ZIMBABWE REVENUE AUTHORITY
versus
LA AFRICA LOGISTICS

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 27 October 2022 & 17 January 2023

Civil Appeal

Mr *E Mukucha*, for the appellant
Mr *RT Benza*, for the respondent

MUCHAWA J: This is an appeal against the judgment rendered by the Magistrates Court in which an order was made for the appellant to unconditionally release a motor vehicle horse, registration number JTC043MP and two trailers registered under numbers JKX559MP and JKX583MP and to pay costs on a higher scale.

The background to the matter is that the respondent had applied for the release of the horse and trailers following their seizure by the appellant. The respondent, a South African based company in the business of transportation had dispatched its vehicle on 20 October 2021 whilst it was empty and was driven by one Bernard Mudevere. The respondent was shocked to learn that its vehicle had been seized on allegations of smuggling. Bernard Mudevere was arrested on allegations of smuggling the particulars of which were that he had declared the truck empty yet it was full of goods. On the 26th of October 2021, the respondent wrote to the respondent requesting a release of its vehicle and upon follow up in February 2022 was advised to await the outcome of the criminal matter against Bernard Mudevere. A further follow up elicited the same response. As the respondent was suffering economic loss, it filed the application before the court a quo resulting in the judgment in its favour as explained above.

Unhappy with the court *a quo*'s order, the appellant has filed this appeal on the following grounds:

1. The learned Magistrate in the court *a quo* erred in law by ruling that the respondent's claim had not prescribed when in fact the claim had prescribed in terms of s 193(12) of the Customs and Excise Act [*Chapter 23:02*].
2. The learned Magistrate grossly erred and misdirected herself on the law by ruling that the appellant was misleading the court by stating that s 193 (9) of the Customs and Excise Act [*Chapter 23:02*] bars the Commissioner from releasing items seized for violating the customs laws when in actual fact s 193(9) prohibit the Commissioner from disposing seized items until a pending criminal case is completed or abandoned.
3. The learned Magistrate grossly erred and misdirected herself on the law in ordering the release of the respondent's seized vehicle even though the respondent failed to satisfy the fact that it was not aware that the vehicle will be used to commit an offence as required under s 187 and 188(2a) of the Customs and Excise Act [*Chapter 23:02*]
4. The learned Magistrate in the court *a quo* grossly erred on a point of law by ruling that s 193(12) of the Customs and Excise Act [*Chapter 23:02*] regulate internal remedies within the appellant's administrative structures when in actual fact the same provisions relates (*sic*) to court proceedings.
5. The learned Magistrate grossly erred and misdirected herself in law by ordering the respondents to pay costs of suit on a higher scale of attorney client scale without justifying the order for punitive costs.

We heard the parties and reserved our judgment. This is it and we deal with each ground seriatim.

Ground 1 of appeal: Whether the respondent's claim had prescribed

Mr *Mukucha* submitted that in terms of s 193(12) of the Customs and Excise Act, any person aggrieved by the seizure of his or her goods is required to institute civil proceedings for the recovery of same within three months from the date when the notice of seizure is issued and served on the owner of the seized property. He argued that the said proceedings are supposed to be instituted subject to s 196 of the same Act. It was contended that failure to meet the mandatory time frames is fatal as one will be barred by operation of law from suing.

On the facts of this matter, Mr *Mukucha* submitted that the notice of seizure was issued out to the respondent on 22 October 2021 but the respondent only filed its application on 11 May 2022

which was a period in excess of five months from the date when the notice of seizure was given. It was argued that such proceedings should have been instituted before 22 January 2022 in order to be within time. In support of this contention, the appellant relied on the cases of *Murphy* v *Director of Customs and Excise* 1992 (1) ZLR 28, *Harry* v *Director of Customs* 1991 (2) ZLR 39 (H), *Ronald Machacha* v *Zimbabwe Revenue Authority* HB 2/14, *Twotap Logistics (Pvt) Ltd* v *ZIMRA* HH 345/21 and *ZIMRA* v *Motion Nyekete* HH 129/22.

