VENENCIA MHIRIPIRI
versus
ZIMRA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE; 24 January & 14 July 2023

Court Application for review

T Tembani, for the applicant
E Mukucha, for the respondent

CHITAPI J: The applicant company is a transporter. It hires out its trucks for conveyance inter-alia of imported goods into Zimbabwe and does so for profit. It owns a Volvo FH460 truck registration number AFQ 0196 and double trailers registration numbers JZ20 KXGP and JZ20 JZG. On 5 December 2021 the truck and trailers were impounded at Beitbridge Border Post by the respondents under the powers given in the relevant sections of the Customs and Excise Act, [*Chapter 23:02*].

The respondent is an administrative body established by the Revenue Authority Act, [*Chapter 23:11*]. Its principal functions are set out in the introduction to the Revenue Authority Act as set out in s 4(1)(a) thereof which reads that:

> "4(1) The functions of the Authority shall be to act as an agent of the state in assessing, collecting and enforcing the payment of all revenues; and
> (b) …….
> (c) ……."

Amongst the enabling legislation which the respondent utilizes for collection of revenue is the Customs and Excise Act, [*Chapter 23:02*]. It is relevant to this application. The introductory section of the Customs and Excise Act reads as follows:

> "An Act to provide for the imposition, collection and management of customs excise, and other duties, the licencing and control of warehouses and of premises for the manufacture of certain goods the regulating, controlling and prohibiting of imports and exports, the conclusion of customs and trade agreements with others counties, forfeitures and for other matters connected therewith."

This application arises from the discharge of functions of and by the Zimbabwe Revenue Authority under the Customs and Excise Act. What happened is this by way of background. On 5 December 2021, the driver of the applicants' truck in issue herein presented himself at Beitbridge Border from South Africa with the truck and trailers laden with goods for inward clearance of the consignment into Zimbabwe from South Africa. The driver presented his manifest wherein the cargo being conveyed was itemized. The papers were cleared on the strength of the manifest presented. However, on approaching the last man check point the Enforcement Compliance Manager decided to do a routine compliance check. The driver of the truck presented a bill of entry which listed the consequent under carriage as comprising of powdered milk in boxes marked Cremora and Ellis Brown. Upon a physical examination of the consignment being carried out, it was noted that the truck was laden with an assortment of undeclared goods which comprised inter-alia britelite soap, MAQ washing powder, baked beans both soap, candles, canned beef, red bull cases and sta soft boxes. The undeclared goods were stashed in between the declared goods obviously to deceive their true-nature and existence. The declaration made was therefore false. The act of the driver who was acting for and on the course of his employment with the applicant thus made the applicant vicariously liable for the driver's conduct in the clear attempt to smuggle the undeclared consequent into Zimbabwe.

The respondent did not inconsequence of the physical inspection discovery clear the vehicle and the consignment but impounded it for further investigation. On 8 December 2021, after satisfying itself through its offence that an offence had been committed the respondent issued a notice of seizure of the undeclared goods. The applicants' driver was advised of the right to make representations for the consideration of the possible release of the seized vehicle. In relation to the seized undeclared goods a separate notice of seizure was issued and was endorsed by the same officer who seized the vehicle with the following:

"You may write to the Regional Manager Beitbridge for possible release of goods"

A similar endorsement was not made on the notice of seizure of the vehicle. The notice of seizure of the undeclared goods was issued on 16 December 2021.

The applicant duly made representations for the release of the truck and trailers in a letter dated 23 November (sic) 2021. The month was clearly wrong because the whole series of events

leading to the seizure of the truck occurred on 5 December 2021. The error is not material in any event because the representations were responded to in a letter dated 31 January 2022 by or on behalf of the Regional Manager. In the representations the applicant submitted that it had been contracted to transport nine hundred cartons of coffee creamer from South Africa to Harare. It averred that it was not aware that there was contraband hidden inside the coffee creamer cartons and only became aware after being informed that the driver had loaded more than the declared consignment onto the truck and trailers. The applicant submitted that since the declared goods had been released, the truck and trailers be also released. It was submitted that the truck was the only source of the transporters income and survival.

