HB 72/17
HC 740/17

MEMORY CHINGWENYA

And

JOHANESS CHITUTA

Versus

ZIMBABWE REVENUE AUTHORITY

And

THE REGIONAL MANAGER, ZIMRA

And

THE COMMISSIONER GENERAL, ZIMRA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 21 & 30 MARCH 2016

Urgent Chamber application

R. Ndou with Miss G. Makiwa for the applicants
Mrs S. Ngwenya for the respondents

MAKONESE J: It was a well established principle of our law that it is inappropriate for an applicant to seek interim relief which is final in nature because doing so means the applicant obtains final relief without proving its case. It is also well settled that an applicant who brings a matter under a certificate of urgency must demonstrate that when the need to act arose, the matter could not wait, and that applicant took immediate action to protect their interests. Applicant is required to satisfy the court that irreparable harm may be suffered if the matter is not dealt with urgently.

In this matter, the applicant seeks a provisional order in the following terms:-

"Terms of final order sought

1. The respondent's conduct of impounding 1st applicant's motor vehicle a Toyota Gaia registration number AED 4899 and demanding exorbitant fines for the release be and is hereby declared unlawful and wrongful.
2. The respondent's allegation that the said motor vehicle was used for smuggling and therefore that 1st applicant is guilty before she could be convicted by a competent court of law is declared unlawful and wrongful.
3. The respondents are ordered to pay costs of suit on a punitive scale.

Interim relief granted

Pending the confirmation of the provisional order, an interim relief is granted on the following terms:

1. The respondents are ordered to release and return to the 1st applicant her motor vehicle a Toyota Gaia registration number AED 4899 forthwith or at least 24 hours of the date of this order without paying any storage fees."

The application is opposed by the respondents who have filed a detailed notice of opposition and heads of argument. The respondents argue that the matter is not urgent and that the order sought is incompetent at law in that the relief sought is final. The respondents aver that the applicants have an alternative remedy in that at law the mere institution of civil proceedings against the 1st respondent will bar the Commissioner General of the Zimbabwe Revenue Authority from declaring any goods forfeited in terms of section 193 (6) (b) of the Customs and Excise Act (Chapter 23:02).

Background

It is necessary to set out the brief background to this matter before dealing with the issues raised by the respondents.

On the 1st of February 2017 and at Beitbridge, 1st respondent seized a Toyota Gaia, registration number AED 4899 under a notice of seizure together with 10 trays of chicken cuts weighing approximately 450kg. On 23 February 2017 1st applicant wrote a letter to 1st respondent requesting a release of the seized motor vehicle in the following terms:

"The Manager
Zimra
Beitbridge

Re" Appeal for seizure notice 069921 K

I Memory Chingwenya I.D. No. 12-117954 N 12 do hereby appeal for the release of my vehicle registration number AED 4899, engine number 35FE Chassis No. SXM 10-0186627 which was seizure (sic) on the 1st of February 2017 being in custody of Johannes Chituta I.D. NO. 08-736451 R who is my driver.

I gave my motor vehicle to the driver for piloting (sic) to earn money for a living since I am not employed. The instruction to the driver was only to use the motor vehicle for carrying people. However, the driver was hired and he carried some chicken cuts from 181 Dulivadzimu to rank bus terminus. This resulted in the seizure of my vehicle.

I wish to be given back my vehicle for I am not the one who committed the offence.

Your assistance is highly appreciated.

Yours faithfully

Memory Chingwenya"

On 23rd February 2017 the 1st respondent responded to the 1st applicant's request for a release of the seized motor vehicle in the following terms:

"Re: APPEAL AGAINST NOTICE OF SEIZURE NUMBER 069921 K OF 1ST FEBRUARY 2017: MEMORY CHINGWENYA

I acknowledge receipt of your letter dated 2 February 2017 on the above subject.

The facts of the matter have been considered carefully, but however, I cannot overlook the fact that the vehicle was used for smuggling. This has rendered the vehicle liable to forfeiture in terms of section 182 and section 188 of the Customs and Excise Act (Chap 23:02). Nevertheless, I am in this instance prepared to release the vehicle subject to the following:

(a) payment of a fine of $5 000
(b) payment of storage charges

If you wish to recover the vehicle on these terms, you should make a payment of the above amounts to the Regional Manager of the Zimbabwe Revenue Authority at Beitbridge Border Post and arrange for it to be collected from him. The vehicle cannot be held indefinitely and if you have not met the terms set out above by 1 May 2017 I will assume you do not want to and the vehicle will be declared forfeit.

Yours faithfully

For Regional Manager Beitbridge"

In an attempt to explain why the motor vehicle should be released from seizure and on 25th February 2017, 1st applicant addressed a further letter to 1st respondent in part in the following terms:-

"Re: APPEAL AGAINST NOTICE OF SEIZURE NUMBER 069921K OF 1 FERUARY 2017: MEMORY CHINGWENYA

I acknowledge receipt of letter dated 23 February 2017 on the above subject.

