TIME SAHWIRA MUPINGA
versus
THE COMMISSION GENERAL ZIMBABWE
REVENUE AUTHORITY (ZIMRA)
and
MINISTER OF FINANCE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 26 November 2009 and 17 February 2010

Adv. *Fitches*, for the applicant
C. Makuwaza, for the respondent

MTSHIYA J: The applicant herein seeks the following order:-

"WHEREUPON after reading the papers filed of record and hearing Counsel: IT IS ORDERED AND DECLARED THAT:

(a) The applicant duly paid all import duties and taxes for the motor vehicle:

Make	Toyota Landcruiser
Model	200 series
Engine No.	IVD 0032379
Chassis No.	JTMHV05J004018755

(b) That the payment of duty released the motor vehicle from any and all encumbrances connected with the immigrant's rebate.

(c) That the first respondent is not entitled to demand, seize or impound the motor vehicle.

(d) That the first respondent shall not demand the surrender of the motor vehicle to itself for whatever reason or cause.

(e) That first respondent shall pay the costs of suit".

The relief sought is based on the following background facts which are adequately captured by the respondent in its heads of argument.

The applicant, a returning resident, spent six years working in the United Kingdom. He returned to Zimbabwe on 8 August 2008. Upon his return to Zimbabwe, the applicant imported a Toyota Land Cruiser Chassis number JTM05J004018755. On 19 November 2008 the applicant applied for a returning resident's rebate in respect of the said vehicle. The applicant, as a returning resident, qualified for the rebate in terms of s 105 of the Customs and Excise (General) Regulations 2001 (the Regulations). After complying with all the necessary

requirements for the application, the applicant was granted a rebate by the respondent. The rebate granted was $5907601660-00 (old currency). This followed a valuation of the vehicle on 28 November 2008 by the respondent. On the basis of a Customs Clearance Certificate, the vehicle was duly registered in Zimbabwe on 5 December 2008 with the following endorsement: "Not to be sold or disposed of without authority by customs before 29 November 2010". The respondent conducted a physical examination of the vehicle before it was released to the applicant for his own use.

On 26 January 2009 the applicant paid the entire rebated duty to the respondent in local currency. This was in order to free the vehicle from any and all encumbrances resulting from the endorsement referred to above. The payment, effected in local currency (Zimbabwe dollars), was duly accepted by the first respondent.

On 23 February 2009 the first respondent's officers interviewed the applicant seeking a clarification on a payment for the vehicle made by one Dr E Nhodza (Nhodza) through transfers from Standard Band Zimbabwe. The applicant agreed that the payment had indeed been made by Nhodza but explained that the funds in Nhodza's account were his as per arrangement between the two. The applicant also advised the first respondent's officers during the interview that the vehicle was at that time in South Africa for "an after sales service and check up".

On 24 February 2009 the first respondent wrote to the applicant in the following terms:-

> "I refer to the above subject and the interview held in your office on 23 February 2009.
>
> The objective of the audit is to verify whether you qualify to clear the Motor Vehicle under immigrant rebate in terms of Customs and Excise (General) Regulations 2001".
>
> After quoting the relevant sections of the Regulations the first respondent went on to state as follows:-
>
> "The post clearance audit that I am conducting has revealed your application for immigrant rebate does not satisfy the conditions as set in the general regulations in that payment for the motor vehicle is from a different source from what you submitted. This is a serious issue which demands your urgent attention. The validity of the Barclays Bank statement is questionable and I am considering using British Revenue Authority to verify the bank statement.
>
> Please kindly explain the following audit queries
>
> 1. Why was Barclays Bank Statement submitted as proof of payment when it does not relate to the purchase of the motor vehicle cleared under immigrant rebate

2. Why did you not disclose at the time of application that the payment for Toyota Land Cruiser 200 Chassis Number JTM HV05J904014994 was effected by Dr Eric Nhodza through transfers from Standard Chartered Bank Zimbabwe. Please kindly explain the relationship between the two accounts.
3. All correspondences between you or your agent and the supplier indicate that purchase was done in Zimbabwe and payments logical done by a person in Zimbabwe.
4. The car was cleared under immigrant rebate for use in Zimbabwe but at the time of interview the car was said to be in South Africa where it is used for business and private purposes in violation of s 105 (3)(b) of the Customs and Excise (Gen) Regulations 2001

In conclusion you are advised to make arrangement to surrender the motor vehicle to my offices on or before 26 February 2009".

