

ZIMBABWE REVENUE AUTHORITY  
versus  
F. CHAUROMWE N.O.  
and  
BRUNNEL LOGISTICS (PRIVATE) LIMITED  
and  
FRIGID INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 2 December, 2016 and 20 January, 2017

### **Opposed matter**

Miss *C Malaba*, for the applicant  
No appearance for the 1<sup>st</sup> respondent  
*W Chinamhora*, for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents

MANGOTA J: Acting on reasonable suspicion that the second and third respondents' three drivers were entering Zimbabwe with loaded fuel, the applicant placed the respondents' three trucks and their contents under notices of seizure. It did so in terms of s 193 of the Customs and Excise Act. It also caused the arrest of the drivers.

The State charged the drivers with fraud as defined in s 136 of the Criminal Law [Codification and Reform] Act. It charged them with contravening s 174 of the Customs and Excise Act [*Chapter 23:02*] ["the Act"], in the alternative.

The first respondent, a magistrate, presided over the drivers' criminal trial. He did so at the court in Kariba. He acquitted the drivers of the main and the alternative charges. He ordered the release to the respondents of the trucks which the applicant had seized.

The magistrate's order riled the applicant. It contended that s 193 (9) of the Act expressly precluded the magistrate who sat as a criminal court from making an order releasing the trucks and their contents to the respondents. The magistrate's decision, it insisted, was *ultra vires* s 193 (9) of the Act and, therefore, unlawful. It stated that the decision was null, void and of no force or effect. It moved the court to set it aside. Its second reason for moving the court as it did was that the magistrate violated the *audi alteram partem*

rule. It submitted that he made the order which adversely affected it without having heard it as the rules of natural justice required.

The second and third respondents opposed the application. The first respondent did not. The court proceeded on the assumption that the first respondent would abide by the outcome of the application.

The second and third respondents raised three preliminary matters after which they addressed the court on the substance of the application. Their three *in limine* matters were that:

- (i) the application was filed outside the time which the rules of court prescribed. The applicant, they submitted, should have sought condonation before filing the application for review of the magistrate's order. They insisted that the application was legally incompetent and, therefore, invalid.
- (ii) the decision which the applicant wanted reviewed was specifically dealt with in *S v Shumba*, CRB 382/15- a review minute which TAGU J was pleased to consider and make a pronouncement upon on 4 August 2015. They submitted that the court was, therefore, *functus officio* in so far as its interpretation of sections 193 (9) and 196 (3) of the Act was concerned.
- (iii) the applicant was approaching the court with dirty hands. It was seeking the protection of the court when it did not comply with the order which it wanted reviewed. It should not, therefore, be heard.

They submitted, on the merits, that the acquittal of their drivers did not afford the applicant any leg on which it would stand and continue to hold onto the seized trucks. They stated that the magistrate acquitted the drivers because he believed their evidence. The evidence, they said, was that the three drivers who were destined for the Democratic Republic of the Congo with fuel returned to the Zimbabwean side of Chirundu Border Post because they had been directed to use scanning facilities which were on the mentioned side as the Zambian scan was not operational. The applicant's officers who testified in court, they said, corroborated the evidence of the drivers and, in the process, precipitated their acquittal. They dismissed the applicant's assertion which was to the effect that the order was made without the court having heard it. They stated that the applicant's officials who were stationed at Chirundu border post represented the applicant in the criminal proceedings. They submitted that the magistrate's order was *in sync* with the contents of TAGU J's review minute in *S v Shumba*. They averred that the applicant became aware of the magistrate's order on 2 April, 2016. They invited the

court to exercise its powers in terms of s 171 (1) (c) of the Constitution of Zimbabwe and to dismiss the application on the basis that the *proviso* to s 193 (9) of the Act infringed sections 68 (1) and 71 (3) of the Constitution of Zimbabwe.

It is common cause that the application for review was filed concurrently with the application for condonation. That prompted the first and second respondents to submit that the application for review was not properly before the court.

The applicant's response was that the rules of court did not prohibit the approach which it took of the matter. It insisted that the concurrent applications which it made were properly before the court.

The position which the applicant took could not hold. Its application for condonation was filed as a mere formality. The applicant, it was evident, was not compelled by a genuine reason to have what it perceived to be an error on the part of the first respondent corrected in the interest of the attainment of real and substantial justice. The story which it told as constituting its reasons for the delay was more far-fetched than it was a reality.

