SILVERLINE CHEMICALS (Pvt) Ltd
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 11 June 2024
Judgment delivered on 11 July 2024

C. Madzoka; for the Applicant
T.L. Marange; for the Respondent

Opposed Application

ZISENGWE J: This is a composite application for two sets of relief. Firstly, the applicant seeks to recover its truck consisting of a horse and trailer which were impounded by the respondent on allegations that it (i.e., applicant) imported a chemical (either diesel or paraffin) into the country other than the one it declared (methanol) at the port of entry, namely Beit Bridge Border post. Secondly, it seeks an order compelling the respondent to provide a full account and complete details leading to the sale by the respondent of the chemical cargo, the latter which constitutes the subject matter of the dispute. Although in the latter regard the applicant subsequently narrowed down the nature of information it seeks, it initially sought an order compelling the respondent to:

> "provide a full account and complete details leading to the sale of the applicant's cargo including but not limited to the name of the purchaser, price paid, method of payment, date of delivery, proof of delivery and any documents, bids, letters and memorandum that led to the disposal of applicants cargo seized pursuant to Notice of Seizure **04 734 IL**".

The applicant is a company incorporated in terms of the laws of Zimbabwe. The respondent on the other hand is a statutory body whose remit is to collect taxes and other forms of revenue for the State. It is established in terms of s3 of the Revenue Authority Act, Chapter 23:11

The background

On 7 April 2024 the applicant imported through Beit Bridge border post (the border post) a certain hydrocarbon chemical. The nature of that chemical is disputed as between the parties. Whereas the applicant insists that the chemical was methanol, the respondent claims that it was something else other than methanol. Be that as it may, it is common cause that the applicant declared it as methanol and after going the usual check procedures its truck bearing the chemical cargo was cleared at that border post before it proceeded on its journey into the country.

While on its journey, the truck was stopped by the police at Bubi, some hundred and twenty odd kilometres from the border post. The police then proceeded to allege that the truck crew had used "fake" documents to import the chemical in question into the country. It was then that the truck was escorted by police motor vehicle back to the border post. Upon arrival the respondent took custody of the truck under the directions of its (i.e., respondent's) Manager.

The following day samples of the chemical in question were taken and interviews conducted.

Subsequently, notices of seizure in respect of both the truck and the chemical were issued. The first notice of seizure depicts the seizure of 38 000 litres of diesel and the second relates to the seizure of the Scania truck in question. From that point on, the versions of the parties diverge, suffice it to say that the applicant avers that there was no justification whatsoever in its truck and cargo being seized.

It is common cause that the applicant initially approached the court with an urgent chamber application under HCMSC 186/2024 seeking to recover both the truck and the chemical cargo but soon abandoned it when the respondent swiftly disposed of the chemical cargo. It then soon thereafter brought the present court application for the above-mentioned relief.

The application stands opposed by the respondent on whose behalf it is averred that the conduct of its agents or employees in impounding both the chemical cargo and the truck was above board and was done in terms of its powers under the customs & Excise Act [*Chapter 23:02*] ("the Act")

In a nutshell, in the opposing affidavit deposed to by its Regional Manager, one Lonto Ndlovu, the respondent avers that the chemical cargo which the applicant's employees/agents had declared as methanol turned out to be something else other than methanol hence the seizure. He

further asserts that upon entry no analytical tests were conducted on the chemical cargo to determine whether it was in fact methanol but however that the truck was routed through a scanner, the image from which confirmed that the tanker was carrying a liquid. More specifically it is averred that no physical examination was conducted at that stage.

According to respondent, however, it was only upon its interception at Bubi and its return to Beit bridge that tests conducted at its behest revealed that the chemical cargo was not methanol.

According the Ndlovu the first test conducted by National Oil Infrastructure Company of Zimbabwe (NOIC) revealed that the chemical cargo was in fact diesel and it was at that stage that the truck and the chemical cargo were placed under seizure.

The second test conducted by the Zimbabwe Energy Regulatory authority (ZERA), after the applicant disputed the NOIC results revealed that the chemical cargo was in fact paraffin. According to the respondent this is critical because whereas the duty for methanol is payable in local currency that of paraffin is payable in United States dollars.

