

REPORTABLE (40)

LONRHO LOGISTICS (PRIVATE) LIMITED
v
RAM PETROLEUM (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
UCHENA JA, MATHONSI JA & KUDYA JA
HARARE, 8 MARCH 2022 & 12 MAY 2022

Mr *T Mpofo*, for the appellant

Mr *D Ochieng*, for the respondent

MATHONSI JA: Dismayed by the respondent's outright refusal to deliver to it outstanding fuel in terms of an agreement of sale entered into between the parties, the appellant filed a claim for specific performance in the High Court ("the court *a quo*"). The appellant sought judgment compelling the respondent to deliver 120 000 litres of diesel purchased from the respondent.

By judgment delivered on 31 March 2021, the court *a quo* dismissed the claim and issued the following order:

"Accordingly, I order as follows:

1. The plaintiff's claim is dismissed.
2. The contract entered into between the parties whereby the plaintiff purchased 150 000 lrs of fuel from the defendant be and is hereby cancelled.

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3. The defendant be and is hereby is (sic) ordered to pay the plaintiff the sum of \$159 300.00 representing the plaintiff's partial performance of the contract.
4. The plaintiff be and is hereby ordered to pay the defendant's costs of suit."

This is an appeal against that whole judgment of the court *a quo*.

THE FACTS

The background facts are largely common cause. The appellant is a transporter of note while the respondent is a fuel monger. They have a long standing business relationship whereby the respondent has been supplying the appellant with bulk fuel over the years. On 1 November 2018, the parties entered into a sale agreement in terms of which the respondent sold and the appellant purchased 150 000 litres of diesel.

On 2 November 2018 the appellant paid the purchase price of \$201 000 in terms of the invoice presented to it by the respondent but did not take delivery of the diesel in question. In fact, it was not until 28 November 2018 that the respondent delivered only 30 000 litres of the diesel on the instructions of the appellant. This left a balance of 120 000 litres of diesel which is the subject of the present litigation involving the parties.

Problems started in January 2019 when three events occurred in quick succession. First, the Minister of Finance and Economic Development gazetted the Customs and Excise (Tariff) (Amendment) Notice, (No. 7, 2019) as S.I 9 of 2019. The Statutory Instrument came into operation on 13 January 2019. It was enacted to amend Part II of the Second Schedule of the Customs and Excise (Tariff) Notice, 2017 which was published in Statutory Instrument 53 of 2017.

Second, and subsequently to that, the Petroleum (Petroleum Products Pricing) Regulations S.I 10 of 2019 were gazetted. Section 3 thereof made it clear that they applied to “petroleum products prices in relation to wholesaling and retailing activities.” Section 5 provided the formulas that were to be applied by the Zimbabwe Energy Regulatory Authority (“ZERA”) in calculating the price of any petroleum product.

It is significant to note that the amount of duty imposed by S.I 10 of 2019 appears to have been equivalent to the amount fixed by S.I 9 of 2019, which, as I have stated, specifically stated that it came into operation on 13 January 2019 without in any way suggesting that it had retrospective effect.

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Third, and obviously in response to the imperatives of the Statutory Instruments referred to above, the ZERA issued a directive requiring all oil companies to declare their fuel stocks as of midnight on 12 January 2019. The directive was contained in a circular dated 17 January 2019 which reads in relevant part:

“RE: DECLARATION OF OIL COMPANY FUEL STOCKS AS OF MIDNIGHT 12TH JANUARY 2019

Pursuant to the meeting held at the Ministry of Finance on the 16th January 2019 between Ministry of Energy and Power Development, Ministry of Finance, Zimbabwe Energy Regulatory Authority and Oil Companies, the authority requires that Oil Companies declare the details of the following:-

- 1.0 Stockholding of diesel, petrol and paraffin held by the Oil Company at depot or at NOIC (old duty paid) as of midnight 12th January 2019 before the new pricing (Statutory Instrument 10 of 2019) came into effect.

- 2.0 Outstanding coupons (yet to be redeemed) as of midnight 12th January 2019, indicating products category of customers, volumes and value as well as special conditions attaching to coupons.

Oil Companies are further advised that they are required to pay the difference in duty between the old duty and new duty to ZIMRA on the stock referred to in 1.0 as the fuel will be sold in terms of S.I 10 of 2019.” (The underlining is for emphasis)

Following these developments the appellant moved quickly. On 24 January 2019, it demanded the immediate delivery of the balance of 120 000 litres of diesel. The respondent was unmoved. Citing an increase in duty, the respondent refused to deliver until the appellant paid additional duty on the outstanding diesel.

