REPORTABLE: (3)

TWOTAP LOGISTICS PRIVATE LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GUVAVA JA, CHIWESHE JA, CHITAKUNYE JA
HARARE: 10 MAY 2022 & 12 JANUARY 2023

L. Madhuku, for the appellant

T.R. Marange, for the respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo)* sitting at Harare dated 7 July 2021 upholding the respondent's point *in limine* to the effect that the appellant's cause of action had prescribed thereby dismissing with costs the appellant's claim.

THE PARTIES

The appellant is a company duly registered as such in terms of the laws of Zimbabwe. The respondent is an administrative authority established in terms of the Revenue Authority Act [*Chapter 23:11*] and tasked, *inter alia*, with the collection of revenues in terms of various statutes which include the Customs and Excise Act [*Chapter 23:02*] (the Act).

THE FACTS

In terms of the Act, the respondent's functions include the safe guard of revenue. In that regard it is the respondent's duty to ensure that excisable goods which are cleared through a bill of entry and appear on such bill of entry mirror the goods which are contained in the motor vehicle or vessel carrying the same.

On 14 July 2020, the respondent's officers at Beitbridge Border Post, acting on information, confronted the driver manning the appellant's truck registration number AEZ 7401 demanding to inspect the manifest of the goods being conveyed by the truck. The officers discovered that whilst the manifest indicated that the truck was laden with crude degummed soya beans oil, it was in fact laden with diesel. The officers proceeded to impound the 42 000 litres of diesel as well as the appellant's truck and tanker trailer. Despite the appellant's pleas for the release of the truck, the trailer and its contents, the respondent's officers notified the appellant that the seized diesel and truck would not be released as they were liable to forfeiture to the State. Dissatisfied with that stance the appellant wrote to the Commissioner Customs and Excise for relief. It did so on 12 October 2020. The Commissioner upheld the decision to forfeit the truck, the trailer and its contents. The appellant was advised of that position by letter dated 11 January 2022.

The appellant then approached the court *a quo* by way of application seeking an order couched as follows:

" **IT IS ORDERED THAT:**

(a) The decision by the respondent of forfeiting Scania R400 Horse Registration number AEZ 7401 to the State be and is hereby set aside;
(b) Respondent release the above-mentioned truck and tanker without any condition;
(c) Respondent pays costs of suit."

The respondent raised a point *in limine*, namely, that the matter had prescribed in terms of s 193, subsection 12 of the Act which 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 para (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 sub-section (11), after which period no such proceedings may be instituted." (own emphasis)

The respondent averred in the court *a quo* that it was common cause that the notice of seizure placing the truck and tanker under seizure was issued on 18 July 2020. From that date, the appellant had three months within which to institute proceedings for the recovery of the truck and tanker. In other words, the appellant should have approached the court *a quo* on or, before 17 October 2020, within the period of three months from the date of seizure. That in essence is the basis upon which the respondent mounted the plea in bar in the court *a quo.*

The court *a quo* upheld the point *in limine* and dismissed the application with costs.

GROUNDS OF APPEAL

Aggrieved by that determination the appellant has noted the present appeal on the following ground:

> "The court *a quo* erred in law and misdirected itself in upholding the respondent's point *in lim*ine in respect of the three month prescription period under s 193 (12) of the

Customs and Excise Act, [*Chapter 23:02*] in circumstances where the appellants cause of action did not fall within the ambit of the aforesaid s 193 (12) but under the eight month prescription provided for in s 196 (2) of the same Act."

RELIEF SOUGHT

The appellant seeks the following relief:

"1. That the appeal succeeds with costs.
2. That the whole judgment of the court *a quo* is set aside and in its place, the following is substituted:

"The preliminary point in respect of prescription be and is hereby dismissed.

3. That the matter is remitted to the court *a quo* for a determination on the merits before a different Judge."

THE ISSUE FOR DETERMINATION

Only one issue falls for determination, namely, whether on the facts of the matter the question of prescription should have been determined in terms of s 193 (12) or s 196 (2) of the Act.

ANALYSIS

Section 196 of the Act upon which the appellant relies for relief provides as follows:

"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 60 days after notice has been given in terms of the State Liabilities Act [*Chapter 8:15*]

(2) Subject to subsection 12 of section one hundred and ninety three, any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and

> shall have such remedy for the same as any defendant has in other cases where costs are given by law." (Own emphasis)

It is the eight months prescription period referred to in subsection (2) of s 196 above that the appellant argues is applicable to the facts of this matter and not the three month prescription period referred to in s 193 (12) of the Act.

In its judgment at p 196 of the record the court *a quo* observed as follows:

> "*In casu*, the cause of action as stated in the letter dated 13 of October 2020 from the applicant's legal practitioners to the respondent, was the forfeiture of the truck and trailer. This all emanated from the notice of seizure dated 18 July 2020, which on the face of it gave a plethora of rights to any person affected. The cause of action falls squarely within the purview of s 193. I agree with the submission by Mr *Marange* for the respondent that the provisions of s 196 (2) are clearly made subject to s 193 (12). Proceedings were instituted on 2 March 2021, way after the three months period."

The implication in the court *a quo*'s reasoning is that since the provisions of s 196 of the Act are made "subject to" s 193 (12), they are subservient to or overridden by the provisions of s 193 (12). The reasoning is erroneous. The court *a quo* failed to observe that the provisions of s 193 (12) are also made subject to the Provisions of s 196. In other words, the two provisions are made subject to each other. In the context of the Act the phrase "subject to" must be read as "without derogation from" for to read it otherwise would lead to an absurdity. It would mean that the legislature enacted s 196 so that it would be overshadowed by s 193 (12) by rendering it redundant. That surely could not have been the intention of the legislature. The correct position is that both sections exist independently of each other for different purposes and the phrase "subject to" serves to emphasise, rather than detract from, that position.

Connected to the above is the fact that the cause of action contemplated under s 193 (12) is the seizure of the appellant's truck, trailer and its contents. Under s 196 (2) the cause of action is different and wider than just seizure of property. Section 196 (1) provides for the sixty day notice required to be given to the respondent and the officers before any civil proceedings arising from their actions or omissions under the Act are instituted. Section 196 (2) provides that for such civil proceedings (other than against seizure) the period of prescription shall run for eight months reckoned from the date that the cause of action arose. (Own brackets). As the term "civil proceedings" is all embrasive it must include proceedings against forfeiture of property as opposed to seizure of the same. *In casu* the cause of action is not seizure but forfeiture of property. The period of prescription is thus the eight months provided for under s 196 (2).

The court *a quo* failed to note the distinction between seizure and forfeiture. We agree with the appellant's averments to the following effect. Seizure and forfeiture are two distinct juristic acts. In terms of s 193 of the Act, an officer may seize any article on reasonable grounds for believing that the article is liable to seizure. The fact of the seizure is then reported to the Commissioner. On receipt of the report of seizure the Commissioner may either order the release of the article from seizure or declare the article forfeited to the State or, if the article could not be found, declare that the person concerned pays an amount equal to the duty paid value of such article.

Thus after seizure forfeiture is neither automatic nor inevitable. It is the Commissioner who determines whether to forfeit or not. Forfeiture is thus a distinct and separate act from seizure. It gives rise to its own cause of action. A person challenging forfeiture does not do so in terms of s 193 (12) which deals with seizure, but in terms of s 196

which encompasses all causes of action, including forfeiture. The prescribed period in that case is eight months and not the three months relating to seizure.

It is trite that when interpreting statutes words must be given their ordinary grammatical meaning within the text in which they are used unless that would result in an absurdity.

In the case of *Thandakile Zulu* v *ZB Financial Holdings (Private) Limited* SC 48/18 this Court held as follows:

> "The rules of statutory interpretation dictate that the words of a statute shall be given their ordinary grammatical meaning unless doing so leads to an absurdity. In the case of Venter v Rex 1907 TS 910, INNES CJ said the following:
> '…….it appears to me that the principle we should adopt maybe expressed somewhat this way: that when to give plain words of a statute their ordinary grammatical meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it could lead to a result contrary to the intention of the legislature, or as shown by the context or by such other consideration as this Court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the intention of the legislature."

See also *Chegutu Municipality v M*anyora 1996 (1) ZLR 262 (S) and *Stonewell Searches (Private) Limited* v *Stone* H*oldings* and 2 Others SC 22/21.

If the court *a quo* had applied its mind to these principles of interpretation it would not have fallen into error.

The court *a quo* relied, inter alia, on the decision in the case of *Murphy v Director of Customs* 1992 (2) ZLR 28 (H) and the case of *Machacha* v *ZIMRA* HB-186-11. These authorities are distinguishable from the instant case in that what was sought to be

challenged in those authorities was the seizure of the plaintiff's property whereas *in casu* what is, being challenged is the forfeiture of the appellant's truck, trailer and diesel. As already pointed out seizure and forfeiture are two separate juristic acts giving rise to two different causes of action. That this is so is discernible in the provisions of s 193 of the Act dealing with the procedures to be followed regarding seizure and forfeiture.

DISPOSITION

The prescriptive period of three months given under s 193 (12) of the Act only applies with regards to proceedings against seizure of property. In any proceedings in terms of the Act other than proceedings relating to seizure, the prescriptive period of eight months given under s 196 (2) of the Act shall apply. Accordingly we hold that forfeiture of property falls under the purview of s 196 (2) of the Act for purposes of prescription. The appellant's suit having been launched before the eight month prescriptive period had lapsed, the court *a quo* erred in upholding the respondent's plea in bar. That finding must be set aside and the matter remitted to the court *a quo* for it to hear and determine the merits of the case.

Costs shall follow the cause.

In the result it is ordered as follows

1. The appeal succeeds with costs
2. The order of the court *a quo* is set aside and in its place is substituted the following:

   "The preliminary point in respect of prescription be and is hereby dismissed."
3. The matter be and is hereby remitted to the court *a quo* for a determination on the merits, before a different Judge.

GUVAVA JA **:** I agree

CHITAKUNYE **:** I agree

Lovemore Madhuku Lawyers, appellant's legal practitioners.

Zimbabwe Revenue Authority Legal Services Division, respondent's legal practitioners.