

SHOPRITE CHECKERS ZIMBABWE

Versus

THE CO-MINISTERS OF HOME AFFAIRS

And

**THE OFFICER IN CHARGE – ZRP
LICENCE INSPECTORATE SECTION, DRILL HALL BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 9 NOVEMBER 7 6 DECEMBER 2012

Miss E. Sarimana for the applicant
L. Musika for the respondent

Judgment

NDOU J: The applicant was granted a provisional order on the 17th September 2012. The applicant seeks the confirmation of the said order.

The background facts of this matter are the following. On the 10th of September 2012 officers from the Licensing Inspectorate Section of the Zimbabwe Republic Police, Bulawayo arrived at shop 22, Bulawayo Centre in Main Street, a supermarket operated by applicant. The officers demanded to see the current licence authorizing the sale of liquor. The officers were advised that the renewed licence was still being awaited from the Liquor Licensing Board. The application for the renewal of the same had been done in February 2012 and the delay was at the Liquor Licensing Board. The officers were shown copies of proof of payment for the renewal of the liquor licence and the proof that the application had been sent to the Liquor Licensing Board by Fedex Express courier on the 23rd of February 2012 and also the health report date stamped the 23rd February 2012 which is one of the documents which was sent to the Board. The officers were also advised that the applicant had made several follow-ups with the Liquor Licensing Board. The police officers did not accept this explanation. One George Chirinda, an employee of the applicant, was ordered to accompany the police to the police station where he was made to pay a deposit fine of \$20,00 for trading without a liquor licence in contravention of section 113 (1) of the Liquor Act [Chapter 14:12]. A copy of the Admission of Guilt Form seems to imply that the charge was being raised against George Chirinda in his personal capacity as the representative section were deleted and substituted by “as Axxd”. Chirinda paid the fine and after that one of the police officers drafted an affidavit directed Chirinda to sign it before the Officer-in-Charge Licence Inspectorate one Inspector Nkomo.

Despite his protestation on the basis of lack of authority to sign on behalf of the applicant, Chirinda eventually signed the affidavit. Thereafter the police proceeded to seize all the liquor. On the 12 September 2012, the applicant's representative, accompanied by their legal practitioner, proceeded to the police station. The legal practitioner advised the police that the applicant was opposed to the forfeiture of its liquor. The police advised the legal practitioner that she should go and argue the matter in court on Friday the 14th September 2012 at Bulawayo Magistrates' Court. The impression which was given was that the forfeiture had not yet been confirmed by the magistrate and a hearing on the forfeiture would be held on the 14th September 2012. The legal practitioner left the police station. Later that day the police informed the legal practitioner that the hearing scheduled for Friday 12th September 2012 would no longer take place as the forfeiture had already been confirmed by a magistrate on 11 September 2012. It is common cause that this application was never brought to the attention of the applicant or its legal practitioner. The applicant was never invited to make any representations before the magistrate before the forfeiture was authorized. The police and the magistrate acted on the basis of the above-mentioned affidavit by Chirinda. This turn of events gave birth to this application.

The first issue is whether the affidavit by George Chirinda was properly commissioned. This affidavit was drafted by a police officer at the Licence Inspectorate and commissioned by the officer-in-charge of the Licence Inspectorate. In simple terms the police officers who arrested the applicant drafted the affidavit for Chirinda to sign. The senior officer in charge commissioned the affidavit. The latter also made the application for the forfeiture of the liquor to the magistrate and attached the said affidavit. This affidavit was crucial in that it was intended to dispense with the need to invite the applicant to make representations to the magistrate on the question of the forfeiture. From the foregoing it is abundantly clear that the officer who drafted the affidavit and the one who commissioned it had an interest in the matter. This interest renders the affidavit null and void on account of the provisions of section 8 of the Justices of Peace and Commissioners of Oaths Act [Chapter 7:09] and the regulations made thereunder (R 1258) which provides "A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest." The second respondent based this forfeiture on the said affidavit which is null and void. The respondents cannot place anything on this affidavit and expect it to stand – *Talbet v Yeoman Products (Pvt) Ltd* SC-11-99. On this basis alone, the authority granted by the magistrate on the 11th September 2012 cannot stand. Without the affidavit, the magistrate was enjoined to give the applicant an opportunity to make representation before the forfeiture was authorized.

On the issue of non-joinder of the Provincial Magistrate raised by respondents, this case is distinguishable from the case of *Acil Marketing (Pvt) Ltd t/a Boot Leggers Bottle Store v Rukada* HB-77-10. In the *Acil Marketing* case the applicant had been properly invited to make representation before a magistrate on date and time specified in the notice. *In casu*, the proceedings were done behind the applicant's back (so to speak). The applicant's legal practitioner was *in casu* misled into believing that they would be heard by the magistrate on 12

September 2012 when the authority had already been granted a few days ago. In this case the applicant's case is that the 2nd respondent misled the magistrate into believing that George Chirinda was the accused and there was no mention of the applicant at all in the Admission of Guilt. The forfeiture was based on this misrepresentation of facts to the magistrate and the invalid affidavit of George Chirinda.

It is therefore necessary to allow the applicant the right to be heard before the forfeiture is finalized. Accordingly, the final order is confirmed in the following terms:

"It is ordered that the final order is made in the following terms:

1. That the 2nd respondent be and is hereby ordered to retain and keep in safe custody all the seized goods as per the attached inventory pending the determination of the issue of forfeiture by a magistrate.
2. The authority to forfeit goods mentioned in paragraph 1 above, granted by a Bulawayo Magistrate on 11 September 2012 be and is hereby set aside.
3. Issue of the forfeiture of the said seized goods to be determined afresh by another magistrate after affording the applicant the opportunity to make representations.
4. The respondents are to bear costs of this application."

Coghlan & Welsh, applicant's legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners