AJARA TRUCKING LOGISTICS (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 28 December 2022 and 10 January 2023

Urgent Chamber Application

Mr S Ushewokunze, for the applicant
Mr K Manika, for the respondent

CHINAMORA J:

Background

This is an urgent chamber application based on spoliation as well as breach of s 68 of the Constitution and s 3 (1) (a) of the AJA. It bears giving the background to this matter so as to put the relief being sought in context. The applicant is a transporter whose business involves ferrying various goods including petrol and diesel. Sometime at the end of November 2022, the applicant was contracted by Pioneer Petroleum & Gas Limited, in Zambia, to carry petrol from Mozambique to Zambia via Zimbabwe, which consignment was ferried in two trucks. The trucks entered Zimbabwe on 20 November 2022 through Forbes Border Post (Mutare). Bills of Entry marked Annexure "A" and Annexure "B", which appear on pp 14 to 25 of the record were completed declaring the trucks and fuel were transiting to Zambia. The vehicles proceeded to Chirundu and, on 1 December 2022, fuel amounting to 53,664 litres was seized by respondent under Notice of Seizure No. 005685 L (Annexure "C") on p 26 of the record. An additional 53,868 litres of petrol was seized under Notice of Seizure No. 005686L (Annexure "D") which appears on p 27 of the record. The horse and trailers were also seized under Notices of Seizure Nos 005687L (Annexure "E") and 005688L (Annexure "F"), which are on pp 28 to 30 of the

record. The fuel and vehicles are in the respondent's custody at Chirundu. The notices of seizure do not give reasons for the seizure. These are the facts which gave rise to this application.

The applicant's case

The applicant avers that the seizure was unlawful as no reasons were given for it as contemplated by the s 3 (1) (a) of the Administrative Justice Act [*Chapter 10:28*] (hereinafter referred to as "the AJA") and s 68 (1) and (2) of the Constitution of Zimbabwe. It was submitted that the relevant Notices of Seizure are standard forms which have space to insert the name, address and telephone number of the person whose goods are seized; the seized goods and name and signature of ZIMRA officer. The submission continued that the form has no section where the seizing officer states the reason for taking the action to seize. Thus, the applicant submits that the respondent did not specify the offence committed by the applicant which justified the seizure, and proceeds to contend that the seizure amounts to an act of spoliation. In this connection, the applicant argued that there was nothing to show commission of a customs offence, as the quantities of ZIMRA's measurements at Chirundu were substantially the same as those declared at Forbes Border Post. Consequently, the applicant, *inter alia*, prays for the return of the seized horses, trailers and fuel so that they can continue to Zambia were the consignment is to be delivered. In this respect, the applicant contends that it was in peaceful and undisturbed possession of its trucks and consignment after they were duly cleared by the respondent at Forbes Border Post (Mutare) and were proceeding to Zambia. The argument continues that the respondent wrongfully and forcibly dispossessed the applicant of the trucks and fuel without the applicant's consent or following due process. In this regard, the applicant referred the court to the provisions of section 68 of the Constitution and s 3 (1) (a) of the AJA, and submitted the failure to comply with the stipulated requirements rendered the action taken by the respondent an unlawful action and, therefore, an act of spoliation.

The respondent's case

The application is opposed. The respondent states that it suspected that the seals on the tankers had been tampered with, and engaged the applicant's clearing agent, Southern Business Services ("SBS"). On 23 November 2022, the applicant's trucks and trailers arrived at Chirundu. In addition, the respondent submits that its officers and the applicant's agent went to check the

vehicles and found them without the seals which had been put by ZIMRA at Forbes Border Post. It further averred that it placed the vehicles on notices of embargo which were left with (and signed for by) the truck stop operators since they were unattended. The respondent made a report to the police under RRB 5172142 of 23 November 2022 and, on 24 November 2022, the vehicles were driven into the ZIMRA yard. The respondent also asserts that vehicles could have been emptied and then reloaded after realizing that ZIMRA was looking for the trucks and their consignment. It states that it seized the trucks and consignment for a smuggling offence, and calculated duty payable to be US$55,669-01. The respondent raises preliminary points to the application, and I will now examine them. On the merits, the respondent argued that the seizure was lawful since it was made pursuant to s 193 of the Customs and Excise Act [*Chapter 23:02*]

