TWOTAP LOGISTICS (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 24, 28, 29 & 30 June and 6 July 2021 & 7 July 2021

Opposed Application – Preliminary Objection

T. Tembani, for the applicant
T.L Marange, for the respondent

CHIRAWU-MUGOMBA: On 24 June 2021, I reserved judgment in this matter to consider the issue of prescription that had been raised by the respondent. This was after the court had dismissed the applicant's point in *limine* that the opposing affidavit to the respondent's notice of opposition had not been properly commissioned. It is trite that a court before proceeding into the merits must deal with a point in *limine.* See *Gwaradzimba N.O* v *CJ Petron & Co (pty) Ltd,* 2016(1) ZLR 28 (S).

For purposes of this judgment, it is prudent to outline only the critical facts that will enable the court to make a decision on prescription. The respondent issued a notice of seizure of the applicant's truck and tanker dated 18 July 2020 reference number 00348L. By way of a letter dated 27 July 2020, Messrs Gonese Ndlovu Legal Practitioners addressed a letter to the Station Manager, ZIMRA, Forbes Border post on *inter alia,* on the above captioned notice of seizure. The Regional Manager responded by way of a letter dated 18 August 2020 stating that the tanker trucks and petroleum products therein would remain impounded and would be forfeited to the state. By way of a letter dated 12 October 2020, a different firm of legal practitioners wrote to the Commissioner of Customs and excise of the respondent specifically on the notice of seizure issued to the applicant. This was an appeal from the decision to keep the seized items impounded and forfeited. The respondent addressed the appeal by way of a letter dated 11 January 2021.

In its notice of opposition, the respondent raised two points in *limine.* The first point was that the matter has prescribed. It averred as follows. It is not in dispute that the goods were seized under a notice of seizure issued on 18 July 2020. The notice on the face of it

indicates the remedies available. The applicant elected to make representations to the Station Manager as to why the penalties that can be imposed should not be so imposed. That route did not yield any results. The applicant could also have instituted proceedings for the recovery of goods from the Commissioner General or for the payment of compensation in respect of the goods which had been disposed within three months from the date of the notice of seizure. The application in *casu,* was filed on 2 March 2021 well outside the window period. The second objection was that the applicant had not given notice to ZIMRA as required by section 196(1) of the Customs and Excise Act [Chapter *23:02*] (the act) which requires a period of 60 days' notice before commencement of civil proceedings. The applicant only wrote a letter dated 14 January 2021, wherein it was asking the respondent to suspend any forfeiture proceedings pending the institution of the present matter. The letter cannot be taken as notice in terms of the act. If the court were to find that the letter constitutes notice, then the present matter has been prematurely filed since the applicant neglected to wait for the 60 days to lapse.

In addressing the points in in *limine* raised by the respondent, the applicant made the following averments. The applicant served the respondent with notice to institute proceedings on 14 October 2020. The applicant had the option of approaching the court on or before 17 October 2020 but it was premature since it had to first exhaust all internal remedies. The respondent must also take the blame since it delayed in responding to internal appeals.

Respondent's submissions on preliminary issues

In its heads of argument, the respondent indicated that it was abandoning the 2nd preliminary objection in relation to s 196 (1) of the act. It made the following submissions both in the heads and orally. The applicant had a period of three months within which to institute proceedings for the recovery of the truck and the tanker as provided for on the face of the seizure notice. The exhaustion of internal remedies did not bar applicant from approaching the court for relief. The applicant had conceded that it should have approached the court at least by 17 October 2020. The applicant was in violation of s193 (12) of the act. Reference was made to *Murphy* v *Director of Customs,* 1992(1) ZLR 28 @32, *Harry* v *Director of Customs,* 1991(2) ZLR 39(H) and *Dube* v *ZIMRA,* HB-2-14. The 60 days' notice in terms of s 196(1) should be read to be within the three months i.e. 90 days within which the applicant ought to have filed civil proceedings for the recovery of the seized goods. The eight months' time period provided for in s 196 (2) to institute proceedings should not be read

in isolation. This is because s 196 (2) is made subject to the provisions of s 193 (12) that make provision for the three months period. There is no provision anywhere in the law that states that the applicant had to first exhaust internal remedies before instituting action.

The applicant made the following submissions. Notice of the instituting of legal proceedings was given on 14 October 2020. The applicant had an option to institute proceedings in this honourable court on or before 17 October 2020 but it had to exhaust internal remedies. In terms of issuing civil process, the eight months period was affected by the various Practice Directions issued in 2021 that impacted on the reckoning of days. This is due to the fact that the filing of process was limited.

In my view, the legal issues that arise are these?

1. What is the meaning of instituting legal proceedings within three months from the date of the cause of action?
2. Is there a requirement that internal remedies should be exhausted before instituting civil proceedings?

Section 196 of the act makes provision for the 60 days' notice period and the eight months period within which to institute proceedings 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*].
>
> (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.

Section 193 broadly deals with the procedure as to seizure and forfeiture. Specifically s 193 (12) states 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 or 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.

In *casu,* the time lines are very clear and have raised no dispute hence there is no need to establish them through oral evidence as contended in *Brooker* v *Mudhanda and anor, Pearce* v *Mudhanda and anor*, 2018(1) ZLR 33. The notice was given on 18 July 2020 and the three months lapsed on 17 October 2020.

In dealing with the then provision on forfeiture and seizure, (s179(6) of the then Customs and Excise act [*Chapter 177]* in *Murphy* v *Director of Customs and excise,* 1992(2) ZLR 28, the headnote reads, *"In terms of s176 (9) of the Customs and Excise Act, Chapter 177, a person wishing to recover goods which have been seized by Customs must institute proceedings to recover his goods within three months of the seizure. As the plaintiff had failed to bring his proceedings within the time period specified, his claim was prescribed.* What is critical to note in that case is the observation by *SMITH J* that the 3 month period was extended to eight months – see s 196(2). It is clear that the cause of action is the notice of seizure. To that extent, reliance by the respondent's legal practitioner to the three month period in that case is out of context.

In *Machacha* v. *ZIMRA,* HB-186-11, NDOU J had this to say,

> 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 *Chigonga* v *ZIMRA,* HH-663-17, NDEWERE J stated as follows;-

> 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 *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

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. There is nothing warranting departure from the general rule that costs should follow the cause especially in non-constitutional matters.

DISPOSITION

It is ordered as follows:-

1. The respondent's point in limine on prescription is upheld.
2. The application is dismissed with costs.

Muhlolo Legal Practice, applicant's legal practitioners