MERYSTAKE INVESTMENTS [PRIVATE] LIMITED
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 24 August and 13 September 2022

Civil Trial – special case

Mr. G Nyandoro, for the plaintiff
Adv S Banda, for the defendant

Factual background

The parties agreed to refer this matter to me as a special case in terms of rule 52 of the High Court Rules, 2021. On 15 August 2022, the statement of agreed facts was duly filed, which were captured as follows:

1. Sometime in September 2020, the Plaintiff transported a fuel consignment for Wellsford International destined for Zambia, the trucks of which are the subject matter of this case.
2. Before crossing into Zambia, the trucks made an about turn and made entry into Zimbabwe, still loaded with fuel without following the customs procedure prescribed by the law.
3. The Plaintiff's two truck horses, namely, a Freightliner Columbia, chassis number IFUJAB033LK81155 and another Freightliner Columbia, chassis number IFUJA6A33LK84802, as well as two tanker trailers, whose chassis numbers are 3010 and TT409512, respectively, were seized for smuggling under Notices of Seizure Number 011035K and 011036K.

4. The drivers of the aforesaid motor vehicles were subsequently tried and convicted of smuggling by the Kariba Magistrates Court under CRB No 500-502/20.

5. The plaintiff made representations to the defendant's Regional Manager, who on 12 October set out release terms for the seized motor vehicles and trailers.
6. Pursuant to release terms, on 12 October 2020, the plaintiff paid the sum of ZWL$72,000 to the defendant.
7. On 28 October 2020 however the Commissioner, Customs and Excise overturned the Regional Manager's decision and forfeited the trucks and trailer.
8. The said forfeiture was communicated to the plaintiff by letter dated 6 November 2020 which was received on 9 November 2020.
9. On 13 January 2021, the plaintiff obtained an interim order from this court under HC 6620/20 (per TAGU J) interdicting the defendant from disposing the seized articles. By the date of hearing of the special case that order was still extant.
10. The Plaintiff issued summons under Case No. HC 1343/21 on 12 April 2021, for an order declaring the forfeiture of the seized articles to be unlawful, and for their release.

For the sake of clarity and completeness of the record, let me return to para 5 of the statement of agreed facts. The letter from the defendant was written in the following terms:

> "Dear Sir"
>
> **FALSE DECLARATION: NOTICE OF SEIZURE No. 011035K OF 19 SEPTEMBER 2020: FREIGHTLINER COLOMBIA CHASSIS No. IFUJAB033LK81155 and TRAILER TANKER CHASSIS No. 3010: ENIAS MOYO c/o MERYSTAKE INVESTMENTS (PVT) LTD**
>
> The above subject matter refers.
>
> The facts are that you availed your vehicle to transport fuel and falsified transiting it to DRC without documentation of the consignee and later returned it to Zimbabwe without paying duty. It is noted in this case that you contravened the provisions of section 38 (1) as read with s 187 of the Customs & Excise Act [*Chapter 23:02*]. This rendered the vehicle liable to seizure and forfeiture.
>
> Having considered the facts and your submissions I am, however, prepared to release the vehicle to you subject to the following conditions being met.
>
> -Payment of level 12 fine amounting to ZWL$36,000 and
>
> -Payment of storage charges
>
> If you are agreeable to the set terms, please approach the ZIMRA Station Manager at CONDEPS and arrange for payment and collection of your vehicle. The vehicle cannot be held indefinitely,

> and if you have not met the terms set out above by 11 January 2021, the vehicle will be declared forfeit and disposed of without further reference to you.
>
> Please be advised that if you are dissatisfied with my decision, you have the right to appeal to the Commissioner, Customs and Excise at ZB Centre, 6th Floor, Corner Kwame Nkrumah and First Street, P O Box 4360, Harare or at commissionercustomsandexcise@zimra.co.zw
>
> Yours faithfully
>
> J Munongi-Chikwanda (Mrs)
> **For: Regional Manager, Region 1/Greater Harare, Customs and Excise**

A similar letter written on the same day was sent to the plaintiff in respect of the Freightliner Columbia chassis number IFUJA6A33LK84802 and trailer tanker chassis number TT409512. The statement of agreed facts, in para 2, confirms payment of the fine imposed by the defendant.

Issues for Determination

The issues for determination as agreed to by the parties are as follows:

1. Whether or not the plaintiff's cause of action is seizure or unlawful forfeiture
2. Whether or not the plaintiff's claim has prescribed.
3. Whether or not the forfeiture of plaintiff's truck horses and trailers by the defendant was unlawful.
4. Whether or not the defendant must be compelled to release plaintiff's two truck horses and two tanker trailers to it.

