INDUCTOSERVE (PROPRIETARY) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 16 October 2023 and 8 February 2024

P. Mtembo, for Applicant
E. Mukucha, for Respondent

Opposed Application

ZISENGWE J: This is an application for review wherein the applicant seeks the setting aside the respondent's decision to declare one of its trucks and two trailers (the vehicles) declared forfeit to the State. The forfeiture followed the vehicles' irregular importation into the country on a temporary import permit. The applicant claims that the decision to forfeit those vehicles was tainted by gross unreasonableness and gross irrationality lending itself to being set aside on review. Consequent to such setting aside of the respondent's decision, the applicant prays that the vehicles be released to it.

The applicant is a South African registered company with interests in the transport and logistics business and plies its trade along routes criss-crossing Southern Africa. The respondent on the other hand is statutory body established in terms of the Revenue Authority Act [*Chapter 23:11*] and its primary mandate is to collect revenue for the Government of Zimbabwe.

The background

Although there is divergence as between the parties on matters of detail (which details will be dealt with later), the general sequence of the events culminating in this application dispute is common cause and is as follows. The vehicles forming the subject matter of the dispute are

registered in South Africa. They therefore required a valid import licence to be brought into the country.

However, sometime in December 2021, the vehicles were placed under embargo by the respondent's officials who were carrying out routine checks. They were parked at a truck yard in a place called Glengary in Bulawayo. There is some material divergence as between the parties on the exact chronology of the events leading to the placement of the vehicles under embargo and their subsequent seizure. Whereas the applicant's account is rather truncated and short on detail, that of the respondent is quite elaborate. The following is a synopsis of their respective versions.

The applicant avers that when the officers of the respondent came across the vehicles parked at Glengarry they discovered that the Chassis numbers on the import permit were at variance with the ones on the truck and trailers. This led to the officers to suspecting fraud prompting them to seizure the vehicles. The distinct impression created therefore was that the truck and the trailers were all parked at Glengarry at that moment in time.

However, the respondent in an opposing affidavit deposed to by one Batsirai Denford Chadzingwa, avers as follows. What the respondent's enforcement officers found at the truck yard at Glengarry on the 29th of December 2021 were in fact two trailers only whose licence disks had expired in July 2020. Upon inquiry, the applicant (implying an employee of the applicant) they were informed that the horse had departed for South Africa. The applicant's employees then produced a Commercial Temporary Import permit (CTIP) in the name of the driver who had processed it, one Samuel Mukakanhanga. An examination of the documents availed to them revealed a discrepancy between the Chassis numbers and what was described as the Commercial Guarantees (CVG'S). This then led to the placement of the two trailers under embargo pending clarification and production of the relevant documents.

A check with the Respondent's Beit Bridge Border post office however revealed that the CITP and the CVG did not match their records and more tellingly that the stamp that had processed the documents were not in use at that Border Post.

The respondent further avers that on 4 January 2022 Applicant advised the respondent's officers that the horse had now returned from South Africa and produced documents purportedly showing that the horse also included the very trailers that were under embargo. On that occasion the CITP was now in the name of the Lameck Mashizha and had purportedly been issued on 2

January 2022. An inspection of the Carbon tax receipts, revealed same to be also fraudulent. Further, an inspection of Mashizha's passport revealed that he had not crossed the border on 2nd January 2022.

The conclusions the respondent therefore drew, were firstly that the documents availed by the applicant were not authentic, secondly that given that the trailers were under embargo in Bulawayo, they could not have been used on South African roads after the expiration of their licences in July 2020 and ultimately therefore that the horse and trailers had been smuggled into Zimbabwe on unknown dates and that fraudulent documents were produced to cover for their fraudulent importation. The vehicles were accordingly placed under seizure.

The events which took place thereafter are common cause. Firstly, representations made by the applicant's erstwhile Legal Practitioners, *Thakor Patel Legal practitioners* to the respondent's Regional Manager for a reversal of the seizure were unsuccessful. In those representations the applicant denied liability in respect of the fraudulent documents surmising as it did that its clearing agent one Marshal Tabvakure ("Tabvakure") was responsible. At that stage Tabvakure was nowhere to be seen. Those representations to the Regional Manager however produced a result opposite to the intended one as the latter summarily declared the vehicles forfeit to the State. The explanation given by the Regional Director was that not only was the offence associated with the smuggling of the vehicles a serious one but also that the documents which were produced by the applicants on the 4th of January 2022 for the horse and the same trailers which had been placed under embargo were also fraudulent. He concluded thus:

> *"This is evidence that the vehicles were smuggled into the country and there is determination to conceal the fraudulent importation of the vehicles. This rendered the vehicles liable for forfeiture. I regret to inform you that your representations are hereby rejected and the vehicles will not be released from seizure but declared forfeit to the State."*

An appeal against that decision to the Commissioner of customs was unsuccessful.