Point *in limine*

The first point *in limine* raised is the relief sought was improper, and that the application is defective. The argument is that the relief cannot be obtained via an urgent chamber application, since it is final in nature. Put differently, the respondent's contention is that the applicant seeks the release of the trucks and their consignment on the strength of a *prima facie* right without establishing a clear right. In its affidavit, the respondent says that application is one for review and must be brought by way of an application. In other words, the submission of the respondent is that this matter should have been brought before this court as a review application. The second point in *limine* need not detain me as it was subsequently abandoned. For completeness of record, the objection was that the date on the founding affidavit was typewritten and not inserted in ink by the commissioner of oaths. My view is that the point lacked merit and Counsel for the respondent rightly abandoned it. I prefer to deal with and determine the first preliminary point when I deal with the merits of the application. Let me now turn to the law on the subject.

The applicable law

The law on spoliation is a well-beaten path and easy to understand. An applicant in spoliation proceedings needs to show that he or she was in peaceful and undisturbed possession of the thing in question at the time they were deprived of possession. Such applicant must also prove that they were forcibly and against their consent deprived of the possession. This position of the law was asserted by GUBBAY CJ in *Botha & Anor* v *Barret* 1996 (2) ZLR 73 (SC) at 79.

In fact, the position had been put clearly by REYNOLDS J in *Chisveto* v *Minister of Local Government & Town Planning* 1984 (1*) ZLR 248* at 250 A-D as follows:

> "it is a well-recognized principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing—that *spoliatus ante omnia restituendus est*" (Beckus v Crous and Another *1975 (4) SA215 (NC).* Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property does not fall for consideration at all. In fact the classic generalization is sometimes made that in respect of spoliation actions that even a robber or a thief is entitled to be restored to possession of the stolen property."

From the case law, it evident that the remedy of spoliation has as its core value or objective, the protection of property against unlawful or wrongful dispossession. I am mindful that the applicant relies on the respondent's failure to comply with s 68 of the Constitution and s 3 (1) of the AJA as the reason why the seizure amounts to an act of spoliation. It is therefore imperative for me to intimately consider those provisions. I make the deliberate choice to begin by examining s 68 (1) and (2) of the Constitution, which entitles everyone to just administrative action which is carried out in a lawful, reasonable and procedurally fair manner.
Section 68, *inter alia*, provides as follows:

> **"68 Right to administrative justice**
>
> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
>
> (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct". **[My own emphasis]**

I observe that the right enshrined in s 68 (1) has been mirrored and given effect in the AJA. To this extent, s 3 (1) of the AJA provides that an administrative authority which takes action which may affect the rights, interests or legitimate expectations of any person must act lawfully, reasonably and in a fair manner and give reasons for its action. No doubt is left on what is requires of an administrative functionary, because s 3 (2) of the AJA reads:

> "In order for an administrative action to be taken in a fair manner as required by paragraph (*a*) of subsection (1), an administrative authority shall give a person referred to in subsection (1) –
>
> (*a*) adequate notice of the nature and purpose of the proposed action; and
>
> (*b*) a reasonable opportunity to make adequate representations; and
>
> (*c*) adequate notice of any right of review or appeal where applicable".

It is relevant to state that when an aggrieved person approaches the court for redress, section 4 of the AJA provides a range of possible outcomes, and provides as follows:

> **"4 Relief against administrative authorities**
> (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.
> (2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate—
> (*a*) confirm or set aside the decision concerned;
> (*b*) refer the matter back to the administrative authority concerned for consideration or reconsideration;
> (*c*) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
> (*d*) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
> (*e*) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.
> (3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision".

I will proceed to apply the law to the facts of this case.

Analysis of the case

The applicant submits that this is an application for spoliation wherein the respondent removed the applicant's trucks and consignment they were carrying without its consent or following due process. It was emphasized that the notices of seizure that the respondent issued did not specify the reason for the seizure or offence that prompted the actions of the respondent. The applicant's contention is that, as long as the respondent did not give reasons for its action at

the time of seizure that constitutes an act of despoliation. The submission was forcefully made that the applicant had lawfully declared the trucks and consignment of fuel at Forbes Border Post as being in transit to Zambia, and same were seized while the applicant had peaceful and undisturbed possession. That is precisely why the applicant pursued the relief of a spoliation order on the basis that the respondent was not supposed to effect a seizure without fist giving reasons for such action. The *mandament van spolie* is a restitutory interdict that accrues to a possessor where another has deprived him of possession on the pretext that the later was entitled to do so, or where the possessor has otherwise been deprived of possession unlawfully. I must add that the facts show that the respondent, on its own version, accessed the trucks, trailers and fuel on 23 November 2022. (See para 7.10 of the respondent's opposing affidavit). In fact, it is the applicant's clearing agent who informed ZIMRA that the trucks had arrived at Chirundu. While the respondent for the first time alleged in its opposing affidavit that the applicant had tampered with the electronic seals, it is curious and significant that the Notices of Seizure do not contain this allegation. This court is left wondering why this vital piece of information was omitted, yet it is the reason for the seizure if the respondent's version is to be believed. In para 7.25 the assertion is made that the respondent "seized the two trucks and consignment for a smuggling offence". However, the Notices of Seizure are conspicuously silent on this.

In opposing the application, the respondent argued (in para22 of its affidavit) that a review application cannot be sustained via an urgent chamber application, as such an application cannot have an order which is final in nature. This proposition has no basis in law, since the seminal case of *Blue Rangers Estates (Pvt) Ltd* v *Muduvuri & Anor* 2009 (1) ZLR 368 (SC) settled the position of the law as that, a spoliation being a final order cannot be granted as a provisional order. At any rate, the application makes it clear that it is based on spoliation as well as breach of s 68 of the Constitution and s 3 (1) (a) of the AJA. This where s 4 (1) of the AJA becomes of particular relevance. As submitted by Counsel for the applicant, that provision allows any person who is aggrieved by the failure of an administrative authority to comply with s 3 to apply to the High Court for relief. There seems nothing in the architecture of s 4 that precludes such an approach to this court to be made through an urgent chamber application as long as the non-compliance with s 3 can be demonstrated to the satisfaction of the court. The possible orders that this court can grant to a successful applicant are contained in s4 (2) of the AJA. It is noteworthy

that s 4 (2) (a) allows the High Court to confirm or set aside the decision complained of. In this respect, it is important to clarify that an application for review under s 26 and 27 of the High Court Act *[Chapter 7:06]* is not the same as an application in terms of s 3 (1) (a) of the AJA. I say so because the grounds upon which a review may be brought are set out in the High Court Act, are contained in section in section 27 which states:

> **"27 Grounds for review**
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –
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> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c) gross irregularity in the proceedings or the decision.
>
> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities." **[My own emphasis]**

It is apparent that s27 (2) of the High Court Act contemplates and does not proscribe review proceedings brought under other statutes, in particular, the AJA. Any confusion around this issue was resolved by the Supreme Court in *Gwaradzimba N.O.* v *Gurta AG* SC 10-15, and it is instructive to quote in *extenso* what GWAUNZA JA (as she then was) had to say:

