ROCK TELECOM LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 8 August and 4 September 2023

Opposed Matter

Mr *T Tendai,* for the applicant
Mr *E Mukucha,* for the respondent

MANGOTA J: I heard this application on 10July, 2023. I delivered an *ex tempore* judgment in which I dismissed the same with costs.

On the date that the application was heard, the applicant wrote requesting full reasons for my decision. These are they:

The applicant, a legal entity which is registered in terms of the laws of Zambia applied to review the decision of the respondent, a corporate body which is established in accordance with the Revenue Authority Act of Zimbabwe. Its grounds of review are three. They are that:

i) the respondent's forfeiture of its techno mobile phones is grossly irregular on account of the allegation that the respondent failed to take into account the fact that the applicant was not involved in the violation of the Customs and Excise Act [*Chapter 23:02*] ("the Act")
ii) the respondent's forfeiture of the applicant's mobile phones was grossly harsh, excessive and unfair because the respondent did not impose a penalty which is provided for in s 174 of the Act –and
iii) the respondent's action was grossly harsh, excessive and unfair because it failed to treat it in the same way that it treated other parties which committed similar offences in the past.

It moves me to set the respondent's decision aside, direct the respondent to release its mobile phones to it and to levy a fine against it for its violation of s 174 of the Act in addition to ordering the respondent to pay its costs of suit.

The applicant's narrative is that, in October 2022, it imported 96820 techno mobile phones from China. These were to be delivered to Zambia which is its country of domicile. It engaged a transporter who lodged a manifest and its clearing agent registered a bill of entry. At the point of entry of the goods into Zimbabwe, the respondent's officials conducted a physical examination of its goods. They discovered that the goods which the clearing agent declared were less than what was being transported as a result of which they seized its mobile phones. The applicant wrote advising the respondent that its agent, and not it, under-declared the goods. The agent, it claimed, had been provided with all the paper work for the goods. It took its case to the respondent's regional manager who did not believe its submissions. He ruled that the goods were liable to forfeiture. He, it avers, forfeited the goods. It approached the respondent's commissioner for customs and excise who confirmed the decision of the regional manager. It, as a final resort, approached the respondent's commissioner-general arguing that forfeiture of the goods which were never consumed or intended to be consumed in Zimbabwe was drastic a punishment. It persuaded the commissioner-general to impose other forms of punishment which the law provided to him instead of forfeiture. He confirmed the decision of the commissioner of customs and excise. It states that an entity which is known as Gatbro International Limited, Zambia whose circumstances were on all fours with its own case was treated more leniently than it was by the respondent who, according to it, offered release terms to Gatbro International Limited. It moves me to grant its application as it prays for it in its draft order.

The respondent opposes the application. It alleges that, on 3 November 2022, its Forbes Border commercial release desk issued an F 45 number 19725 of 03.11. 22, for physical examination of the applicant's goods after they observed that the same were grossly under-valued. It avers that, on 4 November 2022, the applicant's clearing agent namely Allied Customs Freight requested a waiver for the physical examination of the goods which request the respondent declined. It asserts that it instructed the clearing agent to arrange to do the physical examination of the goods. The agent, it claims, made a further appeal to the acting customs manager for physical examination waiver claiming that the respondent and GMS would be held liable in the event that the goods are, in any way, damaged or if the same reach their destination with a shortage. The appeal was refused, according to it. The agent, it states, refused to co-operate resulting in its officials clamping the motor vehicle which carried the applicant's goods.

It states that, on 18 November 2022, the motor vehicle was moved to the examination bay where, on examination, it was discovered that 81540 mobile phones with a value of USD 352 930 were not declared. The applicant, it avers, declared only 9000 mobile phones with a value of USD 9000. The undeclared goods, it states, were detained on notice of seizure number 041064 L of 22 November, 2022. The clearing agent, it avers, was advised of his right to make written representations to the regional manager requesting release of the goods. He, according to it, unsuccessfully made written representations to the regional manager, the commissioner of customs and excise as well as to the commissioner-general of the Zimbabwe Revenue Authority. It states, on the merits, that the applicant had an invoice number 1022090101 dated 01 September 2022 for 13000 mobile phones which it declared. It did not declare 81540 mobile phones, according to it. These, it states, were seized on notice of seizure 041064 L. It claims that the goods which were the subject-matter of the offence were liable to forfeiture in terms of s 188 (2) of the Act. It insists that its decision is supported by law. It states that the duty to make sure that a correct declaration is made at the point of entry falls upon the importer and the transporter. The goods, it avers, were seized in terms of s 188 (1) of the Act. It distinguishes the case of the applicant from that of Gatbro International-Zambia. It avers that the quantities in the two cases are not the same. It moves me to dismiss the application with costs.

