

REPORTABLE ZLR (11)

Judgment No. S.C. 18/2002  
Civil Appeal No. 370/00

BERNARD CHIONDEGWA v  
THE DIRECTOR OF CUSTOMS AND EXCISE

SUPREME COURT OF ZIMBABWE  
CHIDYAUŠIKU CJ, SANDURA JA & ZIYAMBI JA  
HARARE, FEBRUARY 14 & APRIL 19, 2002

*M E Motsi*, for the appellant

*E Munyuki*, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an order directing the respondent to release to him a BMW motor vehicle which had been seized by the respondent in terms of s 193(1) of the Customs and Excise Act [*Chapter 23:02*] ("the Act") on the ground that when the vehicle was imported into Zimbabwe no duty was paid.

The relevant facts are as follows. On 22 April 1999 the respondent seized a BMW motor vehicle registered in the appellant's name on the ground that he had reasonable grounds for believing that when it was imported into the country no duty was paid. The appellant had previously worked in the Department of Customs and Excise.

Subsequently, the appellant's lawyer wrote to the respondent, informing him that the appellant had purchased the motor vehicle from Innocent Gumbura ("Gumbura") and calling upon him to release the motor vehicle to the appellant without delay.

When the motor vehicle was not released, the appellant filed a court application in the High Court. That application was subsequently dismissed with costs. Aggrieved by that decision the appellant appealed to this Court.

After the motor vehicle had been seized by the respondent, the matter was investigated by a customs officers in the Investigations Department. He prepared an affidavit which was filed in the court *a quo*. The relevant part of that affidavit reads as follows:

- “1. I handled the matter. The BMW in question was imported into the country and duty was not paid.
2. The applicant should refer us to the person who imported the vehicle ...
3. The applicant referred me to Innocent Gumbura whom he says sold the vehicle to the applicant and in turn Innocent Gumbura referred me to Temba Dube also known as Calvin Dube.
4. The respondent has tried to locate Temba Dube to no avail. My investigations in this matter have revealed that the BMW in question was first fraudulently registered by one Vincent Chakala using fake Customs Clearance Certificate number 630815, date-stamped 26 March 1997. The date stamp is fake. The BMW was then issued registration number 654-334 G.
5. Vincent Chakala's address was given as 49 Borrowdale Trust, Marondera. On checking on this address it turned out that this place is an old people's home. Vincent Chakala is not known at this address. During 1997 49 Borrowdale Trust was occupied by a Mr and Mrs Steynberg.

6. In 1999 the BMW was fraudulently registered using fake Customs Clearance Certificate number 698818 date-stamped 30 January 1999. The fake Customs Clearance Certificate was issued in the name of Joyce Chasara of 38 Princess Margaret Road, Marlborough, Harare. The date stamp used was fake. The new fake registration number issued is 711-288 N, which is the one currently affixed to the BMW.
7. I proceeded to 38 Princess Margaret Road and found that Joyce Chasara used to stay there. She was a housemaid working for a Murira family who own the said property. Her last known address is number 3, Guthrie Avenue, Marlborough, but unfortunately she does not reside there anymore.
8. Innocent Gumbura's name does not appear on any of the fake documents, neither does the name of Temba Dube."

In his founding affidavit, the appellant averred that he bought the motor vehicle from Gumbura for \$506 000.00, that he paid the purchase price by means of five company cheques (the company being Con-Plant Technology (Pvt) Ltd), that at the time of the sale Gumbura was in possession of a Customs Clearance Certificate, that Gumbura had imported the vehicle into the country, and that he (the appellant) had given all this information to the respondent.

In the circumstances, it was submitted on behalf of the appellant that in terms of s 193(3) and s 222(1) of the Act the appellant was entitled to the release of the vehicle.

Before considering that submission I would like to set out the relevant provisions of the Act.

Section 193(1), in terms of which the vehicle was seized, reads as follows:

“Subject to subsection (3), an officer may seize any goods, ship, aircraft or vehicle (hereinafter in this section referred to as articles) which he has reasonable grounds for believing are liable to seizure.”

