LEAHOLM ENTERPRISES (PVT) LTD

Versus

ZIMBABWE REVENUE AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 AUGUST, 5 & 8 SEPTEMBER 2011

R Ndlovu with Director of Application (Mr Howard) for applicant
P. Ncube with Miss S. Ncube for respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of the Final Order sought

That you show cause to this honourable court why a final order should not be made in the following terms:

1. The respondent's decision to detain the applicant's consignment of used wagon monoblock wheels under Bills of Entry numbers E3415, E3451, E3449, E3445 and E3450 at Beitbridge border post on the 18th August 2011 to and is hereby declared unreasonable and unfair and therefore in breach of section 3 of the Administrative Justice Act [Chapter 10:28] and is set aside.
2. The respondent be and is hereby ordered to pay costs of suit on an attorney and client scale.

Interim Relief granted

Pending the finalization of this matter, applicant be and is hereby granted the following relief.

1. The respondent be and is hereby ordered to forthwith process the customs clearance and release the applicant's consignment of used wagon monoblock wheels detained at Beitbridge border post under Bills of Entry numbers E3415, E3451, E3449, E3445 and E3450."

The salient facts of this matter are the following. On or about the 15th July 2011, the applicant was awarded a tender to purchase four hundred (400) tonnes of monoblock wheels by the National Railways of Zimbabwe and by virtue of that award, purchased the same.

Thereafter, the applicant sold the monoblock wheels to a South African company called Hariot Exports (Pty) Limited and then sought to export the same. It obtained a licence to export the said wheels from the Ministry of Industry and Commerce dated 20 July 2011 and Release Order from the respondent dated 27 July 2011. Based on the said documents, on 27 July 2011, it exported thirty-two tones of monoblock wheels. However, when it sought to export one hundred and sixty (160) tonnes of the same monoblock wheels and by virtue of the same documentation on or about 14 August 2011, the consignment was detained by the respondent at the Beitbridge border post on the instructions of the Mines and Minerals Corporation of Zimbabwe (MMCZ). This was on the basis that the applicant has not sought the requisite authority from MMCZ to export that consignment. The applicant was not amused by the turn of events and filed this application. The application has been opposed by the respondent with supporting documents from MMCZ. In his affidavit by Rodrick Chikwira, MMCZ's Monitoring and Inspectorate Manager, opines that used railway wagon wheels which were being exported by the applicant was scrap metal which falls within the definition of a mineral. Accordingly such export has to be sanctioned by the MMCZ. The allegation is further that the consignment is a banned product which required special exemption from the Ministry of Mines and Mining Development through their department of Metallurgy.

The respondent has raised three points *in limine*. One of those is that the interim relief sought is not competent at law as it seeks, under the guise of a certificate of urgency, an order that overrides the statutory provisions of the Minerals Marketing Corporation of Zimbabwe Act [Chapter 21:04] and the Customs and Excise Act [Chapter 23:02]. It is trite that it is not competent to seek an order that overrides a statutory provision under the guise of a provisional order – 1, 2, 3 *Combined Harare Residents Association & Anor* vs *Registrar General & Ors* 2002 (1) ZLR 83 (H) at page 86C and *Triangle Limited* vs *Zimbabwe Revenue Authority* HB-12-11. The applicant does not want to regularize the exportation of the metal in question by going through all the statutory procedures at the Ministry of Mines. Section 42 of MMCZ Act, which deals with the prohibition of sale or export of minerals otherwise than through the MMCZ, stipulates that:

> "(1) subject to this Act, no person other than the Corporation shall-
>
> (a) …
> (b) export any mineral from Zimbabwe except –
> (i) in terms of a contract in sub-paragraph (ii) of paragraph (a) or;
> (ii) when authorized to do so by the Corporation in terms of section 43 and in accordance with the terms and conditions of such authority."

In fact in terms of such-section 2, any person who sells or exports any mineral in contravention of sub-section 1 shall be guilty of an offence and liable to a fine or imprisonment.

In terms of section 61 of the Customs and Excise Act;

"1. If the exportation of any goods is restricted or controlled by enactment, such goods shall only be exported in conformity with the provisions of such enactment.

2. Any person who exports or assist in exporting of any goods the exportation of which is prohibited by enactment and any person who exports and assists in exporting any goods in contravention of any enactment which restricts or control the exportation of such goods shall be guilty of an offence."

Clearly once the MMCZ states that the used wagon monoblock wheels constitute a mineral as defined in the MMCZ Act, the applicant cannot seek to export same without proving its case that it is not a mineral. The provisional order is clearly incompetent. The respondent should not be compelled to allow the exportation of banned or restricted goods. To do so would defeat the whole purpose of the legislature making the respondent the enforcer of controls on exports and imports. Irreparable harm will be suffered by fiscus. Such irreparable harm has already been suffered in respect the first erroneous clearance of the four trucks on 27 July 2011. The applicant seems to be relying on such earlier clearance to imply that it legitimately excpets the current consignment to be cleared. No legitimate expectation could arise from an *ultra vires* or erroneous relaxation of the relevant statute by the body responsible for enforcing it. The facts reveal unfairness to the fiscus. There is no unfairness to the applicant in acting upon the error of law that resulted in the first clearance. It would be null and void *ab initio* for ZIMRA to bind itself to accept as valid a clearance based upon the error of law – *R* v *AG exp Imperial Chemical Industries plc* (1986) 60 TC 1 and *Commissioner of Taxes* vs *Astra Holdings (Private) Limited t/a Puzey & Payne* 66 SATC 79. I therefore uphold the point *in limine* raised by the respondent.

It is unnecessary for me to consider the other two points raised. I accordingly dismiss the application with costs.

R. Ndlovu & Co, applicant's legal practitioners
Coghlan & Welsh, respondent's legal practitioners