The respective arguments of the parties

At the hearing, the parties agreed on a rolled up approach which entailed arguing the points in *limine* and the merits at the same time. For the defendant, *Adv Banda* raised the issue of prescription, arguing that the plaintiff's claim had prescribed by operation of law. He submitted that the cause of action was in terms of s 193 (12) of the Customs and Excise Act, which provides as follows:

> "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".

The plaintiff relied on s 196 (1) and (2) of the Customs and Excise Act, which read:

> "(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".

It is evident that ss 193 (12) and 196 (1) and (2) of the Customs and Excise Act are apparently conflicting. The defendant contended that, with regard to the present proceedings, the prescriptive period was three (3) months and not eight (8) months. The argument was that the prescriptive period must be calculated to run from the date of seizure, and that forfeiture was incidental to the seizure. Counsel for the defendant referred the court to the decision in *Patel v Controller Customs and Excise* 1982 (2) ZLR 82 (H), where GUBBAY J as he then was said:

> "My conclusion that the plaintiff's cause of action did not arise at the moment of forfeiture is, I consider, borne out by the following features. Firstly, an individual who is affected by the seizure of articles is able to protect his rights against the possibility of their subsequently being declared to be forfeited, by instituting proceedings for their release from seizure. A declaration of forfeiture must be preceded by the seizure of the articles … Secondly, it is clear from the provisions of section 176 (10) that the intention of the lawmaker was that finality should attach to a declaration of forfeiture by the Controller of articles which have been seized".

The defendant proceeded to submit that, the application before me was done outside the period of three months, making it prescribed by virtue of s 193 (12). Additionally, it submitted that s 196 (2) did not apply to the present case since s 193 (12) specifically dealt with seizure of goods or articles. On the merits, the defendant contended that s 193 (17) of the Customs and Excise Act empowers the Commissioner to delegate his powers to subordinate officers. Further, it was argued that, by virtue of s 193 (19), the Commissioner may set aside anything done by an officer exercising a delegated power. It was also contended that the plaintiff had not challenged the validity of the law which allows the Commissioner to set aside decisions of his junior officers.

The plaintiff argued that the lawsuit, in *casu*, was challenging the forfeiture of its property on the basis that it was unlawful. The argument continued that the trucks and trailer tankers were seized on 19 September 2020, and that release terms were set out by the defendant in its letter dated 12 October 2020. Thereafter, the plaintiff paid for the release of the seized goods as stated in the statement of agreed facts filed of record. Thus, according to the plaintiff, the lawsuit could not have been made at the time of seizure, because the release terms meant that forfeiture was not in the contemplation of the parties. When the trucks and trailer tankers were forfeited on 9 November 2020, the plaintiff argues that it gave the defendant notice of its intention to sue based on unlawful forfeiture as the cause of action. Thus, the plaintiff contends that it acted within the period of three months stipulated in s 193 (12) of the Customs and Excise Act.

In the alternative, the plaintiff submits that the use of the discretionary word "may" in s 193 (12) means that it is not peremptory to institute proceedings within a period of three months. Mr Nyandoro for the plaintiff, contended that the use of the "may" gives a discretion to this court to hear the plaintiff's cause if it finds that the claim was filed outside the period of three months. The plaintiff's auxiliary argument is that, in terms of s 196 (2), the claim could be made within eight months since the cause of action (forfeiture) arose on 9 November 2020. On this further basis, the plaintiff asserts that its claim is not prescribed. Reliance was placed on the case of *Betty Dube* v *ZIMRA* HB 2-14, where this court accepted that the prescription period stipulated in section 196 (2) was eight months.

Analysis of the case

The question of prescription needs to be decided first. When the cause of action arose is fundamental to such a decision. From the decided cases, the meaning of cause of action cannot be overemphasized. For example, in *Abrahamse & Sons* v *SA Railways and Harbours* 1933 CPD 626 at 637 WATERMEYER J stated:

> "The proper legal meaning of the expression 'cause of action' is <u>the entire set of facts</u> which gives rise to an enforceable claim and <u>includes every act which is material</u> to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. (See Halsbury, vol 1, s 3, and the cases there cited.) (My underlining for emphasis)".

This case was cited with approval by GUBBAY J in *Patel* v *Controller of Customs and Excise* 1982 (2) ZLR (HC) 82 at 86C-E. MALABA J (as then was) made a similar point in *Peebles* v *Dairiboard (Private) Limited* 1999 (1) ZLR 41 (H) at 54E-F. In my view, what emerges from the jurisprudence is that a cause of action arises when all the material facts that will allow an aggrieved person to approach the court to enforce their rights or the totality of facts that allows an individual to bring an action against another. It is the totality of facts put together, that give a clear picture of a party's claim against another person. In *casu* I am of the view that the totality of facts that gave rise to the claim arose after the trucks and tankers of the plaintiff had been forfeited according to the notification sent via email dated 28 0ctober 2020 which appears on page 21 of the defendant's bundle of documents, which stated that the goods of the Plaintiff had been forfeited. This is the totality of facts that prompted the plaintiff to act, and that was sufficient to bring an action against the defendant.