The above letter prompted the following reply from the applicant's then legal practitioners:-

"We refer to your letter dated the 24th instant which has been handed to us by our client and the contents therein have been noted. We respectfully are of the view that the contents of your letter and the sections of law you have quoted have been overtaken by events. Our client duly paid the rebated duty on the 26th of January 2009 which duty was to the value of $5 907 601 660-00. This amount was confirmed to be gracefully settled in the Zimra account on the 27th January 2009. Attached is the processed Rtgs application form for your perusal.

If you have further concerns concerning this matter kindly address them to the writer in tandem with the mandate bestowed upon us.

We duly advise that our client will take the necessary legal steps to protect its interest should you decide to seize the said motor vehicle.

We trust this clarifies any issues you might have entertained concerning this case"

The above letter did not win favour with the first respondent who, on 9 March 2009, wrote back to the applicant's legal practitioners in the following terms:-

"I refer to your letter of 9 March 2009.

You are kindly requested to avail the motor vehicle that bear the Chassis Number JTM055004018755 and the Engine No. IVD0032379 on or before 20 March 2009 for me to conclude my verifications and thereafter advise you of my decision.

May your client further submit proof of the source of funds and mode of payment of the purchase price of the vehicle. I would appreciate certified copies of the said proof.

Your usual cooperation will be greatly appreciated.

The applicant did not surrender the vehicle and on 18 March 2009 the first respondent again addressed the following letter to the applicant's legal practitioners:-

"I refer to your letter of 17th March 2009.

I hope you are not overlooking the fact that I carrying out a post clearance. The Exhibit 2 that you attached to your letter is possibly a copy of the evaluation of the vehicle in question, the exercise which is subject to post clearance hence the request for the vehicle for verification with the documents.

Please be advised that the final position on the payment of duty is intertwined to this verification since there are underlying conditions for the payment of duty for imports of persons accorded the immigrants rebate.

It is in your interest that you avail the motor vehicle and respond to all issues within the time frame accorded in my mail of 9 March 2009 so that we can come to a logical conclusion of the audit.

Your urgent co-operation will be greatly appreciated".

On 18 June 2009, having noted the first respondent's stance on the issue of surrendering the vehicle, the applicant filed this application seeking the relief indicated on page 1 of this judgment. The first respondent had, up to the time of this application, not taken any further action.

The first respondent, in its heads of argument filed by its legal practitioner on 8 September 2009 initially raised a point *in limine*. The point was that the applicant should have, in terms of s 196(1) of the Customs and Excise Act [*Cap 23:02*] ("the Act") given notice of intention to institute legal proceedings against the first respondent. The said section provides as follows:-

> "(1) No civil proceedings shall be instituted against the State, the Commissioner or an officer for anything done or omitted to be done by the Commissioner or an officer under this Act or any other law relating to customs and excise until sixty days after notice has been given in terms of the State Liabilities Act [*Cap 8:15*]".

The applicant countered the point *in limine* by correctly stating that the relief sought was declaratory and therefore the issue of notice was not relevant. I agree. The first respondent, in any case, did not pursue that argument in court. The point *in limine* therefore fell way.

In seeking the declaratory relief the applicant argued that as a returning resident, he had fully complied with all the requirements of s 105 of the regulations. The rebated duty had been

paid as required by s 105(5) of the Regulations. It was further submitted that as shown by annexures BB1, BB2 and D the applicant owned the vehicle at the time of his arrival. The vehicle, it was argued, had been bought through the use of personal funds as per arrangements between the applicant and Nhodza. Payment for the vehicle was routed through an authorised dealer, namely Standard Chartered Bank Zimbabwe Limited as required by exchange control regulations. It was therefore argued that the first respondent's attempt to retrospectively alter the position which freed the vehicle from all and any encumbrances was without basis and should therefore be rejected.

