ZIMBABWE REVENUE AUTHORITY
versus
MOTION NYEKETE

HIGH COURT OF ZIMBWBWE
MUCHAWA, MANYANGADZE JJ
HARARE, 11 January & 9 March, 2022

Civil Appeal

E Mukucha, for appellant
D Chiromo, for respondent

MUCHAWA J: This is an appeal against a decision rendered by a magistrate which compelled the appellant to release unconditionally, a vehicle it had impounded from the respondent with each party bearing its own costs.

The brief facts giving rise to this matter are that on the 25th of April 2020, members of FERET team who were patrolling along the Limpopo river area intercepted the respondent's vehicle which was loaded with unaccustomed goods. It was alleged that the vehicle in question was being driven by the respondent who produced his identification document with number 43-162579 W 43. The smuggled goods were seized for smuggling through an undesignated entry point under respondent's name whilst the vehicle was seized for conveying goods liable for forfeiture in terms of section 188 of the Customs and Excise Act under Notice of Seizure number 042591 L. This was issued to the respondent on 25 April 2020. On the 29th of April, 2020, the respondent wrote to the regional manager requesting that the vehicle be released on the claim that it had been hired by a friend, Boniface Chapeyama. The said friend wanted to visit his in-laws when he was intercepted and abandoned the vehicle, leading to the respondent going to attend to the vehicle at the scene in order to bring it to ZIMRA. It was also claimed that the goods in the vehicle belonged to a certain Prince Siziba. A response was sent out on 3 May 2020, advising that the vehicle was liable for forfeiture and would be forfeited to the State. An appeal to the Commissioner of Customs and Excise on 9 May 2020 was unsuccessful as communicated in a letter of 22 June 2020. Upon further inquiry through his legal practitioners, the respondent was advised on 30 July 2020, to

appeal to the Commissioner General. Instead of proceeding as advised, the respondent made an application before the Magistrate's Court, for an order compelling the appellant to unconditionally release his motor vehicle. The court granted the application leading to this current appeal.

The grounds of appeal before us are as follows;

1. The learned Magistrate in the court *a quo* misdirected himself in law in granting the respondent an order for the release of the vehicle that was now property of the State following its forfeiture.
2. The learned Magistrate in the court *a quo* erred in law by ruling that the respondent's case had not prescribed when the same had prescribed.
3. The learned Magistrate in the court *a quo* erred in law in making a finding that section 193 of the Customs and Excise Act [Chapter 23:02] breaches constitutional provisions when such case was never pleaded by the respondent.
4. The learned Magistrate in the court *a quo* grossly erred on a point of law and fact by ignoring clear evidence that the respondent's vehicle was used to smuggle goods in breach of the provisions of the Customs and Excise Act [Chapter 23:02].
5. The learned Magistrate in the court *a quo* grossly erred on a point of law by ruling that section 193(12) regulates internal remedies when in actual fact it relates to court proceedings.

I deal with these grounds hereunder as addressed by the parties.

Grounds 1 and 4: Whether the respondent's vehicle was liable for seizure and as State property could not be released by the Magistrate

Mr *Mukucha* combined grounds of appeal 1 and 4 in his oral submissions and made the point that it was an established fact that the respondent's vehicle had been used to transmit smuggled goods which were unaccustomed in contravention of the Customs and Excise Act. Reference was made to the respondent's letter to the regional manager on page 40 of the record where he states that the offence of smuggling was beyond his control and he is pleading that he be given the option to pay a fine and get his vehicle back. Further reference is also made to this record, on page 43 wherein similar sentiments are made to the Commissioner of Customs and Excise. This is said to be an admission by the respondent that his vehicle was used to ferry smuggled goods. It

was argued that in the face of such an admission, the vehicle was liable for seizure in terms of section 187 (2) of the Act as read with section 188 thereof.

Mr *Chiromo* submitted that it was not correct that the vehicle was used to smuggle goods and referred the court to an extract from the criminal record book of the Magistrate's Court which shows that on 27 July 2020, the respondent was found not guilty of the charge of smuggling and was acquitted. It was argued that section 188 (2) of the Act therefore becomes inapplicable. Upon being quizzed on the fact that in the criminal matter it was the respondent who was found not guilty whereas in *casu* it is the use of the motor vehicle, Mr *Chiromo* conceded but persisted in arguing that as he was not aware that the vehicle would be used for smuggling, the vehicle is therefore excluded by the operation of section 188 (2a).

A look at the provisions of section 188 of the Act is a good starting point. It provides as follows;

> **"188. Goods and ships, aircraft, vehicles or other things liable to forfeiture**
> (1)Any goods which are the subject matter of an offence under this Act shall be liable to forfeiture.
> (2)Any ship, aircraft, vehicle or other thing used for the removal of goods which—
> (a)are liable to forfeiture; or
> (b)are being exported or have been imported or otherwise dealt with contrary to or not in accordance with—
> (i)the provisions of this Act or any other law relating to customs or excise; or
> (ii)any enactment prohibiting, restricting or controlling the importation or exportation of such goods; shall itself be liable to forfeiture.
> (2a)Any person who makes available his or her ship, aircraft or vehicle for use by another person for the removal of goods referred to in subsection (2)(a) or (b), shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment, unless he or she proves that he or she was unaware that the ship, aircraft or vehicle would be so used."

What is evident from s 188 (2) is that where a vehicle is used for the removal of goods which are liable to forfeiture or have been imported or dealt with contrary to the provisions of the Act or any other law relating to customs and excise, it shall itself be liable to forfeiture.
However s 188 (2a) provides for what happens to the owner of a vehicle who makes it available for use by another person for the removal of goods as set out in ss (2). Such person shall be guilty of an offence and liable to a fine, as specified or imprisonment or both unless such person proves that he was unaware that such vehicle would be so used.