The applicant's assertion which was to the effect that the magistrate's order first came into its system on 8 April, 2016 was a blatant falsehood. The assertion was inconsistent with para 7 of the founding affidavit. The paragraph read, in part, as follows:

"7. This is an application for review of the first respondent dated 31<sup>st</sup> March 2016 which the applicant became aware of on 2<sup>nd</sup> April, 2016" [emphasis added]

The applicant did not have any concrete reasons which compelled it to apply for review out of time. Its story as stated in sub-paras 14.1-14.6 of the founding affidavit was nowhere near a justification for the delay. The falsehoods which it chronicled in the mentioned sub-para(s) were very disquieting. The fact that such were told under oaths reveals the character not of the applicant but of the person who sits at the helm of the applicant. The Commissioner-General of the applicant was, in the court's view, the author of the muddled applications and the attendant falsehoods.

Evidence filed of record showed that it was never the intention of the Commissioner-General to apply for review on behalf of the applicant. He filed the application for ulterior reasons, so to speak. The submissions which he made during the hearing of the application were very revealing on the stated aspect of the matter. He averred, through his legal representative, as follows:

"We filed our application for condonation together with the main application because of the respondents' application for contempt of court. Applicant was of the view that the respondents would take heed of the proper procedures for seeking the release of the motor

vehicle in which case this application would not have been necessary. When the applicant realised that the respondents' were pressing forward with their application for contempt of court that is when the applicant deemed it necessary to file the application for review ..... Unfortunately, at that point, the applicant was now out of time in terms of the rules. This necessitated the seeking of condonation" [emphasis added]

The approach which the applicant took of the matter through its Commissioner- General made it hard, if not impossible, for it to advance any meaningful reasons which justified its delay to file the application for review timeously. It, therefore, made up its mind to tell a lie as a way of persuading the court to condone its dilatoriness. It, unfortunately for itself, could not cover up the cavalier manner which it employed as a way of the Commissioner - General's intention to, as it were, hit back at the respondents.

The court does not take kindly to a party which makes a deliberate effort to mislead it by stating as the truth what it knows not to be such. *A fortiori* when the falsehood is told under oath.

The deponent to the applicant's founding affidavit told a deliberate lie. He did so under oath. His desire was to justify the delay which related to his application for review. He, in the process, failed to place the court into his confidence.

The applicant's contention which was to the effect that the concurrent applications for condonation and review were properly before the court was misplaced. The applicant knows as much as the court does that all the courts in the country have designed rules which assist in the expeditious dispensation of justice to all parties whose cases may be before them at any given time. Those rules are not in place for the parties to refer to them at will. Parties are, at all times, required to comply with the rules of court in the strict sense of the word. They cannot pick and choose as the applicant wanted to portray *in casu*. Where they have fallen foul of any rule of court as the applicant did, the party's best course of action is first, to acknowledge the fault, and, second, to move the court to condone the fault. In doing so, the party must advance cogent and convincing reasons for the failure which it suffered.

The applicant appeared not to have acknowledged the fault which it suffered. It failed to give convincing reasons for the delay which related to its application for review. Its application for condonation could not, therefore, stand.

The applicant filed its application for review in terms of order 33, r 256 of the High Court Rules, 1971. It contended that the order of the magistrate was unlawful and *ultra vires* the provisions of s 193 (9) of the Act. The first respondent, it submitted, had no jurisdiction to

make an order for the release of the respondents' goods as such were seized in terms of the Act.

From a *prima facie* perspective, the applicant's argument appears to be water – tight. The magistrate presided over the case of the respondents' drivers as a criminal, and not a civil, court. He, therefore, had no jurisdiction to order as he did at the conclusion of the criminal trial.

Both parties were *ad idem* on the point that the magistrate acted *mero motu* when he ordered the release of the respondents' goods to them. The question which begs the answer is whether or not the magistrate was alive to s 193 (9) of the Act when he ordered as he did. The simple answer which comes to the fore is that he was aware of the section and that he was fortified in his conduct by the review minute which TAGU J was pleased to consider and deliver in *S v Shumba* - a case which was on all fours with the present one. TAGU J ruled in *S v Shumba* as follows:

“In my view, having acquitted the accused the court was right to order that the motor vehicle and the 7 bales of used clothes were to be returned to the accused since they were not subject to any offence and the accused could lawfully possess them.....