> "In holding that the application before him was not one for review, the judge *a quo* stated as follows in his judgment:
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> > "Mr *Mpofu*, for the respondent protested that a wrong procedure was employed as s 4 of the Administrative Justice Act is an embodiment of the common law grounds for review. For that reason the applicant should have brought a review application in terms of Order 33 of the High Court Rules. I do not agree. Section 4 allows an aggrieved party to seek recourse in this Court. It makes no reference to a review application. I agree with Mr Moyo, for the applicant that if the legislature desired to provide for a remedy of review in terms of order 33, it would have specifically said so. It however elected to create a statutory remedy in terms of which a party is entitled to approach this court by application where the administrative authority has come short."
>
> I find little to fault in the reasoning of the court *a quo* on this point. As correctly stated, s 4 (1) of the Administrative Court Act ("the Act") provides that the statutory relief referred to by the judge *a quo* may be sought by way of an application to the High Court. However no specific format for such application is prescribed. While a review in terms of the High Court Rules is a special form of application, there is nothing in s 4(1) to suggest that any other form of application for judicial review would in any way offend against that sub-section as long as it meets the requirements of an ordinary court application". **[My own emphasis]**

I am satisfied that the applicant has shown that it was deprived of its trucks and fuel on board those trucks without its consent and in circumstances where the respondent did not follow due process. Additionally, I am satisfied that in terms of s4 of the AJA this court can review the decision of the respondent upon demonstration that s 3 of the same legislation was not complied with. I return to the respondent's point in *limine* on propriety of the application before me and conclude that it has no merit. In this respect, the Supreme Court decision in *Gwaradzimba N.O.* v *Gurta AG supra* is apposite. Let me place it on record that Counsel for the respondent conceded, when asked by the court, that the Notices of Seizure did not state the offence allegedly committed by the applicant or reason for the seizure. That being the case, the relief sought in the amended draft order can be afforded, as it is provided for under s 4 of the AJA. I need to comment on my reference to the amended draft order. In terms of r 59 (27) (b) of the High Court of Zimbabwe Rules, 2021, at the conclusion of the hearing the court may grant the order sought or variation of such order whether or not general or other relief has been asked for. This rule is more or less replicated in r 60 (9) in relation to provisional orders. In granting the order as amended, I am instructed by the remarks of KWENDA J in *Chiswa* v *Maxess Marketing (Pvt) Ltd & Ors* HH 116-20, where he said:

> "My understanding is that the final wording of any court order (whether final or provisional) is the prerogative of the court as long as the order resolves the dispute(s) before the court. The draft provisional order submitted by the applicant with the application remains a proposal".

Finally, on the issue of costs, Counsel for the applicant's position is that the respondent is a department or agency of the State funded by taxpayers, so if saddled with costs that would ultimately be a burden on the public. Because of this, he submitted that no costs be awarded against the respondent in the even the application was successful. That is an eminently reasonable approach, in my view, and I endorse it.

Disposition

In the result, I grant the following order:

1. The points in *limine* are hereby dismissed.
2. The application be and is hereby granted.

3. The respondent's decision to seize petrol amounting to 53,644 litres seized from the applicant under Notice of Seizure No. 005685 and which is in ZIMRA's custody at Chirundu Border Post be and is hereby set aside.
4. The respondent's decision to seize petrol amounting to 53,868 litres seized from the applicant under Notice of Seizure No. 005686 and which is in ZIMRA's custody at Chirundu Border Post be and is hereby set aside.
5. The respondent's decision to seize Horse registration number AEZ7438; Tanker registration number AEZ7022; Tanker registration number AEZ2287; Horse registration number AEG9297; Tanker registration number AEZ7042; Tanker registration number AEZ7018 be and is hereby set aside.
6. The respondent or its Regional Manager or other responsible officer manning the Chirundu Border Post is hereby ordered o do all acts and sign all documents as may be necessary to release of the vehicles and petrol consignment referred to in paragraphs 3 to 5 of this Order and ensure the smooth passage of same from Zimbabwe to the Zambia (Chirundu) Border Post.
7. The Sheriff of Zimbabwe or his lawful deputy, with the assistance of officers from the Zimbabwe Republic Police, when necessary, be and is hereby directed and authorized to effectuate this order.
8. Each party shall bear its own costs.

Ushewokunze Law Chambers, applicant's legal practitioners
ZIMRA Legal Services Division, respondent's legal practitioners