EDSON DYLKA E NEURICE LIMITADA
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5 July & 8 August 2023

**Opposed Application for Review**

*J Tuso*, for the applicant
*T E Kameno,* for the respondent

**CHITAPI J**: The applicant is Edson Dylka E Neurice Limitada a peregrine company domiciled and incorporated in Mozambique. It is in the business of transporting goods within and across neighbouring countries including Zimbabwe. The respondent is Zimbabwe Revenue Authority statutory corporate body established under the Revenue Authority Act, [*Chapter 23:11*]. The respondent *inter-alia* is responsible for revenue collection on behalf of Government and is also the regulatory authority for the exportation and importation of goods at the country's borders. The respondent also administers and enforces the Customs and Exercise Act, [*Chapter 23:02*] ("the Act").

In the process of enforcing the provisions of the Act, and on 26 May 2022, at Mutare Dry Port, the respondent placed under seizure the applicant's trucks and trailers which were physically inspection by the respondent's officers to ascertain whether or not the consignment declared on the goods manifests tallied with the actual goods carried on the trucks. The physical inspector showed a discrepancy. The trucks and trailers had been cleared before the search on the basis of documents presented to the respondent. Seizure notices were issued being serial number AAE 0090511 in respect of the applicant's truck registration number AAE341 SE with trailer registration number MA 0399, and serial number 009056L in respect of a truck registration number AAY510 SF with trailer registration number AA047 MN.

The notices of seizure contained an advice to the applicant that it could make representations to the station manager at the place of seizure giving reasons why the goods should be released from seizure or that they should not be ordered forfeited to the State. The notices also advised the applicant of the additional or alternative avenue of instituting proceedings for the recovery of the goods against the Commissioner General of the respondent in terms of s 196 of the Act, such proceedings being subject to the giving by the applicant to the Commissioner General, of 60 days' notice to sue.

By letter dated 6 June 2022, the applicant through its legal practitioners Bere Brothers made representations to the respondent's Regional Manager for Forbes Region for the release of the two trucks and two trailers. The letter outlined the background of the matter and how the applicant was involved in the saga. It was outlined that the applicant was a transporter company that carried goods on hire by its customers importing goods which would have been shipped to Beira Port in Mozambique since 2020. It was stated that although the applicant's company was conversant with the E-Manifest pre-electronic system of clearance which it had operated since 2021 without problems, it had to engage local agents to use the system on its behalf because of language barriers as the system did not make provision for other languages except English. The applicant averred that it had its own agents at Beira Port in Mozambique who would refer the applicant to local agents at Forbes Border Post to do the clearance thereat of the applicant's trucks.

The applicant averred in respect of the background facts that it was contracted to transport by its client, bales of assorted new clothes, boxes of assorted new clothes, boxes of Chinese food and gas stoves from Beira to Harare. The applicant averred that the consignment was cleared in Mozambique as requirement by the laws of that country by an appointed agent. The applicant averred that the goods consignment was accurately described in the bill of lading and on the invoices given to the Zimbabwe agent. The applicant averred that the payment of duty for the goods under carriage was to be made in Harare by the importer. The applicant averred that it was not aware that the agent had created false bills of lading and made a false declaration based on those false bills of lading. The applicant averred that it was not involved nor complicit in the making of false declarations made by the agent on whom the applicant had placed its trust. The applicant averred that it hoped that the agent would be prosecuted for the misdemeanour.

The applicant pleaded for the immediate release of the two trucks, trailers and a container. It averred that the container was being charged demurrage by shipping lines. It averred that the language barrier compromised the effective operation of the E-Manifest system and that this resulted in the employment of agents on whom the applicant placed reliance and depended on their word as the language barrier unpled that the transporter with the language handicap could not even cross check or verify whether what the agent had done was correct. The applicant averred that its offices were damaged from the cyclone Idai effects and were still not yet fully operational with the result the applicant and its drivers could not operate the E-Manifest system from the offices and had to rely on outside agents. The applicant averred that on 26 May 2022, the applicant's drivers entered the border following assurance by the agent that all was well to proceed. The applicant averred that to its knowledge, the agent was registered and was therefore relied upon by the applicant in good faith to do the correct thing. The applicant pleaded that it had a clean record with the respondent over the period from when it started operating.

The applicant averred that the seizure was prejudicial to it financially as it relied on the trucks and trailers for its business. It also averred prejudice to the importer and to the container owners. It averred that the respondent had not seen it fit to have the agent prosecuted. The applicant averred that it had now taken active steps to capacitate its office so that the E-clearance processes could be done at its offices. It had also facilitated the training of its own staff to use the E-clearance system as well as training the staff in Basic English so that communication barriers could be overcome.