By email of 24 January 2019 the respondent tabled three options available to the appellant. The respondent wrote:

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“... we wish to provide you with below three options.

1. Lonrho pay the difference of duty amounting to \$1.65.
2. Lonrho can draw down at the current price of fuel to exhaust your prepayment with us.
3. RAM Petroleum can refund Lonrho the total amount prepaid.”

The appellant would have none of it. Calling the respondent’s proposal “nonsense”, it emotionally put its case across that the ZERA directive did not apply to the diesel that had already been sold. With the battle lines drawn, the appellant enlisted the services of its legal practitioners whose letter of demand to the respondent yielded nothing.

PROCEEDINGS BEFORE THE COURT A QUO

On 7 February 2019 the appellant sued out a summons against the respondent seeking an order directing the respondent to deliver the outstanding diesel. The claim was contested by the respondent. In a long winding plea characterized by a number of alternative averments, the respondent pleaded the existence of a tacit term of the agreement that the appellant should have taken delivery within seventy two hours after effecting payment.

In addition, it asserted that s 230 (1) of the Customs and Excise Act [*Chapter 23:02*] constituted an implied term that it was entitled to recover from the appellant any amount by which duty was increased. Some of the pleas raised by the respondent related to fictional fulfilment of the contract in the sense that it had tendered delivery of the diesel which the appellant refused. Also, that by failing to accept delivery, the appellant had repudiated the contract thereby entitling the respondent to cancel it and tender the sum of \$159 300.00 being the difference.

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Following a full trial, the court *a quo* found that the contract became *perfecta* when the parties agreed on the thing sold (the *merx*), the price (*pretium*) and showed they had the requisite *animus* to contract. It was the court *a quo*'s finding that the contract was perfected when the respondent accepted the payment for the 150 000 litres of diesel.

Regarding transfer of ownership of the diesel, the court *a quo* remarked:

“It is evident to me that in the present matter, transfer of ownership of the fuel in question happened by way of *constitutum possessorium* without actual delivery of the thing and by means of a mere change in the parties' intention regarding *animus domini*. The change in *animus* in this matter repeatedly took place each time the plaintiff paid for the fuel and the defendant accepted payment for the fuel. By that exchange, the plaintiff

acquired ownership in the fuel, when looking at the facts in the present matter means that ownership of the 150 000 litres transferred to the plaintiff in early November 2018.”

Notwithstanding those findings, the court *a quo* went on to find that the burden for paying for the increase in duty passed to the appellant. Further, it found that by failing to accept delivery, the appellant repudiated the contract of sale. In disposing of the matter, other than dismissing the appellant’s claim, the court *a quo* also granted positive relief to the respondent, namely the cancellation of the contract and the return of the purchase price paid by the appellant.

PROCEEDINGS BEFORE THIS COURT

The appellant remained aggrieved. It noted this appeal on the following grounds of appeal.

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1. Having come to the conclusion that the contract between the parties had become *perfecta* and ownership passed to the appellant, the court *a quo* erred in not concluding that provisions of Statutory Instrument 10 of 2019 were, on the circumstances of the matter, not engaged in that:
 - (a) The duty chargeable under and in terms of that Statutory Instrument was not meant to and did not affect transactions that had already been concluded.
 - (b) Respondent did not place before the court any evidence tending to show that it had been required to and had in fact paid additional duties on fuel already purchased by appellant.

2. The court *a quo* erred at any rate in concluding that the increase of duty on future sales was a risk which appellant was required to bear by operation of law.
3. Consequently, the court *a quo* erred in not finding that respondent had breached the agreement between the parties by reason of its failure to deliver diesel that had been purchased by appellant.
4. The court *a quo* seriously misdirected itself on the facts, such misdirection amounting to an error in law in not finding at any rate, that there was no agreement between the parties on the delivery timelines and that respondent had at all times been prepared to effect delivery of the fuel to appellant.
5. The court *a quo* erred in granting respondent positive relief on the basis of averments made in its plea.

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The overarching issue commending itself for determination from the foregoing grounds is whether the appellant's consignment of diesel was subject to additional duty under S.I 10 of 2019. Also, whether there were any timelines for the delivery of the diesel and whether the court *a quo* erred by granting relief to the respondent.

