TAWANDA MUNGATE
and
KENNETH MUSHAIKWA
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 9 March 2022

Date of written judgment: 10 August 2022

Special plea

N. Chidembo, for the defendant
L. Dzoro, for the plaintiff

MAFUSIRE J

[1] This is a determination on a special plea. The special plea is in respect of a summons issued by the plaintiffs on 12 November 2021 under HC 6404-21. In the main, the summons seeks an order compelling the defendant to release to each of the plaintiffs respectively certain two motor vehicles, a Nissan Vanette, registration no ADK 0695, and a Mitsubishi Delica, registration no ABU 6387 ("**the vehicles**"). In the alternative, the summons seeks payment by the defendant to the each of the plaintiffs respectively, amounts in the sums of USD7 000 and USD12 000, or the local currency equivalent thereof of ZW$588 000, and ZW$1 008 000 respectively.

[2] The defendant has filed a special plea in bar or abatement, raising two special defences to the plaintiffs' claims. The one defence is that the plaintiffs are non-suited, or improperly before the court, in that they failed to serve a proper notice to the defendant prior to the issuance of their summons as required by s 196 of the Customs and Excise Act [*Chapter 23:02*] ("**the s 196 notice**"), as read with the State Liabilities Act [*Chapter 8:15*]. The other special defence raised by the defendant is that the plaintiffs' claims have become prescribed in terms of s 193(12) of the Customs and Excise Act because their summons was

issued more than the three months prescribed by that Act. The defendant alleges that the summons was issued more than five years out of time.

[3] The plaintiffs filed a replication to the special plea. In regards to the s 196 notice, they allege in the main that the defendant's averments lack legal premise; that in fact, they gave the requisite notice way back in November 2017 and that at any rate, this issue was now *res judicata* because by a judgment of this court under HH 265-19 (per MANGOTA J) the same special defence had been raised but had been dismissed. In the alternative, the plaintiffs allege that a failure to give the s 196 notice is not fatal because the court can always grant condonation in terms of the State Liabilities Act.

[4] In regards to the special plea of prescription, the plaintiffs allege in the main that the defendant's averments lack legal premise in that it relies on s 193(12) of the Customs and Excise Act, yet this provision is not applicable. The plaintiffs allege that this provision governs seizures and forfeitures of articles that are still under the exclusive jurisdiction of the defendant, whereas in the present matter, the vehicles were declared forfeited by the court. The plaintiffs further allege that the defendant's special plea lacks legal premise in that they successfully appealed against the forfeiture order and that by another judgment of this court under HH 347-21 (per MUZOFA & CHIKOWERO JJ) it was ordered that the vehicles be released to them forthwith. In the alternative, the plaintiffs allege that the failure to comply with s 193(12) of the Customs and Excise Act is not fatal because in terms of it, the court can always grant condonation.

[5] Most of the background facts are common cause or uncontroverted. However, the pleadings are somewhat imprecise. The crisp point or points for determination in this matter can only become clearer upon an accurate expose of the background facts and an examination of the salient points thereto. In summary, these are the facts. The two plaintiffs are private individuals. The defendant is the central collector of taxes for government. It is established in terms of s 3 of the Revenue Authority Act [*Chapter 23:12*]. In the exercise of its functions, the Revenue Authority Act and the several other pieces of tax legislation repose the defendant with a vast array of powers and overarching authority for the effective collection of taxes. One such power is the power to seize any goods, ship aircraft or vehicle upon reasonable

grounds for believing that they are liable for seizure. This power is reposed by s 193(1) of the Customs and Excise Act. It reads:

> "Subject to subsection (3), an officer may seize any goods, ship, aircraft or vehicle (hereinafter in this section referred to as articles) which he has reasonable grounds for believing are liable to seizure."

[6] The defendant's officials seized the vehicles in 2016. It was suspected they had been used in the unlawful transportation of a certain type of cigarettes. The cigarettes had been liable for excise duty. It had not been paid. Following the seizure, the drivers of the vehicles escaped. From the previous proceedings, it emerged that the plaintiffs had not been responsible for the crime. At all material times, their vehicles had been in the custody of a mechanic for repairs. When they had gone to pay for the repairs and collect their vehicles, neither the mechanic nor the vehicles could be found. Upon enquiry, the plaintiffs learnt that the vehicles had been seized by the defendant's officials. The owner of the cigarettes was eventually traced and arrested. His name was Richard Tafirei ("**Richard**"). He was convicted by the magistrate's court for a contravention of s 184(e) of the Customs and Excise Act. This is the provision that makes it an offence for any person to possess, or have in his custody or control without authority, any manufactured goods liable for excise duty or surtax when such have not been paid.