The order made by the court was therefore competent and regular. It could have been incompetent if the court had found out that the goods had been imported or were being exported without the payment of duty. That is where section 193 (9) of the Customs and Excise Act [*Chapter 23:02*] comes into play” [emphasis added].

The applicant was aware not only of TAGU J's decision but also of the court *a quo's* order on which the review minute was based. The court *a quo's* order adversely affected the applicant in a very substantial manner and so did TAGU J's review minute which confirmed the order of the magistrate. The magistrate made the order when he presided over *Shumba's* case as a criminal court.

The applicant did not seek a review of the court *a quo's* order. It did not appeal against TAGU J's decision. It, in fact, allowed the matter to remain as the court *a quo* had decided it and as TAGU J confirmed the proceedings which related to the order as having been in accordance with real and substantial justice.

Section 193 (9) was in the Act when the applicant failed to invoke it as it did *in casu*. It advanced no reasons for taking the position which it took in *S v Shumba*.

The magistrate was only complying with precedent when he ordered the respondents' trucks and their contents to be released to the latter persons. His conduct cannot be faulted. A

*fortiori* when criticism of his decision is not based on an objective desire by the applicant to correct a perceived error.

A criticism which the Commissioner – General of the applicant filed with a clear intention to hit back at the respondents for having sued the applicant and him for contempt of court falls more into the area of abuse of the court and its process than it does towards the attainment of real and substantial justice. The court cannot and should not be used to settle parties’ scores as the applicant attempted to do in its application for review.

That the applicant’s Commissioner– General took advantage of s 193 (9) of the Act to get at the respondents is evident from the Commissioner – General’s conduct. The magistrate’s order was made on 31 March, 2016. The Commissioner – General did nothing which adversely affected the second and third respondents following that order. When the respondents sued the applicant and him for contempt on 25 April 2016, he filed his opposition to the application on 4 May, 2016 and filed the applications for condonation and review on 2 June, 2016. He, in the process, arm-twisted the respondents into withdrawing their application for contempt of court. These withdrew their application on the understanding that their trucks and contents would be released to them. After the withdrawal of the application for contempt, the Commissioner – General continued to hold onto the respondents’ trucks.

The applications for condonation and review were set down for hearing at 10 am of 3 November, 2016. On the mentioned date, the applicant’s legal practitioner intimated that the Commissioner-General wanted to discuss an out –of-court settlement with the respondents. Time was duly granted to the parties to achieve the stated objective only to have the respondents write requesting the court to hear arguments on the applications. The letter which their legal practitioner addressed to the registrar of this court on 29 November, 2016 reads, in part, as follows:

- “(1) .....
- (2) .....
- (3) As we left court, ZIMRA’s Legal Practitioners advised us (as he had indicated before Justice Mangota) that his client would release the seized vehicles if we wrote asking their release. We wrote to ZIMRA, which asked our client to pay excise duty and fines for having used the vehicles in smuggling and penalties of 50% of the excise duty.
- (4) Not surprisingly, we objected to the levying of fines and penalties, which were an attempt to undermine the findings of the criminal court which acquitted our client’s drivers of the offence of smuggling. In brief, our contention is that there is no legal basis for imposing those fines and penalties.

- (5) ZIMRA, in its response, dated 23 November 2016, waived the fines but still maintains that the penalty of 50% of excise duty has to be paid as a condition for release. We are unhappy with this unfortunate stance taken by ZIMRA, which we believe is without justification and unduly oppressive.
- (6) The aforesaid letter threatens to dispose of the fuel, which is classified as dangerous goods in terms of s 39 of the Customs and Excise Act [*Chapter 23:02*]. This will compound the loss already suffered by our client through loss of income for a year that the product has been under seizure and through evaporation. The matter, therefore, requires urgent and decisive resolution.
- (7) While we had hoped that the matter would be resolved without much ado, the current impasse has necessitated that we appear again before Justice MANGOTA for argument to be presented to test the legality of ZIMRA's insistence on penalties."[emphasis added]

When the idea of an out-of-court settlement was mooted, the only concern which the Commissioner-General raised was the magistrate's order. He said it offended s 193 (9) of the Act and it should, therefore, be set aside. He did not, at the time, make reference to payment by the respondents of excise duty, fines and penalties. These were never in the equation.

As the magistrate's order appeared to have been the parties' only bone of contention, the court directed them to draw a deed of settlement which was accompanied by a consent order which set aside the magistrate's order. It directed the parties to file the deed and the consent order with it on or before 9 November, 2016.