Mr *Mpofu* for the appellant submitted that S.I 10 of 2019 was not applicable in the circumstances of this case, it having come into effect on 13 January 2019 and not having retrospective effect. In counsel's view, and for that reason, the directive to Oil Companies given by ZERA only applied to fuel that was still to be sold and not the fuel, like the 120 000 litres of diesel, that had already been sold.

The fuel that had already been sold could not be subjected to further taxation and did not carry such risk. Counsel submitted that the respondent had no business subjecting the appellant's fuel to the directive issued by ZERA.

Regarding the applicability of s 230 (1) of the Customs and Excise Act, Mr *Mpofu* took the view that the section was not engaged. There was no evidence, so it was argued, that the respondent had been requested to, and did pay, any additional duty as envisaged by s 230 (1).

On repudiation, Mr *Mpofu* submitted that the court *a quo*'s findings were not supported by any evidence at all. There was nothing in the conduct of the parties suggesting that delivery was to be made within 72 hours. Neither was there evidence of any delivery timelines or any tender of delivery.

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Per contra, Mr *Ochieng* for the respondent contended that the appellant's reference to S.I 10 of 2019 was not only a false premise, it was also irrelevant. This is because the additional duty was imposed by S.I 9 of 2019. In counsel's view, it was a fallacy that the directive by ZERA imposed a duty on fuel. Counsel further contended that s 230 (1) constituted a term imposed by law which transferred liability to pay duty onto the appellant.

Finding it difficult to defend most of the findings made by the court *a quo* which appeared contradictory, counsel for the respondent submitted that the court *a quo* arrived at a correct conclusion on wrong reasons. Given that a party does not appeal against the reasons for judgment, so it was argued, the respondent could not do anything about the situation.

WHETHER THE DIESEL WAS SUBJECT TO ADDITIONAL DUTY

On the evidence presented before the court *a quo*, including the manner in which the parties conducted themselves, the basis upon which the appellant should pay an additional duty was the directive given by ZERA as read with S.I 10 of 2019.

I mention here that the court *a quo* correctly found that the sale became *perfecta* at the beginning of November 2018. In other words, the sale was completed before the Statutory Instrument came into effect. The question which then arises is whether its application extended to the diesel, which for all intents and purposes, had been sold and belonged to the appellant.

I have already dealt with the two Statutory Instruments (S.I. 9 and 10 of 2019),
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their introduction and purposes. I have also stated that S.I 9 of 2019 expressly provided that it came into effect on 13 January 2019 and that it did not provide for retrospective application.

In statutory interpretation, there is a salutary presumption, as can be gleaned from s 20 (1) of the Interpretation Act [*Chapter 1:01*], that statutes are not to be construed retrospectively. In fact, the general rule is that, in the absence of express provision to the contrary, statutes should be regarded as affecting future matters only. They should, if possible, be so interpreted as not to take away rights actually vested at the time of their promulgation. See *Curtis v Johannesburg Municipality* 1906 T.S 308 at 311.

The above proposition has been hallowed by repetition over the years in this jurisdiction. See *Nkomo & Anor v Attorney General & Ors* 1993 (2) ZLR 422 (S) at 429. *Greatermans Stores (1979) (Pvt) Ltd & Anor v Minister of Public Service, Labour and Social Welfare & Anor* 2018 (1) ZLR 335 (CC) at 341.

I have no hesitation in concluding that the pricing regime introduced in January 2019, not having retrospective application, did not affect the diesel forming the basis of this dispute. This is so because ownership of it had long passed to the appellant.

The issue however does not end there because the respondent also placed reliance on s 230(1) of the Customs and Excise Act [*Chapter 23:02*] as bringing the diesel in question under the new pricing regime. The section provides:

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“230. Seller under contract may recover any increase and purchaser may deduct any decrease of duty.

- (1) Whenever any duty is imposed or increased on any goods and such goods, in pursuance of a contract made before the duty or increased duty becomes payable, are thereafter delivered to and accepted by the purchaser, the seller of the goods may, in the absence of agreement to the contrary, recover from the purchaser as an addition to the contract price a sum equal to any amount paid by him reason of the said duty or increase.”

This provision admits of no ambiguity. It must be given its simple grammatical meaning. In the context of the present case, it raises a number of juridical factors that must be established before its provisions are engaged.

First, there must be a contract entered into before duty was increased. Second, duty must have been increased. Third, the goods must have been delivered to and accepted by the purchaser after duty was increased. Fourth, the seller must have paid the duty thereby entitling him or her to recover a sum equal to the amount so paid by reason of the increase.

