KENNEDY MASVIKENI
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 11 May, 2023 and 30 October 2024

Opposed Application

Mr. G. Tapera, for the applicant
Mr. T.L. Marange, for the respondent

DEME J: On 11 May 2023, I dismissed the present application for condonation for the late filing of application for review on the basis that the intended application enjoys zero prospects of success due to prescription provided for in terms of Section 196(2) of the Customs and Excise Act [*Chapter 23:02*] (hereinafter called "the Customs and Excise Act"). Subsequently, the applicant requested for the reasons for the order of 11 May 2023. These are they.

The applicant approached this court with a prayer for the relief of condonation for the late filing of the application for review. In particular, the applicant prayed for the following relief:

1. "The late filing of the application for review of the decision of the respondent be and is hereby condoned.
2. Respondent to pay costs if they oppose this application."

The applicant is a Zimbabwean citizen who has been resident in United Arab Emirates for around eleven years. At the expiration of his residence in United Arab Emirates, the applicant returned to Zimbabwe in December 2019. He alleged that the respondent, on 10 February 2020, after assessment, came to conclude that he qualified for the returning resident duty free rebate. He further asserted that some of his goods including solar system, water pump, garden irrigation system and 40 ft container were denied duty free rebate. These goods were, according to the applicant, supposed to be taken to the applicant's plot in Nyabira. The applicant also claimed that he finally paid the duty for the other goods but was not able to raise the duty for the 40 ft container. The applicant further affirmed that his household Goods, solar system and water pump which were to be taken to Hillside, Harare, were granted duty rebate.

Dissatisfied by the decision for the denial of duty rebate, he appealed against such a decision to the Station Manager who dismissed the appeal on 11 February 2020. The reason for the dismissal was that the goods were for commercial consumption. The appellant further appealed against this ruling to the Regional Manager who, on 12 February 2020, again dismissed the appeal on the basis that the goods were for commercial purposes. The applicant unsuccessfully appealed against the determination of the Regional Manager. The appeal was lodged with the Commissioner for Customs and Excise. In dismissing the appeal on 18 February 2020, the Commissioner for Customs and Excise commented that the 40 ft container is built and designed to move goods from one mode of transport to another without unloading and reloading. Hence, the Commissioner for Customs and Excise came to the conclusion that such a container is of a commercial nature.

The applicant unsuccessfully appealed to the Commissioner General through e-mail on 4 April 2021. The appeal was dismissed on 26 May 2021 based on the reasoning highlighted by the Commissioner for Customs and Excise. According to the applicant's averments in the founding affidavit, he was served with a copy of the Commissioner General's decision on 21 June 2021. However, in the answering affidavit, the applicant affirmed that he received the Commissioner General's decision on 9 June 2021 through e-mail. On 5 July 2021, the applicant gave notice of his intention to sue the respondent. The applicant affirmed that the delay in filing the application for review within the prescribed time was necessitated by COVID-19.

It is the applicant's case that he intended to use the 40 ft container for personal use and not for commercial use as alleged by the respondent. As a result, the applicant is of the firm conviction that the 40 ft container must qualify for a duty rebate.

The matter was opposed by the respondent which raised two points *in limine.* Firstly, it argued that the main claim for the recovery of the 40 ft container has prescribed as the period of eight months has lapsed reckoning from the date of the respondent's decision. The decision for the denial of duty rebate for the 40 ft container was made on 12 February 2020, according to the respondent and hence the claim has prescribed. In response, the applicant claimed that the matter has not prescribed. The applicant asserted that the prescriptive period only began to run from 9 June 2021 when he received the e-mail.

Secondly, the applicant maintained that the applicant did not comply with Section 196(1) of the Customs and Excise Act. Section 196(1) of the Customs and Excise Act provides as follows:

> "No civil proceedings shall be instituted against 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 State Liabilities Act [*Chapter 8:15*]."

According to the respondent, the applicant ought to have given notice of intention to sue before instituting this application. It is the case of the respondent that the purported notice of intention to sue attached to the founding affidavit was meant for the application for review. It further maintained that the applicant proceeded to mount the present application without issuing the relevant notice of intention to sue the respondent. The respondent further averred that the applicant is improperly before the court on this basis. Responding to this point *in limine,* the applicant averred that he served the respondent with a notice of intention to sue on 5 July 2021. The applicant averred that such notice was sufficient for the present application.

In the answering affidavit, the applicant raised two points *in limine.* Firstly, he affirmed that the notice of opposition filed on behalf of the respondent is fatally defective. During the court proceedings, it later turned out that the court's copy of the notice of opposition was signed and hence the point *in limine* was no longer relevant and was accordingly abandoned.

Secondly, the applicant, by way of a further point *in limine,* argued that the deponent to the opposing affidavit had no authority to depose to such affidavit as no resolution was attached to the opposing affidavit. Mr. *Marange,* on behalf of the respondent, argued that not all circumstances would require the production of the resolution. Mr. *Marange* further contended that the deponent of the opposing affidavit was qualified to depose to the opposing affidavit as he had the knowledge of the facts required in this matter. Mr. *Marange* referred the court to the case of *BANC ABC v PWC Motors and Ors*[1], where MATHONSI J, as he then was, pertinently commented as follows:

> "To my mind, the affidavit of Pfukwa meets all the requirements of Rule 64 and he fell within the category of persons who could swear positively to the facts; *Bubye Minerals (Pvt) Ltd & Anor v Rani International Ltd* 2007 (1) ZLR 22 (S) 25B.
> I am aware that there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution; *South Africa Milling Company (Pvt) Ltd v Reddy 1980(3) SA 431; South African Allied Workers Union & Others v De Klerk N.O & Others* 1990 (3) SA 425.

