PATRICK MUSARARA
versus
THE COMMISSIONER GENERAL
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 10 February 2011 and 1 June 2011

Advocate *Mushore*, for the applicant
A. Moyo, for the respondent

MTSHIYA J: This is an application wherein the applicant seeks the following relief:-

"IT IS ORDERED THAT:-

1. The respondent shall forthwith release to the applicant the Crysler Lemis 300C Hemi motor vehicle seized from the applicant on the 21st October, 2009.

2. The applicant shall not be required to pay any duty or storage charge in respect of the motor vehicle.

3. The costs of this application shall be paid by the respondent on the legal practitioner and own client scale".

The background to the relief sought is this.

On 12 November 2008 the applicant, a Zimbabwean citizen who had been living outside the country for five years returned to the country (Zimbabwe) through Beitbridge Border Post. He was travelling from the United Kingdom. On his way back to Zimbabwe he had passed through Sought Africa where he had purchased a vehicle, namely a Crysler Lemis 300C Hemi (the motor vehicle). Upon entry into Zimbabwe, the applicant was granted a rebate on the motor vehicle on the basis that he was a returning resident. However, on 21 October 2009 the vehicle was seized by officers of the respondent on the ground that they doubted if indeed he was a returning permanent resident.

On 2 November 2009 the applicant made representations to the respondent in the following terms:

> "My name is Patrick Musarara a returning resident from the United Kingdom. On my way from the United Kingdom, I passed through South Africa and bought the Chrysler Lemis 300C Hemi, from an auction of repossessed cars at Aucar Auctions, Johannesburg, South Africa. I drove the car to Zimbabwe on the 12 November, 2008 through Beitbridge Border Post and got a rebate as a returning resident.

I am in the process of buying trucks from USA for my haulage business which I have just started and this necessitated that I travel to carry out the transactions which I did. The trucks are due into the country in January, 2010 from the United States. The papers are hereby attached for ease of reference.

While I was away, my car was driven without my authorization on the 21st October, 2009. I had left the car in safe keeping knowing that this type of a car can easily attract car-jacking syndicates. Therefore, I truly submit that I did not authorize the use of the car while I was away on business transaction as stated earlier.

There, I am appealing for your consideration on the determination of this matter for the release of the car to me personally. I undertake to ensure that there will not be a repeat of this nature again and hereby swear to abide by the rules of the rebate.

I pray to God for your favourable consideration of the mater and have the car released to me".

On 9 November 2009, after further exchanges of correspondence and interviews, the respondent gave the following response to the applicant's request for the release of the motor vehicle;

"Re: Notice of Seizure Number 027411K of 21 October 2009: CHRYSLER LEMIS HEMI: CHASSIS NO. IC3H9E3H67Y51914

I have thoroughly considered your submission and subsequent interviews in connection with your violation of the Customs and Excise (General) Regulations Section 105 subs 3. The circumstances under which the immigrant rebate was claimed indicate that it was claimed earlier than the date of your return as your passport indicate that you are spending most of your time in the UK and in Zimbabwe you only come as a visitor. Hence, breaching of this condition required placing of the motor vehicle under seizure, release of which could be effected after payment of duty which was due on the day the motor vehicle was cleared under immigrant's Rebate and penalty. The vehicle was placed on seizure on 21 October 2009 a.m. therefore prepared to release the motor vehicle on the following conditions:-

1. Payment of duty of **ZAR253,000-00**
2. Payment of 100% penalty of **ZAR253,000-00**
3. Payment of storage charges.

You are being requested to pay Customs Duty in terms of the Customs and Excise (General) Regulations s 105 subs 8 which provide that where a person leaves the country within two years of claiming immigrant rebate he should remove such effects or duty pay for the goods so cleared.

Please arrange with the head Investigations to pay the above amounts and release of your motor vehicle at Kurima House 89 N Mandela Ave. Failure to pay the above

> amounts within three months will result in the motor vehicle being forfeited to the state". _

The applicant has to date refused to pay duty arguing that he is a *bona fide* returning permanent resident and that he has not violated the country's customs and Excise (General) Regulations S.I. 154/2001. The respondent has in turn refused to release the motor vehicle and hence this application.

In an opposing affidavit to this application the respondent raised a point *in limine*. The respondent argued that the application, having not been made within three months, as required by the regulations, was prescribed. The respondent correctly relied on the notice of seizure which states:

> "If you wish, you may within three months from the date of this notice, make your own representations to the Port Manager of the Port shown on this notice, for the release of the goods. Additionally or alternatively you may, within three months from the date of this notice and subject to the submission of written notification 60 days beforehand and in terms of s 196 of the Act, institute proceedings for the recovery of the goods from the Commissioner…"

The respondent submitted that, notwithstanding the fact that the applicant had engaged the respondent in discussions for the release of the motor vehicle, the applicant should have all the same filed this application three months from the date of seizure (i.e 21 October 2009).

The applicant on his part has argued that, given the appeals he made to the respondents, his application was filed within the requisite period.

Both parties have dealt with the issue of prescription at length in their heads of argument. I am, however, unwilling to accept that the applicant's application should be dismissed on the basis of prescription. I find it untenable for anyone to suggest that the applicant should be punished for his confidence in the internal remedies that the respondent can, in law, offer. Furthermore, even on 2 November 2009 the respondent was still in a position to allow the applicant to pay duty within a period of three months. That surely brought clear shifts in terms of time calculations.

It should also be noted that as late as 31 December 2009 the respondent was still saying the following:-

> "We wish to advise that your client's appeal is still under consideration and you will be advised of the outcome in due course. Please bear with us in the meantime."

