Judgment No. HB 45/2002
Case No. HC 5006/99

ROSELENE XABA

and

THE DIRECTOR OF CUSTOMS AND EXCISE

IN THE HIGH COURT OF ZIMBABWE
SIBANDA J
BULAWAYO 19 JANUARY 2001 & 13 JUNE 2002

J Tshuma for the applicant
Ms P Dube for the respondent

SIBANDA J: On 25 October 1999 applicant instituted an urgent chamber application seeking a provisional order for the release, by the respondent of her motor vehicle, registration number 735-277N upon service of the provisional order on the respondent. The urgent application came before CHEDA J, as he then was, who granted the provisional order. The respondent opposed confirmation of the *rule nisi.*

On the return day the matter came before me on the opposed motion roll and I confirmed the *rule nisi*. The respondent seems to be labouring under a false notion that confirmation of the *rule nisi* left undecided the issue of who is liable for the payment of import duty. He believes that the applicant is liable and for that reason has refused to release the vehicle to the applicant. I would like to say at the on set that the suggestion that the question of who is liable for the payment of duty, need not arise because the confirmation of the provisional order was made on the basis of clear evidence that the applicant is not the importer and in terms of the Act only an importer is liable for payment of duty.

The facts of the case are fairly straight forward and admit of no ambiguity in as much as they are common cause and are as follows:

Sometime in February 1999, the applicant while perusing *The Herald Newspaper*, came across a motor vehicle advertised for sale under the "cars for Sale" column. She then contacted the owner of the vehicle who advised her that the vehicle on offer was at the Automobile Association in Harare. The applicant then arranged with the seller, a car dealer, that the vehicle be sent to Bulawayo in order that she may view the vehicle. The vehicle was duly sent to Bulawayo and the applicant after an inspection satisfied herself with the condition of the vehicle.

Subsequent thereto the applicant entered into an agreement of sale with Multi Task (Pvt) Ltd of number 3099 St Mary's, Chitungwiza, to purchase the motor vehicle for the sum of $160 000,00. However, before making payment of the purchase price, and taking transfer, applicant took the vehicle to the police for inspection and clearance. The vehicle was duly cleared and the applicant was satisfied that the seller appeared to be a reputable car dealer. She then proceeded to pay the purchase price in cash and duly took transfer.

In about October 1999 she received a letter from Central Registry requesting her to present the registration book of the vehicle to their office and she obliged. She was later informed that the registration book would be retained at the Registry Office and that she should take her vehicle to an Inspector Ncube of the Car Theft Department at the Bulawayo Drill Hall. She took the vehicle as directed. She was later informed by Ncube that they had no record of the clearance of the vehicle. A Mr Gumbo was then called from the Department of Customs and she was later informed

that the Bulawayo office was going to conduct a check in Harare to establish whether the vehicle was cleared cleared by the Customs Department.

On 20 October 1999, she was issued with a notice of seizure of the vehicle. She was at the same time asked to pay duty in the sum of $119 000,00. On 25 October 1999 she instituted these proceedings seeking the release for the vehicle by the respondent. The application was opposed by the respondent on the grounds that the vehicle was imported and the applicant has failed to produce proof of clearance as required by the Act. It is respondent's case that in terms of section 2 of the Act (Chapter 23:02) applicant is an importer and as such is liable to pay duty for the vehicle in terms of section 34 (2) of the Act.

That of course, leads to the obvious question of who is an importer in terms of the Act. The definition of importer is to set out in section 2 of the Act, which provides:

> "Importer, in relation to goods includes any owner of or other person possessed of or beneficially interested in any goods at <u>any time before entry of the same has been made and the requirements of this Act fulfilled</u> ..." (the emphasis is my own)

It is clear that to fall within the ambit of the definition under section 2 *supra*, the applicant must have been the "owner" or "in possession" or "beneficially interested" in the goods at any time before entry of those goods has been made and the

requirements of the Act fulfilled.

The applicant, on evidence, does not fall within the preview of the definition. She did not own, or possess or had a beneficially interest in the car before entry. The applicant bought the vehicle from a dealer long after its entry into the country.

The next question to consider is could the applicant fall within the ambit of an

importer in terms of subsection (2) of section 34? That subsection provides that

where the provisions of subsection (1) of section 34 do not apply "... liability or duty on all imported goods or goods deemed to have been imported in terms of section thirty-six shall rest upon the importer..." Would in those circumstances and because the applicant was found in possession be held to fall within the preview of subsection 2 *supra* of the Act?