The respondent's regional manager considered the representations made and generated three letters of the same date being 8 June 2022. Two of the letters related to the request for the release of the trucks and trailers individually addressed. The third letter related to the release of a 40 foot container which was carried on one of the trucks. In relation to the first response which related to truck registration number AAE3415 F and trailer registration number MA 0399, the Regional Manager C. Marekera wrote that the truck and trailer were carrying goods which were not accounted for in terms of the Customs and Excise laws "thereby making them liable to forfeiture". Significantly the regional manager wrote as follows in para 3 of the letter:

> "The vehicle and trailer which you seek release was used for the removal of goods liable to forfeiture, hence consequently becomes liable to forfeiture in terms of section 188(2)

> of the Customs and Excise Act, [*Chapter 23:02*]. I regret to advise that the truck and trailer cited on notice of seizure number 009051 L of 01 June 2022 shall not be released from seizure but shall be forfeited to the State in due course without any further reference to you."

As regards truck registration number AA1510 SF and trailer registration number AA047 MN, the response of the regional manager was a replica of the response relating to the first truck and trailer save for the notice of seizure serial number and the truck and trailer registration descriptions.

In relation to the container, the regional manager was prepared to release the container upon payment of a level 12 fine of ZWL $200 000 "for the container" and payment of State warehouse rent from the date of detention of the container to the date of its collection. The applicant was granted an extension of time until 01 September 2022 to have complied with the conditions of release failing which the container would be forfeited to the State without further reference to the applicant. The container and goods had been seized under seizure notice number 009052 C. I consider it necessary to reproduce the regional manager's letter because it will be integral to my determination in this matter. It read as follows and was addressed to the applicant's new legal practitioners Messrs Tavenhave and Machingauta:-

> "08 June 2022
>
> EDN Limitada
> C/O Bere Brothers Legal Practitioners
> Suite 3 Manica Centre
> 118 Herbert Chitepo Street
> Mutare
>
> Dear Sir/Madam
>
> **NOTICE OF SEIZURE NUMBER 009052L OF 10 JUNE 2022: 1* 40 FOOT CONTAINER MRKU6241760: COAST TO COAST TRUCKING A/C EDN LIMITADA COMPANY MOZAMBIQUE**
>
> Reference is made to your letter, wherein you are seeking release of the container specified on the above notice of seizure receipt.
>
> The facts of the matter have been considered very carefully, however, it cannot be overlooked that the container cited on the above notice of seizure was used for the removal of goods which are liable to forfeiture. The goods which were transported by the trucks were impounded under Notice of Seizure number 009052 L of 01 June 2022. These imported goods were not accounted for as is required in terms of the Customs and Excise laws.

Any package which is found to contain goods which are liable to forfeiture, consequently becomes liable to forfeiture in terms of section 190 (1) of the Customs and Excise Act [Chapter 23:02]. Nevertheless, in the matter at hand, I am prepared to release from seizure, the container cited on notice of seizure number 009052L of 01 June 2022, in this instance only, subject to the following conditions:

a) Payment of a level 12 fine of ZWL$200 000 for the container
b) Payment of state warehouse rent from the date of detention of the container until the day of collection.

If you are agreeable to the above terms, kindly approach the Shift Manager at Forbes Border Post for the finalization of this matter. The container cannot be held indefinitely and if the above terms are not met by 01 September 2022, I will assume that you are no longer interested in the containers and they will be declared forfeit without any further communication to you.

If you are not satisfied with this decision, you can exercise your right to appeal in writing to the Commissioner – Customs and Excise, 6th Floor ZB Centre, Corner First Street and Kwame Nkrumah Avenue, P.O. Box 4360, Causeway, Harare.

Yours faithfully

C Marekera
**FOR: ACTING REGIONAL MANAGER, FORBES & ENVIRONS REGION**"

The applicant was dissatisfied with the decision of the Regional Manager. It appealed by letter of appeal dated 14 June 2022 to the respondent's Commissioner of Customs and Excise. The applicant listed eighteen grounds of appeal. Its prayer was for the unconditional release of the two trucks and trailers upon payment of State house rent. In the alternative the applicant prayed that the trucks and trailers be released upon payment of a just fine which took into account all the circumstances of the case. I propose to set out the grounds of appeal which the applicant advanced. I reproduce the letter of appeal as follows:

"6th June 2022

The Regional Manager
ZIMRA
Forbes Region
P.O. Box 90
**MUTARE**

Dear Sirs

**RE: OUR CLIENT: EDN LIMITADA: NOTICES OF SEIZURE NOS. 009056 L, 009051L, 009055L & 009052 L, DATED 1ST JUNE 2022: REQUEST FOR RELEASE OF:**
**1 x HOWO SINOTRUCK REG. NO. AA1510 SF, CHASSIS NO LZZ5CLSBODHD232941,**
**1 x 2012 DPS40WD3B SEMI-TRAILER REG NO. MA0399, CHASSIS NO. LSEJP394390014511,**
**1 x 40FT CONTAINER MRKU6241760,**
**1 x 40FT CONTAINER CMAU9349960**

We have been instructed and we represent herein EDN Limitada, a company duly registered in terms of the company laws of Mozambique.

