WASHINGTON MANDIWO APPLICANT
versus
ZIMBABWE REVENUE AUTHORITY 1ST RESPONDENT
and
REGIONAL MANAGER: ZIMRA FORBES ENVIRONS 2ND RESPONDENT
and
THE COMMISSIONER GENERAL: ZIMRA 3RD RESPONDENT

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 20 January and 10 February 2022

Opposed Application

C. N. Mukwena, for the Applicants.
T. L. Marange, for the Respondents.

MUZENDA J: This is an application for a review in terms of sections 26-28 of the High Court Act, [*Chapter 7:06*] as read with Rule 62 (1)(2) of the High Court Rules, 2021 where the applicant seeks the following order:

"IT IS HEREBY ORDERED THAT:
1. *The decision of the third respondent dated 1 April 2021 be and is hereby set aside on the ground of gross irregularity and is substituted with the following:-*
   (a) Applicant shall pay RTGS $100 000 being a fine and storage charges to the first respondent within (twenty-one) 21 days of receipt of this order;
   (b) Upon payment of the said amount, respondents shall rescind forfeiture of the vehicle Nissan Caravan Reg No. AEL 9813, Chasis Number VWEZ5057275 and immediately release the same to the applicant"

The application is opposed.

Facts.

Applicant is the registered proprietor of the Nissan Caravan under seizure. It's a 2004 model which he purchased for US$3500. Sometime in December 2020 he was hired by Andrew Kaspara to ferry 160 cases of alcoholic beverages of Mozambican origin into Zimbabwe. Applicant was informed by Andrew Kaspara that the goods had been cleared, so he did not

know that they were hot. On 23 December, 2020 the loaded motor vehicle was intercepted by Mutare Central Police Station details at Border Streams, Vumba area along the Zimbabwe-Mozambique borderline and both applicant and Andrew Kaspara were arrested for smuggling. Andrew Kaspara was charged and prosecuted. He was convicted and fined RTGS$2000. The 160 cases of alcoholic beverages were forfeited to the state. Unfortunately for applicant the motor vehicle was seized by the first respondent and a Notice of seizure was issued to the applicant. Applicant made representations to the first respondent to have the car released. He was told to pay a fine of RTGS $800 000 as well as storage charges. Applicant felt that the fine was out of this world and appealed to second respondent. Second respondent dismissed the appeal. Applicant appealed to the third respondent and on 1 April 2021, third respondent found no merits in the applicant's appeal and dismissed it.

On 29 April 2021, applicant served respondents with a notice to sue dated 28 April 2021. On 27 September 2021 the current applicant for Review was filed at this court.

In their opposing papers respondents raise points in *limine* to the effect that:

(a) The application is improperly before the court for failure to comply with Rule 62(4) of High Court Rules, 2021 on that the proceedings were not instituted within eight (8) weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred.

(b) *Applicant did not apply for condonation.*

The second point *in limine* is that of *prescription*. Respondents contend that the seizure of the motor vehicle took place on 23 December 2020 and proceedings were supposed to have been instituted by 23 March 2021 in compliance with s 193 (12) of Customs and Excise Act, [C*hapter 23:02*], that is within 3 months of the notice of seizure being given or published.

On the merits respondents aver that applicant has failed to establish grounds to justify the relief he is seeking in terms of the draft order. To the respondents both the fine and storage charges are provided for in the enabling act and all the respondents did was to enforce and apply the law as it is. They pray that the application be dismissed with punitive costs of legal practitioner-client scale and to be paid by applicant's legal practitioners, that is *debonis propriis.*

Counsel's Submissions on Preliminary Points.

Mr *Marange* for the Respondents submitted in his heads that applicant neglected to file an answering affidavit. A perusal of the record on page 51 shows that applicant filed the answering affidavit. Respondents then added that applicant fused the answering affidavit with the heads of argument. Again a perusal of the record on p 57 shows that applicant's heads were separately filed. Respondents urged the court to treat respondents defence as unopposed and dismiss applicant's application.

I am not persuaded by the respondent's counsel on this aspect. Applicant filed an answering affidavit and also filed a separate copy of his heads. This preliminary point should not detain the court it is dismissed.

Whether the application is properly before the court?

Respondent's Counsel contended that an application for review should and ought to have been filed by applicant within 8 weeks and respondents' starting date is 16 January 2021. The first date when first respondent requested applicant to pay a fine of ZW$800 000. In the event that the court considers the crucial date of taking action as the 1 April 2021, when third respondent finally and domestically disposed of the appeal, respondents submitted that applicant had upto 27 May 2021 to file the application for review. To the contrary applicant only filed the current application on 27 September 2021, a period of 4 months down the line. In response to applicant's arguments on the sixty days notice before a litigant sues a statutory body, respondents submitted that the eight weeks period is equivalent to the sixty days and the expiry of 8 weeks coincided with the sixty days. As a result the failure by applicant to apply for condonation paralyses the application for review and prays for the dismissed of the application.

