HB 27-17
HC 311/17

SAMUEL KUFANDADA
versus
ZIMRA (ZIMBABWE REVENUE AUTHORITY)
and
THE OFFICER IN CHARGE ZRP MINERALS
AND BORDER CONTROL

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 13 FEBRUARY 2017 AND 23 FEBRUARY 2017

Urgent chamber Application

Applicant in person
Mrs Ngwenya for 1st respondent
L Musika for the 2nd respondent

MAKONESE J: In terms of section 193 (6) of the Customs and Excise Act [Chapter 23:02], the Zimbabwe Revenue Authority (ZIMRA) is empowered to dispose of or destroy, any dangerous goods off-hand without the need to obtain a court order.

On 1 February 2017 first respondent seized 600 litres of petrol and 1400 litres of diesel at applicant's residential address, being 379 Emganwini, Bulawayo. First respondent confiscated the fuel on reasonable suspicion that the fuel had been smuggled into Zimbabwe from Botswana by the applicant. A Notice of Seizure was issued in terms of section 193 (6) of the Act. The applicant made written representations to the Commissioner. He claimed that he had purchased the fuel in Plumtree and that the documentation relating to the fuel had been lost in a scuffle that occurred with the police when the fuel was seized. Applicant further alleged that they had been an attempt to extract a bribe from him to secure the release of the fuel. I shall not dwell on those allegations which should competently be dealt with by the police who have the mandate to investigate such allegations.

The applicant filed an urgent chamber application with this court on 1 February 2017 seeking the following relief:

"INTERIM RELIEF

1. The 1st respondents be and are hereby interdicted from auctioning the 600 litres of petrol and 1400 litres of diesel belonging to Applicant pending finalization and outcome of this matter and or the representations made by Applicant made by the Applicant in terms of the Customs and Excise Act.
2. Pending finalization of all outstanding issues connected to this matter, the property in (1) above be removed to a garage or service station in Bulawayo for storage purposes at respondents' expense.
3. The 2nd respondent be and is hereby ordered to institute investigations of his subordinates involved in this matter for criminal abuse of public office and lodge his findings with the Registrar of the High Court within 30 days of the granting of this order."

Upon receipt of the urgent application I wrote a memorandum in the following terms:

"1. In terms of s193 (6) of the Customs and Excise Act [Chapter 23:02] the applicant is entitled to make representations to the Commissioner (ZIMRA) regarding the Notice of Seizure.
2. The Applicant has already made such representations to ZIMRA in terms of the provisions of the law.
3. On what basis must the court intervene?
No order."

The respondents have since filed their opposing papers and I deemed it appropriate to hear the parties on the merits. The respondents contend that the matter is not urgent and should not be allowed to jump the queue ahead of more deserving cases. The applicant has given as the basis of urgency the fact that the seized fuel may be sold at any time without a court order and that such sale would cause him to suffer harm as the fuel is his only source of income. In his oral submissions the applicant was singing a different tune. He averred that he was keeping the fuel for the purpose of building up "collateral" needed by financial institutions. When it was put to him that it was not safe to keep fuel in plastic containers in a residential suburb, the applicant made the rather startling submission that fuel is safer in fuel containers than anywhere else. Applicant stated that he had sourced the fuel in Plumtree for the reason that the fuel was cheaper than that sold in most service stations in Bulawayo. When it was further put to the applicant that there was documentary proof to establish that on 31 January 2017 he had declared 800 litres of petrol with the Botswana Unified Revenue Service (BURS), he argued that, the petrol in question was never transported through the border into Zimbabwe because he failed to get transport.

What became very clear is that the applicant's version is not only improbable but false. An applicant who brings to court an application based on falsehoods will never obtain the sympathy of the court. The courts cannot be seen to condone, let alone allow applicant to willy nilly abuse court process. It is a trite principle of our law that an application stands or falls on its founding affidavit. In *Graspeak Investments P/L* v *Delta Corporation P/L and Another* 2001 (2) ZLR 551 (H).

The court held in that case that that an urgent application is an exception to the *audi alterma partem* rule, and as such, the applicant is expected to disclose fully and fairly all material facts known to him or her.

In this matter the applicant's matter is not only characterized by material non-disclosures, outright falsehoods but is clearly not urgent. The fact that the first respondent threatened to auction the seized fuel in terms of the provisions of the law cannot create urgency. In my view the applicant has not disclosed urgency and on that basis alone the matter deserves to be dismissed for lack of urgency.

On the merits

On the date of seizure of the fuel the applicant was requested to submit proof that he had not smuggled the fuel from Botswana and he failed to do so. Applicant claimed that he had bought the fuel from one Mushayavanhu in ZBS residential area in Plumtree but he refused to give the address of the said Mushayavanhu. Applicant failed to produce any receipts or tax invoices for the fuel. First respondent checked the truck documents and they revealed that the truck driver one Maringire had travelled to Botswana on 31 January 2017 and returned on the same day. He was caught carrying the fuel by the police at around 2:00 am. All these factors and the fact that applicant could not provide proof of local purchase of the fuel led a reasonable officer to verily believe that the fuel was indeed smuggled. The fuel was thus seized in terms of s193 of the Act. On 3 February 2017, two days after this urgent application had been filed the applicant tendered two cash receipts for 1400 litres of diesel and 600 litres of petrol respectively issued by PUMA Energy Service station in Plumtree on 31 January 2017 as proof that applicant had bought the fuel in Zimbabwe. First respondent's officers proceeded to PUMA service station in Plumtree to

verify the authenticity of the receipts in question. Upon interviewing one Bhebhe who had issued the relevant receipts, he confirmed that the receipts were indeed issued on 2 February 2017 at the instance and request of the applicant who claimed to have misplaced the original receipts. The petrol attendant had not verified the sale of fuel to the applicant. When first respondent reconciled the cash sale receipts provided by the applicant they indicated the fuel bought by the applicant was valued at US$2532. The total sales recorded for the whole day on 31 January 2017 at the service station in question totaled US$1086. This therefore meant that applicant's purchase who have exceeded the total sales for that day at that service station. This is a clear indication that applicant's receipts were procured through a false misrepresentation made to the fuel attendant on 2 February 2017. The receipts are therefore a lie. This lie was meant to mislead this court.

It is my view that applicant does not require the intervention of this court to stop the auctioning of the seized fuel. The applicant alleges that he has a pecuniary interest in the fuel. It is clear that he has an appropriate remedy available to him to secure his interests. The Act has put in place the remedy of compensation to anyone whose dangerous goods are disposed of out of hand. If that remedy is taken by the applicant he will achieve the same result without endangering members of the public as well as the environment. It can never be safe to keep huge quantities of fuel in plastic containers in a home. It is neither prudent nor desirable to stop the disposal of the fuel pending the finalization of the case.

The legislature was alive to the fact that such dangerous goods could be seized by first respondent and the vanity of trying to seek a court order to dispose of such dangerous goods. In order to preserve life and property the Act gives first respondent the power to dispose or destroy such goods off-hand without the need for a court order and in the *proviso* to section 193(6) of the Act it is provided as follows:

> "Provided that if any of the articles of a dangerous or perishable nature, the Commissioner may direct that they be sold out of hand, if they cannot be sold, that they be destroyed or appropriated to the State."

In my view, the court can only intervene if the first respondent is shown to be exercising its discretion arbitrarily or in an unreasonable manner.

After hearing oral submissions by the applicant I am left in no doubt that the interdict sought by the applicant is without any legal or factual basis as the applicant has failed to show that there is no other remedy available to him to protect his pecuniary interest in the fuel which is the subject matter of the application. The essential requirements of an interdict have not been satisfied and this is fatal to the application. The requirements for an interdict were re-stated in the case of *Zesa Staff Pension Fund* v *Mushambadzi* SC 57/02, and these are:

1. a clear right which must be established on a balance of probabilities.
2. irreparable injury actually committed or reasonably apprehended; and
3. the absence of a similar protection by any other remedy.

On the facts of this application neither a clear right nor a *prima facie* right was established. The applicant has an alternative remedy. What the papers disclose is a certain level of dishonesty displayed by the applicant which cannot be allowed by this court. There is *prima facie* a case for smuggling of the fuel. The applicant's story simply does not make sense.

Finally, I conclude that, in any event, the matter is not urgent at all. The applicant seeks the intervention of this court in order to thwart the first respondent's seizure of the goods in terms of the law. I have no doubt in my mind that that if the fuel had not been smuggled from Botswana, the first respondent would have had no cause to seize the said fuel.

In the result, the following order is made:

1. The application be and is hereby dismissed
2. The applicant is ordered to pay the costs of suit.

Messrs Coghlan & Welsh, 1st respondent's legal practitioners
Civil Division, Attorney General's Office, 2nd respondents' legal practitioners