Our Client's two trucks, two semi-trailers and two containers were seized by ZIMRA on the 1st June 2022 by S. Maburutse and R. Kamutanho respectively amids allegations of a false declaration by A Makunike to whom the notices of seizure were served on 2nd June 2022 at Mutare.

1. **BACKGROUND**

Our client is a duly registered company in terms of the Mozambique laws, currently based in Beira, Mozambique. Our client is a transporter in the business of carriage of goods both within and across the borders into neighbouring countries. It also carries goods from Beira Port across the Mozambique-Zimbabwe border into Zimbabwe through Forbes border post. It has been in this business since August 2020 to date and has operated the E-Manifest pre-electronic profile since January 2021 without any hustles.

Our client was contracted to carry bales of assorted new clothes, boxes of assorted new clothes, boxes of chines food and gas stoves from Beira to Harare. All the requisite clearances were conducted in terms of the Mozambican laws through our client's appointed Beira agent and was fully complaint.

Sometime last year ZIMRA introduced the E-Manifest electronic system which all the transporters of goods across the border are obliged to comply with. As a result of the language barrier (our client's official language is Portuguese) and since the E-Manifest system did not make provision for the Portuguese language, our client had no option but to engage local agents to assist it to apply for and establish its E-Manifest profile. Whenever our client's trucks carried containers through the Forbes border post, necessary assistance has always been procured from local agents who were from time to time identified by its Mozambican agents based in Beira and all went all.

Our client being a foreign based company entirely relied on the expertise and integrity of Zimbabwean agents to process all loads through its E-Manifest profile. It would customarily pay the requisite agency fees. Our client has always trusted and presumed that the Zimbabwean agents are fully complaint with Zimbabwean laws as well as ZIMRA requirements inclusive of the usual duty to declare the goods in carriage and payment of the duty involved.

Further, the payment of duty for goods in carriage has always been the client/importer's obligation. In this case duty was obviously going to be paid by the Harare based clients upon

being advised by the agent. The importers were at all material times ready to pay the assessed duty.

Despite the goods having been accurately described in the bill of lading as well as the invoices and same having been handed to the Zimbabwean agent, he without our client's involvement nor that of the importer proceeded to make a false and misleading declaration of the goods in transit. Our client is informed that he even went to the extent of creating false bills of lading which obviously is a criminal offence. Our client hopes that the said agent is being prosecuted both for the false declaration and the creation of fraudulent bills of lading.

2. **OUR CLIENT'S PLEA**

Our client thus pleads for the immediate release of its two trucks and trailers as well as the two containers. The seizures have resulted in massive loss of income for our client and an accumulation of costs since the containers are charged demurrage by the shipping lines on a daily basis.

Our client's core business is the transportation of the goods and it has always had them cleared lawfully both in Beira and on the Zimbabwean side through appointed agents.

Our client's capacity to administer the E-Manifest profile is compromised mainly due to the language barrier and that it has not received any training form ZIMRA. In future it hopes that ZIMRA may consider capacity foreign transporters through such training to avoid the resort to agents who are now proving to be unscrupulous and indeed criminal.

Our client's administration office is not fully computerized and consequently it could not effectively train its staff to administer the electronic E-Manifest profile. The only practical way was the engagement of Zimbabwean agents whom it presumed are not only law abiding but knowledgeable and honest. Our client is yet to fully recover from the massive destruction of its gadgets and relevant infrastructure from cyclone Idai. Our client and its drivers would not know what is loaded in the containers as a result of both the language barrier and the fact that the bills of lading are forwarded to the Zimbabwean agents by the Beira agents. At all times our client and its drivers presume that the agent makes accurate declarations as expected.

When the drivers entered Mutare Dry Port on the 26th May 2022 they had been given clearance information by the agent which they presumed were above board. Our client is unable to verify if the agent is duly registered or might be a mere runner operating under the armpits of a duly registered agent. It was not feasible for our client to distinguish a duly registered agent from a mere runner since these are engaged by its Beira agent directly.

Our client has not had any previous seizures of its trucks and containers and to date has had a clear record with ZIMRA.

3. **PREJUDICE**

Our Client continues to suffer the following irreparable prejudice:

a) Continued loss of income and a definite loss since the trucks remain seized and operational.
b) Rising demurrage costs of the containers which are owned by shipping lines.

c) Potential long-term loss of business from the client/importers whose goods have been seized as a result of damaged business goodwill.
d) Incurred inconvenience arising from the conduct of the Zimbabwean agent who represented himself/itself as an expert fully conversant with clearance requirements on the Zimbabwean side. Information gathered to date reveals that the agent is not even being prosecuted for his/her communal conduct.
e) Financial loss for not having committed any wrong doing.