Mr *Benza* relied on s 196 of the Customs and Excise Act to argue that this section specifically deals with civil proceedings against the respondent and its officers and that such proceedings must be done within eight months and not three months. S 193(12), it was argued, deals with administrative proceedings whereby one has to make representations to the appellant and is only a way to exhaust domestic remedies. The case of *TM Supermarket (Pvt) Ltd* v *ZIMRA* HH 304/16 was relied on for this argument. Mr *Benza* contended that s 193(12) ought to be interpreted within the provisions of s 196 in upholding the principle of "*generalia specialibus non derogant*" as there is a seeming conflict in the two sections. The provisions of a general section, it was argued, should yield to those of a specific section. Furthermore, it was argued that s 193(12) uses the word "may" which is directory and not the word "shall" which is peremptory and is used in s 196(2).

The issue of the interpretation of these two sections has been settled by this court and in the case of *ZIMRA* v *Motion Nyekete (supra)*, I dealt with exactly the same issues as laid out herein. I will therefore quote extensively from that case in resolving the issues before us.

Below, I quote from s 193 (12) which provides as follows:

> "(12) Subject to section *one hundred and ninety-six*, the person from whom the articles have been seized or the owner thereof may institute proceedings for—
> (*a*)the recovery of any articles which have not been released from seizure by the Commissioner in terms of paragraph (*a*) of subsection (6); or
> (*b*) the payment of compensation by the Commissioner in respect of any articles which have been dealt with in terms of the proviso to subsection (6); within three months of the notice being given or published in terms of subsection (11), after which period no such proceedings may be instituted."

On the other hand, s 196 provides as follows:

> "**196 Notice of action to be given to officer**
> (1) No civil proceedings shall be instituted against the State, the Commissioner or an officer for anything done or omitted to be done by the Commissioner or an officer under this Act or any other law relating to customs and excise until sixty days after notice has been given in terms of the State Liabilities Act [*Chapter 8:15*].

> [Subsection amended by Act 17 of 1999]
> (2) Subject to subsection (12) of section *one hundred and ninety-three*, any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law."
> Based on a perusal of case authorities referred to by the appellant, the issue of prescription in this context has exercised the minds of the courts over time and the interpretation of sections 193 (12) as read against section 196 of the Act, have been settled even in relation to similar provisions in the old Act."

The first case is that of *Ronald Machacha* v *ZIMRA* HB 186/11 wherein NDOU J held as follows:

> "In the event I am wrong in this conclusion, still the application has to be dismissed on the basis of the other point *in limine* raised i.e. the claim has prescribed in terms of section 193(12) of the Act. In terms of section 193 (12) the application of this nature has to be made within three months of the notice of seizure being given to the owner of the vehicle. *In casu*, the Notice of Seizure was given to Murada on 10 June 2010. This application was filed about four months after this date. This means that his cause of action based on unlawful seizure has prescribed – *Harry v Director of Customs* 1991 (2) ZLR 39 (H) and *Murphy v Director of Customs and Excise* 1992 (1) ZLR 28 (HC)."

In the case of *Kuda Chigoga* v *Zimra* HH 663/17, the court followed this line of reasoning as shown below:

> "The motor vehicle in dispute was seized on 19 December, 2014. The applicant instituted proceedings for the release of the motor vehicle on 2 October, 2015, more than nine months later, yet in terms of s 193 (12) of the Act referred to above, proceedings ought to have been instituted within three months. Thus instituting the proceedings on 2 October, 2015, was in direct conflict with the specific provision of s 193 (12) of the Customs and Excise Act, [*Chapter 23:02*].
> In addition to the specific provisions of s 193 (12), the respondent also submitted that persons whose goods have been seized are advised of the rights and remedies at their disposal at the bottom of the Notices of Seizures. The respondent submitted that the applicant was informed about his rights and remedies. The applicant did not dispute this submission by the respondent. Despite the additional information availed to the applicant by the respondent, the applicant still chose to institute proceedings after the prescribed three months period.
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> As correctly pointed out in *Harry* v *Director of Customs* 1991 (2) ZLR 39; *Murphy* v *Director of Customs and Excise* 1992 (1) ZLR 28, and *Ronald Machacha* v *ZIMRA* HB 186/11; the failure to give the required three months' notice meant that the claims had been prescribed in terms of s 193 (12) of the Customs and Excise Act and accordingly, the claims could not succeed. The applicant's claim in the current case has similarly prescribed in terms of the above section and cannot be entertained by the court on the merits. The 3rd point *in limine* is accordingly upheld."