The letter which the respondents addressed to the registrar of this court on 29 November, 2016 constitutes clear evidence of the fact that the Commissioner-General and through him, the applicant was not negotiating in good faith. They were negotiating in bad faith. Their application for review was also lodged *mala fide*. It was not aimed at the attainment of real and substantial justice. It aimed at getting at the respondents who had sued them for contempt of court. It was for the mentioned reason, if for no other, that the respondents regarded the applicant's stance as having been unduly oppressive.

The wide and unbridled discretion of the applicant remains a serious cause for concern. It is a *fortiori* so when it is exercised for subjective, as opposed to objective, reasons.

Observations which GUBBAY CJ made in *Elliot v Commissioner of Police & Anor*, 1997 (1) ZLR 315 (S) are applicable to the present case. In *Elliot v Commissioner of Police*, the applicant, a legal practitioner, was walking through Harare one lunch time on his way to the gymnasium which he attended. He deliberately left his wallet which contained his metal identity card issued in terms of s 7 of the National Registration Act [*Chapter 10:17*], fearing that the wallet and its contents might be stolen at the gym. He was stopped by police officers

who demanded to see the identity card, arrested for being found without it on his person, and conveyed to Harare Central Police Station. He applied to the Supreme Court in terms of s 24 of the Constitution, contending that s 10 (1) (c) of the National Registration Act which created the offence for which he had been arrested, restricted the constitutional freedom of movement of all persons who are obliged to have their identities registered in terms of the Act. Granting the application, the learned Chief Justice remarked as follows:

“In my view, the underlying objection to s 10 (1) (c) is that it permits the random stoppage of movement of a person for the purposes of a spot check for compliance with whether an identity document is being carried by him. It does not specify that there must be some ground or cause for stopping the person. Almost invariably, the stoppage is not based on any reasonable suspicion that the law is being breached. The utilization of the discretion is entirely arbitrary, there are no criteria, express or implied, which govern its exercise. There are no criteria for the selection of persons to be stopped. The choice is in the absolute discretion of the police officer. He may act on his own notion, whim or caprice, without any adequate determining principle.” [emphasis added]

It was, in the court’s view, certainly not the intention of the legislature to allow the Commissioner-General of the applicant the discretion to use and abuse s 193 (9) of the Act as he pleased. He allowed its apparent violation in *S v Shumba* and did not, for ulterior reasons, allow the same in the present case. The court has already stated that his application for review was *mala fide*.

The Act in which s 193 (9) resides was promulgated some fifty (50) years or so before the coming into operation of the Constitution of Zimbabwe Amendment [No. 20] Act of 2013. Most of the Act’s provisions do, therefore, offend some sections of the Constitution which relate to the Bill of Rights.

Section 193 (9), with its very wide discretionary powers is, in the court’s view, one such provision which requires alignment with the provisions of the new constitution of the country. It should contain clearly defined guiding principles which assist the Commissioner-General of the applicant to act in an objective, as opposed to a subjective, manner. In its current form, the section offends s 68 (1) and (2) of the Constitution of Zimbabwe and by extension, ss 1 and 2 of the same.

Subsection 1 of s 68 of the Constitution reads:

“Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedural fair.”

It cannot be said that the conduct of the applicant falls into any one of the adjectives which are mentioned in the subsection. The decision which the applicant complained of was

made on 31 March, 2016. It took the respondents nine (9) months to have the matter decided. The applicant was not prompt, efficient, reasonable, impartial or fair in the manner that it dealt with the respondents' case. These incurred substantial pecuniary losses at the hands of the applicant.

Subsection 2 of s 68 of the Constitution reads:

“2 Any person whose right, freedom or interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.”

The reasons which compelled the applicant to continue to hold onto the respondents' goods were never availed to the latter. When the court delved into that matter with it, the applicant's assertion was that it furnished those to the respondents in its opposing papers to their application for contempt of court. Whatever its statement was meant to convey remains anyone's guess. It certainly cannot be said to have complied with s 68 (2) as it should have done.

The court remains of the view that the applicant's conduct in continuing to hold onto the respondent's goods, for its ulterior reasons, is unlawful. Its application for condonation was without merit. Its application for review was *mala fide* and, therefore, misplaced.

The court is satisfied that the applicant failed to prove its case on a balance of probabilities. Both its applications are, therefore, dismissed with costs.

*Kantor & Immerman*, applicant's legal practitioner  
*Mushonga & Mutsvairo*, respondents' legal practitioners