Section 26 of the High Court Act [*Chapter 7:06*] confers upon me the power, authority or jurisdiction to review proceedings and decisions of all courts which are subordinate to this court including tribunals and such administrative authorities as the respondent. Section 27 of the same Act stipulates what are commonly accepted as grounds for review. These are either that:

i) the court or the administrative authority or the tribunal did not have the jurisdiction to hear and determine the case; or
ii) there was bias or malice, interest or corruption on the part of the person who presided over the case; or
iii) there was gross irregularity in the proceedings or the decision.

Apart from the last ground of review which it mentions with little, if any explanation, the applicant does not accuse the respondent of having dealt with its case when it did not have the jurisdiction to hear and/or determine it. Nor does it allege any bias or malice or interest or corruption as having been employed by the respondent when it heard and determined its case. Its

grounds of review as stated by it are three. They are that the respondent's conduct of forfeiting its goods was grossly irregular in that the respondent:

a) placed liability upon it when it was not involved in the violation of the Act;
b) imposed a very harsh, excessive and unfair punishment upon it when it should have imposed a sentence which is provided for in s 174 of the Act, amongst them a fine; or
c) did not employ the same yardstick as it employed on other persons who committed a similar offence in the past.

The High Court Act does not define the meaning and import of the phrase 'gross irregularity'. Case authorities, however, do. An irregularity must have resulted in a miscarriage of justice for it to be sufficient ground for review. It is not merely high-handedness or arbitrary conduct which is described as a gross irregularity. Behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of issues. If it prevented a fair trial of issues, then it will amount to gross irregularity: *Pondoro (Pvt) Ltd & Anor* v *Nemakonde*, 2008 (1) ZLR 6. *Kwaramba* v *Bhunu*, 2012 (2) ZLR 358 (S) at 359 E aptly describes the meaning of the word irregularity. It states that:

> "….an irregularity occurs when a judicial officer takes into account factors that he should not take into account or fails to take into account factors he should take into account in the process of the making of the decision he is seized with. An irregularity also occurs where the law is misapplied or an incorrect procedure is adopted".

The question which begs the answer is whether or not any of the applicant's three grounds of review falls into the above-quoted *dicta.* The answer remains to be seen. It is, accordingly, pertinent for me to deal with each ground as the applicant states them as follows:

The applicant's first ground of review is misplaced. It is misplaced because the respondent does not appear to appreciate the concept of the principle-agency relationship. That concept was discussed and clarified in law textbooks as well as in case authorities to a point where its misunderstanding is not called for at all. It is as clear as night follows day. It is to the effect that the action of the agent, conducted by him within the scope of the mandate which his principal extends to him, binds the principal. If doubt remains in the mind of the applicant on this aspect of the case, then its reading of *Mine Consultants & Supply Company* v B*orrowdale Motors (Pvt) Ltd*, 1990 (2) ZLR 281 (SC) would assist it to clear such.

It is common cause that Allied Customs Freight had the express mandate of the applicant to clear the latter's goods. It was and is the agent of the applicant in so far as the applicant's goods are concerned. It under-declared the goods. Its reasons for doing so remain unknown. Whatever it did was, on the basis of the principle-agency relationship, done by the applicant. The applicant cannot therefore escape liability for its agent's misconduct. It can only escape Liability where it alleges and establishes, on a preponderance of probabilities, that the agent acted outside the mandate which it extended to it.

The applicant states that the agent acted outside its knowledge when it under-declared the goods. It alleges that it gave all the paper work which relates to the goods to the agent. It, however, does not produce the paper work which it claims it gave to the agent. Those remain a matter of conjecture. They are unknown to the court and to the respondent. Its case would have held if it placed itself in the court's confidence by showing the papers which it gave to the agent. The court would have known what it gave to the agent as well as what the latter did which conflicted with the mandate which the applicant gave to it. Nothing prevented it from attaching to its review application the papers which it alleges it gave to its agent

As the respondent correctly states, it is the duty of the importer, the applicant *in casu*, to make sure that a correct declaration is made by its agent. The question which begs the answer is: how does it ensure the occurrence of that. The answer to the same is simple and straightforward. It should have given to its agent documents which show a correct reflection of the quantity of goods which it is importing into, or through, Zimbabwe. If it did so, the agent would have found it hard, if not impossible, to declare the quantity of goods which were not reflected in the documents which were given to it. The *res ipso loquitor* principle would have prevented the agent from doing so. After all, the applicant, as importer of goods, would have made prior discussion with the seller and agreed on the quantity of goods which were to be transported from their point of sale to the applicant itself. Documentation for the goods was prepared by the seller in consultation with the purchaser who, in this case, is the applicant. That paperwork would accompany the goods from their point of dispatch to their final destination. It would therefore speak for itself making it hard or impossible, for the agent to temper with it.

In the view which I hold of this case, the applicant knew that the paperwork which it gave to the agent did not reflect the correct quantity of mobile phones which it was importing from

China. It, in the process, opened an avenue for its agent to under-declare the goods as it did. It is, in the circumstances, as much to blame as its agent is. It cannot therefore escape liability as it intends to. If its agent was not acting in collusion with it, the probability is that it would have sued its agent together with the respondent so that the truth of the matter would have been allowed to come to the fore. Its decision not sue its agent speaks volumes of its collusion with its agent. One may as well suggest that it did not sue the agent because it feared that the latter would come and unearth what it did not want to come to light. The observed matter as read with the conduct of the agent who, at the point of entry of the goods into Zimbabwe, refused to co-operate with the respondent's officials whom it requested for a waiver of the physical examination of the goods twice coupled with the threat that the respondent and GMS would be held liable in the event that the goods get damaged or reach their destination with shortages evinces the agent's collusion with the applicant.

The applicant's submission is that it had an agreement with the agent. The agreement, it submits, was to the effect that the agent was to comply with all the customs procedures. Whilst it states as it does, it does not produce the agreement which it makes reference to. The law states that he who alleges must prove: *Van Der Linden, Institutes of Holland*,3rd edition, p 155. The applicant alleges but does not prove what it asserts. Its statement on this aspect of the case is therefore without foundation.

It follows from the above-analyzed set of matters that the applicant's first ground of review cannot hold. It stands on no leg. It is without merit and it is dismissed.

The applicant's second ground appears to be one of appeal more than it is that of review. A ground which makes reference to the harshness or excessiveness of the punishment which was imposed upon the applicant cannot, in my view, be a ground for review. It cannot be such because it speaks to the substantive, and not to the procedural, aspects of the case.

There is a world of difference between a review and an appeal. The two are not synonymous with each other. In proceedings which are brought on review, the court remains confined to matters of procedure and the rules of natural justice: *Mawere* v *Minister of Justice*, 2005 (1) ZLR 65 (H). In an appeal, on the other hand, the court's concern centers on the court *a quo's* misdirections. The appellant's complaint, in an appeal, is anchored on the allegation that the respondent misdirected itself in imposing, *in casu*, the penalty of forfeiture of its goods

instead of imposing a fine against it. The ground which the applicant raises in this review application is therefore one for appeal and no one for review as the applicant is suggesting.

However, for the sake of completeness of this aspect of the applicant's case, it is pertinent for me to consider the same in the context in which the applicant applies it. In so far as the stated context is concerned, therefore, the following circumstances emerge:

That the applicant's goods were seized in terms of s 174 of the Act is common cause. It is for the mentioned reason, if for no other, that it insists that a fine, and not forfeiture of its goods, should have been imposed upon it as a punishment for its violation of the law. To appreciate its argument, it is necessary to quote verbatim s 174 of the Act. It reads:

> "Any person who produces any false invoice or an invoice framed so as to deceive or makes any false representation in regard to the nature, the quantity or the value of any goods or the country in which such goods are grown, produced or manufactured, or forges any document required under this Act or any law relating to customs and excise; or (c) under false pretences or with intent to defraud or to evade the provisions of this Act or any law relating to customs or excise or by making any false statement, affidavit or declaration, procures or attempts to procure any document required under this Act or any law relating to customs and excise which is…shall be guilty of an offence …Any person who is guilty of an offence in terms of subsection (1) or (2) shall be liable to a fine not exceeding level 12 or three times the duty-paid value of the goods concerned, whatever is the greater; or imprisonment for a period not exceeding five years or to both such fine and such imprisonment".