[7] As part of its sentence against Richard, the magistrate's court declared the vehicles forfeited to the state. The plaintiffs were not heard. It has never been established upon what authority the magistrate's court ordered the forfeiture. It was not in its reasons for sentence. Upon subsequent enquiry, the trial magistrate vacillated between the various provisions of the law. When a query was raised by a judge of this court upon the automatic criminal review of her proceedings, the magistrate alleged that the forfeiture had been ordered in terms of s 188(2) and s 209 of the Customs and Excise Act. But subsequently, in her comment to the appeal that the plaintiffs had eventually filed against the order of forfeiture, the same magistrate claimed that in ordering a forfeiture of the vehicles, she had relied on s 62(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In both judgments under HH 265-19 and HH 347-21 this court expressed concern on the conduct of the trial magistrate. In summary and in general, all those provisions mentioned by the trial magistrate empower a

court convicting a person for certain types of offences to order a forfeiture of any such articles as may have been used in the commission of the offences. But the considerations may be different.

[8] The plaintiffs successfully appealed the order of forfeiture. As already indicated, in the judgment under HH 347-21 aforesaid, this court ordered the release of the vehicles forthwith to the plaintiffs. This was in July 2021. However, the defendant did not release the vehicles. In their summons in the present proceedings, the plaintiffs allege that notwithstanding the order of this court for the release of the vehicles as aforesaid, they are also required at law to seek the return of their vehicles or their monetary values. It is not explained which law the plaintiffs rely on for this proposition. So far, the defendant has not yet pleaded to the merits. It has only filed the special plea aforesaid.

[9] Some of the salient details to the factual compendium and to the legal arguments placed before me are these. The notices of seizure issued by the defendant upon the seizure of the vehicles are dated 27 January 2016. It is not apparent from the record when exactly the forfeiture order was made by the magistrate's court. But on 17 November 2017 the plaintiffs' legal practitioners addressed a letter to the defendant's Commissioner General. In that letter it was alleged, among other things, that it (the letter) was the requisite s 196 notice. It is important to duplicate the material portions of this letter because the first part of the defendant's special plea exclusively hinges upon it:

> "**Re: TAWANDA MUNGATE AND KENNETH MUSHAIKWA v ZIMRA.**
> **NOTICE OF INTENTION TO INSTITUTE LEGAL PROCEEDINGS**
>
> Kindly note our interest in this matter wherein we represent Mr Tawanda Mungate and Kenneth Mushaikwa whose motor vehicles were sized by Zimbabwe Revenue Authority and forfeited to the state by virtue of a Court Order by the Magistrate sitting at Beitbridge Magistrates Court. (See ***Annexure A*** attached).
>
> We note that there was communication between our clients and your office represented by the Regional Manager stationed at Beitbridge. (See ***Annexure B*** attached).
>
> What is obvious and apparent from those documents is that your office alleges that it is not able to assist our clients since the court order is already in place and we don't agree with that point.

> This letter however has been simply written in compliance with ***Section 196 of the Customs and Exercise*** (sic) ***Act 23:02*** (sic) as it is our client's intention to institute legal proceedings and appeal against the judgment by the Magistrate and request release of those vehicles.
>
> It is clear that our clients were never convicted of any crime and were not aware of the alleged illegal activities of the accused. Our clients even assisted the police identify the accused who was convicted.
>
> We therefore kindly seek your expedient response allowing us leave to proceed with the legal proceedings pertaining to the court order.
>
> Regards"

[10] The annexures "A" and "B" referred to in the letter have not been made part of the record before me. The defendant argues that the plaintiffs' letter was not the requisite s 196 notice because it was not related to the present proceedings which were instituted a staggering four years later. The plaintiffs' summons was issued on 12 November 2021. The defendant argues that the letter was issued in contemplation of the appeal that the plaintiff meant to file at that time.

[11] Section 196(1) of the Customs and Excise Act reads:

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

[12] The relevant provisions in the State Liabilities Act which is referred to by s 196 of the Customs and Excise Act are found in s 6. They read:

> "**6 Notice to be given of intention to institute proceedings against State and officials in respect of certain claims**
>
> (1) Subject to this Act, no legal proceedings in respect of any claim for—
>
> (*a*) ……..
>
> (*b*) the delivery or release of any goods;
>
> and whether or not joined with or made as an alternative to any other claim, shall be instituted against—
>
> (i) the State; or
>
> (ii) ……..

unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at least sixty days before the institution of the proceedings.

(2) A notice referred to in subsection (1)—

(i) (*a*) ……..

(*b*) shall set out the grounds of the claim; and

(*c*) …….

(*d*) where the claim is against or in respect of an act or omission of any officer or employee of the State, shall specify the name and official post, rank or number and place of employment or station of the officer or employee, if known.

(3) The court before which any proceedings referred to in subsection (1) are brought may condone any failure to comply with that subsection where the court is satisfied that there has been substantial compliance therewith or that the failure will not unduly prejudice the defendant.

(4) ……..”

[13] The defendant’s argument, distilled, is that the purpose of the s 196 notice is to afford it a timely opportunity to know and investigate the material facts upon which its actions are challenged. By that notice, it is afforded the chance to protect itself against the consequences of possible wrongful action by tendering early amends. For this proposition the defendant relies on authorities such as *Machacha v Zimbabwe Revenue Authority* HB 186/11 and *Care International in Zimbabwe v Zimbabwe Revenue Authority & Ors* SC 76-17. The defendant further argues that even if the plaintiffs’ letter aforesaid is taken as the requisite s 196 notice, it is still incompetent as it was not directed to the correct legal person, namely the defendant.

[14] The defendant’s arguments ignore some salient and pertinent features of this matter. Undoubtedly, the plaintiffs’ letter aforesaid was written in contemplation of the appeal against the forfeiture order that they intended to file at that time. After getting condonation for late noting of the appeal, the plaintiffs indeed went on to file an appeal. The appeal succeeded. By its judgment under HH 347-21 aforesaid, this court made a finding that the plaintiffs had not been afforded the opportunity to be heard before their vehicles were ordered forfeited to the State. The court further found that the trial magistrate had not given her reasons for the order of forfeiture. The court then unequivocally ordered and directed that the vehicles be released to the plaintiffs forthwith. Thus, until the defendant pleads to the merits

and explain why it did not, and does not, release the vehicles in apparent disregard of an order of this court, it cannot not lie in its mouth to say the plaintiffs are non-suited or improperly before the court.

[15] In the earlier proceedings that culminated in the judgment of this court under HH 265-19, the defendant was a party. Although the claim was clearly misconceived as a *declaratur* when in reality what was being sought was demonstrably an order of mandamus for the release of the vehicles, nonetheless, the issue of the s 196 notice was raised by the defendant in those proceedings. It raised the same objection as it is raising herein. The matter was fully ventilated in argument. The court fully considered the plaintiffs' letter of 17 November 2017 aforesaid. It made reference to some of the case authorities referred to by the defendant herein. In the end, it unequivocally and emphatically pronounced on the matter as follows:

> "It follows that, from the foregoing, that the applicants' notice of 17 November, 2017 suffices although it was, in my view, misplaced. The court, and not the second respondent, ordered forfeiture of the cars to the State. The second respondent could not investigate anything or even be accused of any wrongful action by anyone. It held the cars by virtue of the court *a quo's* order. The issue of the notice being served upon the second respondent, is therefore, neither here nor there.
>
> It is accepted that the second respondent was/is not one of the actors in the criminal prosecution of Richard Tafirei the conviction of whom resulted in the order of forfeiture of the applicants' cars to the State. It is accepted further that the second respondent was a witness in the criminal matter. However, its motion to have the application dismissed on the strength of its misjoinder to the same cannot hold."

[16] The defendant purports to dismiss the aforesaid finding by the court as *obiter dictum* which, it alleges, is not binding. This is absurd. The issue of the s 196 notice had been raised squarely as a substantive issue for determination. It is now issue estoppel. Issue estoppel is a species of *res judicata*. It applies where an issue that was a necessary ingredient in a previous cause of action decided upon is presented to the court again.

[17] It is incompetent for the defendant to raise the issue of the s 196 notice under various guises, especially given the trite position of the law as regards the true objective of that notice. Since 2016 the plaintiffs have been engaging the defendant, either privately or through direct communication, but also through legal proceedings in regards to the release of their vehicles. The defendant has become fully aware of the basis of the plaintiffs' claims. It is fanciful and frivolous to suggest that it wants information to enable it to carry out any

investigation on the seizure or forfeiture or continued detention of those vehicles or that the plaintiffs' letter was not served on the defendant. Who better than the defendant's Commissioner General to serve that kind of notice on? At this stage, the court does know the contents of Annexures "A" and "B" referred to in the plaintiffs' letter. But it is apparent that any further details of what the letter alleges are to be found in those documents. It is premature to ask that the plaintiffs be declared non-suited or improperly before the court

[18] The defendant's second special plea is that the plaintiffs' notice is prescribed by reason of s 193(12) of the Customs and Excise Act. Although not in its special plea, the defendant in its heads of argument also alleges prescription in terms of s 15(d) of the Prescription Act [*Chapter 8:11*]. Section 15(d) of the Prescription Act is the provision that prescribes three years as the period of prescription for any ordinary debt. On the other hand, s 193(12) of the Customs and Excise Act provides as follows:

> "(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 paragraph (*a*) of subsection (6);
>
> *(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 subsection (11), after which period no such proceedings may be instituted.

[19] The two types of prescription that the defendant alleges in terms of s 15(d) of the Prescription Act and s 193(12) of the Customs and Excise Act are manifestly a red herring. Whilst the court is still to be apprised why the plaintiffs allege in their summons that notwithstanding the order by this court for the release of the vehicles, they are still required by law to seek their return, the present proceedings are realistically a continuation of the proceedings mounted by them for the return of the vehicles from the time that they issued that letter of 17 November 2017. Whether prescription ran the full course or was interrupted are matters that require *viva voce* evidence.

[20] At the hearing, the defendant argued that the plaintiffs' claims are based on the forfeiture of the vehicles on the orders of the court, and not on the seizure by the defendant, and that in terms of s 196(12) of the Customs and Excise Act it is prescription in regards to

seizure, not forfeiture, that the defendant is relying upon. But this argument glosses over certain fundamental considerations in regards to the defendant's power or authority. The defendant is an agent of the State. It exercises its functions on behalf of the State. Section 4(1) of the Revenue Authority Act states that the functions of the Authority shall be to act as an agent of the State in assessing, collecting and enforcing the payment of all revenue. When it seizes articles liable for seizure, it does so on behalf of the State. When the articles are eventually forfeited following such a seizure, they are forfeited to the State. The defendant cannot exercise or purport to arrogate to itself greater power than is conferred upon it on behalf of its principal, the State. So, when this court ordered the State, which is the defendant's principal, to release the vehicles, the court is still to be apprised by what powers the defendant refuses to comply. Prescription cannot be competently pleaded in the circumstances of this case.

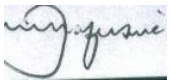
[21] The act of seizing articles liable for seizure in terms of s 193(1) of the Customs and Excise Act is not an end in itself. Ultimately, seizure may end with forfeiture in terms of s 193(6)(b). This is the forfeiture by the defendant itself. But when it forfeits, it is doing so for and on behalf of the State. As said already, in this case, it was not the defendant that ordered forfeiture of the vehicles. It was the magistrate's court. Aside from the fact that it has never been established by what authority the magistrate's court ordered forfeiture, the defendant itself could not, in terms of s 193(9) of the Customs and Exercise Act, have forfeited the vehicles while proceedings for the recovery of the vehicles might be instituted in terms of s 193(12), and if instituted, until concluded in its favour. In this case, not only were such proceedings instituted, but also, they were concluded in favour of the plaintiffs.

[22] Thus, the special plea filed by the defendant is manifestly unmeritorious. There is no need to consider the aspect of condonation that the plaintiffs raise in the alternative. Even if the defendant somehow manages to get round the previous judgments of this court, there is still the question of the propriety of the notices of seizure themselves. In terms of s 193(10) of the Customs and Excise Act, there are certain requirements to be met in regards to the issuing of the notices of seizure by the defendant. Among other things, the person from whom the articles are seized must be given the notice of seizure and be informed of the provisions of s 193(12) (relating to the right to seek recovery of the articles). Furthermore, in terms of s

193(11) the notice of seizure must be given personally to the person from whom the articles are seized, or at his address, or by publication in the Government Gazette where the address is unknown. Until evidence is led, there is no information on all these aspects. What is apparent is that the plaintiffs were not the recipients of those notices of seizure. This cannot be a matter to be dealt with on the papers. It has to go to trial.

[23] In the premises the defendant's special plea is hereby removed from the roll and referred to trial. The costs shall be in the cause.

10 August 2022



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