BAUXIM LOGISTICS (Private) Limited
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 22 February 2022 and 09 March 2022

Opposed Urgent Chamber Application

T Sena, for applicant
Marange, for the respondent

NDLOVU J: This is an urgent Chamber application for an interim interdict seeking to interdict the Respondent from disposing of the Applicant's tanker and trailer seized by the Regional Manager, Region 1, Customs and Excise of the Respondent on 6 October 2021after it was found to be laden with water instead of fuel on its way to Zambia at Chirundu border post. When the tanker and trailer were seized, the driver vanished and has not been accounted for up to this day.

A Notice of Seizure No. 043467L dated 06 October 2021 was duly issued to the Applicant. After the seizure of the Applicant's property, the Applicant made representations to the Regional Manager, Region 1, Customs and Excise for the release of the tanker and trailer as Applicant distanced itself from the criminal conduct related to this matter. The representations made, bore no fruit, leading to the Applicant appealing to the Acting Commissioner of Customs. That appeal was unsuccessful and that result was communicated to the Applicant on 14 December 2021.

The Notice of seizure, a copy of which the Applicant attached to its founding papers in part, states that a person in the circumstances the Applicant found itself in, has an option to, within 3 months from the date of the Notice of seizure, make written representations to the relevant officer of the Respondent for the release of his goods. Additionally or alternatively the person may, within the three months in question institute proceedings for the recovery of the goods in question from the Commissioner General.

Stung by the failure of its appeal to the Acting Commissioner Customs and Excise, the Applicant on 10 January 2022 wrote to the Acting Commissioner of Customs and Excise putting the Respondent on Notice of its intention to institute legal proceedings for the recovery of the tanker and the trailer in question in terms of Section -193 (12) (a) of the Customs and Excise Act, (Chapter 23:02). In that Notice the Applicant sought a written undertaking that the Respondent will not proceed to dispose of the tanker and trailer pending the determination of the legal proceedings. The Respondent was given 7 days by the Applicant to furnish it with that undertaking. The 7 days lapsed without the Respondent responding to the Applicant's request and threats of this application.

On 27 January 2022 the Applicant then filed this application.

On its papers and in oral arguments, the Respondent took 3 preliminary points namely, Urgency, Prescription and Impropriety of the Relief sought. On its part, the Applicant raised one point *in limine* challenging the validity of the opposition arguing that the deponent of the affidavit did not have authority to represent the Respondent. At the end of hearing arguments on the points in *limine* raised I reserved my ruling as I was of the opinion that if upheld singularly or collectively, the points *in limine* taken potentially could lead to the disposal of this matter.

POINTS IN LIMINE

I find it prudent to first decide on the point *in limine* raised by the Applicant.

(1) Whether or not there is valid opposition to the application

Rule 58 (4) (a) provides as follows:

> (4) "An affidavit filed with a written application
> (a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein;……." (my emphasis)

In Newman Chiadzwa v Herbert Paulkner 1991 (2) ZLR 33 GUBBAY CJ (as he then was) stated:

> "What a deponent must do in order to effectively counter any such doubt is to set out facts which will justify the court in coming to the conclusion that the averments in the summons are within his knowledge – some facts which show an opportunity on his part to have acquired such personal knowledge……"
>
> "A useful test is to ask whether the deponent would be a competent viva voce witness to the facts were he to be called." (my emphasis)

In BANCABC v PWC Motors (Pvt) Ltd and Others HH 123/13 Mathonsi J (as he then was) stated that;

> "I am aware that there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution:…."
>
> "However, it occurs to me that <u>that form of proof is not necessary in every case as each case must be considered on its own merits.</u> "my emphasis

The issue of the authority for one to represent a corporate body in legal proceedings and/or stating as much in the deponent's affidavit is extensively trodden but it keeps on being a regular point *in limine* in proceedings in this Court. To that end, a good practice has developed whereby some deponents have alluded to written authority and gone ahead to attach it, others have only alluded to authority having been granted but do not attach the same to their affidavits yet others have only stated that they occupy such and such position in the company concerned and have personal knowledge of the facts of the matter. What however, remains clear based on the above authorities is that the deponent of an affidavit must set out facts capable of justifying the court to conclude he has personal knowledge of the averments he or she makes in the affidavit and if called to the witness stand can be a competent witness. In addition to that, each case in this regard must be considered on the peculiarities of its own facts and circumstances.

In the Respondent's opposition in this matter the deponent to the opposing affidavit stated as follows in part:

> "1. I am employed by the Respondent as the Reginal Manager, Customs and Excise Region
> 1. I am privy to the facts of this matter and it is in this capacity that I depose to this affidavit.
> 2. The facts stated herein are to the best of my belief and knowledge true and correct…."

I am convinced that the affidavit of the deponent Angeline Mashiri meets the requirements of Rule 58(4) (a) and that she is a person who can swear positively to the facts. Were she to be called as a witness, she would be a competent *viva voce* witness to the facts. On the facts and circumstances of this matter I am convinced that the non-production or pleading of authority to represent the Respondent is not fatal and can safely be dispensed with especially regard being had to the fact that the Applicant's representations were made to the office that she occupies and that the affidavit is on behalf of the corporate Respondent as opposed to a corporate Applicant.

The point *in limine* raised by the Applicant is therefore dismissed as lacking in merit.

(a) <u>Whether or not the matter is urgent</u>

The Respondent argued that this matter is not urgent as according to it, the cause of action arose on 06 October 2021 and even if the need to act is taken to have arisen on 14 December 2021 the Applicant only brought this application on 27 January 2022 and thus Applicant was laggard in its approach. The Applicant countered this argument by stating that in as much as the cause of action arose on 6 October 2021, the need to act arose on 14 December 2021 when the Acting Commissioner of Customs and Excise dismissed its appeal. 14 December to 27 January 2021 is not an inordinate delay considering that tax matters are complex and take time to research and that period was interrupted by the festive period annual closure of offices. From the Notice of Seizure and the pursuant correspondence therefrom between the parties and other related actions by the Applicant, it does seem to me that the Applicant was well appreciative at all times of what ought to be done.

The law on urgency is trite. For this application I am in agreement with the Applicant that the need to act arose on 14 December 2021, owing to the domestic processes the parties were engaged in. The Applicant has however, failed to explain convincingly its inaction between 14 December 2021and 27 January 2022. That tax matters are complex is far from convincing, there is nothing complex in this matter. That some offices were closed during the feastive period is equally far from convincing. Even if that were to be accepted, the Applicant fails to explain its inaction from 10 – 26 January 2022. Right from 6 October 2021 based on the contents of the Notice of seizure it was clear to the Applicant that the clock had started ticking, and that time was of essence.

A delay of over 40 days which goes unexplained is inordinate. I thus uphold the point *in limine* as regards urgency raised by the Respondent. Having so found on urgency, there is, in my view no need to deal with the other points *in limine* raised by the Respondent. I hold that this Application is not urgent and should be struck off from the roll of urgent matters.

I therefore order as follows:

"The Application be and is hereby struck off the roll with costs."

Chimuka Mafunga Commercial Attorneys, applicant's legal practitioners
Zimbabwe Revenue Authority, Legal Services Division, respondent's legal practitioners