BERNCORN (PVT) LTD T/A TWO KEYS TRANSPORT
versus
ZIMBABWE REVENUE AUTHORITY
HIGH COURT OF ZIMBABWE
CHATUKUTA J
Harare 28 February 2008 & 3 March 2010

Opposed application

Mr. Motsi, for applicant
Mr. Moyo, for respondent

CHATUKUTA J: The applicant is a haulage company. At the time of hearing it operated a foreign currency account with Renaissance Merchant Bank Limited. In April 2007, the applicant applied, through its bank, to the Reserve Bank of Zimbabwe to use its foreign currency to procure a motor vehicle, a Mercedes Benze ML 320. The application was granted and the foreign currency was released by Renaissance Merchant Bank Limited with the approval of the Reserve Bank. Thereafter, the applicant procured its vehicle and imported it into the country. The respondent refused to accept import duty in local currency. It seized the vehicle pending payment of duty in foreign currency. Aggrieved by this decision, the applicant filed this application.

The respondent raised a point *in limine*, that the applicant did not comply with section 196 of the Customs and Excise Act [*Chapter 23:02*]. Section 196 requires a party intending to institute proceedings against State, the Commissioner or an officer for anything done or under the Act to give at least sixty days notice as is required in terms of the State Liabilities Act [*Chapter 8:15*]. It is contended that the applicant did not give the requisite notice.

The applicant conceded that it did not give the requisite notice. However, it urged this court to exercise its discretion in terms of section 6(3) of the State Liabilities Act and condone failure to comply with section 6(1) of the same Act. Section 6(3) empowers the

court to condone any failure to comply with that subsection where the court is satisfied that there has been substantial compliance with the section 6(1) or that the failure will not unduly prejudice the defendant.

The purpose of giving notice is stated in *Masenga v Minister of Home Affairs* 1998 (2) ZLR 183 (HC). In that case, the court had to consider whether or not it would condone a departure from Rule 43 of the High Court Rules in that the requisite notice to institute proceedings in terms of the Police Act [*Chapter 11:10*] had not been served upon the Deputy Secretary (Finance and Administration) of the Ministry of Home Affairs. MUNGWIRA J observed at p 185 A-B that:

> "It is clear that this court has the discretion to B condone failure to give notice in terms of the rules. The purpose giving notice is to inform the defendant of the cause of action and the intention to institute action. Thus forewarned, the defendant is placed in a position whereby he is able to investigate the merits of the proposed action and to collect any relevant evidence that enables him to make a decision on whether or not to meet the claim. This may prevent the incurrence of unnecessary legal costs."

It appears to me that the intention of the notice in terms of section 196 of the Customs and Excise Act is equally to enable the Commissioner General of the respondent to investigate the merits of an action. In the present application, the respondent has not indicated in what way it was prejudiced by the lack of notice. As submitted by *Mr Motsi*, the respondent was able to file its plea and heads of argument timeously. This in my view is an indication it has not been unduly prejudice. In the result, I am inclined to condone the applicant's failure to give notice to sue the respondent.

On the merits, the applicant contended that the funds used to purchase the vehicle were obtained through an authorized dealer. It was therefore exempted from paying duty in foreign currency as prescribed in s 3 (a) of the Customs and Excise (Designation of Luxury Items) Notice, 2007, (SI 80A of 2007).

The respondent's demand for payment of duty in foreign currency is premised on s 3 (a) of SI 80A of 2007. The respondent contended that the funds used by the applicant to purchase the vehicle belonged to the company. The applicant did not therefore

"obtain" the funds as it already had ownership of the funds. The funds were already to the credit of the applicant. Therefore the applicant did not apply to the bank to obtain money but sought authorization to utilise the money already to its credit

Section 3 (a) of SI 80A of 2007 provides that

> "3. The following persons shall be liable to pay duty and value added tax on luxury items in terms of *s*2-
>
> (a) every resident of Zimbabwe who imports luxury items that were purchased using funds obtained otherwise than through an authorized dealer;"

The issue before me is therefore whether or not the funds in the applicant's foreign currency account that were used to purchase the vehicle were funds "obtained" through an authorized dealer. The applicant referred me to the case of *Murowa Diamonds (Private) Limited v Zimbabwe Revenue Authority & Anor* HH 88/2007. The above issue is identical to the issue that the court in that case had to determine. In that case, Murowa Diamonds (Private) Limited imported two vehicle using funds in its foreign currency account. It applied to the Reserve Bank, through its bank to utilize the funds. The respondent refused to release the two vehicles on the basis that the vehicles were luxury items and demanded import duty and value added tax in foreign currency in terms of s 3(a) of SI 80A of 2007. MAKARAU JP ruled that the word "obtain" in s3 (a) should be accorded its ordinary meaning. She therefore dismissed the submissions by the respondent that the applicant already had the foreign currency at its disposal and only sought authority from the Reserve Bank to use the funds.