The latest decision is that of *Twotap Logistics* supra which exhaustively deals with this issue as shown below:

> "In casu, the cause of action as stated in the letter dated the 13th of October 2020 from the applicant's legal practitioners to the respondent, the cause of action was the forfeiture of the truck and the trailer. This all emanated from the notice of seizure dated 18 July 2020, which on the face of it gave a plethora of rights to any person affected. The cause of action falls squarely within the purview of s 193. I agree with the submission by Mr *Marange* for 5 HH 345-21 HC 185/21 the respondent, that the provisions of s 196 (2) is clearly made subject to s 193 (12). Proceedings were instituted on 2 March 2021, way after the three months period. The applicant contended that it first had to exhaust internal remedies and reference was made to *Qingsham Investment (Pvt) Ltd v ZIMRA*, HH-207-17. However in that case, the exhaustion of internal remedies was in the context of an urgent application and therefore is not applicable. In my view, exhaustion of internal remedies is not a bar to the institution of civil proceedings. Section 193(12) is a statutory provision that makes no provision for the extension of the time period. To that extent, it is my considered view that the exhaustion of internal remedies is not a bar to the institution of civil proceedings as long as the cause of action falls broadly under s 193. To that end the applicant's claim has prescribed."

As found by in the *Twotap* case (*supra)*, s 196(2) is made subject to the provisions of s 193(12):

> "(2) Subject to subsection (12) of section *one hundred and ninety-three*, any proceedings referred to in subsection
>
> (1) shall be brought within eight months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law."

Honourable MANZUNZU J had occasion to deal with the interpretation of ss 193(12) and 196 (2) of the Act in the case of *Clayton Kasosera* v *Zimbabwe Revenue Authority* HH 595/21. He made findings which I am persuaded to follow. I list these findings below:

a. That a party who elects to bring an action for recovery of a seized article must do so within three months of the notice of seizure.
b. That the right to sue for recovery within three months is exercised subject to s 196(1) of the Act, in particular that in observing the three months required by s 193(12), a party must give sixty days' notice to the Commissioner of one's intention to sue.
c. The use of the word "may" in s 193(12) does not extend the period within which to sue but points to the election available to either sue for recovery or pursue internal remedies
d. That there is no ambiguity created by s 193(12) and s 196(2) because the three months prescription period in s 193(12) applies to seized goods whereas the eight months limit in

s 196(2) applied to any other civil proceedings other than proceedings to recover seized goods.

e. The words; "subject to subsection (12) of section one hundred and ninety-three," in s 196 (2) can be substituted with the words, "other than what is provided in subsection, apart from, with the exception of-----". Section 196 (2) therefore excludes the application of s 193 (12) in it, meaning that when section 193 (12) says "subject to section 196, it relates to section 196 (1) only in respect to the giving of notice. In other words s 196 (2) is saying the civil proceedings referred to in this subsection do not include those referred to in section 193 (12)."

It is my finding therefore that as the respondent's application for release of seized goods was brought some five months after the date of seizure, any proceedings to recover same were supposed to be brought within three months, the matter was prescribed and should not have been entertained by the court *a quo.* Ground of appeal 1 therefore succeeds.

Though the appellant had advanced five grounds of appeal which are extensively covered in its heads of argument, at the oral hearing, both parties leaned heavily on the first ground of appeal and did not submit on the rest of the grounds. Due to the nature of our finding on the first ground of appeal, there is no need to proceed to the rest of the grounds of appeal seeing as we have concluded that the matter had prescribed and the court a quo had no business going into the merits of the matter.

Accordingly we order as follows:

1. The appeal succeeds.
2. The order of the court *a quo* be and is hereby set aside and is substituted as follows:
   "The application for the unconditional release of the respondent's vehicle namely a Man truck registration number Horse JTC043MP, trailer 1-JKX559MP and trailer 2-JKX583MP be and is hereby dismissed with costs.

MUCHAWA J:……

WAMAMBO J: Agrees……..

Masawi & Partners, respondent's legal practitioners