4. **MITIGATION FOR RECURRENCE OF SUCH INCIDENTS IN FUTURE**
Our client has made a position to ensure that incidences of this nature will not recur through the adoption of the following measures:-
a) Capacitating its office with the requisite gadgets and ensuring internet connectivity at all times.
b) Facilitating the training of its staff on the use of E-Manifest electronic profile by reputable consultants in order to get rid of unscrupulous agents.
c) Ensuring that its Beira agents do business only with verifiable and professional Zimbabwean agents.
d) In the long term training its drivers in basic understanding of the English language and ensure that they are able to read and understand the bills of lading and cross check with any clearance papers or information.

5. **REQUEST**
In view of the above, we have been instructed to request, as we hereby do, that our client's aforementioned trucks, trailers and containers be released forthwith.

We sincerely hope that our client's request will be urgently considered.

We await your most urgent response.

**BERE BROTHERS**
**LEGAL PRACTITIONERS**
c.c. client."

The respondent's determination of the quoted appeal was set out in a letter dated 23 August 2022. I again reproduce the response. I deliberately do so for reasons that will be given in this judgement. The letter reads as follows:

"23 August 2022

Bere Brothers Legal Practitioners
C/O EDN Limitada
Suite 3 Manica Centre
118 Hebert Chitepo Street
Mutare

Dear Sir/Madam,

**VEHICLE USED FOR SMUGGLING OF GOODS: 1 x BEINBEN TRUCK HORSE REG# AAE341SF VIN# LBZ447DB3EA001859, 1 x 2009 TRIAXLE TRAILER REG# MA0399, VIN LSEJP394390014511: EDN LDA C/O COAST TO COAST TRUCKING (PVT) LTD – NOTICE OF SEIZURE NUMBER 009051L OF 01.06.2022; ON C7807 OF 26.05.2022 EDN LOGISTICS P/L**

Your letter of appeal to the Commissioner refers as per the subject matter above.

Please be advised that the facts of the matter and your grounds of appeal have been carefully considered. It has been noted that a false declaration on the manifest was made as solar panels when in the goods in the truck were clothes valued at ZWL$43 378 017.77 with duty at stake amounting to ZWL$42 131 883.31. Also take note that had a physical examination not been conducted the goods were going to be smuggles into the country prejudicing the state of the revenue.

You have stated that it was the Agent who produced the fake manifest and not the importer or transporter. Take note of the provisions of Section 26(2) of the Customs & Excise Act that stipulate that it is the transporter that is required to lodge the manifest after loading the goods. Accordingly, ZIMRA only issued the e-manifest profile password to the transporter.

In addition, Section 218(3) of the Customs & Excise Act, prescribes that;

"*Any person who appoints an agent to carry out any requirements of this Act on his behalf shall be responsible for any action of his agent while acting on his behalf and shall be liable to prosecution for any contravention of this Act committed by his agent while acting on his behalf*." As such, the transporter or importer cannot exonerate themselves from the action of their appointment.

In conclusion, it has been observed that the following sections of the Customs & Excise Act were contravened; Section 188, 38 and 174. As such, your appeal is not successful in this instance and therefore the vehicle and trailer remain forfeited to the State.

If you are not satisfied with this decision you may approach the Courts of Law for further consideration of your case.

Yours faithfully

Mutembo, P (Mr)
**FOR: COMMISSIONER CUSTOMS & EXCISE**"

In *casu*, the applicant has set out three grounds of review which I again reproduce. They are as follows:

"a. The respondent's decision to forfeit the applicant's trucks and trailers is grossly irregular, unreasonable and unjustified in that the respondent failed to consider that since the applicant is a transporter, it should have been ordered to pay fine in terms of the law and not forfeiture of its trucks and trailers.
b. The respondent's decision to forfeit the applicant's trucks and trailers is grossly irregular and reasonable in that the respondent failed to consider that the applicant was completely unware

that the clearing agent would make false declarations as he was issued with original Bill of Lading and Invoices but then proceeded to use his own fake documents to make declarations. The agent was not acting on behalf of the applicant in making false declarations as he was never issued with any fake or false documents by the applicant.

c. The respondent's decision to forfeit the applicant's trucks and trailers is grossly irregular and unreasonable in that the respondent released the containers that were carrying the goods but refused to release the trucks and trailers that were carrying the said containers. The trucks and trailers that were carrying the containers should have been released the same way the containers were released because both were carrying goods whose declarations were claimed to be false."

The respondent in opposing this application relied on an opposing affidavit deposed to by its regional manager Chabveka Marekera. He is of course the one who dealt with representations made by the applicant for the release of the trailer, trucks and containers. I should make a note that the respondent's affidavit raised two points *in limine*, the first relating to prescription and the second to a non-compliance with r 62(4) of the High Court Rules, SI202/2021.