The respondents appealed against MAKARU JP's judgment. At the time of hearing of this application the appeal was pending before the Supreme. Judgment in this matter was reserved pending the determination of the appeal. I considered it *brutum futum* to make a determination when the same issue was already before the Supreme Court. The appeal was decided on 28 september 2009 in favour of Murowa Diamonds (Private) Limited in *Zimbabwe Revenue Authority & Anor v Murowa Diamonds (Pvt) Ltd* SC 41 /09. GARWE JA observed that funds in a foreign currency account do not belong

to the account holder. He decided that the word "obtain" would be accorded its literal meaning. He cited with approval on p8 the remarks of MAJARAU JP at p3 that:

> "The natural meaning of the word appears to me to be clear. It means get in common language.
> ……
> [I cannot read into the language of the subsidiary legislation] anything that would [grant their wish and] expand the meaning of the word "obtain" to exclude obtaining fund from a foreign currency account lawfully held with an authorized dealer. It is trite that the law maker speaks through the language used in an enactment and the court can only read the law maker's intention from that language. I see nothing in the language used by the law maker in the statutory instrument or the context of the legislation to justify an expansion of the word as urged upon me by the respondents. In my view, if the intention of the law maker was to exclude funds from foreign accounts (*sic*) lawfully held, the language used in the subsidiary legislation would have expressly said so. Alternatively, if it was the intention of the law maker to use the word "obtain", to mean to "purchase", then the law maker would have so defined the word for the purposes of the subsidiary legislation to make it clear that it only exempted those funds purchased from the authorized dealer."

The respondent conceded that it was bound by the decision in *Zimbabwe Revenue Authority & Anor v Murowa Diamonds (Pvt) Ltd* (*supra*). It appears to me that the concession was proper, as it is the decision of a superior court.

Mr Moyo, for the respondent, however argued that the case was distinguishable from the present application in that in the present application, the applicant had not yet paid any duty to the respondent. In *Zimbabwe Revenue Authority & Anor v Murowa Diamonds (Pvt) Ltd*, Murowa Diamonds (Pvt) Ltd had already paid duty in Zimbabwean dollars. All that was left in that case was for the Zimbabwe Revenue Authority to release the vehicle in issue to Murowa Diamonds (Pvt) Ltd. He submitted that in the present application, the applicant would be required to pay duty in United States dollars as opposed to Zimbabwean dollars. He conceded that although the country now operates on a multicurrency regime, the Zimbabwe dollar is still legal tender. He, however, argued that it did not make economic sense for the applicant to pay duty in Zimbabwean dollars considering that the economy is currently using United States dollars. He further referred

me to section 19 of the Finance Act, 2009 (No 2 of 2009) (SI 5 of 2009) arguing that the Act provides for collection of duty in United States dollars.

Mr Mosti, for the applicant, contended that the applicant had tendered payment in local currency at the relevant time which tender the respondent refused to accept at its own peril. He further contended that the Finance Act referred to by *My Moyo* relates to taxable income from trade or investment and not from duty payable.

Section 19 of the Finance Act is a transitional provision. It provides that, for all accounting and taxation purposes, taxable income from trade or investment which was received or accrued in whole or in part in Zimbabwean currency in the previous financial year whose balance is denominated in Zimbabwean currency shall be expressed in United State dollars at a rate of exchange to be approved by the Commissioner-General. As rightly submitted by the applicant the provision relates to "taxable income from trade or investment". Duty on imported items does not, in my view, constitute income from trade or investment. The provision relied upon by the respondent in support of calculation of duty in United States dollars therefore does not apply to the applicant.

It is not in issue that the applicant tendered payment of duty in Zimbabwean dollars which tender was refused by the respondent. It is also not in issue that the Zimbabwean dollar is still legal tender. It therefore appears to me that the respondent cannot under the circumstances demand payment of duty in United States dollars merely because it is expedient to do so under the current economic environment. The loss, it seems, lies where it falls.

In the result, I make the following order:

1. The first respondent be and is hereby ordered to release the Mercedes Benze ML 320, chassis number WDC 1631542A086385, Engine No. 1129430346067 upon payment by the applicant of duty assessed by the respondent in Zimbabwean dollars.
2. The first respondent shall bear the costs of this application.

Mabulala & Motsi, applicant's legal practitioners.
Zimra Legal Corporate Services , first respondent's legal practitioners.