Subsection (3) of s 193 of the Act, which is referred to in subs (1) above, reads as follows:

“No seizure shall be made in terms of subsection (1) where more than two years have elapsed since the articles first became liable to seizure or where such articles have been acquired after importation for their true value by a person who was unaware at the time of his acquisition, that they were liable to seizure:

Provided that –

- (i) ...
- (ii) proof that a person was unaware that the goods he acquired were liable to seizure shall lie on him.”

And s 222(1), in relevant part, reads as follows:

“Any person being in possession or control of imported goods or goods which are liable to duty under this Act, ... shall, when requested by an officer so to do, produce proof as to the place where entry of the goods was made and any duty due thereon was paid and also the date of entry ... . If he himself did not pay the duty or make entry of the goods, such person shall produce such evidence as will enable the officer to locate and question the person who did make such entry and payment in respect of the goods.”

It was submitted on behalf of the appellant that the vehicle should not have been seized because the provisions of s 193(3) of the Act were satisfied. In other words, the submission was that the vehicle had been acquired from Gumbura after importation, for its true value, by the appellant who was unaware that it was liable to seizure.

Whilst it is true that the appellant acquired the vehicle after its importation into the country, I do not think that the evidence shows that he acquired it for its true value.

In the first place, the appellant averred that he bought the vehicle for \$506 000.00 when, according to the respondent, the true value of the vehicle at the relevant time was \$1 073 851.02.

Secondly, there is no evidence which shows that the five company cheques, for the total sum of \$506 000.00, which were issued to Gumbura, were issued as payment of the purchase price of the vehicle. Although it appears from the signature on the five cheques that the appellant may have signed them, there is no indication of the capacity in which he may have done so, or his relationship with the company which issued the cheques.

In addition, there is no evidence which shows that the appellant bought the vehicle from Gumbura, apart from the appellant's own word. In this regard, it is pertinent to note that at the time the appellant acquired the vehicle it was registered, not in Gumbura's name, but in Joyce Chasara's name, and yet the appellant made no mention of Joyce Chasara. If, indeed, he bought the vehicle, and assuming that he was a prudent buyer, he would have examined the registration book before purchasing the vehicle. That examination would have revealed that the registered owner was Joyce Chasara, and not Gumbura. In the circumstances, the appellant's failure to explain why the cheques were issued in favour of Gumbura, and not in favour of Joyce Chasara, is very strange. Indeed, the fact that he made no mention of

Joyce Chasara, the registered owner of the vehicle which he said he bought, creates a very strong suspicion that his actions were not *bona fide*.

I am, therefore, satisfied that the vehicle was not acquired for its true value, and that the appellant failed to prove, on a balance of probability, that when he acquired the vehicle he was unaware that it was liable to seizure. He cannot, therefore, rely upon the provisions of s 193(3) of the Act.

I now come to the provisions of s 222(1) of the Act. In order to benefit from these provisions, the appellant should have produced “such evidence as will enable the officer to locate and question the person” who imported the vehicle into the country and paid the duty in respect of the vehicle.

In my view, the appellant dismally failed to produce the required evidence. All he told the respondent was that he bought the vehicle from Gumbura of Aloe Enterprises, 2<sup>nd</sup> Floor, Noczim House, Leopold Takawira Avenue, Harare, for \$506 000.00, and that the vehicle had been imported into the country by Gumbura. He did not inform the respondent that at the time he acquired it the vehicle was registered in the name of Joyce Chasara and that the Customs Clearance Certificate shown to him by Gumbura had been issued in the name of Joyce Chasara in January 1999. He was not, therefore, being truthful.

When Gumbura was subsequently contacted by the investigating officer, he referred him to Temba Dube, who could not be located. In any event,

neither Gumbura's name nor Temba Dube's name appeared on any of the forged Customs Clearance Certificates.

I am, therefore, satisfied that the appellant cannot rely upon the provisions of s 222(1) of the Act. The evidence he gave to the customs officer falls short of what was envisaged by that section.

In the circumstances, the appeal is devoid of merit and is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

*Mabulala & Motsi*, appellant's legal practitioners

*Civil Division of the Attorney-General's Office*, respondent's legal practitioners