In fact at one stage in the process of preparing this judgment I had formed the view that the relief that the applicant should seek is to compel the respondent to make a final decision. I, however, moved away from that view because in para 18 of the opposing affidavit the respondent states the following:-

> "It is admitted that the respondent advised that the applicant's appeal was still under consideration as the respondent had closely monitor the applicant's movement. A decision was eventually made and it was communicated to the applicant that his appeal was unsuccessful".

There is no evidence of that finalisation.

Although I do not know when the final decision "was eventually made, I thought it would only serve to delay finalisation of the issue if I were to suggest that what the applicant needed to do was to seek to compel the respondent to make a final decision. The papers before me suggest that the motor vehicle will not be released until the applicant complies with the requirements of the respondent as spelt out in the respondent's letter of 9 November 2009.

In view of the conduct of the respondent, as confirmed in the above letter of 31 December 2009, I am unable to uphold the respondent's point *in limine*. There was reason for the applicant to believe in respondent's internal remedies. The applicant, having given the necessary notice, is properly before the court.

As to the merits of this application, I believe the issue to determine is whether or not the applicant falsely declared himself a returning permanent resident in order to qualify for the grant of a rebate on the motor vehicle.

In their heads of argument, both parties have carefully considered the issue of whether or not the applicant made a false declaration.

In paras 10 and 11 of his supplementary heads of argument the applicant states as follows:-

> "10. The conditions to be fulfilled for taking up permanent residency are clear and unequivocally state that a permanent resident is a person who returns home and does not stay out of the country for periods longer than 6 months outside the country. Section (8) of SI 154/2001 which reads:-
>
> '(8) An immigrant who has been granted a rebate of duty in terms of this section, and who emigrates or departs from Zimbabwe for a period of more than six months within twenty-four months from the date of which any effects or other goods imported by him were entered under rebate, shall remove such effects or other goods from Zimbabwe on his departure, unless he has obtained the prior written permission of the Commissioner to leave them in Zimbabwe,

or has paid the full duty which would have been payable at the time of entry of the goods but for their entry under rebate'

11. In no way whatsoever has applicant departed from Zimbabwe for a period longer than six months. A departure for longer than 6 continuous month would in accordance with s (8) qualify to be called emigration. He immigrated and under such cause of immigration as it flowed therefrom, was granted a permanent residence rebate".

The respondent counters the above submission through paras 2.5 and 2.6 as follows:-

"2.5 It is the respondent's submission that surely if the applicant was a returning resident he would not have been be accorded a visitors status in Zimbabwe but in the United Kingdom and it boggles one's mind why the applicant was not accorded the visitors status in U.K. which he is claiming to have been visiting and accorded the visitor's status in a country that he is claiming to be residing permanently. All this goes to show that the applicant is not a resident here but is resident in the United Kingdom. Further the fact that he is a British resident is supported by his valid British resident permit.

2.6. It is further submitted that is a pre requisite that one has to be a returning resident to qualify to be granted the immigrants' rebate. In *casu* the applicant misrepresented that he was a returning resident when in actual fact he knew that he had no intentions whatsoever of residing in Zimbabwe permanently. This is clearly evidence by his failure to reside in Zimbabwe for a continuous period of even one month. In doing so the applicant violated the Act and Regulations and his vehicle was liable to seizure".

I initially had a serious inclination to agree with the applicant that he did not breach any law in obtaining the rebate for his motor vehicle. That is so because I hold the view that a returning permanent resident, moreso the applicant who had permission to enter the UK through a resident permit, is not totally barred from leaving the country. He can still visit other countries provided, as already indicated, he does not depart from Zimbabwe for a period of more than six months from the date of being granted the rebate or from the date he or she declares that he or she has returned permanently. A simplistic approach to the problem would make it appear that the applicant managed not to offend this provision of the law. The applicant new the legal meaning of a returning permanent resident. He therefore put in place acts which would, under ordinary circumstances, ensure compliance with the law.

However, the problem *in casu* arises when the applicant accepts to be treated as a visitor in his country of permanent residence. If indeed he was honest that he was now a returning permanent resident, he should, have , in my view,

(a) formally protested against being allowed to stay in Zimbabwe as a visitor for a limited period of only 30 days, or

(b) ignored the 30 days limit.

The applicant did not take either of the above two steps but instead made sure that the 30 days accorded to him as a visitor did not expire whilst he was still in Zimbabwe. Clearly therefore the logical conclusion to be drawn by the respondent, after its post importation clearance audit, was that the applicant was manipulating the system. I am unable to disagree with that conclusion. The applicant clearly sought to manipulate the system in such a way that it would appear he was complying with the law.

The applicant's conduct, in my view, does not qualify him as a returning permanent resident. On a balance of probabilities therefore, the facts presented by both sides clearly point to the finding that the applicant had indeed falsely declared himself to be a returning resident in order to be granted the rebate for the motor vehicle. In those circumstances the respondent was justified in withdrawing the rebate and seizing the motor vehicle pending payment of the requisite rebate.

The authorities cited by Advocate *Mushore* (e.g. *Time Sahwira Mupinga v The commissioner General Zimbabwe Revenue Authority and the Minister of Finance* HH 21/10) could only have been relevant if the applicant was indeed a *bona fide* returning permanent resident. There is therefore merit in the opposition mounted by the respondent against this application. The application cannot succeed.

The application is dismissed with costs.

Mhiribidi, Ngarava & Moyo, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners