RONALD MACHACHA

Versus

ZIMBABWE REVENUE AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 JULY & 1 DECEMBER 2011

R. Mahachi for applicant
Miss S. Ncube for respondent

Judgment

NDOU J: The applicant seeks an order in the following terms:

"It is ordered that:

1. The respondent be and is hereby ordered to release a motor vehicle Toyota Haice Super 16 registration number ABJ 2728 to the applicant unconditionally.
2. The respondent to pay costs of suit on attorney-client scale."

The salient facts of the case are the following. On 9 June 2010 the applicant hired his vehicle described above together with its driver Absolom Murada to one Phanuel Chiwandire. The vehicle was used to smuggle 27 boxes and 24 bricks of Seville cigarettes and 25 bricks of Mega cigarettes from Zimbabwe into Botswana through an undesignated exit point at Plumtree. Chiwandire and Murada were arrested. The cigarettes and the applicant's vehicle that had been used to smuggle the cigarettes were placed under seizure. A Notice of Seizure for the motor vehicle was given to Murada on 10 June 2010 and that for the cigarettes was given to Chiwandire on the same date. Chiwandire was charged for smuggling the cigarettes. Murada was never charged. Chiwandire pleaded guilty to the charge of smuggling the cigarettes before a local magistrate. He was convicted and sentenced to a fine of US$500 or ZAR5 000. The smuggled cigarettes were declared forfeited to the state. After representations had been made before the presiding magistrate that the motor vehicle in question did not belong to Chiwandire (the accused person), the magistrate ordered that the vehicle should not be declared forfeited to the state. The applicant with the support of Murada and Chiwandire then made representations for the release of the motor vehicle to the Commissioner of Zimbabwe Revenue Authority. The Commissioner did not release the vehicle. On 3 September 2010 the applicant filed an application at Plumtree Magistrates' Court under case number 185/10 for the release of the vehicle in question. Among other things the respondent raised

the objection that the applicant had not given notice to institute proceedings as required by section 196(1) of the Customs and Excise Act [Chapter 23:02] ('the Act"). The application was dismissed by the magistrate. The applicant did not seek review or appeal against the dismissal. Instead, on 14 October 2011 the applicant instituted the current proceedings in this court. The applicant did not give the respondent the notice required by section 196(1) of the Act. Section 196(1) of the Act reads thus –

> "196 Notice of action to be given to officer
>
> (1) No civil proceedings shall be instituted against the state, the Commissioner or an 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]."

The applicant ignored this provision at his own peril. The primary objective of the provision is provision of timely opportunity to the Zimbabwe Revenue Authority ("ZIMRA") to know and therefore to investigate the material facts upon which its actions are challenged and to afford ZIMRA opportunity of protecting itself against the consequences of possible wrongful action by tendering early amends as envisaged by the Act – *Ebrahim* v *Controller of Customs* 1985 (2) ZLR 1 (SC); *Building and Engineering Supply Co (Pvt) Ltd* v *Controller of Customs* 1988 (1) ZLR 238 (HC) and *Car Rental Services (Pvt) Ltd* v *Director of Customs and Excise* 1988(1) ZLR 402 (SC). The failure to give this notice is fatal as the applicant is effectively barred from instituting proceedings for recovery of the motor vehicle unless of course if the Commissioner is prepared to waive or extend the period. On this point alone the application should be dismissed without even considering the merits of the case. In the event I am wrong in this conclusion, still the application has to be dismissed on the basis of the other point *in limine* raised i.e. the claim has prescribed in terms of section 193(12) of the Act. In terms of section 193 (12) the application of this nature has to be made within three months of the notice of seizure being given to the owner of the vehicle. *In casu*, the Notice of Seizure was given to Murada on 10 June 2010. This application was filed about four months after this date. This means that his cause of action based on unlawful seizure has prescribed – Harry v Director of Customs 1991 (2) ZLR 39 (H) and Murphy v Director of Customs and Excise 1992 (1) ZLR 28 (HC).

Accordingly, whichever way one looks at the application it has to be dismissed on account of the preliminary objection.

I, therefore, dismissed the application with costs.

T Hara & Partners, applicant's legal practitioners
Coghlan & Welsh, respondent's legal practitioners