LOPDALE ENERGY (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY
and
ZIMBABWE ENERGY REGULATORY AUTHORITY

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 2 March & 4 May 2023

Opposed Application

Mr *T Tanyanyiwa Senior,* for applicant
Mr *D L Marange,* for first respondent
Mr *W Magaya*, for 2nd respondent

MHURI J: In September 2021 first respondent detained applicant's fuel which it had imported into Zimbabwe. The fuel in question was contained in trucks as follows: -

- Truck 1: Registration number
  AEZ 6428/AEZ 4788 with
  39958 litres diesel
- Truck 2: Registration number
  AEZ 8092/AEG 6159
  AEG 6160 with
  52632 litres petrol
- Truck 3: Registration number
  AEZ 8093/AFJ 1767/
  AFJ 1768 with
  52426 litres petrol

Applicant has approached this court seeking an interdict and the following relief:

that first respondent immediately releases the fuel and trucks as stated above

and

that first respondent pays costs of suit.

Both respondents are strongly opposed to the granting of the application. First respondent raised a preliminary point to the effect that applicant can no longer competently bring this application as its claim has prescribed. It cited and relied on section 196(2) of the Customs and Excise Act [*Chapter 23:02*] (THE ACT) submitting that any proceedings applicant ought to have instituted should have been instituted within eight (8) months of the cause of action. Calculating from September 2021 to August 2022 when applicant instituted these proceedings eight months have lapsed and the horses have bolted so the court can no longer adjudicate over the dispute.

Second respondent is in support of the point raised by first respondent and prayed that the point be upheld and application dismissed. It submitted that subsections (1) & (2) of section 196 of the Act are not divorced from each other but are complimentary of each other. The issuing of notice in terms of subsection (1) cannot be an impediment to compliance with subsection (2). It further submitted that the very day when applicant's property was detained is the very day prescription began to run and so applicant ought to have started acting then.

Applicant's submission on the point raised by first respondent was that the import of subsections (1) and (2) of s 196 of the Act, is that once an action arises as what happened *in casu* in September 2021, the notice of intention to sue, must be given within 8 months. When it issued the notice on 14 April 2022 it was within the 8 months which were due to expire in May 2022. It prayed that the point be dismissed as it was ill taken.

It is a trite legal position that prescription extinguishes a cause of action. See *Coutts & Company* v *Ford & Anor* 1997 (1) ZLR 440.

Section 196 of the Act provides:

"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]*.

(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."

Subsection (1) is clear and unambiguous. It requires that notice be given to the Commissioner before any proceedings are instituted against first respondent. The proceedings are to be instituted after 60 days of the notice.

In casu, it is common cause that the cause of action arose in September 2021 and applicant gave the requisite notice on 14 April 2022.

In terms of subsection (2) the 8 months expired in May 2022.

In terms of subsection (1) the civil proceedings are to be instituted after 60 days' notice has been given.

By filing its application in August 2022, applicant was complying with the provision of subsection (1). The question however is, did applicant comply with subsection (2) thereof?

Subsection (2) is equally clear and unambiguous. It provides that any proceedings (civil proceedings) referred to in subsection (1) shall be brought within eight 8 months after the cause thereof arose.

The subsection is couched in peremptory terms.

As adverted to earlier, the 8 months' period ran from September 2021 until May 2022. The notice was supposed to be given well before April 2022 for applicant to be able to comply with subsection (2). By giving notice in April, applicant was putting itself out of the time period it was required to the file its civil proceedings in compliance with s 196 of the Act. Applicant had 8 months reckoned from September 2021 to give the requisite notice and institute the proceedings against first respondent. It waited until April when the 8 months' period was a month away from expiring. It is not correct as applicant would like to have this court believe that the giving of notice is instituting proceedings as per subsection (1). It is clear from a reading of this subsection that civil proceedings are to be instituted after 60 days' notice has been given.

I find in the circumstances that the point *in limine* was well taken and I uphold it.

In the result, it is ordered that the application be and is hereby struck off with costs.

Tanyanyiwa & Associates, applicant's legal; practitioners
Coghlan, Welsh & Guest, second respondent's legal practitioners