In respect of the first point the respondent averred that the applicant ought to have instituted the proceedings within three months of the date of seizure of the trucks and trailers. It submitted that the last date for filing the claim was 2 September 2022. I doubt the correctness of the calculation for what it is worth. The correct calculations do not arise for debate because the respondent counsel wisely abandoned the prescription argument regard being had to the Supreme Court judgement in the case *Two Tap Logisics (Pvt) Ltd* v *Zimbabwe Revenue Authority* SC 3/23. In that judgment the Supreme Court per CHIWESHE JA clarified the confusion surrounding prescription of claims against the Zimbabwe Revenue Authority in relation to seizure and forfeiture under the Act. It clarified that a person who challenges the Commissioner General's decision to order forfeiture does so within eight months as provided for in s 196 of the customs and Excise Act, which section encompasses all causes of action, the exception being seizure which must be challenged within three months of the date of seizure in terms of s 193(12) of the same Act. When the respondent raised the point *in limine*, the Supreme Court decision aforesaid had not yet been rendered, it having been delivered on 12 January 2023, a month after the filing of the notice of opposition. The applicant's review application *in casu* was therefore timeously filed. The concession by the respondent's counsel was inevitable.

The next point of objection was that the review application was filed out of time in violation of r 62(4) of the High Court Rules 2021. In terms of the provisions of the cited rule, a review ought to be filed within eight weeks of the date that the illegality or irregularity complained of occured.

The application was filed a month and a day out of time. The respondent's counsel consented to the upliftment of bar. The applicant averred that it delayed to file the application as it awaited the expiry of the sixty day notice of intention to sue as required by s 6 of the State Liabilities Act [*Chapter 8:15*].

It is noted that the court has power to extend the eight week period by which review proceedings should be filed. The calculation of periods of prescription regard being had to the *Two Tap Logistics Supreme Court* case (*supra*) and r 62(a) of the High Court Rules must be read together with the provisions of s 26 of the High Court Act which reads as follows:

> "Subject to this Act and any other law, the High Court shall have the power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunal and administrative authorities within Zimbabwe."

To the extent that the review powers are exercised by the High Court subject to any other law, then r 62(4) would have to be construed to take into account any qualifying enactments and the court would therefore be justified acting in terms of the proviso to r 62(4) to find good cause for the applicant's failure to meet the eight week rule because the party bound to the eight week rule, had to wait to comply with the requirements of the State Liabilities Act.

On the merits, the respondent averred that the applicant was simply narrating events which happened in the absence of the deponent to the founding affidavit. The respondent averred that there should have been filed affidavits of persons who had first-hand information on what transpired. The agent did not swear to an affidavit nor did the driver. It was averred that even if the applicant did not know the agent involved, it was the applicant's driver who lodged an E-Manifest that showed the description of goods on board the trucks and trailers as bond paper. The respondent averred that the agent concerned even if he forged papers as well as the driver were the applicant's agents and as such, that the applicant was vicariously liable for the actions of its agents. The respondent was especially critical of the fact that the driver manifested the cargo incorrectly. It was averred that the applicant did not exercise due diligence because the applicant and its driver ought to have known that the law required that a transporter should correctly manifest the goods that it was carrying.

The deponent averred that the Commissioner General had acted in terms of the law with regards the forfeiture of the applicant's vehicles because they were used to commit offences thus

making the vehicles liable to forfeiture. It was averred that the respondent had through its Commissioner General properly exercised her discretionary power in terms of s 188 of the Customs and Exercise Act to forfeit the vehicles.

The applicant in reply averred that since it was admitted that the agent a Mr Beven who made a false declaration and was on a frolic of his own, the applicant's averment that it was unware that the agent had gone on a frolic of his own must be accepted because in any event the agent had been issued with correct documents by the applicant. In relation to the allegation that the founding affidavit consisted of hearsay evidence, the applicant averred that the deponent to the founding affidavit was its operations manager who was monitoring the vehicles' movements and receiving reports of what was going on. It is permissible for a person who has knowledge of facts to swear to a founding affidavit. I also took note that the deponent to the opposing affidavit was also not on the ground and relied on facts given to him. He did not directly deal with the trucks. The criticism as to the competence of the deponent to the founding affidavit would apply with equal force to the respondent because they both relied on information given to them by their officials or employees. The respondent denied that its drivers are the ones who lodged the e-manifest and reiterated that it was the agent in Beira who had handled the loading and manifesting of the goods. The applicant averred that it attached the bills of lading describing the goods and that their authenticity were not denied. It averred that the decision to forfeit the trucks was grossly unreasonable in the circumstances. It averred that the respondent acted "injudiciously, unreasonably and unjustifiably" by only releasing the container and not the trucks and trailers yet the trucks, trailers and container all carried the undeclared goods.