Application opposed this preliminary point. In his heads applicant submits that the decision being sought to be reviewed is not the one made by the Regional Manager dated 16 January 2021 but that made by the Commissioner General dated 1 April 2021. In any case, applicant goes on to submit, the need to give a sixty (60) days notice alerting a government institution of an aggrieved party's intention to sue makes it impossible for an applicant to approach the court within eight weeks. He adds further that the proper interpretation of the High Court Rules pertaining to the 8 weeks period juxtaposed with s.196 of the Customs Act is that once a notice to sure has been issued and received by the respondent, the 8 week period stops to run. He further contends that the period stops to run because the respondent would have been afforded another opportunity to reconsider the matter and possibly change the

offensive decision. To the applicant the 8 weeks period started counting on 2 April and the 8 weeks add up to 28 days exclusive of weekends and public holidays. Applicant dispatched the notice to sue on 29 April 2021. The 60 days ran from 30 April 2021 and lapsed on 23 July 2021. Incidentally applicant further elaborated, Practice Direction No 5 suspended the filing of any pleading from 22 July 2021, effectively suspending further the 8 weeks period which suspension was lifted on 25 August 2021. The lifting of suspension on 25 August 2021, according to applicant implied the resumption of counting the 8 weeks period elapsed on 29 September 2021 and Practice Direction 4 of 2021 had earlier on stipulated the time limited by any of the Rules for filing of process, pleadings documents and or papers shall remain suspended for the duration of the extended national lock down.

Issue for Determination on the Point in limine.

The issue posed for preliminary determination is *whether the application for review brought by the applicant in the absence of an application for condonation is properly before this court*. If this court is persuaded by the respondent that the application does not comply with Rule 62 (4) of the High Court Rules, 2021, the resultant effect at law is that the application should be struck of the roll. However respondents do not ask for that relief on this preliminary point, they are moving the court to dismiss the application with costs.

If an application is not properly before this court, then it would be the end of the matter and the application would stand to be struck of the roll[1]. in the event, however that the application is properly before the court based on the computation in its heads, the issue that will arise is whether the Practice Directives No 4 and 5 and 6 had an effect on the computation of the weeks provided by this court's Rules?

It is not disputed by the respondents that as a result of Covid-19 the Chief Justice issued several Practice Directives to steer the entire stack-holders, litigants included on how to proceed with civil and Criminal matters.

In the matter of *Cuthbert Elkana Dube*[2] the then learned Judge of Appeal went to clarify the legal status of a Practice Directive as follows:

> *"[23] A practice directive (or direction) is a supplementary protocol to rules of civil or Criminal procedure in the courts- English Legal system, Nineteenth Edition 2018. Practice Directives are official announcements by the court laying down rules on how it will function. They are not the same as rules of court but express the view of the court on matters of practice*

[1] See the matter of *Cuthbert Elkana Dube* v (1*) Premier Service Medical Aid Society and Another* SC73/19 per GARWE JA (as he then was) on paragraph 15.
[2] Supra, on paragraph

and procedure. Litigants and practitioners are expected to comply with them or show good cause for doing otherwise"
The then learned Judge of Appeal went on to add[3]

"*it is clear from the foregoing that a practice directive is binding and has a legal force and effect. In this regard see also the remarks of BHUNU JA in AHMED v DOCKING STATION SAFARIS (PRIVATE) LTD t/a CC Sales SC 70/18*
[26] litigants appearing before the courts are therefore obligated to comply with, not just the rules of court but also its practice directives. The law, however, recognised that rules of court are not always an end in themselves and that, in appropriate circumstances, they may not be departed from in the interest of achieving justice."

When respondents filed their notice of opposition and raised this particular preliminary point, applicant in his answering affidavit attended to it. He comprehensively took his time to compute the number of days affected by the Practice Directives No 4 and 5 issued by the Honorable Chief Justice. Applicant submitted both in the answering affidavit as well as heads of argument why the application should be adjudged to have timeously filed and complied with the Rules of this court. Besides raising the point *in limine* in their opposing papers respondents did not comment on the computation done by applicant factoring the effect of the attenuated *dies induciae* attributable to the Practice Directions. As has been repeatedly ruled by superior courts, what is not disputed by a litigant is deemed to have been conceded. There is barely no comment of the extension of dies *induciae* brought aboard on pleadings by the Practice Directives. I have ben persuaded by applicant's computation and elaboration, and am satisfied that there was no need for applicant to apply for condonation for late filing and have no hesitation in dismissing this point *in limine*

Respondents raised a further point *in limine* premised upon prescription. They are citing s 193 (12) of Customs And Excise Act[4] which principally gives an aggrieved party a period a period of three months of the notice being given or published by seizing authority. It is important to cite the Section:

"*S.193 (12): Subject to section one hundred and ninety six, the person whom the articles have been seized or the owner thereof may institute proceedings for-*

(a) the recovery of any articles which have not been released from seizure by the Commissioner in terms of paragraph (a) of Subsection (6); or

(b) *the payment of compensation by the Commissioner in respect of any articles which have been dealt with in terms of the proviso to Subsection (6); within three months*

[3] On paragragh 25
[4] Chapter 23:02

of the notice being given or published in terms of Subsection (1) after which period no such proceedings may be instituted."

