TANKE HAULAGES (PVT) LTD
versus
ZIMBAWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 4 March & 13 April 2022

Opposed Application

P Tererai, for the applicant
E Mukucha, for the respondent

ZISENGWE J: The applicant, a South African registered transport company, seeks the release of one of its haulage trucks seized by officials of the respondent. The said truck, consisting of a mechanical horse and two trailers ("the truck"), was impounded in Masvingo *en route* from South Africa. The seizure took place after a routine roadblock search conducted on it yielded a contraband of smuggled goods comprising 31 refrigerators, 10 electric stoves and a few other items ("the smuggled goods") over and above the consignment of goods that had been officially declared at the port of entry. The latter goods were referred to as "novawood" boards

Applicant's contention in the main is that it cannot be held accountable for the transgressions of its employee, namely the driver of the truck, whom it claims unbeknown to it, embarked on a frolic of his own in loading and smuggling those goods. It averred that efforts to engage the respondent for the release of the truck proved fruitless as the respondent's Regional Manager levied a penalty of ZWL 1 825 904.61 which sum represents the amount the revenue authority stood to be prejudiced on account of the failure to declare the smuggled goods in addition to storage charges as a pre-condition for the release of the truck. This was over and above the duty and penalty levied for the smuggled goods.

Applicant's appeal against the decision Regional Manager to the ZIMRA's Commissioner was unsuccessful as the latter rejected the assertion that it (i.e., applicant) was unaware that the driver had loaded and smuggled those additional items.

Disgruntled with that outcome the applicant launched the present applicant seeking an order in the following terms;

"It is hereby ordered that:

1. Respondent unconditionally release applicant's mechanical horse Registration JC 10RC GP and trailers Registration Number JV 32 KRGP/ JV 33km GP held under notice of seizure No. 04777L forthwith.
2. That Respondent pays costs of suit on legal practitioner and client scale.

The application stands sternly opposed by the respondent whose position is that the seizure was justified and that it (i.e., respondent) did no more than what it was legally entitled to do in terms of section 188 of the Customs and Excise Act, *[Chapter 23:20]* ("the Act). According to respondent, the said section permits the seizure of any vehicle used in the conveyance of goods liable for forfeiture. More pertinently the respondent resists the application on the basis that the applicant has dismally failed to demonstrate that it was unaware that the driver had embarked on what amounted to a frolic of his own in spiriting into the country the smuggled goods without having them officially declared at the port of entry for duty purposes.

The respondent, however, raised the defence of prescription as a preliminary point which it believes is potentially dispositive of the matter without even considering the merits. In this regard, it is the respondent's contention that section 193 (12) of the Act provides that a person aggrieved by the seizure of goods under the Act is required institute any claim for the recovery of such goods within three months of the giving or publication of such notice of seizure. Therefore, according to the respondent, the notice of seizure of the trucks and trailers having given on 19 May 2021, it was incumbent upon the applicant to institute the current application on or before the 20 August 2021 which it failed to do. The applicant filed the present application on 7 September 2021, and as far as respondent is concerned, the application was some three weeks out of time.

The applicant mounted a doubled pronged response to this preliminary point. Firstly, it relied on section 196 (2) of the Act which is a general provision for the time frame within which

any contemplated legal proceedings against the respondent must be instituted. Secondly, it contended that in any event the running of prescription was interrupted by the Chief Justice's Practice Direction 7 of 2021 issued to give effect to the government's Covid-19 pandemic induced National lockdown.

I will deal with each of these in turn. The crisp issue for determination with regard to the first leg of respondent's contention is whether the period within which to institute proceedings for the recovery of seized goods is 3 months from the date of seizure as provided in section 193 (12) of the Act or it should be construed as 8 months as provided for in section of section 196 (2) of the Act.

Section 193 (12) of the Act provides as follows;

"Subject to section one hundred and ninety -six, the person from which 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 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);

(c) within three months of the notice being given or published in terms of subsection (11), after which no such proceedings may be instituted.