I have indicated that I found it necessary to copy the correspondence between the applicant's legal practitioners and the respondent because they at best taken together with the notices of seizure are the documents which evidence the record of the "proceedings" if I may call them such. The court rules provide for the respondent whose proceedings are brought on review o prepare and lodge a record of the proceedings and two typed copies with the Registrar of the High Court, within twelve days of being served with the review application. No such record was lodged by the respondent. The respondent was required to do so. It does not matter that there could be two or three letters exchanged between the parties. The record should still be prepared of the complete correspondences and other documents if any and clearly marked so. The filing of the full record

furthers not just the applicant's right of access to the court by ensuring that the court has all relevant information before it but ensures that the court is put in the clear of the full proceedings which it is asked to review. The record therefore should contain all the material which the court or quasi administrative body or tribunal has had regard to in coming up with a decision on a matter. It is not permitted for parties to compose a case for review in the founding and answering affidavit as done in this case. A perusal of the founding affidavit shows that several annexures were attached thereto without the applicant even alleging that they formed part of the documents which exchanged hands between the parties. The respondent would similarly not be permitted to set out an account of what transpired. Review proceedings by way of application are different from applications commencing claims brought before the court. With a review there must be completed or going proceedings which are then subjected to review by the court. A review therefore concerns itself with process and regularity which process is determined upon the consideration of the record and reasons given by the decision maker. The body whose decision is brought on review is held and bound to the reasons given at the time that the decision is made.

In *casu*, it is not for the court to prescribe the exact form that the respondent's record may take. In the absence of rules which prescribe what the record should be constituted by, then the nature and form of the record should be a matter of common sense and logic. As I have already indicated, once proceedings are brought on review, then it must follow that the review court, because its primary function is to consider the process and regularity of proceedings requires that all facts, documents and other information which were placed before the body whose decision is brought on review be included to form the record.

The failure to comply with the strict provision to avail the record of proceedings has however not resulted in my failure to determine the application. The court has a discretion to condone the non-compliance with its rules. In *casu*, I considered that in fact, the determination of the Regional Manager to whom representations were made was the decision which was then further determined by the Commissioner of Customs and Excise on appeal. The Regional Manager simply stated that he had considered the facts carefully but noted that the trucks and trailers had been used to remove goods which are liable to seizure. He stated that the goods were not accounted for in terms of the Customs and Excise Act. He ended his decision by stating that:-

> "I regret to advise that the truck and trailer cited on Notice of Seizure number 009051L of 01 June 2022 shall not be released from seizure but shall be forfeited to the State in due course without any further reference to you."

The same is stated of the other truck and trailer seized under Notice of Seizure 009056 L. Significantly the facts said to have been considered were not stated. That aspect remained in the mind of the Regional Manager. The only facts considered and written down was that the trucks and trailers carried the goods which should have been accounted for in term of the Act. The explanations of the applicant were not recorded or reference made to them. If they were considered, then that did not appear apparent in the letter. There was no flow in the decision. It is a gross irregularity to fail to record reasons for a decision. See *S* v *Makawa & Anor* 1991 (1) ZLR 142 (SC) at 146 (D – E).

In relation to the appeal in relation to Notice of Seizure 009051 L made to the Commissioner of Customs and Excise, again the determination on appeal simply indicated that the Commissioner had "considered" "carefully" the facts of the matter and the ground of appeal. He noted that a false declaration was made that the consignment consisted of solar panels yet the goods were in actuality clothes. He noted that had a physical examination of the trucks not been undertaken, the clothes would have been smuggled into the country to the prejudice of the State in revenue. In essence the Commissioner must have considered that there had been an attempted smuggling. He also indicated that he had considered the provision of s 26(2) of the Act which provided that the transporter is required to prepare and lodge the manifest of goods carried by his vehicle after loading the goods and that it was the transporter who was issued with the E-manifest password so he would send the electronic copy of the manifest ahead of arrival at the border.

The Commissioner then referred to s 218(3) of the Act which states:-

> "Any person who appoints and agent to carry out any requirements of this Act on his behalf shall be responsible for any action of his agent while acting on his behalf and shall be liable to prosecution for any contravention of this Act committed by his agent while acting on his behalf."

The Commissioner after quoting the above provision then continued to conclude:-

> "As such, the transporter or importer cannot exonerate themselves from the actions of their appointed Agent.
> In conclusion, it has been observed that the following sections of the Customs and Excise Act were contravened, sections 188, 38 and 174. As such, your appeal is not successful in this instance and therefore the vehicle and trailer remain forfeited to the State.

> If you are not satisfied with this decision you may approach the Courts of Law for further consideration of your case."