Although lengthy affidavits were deposed to by the parties in support of their respective positions, the crisp question that falls for determination is whether or not the applicant (through its agents) falsely declared the chemical cargo as methanol when it was in fact paraffin.

Initially two preliminary points were raised by the respondent. The first was that the applicant had not exhausted domestic remedies. The second was that the draft order was incompetent in that it is not provided for in term of the Administrative Justice Act, [*Chapter 10:28*]. However, during oral submissions in court, counsel withdrew both preliminary points, it being submitted that the first could be adequately dealt with under the merits and the second was incapable of disposing of the matter, hence not a proper point in limine.

The quest for the return of the truck

Although it would appear that the respondent initially questioned the nature of the relief sought in respect of the truck contending as it initially did that such a relief is not available as relief to a party who has approached the court in terms of Administrative Justice Act, counsel for the respondent conceded, properly so, that the applicant sought this relief under the common law mandamus. The applicant specifically averred in paragraph 4 of its founding affidavit that it was approaching the court for a mandatory interdict and/or in terms of Section 4(1) of the Administrative Justice Act.

A mandamus is remedy can be used to require an administrative authority to perform a mandatory statutory duty imposed upon it that it is wrongly refusing to perform, or to require the authority to correct the effects of its unlawful administrative action. See Feltoe, A Guide to *Administrative and Local Government Law in Zimbabwe***,** 2007, *Lipshitz* v *Wattrus NO* 1980(1) SA 662 (T) at 673C-D *& Kaputuaza & Anor* v *Executive Committee of the Administration for the Hereros & Ors* 1984 (4) SA 295 SWA 317 E. In *Chironga & Another* v *Minister of Justice Legal and parliamentary Affairs and 3 Others* CCZ14/20 at page 15 to 16 a mandamus was defined in the following terms:

> "A mandamus is a judicial remedy available to enforce the performance of a specific statutory duty or remedy the effect of an unlawful action already taken. See, the case of *Oil Blending Enterprises (Pvt) Ltd* v *Minister of Labour* 2001 (2) ZLR 446 (H) at 450.

To succeed in an application for a mandamus, the applicant must prove the following:

(1) A clear or define right – this is a matter of substantive law

(2) An injury actually committed or reasonable apprehended – an infringement of the right established and resultant prejudice

(3) The absence of a similar protection by any other ordinary remedy.

See *Setlogelo v Setlogelo* 1914 AD at 227, *Tribatic (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at p56 & *Chironga & Another* v *Minister of Justice Legal and parliamentary Affairs and 3 Ors* CCZ14/20 (*supra*).

Clear right

The term clear right has been interpreted to mean "a right clearly established at law" in Erasmus *"Superior Court practice"*, 2nd edition at D6-12-13, the following is stated:

> "It is submitted that what is meant by the phrase (clear right) is a right clearly established. Whether the applicant has a right is a matter of substantive law, whether that right is clearly established is a matter of evidence. In order to establish a clear right, the applicant has to prove on a balance of probability the right he seeks to protect."

In *Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd* (*Supra*) it was held that a clear right need not be incontrovertible but definite.

Finally, in *Masimba Charity Huni Fuels (Pvt) Ltd* v *Kadurira & Anor* SC 39-22, a clear right as it relates the granting of a final interdict was explained in the following terms:

> "...the word "clear" relates to the degree of proof required to establish the right an should strictly not be used to qualify the right at all …. A clear right must be established on a balance of probabilities…... From the authorities it is clear that where a final interdict is sought, a clear right as opposed to *prima facie* right must be established by evidence on a balance of probabilities."

In the context of this application, it is common cause that the applicant as the owner of the said property ordinarily has a clear right to the enjoyment, possession and use of it. It is inherent in the nature of ownership of a thing that its possession rests in the owner (*ius possidendi*).

Such right of possession can only be divested from the owner upon a legally recognised ground.