In the meantime, however, Tabvakure was apprehended and prosecuted. According to the applicant at the conclusion of the ensuing trial Tabvakure was acquitted.

Armed with the apparent acquittal of Tabvakure the applicant approached the Commissioner General for the release of the vehicles. It argued that since liability for the irregular importation of the vehicles had initially been ascribed to it by virtue of s218 of the Customs and Excise Act ("the Act"), it stood to reason that once the agent was exonerated at the criminal trial meant that it too should be deemed not liable and that therefore the forfeiture should be rescinded. Section 218 of the Act reads:

> **218 Liabilities of agent and principal**
> *(1) An agent appointed by any master, pilot, importer or exporter, or any person who represents himself to any officer as the agent of any master, pilot, importer or exporter and is accepted as such by that officer, shall be liable for the fulfilment, in respect of the matter in question, of all obligations, including the payment of duty, imposed upon such master, pilot, importer or exporter by this Act or any other law relating to customs or excise:*
>
> *Provided that an agent may not sign on behalf of the importer a declaration of value required in terms of section forty-two.*
>
> *(2) Every master, pilot, importer or exporter, or any owner of goods in a bonded warehouse, container depot or any manufacturer licensed in terms of section one hundred and twenty-eight shall be responsible for any act committed by any person acting in his place or on his behalf, whether the said act was done within Zimbabwe or beyond its boundaries, and the person so acting shall, if within Zimbabwe, likewise be liable to prosecution under this Act or any other law relating to customs or excise.*
>
> *(3) 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.*

The Commissioner General however rejected those representations primarily on the basis that a serious offence had been committed in terms of S174 (2) and (2a) of the Act in that the

applicant had temporarily imported the vehicles using forged documents rendering the vehicles liable to forfeiture.

It was then that the applicant turned to this court seeking the review of the Commissioner General's decision. The applicant avers that the Commissioner General's decision in rejecting its representations was grossly unreasonable, irrational and an affront to justice. He therefore seeks an order under the administrative justice Act [*Chapter 10:28]* setting aside the decision.

. The applicant reiterates its position that given that liability was imputed to it by virtue of principal/Agent relationship then the reverse should hold true, namely that if the agent is exonerated by the Criminal Court, then the principal should likewise escape civil liability.

Further, reliance was placed on certain observations by the trial magistrate before whom Tabvakure was arraigned and subsequently acquitted which observations appear the face of the judgment. The criminal court before whom Tabvakure was prosecuted remarked *inter alia* that the origins of the forged documents remained unknown and that it would have been difficult for Tabvakure to discern if the stamps were fake or genuine and that the possibility of the Respondents' own officials having forged the documents could not be discounted.

The applicant therefore seeks an order setting aside the Commissioner General's determination dated 21 December 2022 and an order of the release of the horse and trailer in question (whose identification particulars are started in the draft order) to the applicant. He also seeks costs of suit.

The application stands opposed by the respondent who denies any unreasonableness or irrationality in the forfeiture. It avers that the forfeiture was firmly anchored in the provisions of the Act.

Regarding the acquittal of the agent Tabvakure, the respondent avers that in terms of s193 (2) of the Act, a conviction of any person is not a prerequisite for forfeiture and therefore that its decision was not dependent upon the outcome of any criminal proceedings.

The respondent also avers that to date the applicant has not produced any evidence to demonstrate that the vehicles had been imported legally into the country.

Further, the respondent insists that the onus to establish the source of the fraudulent documents used in the irregular importation of the vehicles rested on the applicant and not on it and that the applicant can only escape liability upon production of evidence if its innocence. It

therefore avers that the applicant having failed to prove that it had legally imported the vehicles it is deemed that these were smuggled into the country.

It is common cause that the respondent as an administrative body in terms of s3 (1) (a) of the Administrative Justice Act [Chapter 10:28] is required to act in a lawful, fair and reasonable manner.

It is common cause that the documents used by the applicant to import the vehicles into the country were not authentic. They were generated by some other person or entity other than the respondent, designedly to evade paying the requisite duties levies and taxes.

The question which arises is whether the Commissioner General's decision to refuse to reverse the forfeiture order meets the test of fair, lawful and reasonable. One useful way of doing so is to undertake a two-legged inquiry as follows:

a) whether the vehicles were (with the hindsight of the acquittal of Tabvakure) liable to forfeiture in the first place, if not, *cadit quaestio* –the forfeiture cannot stand. if they were, then;
b) whether the sanction of forfeiture meets the aforesaid test.

The first part of the inquiry addresses the "lawfulness" element of the forfeiture and the second part deals with the "fair and reasonable" question.