In reading the determination of the Commissioner, other than stating that a false declaration on the manifest was made to state that the goods carried were solar panels yet on physical examination the goods were found to be clothes, there was nothing stated to deal with the specific grounds of appeal raised by the applicant. The Commissioner appeared to have accepted the applicant's explanation that it engaged an agent who produced the fake manifest. The Commissioner having so accepted the positon then found that s 218(3) of the Act, imputed vicarious liability for the agents' transgressions on the transporter or importer. The provision of s 218(3) however do not create strict liability on the part of the agent's principal or the agent. The agent must be shown or proved to have been acting on behalf of the principal in the sense that the agent was carrying out the mandate given and not some other mandate. As an example and with reference to smuggling as provided in s 188 of the Act, KAMOCHA J in the case *Chamu Ndava* v *Zimbabwe Revenue Authority* found that although the provisions of s 188 of the Act were peremptory (as indeed is the case with the provisions of s 218(3), the courts have adopted the approach that with statutory offences, strict liability will only be implied where the offence or violation of a statute relates to public welfare offences of which smuggling was not. By the same reasoning the provisions of s 218(3) do not fall within the realms of a public welfare offence. Accordingly, there would have to be alleged and proved, intention or culpa on the part of the applicant as principal. In the *Ndava* judgement (*supra*) KAMOCHA J the learned judge stated at p 4 of the cyclostyled judgement:-

> "……it must be established that there was intention or culpa on the part of the owner for liability to attach. In *casu*, there is no doubt that the applicant had no knowledge of the commission of the crime which led to the seizure of his vessel. Neither was he negligent in any way.
>
> Finally I wish to emphasize that although the provisions of sections 187 and 188 of the Customs and Excise are indeed peremptory, they do not create a strict liability offence."

For easy comparison in order to understand the parallel which I have drawn between the provisions of s 218(3) and s 188 which KAMOCHA J interpreted, the provisions which the learned judge considered were these:-

"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
   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."

The use of the word "shall" in the quoted provision per the dicta of KAMOCHA J does not create strict liability. It is so with the provisions of s 218(3).

Reverting to the applicant's grounds of review, the applicant submitted in its first ground of review that the respondent's decision be found to have been irregularly reached and that it was unreasonable because the respondent failed to consider the applicant's representations to the effect that the agent used his own prepared fake documentation to make the false declaration without the knowledge of the applicant and that what the agent did, did not fall within the mandate given to him. The applicant submitted in the representations that the agent should be prosecuted in his personal capacity.

In my view the ground of review has substance. The respondent's Commissioner was required to properly or correctly interpret the provision of s 218(3) and consider and accept or reject the applicant's explanation which averred lack of culpa and/or intention and denial of vicarious liability. A valid decision by the respondent could only be reached upon the application of a lawful process by which the decision was reached. The failure by the Commissioner to consider the applicant's defence challenging the application of the principle of strict liability and vicarious liability flawed the decision making process so that it can safely be held that the Commissioner did not apply his mind to issues which he was required to determine.

It is trite that every person has a constitutional right in terms of s 68 of the Constitution to administrative justice which is lawful, reasonable and procedurally fair. The Administrative Justice Act, [*Chapter 10:28*] gives effect to the provisions of s 68 of the Constitution. In terms of s 3(1)(a) of this Act, an administrative authority is required to act lawfully, reasonably and in a fair manner. The Constitutional Court in the case of *Margaret Zinyemba* v *The Minister of Lands and Rural*

*Resettlement & Anor* CCZ 3/2016 underlined the right given in s 68(1) of the Constitution which for posterity reads as follows:

> "68. Right to Administrative Justice
> 1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

The Constitutional Court noted that where the remedy sought by a person who alleges an infringement of s 68 of the Constitution relates to matters covered in the Administrative Justice Act, then the principle of subsidiarity had to be respected and the complaint had been brought in terms of the subsidiary Act.

In *casu*, the respondent's failure to properly consider matters which he ought to have considered amounted to a gross procedural irregularity which cannot be regularized and vitiates the decision reached. An irregular procedure remains so. See *S* v *Mashinini* 2012 (1) SACR 604 @ para 10 and cannot be acquiesced to.

The respondent dealt with the representation for the release of the other truck seized under Notice of Seizure Number 009056 L separately and a different officer for and on behalf of the commissioner dealt with the appeal. In relation to the goods the Commissioner indicated that she had "carefully" "considered" the "grounds of appeal" by the applicant. She noted that a declaration had been made that the consignment carried on the truck was bond paper yet upon examination it turned out that the consignment consisted of an assortment of Chinese food and gas stoves. The Commissioner noted that had there been no physical examination of the trust, the goods would have been smuggled. It appears that the Commissioner in effect noted that there was an attempted smuggling. The Commissioner determined that the applicant's explanation that it suffered a language handicap hence its reliance on agents was dismissed as a handicap on the basis that the applicant successfully applied for an E-manifest profile which involves a process done in the English language. Just as an aside, it must be noted that the applicant being a company must perforce use agents including the making of the application for the E-Manifest profile.