In this regard the respondent primarily justifies its actions in impounding the truck on Section 174 (1) (as read with subsection 193 &188 of the Act. The nub of the argument being that having made a false declaration in relation to the nature of the chemical cargo it was importing, the applicant by dint of that conduct relinquished its right of ownership of the truck and its cargo.

I briefly interpose here to deal with the question of onus. The respondent mixed up this question when it submitted in paragraph 34 of its heads of argument as follows:

> "The application for a mandamus fails at the first hurdle in that the applicant does not have a clear right. Whilst it might have a clear right. Whilst it might have a right emanating from the constitution, it is the respondent's contention that it also has a clear right to hold onto the vehicle as it is the subject matter of an offence having conveyed goods which were falsely declared in contravention of the customs & Excise Act"

To suggest that both parties have a clear right over the same property amounts to a *non-sequitu*r. The correct position in my view is that the ordinary principles relating onus in civil disputes as set out in *Astra industries Ltd* v *Peter Chamburuka* SC-12-12 are applicable. The following was said:

> "The position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegations.
>
> In *Book* v *Davidson* 1988 (1) ZLR 365 (S) at 384 B-F DUMBUTSHENA CJ quoted with approval the words of POTGEITER AJA in *Mobil Southern Africa (Pvt) Ltd* v *Mechin* 1965(2) SA 706 AD at 711 E-G:

> "The general principle governing the determination of the incidence of the onus is the stated in *Corpus luris Simper necessitas probandilcumbitilli quur agit*. In other words, he who seeks a remedy must prove the grounds therefore"

The same principle was stated by Schwikkard & Van der Merwe, *"Principles of Evidence"* 3rd ed at page 572-73 where the following was stated:

> "Where the incidence of the burden of proof in relation to a particular rule of law has not been authoritatively settled it necessary to refer the following general approaches set out in *Pillay v Krishna and Anor* 1946 AD 946 at 951 -2
>
> > "If one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it. But there is a second principle which must always be read with it : where the person against whom the claim is made is not content with a mere denied of the claim, but sets out a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he is entitled it succeed on it : HC who asserts, proves and not the one who denies, since a denial of a fact cannot naturally be proved provided it is fact that is denial is absolute……The onus is on the person who alleges something and not his opponent who merely denies it.

Ordinarily, therefore the onus lies on the claimant to satisfy the court on a balance of probabilities he/she is entitled to the relief it seeks. There are instances where the onus shifts to the defendant/respondent to prove a specific defence. In this regard the following was said in Schwikkard & Van der Merwe, ibid. at page 618:

> "It follows that the burden of proof in an action will not necessarily fall on one party alone, but each of the parties may bear a burden of proof in relation to different issues. Davis AJA put the matter as follows in Pillay v Krishna & Anor (supra):
>
> > [W] here there are several and distinct issues, for instance a claim and a special defence, there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged"

In the context of this case the applicant bore the burden to show that the truck belonged to it, which as earlier stated is common cause. Thereafter it was incumbent upon the respondent to show that they were justified in impounding the applicants truck in that it contravened some provisions of the Act. The all-important question is that the respondent can seize any goods which are liable to seizure under the Act. This is provided for in terms of Section 193 (1) of the Act which 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 to as articles) which he has reasonable grounds for believing are liable to seizure.

Meanwhile Section 193 (2) defines the term 'liable to seizure" as:

…

""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 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."

What falls for determination is the question whether there were reasonable grounds for seizing the truck and chemical cargo. This in turn revolves around the events that unfolded during those fateful few days.

A few things are critical. The first and perhaps the turning point of this dispute are the contrasting results obtained after the testing of the chemical cargo. According to the respondent's own assertions, the first test which was conducted by NOIC revealed that the chemical cargo was diesel. A subsequent test conducted by ZERA on the other hand apparently revealed that it was paraffin. This stark variance in the results lends credence to the applicant's contention that as a matter of was in fact it was neither of those two hydrocarbons. This in turn supports the contention that the probabilities favour the inference that it was in fact methanol. I say so given there was no attempt whatsoever on the part of the respondent to explain the starkly contrasting results of the same sample. To the contrary the applicant, as will be shown hereunder went out its way to explain how the two tests yielded faulty results. The possibility of a serious error in both tests in my view cannot be discounted.