Whether the vehicles were liable to forfeiture in light of the acquittal of the agent

The applicant concedes that s193 (6) empowers the Commissioner in appropriate circumstances to forfeit goods which are the subject of a criminal offence. He however takes umbrage at reference by the commissioner to s174 (2) and (2a) of the Act to justify the forfeiture. The said provision reads:

> **174 False invoices, false representation and forgery**
> (1)…
> (2) Any person who—
> (*a*) uses or attempts to use any document which has been forged with intent to defeat this Act or any law relating to customs or excise; or

(*b*) otherwise than in accordance with this Act, buys or receives or has in his possession any goods required to be accounted for by this Act or any law relating to customs or excise before they have been so accounted for; or

(*c*) otherwise than in accordance with this Act, has in his possession any goods liable to forfeiture under this Act or any law relating to customs or excise;

shall be guilty of an offence, unless he produces evidence to show that he did not know—

i) that the document was forged; or

(ii) that duty on the goods had not been paid or secured or that the goods had not been accounted for in terms of this Act or any law relating to customs or excise; or

(iii) that the goods were liable to forfeiture; as the case may be.

(2a) Any person who is guilty of an offence in terms of subsection (1) or (2) shall be liable to—

(*a*) a fine not exceeding level twelve or three times the duty-paid value of the goods concerned, whichever is the greater; or

(*b*) imprisonment for a period not exceeding five years; or to both such fine and such imprisonment.

The argument which the applicant advances is that the above provision relates to the criminal liability and prosecution of offenders something beyond the Commissioner's jurisdiction. It is further averred on its behalf that in any event that provision does not grant the Commissioner the power to forfeit goods.

What probably eludes the applicant is that reference by the Commissioner to s174 (2) and (2a) of the Act was merely meant to convey the message that a serious offence in relation to the importation of the vehicles was committed which in turn justified triggering the forfeiture provisions. The forfeiture provision being s169 (6) of the Act. The Commissioner could not have declared forfeiture without reference to a provision justifying the same.

The second question which falls for determination is whether or not the vehicles' liability to forfeiture was solely dependent upon the conviction of Tabvakure (or anyone else for that

matter). The short answer to that question is no. Forfeiture of the goods in question may still be lawful even where no-one has been held criminally liable for the unlawful importation of the goods in question. This may be possible for example where the identity of the person criminally responsible for the transgression in question cannot be established or where he/she absconds.

This much is clear from a reading of s193 (1) of the Act which provides that seizure (which in turn may result in forfeiture) of any goods may ensue even though no prosecution for the contravention of the Act has taken place or even where prosecution has taken place it has resulted on the acquittal of that person. It reads:

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 it as articles) which he has reasonable grounds for believing are liable to seizure.

The term liable to seizure is provided in subsection (2) of that section which reads:

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

(a) *"liable to forfeiture under this Act or any other law relating to customs or excise or*

(b) *The subject matter of an offence under or a contravention of any provision of*

(i) *this Act or any other law relating to customs and exercise; 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 interpretation of this provision is that goods that are liable to be forfeited because they are the subject matter of an offence or contravention of the Act may be seized. Goods so seized by an officer may subsequently be forfeited by the Commissioner in terms of subsection 6 of the Act. The said provision reads:

(6) Subject to subsection (9), where an officer has reported in terms of subsection (5), the Commissioner may—

(a) either unconditionally or subject to such conditions, whether as to the payment of a fine imposed in terms of subsection (1) of section two hundred or otherwise, as he may fix, order all or any of the articles to be released from seizure; or
(b) ***declare all or any of the articles to be forfeited****; or*
(c)….

What this means is simply that goods seized (even those seized without anyone being prosecuted or convicted of an offence under the Act) may be declared forfeit by the Commissioner. The only limitation to the exercise of this power is set out in subsection 9 of the same section namely where proceedings are sooner instituted for the release of the goods in question. In such an instance the Commissioner is obliged to await the outcome of those proceedings and can only forfeit the goods if the outcome thereof is his favour.

To summarize, therefore, what is critical is that there must be a legal basis for forfeiture of which there are two broad categories, namely the commission of an offence in connection with the goods in question being one and a contravention of the Act being the other. Once the basis for the seizure is established the Commissioner has the discretion whether or not to forfeit such goods. The prosecution or conviction of an individual is not a pre-requisite for forfeiture. It is the commission of an offence in relation to the goods rather than the conviction of an individual or individuals which matters. Section 188(1) (a) specifically provides that any goods which are the subject matter of an offence under the Act are liable to forfeiture In *casu*, that an offence the forgery of documents to facilitate the irregular importation of the vehicles into Zimbabwe amounts to such offence.

Ultimately therefore, the Commissioner General cannot be faulted for rejecting applicant's representations for the release of the vehicles purportedly on the basis of acquittal of Tabvakure.