I must comment that the circumstances of this case are peculiar because when the trucks of the plaintiff were seized the plaintiff made representations to the defendant's regional manager, who responded by giving them terms for the release of the forfeited property. At this juncture, as seizure was now out of the picture, there was no need to institute legal proceedings because there was mutual understanding between the parties. Quite understandably, the Plaintiff was acting under the reasonable belief that the course of events was ordinarily that if they pay the required fine trucks and tankers would be released. In fact, I can go so far as to say that the defendant created a reasonable and legitimate belief and expectation in the plaintiff's mind that there was not going to be future litigation between the parties. It was not conceivable that after meeting the release terms set by ZIMRA, there would be a complete about turn forfeiting the seized goods. I take this view, because the defendant had unequivocally stated that the only reason for which their vehicle would be declared forfeit is if the plaintiff failed to pay the requisite fine by 11 January 2021. The plaintiff complied with the defendant's stipulation. The forfeiture of the vehicles and trailer tankers is obviously a new issue which created a fresh cause of action, namely, that which appears in the papers before me. Consequently, I do not agree with the defendant that the cause of action arose at the point of seizure, as that would be illogical and absurd. In coming to this conclusion, I am fortified by the case of *Zimasco Private Limited* v *San He Mining Private Limited* HH 654-15, where CHIGUMBA J appositely observed:

> "It is trite that, for purposes of calculating the relevant time when prescription begins to run in respect of a debt, regard must be had to the date when the cause of action 'arises'. The meaning of 'cause of action', while clearly formulated in legal terms, at times gives rise to difficulty in its application to particular circumstances where the facts that are material for the plaintiff to prove its claim, do not converge or come together during the same period of time. The question that arises as a consequence of this legal dilemma is whether the period of prescription begins to run as soon as one factor needed to prove the plaintiff's claim takes place, or the period of prescription begins to run only when all the factors that the plaintiff needs to prove its case are present, at the same time. The answer is simple. It depends on all the surrounding circumstances, and the onus rests on the plaintiff to show that, prescription began to run on a particular date, according to the nature of the cause of action on which the plaintiff's claim is premised. The authorities are clear that the cause of action arises when the last of the facts required to prove the claim and win it, become known to plaintiff. In my view the authorities are equally clear that, the running of prescription shall be interrupted by the service of process on the other party, not by the mere issue of process."

Having concluded that prescription began to run at the time of forfeiture and not seizure, the next question to address is whether it is s 193 (12) or s 196 (1) and (2) of the Customs and Excise Act which applies to the dispute in *casu*. In *Clayton Kasosera* v *Zimbabwe Revenue Authority* HH 595-21, MANZUNZU J had an occasion to interpret the meaning of the two sections. The learned judge said that where a party elects to sue for seizure of articles in terms of the Act, such a party had to do is in terms of S 193 (12) of the Act and the period within which to institute proceedings under this cause of action is three months which starts to run from the notice of seizure. In his words MANZUNZU J said:

> "This means a party who makes a choice to sue for the recovery of a seized article must do so within three months of the notice of seizure."

Even if this court was to find that the action was brought outside a period of three months, it is pertinent to observe that s 196 (1) of the Customs and Excise Act does not preclude the bringing of civil proceedings, such as the current lawsuit, to declare the forfeiture unlawful. In this respect, s 196 (2) goes on to provide that if such proceedings are instituted that must be done within eight months of the cause of action arising. In this context, it is noteworthy that s 193 (12) states that it is subject to the s 196 of the same Act. Therefore, I consider it significant, if not relevant, that s 193 (12) apart from using the non-peremptory word "may", deals with lawsuits for the recovery of seized items which have not been released. In *casu*, the defendant had agreed and stipulated conditions for the release of the items, but the Commissioner then forfeited the motor

vehicles and trailer tankers instead. In my view, this is the kind of situation that is contemplated by s 196 (1), which provides that 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. Thus, the lawsuit was competently brought within a period of eight months as required by s 196 (2).

Before ruling on the point in *limine,* it is important to deal with the defendant's submission that s 196 (2) of the Customs and Excise Act cannot found a cause of action as it does not relate to ZIMRA, but specifically refers to the State, the Commissioner or any officer employed by ZIMRA. It was further argued that ZIMRA should not have been made a party in proceedings whose cause of action is founded on S 196 (2) of the Customs and Excise Act. The defendant's argument continued that the Commissioner General ought to have been cited in his official capacity and, for these propositions the defendant relied on the case of *Twotap Logistics (Pvt) Ltd* v *ZIMRA* HH 345-21. However, the Supreme Court has already decided this issue in *Care International in Zimbabwe* v *Zimbabwe Revenue Authority & Ors* SC 76-17, where GOWORA JA (as she then was) pertinently stated:

> "The Commissioner General is undoubtedly an employee of the Zimbabwe Revenue Authority and when he performs the functions bestowed upon him by the various statutory provisions that govern the assessment and collections of revenue on behalf of the state he does so as such employee".