Section 196 on the other hand provides as follows;

196 Notice of action to be given to officer

(1) no civil proceedings shall be instituted against the State, the Commissioner or any 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 bought within eight months after the cause thereof arose, and if the plaintiff discontinues the action or if judgement 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 remedy for the same as any defendant has in other cases where costs are given by law.

This particular issue needs not detain anyone, the interpretation which applicant seeks to give to the above section is insupportable from a reading of the wording of these two sections. Section 196 is a general provision which governs the time frame for the institution of legal proceedings against the respondent in matters other than for the recovery of seized goods. Section 193 (12) on the other hand is a specific provision dealing with the time frame that must be obeyed for recovery of seized goods. The latter provision admits of no ambiguity. It clearly provides that a claim for the recovery of goods seized must be instituted within three months of the date of the giving or publication of the notice of seizure.

In *Patel v Controller of Customs & Excise* 1982 (2*)* ZLR 82 (HC) GUBBAY J (as he then was) extensively dealt with the relationship between seizure of an item liable to forfeiture and its possible subsequent forfeiture. Pertinently, he upheld the special plea of prescription in instances where the suit for the recovery of seized items was instituted outside the 3 months stipulated in the Act. The Controller had entered a special plea in bar averring that plaintiff's action was prescribed not having been bought with 3 months after the cause of action arose, which cause of action had arisen the articles were seized. The court agreed with him and upheld the special plea of prescription.

The ratio *Patel v Controller of Customs & Excise* (supra) was followed in *Harry v Director of Customs & Exercise* 1991 (2) ZLR 39 (HC); *Murphy v Director of Customs & Exercise* 1991 (2) ZLR 28 (HC) and *Machacha v Zimbabwe Revenue Authority* HB 186/11. In *Harry v Director of Customs & Exercise* (supra), for example, the court upheld the defendant's plea in bar contending that plaintiff's action for the recovery of two typewriters seized by the defendant was barred in that it had not been brought within three months of the date of the delivery of the notice of seizure.

Accordingly, therefore, in the instant case, the notice of seizure having been given on 19 May 2021 and the current application having been instituted only on 7 September, it would ordinarily have been deemed prescribed as it was some three weeks out of time. That would have

spelled the end of the road for the applicant, that is but for the provisions of the Chief Justice Practice Direction 7 of 2021.

Practice Direction 7 of 2021 (which amended Practice Direction 6 of 2021) issued by the Chief Justice on 28 July 2021, had the effect of not only regulating court operations during the extended level IV Covid-19 induced National lockdown period, but also interrupted the running of *dies induciae* and prescription during that period. The rationale being that courts, as with virtually all government institutions and private businesses alike, (except these deemed essential) were closed to the public to stem the tide of the spread of Covid-19.

Paragraphs 3 and 10 thereof spoke directly to this cause, and read as follows:

> ***"Court Operations***
> *3. With effect from 29 July 2021, the filing of new cases, process, documents, pleadings and papers shall be suspended for a period up to 19 August 2021, unless the period is earlier extended or revoked.*
>
> ***Dies Induciae/Prescription***
> *10. Any act required by the rules to have been done during the period of the lockdown within a specified period of time, shall be done time limit calculated from the 19th of August 2021.*

Impliedly, therefore, the three months referred to in section 193 (12) of the Act were, in the context of the current application, deemed to have started running from 19 August 2021. Suffice it to say that the application was therefore timeously filed.

There was a half-hearted attempt on the part of respondent's counsel to impugn the authority of the Chief Justice to issue Practice Directions whose net effect is to interrupt the running of periods of prescription. The argument in this regard was that a Practice Direction being subsidiary legislation cannot purport to override provisions of primary legislation. That argument cannot find traction. The national lockdown was a governmental response to an existential threat brought about by the COVID-19 pandemic. The Practice Direction was merely a judicial mechanism to implement, the national lockdown in the context of court operations. To set aside the Practice Direction, the respondent (which incidentally is an organ of state) must first seek a declaration of the nullity government's national lockdown itself.