[1] HH123/13.

> However, it occurs to me that that form of proof is not necessary in every case as each case must be considered on its own merits. *Mall (Cape) (Pvt) Ltd v Merino KO-Oprasie Bpk* 1957 (2) SA 345 (C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person.
> To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary. Where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application. I therefore reject the point *in limine*."

I do agree with the view of the court in the case of *Banc ABC* (*supra*). The deponent had the capacity to swear positively to the facts, in my view. No contrary evidence was placed before the court suggesting that the Respondent is not the one litigating in this matter.

Mr *Tapera* also raised a further point *in limine* through oral submissions to the effect that the respondent's Heads were filed out of time. However, this was correctly abandoned after it was discovered that the Heads of Argument for the respondent were filed on 14 July 2022 while the applicant's Heads of Argument were filed on 30 June 2022. In light of this, the respondent's Heads of Argument were filed within the prescribed timelines.

On merits, the respondent argued that the 40 ft container was intended for commercial use and not for personal use as alleged by the applicant. On this basis, the Commissioner General did not err by denying duty rebate on the 40 ft container, according to the respondent.

The respondent additionally alleged that the application does not satisfy the requirements for the application for condonation. It contended that the applicant failed to offer a reasonable explanation for the delay. Further, the respondent asserted that the applicant has failed to specify the legally recognised ground upon which he seeks to have the Commissioner General's decision reviewed by this court. On this basis, the respondent claimed that the intended application for review lacks merit and hence it prayed for the dismissal of the present application.

Having dealt with all points *in limine* raised by the applicant in his answering affidavit, I will now shift my attention towards the points *in limine* raised by the respondent. In terms of the Customs and Excise Act, the prescriptive period for claiming the property forfeited is eight months. Section 196(2) of the Customs and Excise Act provides as follows:

> "Subject to subsection (12) of section one hundred 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 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 in other cases where costs are given by the law."

In the founding affidavit, the applicant averred that he was served with the Commissioner General's response on 21 June 2021. Reference is made to paragraph 9 of the founding affidavit part of which is as follows:

> "The letter from Commissioner General was dated 26 May 2021, (see Annexure "E") which response I however received on 21 June 2021."

However, the applicant departed from this version in the answering affidavit where he admitted having received this response on 9 June 2021. He stated that:

> "The 8 months to institute civil proceedings being referred (sic) the respondent should not be counted from 20 February 2020, but from 9 June 2021 when the applicant received e-mail from Zimbabwe Revenue Officer known as S. Zengeni"

Counting from 9 June 2021, the prescriptive period of eight months would be complete by no later than 9 February 2022. Even if the prescriptive period is to begin running from 21 June 2021 as alleged in the founding affidavit, such period would be completed by no later than 21 February 2022. This application was filed on 23 February 2022. This was after the prescriptive period had been completed. If I were to grant the application for condonation, the main application was not going to succeed on the basis of prescription. Prescription is an absolute bar. In light of this, the main application has no prospects of success and hence I saw it prudent to dismiss the present application as the application does not enjoy prospects of success.

Mr. *Marange* argued that the prescriptive period must start running from 12 February 2020. I do not agree with his submission. The applicant wishes to seek the review of the Commissioner General's decision of 26 May 2021 for the forfeiture of the 40 ft container. The prescriptive period of eight months should start running from 9 June 2021 the date upon which the applicant became aware of the Commissioner General's determination. It is an established principle in our jurisdiction that the debt cannot be due until the claimant is aware or ought reasonably to have become aware, of the facts from which the debt arose. In the case of *Shonhiwa and Anor v Moor and Ors*[2], Charewa excellently propounded the following remarks:

> "It is also well settled in our law that a debt does not become due until the claimant is aware or ought reasonably to have become aware, of the facts from which the debt arose. These "facts"

[2] HH304/18.

> have generally been interpreted to mean the material or broad facts from which a cause of action arises or all the facts which a plaintiff must prove to obtain judgment in his favour."

The applicant became aware of all relevant facts for the forfeiture of his 40 ft container on 9 June 2021. Hence, he was expected to swiftly prosecute his claim within the prescriptive period. In the case of *Shonhiwa* (*supra*), Charewa further commented as follows:

> "It is further trite that a good explanation for not taking action does not interrupt prescription. The running of prescription can only be interrupted as prescribed by law.
> Nor is it the function of the court to dispense charity however tear-jerking a litigant's case might be. The function of the court is to dispense justice within the confines of the law."

Having reached a conclusion that the main application was not going to succeed on the basis of prescription, it was no longer necessary for me to deal with the other point *in limine* raised by the respondent of failure to issue a relevant notice of intention to sue the respondent. Although I had directed parties to make submissions on the merits, my decision was not based on the merits of the present application. The decision was motivated by the point *in limine* of prescription which acts as an absolute bar where it has been successfully argued.

On the basis of this reasoning, I dismissed the present application.

DEME J: ……....

Tapera Muzanenhamo and Partners, applicant's legal practitioners
Zimbabwe Revenue Authority, Legal Services Division, respondent's legal practitioners