In response to the representations-the Regional Manager or his proxy in the letter dated 31 January 2022stated that the carriage of smuggled goods constituted serious offences in terms of ss 26 and 188 of the Customs and Excise Act. The Regional Manager further stated that the truck was liable to seizure under ss 193(1) and (2) of the same Act. He further reasoned that because the undeclared goods were found inside the declared goods, it meant that they were loaded at the same time yet they were omitted from the goods manifest contrary to s 6 of S.I 154/2003 (Customs and Excise General Regulations). The Regional Manager did not dismiss the averment of the applicant that the driver acted on his own without the knowledge of the company. Though vicarious liability would most probably render the lack of knowledge a non defence to the liability of the applicant, it would still remain a factor properly to be considered in the assessment of the penalty to the imposed. The Regional Manager's decision was that the truck and trailers be forfeited to the state. The Regional Manager then stated that if the applicant was dissatisfied with the decision of the Regional Manager it could appeal to the Commissioner of Customer and Excise.

By letter dated 8 February 2022 the applicant through its legal practitioners wrote a letter of appeal to the Commissioner of Customs and Excise. The applicant reiterated its representations to the Regional Manager. The attention of the Commissioner was referred to s 187 of the Customs and Excise Act [*Chapter 23:02*] which reads as follows in its material provisions relevant to this application:

> "187(1) if……..
> (a) Any ship or vehicle is used in smuggling or in the unlawful importation, exportation or conveyance of any prohibited or restricted goods; or
> (b) ……

(c) ……
(d) ……
the master of the ship, the pilot of the aircraft or any person in charge of the vehicle, as the case may be shall be guilty of an offence unless the he proves that he took all reasonable precautions to prevent the act which constituted the offence."

The applicant submitted that all that the applicant was required to do was to take all reasonable precautions to prevent the act which constituted the offence. The applicant averred that its involvement was that of being transporter on behalf of a usual client who had engaged a clearing agent to deal with all clearance formalities. The applicant admitted the act of omission by her driver of not strictly complying with the provisions of s 26(2) in that the driver abrogated the duty to report the arrival of the truck and left the obligation to be carried out by importers agent. It was submitted that the applicant's driver relaxed after entrusting and trusting the importers clearing agent to perform the obligations of the person in charge of the vehicle. The clearing agent was an accredited one and was registered and the applicant's driver so it was submitted placed faith and trust in the agent to act professionally and comply with the requirements for a lawful clearance of the truck and goods. The applicant averred that the driver only became aware of the falsified consignment on physical examination of the seized consignment. The Commissioner dismissed the appeal. He reasoned that the applicants' driver had upon being intercepted through routine compliance checks been asked to produce clearance documents, whereupon the driver produced a bill of entry showing the consignment which he was carrying to be constituted of Cremora and Ellis Brown milk powder only. Therefore the Commissioner reasoned that the seizure of goods was proper. On this point there is no doubt and none of the parties contested the finding that the truck and goods were liable to seizure.

The Commissioner further drew the attention of the applicants' legal practitioners to the provisions of s 26(2) of the Customs Act and stated that it was the duty of the transporter "to lodge the manifest after loading the goods." The Commissioner then stated that the transporter had contravened the provisions of s "26, 38, 174 and 199." Save for perhaps s 26 which the Commissioner interrogated in relation to the duty of the importer and agent to lodge the manifest on loading goods, the Commissioner did not extrapolate in what way the quoted ss 38, 174 and 188 none contravened. It is a fatal misdirection for a decision maker to find a person guilty or liable for wrong doing by referring to a provision of a statute without discussing its import and relating that law to the facts. Where the determination fails to relate the law to the facts such

determination will be fatally flawed and must be set aside on review or appeal as the case may be.

The Commissioner then dismissed the appeal and stated that "the detained vehicle and trailers remain forfeited to the state." Consequent upon the dismissal of the applicants appeal by the Commissioner, the applicant filed the application for review of the decision of the Commissioner.

The grounds of review were stated by the applicant as follows:

> "(1) The decision of the respondent in forfeiting the applicants' truck and trailer was grossly irregular due to the fact that the respondent neglected to take into account that the applicant was never involved in any way in the violation of the Customs and Excise Act [*Chapter 23:02*];
> (2) The decision of the respondent in forfeiting the applicants' truck and trailer was grossly irregular due to the fact that it was grossly harsh excessive and unfair since other parties who have committed similar offences and more serious offences have been levied fines instead of imposing a drastic penalty such as forfeiture."

