

ACUMEC PBC

Versus

ZIMBABWE REVENUE AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 14 & 28 JULY 2022

Opposed Application

Advocate K. I. Phulu for the applicant
E. Mukucha for the respondent

MAKONESE J: The applicant seeks a declaratory order in the following terms:

- “(a) The decision by the respondent made on 21 September 2020 and upheld on 4 December 2020 and 8 February 2021 to forfeit applicant’s motor vehicle, a Mercedes Benz Alego, chassis number WDB9505092K8235, was made prematurely and in violation of section 193(a) of the Customs & Excise Act and thus null and void.
- (b) Consequently, it is hereby ordered that the respondent shall immediately release the motor vehicle Mercedes Benz Alego to the applicant upon service of this order.
- (c) Any other appropriate relief that the court may order.
- (d) That the respondent is to pay the costs of this application.’

The application is opposed by the respondent who has raised points *in limine* which could be dispositive of the matter without dealing with the merits.

Background facts

On 25th July 2021, one Nkululeko Sibanda smuggled large quantities of an assortment of goods from Botswana into Zimbabwe. The smuggled goods ranged from television sets, radio sets, shoes and solar batteries. Nkululeko was, at the relevant time, driving a Mercedes Benz registration number AFB 6413 belonging to the applicant. Applicant’s motor vehicle was intercepted by police officers from Plumtree, upon entering the country through an undesignated entry point, being a boundary fence that had been cut open for that purpose. The truck was found to have ferried uncustomed goods through the undesignated entry point. The goods and truck were seized and the driver was prosecuted and convicted for smuggling. Applicant made written representations for the release of the vehicle. Respondent’s Regional Manager rejected the appeal for the release of the vehicle. The applicant appealed to the

Commissioner General of the respondent. On 8th February 2021 the Commissioner dismissed the appeal in the following terms:

“After careful consideration of the appeal submitted on behalf of your client I cannot overlook the fact that the vehicle ferried uncustomed goods through an undesignated entry point rendering it liable for forfeiture in terms of the Customs and Excise Act (Chapter 23:02). Your appeal is therefore dismissed and the vehicle remains forfeited to the State.

If you are not satisfied with the above decision you are free to seek redress from the courts of law.”

It is common cause that this application has been filed pursuant the refusal to release applicant’s car by the Zimbabwe Revenue Authority. Applicant has mentioned in its communications with the respondent that applicant had no knowledge that the Mercedes Benz motor vehicle was being used to smuggle the goods across the border. Applicant maintains that Nkululeko was on a frolic of his own when he drove the vehicle with smuggled goods through an undesignated entry point.

POINT IN LIMINE

Before dealing with the merits of the matter, I must deal with the preliminary objection raised by the respondent.

Prescription

Respondent contends that this application is in reality an application for the release of the motor vehicle, despite the fact that the relief sought is couched as a declaratory order. The respondent submits that the vehicle claimed by the applicant was formally seized by the respondent on 28th July 2020 under notice of seizure number 000730L. Respondent argues that in terms of section 193 (2) of the Customs and Excise Act (hereinafter referred to as the Act). Proceedings for the recovery of the seized goods or payment of compensation in this respect must be instituted within 3 weeks of the date when the notice of seizure was issued. The relevant section provides that:

- “ subject to section one hundred and ninety six, the person from whom the articles have been seized or the owner thereof may institute proceedings for –
- (a) The recovery of any articles which have not been released from seizure by the Commissioner in terms of paragraph (a) of subsection (b); or
 - (b) The payment of compensation by the Commissioner in respect of any articles, which have been dealt with in terms of the proviso to subsection (6) within three

months of the notice being given or published in terms of subsection (11) after which no such proceedings may be instituted.”

The present application was filed on the 29th of October 2021 and served on respondent on 1st November 2021, a period of about fifteen months outside the three months prescriptive period. Respondent avers that applicant’s claims have prescribed by virtue of the provisions of section 193 (12) of the Act. On this point alone, respondent contends that applicant’s claims must be dismissed.

The applicant argues that the prescriptive period referred to by the respondent does not arise. Applicant submits that once there is forfeiture of the seized goods the provisions of section 193 (12) do not apply. In support of this argument, applicant cites section 193 (6) (a) of the Act which provides that:

“The Commissioner shall not exercise his powers in terms of paragraph (b) and subsection (6) while proceedings may be instituted in terms of paragraph (a) and subsection (12) or if such proceedings have been instituted, until they have been concluded in his favour.”

Applicant makes the further submission that section 193 (a) does not allow the Commissioner to forfeit seized articles before a period of (3) months from the date of the notice of seizure. It is argued by the applicant that in terms of section 196 (a) and (b) of the Act, the Commissioner may either release the articles from seizure or declare any of the articles to be forfeited retrospectively. Applicant submits that this power to forfeit articles is subjected to sub-section (9) of the Act.

Applicant placed reliance on the case of *Murphy v Director of Customs & Excise* 1992 (1) ZLR 28 H. Although the learned judge acknowledged that forfeiture is distinct from seizure, in that matter, he held at page 35D as follows:

“In this case, even if it were assumed, without deciding the point that the plaintiff had a separate cause of action flowing from the forfeiture of goods, he is barred from bringing this action because he failed to comply with the requirements of section 178 of Chapter 77 –“

It is clear that applicant has misread the import of the decision in *Murphy v Director of Customs (supra)*.

The issue of the prescriptive period has also been dealt with by this court in *Machacha v Zimbabwe Revenue Authority* HB-186-2011, where NDOU J held as follows at page 2 of the cyclostyled judgment:

“In the event I am wrong in this conclusion, still the application has to be dismissed on the basis of the other point *in limine* raised i.e. the claim has prescribed in terms of section 193(12) of the Act. In terms of section 193 (12) the application of this nature has to be made within three months of the notice of seizure being given to the owner of the vehicle. *In casu*, the Notice of Seizure was given to Murada on 10 June 2010. This application was filed about four months after this date. This means that his cause of action based on unlawful seizure has prescribed – *Harry v Director of Customs* 1991 (2) ZLR 39 (H) and *Murphy v Director of Customs and Excise* 1992 (1) ZLR 28 (H).

I am satisfied that the point *in limine* does not have merit. The provisions of section 193 (12) of the Act are clear. They admit of no other interpretation. Any claim for the release of goods that are seized by the Commissioner must be instituted within 3 months of the notice being given. The fact that applicant may have been in communication with the respondent did not suspend the operation of the prescriptive period. In any event, in all the correspondence with the Commissioner, what applicant sought was the release of the motor vehicle. The application has been framed as a declaratory order, to declare the forfeiture a nullity and order the release of the motor vehicle. Applicant has not denied that legal action was instituted some 15 months after the seizure of the vehicle. Legal action was instituted well after the 3 month period in terms of section 193 (12). The matter must end there. Applicant is barred from instituting these proceedings because the claim is prescribed. There is no need to deal with the merits.

In the result and accordingly the following order is made:

1. The point *in limine* is upheld.
2. The application be and is hereby dismissed with costs.

Ncube & Partners, applicant’s legal practitioners