At the hearing of this matter, the first respondent's legal practitioners conceded that:

(i) the applicant was indeed of returning resident entitled to a rebate; and

(ii) the applicant had indeed effected payment of the rebated amount.

The first respondent, however, insisted that it had a right to carry out a post importation clearance audit because it was not satisfied that:

(a) the applicant was the owner of the vehicle at the time of arrival;

(b) the applicant had purchased the vehicle through his own free funds; and

(c) the applicant was exempted from paying duty in foreign currency.

As for (c) above, I think the law stands clearly pronounced in the case of

(1) *Zimbabwe Revenue Authority and* (2) *The Minister of Finance* v *Murowa Diamonds* (Pvt) Ltd SC 41/09 where GARWE JA confirmed that 'as a matter of law if a Zimbabwean resident obtains the funds from an authorised dealer then he or she becomes exempt from paying duty in foreign currency'.

The relevant provision of the law (i.e. ss 2 and 3 of Customs & Excise (designation of luxury items) Notice 2007, S.I. 80A/07 relied on by the applicant and given a different meaning by the first respondent provides as follows:

"2 (1) Subject to s 3, the Minister of Finance designates the items of goods whose tariff codes and rates of customs duty are listed in the first and third columns of the schedule below as luxury items for the purpose of s 115 (2) of the Act.

(2) Payment of customs duty and value-added tax on the importation of any item of goods designated as luxury item under subs (1) shall be payable in United States dollars, Euros or any other currency denominated under The Exchange Control (General) Order, 1996 (SI 110 of 1996).

3. The following persons shall be liable to pay duty and value added tax on luxury items in terms of s 2:

    (a) every resident of Zimbabwe who imports luxury items that were purchased using funds obtained otherwise than through an authorised dealer; and

    (b) …"

It is not disputed that *in casu* the execution of the financial arrangement between the applicant and Nhodza was through an authorised dealer.

Given the Supreme Court's interpretation of the above provisions of the law and the acceptance that the applicant was indeed a returning resident whose financial dealings were through an authorized dealer, there can therefore be no doubt that the applicant fell within the ambit of the exemption clause. He was therefore entitled to pay duty in local currency and that is exactly what he did through lawful channels.

The first respondent submitted that the applicant did not own the vehicle at the time of his arrival or return to Zimbabwe on 8 August 2008. The first respondent based his argument on the fact that payment, as evidenced by annexures B and C1-C4, was effected on 15 and 18 August 2008. This submission by the first respondent is also linked to the submission that the funds for the purchase of the vehicle did not belong to the applicant. It was argued the funds belonged to Nhodza.

With regards to the question of funds I do not find the first respondent's argument sustainable because there is no suggestion that the applicant handled his funds in an illegal manner. There is also no suggestion that the applicant lacked free funds. The applicant did not deny that the funds indeed came from Nhodza's account. The applicant gave the following explanation:

> "I also explained that the funds used to purchase the vehicle were my own and held in account Dr E Nhodza. The payment indeed was effected through Standard Chartered Bank Zimbabwe, an authorized dealer in terms of SI 80A/07".

I do not find anything in the regulations barring the applicant from entering into legal financial arrangements with any other person for the importation of the vehicle into Zimbabwe. The law merely requires the parties to proceed through an authorised dealer. In *casu* there is no evidence that the applicant offended the law. I therefore see no reason to reject the applicant's explanation as given above.

Ownership as indicated in *Mazarura v Director of Customs and Excise* SC 98/02 and *Mahammed v Director of Customs and Excise* 1998(1) ZLR 60 (H) can be acquired in various forms. Annexure D conveys to me that there was indeed a binding arrangement between the applicant and the vehicle supplier (ADC (Export) Services Limited). That arrangement existed at the time the vehicle was imported and indeed it finally arrived under the applicant's name. I do not therefore see value in the argument that the vehicle was paid for after his arrival.

The importation of the vehicle by the applicant brought in a number of players such as Nhodza, authorised dealer (Standard Chartered Bank), the supplier of the vehicle (ADC (Export) Services Limited), Shipper (Safmarine) and the first respondent itself. Documentation from all these players led to the final registration of the vehicle in the applicant's name on 5 December 2008. There is nothing, throughout the process, to show that the applicant's ownership of the vehicle was questionable.