Mr *Marange* submitted that the cause of action arose on 23 December 2020 when applicant's motor vehicle was seized and any proceedings contemplated by s 193 (12) of the Customs and Excise Act ought to have been instituted at least by the 23rd of March 2021 to meet the three months deadline. To the respondents s 193 (12) is peremptory and applicant must adhere to it. Failure to do so leads to the application being prescribed at law and respondent's prayer is that the applicant should be dismissed with costs on attorney-client scale.

Mr *Mukwena* argued to the contrary. He vehemently submitted that the provisions of s 193 (12) do not apply to the current application. To the applicant s 193 (12) applies to actions for the recovery of seized articles in circumstances where the Commissioner General would have been not released the article pursuant to s 193 (6) which speaks of an order by the Commissioner to release the seized article conditionally or unconditionally. Mr *Mukwena* added that once the Commissioner General had exercised his or her discretion to order release of the motor vehicle unconditionally or conditionally, then the need to file an action for recovery of the article under s 193 (12) is obviated, this is so, because the article would have been released already, and there would be no need to go to court for a recovery which would have done already. To the applicant the current application is in terms of the High Court Act where a court is duty bound to exercise its review powers and Rule 62 (4) of the High Court Rules, 2021, will apply. In terms of s 196 (2) of the Customs and Excise Act, the application was brought within eight months and as such it is not prescribed. Applicant prays for the dismissal of the preliminary point as baseless.

The present application is for review of the fine of RTGS $800 000-00 assessed by the respondents. Once the propriety or otherwise of the fine is resolved, the application would fail or succeed on that basis. The court has already ruled that the application for review is properly before it and in my view the interpretation of s 193 (12) of the Customs and Excise Act, by the applicant is by far more persuasive than the argument advanced by the respondents. The Commissioner General has not issued an order to conditionally or unconditionally to release the item or article and as such the issue of prescription to this court does not arise at all. The point *in limine* based on prescription has in my view no merit and it is dismissed.

Having disposed of preliminary points the next issue for determination is whether the applicant has laid the basis for this court to review third respondent's decision on the ground

of *irrationality*. The test for unreasonableness has already been well articulated by the English Judge, LORD DIPLOCK[5].

> "*By 'irrationality' I mean what can by now be succinctly referred to as 'Wedesbury unreasonableness' (See Associated Provincial Picture Houses Ltd v Wedresbury Corp[6]). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Rondcliffe's ingenious explanation in Edwards (Inspector of Taxes) v Bouristow[7] of irrationality as a ground for a court's reversal of a decision maker.*" *Irrationality by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.* (My own emphasis).

This decision by His Lordship has been applied and followed by courts in this jurisdiction and it is so clear as to understand when superior courts can interfere with a lower court's or administrative quasi-judicial body's decision. The most crucial issue to focus on is whether the assessed fine of $800 000-00 by the respondents is outrageous and irrational given the totality of facts in this matter? "*Outrageous*" in the context of this application means "*excessive*", "*extreme*", "*undue*" or "*overpriced*" and one would safely add "*exorbitant*." The word "*irrational*" would connote aspects of an illogical assessment, unreasonableness, non-scientific and fallacious, something incongruous. All these tests must be viewed within the spectrum peculiar to each particular set of facts, after which a court can conclude the rationality or otherwise of the decision under review.

The following aspects were beyond doubt accepted by both counsel as largely common cause and barely uncontroverted:

(a) as at the date of seizure the subject Nissan Caravan's open market value was US$3 500-00.

[5] Council For Civil Service Unions v Minister For The Civil Service [1984] 3 All ER 935 (H) at pp 950-951
[6] [1947] 2 All ER 680, [1948] 1KB.223
[7] [1955] 3 All ER 48, [1956] AC 14

(b) the motor vehicle is a 2004 model which has been in use for fairly a long time.

(c) the principal offender was prosecuted and fined RTGS$2 000-00 and the cargo smuggled was of insignificant value.

(d) applicant had been hired and literally and financially gained nothing out of the engagement by the customer.