I carefully read your letter and still wish to contest the whole decision in it.

In your letter you stated that you cannot overlook the fact that my motor vehicle was used for smuggling and that fact is not existing in the circumstances.

My motor vehicle never crossed Beitbridge Border Post to ferry those goods which are liable to forfeiture.

According to Customs and Excise Act smuggling refers to "any importation, introduction or exportation of goods with intent to defraud the state or to evade any prohibition or restriction on or regulation as to the importation, introduction or exportation of any goods required to be accounted for …"

The 1st respondent was not moved by the 1st applicant's letter and insisted that the motor vehicle would be declared forfeit unless the terms set out in the earlier letter were met. The 1st respondent made known its position in a letter dated 4th March 2017. I shall now deal with the points *in limine* that have been raised by the respondents.

Lack of urgency

The respondents contend that the matter is not urgent and that the applicants have failed to treat it as such. It is not in dispute that on 23rd February 2017 the applicants were aware that respondents were not prepared to release the motor vehicle. On the 4th of March 2017 the respondents reiterated their earlier position and indicated in writing that the vehicle would be declared forfeit if a fine of US$5 000 was not paid as well as storage charges. A deadline of 1st May 2017 was put in place. The urgent application was only filed on the 14th March 2017, twenty days later.

In the case of *Kuvarega* v *Registrar General* 1998 (1) ZLR 188 (H), the principle was established that what constitutes urgency is not only the imminent arrival of the day of reckoning, but a matter is urgent, if at the time the need to act arose the matter cannot wait.

In the present matter, the need to act evidently arose on 23rd February 2017 when the applicants became aware of the likelihood of forfeiture. No explanation has been given for the delay, save that the applicants were still engaged with the respondents in the hope that the motor vehicle would be released. The applicants have clearly failed to establish urgency in this matter and that would dispose of the matter on that point alone. In my view, the urgency, as set out in the certificate of urgency is not the urgency contemplated by the rules.

The applicants allege in the certificate of urgency as follows:

"1. The 1st applicant had her vehicle unlawfully seized by respondents who proceeded to detain the vehicle after alleging that the motor vehicle had been used to smuggle chicken cuts into the country. 2nd applicant is employed by 1st applicant as the driver of the said vehicle.
2. *The said motor vehicle has never crossed the border and the driver last crossed the border on 28th November 2016.*
3. *On several occasions 1st applicant wrote to the respondents requesting that they release her vehicle and at all material times they demanded that she should pay a fine of US$5 000 and storage charges before releasing same.*
4. *..."*

The issues raised in the certificate of urgency relate to the substantive dispute in the matter and deals with the merits. There is no real urgency disclosed in the papers.

See the cases of *Triangle Ltd* v *Zimbabwe Revenue Authority* HB-12-11 and *CABS* v *Ndlovu* HH-3-06

Further, the applicant has failed to satisfy the court that it will suffer irreparable harm if the matter is not dealt with under a certificate of urgency. This court cannot exercise its discretion to hear the matter on an urgent basis where it has not been shown that there is no alternative remedy.

Order sought is incompetent

The respondents contend that the provisional order being sought by the applicants in this matter is incompetent at law in that it has the effect of a final order. In the provisional order sought, applicants have sought an order directing the release of 1st applicant's motor vehicle a Toyota Gaia registration number AED 4899 forthwith or at least 24 hours of the date of the order, without paying storage fees. Then in the final order applicants purportedly seek a Declaratory Order that the impounding of 1st applicant's motor vehicle and demanding exorbitant fines for its release be declared wrongful and unlawful. However, it is clear that by the time the provisional order is confirmed, the vehicle would have been released. The deed would have been done. It would be a *fait accomplii*. It is clear that granting the order as prayed is not competent as it allows the applicant to secure the release of the motor vehicle without arguing the merits of the case.

See the case of *Qalisani (Pvt) Ltd* v *Zimbabwe Revenue Authority* HB-106-11

In that matter MATHONSI J observed at page 4 of the judgment that the practice of seeking interim relief which is final in nature ought to be suppressed decisively.

In *Machakwi Estate (Pvt) & Ors* v *The Minister of State for National Security Responsible for Land Reform and Resettlement in the President's Office and Ors* HH-62-06 at page 4 of the cyclostyled judgment KAMOCHA J, stated as follows:-

> *"The respondents' contentions seem to ignore the fact that the magistrate issued a final order on an ex parte basis. The final order was granted without hearing the applicants."*

If the provisional order is granted in its present form the applicants will have no interest in the confirmation of the provisional order. The order sought is clearly not competent and the court will not grant a provisional order that has the effect of granting final relief.

From the aforegoing I am satisfied that the applicants have not established urgency and that the relief sought is not competent at law. Other than the fact that the 1st applicant is being deprived of her use of the Toyota Gaia motor vehicle which she says brings her much needed income there is no basis for concluding that the 1st applicant has no other remedies.

I would, in the result, dismiss the application with costs.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Messrs Coghlan & Welsh, respondents' legal practitioners