

REBECCA JANE MALONEY
and
MICHAEL DREW MALONEY
versus
ZIMBABWE REVENUE AUTHORITY
and
PRINCIPAL DIRECTOR OF IMMIGRATION
and
REGISTRAR GENERAL OF CITIZENSHIP
and
MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 17, 24, 28 and 31 March 2017

Urgent Chamber Application

T. R. Mugabe, for applicants
V. Muzite, for first respondent
F. Chingwere, for second and fourth respondents
C. Chopamba, for third respondent

MUSAKWA J: The applicants are seeking the following interim relief-

“Pending determination of this matter, the Applicant (sic) is granted the following relief-

1. Upon service of this Provisional Order 1st Respondent be and is hereby ordered to return 1st Applicant’s police clearance certificate seized at Kurima House on 4th March 2017.
2. Upon service of this Provisional Order 1st Respondent be and is hereby ordered to return 1st Applicant’s vehicle registration book seized at Kurima House on 4th March 2017.
3. Upon service of this Provisional Order 1st Respondent’s directive for the 1st Applicant to surrender her Toyota Land Cruiser vehicle be and is hereby suspended.
4. 1st Respondent be and is hereby ordered not to seize or otherwise interfere with 1st Applicant’s use of her motor vehicle Toyota Land Cruiser without leave of this court.
5. 1st, 2nd and 3rd respondents are hereby ordered to allow passage to Applicants upon their repatriation of their remaining property from Malawi between the date of this order and the return date of the main matter.
6. The assessments of their rebate and or other liability, residence or other status, eligibility or otherwise, citizenship by birth or other is suspended pending the outcome of this matter.”

The applicants are a married couple and they claim to be Zimbabwean citizens by birth. In her founding affidavit the first applicant avers that the couple emigrated to Malawi in 2013 where the second applicant was temporarily employed. Upon termination of the second

applicant's contract the couple returned to Zimbabwe. In the process of their relocation they brought among other goods two motor vehicles. The first applicant claims that in the process of importing her Toyota Land Cruiser motor vehicle she was only issued with a Temporary Import Permit. She further claims that initially when she took the motor vehicle to first respondent's offices at Kurima House she was awarded a rebate of almost 100%. Shortly thereafter this was reversed as it was claimed she was not entitled to a rebate. Instead, she was ordered to pay duty in the sum of US\$27 593.28. Thus she was ordered to surrender the motor vehicle. In the process she claims that the first respondent's officers seized the vehicle registration book as well as Police Clearance Certificate.

The first applicant contends that her constitutional rights to citizenship and free movement have been violated. Thus she is entitled to immigrant's rebate as well as administrative justice. Her rights should not be infringed without due process. She further contends that there is no other available remedy against the respondents.

The second applicant deposed to a supporting affidavit. It is premised on the apprehension that upon their next visit to Zimbabwe they will be subjected to further harassment as they are still in the process of repatriating their personal effects. He claims to have been compelled to renounce his Zimbabwean citizenship at the behest of the third respondent. Thus they seek a declaratory order regarding their citizenship, immigrant status and other entitlements.

It is common cause that the applicants lodged an appeal with the Acting Commissioner General of the first respondent. The appeal is yet to be determined.

The matter stands to be determined on the preliminary issues raised by the respondents.

Urgency

All respondents are of the view that the matter lacks urgency. Mrs *Muzite* submitted that for the applicants to institute such proceedings it presupposes that the first respondent's action was unlawful and caused irreparable harm. To the contrary, the first respondent has not acted unlawfully. The dispute regarding the first applicant's motor vehicle has not been finalised. This is because the issue of the appeal against denial of rebate has not been determined. In any event the quest to protect future rights works against the first respondent's responsibility to administer the Customs and Excise Act.

Mr *Chingwere* submitted that despite that the applicants seek a spoliation order, it has not been specified what they have been despoiled of. He further submitted that despite that the matter has been brought on a certificate of urgency it is clear that as regards the interdict sought, the requirements for such relief have not been met. This submission relates to the merits as opposed to lack of urgency.

Mr *Chingwere* also submitted that there has been no demonstration that the matter cannot wait. Where there are alternative remedies a matter fails to qualify to be heard on an urgent basis. There is no proof of the irreparable harm the applicants stand to suffer.

Mr *Chopamba* submitted that this is a typical case of self-created urgency. He submitted that instead of complying with the directive by the first respondent, the applicants have rushed to court. He submitted that the applicants must comply with the directive whilst they pursue other remedies to challenge the directive. Mr *Chopamba* further submitted that superior courts should sparingly interfere with processes of lower courts or tribunals which are not yet completed. In that regard he referred to the case of *Cuthbert T. Chawira And Others v Minister of Justice and Others* CCZ 3-2017.

Mr *Chopamba* also attacked the certificate of urgency which he said did not adequately address the requirements for urgency. It was his submission that nothing was addressed on the irreparable harm that the applicants claim would befall them if the matter is not heard on an urgent basis.

Mr *Mugabe* submitted that the applicants are entitled to administrative justice as provided in s 68 of the Constitution. In that light he further submitted that the applicants have been denied an immigration status that is in accordance with the law. This is because Customs Regulations provide for rebate to returning residents. Thus the denial of the applicant of immigrant's rebate is in violation of her rights.

Mr *Mugabe* further submitted that following the denial of rebate the first applicant lodged an appeal. Whilst the appeal is pending the first applicant sought interim relief with the Acting Commissioner General and this has not been responded to. He insisted that where a constitutional right has been infringed an aggrieved person is entitled to seek urgent redress. He further submitted that even though the collection of revenue is a lawful process for the first respondent, it must not be done on a wrong interpretation of the law.

On the issue of whether there are other satisfactory remedies available to the applicants, Mr *Mugabe* submitted that such alternatives must not be illusory. He contended that it has not been explained why the appeal lodged with the first respondent has not been

determined. He further argued that where internal processes are not efficient, a party is entitled to seek redress with the courts.

Although Mrs *Muzite* also argued two other points *in limine*, I am of the view that they can be addressed under urgency. These are the absence of irreparable harm and failure to exhaust internal remedies.

As was held by MAKARAU J (as she then was) in *Aston Musunga v Ephias Utete and Another* HH-90-2003 a matter is considered urgent if it cannot wait to be determined under the ordinary rules of court on account of the risk of irreparable harm that might befall an applicant. The learned judge further stated that what constitutes irreparable harm is not exhaustive as each case must be determined on its own merits.

The real issue is the denial of immigrant's rebate to the first applicant by the first respondent. I do not see how this has founded a cause of action against the rest of the respondents. In the same vein, the second applicant does not really have a cause of action against the respondents. He has not been denied a rebate and his rights have not been trampled upon by the second to fourth respondents to warrant his being a party to this urgent application. The second applicant applied for resumption of permanent residence status for himself as well as for the first applicant. I do not see how that has a bearing on a customs rebate. There is a difference between lending support to his wife by deposing to a supporting affidavit and being a co-applicant. In any event, some of the issues he raised will be disposed of in the same manner as those relating to the first applicant.

The first applicant imported the motor vehicle in issue under a Temporary Import Permit. I did not hear this being disputed by Mr *Mugabe*. The relevant Temporary Import Permit is part of the bundle of documents that are before the court and were availed by Mr *Mugabe*. As can be noted from s 39 of the Customs And Excise Act [*Chapter 13:02*] it is the duty of an importer of goods to make an entry of the goods at the port of entry. In the opposing affidavit of a representative of the first respondent, it is averred that the first applicant's agent, Admire Chamapiwa is the one who applied for a Temporary Import Permit. It is contended that this was a misrepresentation if the intention was not to import the motor vehicle for a temporary period.

The Temporary Import Permit was endorsed "client has been given this document to enable her to bring the vehicle and surrender to ZIMRA pending payment of duty of \$27 593.28." If the first applicant's agent had claimed an immigrant's rebate I cannot see how the first applicant could have been issued with a Temporary Import Permit.

Nonetheless, it is this decision to charge duty on the motor vehicle that triggered the present application. The issue of the first applicant's citizenship status has no relevance to the matter as contended by the second respondent. In this respect see s 105 of the Customs And Excise (General) Regulations, Statutory Instrument 154 of 2001 which provides for immigrant's rebate. It will be noted that the provision in question makes no reference to citizenship.

Having been denied immigrant's rebate, the first applicant noted appeal with the Acting Commissioner General. The appeal is still pending. How then can the first applicant justify urgency of the present application when the appeal is still under consideration? This also clearly underlines that the first applicant has an alternative remedy available. In that respect I agree with the submission that she has jumped the gun in instituting the present proceedings.

The appeal to Acting Commissioner General was lodged on 8th March 2017. The appeal must have been made in terms of s 87 of the Customs And Excise Act. I note that no time is prescribed within which an appeal should be determined. Since the Commissioner General is an administrative authority within the definition of the Administrative Justice Act [*Chapter 10:28*], where the time to take administrative action is not specified, this must be done within a reasonable period. In this respect, see s 3 (1) (b) of the Administrative Justice Act. Taking into account that the appeal to the Acting Commissioner General was lodged five days after the decision to charge duty on the motor vehicle had been made, it cannot be said by any stretch of the imagination that there has been an unreasonable delay in determining the appeal.

Apart from the fact that the applicants have acted precipitately without exhausting internal processes within the first respondent, I am not satisfied that there is any irreparable harm that may not be redressed through other remedies. What if the appeal is granted? In any event, if it turns out that duty had been erroneously assessed it can be refunded. Therefore, where is the irreparable harm?

There is no wrongfulness in the seizure of the Police Clearance Certificate and vehicle registration book. This is provided in s 203 of the Customs and Excise Act which states that-

“The Commissioner may impound or retain any document presented in connection with any entry or required to be produced under this Act, and the person otherwise entitled to such document shall on application be given *in lieu* thereof a copy of the document duly certified by the Commissioner, and the certified copy shall be admissible in evidence at any trial to the same extent and in the same manner as the original would be admissible.”

In light of the above provision, there is no question about the first applicant having been despoiled.

Dirty Hands

It was also contended on behalf of the first respondent that the first applicant is approaching the court with dirty hands. This is on account of misrepresenting that the motor vehicle was a temporary import. The first respondent contends that this is an offence in terms of s 174 of the Act. Even if the first applicant's agent misrepresented the entry, I do not see how this can be magnified into dirty hands on the part of the first applicant. This is because the first applicant subsequently went to the first respondent's offices on 4th March 2017. Unless the first applicant is that naive, I cannot see how she was going to deceive the first respondent by claiming an immigrant's rebate for a temporary import. The first applicant is said to have produced the vehicle registration book as well as Police Clearance. No mention is made of the Temporary Import Permit. If she produced that as well, it is obvious that it was going to defeat the claim for an immigrant's rebate. No indication has been made that the first applicant has been charged with contravening s 174.

Still on the issue of dirty hands it was also contended that the first applicant is in defiance of a directive to surrender the motor vehicle. No submission was made on behalf of the first respondent under what provision of the Act such a directive was issued. If such a directive has no force of law, it would be stretching it to submit that the first applicant is approaching the court with dirty hands. A reading of the s 193 of the Act shows that a customs officer has authority to seize any goods, ship, aircraft or vehicle that he has reasonable grounds to believe is liable to seizure. In terms of s 193 (4)-

“All articles which have been seized in terms of subsection (1) shall be taken forthwith and delivered to a place of security under the control of a proper officer:
Provided that if such articles are of such a nature that they cannot be removed to a place of security, the officer seizing them may declare them as having been secured in the place where he found them.”

There was no explanation why the motor vehicle in question was not seized in terms of the Act. In the absence of any provision that imposes an obligation on any person to comply with a directive of a customs officer, I am not persuaded to hold that the first applicant has approached the court with dirty hands.

Disposition

- (a) In the result, I find that the application fails to qualify to be heard on an urgent basis.
- (b) The applicants are ordered to pay the respondents' costs.
- (c) The Registrar is directed to remove the matter from the roll of urgent matters.

Nyakutombwa Mugabe Legal Counsel, applicants' legal practitioners
Civil Division of the Attorney-General's Office, 2nd and 4th respondents' legal practitioners
Thondhlanga & Associates, 3rd respondent's legal practitioners