The same pronouncement was made by the Supreme Court, per GARWE JA (as he then was) in *The Commissioner General-Zimbabwe Revenue Authority* v *Benchman* SC 88-21. Finally, the rationale for citing ZIMRA and not the Commissioner General in their personal capacity was highlighted in the case of in *Tregers Industries* v *Zimbabwe Revenue Authority* 2006 (2) ZLR 62 (H) at 66E-F:

> "See also *Maradze* v *Chairman PSC & Anor* HH 223/98. In the case, SMITH J remarked at pp7-8 that it was not appropriate to cite the Chairman of the Public Service Commission as a party unless the allegation is that he personally acted in a manner which necessitated recourse to the courts".

I entirely agree with the conclusions in the above authorities. That being the case, I find no merit in the defendant's argument on s 196 (2) and hold that ZIMRA was properly cited in the

present proceedings. Additionally, I hold that s 196 (2) applies to the time for instituting the proceedings. Accordingly, I dismiss the point in *limine* for lack of merit.

As I have come to the conclusion that the cause of action arose when the trucks and tankers of the plaintiff were forfeited not when they were seized, I now have to decide on the lawfulness or otherwise of such forfeiture. The plaintiff argued that it was not given the opportunity to make representations on the forfeiture in terms of the *audi alteram partem* common law principle or section 68 of the Constitution. The section, *inter alia*, provides:

> "(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".

I must add that the constitutional right enshrined in s 68 (1) has been mirrored and given effect in terms of the Administrative Justice Act [*Chapter 10:28]* (hereinafter referred to as "the AJA"). In this respect, 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 shall act lawfully, reasonably and in a fair manner and give reasons for its action. In fact, s 3 (2) is worth referring to, as it states:

> "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".

Both this common law doctrine and s 68 of the Constitution require that a party affected by an administrative action or decision must be given the opportunity to make representation before the action is taken or the decision is made. The decision to forfeit cannot be procedurally fair if the party affected by it has not been alerted that ZIMRA wished to forfeit his motor vehicles and trailer and tankers, and asked to comment. *Adv Banda* for the defendant conceded that the opportunity to comment was not afforded to the plaintiff and, crucially, that concession settles the issue. I therefore find it irregular and in breach of s 68 of the Constitution, s 3 of the Administrative

Justice Act and the *audi alteram partem* rule that the plaintiff was not heard on what it had to say about the decision to forfeit its property. Consequently, the plaintiff ought to be afforded the relief that it seeks.

I am aware that costs follows the result, but I do not believe that the manner in which the defendant has prosecuted its case merits the awards of costs on a higher level of attorney and client. The plaintiff has asked for costs on an attorney and client scale in the event that it was the successful party. Even though I have dismissed the preliminary point on prescription and found the decision to forfeit the plaintiff's property to be unlawful, I believe that the defendant has litigated in good faith. In the circumstances, I am in agreement with the position taken by CHITAPI J in *Netone Cellular (Pvt) Ltd* v *Reward Kangai* HH 441-19, that a party should not be penalized with punitive costs for holding a contrary legal position, since opposing arguments on the law enhance our jurisprudence. Therefore, in the exercise of my discretion I will award costs on the ordinary scale.

Disposition

Accordingly, I make the following order:

1. The defendant's point in *limine* on prescription be and is hereby dismissed.
2. The forfeiture of the plaintiff's two (2) truck horses, namely, Freightliner Columbia, chassis number IFUJAB033LK81155 and a Freightliner Columbia, chassis number IFUJA6A33LK84802, as well as two (2) tanker trailers, namely, chassis number 3010 and chassis TT409512 by the defendant be and is hereby declared unlawful.
3. The defendant is hereby directed to release the two (2) truck horses referred to in paragraph (1) of this order, namely, Freightliner Columbia, chassis number IFUJAB033LK81155 and a Freightliner Columbia, chassis number IFUJA6A33LK84802, as well as two (2) tanker trailers, namely, chassis number 3010 and chassis TT409512 to the plaintiff within forty eight (48) hours of service of this order on the defendant.
4. The defendant shall pay costs of suit on the ordinary scale.

Hamunakwadi & Nyandoro Law Chambers, plaintiff's legal practitioners
Sinyoro & Partners, defendant's legal practitioners