In those circumstances, the respondent in all fairness must have acceded to the applicant's request for a re-test. Alternatively, the applicant should have been given the benefit of the doubt.

An administrative body such as the respondent, wielding as it does enormous powers in relation to the public has a bounden duty to act fairly, impartially and objectively. It must not seek to get its way at all costs.

Equally telling was the haste with which the respondent proceeded to dispose of the chemical cargo. In the heat of legal contestation, when the urgent application was being heard, the respondent's employees hastily disposed of the cargo making it impossible for a third test to be conducted.

It is pertinent to note that the applicant vigorously protested both outcomes and insisted on a third test.

The court specifically ordered in the urgent chamber application that the respondent was not to dispose of the disputed chemical cargo or that if that had already been done that, all relevant details had to be furnished. This order was granted by consent in the interests of fairness to all parties concerned. Yet no sooner had order been made than the respondent's employees hastily dispose that chemical cargo. The timing of the disposal *vis-à-vis* the contestation between the parties is critical. One gets the distinct impression that the respondent was determined to get rid of the chemical cargo before it could be tested. This begs the question why?

The applicant communicated with the respondent's employees explaining to them that they could not dispose of property that was subject to *res litigiosa* but that warning was roundly ignored.

The excuse proffered by the respondent for the hasty disposal of the chemical cargo is lame. One doesn't need to be an expert in that field to appreciate that liquid hydrocarbons are highly flammable, trucks which are normally used to ferry them are designed to withstand several days of exposure to the elements otherwise with the sheer number of trucks that carry petrol, paraffin, diesel and the like would always be ablaze on the highway.

Then there is the question of the notice of seizure itself. The applicant made a good case in arguing that once the respondent issued out a notice of seizure on the basis of the chemical cargo being diesel, it could not use the same notice of seizure when a different test yielded a different result. It should have issued a different one on the basis that the cargo was in fact paraffin (as opposed to methanol).

In concluding this segment, I find that the respondent failed to advance proper grounds for impounding the applicant's truck and cargo. Put differently, the respondent failed to establish

reasonable grounds for seizing the applicant's truck and chemical cargo as required under either Section 193 (2) or 188 of the Act.

To the contrary, the respondents threw caution to the wind and proceeded with a haste and in a precipitate fashion with scant regard to the applicant's rights. It utterly failed in its conduct as required of an administrative body charged with an administrative function. The respondent's conduct was neither fair, lawful nor transparent.

On a balance of probabilities, I find that the applicant's version that on entry the chemical cargo underwent meticulous pre and post clearance procedures at the border post which clearance procedures included *condep* checks, physical inspections and sample collection and that the respondent was satisfied and allowed to proceed, plausible.

The tenacity with which applicant protested both conflicting results and steadfastly insisted on another test when contrasted with the respondents' hasty and shady way of disposing of the chemical cargo to my mind bespeaks one thing, namely that the respondent sought to conceal the true identity of the chemical cargo.

To make a bad situation worse for the respondent, there was no clear-cut chain of custody availed to this court to show that the sample that was submitted to either NOIC or ZERA was the same extracted from the applicant's truck. In light of the applicant's position it behoved the respondent to demonstrate an unbroken process tracking the movement of the sample from its collection, safeguarding and analysis of its lifecycle by documenting each person who handled it, the date and time it was collected and transferred and the purpose of the transfer.

What we have is a blanket statement by Lonto Ndlovu that samples were collected and sent to NOIC and ZERA respectively. That is patently below par.

The reluctance by which the respondents to immediately disclose the first results is also telling. According to the applicants they were sent from pillar to post.

In its answering affidavit the applicant also questioned the qualifications of the person who conducted the test at ZERA and the results thereof stating that the test was sub-par in that it could not properly distinguish between paraffin and methanol. According to it these two chemicals closely resemble each other. He demonstrated this by stating as follows:

- "Whilst the standard for illuminating paraffin flash point is 38, our methanol flash point was 44.8

- Whilst the density of paraffin is 0.728 our tested density was 0.7901.
- The distillation at 10% test which refers to the temperature at which 10% of a sample has been distilled of during a distillation process. In this case for paraffin it is 205 but as per the test our methanol was 146. Distillation to final boiling point, the standard is at 300 and our methanol was at 268.8."

