

GIBSON MUDIMA  
versus  
COMMISSIONER GENERAL  
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE  
MAKARAU JP  
HARARE 5, 9 and 24 September 2008

TRIAL CAUSE

*Adv R Fitches* for plaintiff  
*Mr M Sinyoro* for defendant.

MAKARAU JP: The revenue authority still has to find ways to endear itself to the public. Throughout the times, the tax collector has been called many unsavory names. In the trial before me, the defendant was called a day light robber.

The plaintiff is a Zambian national. He is a businessman and he often visits Zimbabwe to make purchases of wares and grocery items for resale in Zambia. On 16 July 2007, he entered Zimbabwe through the Chirundu Border Post. He was using the road. Whilst in Zimbabwe, he made certain purchases. Four days later, he left Zimbabwe. This time, he used the Harare International Airport. At the airport, the security scanners detected that he had some money on him. It was US\$70 000-00. The money was then seized on the basis that he had failed to declare it to a customs official. Aggrieved by what he termed the day light robbery, the plaintiff approached this court for an order compelling the defendant to refund the seized amount.

At the trial of the matter, the plaintiff gave evidence. His testimony was to the following effect: When he arrived at the Chirundu Border Post, he had US\$101 600-00 on him. He had purchased this money from a bureau de change in Zambia over a short period prior to his trip to Harare. He adduced into evidence a bundle of receipts proving the various purchases. At the border post, he declared the currency to an immigration office. He then approached the customs officer who waved him on indicating that he was free to go as the officer was busy with other travelers.

Whilst in the country he made a few purchases. He remained with US\$70 000-00. On his way back to Zambia, he presented himself to a customs officer who asked him if he had any Zimbabwean currency. He responded in the negative. The customs officer did not

ask him if he had any foreign currency on him. He then proceeded to the scanning machine where the money was detected. The money was then seized.

The witness gave his evidence emotionally and understandably so. The facts of the matter are largely common cause and his evidence was a repetition of this common cause evidence. Under cross examination, it however emerged that he had tried to prove that he had declared the money upon entry into the country by producing old declaration forms that had no bearing to this importation. He had not testified to this effect in his evidence in chief.

I was not impressed by the witness's failure in this regard. He did not take me into his utmost confidence.

The defendant relied on the evidence of one Douglas Zinyemba. He is the customs official who was on duty at the Harare international Airport when the plaintiff presented himself for pre-departure formalities. He recalls that he greeted the plaintiff when he presented himself and asked him if he had any currency on him, both local and foreign. The plaintiff responded that he had local currency and a few Zambian Kwacha. The plaintiff also mentioned that he was a regular traveler and is aware of the legal restrictions regarding currency movement into and out of the country. He then wished the plaintiff a pleasant flight. The plaintiff went to the Civil Aviation scanner where the money was detected. He was referred back to him. After the plaintiff had failed to prove that he declared the money upon entry into the country, he then seized the money. The plaintiff produced old forms on which he had declared past importations of foreign currency.

The witness did not impress in the witness stand. He was not direct in his responses to questions put to him even under direct examination. On the critical question of whether or not he had asked the plaintiff to declare the foreign currency that he had on him, his response was woolly and did not shed any light on whether he did or did not ask the plaintiff to declare the foreign currency in his possession. The witness was in my view unnecessarily argumentative. For instance, he argued and incorrectly so in my view, that by failing to make a declaration even when not asked to do so, the plaintiff is at law taken to have declared that he had nothing to declare. In my view, this further clouds his evidence as to whether or not he asked the plaintiff to declare the foreign currency he was carrying.

In its plea, the defendant denies that the seizure of the plaintiff's money was unlawful. It proceeds to plead that the plaintiff failed to declare the money upon exiting Zimbabwe in violation of section 55 (2) (b) and 193 of the customs and Excise Act [Chapter 23.03], ( " the Act"). In particular, it pleads that the plaintiff lied that he did not have any

foreign currency on his person when asked by a customs officer to make the requisite declaration.

Section 55 (2) (b) of the Act provides:

“Any person leaving Zimbabwe shall, whether or not he has goods in is possession, report to an officer-

(b) in the case of a person leaving by aircraft, at the customs post or to an officer at the aerodrome of departure or such other aerodrome as the Commissioner may direct;

(c) .....

(d) .....

**and shall, if called upon to do so**, unreservedly declare all the goods in his possession which he proposes to take with him beyond the borders of Zimbabwe in such manner as the officer may require, and shall fully and truthfully answer any questions put to him by the officer and, if so required, produce such goods for inspection by an officer.”