The real issue which arises in the decision was as in the other decision (*supra*) the misapplication and misinterpretation of s 218(3) of the Act. The Commissioner in a replica of the decision relating to the Notice of Seizure 009051 L quoted ss 26 and 218(3) of the Act and stated:

> "You have stated that the Agent who produced the fake manifest and not the importer or transporter. Take note of the provision of s 26(2) of the Customs and Excise Act that stipulate that it is the

> transporter that is required to lodge the manifest after loading the goods. Accordingly ZIMRA only issued the E-manifest profile password to the transporter.
>
> In addition, s 218(3) of the Customs and Excise Act, prescribes that:-
>
> "Any person who appoints an agent to carry out any requirements of this Act on his behalf shall be responsible for any action of his agent while acting on his behalf and shall be liable to prosecution for any contravention of this Act, committed by his agent while acting on his behalf."

As such, the transporter or importer cannot exonerate themselves from the actions of their appointed agent. (own underlining)

The conclusion underlined is obviously erroneous because of the misinterpretation of the law I have already discussed the provisions of s 218(3) which discussion and conclusion reached is incorporated by reference. The decision of the Commissioner was vitiated by the irregularity of a failure to interpret the law leading into a procedural irregularity of failure to consider the applicant's submissions made to avoid liability. The same criticisms which I made in respect of the determination made in regard to Notice of Seizure number 009056 L which decision must be set aside for procedural irregularity and a failure to interpret the law correctly rendering the decision an unlawful or invalid one applies to the ruling on Notice of Seizure 009051 L

The applicant also submitted that the decision of the Commissioner to forfeit the trucks was unreasonable because there was no justification given for the release only of the container which carried the goods whilst forfeiting the truck which carried the container. In answer to this criticism, the deponent to the opposing affidavit being also the officer who released the container only and forfeited the truck carrying the container did not explain the anomaly. He did not do so in the letter of release of the container. It must be noted that the applicant made one appeal or representation which sought the release of the two trucks, two trailers and container. The release of the container only implied that different considerations applied to the container release. However the Commissioner did not state them. The applicant averred that there was no justification given for treating the trucks differently let alone separately from the container. There is substance in this submission because whilst the Commissioner has a discretion to release goods from seizure or forfeiture, such discretion must be exercised judiciously taking into account all relevant facts and circumstances of the case. Once the Commissioner had decided to treat the offending vehicles separately and to release the container only and refuse to release the trucks of

which the container was part, full reasons should have been given for the distinction. A failure to do so again implies that the Commissioner did not fully apply her mind to the facts thus again vitiating the decision.

The other ground of review to the effect that the respondent should have considered the option of a fine as opposite to settling for forfeiture only becomes academic in the light of the decision I have come to that the decisions of the respondent be set aside for irregularity. It must however be noted that it is the jurisprudence followed by courts in this country that whenever a conduct prohibited by statute provides as punishment for the violation, several options of punishment, the correct approach is to first consider the lesser of the penalties and only impose the more severe penalty where the facts of the case make the imposition of a lesser penalty inappropriate.

The applicant has prayed for an unconditional order of release of the trucks and trailers. Such relief is inappropriate because it is a fact that the applicant's trucks carried goods differently described on the manifest presented to the respondent from the actual goods carried on the trucks. The applicant also submitted that the trucks ought to have been released on the same conditions as the container, which was upon payment of a fine and warehouse rent. It seems to me that the correct order to make is one that refers the matter back to the respondent to release the goods upon imposition of an assessed fine and payment of warehouse rent which must however be for the period from seizure of the trucks to the date of the decision of the respondent which has been set aside by his judgement.

The remaining issue is the incidence of costs. The court has a discretion on costs and is normally guided by the principle that costs follow the event. However, the event is that there has only been partial success for the applicant since the release of its forfeited trucks cannot be unconditional. The applicant is not without blame. In such a case an appropriate order of costs should be that each party bears its own costs. The application is disposed as follows:

**IT IS ORDERED THAT**:

1. The respondent's decisions to forfeit the applicant's two trucks and trailers, namely:
    1.1 Beiben Truck, registration number AAE341SF, Chassis Number LBZ44TDB3EA001859 and 2009 JPSSOA3D Semi-Trailer registration number

MA0399, Chassis Number LSEJP394390014511 as described in Notice of Seizure number 009051 L dated 1 June 2022; and

1.2 Howo Sinotruck registration number AA1510SF, Chassis Number LZZ5CLSB0DHD232941, and 2012 DPS40WD3B Semi-Trailer registration number AA047MN Chassis Number LSELB3947C0019323 as described in Notice of Seizure 009056 L dated 1 June 2022 are hereby set aside.

2. The respondent be and is hereby ordered to release the applicant's said trucks and trailers from forfeiture within seven (7) days of service of this order subject to the applicant paying an assessed fine by the respondent including any related charges for storage calculated from the date of seizure to 24 August, 2022 being the date of the last decision of the respondent which has been set aside by this order.
3. Each party bears its own costs.

*Tavenhave & Machingauta Legal Practitioners,* applicant's legal practitioners
*Zimbabwe Revenue Authority Legal Services Department*, respondent's legal practitioners