The respondent's statement on this aspect of the case is that the applicant's goods were grossly undervalued. The applicant, it states, declared only 13 000 mobile phones with a value of USD 9000 which were assessed to USD 54 930 free on board value. It avers that 81 540 mobile phones with a duty value of USD 352 792.80 were not declared. It gives this discrepancy between what the applicant declared and what it did not declare as a reason which persuaded it to opt to forfeit the goods of the applicant in terms of s 188 (1) of the Act.

Section 188 (1) of the Act makes reference to forfeiture of goods and ships, aircraft, vehicles and other things. It provides that any goods which are the subject matter of an offence under this Act shall be liable to forfeiture. The section, it is evident, is couched in mandatory language. It does not offer a discretion to the respondent to act otherwise where the latter decides to punish a person who violates provisions of the Act under it.

The respondent, it is my view, had the option to punish the applicant in terms of s 174 of the Act. It did not do so. It punished it under s 188 (1) which offered it no option to act otherwise than what it did. The question which begs the answer is did the respondent act within, or without,

the law. The answer is simple and straightforward. It acted within the law. A corollary question which arises from the first question is: why did the respondent choose to act under s 188 (1) and not under s 174 of the Act. The answer to the same is also simple.

It is trite that, in any sentencing process, the moral turpitude of the offender plays a pivotal role. The applicant's moral blameworthiness cannot be wished away. It is very high by any standard. It under-declared the goods which it was importing in a most unacceptable manner. The reasons which the respondent advances for acting in the manner that it did cannot be faulted. It submits, and I agree, that the surety which the applicant gave was insufficient. The surety, it argues, did not cover all the 94 540 units of mobile phones which the applicant imported. It submits further, and I also agree, that the decision which it took was/is the only way to deter smuggling of goods.

The respondent cannot be said to have acted irregularly given the circumstances of the present case. The law supports the approach which it took of the applicant's case. The applicant, as a business entity, should always make the effort to act honestly in its dealings with other persons, Governments of the countries through which its goods pass on their way to it in particular. If the respondent fails to act in circumstances such as what occurred with the goods of the applicant, the respondent will be failing in its duty to bring to book people or business entities which have their goods pass through this country. Punishments which the respondent imposes should bring to the business community, within and without, Zimbabwe that dishonesty has no room and is not tolerated in this country. The sentencing adage which states that punishment should fit the crime and the offender holds true in the present case. This is a *fortiori* the case where, as *in casu*, the applicant had the apparent intention to under-declare its goods for its own unknown reasons. The applicant's second ground of review is without merit and it is therefore dismissed.

The applicant's last ground of review elicits a lot of debate. Whilst the principle that persons in similar circumstances should be treated equally is taken as given, the applicant does not state that it drew the attention of the respondent to the case of Gatbro International Limited, Zambia at the time that it made the effort to exhaust internal remedies which were available to it with the respondent. The record of proceedings which it filed in terms of Rule 62 of the rules of court does not appear to contain the case which it is making reference to in this review

application. If the case was not raised at the time that it should have been raised, which I think is the case, then the applicant's last ground of review cannot hold. It cannot hold because the case which it is relying upon in this application is not part of the review record. A review is confined to the record and not to anything which was not brought to the attention of the judicial officer who dealt with the matter which is placed under review.

However, for the sake of clarifying issues which relate to the applicant's third ground of review, it is pertinent for me to deal with the same and consider its merits or demerits. The applicant's statement is that the respondent did not treat it in the same manner that it treated Gatbro International Limited, Zambia whose circumstances, according to it, were/ are on all fours with its own circumstances. Gatbro International, it insists, under-declared its goods which were passing through Zimbabwe into Zambia. The respondent, it submits, released Gatbro International's goods on terms of payment of a fine and other conditions. Its view is that the same standard of punishment as was accorded to Gatbro International should have been accorded to it.

The response of the respondent on this aspect of the case is that the circumstances of Gatbro International, Zambia are distinguishable from the circumstances of the applicant's case. It submits that the nature of the goods in Gatbro International Limited are different and the point of detection of the disparity in quantities different.