(The emphasis is mine).

Section 193 of the Act that the defendant referred to in its plea provides for the seizure of goods, including local and foreign currency, where an officer has reasonable grounds for believing that such goods are liable to seizure.

In essence, it was the defendant’s plea that the foreign currency was seized because the plaintiff failed to declare it upon exit from Zimbabwe.

The plaintiff attacked the seizure of his funds on two grounds. Firstly, he argued that he was authorized to take the money out of Zimbabwe as he had imported it into the country four days earlier when he entered the country through Chirundu Border Post. Secondly, he denied that he was ever called upon to declare the money when he exited the country and thus did not violate section 55 (2) (b) of the Act.

I will deal with the first leg of attack.

The plaintiff argued that since he had imported the money into the country four days earlier, he fell squarely within the within the provisions of section 20 (2) (c) of the Foreign Exchange Regulations S. I. 109/96, ( “ the Regulations”), which exempts a foreign resident from seeking exchange control authority to export money that he imports into the country.

I cannot fault this conclusion at law as the law clearly provides so.

To his credit, I did not hear Mr Sinyoro for the defendant as challenging the legal conclusion reached by the plaintiff above. Instead, I heard Mr Sinyoro to argue that the plaintiff failed to declare the money upon exit when he was called upon to do so by Zinyemba, the customs officer. He thus urged me to dispose of the matter on the factual

basis of whether or not Zinyemba called upon the plaintiff to declare the foreign currency in his possession and the plaintiff failed to do so.

I am in agreement with Mr Sinyoro that this matter turns on whether or not the plaintiff failed to declare the foreign currency in his possession after being called upon to do by the customs officer at the point of exit. In my view, if this is proved, then, the money was liable to seizure even if the plaintiff had imported the money into the country four days earlier.

It is my further view that there has been in my view a curious mixing of the legal provisions applicable in this matter.

The balance of the plaintiff's case was to prove that he had imported the money into the country and was therefore allowed to take it out without the need to procure a permit. Thus he was at pains to show that he had purchased the money in Zambia and had declared it to an immigration officer at Chirundu Border Post. It is not in dispute that the plaintiff, as a foreign resident was permitted by law to export the foreign currency. In my view, section 20 of the Regulations simply permits a foreign resident to take out foreign currency from the country without a permit if, he can show that he imported the money into the country. It does not prescribe the customs clearance procedures by which such foreign currency may be exported. More importantly the provisions of section 20 do not exempt the foreign resident from declaring the money in his possession if called upon to do so by a customs officer in terms of section 55 of the Act. The issue facing the plaintiff in this matter is not that he attempted to export foreign currency without a permit in terms of the regulations. Were it so, issues of his foreign residency and the fact that he had imported the money into the country would then have been key and material in resolving the dispute. Instead, the plaintiff had his money seized on the allegation that he failed to declare it upon exiting Zimbabwe. Having allegedly violated section 55 of the Act, the consequences spelt out in section 93 of the Act were enforced. This is why I am in agreement with Mr Sinyoro that the center piece of this dispute is whether or not the plaintiff violated section 27 of the Customs and Excise Act and thereby rendered his money liable to seizure. The dispute before me is factual.

As indicated above, the two persons who are central to the dispute gave evidence. These were the plaintiff and Zinyemba the customs officer. I have already made my findings above as to the credibility of each. On balance I was impressed more by the plaintiff and less by Zinyemba. While the plaintiff did not take me into his utmost confidence, I believed him when he said that he was not asked to declare the foreign currency in his possession.

Had he been asked, he most probably would have declared the money as he had done when he entered the country. I do not believe the testimony by Zinyemba that he asked the plaintiff to make the declaration and the plaintiff lied to him that he had no foreign currency to declare save for some *Zambian Kwacha*.

In my view, the discovery of the money in circumstances in the possession of the plaintiff where the plaintiff had not been asked to declare it is not a violation of section 27 of the Act. There was thus no violation of the law and consequently, no basis upon which the seizure of the money could be lawfully made. The law does not oblige every traveler to *mero motu* declare the goods on his person. A traveler is only obliged to disclose and disclose fully and truthfully the goods in his possession if called upon to do so by a customs officer.

In the result, I make the following order:

1. The defendant is hereby ordered to return the sum of US\$70 000-00 to the plaintiff together with interest thereon at the prescribed rate of interest for foreign currency accounts.
2. The defendant shall pay the plaintiff's costs of suit.

*Atherstone & Cook*, plaintiff's legal practitioners.

*Sinyoro & Partners*, defendant's legal practitioners.

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