The applicant concluded on this point thus

> "This is why ZERA did not conclusively state that product is paraffin, instead it used the word **characteristics**. While our cargo may meet the specifications of illuminating paraffin, it does not necessarily mean it is paraffin. It could be another substance that happens to have similar properties to paraffin. Therefore, while the test results might be indicative, they are not conclusive in determining the true nature of the product. Put differently, a girl may dress like a boy and have physical characteristics of a boy but that does not make her a boy, she remains a girl!"

The respondent's reason for seizing the respondent's truck being premised on very shaky grounds, the applicant being the owner of the motor vehicle has managed to prove a clear right on a balance of probabilities.

Injury actually committed or reasonably apprehended

This particular requirement in the context of this case is self-evident and requires no elaboration. It suffices to say the deprivation of the use and enjoyment of its truck constitutes an injury to the applicant.

Absence of any other remedy

The Supreme Court in *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S) had occasion to elaborate what constitutes the requirement that there be no other remedy before an application for an interdict can be granted GUBBAY CJ had this to say:

> "The absence of a similar protection by any other ordinary remedy. The alternative remedy must a) be adequate in the circumstance
> b) be ordinary and reasonable
> c) be a legal remedy, and
> d) grant similar protection
> See: *Setlogelo* v *Setlogelo* 1914 AD 221 AT 227 & *PTC Pension Fund* v *Standard Chartered Bank* 1993 (1) ZLR 55 (H) 63 A-C"

Not only would pursuing internal remedies have amounted to an exercise in futility given the intransigent conduct of the respondent's employees, but also Section 193 (12) of the Act

permits a person whose articles have been seized to approach the court for redress. This provision reads:

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

Ultimately, therefore, the applicant has managed to establish all the pre-requisites for the granting of the mandamus in relation to the truck.

The application for the production of documents

The respondent's main gripe with the order sought in paragraph 2 of the draft order was that it is too wide. It was averred that the scope of the information covered by its broad sweep was probably protected under the official secrets Act or under the Act. It also argued that most of the information sought has in any event been disclosed via annexures to its opposing affidavit.

After much haggling during the oral presentations of the arguments in court, the applicant made some concessions and proposed that paragraph 2 be amended to read:

> "The respondent is ordered to provide a full account and complete details leading to the sale of the applicant's cargo specifically the name of the purchaser, price paid, method of payment, date of delivery, proof of delivery and any documents and bids that led to the disposal of the applicant's cargo seized pursuant to Notice 047341L."

There is no need to belabour this point, not only is the applicant entitled to information relating to the disposal of its chemical cargo, but also that such relief is obtainable in terms of the Administrative Justice Act or under the common law mandamus. This is in keeping with the duty reposed on an administrative authority such as the respondent to act in a fair, objective and transparent manner.

Costs

The general rule is that the successful party is entitled to its costs. There is no good reason to depart from that principle. Similarly, there is no reason to award costs on the attorney and own client scale. The opposition to the application by the respondent was neither reckless nor mala fide. Accordingly, the following order is hereby made:

IT IS ORDERED THAT:

1. The application succeeds.
2. The respondent is ordered to release and return to the applicant the horse and trailer Scania GRN, Registration KG30FWGP, KV065SJGP, KV06NLGP seized pursuant to issue of Notices of Seizure 002500L issued on 8 April 2024 within 48hours of this order without payment of any costs, fines charges or storage fees.
3. The respondent is ordered to provide a full account and complete details leading to the sale of the applicant's cargo specifically the name of the purchaser, price paid, method of payment, date of delivery, proof of delivery and any documents and bids that led to the disposal of the applicant's cargo seized pursuant to Notice 047341L.
4. The respondent to pay costs of suit.

ZISENGWE J.

Mangwiro Tandi Law; applicant's legal practitioners
Zimbabwe Revenue Authority Legal Services Division; respondent's legal practitioners.