

**ACIL MARKETING (PVT) LTD
t/a BOOT LEGGERS BOTTLESTORE**

versus

INSPECTOR RUKUNDA

And

COMMISSIONER GENERAL OF POLICE

And

CO-MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 AND 22 JULY 2010

Mrs D. Phulu, for the applicant
L. Musika, for the respondents

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:

“Interim relief granted

1. That 1st respondent be and is hereby ordered to immediately upon being served with this order, release to applicant the removed stock as listed in Annexure “B” hereof. In the event that 1st respondent refuses to co-operate the Deputy Sheriff or her lawful assistant be and hereby is authorized and directed to enter into the storeroom and remove therefrom all the goods as listed in Annexure “B” and place applicant in possession thereof.

Terms of the final order sought

That you show cause to this honourable court why a final order should not be made on the following terms:

1. That in the event that the respondents have disposed of the removed goods as listed in Annexure “B” they be ordered to pay to applicant a sum of \$7 515,00 being the value thereof.

2. That the respondents pay jointly and severally the one paying the others to be absolved, costs of this application on an attorney-client scale.”

The salient facts of this case are the following. On 12 February 2010 the office of the 1st respondent received an anonymous call to the effect that the applicant’s bottle store in Barham Green was operating without a liquor licence. Three police details went to the bottle store and demanded to see the applicant’s liquor licence. The applicant was using someone else’s liquor licence. So in essence the applicant was operating without the requisite licence. The applicant was charged with trading without a liquor licence in contravention of section 113 (1) of the Liquor Act [Chapter 14:12]. The applicant mandated its employee to go to police at Drill Hall Licence Inspectorate together with the liquor subject matter of this application. The said employee admitted guilt on behalf of the applicant and paid a deposit fine of US\$20,00.

The applicant’s Managing Director visited the Licence Inspectorate on 13 July 2010. He was advised by the 1st respondent to obtain a licence in his own name in order to sale liquor. The applicant indeed complied and applied for and was issued with a Temporary Transfer Liquor Licence by a Bulawayo Provincial Magistrate in terms of section 35(1) of the Liquor Act, *supra*. It has to be pointed out that prior its arrest, the applicant had already submitted its application to the Liquor Licencing Board for the transfer of the licence from the names of the previous owner to those of the applicant. The application had been advertised in the Chronicle newspaper and the Government Gazette.

Applicant seeks an order releasing the removed stock of alcohol. The value of the stock is US\$7 515,00. The 1st respondent has refused to release the liquor. This liquor was seized by the respondents as exhibits. On 12 July 2010 the 1st respondent applied for authority to confiscate and dispose the liquor from a Bulawayo Magistrate in terms of section 59(1)(c) of Criminal Procedure and Evidence Act [Chapter 9:07]. This application was brought to the attention of the applicant through its agent who paid the deposit fine. The applicant acknowledged receipt of the said application and signed on 12 July 2010. The application read *inter alia*,:

“This station is seeking for authority to confiscate and dispose seized goods, which were being sold by the accused without relevant licences [*sic*]. The accused Sean Randen of Bootleggers Bottle store Reynolds Drive Barham Green Bulawayo was selling the listed liquor without a licence. The accused paid fine Z69 (J) 8407043A. All the seized goods are still withheld at this station pending the approval of this forfeiture order.

An application for the forfeiture of these goods will be made to the Tredgold magistrates Court Office 138 on 14 /7/10. If you have any representation to do so before this date [*sic*]

Signed (accused) [Sean Randen] NR 58-200641Q-00

Date 12/7/10

Time 20:25Hrs”

(Emphasis added)

What is clear from the above is that,

- (a) The applicant was informed of his right to be heard before the magistrate's determination;
- (b) The place and date of the hearing by the magistrate;
- (c) The liquor subject-matter of these proceedings will be seized if the applicant does not make successful representations;
- (d) The hearing by the magistrate will take place on 14 July 2010 i.e. about two days after the applicant was so informed.

Having been so informed the applicant neglected or chose not to be heard before the magistrate's determination. The applicant chose not to cite the said magistrate in these proceedings. The long and short of it is that the magistrate authorized the forfeiture and disposal of liquor without the applicant's input or representations. All the representations that the applicant now should have been made before the magistrate. The applicant seeks to rely on the case of *N & B Ventures (Pvt) Ltd v Minister of Home Affairs & Anor* 2005 (1) ZLR 27(H)

The facts of this case are distinguishable from those in the *N & B Ventures* – case, *supra*. At page 31C-E CHEDA J stated in the latter case:

“The second issue is the reason for the forfeiture. The forfeiture was authorized after an admission of guilty had been paid by the applicant. ... The applicant was not informed of the intended forfeiture by the second respondent. Failure to inform the applicant clearly offends against the principles of natural justice *audi alteram partem* The learned magistrate should have afforded the applicant an opportunity to explain its default before it took such a drastic step of forfeiting its goods.” (Emphasis added)

In this case, as alluded to above, the applicant was informed of the intended forfeiture and was invited to explain why the goods should not be forfeited. The applicant ignored or neglected this show cause notice. The respondents did all that is required of them in terms of the principles set out in the *N & B Ventures* – case, *supra*. If the applicant is not satisfied with the determination of the magistrate it can seek review thereof. There is no basis for interference in this case as I am not seized with an application for review of the forfeiture by magistrate. In effect it is the magistrate who forfeited the applicant's liquor and authorized its

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disposal. The applicant is barking the wrong tree, it should have cited the magistrate and challenged his/her said order of forfeiture and disposal of the liquor. I brought this issue to attention of the applicant's legal practitioners and there was not attempt to remedy the problems and as such costs should be borne by the applicant.

Accordingly, the application is dismissed with costs on the ordinary scale.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners