JULIUS KASAIRA
and
CECILIA KASAIRA
and
GILLINGTON NYAMWEDA
and
CONSTANCE MELODY JORI
and
MAKOTSA CHARLES RANGARIRAI
and
TAFADZWA MUCHOPA
and
ELLIOT MANDERE
and
JOSEPH AKUMBACHA
and
GUTA DOUGLAS TONDERAI
and
KEVIN MANYAIRA
and
ITAI CHITIMBE
and
LAWRENCE FARAI CHITIMBE
and
MUNYUKI CONFIDENCE
and
KUDAKWASHE MUSHANGWE
and
NOMORE HWARIVA
and
TINOTENDA HWETA
and
NORMAN JEREMIAH JECHE
and
OWEN MAPEPA
and
PROSPER ISAKA
TALENT KACHAMBWA
and
BRENDA CHIDZIYA
ALEXIO MUDE
and
JOHN MARSHAL ZIMECHA

and
CHISAMBIRO AGNES
and
CONCILIA MUGOVA
and
FLORENCE MUJURU
MOLLINE MUJURU
and
CHISAMBIRO ABIGAIL
and
MICHAEL KAMPION
and
NOMA CHITENGU
and
MARTIN DAHWA
and
KNOWLEDGE JAKARASI
and
NYAMWEDA GAMUCHIRAI
and
ALTON MTENGWA
and
PATRICIA TAMBURA MUPAYA
and
MUNYARADZI KUDANGIRANA
and
MICHELE MUTEVERA
and
LISA LETICIA MURAPA
and
EDWARD MARUFU
and
CAROLINE MACHABVUNGA
and
CANAAN CHIKOHOMERA
and
GEORGE MUPAKAMI
and
CIDRIC AMON NHIMBA
and
SAMANTHA CHIDO MACHINI
and
ELIAS MURANDU
and
NYARAI BENE

and
LYRIC CHIDEMO
and
NAUME CHIPINDU
and
KUDAKWASHE VENGESAI
and
LEWIS BANGOMWE
and
MKHOLISI NCUBE
versus
ZIMBABWE REVENUE AUTHORITY
and
ZIMBABWE ANTI CORRUPTION COMMISSION (ZACC)
and
MINISTER OF INDUSTRY AND COMMERCE NO.

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 August & 3 September, 2021

Urgent Chamber Application

H Chitima with M. Chitsinga, for the applicants
T. L. Marange, for the 1st respondent
Ms T. Tembo, for 2nd & 3rd respondents

MUREMBA J: It is common cause that all the applicants imported motor vehicles from outside the country using motor vehicle licences or permits that were issued by the third respondent's ministry, the Ministry of Industry and Commerce. The third respondent is the Minister of Industry and Commerce. The applicants all paid import duty and the motor vehicles were delivered into the country through Beitbridge Border Post. At the instance of the first respondent, the motor vehicles were delivered to different bonded warehouses or transit sheds for storage. That is where the applicants were supposed to collect them from. However, when the applicants went to collect their motor vehicles, they were not allowed to collect them because the import licences which they used to import the motor vehicles were said to be under investigation. Apparently, an audit that was done in June 2021 in the third respondent's

ministry revealed that 8 licence books were stolen from the ministry and some import licences had been issued from these licence books. These licences were used to import motor vehicles into the country. This prompted the third respondent to engage the second respondent, the Zimbabwe Anti-corruption Commission to conduct investigations which investigations are still on going. The third respondent also engaged the first respondent by letter dated 17 June 2021 advising it that specified licences were fraudulently issued and that it had also discovered that 8 licence books were missing.

On 23 June 2021, the second respondent also wrote to the first respondent requesting for information of all the motor vehicles that were imported using licences that were issued by the third respondent. The second respondent specified the range of those licences and indicated that it was investigating a case of Criminal Abuse of Duty by a Public Officer. The first respondent circulated the list of those motor vehicles to officers at transit sheds or bonded warehouses to halt their release. Those vehicles were then "detained pending verification of import licence" and this was endorsed on the receipt for items held.

It is on the basis of the refusal by the first respondent to release the affected motor vehicles to the applicants that the applicants filed the present urgent chamber application on 5 August 2021 with a prayer for a mandatory interdict for the release of the motor vehicles in the interim pending the return day. On the return day the applicants will be seeking a *declaratur* that they are the owners of the motor vehicles in question. The reliefs are couched as follows:

"TERMS OF THE FINAL ORDER SOUGHT

That the 1st, 2nd and 3rd Respondents show cause why a final order should not be granted in the following terms;

1. That each respective applicant be and is hereby held to be the rightful and lawful owner of the motor vehicle/s identified and described in the schedule attached to this order against each applicant.
2. That pursuant to the finding made in paragraph 1 above, the respondents be and are hereby directed not to interfere in any way with the applicants' exercise of ownership and dominion over the motor vehicles identified and described in the schedule attached to this order.
3. 1st, 2nd and 3rd respondents, jointly and severally the one paying the others to be absolved, shall pay costs on the higher scale.

TERMS OF THE INTERIM RELIEF GRANTED

1. Pending the return day, 1st, 2nd and 3rd respondents and all those acting on their instructions or behalf or behest or account, be and are hereby directed and ordered to forthwith allow the applicants to access and/or take possession of and/or take full control of and/or take ownership of the motor vehicles identified and described against each respective applicant in the schedule attached hereto.
2. Applicants be and are hereby allowed to serve this order upon the respondents themselves or through their legal practitioners."

In response to the application the respondents raised points in *limine* which I deal with hereunder.

The matter is not urgent

It was averred and submitted by the second respondent that the import licences in question are under investigation and that as such there is no urgency in the matter.

The first and second respondents further averred that the certificate of urgency and the founding affidavit do not justify why this application should jump the queue. According to the certificate of urgency in para 2, the cause of action arose as far back as March 2021, but the applicants only filed this application on 5 August 2021. Para 2, of the certificate of urgency reads,

> "Applicants purchased and imported second hand motor vehicles from South Africa between March 2021 and Mid July 2021."

Mr *Marange* for the first respondent submitted that the applicants had not bothered to explain the delay that the applicants made in bringing the application. In response Mr *Chitima* submitted that it is not correct to say that the need to act arose in March 2021 because that is when the motor vehicles were purchased. He submitted that the cause of action arose when the applicants attempted to collect their motor vehicles and were not allowed to do so. Asked when exactly the applicants were not allowed to collect the motor vehicles, the applicants' legal practitioners referred to para 68 of the first applicant's founding affidavit which says, "*The motor vehicles in question were delivered into Zimbabwe on differing dates around mid-month July 2021*."

This court does not believe that this is a satisfactory answer. There are 51 applicants who decided to bring one application on the basis that the circumstances giving rise to the application are the same. However, that did not take away the requirement that each applicant needed to show that their matter is urgent. Thus, the applicants needed to demonstrate this by

making individual averments with regards to when they became aware of the facts giving rise to the complaint; what they did after becoming aware of the conduct complained against; explain the non-timeous action if there was any delay[1]. Each applicant needed to show that if the conduct complained of is not addressed on an urgent basis, irreparable harm will occur to them. The nature and extent of the irreparable harm also needed to be demonstrated. A judge can only be inclined to hear a matter on an urgent basis if the applicant takes the court into its confidence by addressing all these issues in his or her founding affidavit. In *Dombodzvuku & Anor v Sithole & Anor* HH 174-2004, MAKARAU JP (as she then was) said:

> "It is trite that facts giving rise to the urgency of an approach to a judge in chambers are to be placed and found in the founding affidavit."

In *casu* the 2nd to 51st applicant authorised the first applicant to depose to the founding affidavit on their behalf in their supporting affidavits[2]. Consequently, the individual applicants did not take time to address the issues that I have mentioned above. They left the first applicant to deal with the issue of urgency in paras 68-83 of his founding affidavit. However, what is missing from his explanation are the times when events occurred for each individual applicant. It is only in para 68 that he says that the motor vehicles in question were delivered into Zimbabwe on differing dates around mid-month in July 2021. The rest of the paragraphs deal with the efforts that the applicants made in seeking to be given their motor vehicles by the first respondent. However, no reference is made to any specific dates except for the first applicant who says he was turned away on 26 July 2021 when he attempted to obtain the release of his motor vehicle. Averments are made that the applicants faced resistance by personnel at the bonded warehouses when they went to collect their motor vehicles, but dates when this happened are not mentioned. It is clear from the attached correspondence from the second and third respondents addressed to the first respondent that the first communication about import licences being under investigation was made on 17 June 2021. Each applicant therefore needed to show the date they first approached the bonded warehouses seeking to collect their motor vehicle. Surely each applicant would know when they went to the bonded warehouse to collect their motor vehicle for the very first time and were denied collection. That particular date is important because that is when the cause of action arose for each applicant. The receipts for items held that were completed by the first respondent for the detention of these motor vehicles have dates of detention dating as far back as 26 June 2021 stretching to 5 July 2021. If we go

[1] *Kuvarega v Registrar-General & Anor* 1988(1) ZLR 188 H.
[2] Para 3 of 2nd to 51st applicant's supporting affidavits.

by these dates, the questions that arise are why did the applicants only file the present application on 5 August 2021 a period of more than a month? The non-timeous action needed to be explained by each applicant in his or her affidavit. Although the applicants decided to file one application, each applicant still needed to demonstrate the urgency in their matter in terms of time and consequences. In urgent chamber applications the two paramount considerations are time and consequences[3]. In respect of time there is need to act promptly when there is apprehension of harm[4]. In *casu* it is clear that the second to the last applicant did not demonstrate that they acted promptly when the need to act arose in terms of time. If it is assumed that they were not allowed to collect their motor vehicles in June 2021, and they filed this application on 5 August 2021, then clearly, they delayed filing their application. It cannot be said that they treated their matters with urgency. In the result, the second to the last applicant fail the time test.

As for the first applicant, he said that he was not allowed to collect his motor vehicle on 26 July 2021. This application having been filed on 5 August 2021 it cannot be said a delay of 10 days is inordinate taking into account that on 2 August 2021 his legal practitioners wrote to the first respondent demanding the release of his motor vehicle together with the rest of the other applicants' motor vehicles. This applicant passes the time test. However, what makes the first applicant's application not urgent despite passing the time test, is the reason why the vehicles of all the applicants were detained and continue to be detained by the first respondent. The import licences that were used to import the vehicles are still under investigation by the second respondent. It is stated in the second respondent's notice of opposition that it is investigating a case of corruption in respect of these motor vehicles. They are said to be subjects of illegal import licences or permits. Although it is the third respondent's officials who issued the illegal import licences, it is averred that the investigations are being done to establish whether or not there was connivance with the applicants. The issuing authority, the third respondent averred that the import licences that were used to import the applicants' motor vehicles are fake. As such the detention of the motor vehicles is justified in terms of the law. The explanation that was given by the third respondent for suspecting collusion or connivance between the applicants and the third respondent's officials who issued the fake import licences/permits is sound. She explained that Statutory Instrument 189 of 2021 was gazetted on 2 April 2021 regulating the importation of second-hand motor vehicles which are at least

[3] *James Mushore v Councillor Christopher Mbanga N.O & 2 Ors* HH 381/16.
[4] Ibid page 7.

10 years old from the date of manufacture. The reason is to stop flooding the country with old motor vehicles. Therefore, their importation now requires a person to apply to her ministry for the issuance of an import licence. Since the law does not apply retrospectively, people who had already purchased such motor vehicles before the Statutory Instrument was gazetted on 2 April 2021 were allowed to apply for import licences to enable them to import their motor vehicles. Ms *Tembo* for the second and third respondents submitted that the import licences were not meant to facilitate the purchasing and importation of such motor vehicles as the first applicant averred in his founding affidavit in para 16. The first applicant said,

> "Upon being issued with the import licences, applicants would then proceed to purchase the motor vehicles and pay commensurate import duty to the first respondent."

In para 35 the first applicant repeats that the applicants were permitted by the third respondent to *purchase* motor vehicles through the issuance of import licences. It is the respondents' contention that import licences for such motor vehicles were being issued to persons who had already purchased such motor vehicles before the Statutory Instrument was gazetted. Ms *Tembo* submitted that therefore the issue that is being investigated is whether or not the applicants purchased their motor vehicles before or after 2 April 2021. If they purchased before, they will be cleared.

Clearly from the foregoing, the relief that is being sought by the applicants is such that it cannot be sought on an urgent basis in view of the investigations that are still on going. This is one case where preferential treatment of the applicants' case is not possible because investigations into the fake import licences have not yet been completed by the second and third respondents. I can do no better than borrow the words of MAFUSIRE J as he was determining the issue of urgency in the *Mushore* case. He said at p 9,

> "However, whilst the applicants' situation may invoke sympathy, in my considered view, he just does not have, at least at this stage, sufficient grounds to litigate, less so, on an urgent basis. I find it hard to accept that the applicants' legal practitioners had carefully thought through their client's case and the possible legal remedies available to him before bringing this application in the form that it is in."

In *casu* the applicants through their legal practitioners had done well to write to the first respondent on 2 August 2021 demanding the release of their motor vehicles. The same letter was copied to the second and third respondents. What is unfortunate is that the applicants were too impatient to wait for a response to their letter. That letter having been delivered to the first respondent on 3 August 2021, the present application was then filed on 5 August 2021. If the applicants had waited for the response, they could have, in view of the response given, weighed

their options and considered the best course of action to take. Non legal remedies might have worked perfectly well for the applicants before running to this court. They could have worked with the second respondent in order to expedite investigations.

Section 48 of the Customs and Excise Act [*Chapter 23:02*] provides that restricted or controlled goods shall only be imported in conformity with the provisions of the Act or such other enactment as the case may be. The provision is peremptory. In *casu* the applicants' motor vehicles were imported using fake licences. There was no compliance with the law. It does not matter that the applicants might have not played any role in the issuance of the fake import licences. The importations will remain an illegality which would want to be regularized. An illegality does not have any legal effect. In *City of Gweru v Kombayi* 1991 (1) ZLR 333 (SC) the City of Gweru failed to comply with its own tender procedure set out in s 164 of the Urban Councils Act [*Chapter* 164], when it awarded a tender to Mr Kombayi. It was held that the provisions of s 164(1) of the Urban Councils Act [*Chapter* 214] are peremptory, and the failure to follow the tender procedure rendered the contract void and unenforceable. The applicants in *casu* cannot therefore rush to the courts to enforce an illegality. Investigations into the roles they played have to be completed first. The results will determine whether or not they will be allowed to regularise their import licences. Clearly the applicants have jumped the gun and there cannot be any urgency in the matter.

The other factor which points to lack of urgency in the matter is the nature of the interim relief the applicants are seeking. Its substance clearly shows that the applicants are in actual fact seeking a final relief which is disguised as an interim relief. Even the amendment the applicants' counsel sought to make by deleting the words "or took full control of and/or take ownership" from para 1 did not change anything. The amended relief remains final in nature as it seeks to allow the applicants to collect their motor vehicles. Besides, paras 31, 32 and 33 of the first applicant's founding affidavit make it clear that the applicants want to be granted a final relief on an urgent basis. The paragraphs read as follows.

> "[31] I am advised that the effect of the interdict sought is to effectively allow us to gain possession of the motor vehicles in issue. As such, the interdict sought is final in effect even though it is being sought on an urgent basis.
> [32] I will therefore address the requirements of a final interdict in motivating this application.
> [33] I submit that applicants do have a clear right/s which they individually seek to protect…"

On the return date the applicants will be seeking a *declaratur* that they are the owners of the motor vehicles in question. So, the applicants have approached this court on an urgent

basis in order to get two final reliefs. Firstly, a final interdict which should be granted on an interim basis. Secondly, a *declaratur* which should be granted on the return day. This is incompetent. Besides, a final interdict cannot be sought on an urgent basis. This alone renders the application not urgent.

In view of the foregoing, I uphold the point *in limine* that the matter is not urgent.

It be and is hereby ordered that: -

1. The matter is removed from the roll of urgent matters.

2. The applicants shall pay the respondents' costs.

Mutandiro, Chitsanga & Chitima, applicants' legal practitioners
Zimbabwe Revenue Authority Legal Services Division, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd & 3rd respondents' legal practitioners