In light of the definition of “duty” in s 2 of the Act as “any duty leviable under this Act or any other law relating to customs and excise and includes surtax,” one wonders whether the Petroleum (Petroleum Pricing) Regulations, 2018 are a law relating to customs and excise.

They incorporate the component of duty in the pricing formula to be considered by ZERA. The regulations merely ensure just prices of petroleum products and do not levy a duty. It is the Customs and Excise (Tariff) (Amendment) Notice (No 7), 2019 however, which is a law relating to customs and excise.

This issue was not canvassed with counsel in argument. Accordingly it will not be engaged any further in the resolution of this appeal. Let it suffice to say though that the requirements for the application of s 230 (1) have not been met in this case. In that regard, I agree with Mr *Mpofu* that the prerequisite juridical facts required for the section to be engaged are patently absent.

The respondent did not lead any evidence showing that it paid any additional duty. In the absence of proof of payment of additional duty, among other things, s 230 (1) could

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not be triggered. This is so because it is intended for a seller who has paid additional duty subsequent to the fixing of the contract price to recover it from the purchaser.

That the court *a quo* found delivery as having occurred by *constitutum possessorium* at the beginning of November 2018, which finding was not contested, was not helpful to the respondent's cause. If that is so, delivery occurred before the increase in duty which increase could not affect the transaction within the contemplation of s 230 (1).

It follows that the consignment of 120 000 litres of diesel was not subject to additional duty. The respondent could not recover any from the appellant.

WHETHER THERE WERE ANY TIMELINES FOR DELIVERY

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The court *a quo* agreed with the respondent that the contract provided for delivery of fuel within 72 hours of payment. It is difficult to appreciate how such a finding could have been made from the evidence placed before the court. I need do no more than point to the fact that, not only was there no reference in the correspondence between the parties to that timeline, there was also a stubborn fact staring the court *a quo* in the face.

It is that the only delivery made by the respondent was of 30 000 litres of diesel. This delivery was effected on 28 November 2018 without demur, some 26 days after payment. Clearly there was no evidence pointing to any timelines in delivery. The court *a quo* appears to have read into the contract a non-existent term.

It is not open to the courts to rewrite a contract for the parties. Neither is it permissible to read into the parties' contract some implied or tacit term that is in direct conflict with the express terms. See *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403C.

From the contents of the emails between the parties and the conduct of delivering the first consignment of 30 000 litres 26 days after the contract became “*perfecta*”, it is clear that the parties never set any timelines for delivery. The court *a quo* was clearly wrong in its assessment. The importation of a non-existent term into the parties' contract was a gross misdirection.

WHETHER THE COURT A QUO ERRED IN GRANTING POSITIVE RELIEF TO THE RESPONDENT ON THE BASIS OF ITS PLEA.

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It is curious that the court *a quo* granted an order in favour of the respondent cancelling the sale and directing the respondent to refund the balance of the purchase price. That relief was granted on the strength of a plea and nothing more. The respondent had not filed a counter-claim.

The point is made in *Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd & Anor* 2015 (2) ZLR 40 (S) at 44 F that:

“A plea is a defence and as such can be likened to a shield. It is not a weapon or a sword. No relief can attach to a party through a plea.”

Unfortunately that is precisely what the court *a quo* granted in this case. However just the court *a quo* may have considered the respondent's tender of the sum of \$159 300.00 to be, it was plainly incompetent for it to ratify it through an unsolicited court order. Doing so was a gross misdirection.

DISPOSITION

The court *a quo* made quite a number of errors and grossly erroneous findings of fact which cut against the grain of evidence. On appeal this Court is entitled to interfere with those findings. See *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S).

The Statutory Instrument and the ZERA directive did not apply to the fuel that had already been purchased by the appellant from the respondent. Section 230 (1) of the Judgment No. SC 50/22 Customs and Excise Act did not come into effect in respect of the fuel in dispute. Civil Appeal No. SC 79/21 Finally, there were no timelines for delivery agreed upon by the parties. As such the appellant was still entitled to delivery of the balance of the fuel.

The appeal has merit. It ought to be allowed. Regarding costs, they normally follow the result. It has not been suggested, and I see no reason why the costs should not be awarded in favour of the successful party.

In the result, it is ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“(i) Judgment is entered for the plaintiff for the delivery by the defendant of
120 000 litres of diesel within 7 days of this order.

(ii) The defendant shall bear the costs of suit.”

UCHENA JA : I agree

KUDYA JA : I agree

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Maweresibanda Commercial Lawyers, appellant’s legal practitioners

Kevin J Anott, respondent’s legal practitioners