(e) the fine assessed by the respondents is equivalent to a conservative figure of US$7 000-00 double the amount of value of the motor vehicle.

(f) the fine assessed by respondents for applicant is 40 times more than the fine assessed by a criminal court against the smuggler. The variance between the fines is by all standards bloated.

(g) it is very unlikely that in the subsequent event of the car being auctioned by respondents that it would fetch any amount close to the fine of $ 800 000-00.

What however is contentious between the parties is whether applicant is but an innocent carrier who was equally duped by the hirer of the motor vehicle. It is not disputed by the respondents that in the wisdom of the National Prosecuting Authority, applicant was never prosecuted. Respondents demand proof from applicant to show that prosecution was declined. Applicant attached an extract of the criminal record showing conviction and fine paid by the smuggler. To me this information is entirely adequate and I have no hesitation to accept that applicant did not know that the goods he was asked to ferry had been smuggled. I will treat him as innocent carrier of goods. Lack of knowledge by applicant effectively buttresses factors to be considered in judging the rationality of third respondent's decision.

KUDYA J (as he then was)[8] remarked as follows:

"*The respondent imposed a 100% penalty on the principal value added tax inability which the appellant found disproportional to its moral blameworthiness and verbal representations made in the various meetings held between the parties. I reiterate that in all appeals before the Fiscal Appeal Court, I exercise my own discretion. I am not fettered by what the Commissioner did.*"

I totally subscribe to the Learned Judge's sentiments and add that where an accomplice was prosecuted and sentenced by a competent court which critically examined all the

[8] In PIL (Pvt) Ltd v Zimbabwe Revenue Authority and Another HH 213/17

aggravating and mitigatory aspects a quasi-judicial body in the position of respondents ought to consider that sentence passed by a criminal court in arriving at an appropriate fine. The main perpetrator of smuggling, Mr Kaspara committed an offence which attracted a fine of up to level 10, which is $10 000-00 but he was fined $2 000-00. Respondents is adamant that the "offence" committed by applicant should be visited by a fine of up to level 14 which is $800 00-00 and to the respondents they acted within the confines of the statutes and did nothing irregular to attract the intervention of a review court. One would venture to ask whether applicant would have received a fine of $800 000-00 ha he been criminally prosecuted? Moreso if one looks at the fine paid by Mr Kaspara? Where an official of Zimbabwe Revenue Authority is statutorily obliged to assess an appropriate fine for an offence committed in terms of a statute, he or she is duty bound to factor all the factors normally and regularly considered by a sentencing court. There is no law that stipulates that when a fine is set by law or statute the assessing officer is duty bound to ignore other mitigatory factors peculiar to the offender such as moral blameworthiness, the need to rehabilitate and reform the offender, the list is endless. Where an officer or assessor of a monetary penalty omits to take all these factors into consideration that would constitute a misdirection and a revisiting court has to intervene and correct the anomaly.

When I look at the factors outlined hereinabove as common cause it is not difficult to conclude that the decision made by the officer was patently absurd looking at the value of the motor vehicle in dispute. The moral blameworthiness of the applicant is almost non-existent given the fact that he was misled by Kaspara into believing that all was well and had nothing to fear. In addition looking at the fine paid by Mr Kaspara amounting to $2 000-00, a fine of $800 000-00 apparently induces a sense of shock. A fine assessed must incentivise an offender to pay not to deter him. Indeed when an innocent bystander casting an eagle's eye on these factors independent of the dispute between the warring parties, one would not hesitate to conclude that respondents improperly exercised the discretion reposed on them and assessed an irrational, bloated fine devoid of all logic given the circumstances of what transpired in this matter and the court has to interfere with the fine passed.

The subject motor vehicle has been stationery since 23 December 2020 and unavoidably gradually losing its glitter and value. The current value is unknown since respondents barred applicant to access the motor vehicle. Storage charges have been accumulating and this accumulation of storage costs was created by the respondents. Applicant

has offered to increase the proposed fine from RTGS $100 000-00 to RTGS $250 000-00 respondents did not accede to that figure, they still demand $800 000-00 together with storage charges. Given all the factors considered in this matter the revised amount of fine of $250 000-00 tendered by applicant finds favour with the court and that is the reasonable fine to be paid by the applicant.

On the seaspect, costs would follow the outcome of the matter.

Accordingly the following order is granted:

1. ***The decision of the third Respondent dated 1 April 2021 be and is hereby set aside and substituted with the following:-***
    a) ***Applicant shall j RTGS$250 000-00 being a fine and storage charges to the first Respondent within 21 days of receipt of this order.***
    b) ***Upon receipt of the payment, respondent shall release the applicant's motor vehicle.***
    c) ***Respondents to pay costs of the application.***

Chibaya and Partners, applicant's legal practitioners.
Zimra's Legal Service Division, for respondents.