It appears to me that Mr *Chiromo* is mixing up two consequences which the law clearly separately provides for. The first relates to what happens to a vehicle which has been allegedly

used for conveying goods which are liable to forfeiture or have been otherwise smuggled. Such vehicle is itself liable to forfeiture. The second separate consequence is what happens to the owner of such vehicle who makes their vehicle available for use by another for smuggling purposes. Such person shall be guilty of an offence unless they can prove they were in the dark regarding the intended use of the vehicle. The outcome of the criminal matter referred to by the respondent only goes to show that he was personally found not guilty of the offence set out in s 188 (2a) presumably because he was able to show that he was unaware of the intended use of the vehicle. I was not shown any provision which then states that the forfeiture of the vehicle would be reversed on account of the separate offence against the owner having fallen away. That, in the face of the respondent's clear admission that the vehicle had been used for smuggling, does not help advance the respondent's case.

On the contrary section 193 (13) clearly provides as follows;

> "(13) If proceedings are not instituted in terms of subsection (12), any articles declared to be forfeited shall without compensation vest in the President and may, by direction of the Commissioner, be sold or destroyed or appropriated to the State."

In the case of *Patel v Controller of Customs and Excise* 1982 (2) ZLR 82 (HC) where provisions similar to the ones in *casu* were under consideration, and plaintiff had been acquitted by the criminal court, the forfeiture of seized goods was found to be separate and not affected by the acquittal.

There is therefore merit in grounds 1 and 4 of appeal. It is my finding that the respondent's vehicle was indeed liable for seizure and once forfeited as State property it vested in the President and the magistrate could not have properly released it without a clear legal basis for so acting.

Grounds 2 and 5: Whether the matter had prescribed

Mr *Mukucha* submitted that the magistrate should have upheld the point *in limine* on prescription as the respondent filed his application well after the three months prescribed in s 193 (12) as the time within which a claim for release of seized goods should be noted from the date of issue of the notice of seizure. Further, it was averred that such proceedings are supposed to be instituted subject to the provisions of s 196 of the Act. Failure to meet the set timelines was said to be fatal. Reference was made to several case authorities including *Ronald Machacha v ZIMRA*

HB 2/14, *Kuda Chigoga v ZIMRA* HH 663/17 and *Twotap Logistics (Pvt) Ltd v ZIMRA* HH 345/21 in support of such contentions. It was also submitted that the court *a quo* erred in ruling therefore that s 193 (12) regulates internal remedies when it in fact relates to court proceedings. Such an interpretation was said to offend against the clear intention of the legislature and leads to an absurd result.

In addition, Mr *Mukucha* pointed out that the notice of seizure issued out to the respondent actually advised him of two options available to him which he could exercise parallel to each other. He could choose to follow domestic remedies by making representations to the Commissioner as represented by the station manager or institute civil proceedings. Both options were to be done within three months or additionally, he could opt to pursue both.

On the other hand, Mr *Chiromo* relied on s 196 of the Act, to argue that this section allows a person aggrieved by a notice of seizure to institute proceedings within eight months. This section was said to refer specifically to civil proceedings whereas s 193 refers to proceedings generally. It was argued that this was deliberate on the part of the legislature and the applicable provision where one intends to institute civil proceedings is s 196 which uses peremptory language whereas s 193 uses merely directory language. It was argued that the provisions of s 193 (12) ought to be interpreted within the provision of section 196 and the principle '*generalia specialibus non derogrant'* would apply in the interpretation of the two provisions which appear to be in conflict; that the provisions of a general section must yield to those of a specific meaning. This argument was raised to say that as s 196 specifically refers to civil proceedings which are proceedings brought before a civil court, it was the applicable clause in *casu*. We were referred to case law authorities which include that of *Bon Espoir (Pvt) Ltd v Hearing Chabata & ORS* SC 45/03.

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, section 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.

> 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."

In *casu t*he cause of action arose on the 25 April 2020 when the respondent was issued with the notice of seizure number 042591 L. The application before the Magistrates' Court was lodged on 1 October 2020, some five months from when the cause of action arose. On the face of the notice of seizure, the respondent was given several options which he could pursue. He could choose to follow domestic remedies by making representations within three months to the Commissioner as represented by the station manager. He seems to have exercised this option. He could also, at the same time or alternatively, choose to institute civil proceedings within three months as provided in section 193 (12) of the Act. It appears to me that the respondent is embarking on a futile exercise of splitting hairs in a case with the statute in very clear. As found by in the *Twotap* case *supra*, section 196 (2) is made subject to the provisions of section 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 sections 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 section 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.* Grounds of appeal 2 and 5 therefore succeed.

Ground of appeal 3: Whether the constitutionality of section 193 of the Customs and Excise Act was pleaded by the respondent

Mr *Chiromo* conceded that the issue of the constitutionality of section 193 was not pleaded and stated that the issue was however not resolved on the basis of this. It is trite that the court

cannot go on a frolic of its own and create issues for resolution which the parties have not placed before it. Ground of appeal 3 therefore succeeds.

In the result, this appeal succeeds in its entirety. The appellant did not pray for an order as to costs. I therefore order as follows:

1. The appeal succeeds.
2. The judgment of the court a quo be and is hereby set aside and in its place be substituted as follows:

   "The application for unconditional release of the respondent's vehicle be and is hereby dismissed with costs."

MANYANGADZE J AGREES----------

Masawi & Partners, respondent's legal practitioners