ZIMBABWE REVENUE AUTHORITY
versus
SIKHANYISIWE MPOFU
AND
CHRISTIAN NDLOVU
and
T. TASHAYA N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15 AND 21 APRIL 2016

Urgent Chamber Application

P. Ncube for the applicant
Respondents in default

MATHONSI J: This matter was placed before me on the afternoon of 14 April 2016. As the applicant complained of the risk of being in contempt of a court order issued by a magistrate on 12 April 2016 directing it to release fuel to the first respondent within 48 hours, a period which was expiring a while after the matter was placed before me, I set the matter down for hearing on 15 April at 14:30 hours, the best that could be done in the circumstances.

When the matter came up, Mr *Ncube* for the applicant produced returns of service attesting to the challenges experienced in trying to bring the first and second respondents to court. In respect of the first respondent, although the papers show that she was indeed represented by *Messrs Sansole and Senda* who wrote a letter on 1 April 2016 to the applicant demanding the release of the fuel which had been seized, the sheriff reports that they "advised that they have no instructions to receive documents" on behalf of the first respondent, an overused and tired ruse employed by unco-operative legal practitioners.

Regarding the second respondent, who, I must say, did not approach the magistrates court before the offending order was issued and therefore should not have been included, his address is given in the state outline as 1499 Luveve Gwabalanda, Bulawayo. The sheriff reports that an attempt at that address yielded negativity because the address could not be located and the Luveve Housing office informed the sheriff that it does not exist.

I was not overly concerned about the second respondent for purposes of this application because the interim relief sought really does not affect him. He did not apply for the release of his fuel but the first respondent did. I then stood the matter down to 1600 hours and directed that the first respondent be served with a notice of set down for that time at 2228 Cowdray Park, Bulawayo. That has since been done, but the first respondent has not bothered to come. I have proceeded to consider the application in her absence. It is however necessary to give the background of the circumstances under which the decision was taken.

Ulric Huber, *Jurisprudence of My Time*, page 318, put it very well when he said:

> "The duty of the judge is, in general, to give his decision according to the dictate of the law and custom ----. Everything, therefore, which is done by a judge contrary to the precepts of the law or the established essentials of a transaction is *ipso facto* and immediately null and void by force of law."

I am surprised that the first and second respondents appear to be difficult to locate at addresses they gave to the authorities. I am also surprised that a magistrate sitting at Bulawayo was able to entertain an application for the release of fuel in respect of which no criminal prosecution was ever commenced before him. How then could he become seized with a matter in which there was not even a court record? I say this because the charges preferred against the first and second respondents never saw the light of day in a court of law. They ended at the set down office when the public prosecutor declined to prosecute.

Where the public prosecutor declines to prosecute, ordinarily no court record is created and the accused person is therefore not taken to court for remand. A court record is only generated when the matter is being taken to court either for a plea recording or initial remand. That is when it is entered in the Criminal Record Book and a number is generated.

The history of the matter is that on 29 March 2016 the applicant seized 20408 litres of petrol belonging to the first respondent and 7450 litres of petrol belonging to the second respondent by notices of seizure numbers 014683L and 014684L respectively on suspicious that it had been smuggled into the country. At the same time the police charged them with smuggling.

As I have said, the criminal prosecution floundered at the first hurdle when the public prosecutor declined to prosecute. That outcome did not stop the first respondent writing a letter addressed to "Tredgold Court, Bulawayo" to wit:

> "Application for release of Thirty-seven thousand (37000) litres of fuel and two (2) Trucks in terms of section 59 of The Criminal Procedure (and) Evidence Act.
>
> I bought my fuel from Harare, which was confiscated by The Zimbabwe Revenue Authority and The Zimbabwe Republic Police in Bulawayo suspecting that the fuel had been smuggled from outside the country. After giving evidence of purchase, the prosecution was declined at Tredgold Court. I am hereby applying for a court order for The Zimbabwe Revenue Authority to release the goods mentioned here above.
>
> Yours faithfully
> Mpofu Sikhanyisiwe."

It is significant that the letter could not possibly constitute a proper application to be filed in court. More importantly, the "application" was not served on the present applicant but the magistrate still heard it on 12 April 2016 with the applicant being the present first respondent and the public prosecutor presumably as the respondent. The latter did not oppose the application, he could not because he had declined to prosecute, was *functus officio* and had no interest in the matter at all.

At the end of what was apparently a one sided affair, the magistrate issued an order in the following:

> "IT IS HEREBY ORDERED THAT
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> Zimra is ordered to release 37 000 litres of petrol belonging to the accused which was confiscated by it pursuant of a criminal offence. The property is to be released within 48 hours from granting of this order into the custody of Sikhanyisiwe Mpofu and Christian Ndlovu."

The order was issued despite the fact that only Mpofu had applied and only 20408 litres of petrol had been seized from her. Although it was issued against Zimra, it did not occur to the magistrate that Zimra deserved to be heard before an order adverse to it could be made. Therefore the order was made in breach of the *audi alteram partem* rule.

The applicant has made this application seeking interim relief staying the order of the magistrate on the grounds that it was issued without their involvement and in breach of the law.

In terms of the proviso to paragraph (c) of subsection (9) of s 193 of the Customs and Excise Act [Chapter 23:02];

> "---- no court sitting as a criminal court for any purposes of this Act shall make an order for the return of articles seized in terms of this section, and no such articles shall be returned except by the Commissioner General acting in accordance with this Act or by order made by a court of appropriate jurisdiction in which the person from whom the articles have been seized has instituted separate civil proceedings for their return."

The respondents did not institute separate civil proceedings for the release of the goods. Instead they unprocedurally approached a criminal court which was not even seized with the matter and had no business dealing with it after prosecution had been declined. I agree with Mr *Ncube* for the applicant that the court in question did not have jurisdiction.

It is not clear in terms of what law that court received the application or ordered the release of the goods. Section 61 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07] reposes in a judge or magistrate presiding at criminal proceedings the discretion to order the release of exhibits at the conclusion of those proceedings to the person from whose possession the articles were obtained where that person may lawfully possess them. In my view that section has no application to the present matter because the magistrate was not presiding over criminal proceedings which had been concluded.

Section 59 of the Act which was cited by the first respondent in her letter to "Tredgold Court" has no application either. More importantly, the section is nor a right endowing provision upon which the first respondent could approach the court seeking release of the fuel and it was not used to seize the fuel which was only seized in terms of s193 of the Customs and Excise Act.

The inescapable conclusion therefore is that the magistrate acted contrary to the precepts of the law. What he did was therefore *ipso facto* null and void. I am therefore satisfied that the applicant has made out a case for the relief that is sought.

Accordingly the provisional order is hereby granted in terms of the draft order.

Coghlan and Welsh, applicant's legal practitioners