Equally untenable was alternative argument by respondent's counsel that the applicant ought to have brought this application on an urgent basis ostensibly to circumvent the operation of

Practice Direction 7 of 2021. There is nothing urgent about this application to clothe it with the requirements of urgency. Further, it would have been unconscionable (and counter-intuitive) for the applicant to falsely characterize the applicant as urgent in a bid to escape the consequences of Practice Direction 7 of 2021. Counter -intuitive in the sense that it had nothing to gain by falsely claiming that the application was urgent. In any event applicant in the interim was pursuing internal remedies for the release of its truck.

In summation therefore, I find that the running of the three months prescription period stipulated in section 193 (12) of the Act was therefore interrupted by the operation of Practice Direction 7 of 2021. The application was therefore instituted timeously and the point *in limine* is hereby dismissed.

ON THE MERITS

During oral arguments in court, part of the dispute revolved around the propriety of the seizure by officials of the respondent, of a motor vehicle used in the conveyance of smuggled goods other than in the course of criminal proceedings. A reading of the relevant provisions of the Customs and Excise Act reveals that respondent's officers are indeed empowered to so seize such a vehicle or vessel.

The relevant portions of section 193 of the Act are as follows;

193 Procedure as to seizure and forfeiture.

(1) *Subject to subsection (3),* ***an officer may seize any goods, ship, aircraft or vehicle (hereinafter in this section referred to as the articles) which has reasonable grounds for believing are liable for seizure*** {emphasis added}

(2) In this section

...

...

"Liable to seizure" in relation to articles, means articles

(a) liable to forfeiture under this Act or any other law relating to custom and excise; or

(b) the subject matter of any offence under or a contravention of any provision of

(i) this Act or any other law relating to customs or excise; or

(ii) any enactment prohibiting, restricting or controlling the importation or exportation thereof;

notwithstanding the fact that no person has been convicted of such offence or contravention.

The above provision is sufficiently wide in its ambit to authorize the seizure by respondent of any article that can potentially be forfeited be it under customs or excise Act (this includes potential criminal proceedings) or under any law.

That a transporter who avails his motor vehicle (or other mode of conveyance) for the smuggling of goods is liable for criminal prosecution under the Act is undisputed. What would therefore call for consideration in such criminal proceedings is absence (or otherwise) of knowledge on the part of such a person that his vehicle was used for smuggling purposes. Section 188 (2a) of the Act reads;

"Any person who makes available his or her ship, aircraft or vehicle for use by another person for the removal of goods referred to in subsection (2) (a) or (b) shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding one year or to both such fine and sum imprisonment, unless he or she proves that he or she was unaware that the ship, aircraft or vehicle would be so used.

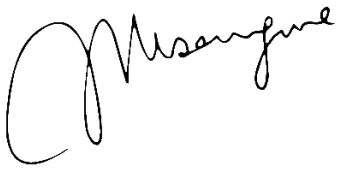
As indicated right from the onset, the applicant's position is that it was unaware that the truck in question was used by the driver to smuggle goods across the Beit-Bridge frontier – hence it should not be held accountable for the driver's transgressions in smuggling the stoves, refrigerators and other items.

The absence of the driver's statement confirming that he indeed embarked on a frolic of his own in loading and transporting the smuggled goods is quite telling. The applicant took a giant leap of faith by trying to discharge the onus reposed on it to demonstrate that it was unaware of such irregular importation of the goods by its mere its mere *ipse dixit*.

Furthermore, the respondent makes the pertinent point that the sheer quantity of the smuggled goods relative to the declared goods, on the face of it, is such as to negate the notion of the driver having embarked a frolic of his own. Mindful of the onus on it, the applicant should have gone beyond merely claiming lack of knowledge of the driver's supposed misdeeds. For

instance, supporting affidavits (accompanied by relevant supporting documentation) by persons who oversaw the loading of the Novawood boards are conspicuous by their absence.

In the final analysis therefore, I do not believe the applicant has managed to establish that it is entitled to the release of the truck and accordingly the application is hereby dismissed with costs.

ZISENGWE J 

Tererai Legal Practice, applicants' legal practitioners
Zimbabwe Revenue Authority Legal Services Division, respondent legal practitioners