I interpose here briefly to address the judgment which the applicant sought to rely upon in mounting its appeal with the Commissioner General and which he indirectly seeks to rely upon in this review application. Although the Commissioner General rejected submissions based on that judgment on the reasons he gave, for purposes of this application I find that the judgment is of minimal probative value. The judgment does not show who the accused was, neither was the charge sheet and state outline attached to that judgment.

It is not properly certified as a correct copy of the record of proceedings as required leaving everyone to second guess whether it indeed relates to the present application.

Further in this regard, the applicant refers to certain evidence purportedly led during those proceedings yet it failed to produce the record of those previous legal proceedings for those averments to have any probative value. The record of the evidence should have been produced in terms of S28 of the Civil Evidence Act, [*Chapter 8:01*].

Whether the sanction of forfeiture was grossly unreasonable

Here, the question is whether the punishment in the form of the Commissioner's decision to forfeit the vehicles (and the subsequent refusal by the Commissioner General of the respondent to release the vehicles) was grossly unreasonable or grossly irrational. The test gross irrationality and gross unreasonableness set out in Secretary for Transport & Another v Makwavarara was reiterated in *Basera v The Registrar of the Supreme Court & Others* (35 of 2022) [2022] ZWSC 35 where the following was said:

> "*It is settled law that a decision will be irregular and irrational where the decision-making body had arrived at a decision;*
>
> *'... so outrageous in its defiance of logic as accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" See Secretary for Transport & Another v Makwavavara 1991 (1) ZLR 18 (S) at 20. A decision would be irrational if it is irreconcilable with the facts that were before the decision maker"*

In this regard the applicant avers that forfeiture was excessive grossly unreasonable for the following reasons.

(a) The value of the vehicles is far greater than the duties/taxes/levies payable for their temporary importation
(b) That its employees aver completely of the forgery of the temporary importation documents and the circumstances under which they were forged.
(c) That the forfeiture of the vehicles would result in serious financial loss to it.
(d) That the respondent had the option of the imposition of a fine in terms of S174 (2a) of the Act.

The respondent on the other hand justified forfeiture owing to the following factors

a) That the applicant is a repeat offender having committed a similar transgression in 2017.
b) That the applicant's employees were aware of and compliant to the forgery as shown by their conduct in attempting to mislead the respondent's officers at the time the vehicles were placed under embargo and subsequent thereto.
c) That the forgery of documents to facilitate the irregular importation of the vehicles constituted a serious offence.

From the facts one gets the impression that the applicant through its workers was aware that the vehicles had been improperly brought into the country. This much is borne out firstly from the attempt by the applicant in its founding affidavit to conceal pertinent facts surrounding the placing of the vehicles under embargo. It sought to create the impression that both the trucks and trailers were parked at its industrial yard in Bulawayo on the 29th of December 2021. Only the trailers were so parked. At that stage the respondent's enforcement officers were informed that the horse had departed from South Africa and it was only some 6 Days later, on the 4th of January 2022 that the respondent was advised that horse had returned. On that occasion not only were the documents produced purportedly issued on 2 January 2022 also fake but also that the document produced fraudulently depicted that the trailers had also been to South Africa yet they had all along been parked in Bulawayo under embargo.

As if that was not bad enough the driver Lameck Mashizha had not even crossed the border on 2 January 2022 as depicted in the second set of fraudulent documents.

In its answering affidavit the applicant appears flippantly dismissive of the panoply of facts attending to the seizure as portrayed by the respondent labelling same as being "coloured with respondent's interest and influence".

Tellingly, the applicant on whom the onus rested never bothered to attach supporting affidavits from Tabvakure or from either of the two drivers associated with the importation of the vehicles into the country.

I find on the probabilities, particularly given that the CITP in the name of the 2nd driver dated 2 January 2022 which proved to be false was also attached to the respondent's opposing affidavit that the applicant's employees were complicit in generating or falsifying the documents or were at least aware of the same. In this regard, the conduct of the applicant's employees is imputed to the applicant.

I agree with the Commissioner's categorization of the offence associated with the irregular importation of the vehicles as serious and is tantamount to smuggling the same. Further, the fact that the applicant is a repeat -offender constituted an aggravating factor although the first transgression was of a different nature from present one. The applicant does not deny this previous transgression despite having had ample opportunity to do so.

Ultimately therefore, in applying the test stated earlier to the facts of the matter, I do not get the impression that forfeiture of the vehicles by the Commissioner was disproportionate to the transgression as to amount to gross irrationality or gross unreasonableness, *c.f.* Venencia *Mhiripiri v ZIMRA* HH 426-23. The refusal by the Commissioner General therefore to release the vehicles cannot be faulted.

It is for foregoing that the following order is hereby made.

IT IS HEREBY ORDERED THAT:

The application is hereby dismissed with costs.

ZISENGWE J

Garikayi and Company; Applicants Legal Practitioners.

ZIMRA Legal Services Division; Respondent's legal practitioners.