The circumstances of Gatbro International Limited come out clearly in a letter which its legal practitioners, *Muhlolo Legal Practice,* wrote to the respondent's station manager who is based at Chirundu Border Post on 12 September, 2020. The applicant attached the letter to its founding papers as Annexure K. The annexure is at page 22 of the record. The circumstances as contained in the annexure are that:

i) On 21 August, 2020 Gatbro International Limited imported an assortment of 2002 boxes of detergents from South Africa through the Beitbridge Border Post. These were on invoice number 20116786.
ii) On 3 September, 2020 its goods were cleared in transit to Zambia by Burlpack Enterprises, its clearing agent ('the agent").
iii) On 5 September, 2020 there was an issue which related to departure validation. The transporter submitted relevant documents to the respondent's officials as per procedure but the officer on duty did not book the motor vehicle which carried the goods in the respondent's register and did not, therefore, validate the motor vehicle's departure.

iv) On 6 September, 2020 the agent visited the respondent's bonds off ice, Beitbridge, for departure validation and could not find the departure validation in the respondent's register.

v) The respondent's officials advised the agent that Gatbro International Limited's motor vehicle left customs yard without authorization and without following proper customs procedures. But to the agent's surprise, the respondent's officials had given back to the driver of the motor vehicle the documents which related to Gatbro International's goods.

vi) The respondent's officials charged the agent a fine of ZWL 2400 for departure validation which the agent paid.

vii) When Gatbro International's motor vehicle arrived at Chirundu Border Post, a physical examination of the goods was conducted as a result of which the respondent's officials discovered an invoice number 20116787 which was not attached in the respondent's system but was on the driver's set.

viii) The invoice was erroneously omitted by the agent when it was processing the declaration for the particular entry.

ix) The physical examination showed excess goods of 68 boxes on invoice number 20116787 and a short shipment of 56 boxes on the omitted invoice number 20116787.

x) The assumption which Gatbro International advanced for the excess and short shipment was that the same could have emanated from the supplier of the goods when it was loading the same onto the motor vehicle.

xi) Gatbro International Limited drew the attention of the respondent to the manifest which was attached to the system and the bill of entry which showed that the agent endorsed the quantities and tonnage as per the invoices.

xii) It placed emphasis on the observed matter which it submitted showed that Gatbro International did not intend to smuggle the excess goods which were on invoice number 20116786 as well as those which were on invoice number 20116787.

xiii) It stressed the point that the motor vehicle was sealed from its loading point and was only unsealed by the respondent's officials at Chirundu Border Post after they satisfied themselves that there was no tempering with the seal along the way.

The circumstances of Gatbro International Limited, Zambia as tabulated in the foregoing paragraphs cannot, under any stretch of imagination, be equated to those of the applicant. It satisfied the respondent that it had no intention whatsoever to prejudice the fiscus by having its goods consumed in Zimbabwe. The respondent was also satisfied that the discrepancy in the quantities of goods was/is marginal and that the same arose from a genuine mistake on the part of its officials and the agent which cleared the goods at Beitbridge Border Post. What weighed heavily in Gatbro International Limited's favour is that the seal of the motor vehicle which carried the goods was not tempered with all the way from Beitbridge to Chirundu. The fact that

the discrepancy was only discovered at Chirundu which is the point of exist from Zimbabwe satisfied the respondent that Gatbro International Limited's error was not only genuine but that its intention was, to all intents and purposes, to have its goods reach their destination in Zambia safely.

As the respondent correctly asserts, Gatbro International Limited's case is markedly different from that of the applicant which intentionally made up its mind to under-declare a huge quantity of goods which it was importing into, and through, Zimbabwe. Its refusal to co-operate with the respondent's officials coupled with its request for a waiver of having the goods physically examined and the threats which it issued to the respondent that the latter would be held liable if the goods get damaged in the process of them being examined or reach their destination with a shortage all point to its unwholesome conduct which the court cannot condone let alone accept.

Whilst the case of Gatbro International Limited was one of negligence, the applicant's case was, it would appear, one of a clear intention to smuggle the goods into Zimbabwe. The moral turpitude of the two entities are markedly different the one from the other. The gravity of the applicant's moral blameworthiness accounts for the difference in the treatment of the applicant from that of Gatbro International Limited, Zambia.

It follows, from a reading of the above-analyzed matters, that the applicant's last ground of review is devoid of merit. It is dismissed as well.

The applicant, it is evident, failed to prove its case on a balance of probabilities. The application is, in the result, dismissed with costs.

Tembani Gomo Law Practice, applicant's legal practitioners
(*ZIMRA) Legal Service Division*, respondent's legal practitioners