In my view, the circumstances under which she came into possession of the vehicle can only lead to the conclusion that she does not fall within the provision of subsection (2). On the evidence, she is the person envisaged by the proviso to subsection (2) which reads:

> "Provided that liability for duty on goods which are no longer in his possession shall not rest upon an importer who proves that he -
>
> (a) acquired those goods for their true value after they were imported; and
>
> (b) was unaware at the time of such acquisition that entry had not been made and the requirements of this Act had not been fulfilled in respect of those goods."

In my respectful view that, the applicant has not been shown to have been aware that the vehicle was imported, let alone improperly imported for that matter at the relevant time. On the contrary, the only evidence that there is, has shown that the applicant acquired the vehicle for its true value of $160 000,00 and that she was unaware at the time of the purchase of the vehicle that, at the time of importation the importer, had not complied with the requirements of the Act.

Further, the applicant, in my respectful opinion, on this evidence is certainly the person envisaged by section 193(3) of the Act in which the subsection provides, in imperative terms that:

> "No seizure shall be made in terms of subsection (1) ... 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."

To that extent, the applicant has in my view discharged the onus in terms of sub-paragraph (3)(ii) of section 193 of the Act, resting upon her of showing that, indeed, she was unaware, at the time of purchase, that the vehicle was liable to seizure.

It is to be observed that according to the registration book, annexure (A) paragraph (3) the vehicle is said to have been used as new in 1996. If it was imported,

then 1996 or 1997 was the year of its importation and liable to seizure immediately thereafter. The notice of seizure was issued on 20 October 1999 about 3 years from the year of entry or registration. In terms of subsection (3) of section 193 *supra*, "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 ..."

The relevant date can only be the date of the year of entry into the country. It follows therefore that, prescription has, in terms of the Act, taken its course. Thus even if the vehicle was liable to seizure it now cannot, in terms of the Act, be seized.

Mr Ncube in his heads of argument says the subsection is of no avail because the vehicle was smuggled, fraudulently registered and above all the Director was not aware of the importation of the vehicle. Mr Ncube, must be thinking of prescription at common law. Under the Act the running of time period is unconditional. If the legislator had wanted conditions under which prescription would not run as is the case at common law he would have provided accordingly. The pancity of the rest of

Mr Ncube's submissions are based on the erroneous interpretation that applicant in

terms of the Act is an importer and are therefore irrelevant.

It is some what puzzling that the respondent seeks to recover duty from the applicant, despite the fact that the seller or Mr Chitekeshe has offered to pay the duty. Indeed, such payment, if the seller is not the importer, is envisaged under subsection (2) of the Act on the basis that the seller dealt with the vehicle on behalf of the importer or owner, when selling it and thus acting as the importer's agent.

In any case the offer to pay the duty by Mr Chitekeshe, should be seen for what

it is a clear indication if not admission, that, firstly he was aware that duty was not paid at the time of sale of the vehicle, if not importation, secondly, that applicant was not aware that duty was not paid at the time of purchase and thirdly by offering to pay the duty he intends indemnifying the applicant as an innocent purchaser, against any claim for payment of duty. Is there any legal impediment, if I may ask, in recovering the duty from Mr Chitekeshe as offered? He has made an offer to pay and I can see no

reasons why the Director should refuse to accept the payment.

In the result I am satisfied that the applicant is not an importer, in terms of the Act. Instead she is an innocent purchaser for the true value of the vehicle which was publicly advertised in the press prior to the sale. She, on the evidence, was not and could never have been aware that the vehicle was imported and for that matter let alone, imported in contravention of the provisions of the Act, at the time of purchase. She responded to a press advertisement and innocently purchased the vehicle, as any other member of the public would have, in her position done. She is, therefore, in my

respectful opinion the person envisaged by the proviso to subsection (2) of section 34 and subsection (3) of section 193 of the Act. In the circumstances, she could not be

liable to pay duty on the vehicle. The respondent, in my view, should have sought to recover the duty from the importer. If the seller and Mr Chitekeshe are not the importers then they certainly must be the agents of the importer, or they ought to know the previous owner, who, in turn, should know the importer, if he himself is not the importer, and thus liable to pay the duty.

The applicant, in my view, as an innocent purchaser is entitled to have her vehicle released to her.

Accordingly, the following order is granted. It is ordered:

1. That the provisional order be and is hereby confirmed with costs.

2. That the respondent be and is hereby ordered to release the vehicle to the applicant forthwith, upon service of this order.

Webb, Low & Barry applicant's legal practitioners
Coghlan & Welsh respondent's legal practitioners