The respondent raised a point *in limine* that the applicant's claim was prescribed it was submitted that the applicant was time barred in that in terms of the provisions of s 193(12) of the Customs Excise Act, proceeding for the recovery of goods placed under seizure should be filed with the court within three (3) months of the date of seizure. The respondent had averred in the opposing affidavit that as the court application had been filed seven (7) months post the date of seizure, the application should be dismissed on the basis of prescription. In the course of hearing Mr *Mukucha*, Counsel for the respondent abandoned the point and referred the court to the Supreme Court judgment in the case of *Twotap Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* SC 3/23. The Supreme Court analysed the provisions of ss 193(12) and 196(2) of the Customs and Excise Act which relate to prescription. The Supreme Court per CHIWESHE JA distinguished the two sections and held that they were subject to each other and therefore of equal standing and prominence. The learned judge stated that p 5 of the cyclostyled judgment:

> "The implication in the court *a quo's* reasoning is that since the provisions of s 196 of the Act are made "subject" to s 193(12) they are subservient to or overridden by the provisions of s 193(12). The reasoning is erroneous. The court a quo failed to observe that the provisions of s 193(12) are also subject to the provisions of s 196. In other words the two provisions are made subject to each other. In the context of the Act, the phrase "subject to" must be read as "without derogation from" for to read it otherwise would lead to an absurdity. It would mean that the legislature enacted s 196 so that it would be overshadowed by s 193(12) by rendering it redundant. That surely could not have been the intention of the legislature. The correct position is that both sections exist independently of each other for different purposes and the phrase "subject to" serves to emphasize rather them detract from that position than just seizure of property. Section 196(1)

provides for the sixty day notice required to be given to the respondent and the offices before any and proceedings arising from their actions or omissions under the Act are instituted. Section 196(2) provides that for such and proceedings (other than against seizure) the period of prescription shall run for eight months reckoned from the date that the cause of action arose. (own brackets). As the term "civil proceedings" is all embrasive it must include proceedings against forfeiture of property as opposed to seizure of the same. *In casu*, the cause of action is not seizure but forfeiture of property. The period of prescription in thus the eight months provided for under s 196(2)"

As the learned judge then stated, there has to be a distinction between seizure and forfeiture since the two are separate juristic acts. Seizure is founded upon the provisions of s 193 and is done by an officer who on reasonable grounds suspects that an article is liable to seizure. The seizure is reported to the Commissioner who in the exercise of his or her powers granted under the Act, may release the seizure article or declare the article forfeited to the state in including levying duty on the article if it not to hand. The learned judge stated that a challenge to a forfeiture is founded on s 193(12) which encompasses all causes of action.

In casu, there was a conflation of seizure and forfeiture. The respondent was misdirected not to separate the two causes. Through this conflation, Mr *Mukucha* had as conceded by him taken an unsustainable point *in limine* of prescription in holding that the applicant should have challenged forfeiture within three months of seizure yet it was eight months subject also to the giving of sixty days of intention to sue as provided for in s 196(1) of the Act. In the circumstances, the point *in limine* having been abandoned shall be disregarded.

The applicant's counsel submitted that the applicant did not commit any violation of the provisions of the Act. The argument had no substance because the applicant was liable for the drivers' actions on the grounds of vicarious liability. The alleged misdirection alleged in the respondent imputing liability on the applicant was advisedly not persisted in quite rightly so because it was devoid of merits. The only issue that remained to be reviewed was the penalty of forfeiture of the truck and two trailers imposed on the applicant's truck and trailers.

The applicant averred that the penalty of forfeiture of the truck and trailers was too harsh, excessive and unfair since other parties who committed similar transgressions had their trucks released on payment of appropriate penalties fines levied by the respondent. It was argued that the penalty of forfeiture was too drastic in the circumstances. The respondents averred that the decision taken by the respondent to forfeit the truck and trailers was a lawful one. I should hasten to say that the legality of the seizure was not put in issue but the justification,

reasonableness and fairness of the penalties imposed in the circumstances of the case. A striking feature of this case was that the smuggled goods were released to the importer who had hired the applicant to be the transporter. The importer was in fact the principal and the transporter, the applicant, the agent. The smuggling in issue did not pertain to the truck but to the goods which belonged to the importer. Without the importer, the applicants' truck and trailers would not have conveyed the goods in question. It was not denied that the respondent took pains to separate declared and undeclared goods released the declared ones and levied duty on the undeclared goods.