The foregoing demonstrates that upon payment of the rebated amount on 26 January 2009 the applicant, as owner of the vehicle, was freed from any and all encumbrances relating to the vehicle. The temporary export of any vehicle outside this country is subject to the control of the first respondent. It is therefore logical to assume that the first respondent sanctioned the temporary export of the vehicle when it was taken to South Africa for 'an after sales service and check up'.

It indeed makes a lot of sense for the first respondent to have in place a mechanism called post importation clearance audit. That arrangement ensures that non deserving cases are properly dealt with. However, in order not to interfere with a citizen's rights arising from a legal process of the importation goods into the country, such an exercise should only be undertaken where sustainable and reasonable grounds exist. Where such grounds exist, it would be counter productive for a court to grant the relief such as the one sought by the applicant herein. It would in reality stifle the operations of the first respondent. Accordingly the legitimate operations of the first respondent should always enjoy the protection of the law.

However, it is clear to me that *in casu* the first respondent's insistence on a post importation clearance audit is based on mere suspicion. That suspicion is based on its finding that the source of funds used by the applicant came from Nhodza's account. In its opposing affidavit the first respondent states, in part,

> "This is admitted save to add that the first respondent's officers subsequently established that the details of the vehicle paid for Mr Eric Nhodza were exactly the

> same as those of the vehicle that was referred to in the proforma invoice that applicant had submitted with his application for an immigrant's rebate.
>
> … The request by the first respondent's officer was necessitated by the discoveries made as stated above.
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> …
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> … Subsequent investigations by the first respondent revealed that the vehicle for which the applicant had applied for and been granted an immigrant rebate had been paid for by Mr Eric Nhodza through Standard Chartered Bank. The payments had been made on the 15th and 18 of August 2008, as stated in the letter (attached hereto as Annexure B) by Mr Nhodza to the car dealer through whom purchase of the vehicle was facilitated. This was confirmed in the statements of account for Mr Nhodza's account indicating the dates when the money was transferred from the account. I attach hereto the statements as Annexure C1 to C4".

The above was in line with the import of the first respondent's letter of 24 February 2009. It is the above finding that led to the raising of more issues which the applicant, in my view, adequately dealt with on 23 February 2009 when the first respondent's officers interviewed him at his offices. The first respondent does not deny that prior to the release of the vehicle from its custody at Bak Storage, a physical examination of the said vehicle was undertaken and a release note was thereafter issued.

My view is that once proper explanations had been given by the applicant on all issues that were anchored on suspicions ignited by the issue of funds used for the purchase of the vehicle, no sustainable and reasonable grounds remained to warrant the applicant's surrender of the vehicle to the first respondent. There is no evidence that the respondent ever cared to interview Nhodza in order to confirm or deny the applicant's explanation on the issue of funds. The first respondent should not, in my view, be allowed to deprive the applicant of the use of the vehicle on the basis of mere suspicions. The applicant, like all citizens, must have faith and confidence in the first respondent's operations. This means that in the absence of any sustainable and reasonable grounds, the first respondent cannot simply withdraw its authorisations which were legitimately granted in terms of the law.

I therefore come to the conclusion that this application has merit and the applicant is entitled to the relief he seeks.

Accordingly I make the following order:

IT IS HEREBY DECLARED THAT:-

(a) The applicant duly paid all import duties and taxes for the motor vehicle whose particulars are as follows:

Make	Toyota Landcruiser
Model	200 series
Engine No.	IVD 0032379
Chassis No.	JTMHV05J004018755

(b) The payment of duty released the motor vehicle from any and all encumbrances connected with the immigrant's rebate and accordingly the first respondent is not entitled to demand, seek the surrender, seize or impound the said motor vehicle from the applicant; and

(c) The first respondent shall pay the costs of suit.

Muringi Kamdefwere, applicant's legal practitioners

Zimbabwe Revenue Authority – Legal and Corporate Services Division, 1st respondent's legal practitioners