The respondent did not explain or justify in the opposing affidavit the differentiation in the treatment of the importer whose offensive goods were released on payment of duty and the transporter hired to carry the consignment. Mr *Mukucha* for the respondent submitted that the decision to forfeit the truck and trailer was informed by the need to deter other transporters from carrying smuggled consignments. It seems to me that it was illogical to allow the smuggled goods to be cleared upon payment of duty, yet to forfeit the truck without considering other penalties which could have been imposed by the respondent. The applicant averred that she was unaware that the vehicle would be used for smuggling the undeclared goods. The respondent did not in making an inference that the applicant must have been aware of the smuggling set facts from which a reasonable inference of conspiracy with the importer to smuggle goods could be inferred. The allegation by the applicant that she was through her agent, the driver aware that smuggled goods were hidden in the declared and listed goods on the manifest which the driver carried with him was not rejected.

The applicant attached various decisions of the respondent whereby the transporter's vehicles seized for carrying undeclared goods were released after the respondent levied a fine which was paid. Although the respondent averred that every case is dealt with on its merits, the fact remains that the respondent in his discretion can levy a different and lesser penalty from forfeiture. The decision of the respondent shows that he/she was not minded to consider other competent penalties save for the most drastic one of forfeiture. As correctly pointed out by Mr Simango for the applicant relying on the judgment of GREELAND J in the case *Tenesi* v *PSC* 1996(2) ZLR 44, where the decision maker fails to apply his/her mind to the matter, the consequent decision reached cannot be sustained. The respondent treated the punishment of

forfeiture as absolute yet s 188 which relates to the transporter of smuggled goods provides for forfeiture as permissive or directory and further provides for an exception to forfeiture where the transporter proves that the transporter was unaware that its vehicle would be used for purposes of smuggling.

In casu, the applicant did not produce any evidence or affidavit from the importer or the applicants' driver to show that the driver had no knowledge of the contraband or offensive goods which were undeclared but carried as part of the consignment properly listed on the manifest and declared to the respondent. Were this all there was, the decision of forfeiture would have been reasonable and supported. However, the applicants' *actus and mens rea* could not have been properly considered differently from that of the importer. The two would have to be conspirators or accomplices. There could not have been one without the other. The importer claimed the undeclared goods and was fined and duty levied thereon. The importer therefore got away with the smuggled goods on payment of a fine. The applicant did not get away with her truck and trailers on conditions as one would have expected. Yet although the penalties imposed on the importer and the applicant respectively did not have to be similar there was need to justify the dissimilarity. A failure to do so amounted to a failure by the respondent to apply its mind fully to the facts and circumstances of case and the factors proper to take into account in assessing an appropriate penalty. The penalty imposed must be set aside or vacated.

The applicant in the draft order prayed for an order of unconditional release of the applicants' truck and trailers. I cannot grant such as order because the seizure of the track was lawful. The forfeiture was not lawful for reasons of procedural irregularities in the assessment of an appropriate penalty. The respondent was grossly misdirected in imposing different penalties on the importer and transporter without distinguishing and justifying the different penalties on the similar facts. The matter must be referred back to the respondent to reconsider an alternative penalty other than forfeiture. I therefore determine the application as follows:-

IT IS ORDERED THAT

1. The decision of the respondent communicated by letter dated 5 September 2022 per the hand of Mr R Mukweva to forfeit the applicants truck registration No AFQ 0196 and trailers registration numbers JZ ZOJZGP and JZ ZOKXGP as described in notice of seizure number 0088544L dated 8 December 2021 be and is hereby set aside.

2. The matter is referred back to the respondents Commissioner of Customs and Excise who shall exercise the discretion to impose an alternative penalty to forfeiture and payment of storage charges from the date of seizure up to 5 September 2022 being the date on which the decision which has been set aside herein was made.
3. There be no order as to costs.
4. Paragraph 2 of this order must be complied with ten (10) days from the date of this judgment.

WOM Simango and Associate, applicants' legal practitioners
Zimbabwe Revenue Authority, respondents' legal practitioners