FREEZIM CONGRESS
versus
MR MOSES BOORA N.O
and
COMMISSIONER GENERAL OF
THE ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 24 MAY 2018 AND 14 JUNE 2018

Urgent Chamber Application

V Majoko for the applicant
L Musika for the respondents

MOYO J: This is an urgent application in which the applicant seeks the following interim relief:

"That 1st respondent be and is hereby ordered to release or cause to be released to the applicant the 50000 T-shirts seized on the 30th of April 2018 from the vehicle being driven by Ethan Singola Hino truck bearing registration number ABQ 5627.

At the hearing of this matter, I granted the relief sought and stated that my detailed reasons will follow. Herewith my reasons.

The facts of this matter are as follows:

- The applicant is a political party. On 30 April 2018, the police seized 50000 T-Shirts belonging to the applicant along the Bulawayo-Beitbridge high way, at Makhado, to be precise. The applicant's driver was advised to return to Beitbridge police station since he was carrying campaign material.

At Beitbridge police station, the T-shirts were declared to be under seizure and the truck was ordered to drive to ZIMRA Warehouse where it was detained and remained in ZIMRA's custody pending investigations. Applicant's representative avers in the founding affidavit tht he had gone twice to Beitbridge to enquire from the police as to the reason for the seizure but was

not given a satisfactory answer. He avers that at some point, he was assured that the T-shirts would be released but that did not happen. Applicant's representative avers that he is fully aware of the police powers in terms of the Criminal Procedure and Evidence Act [Chapter 9:07] to seizure any article on reasonable grounds that it is concerned with the commission of an offence. He avers that no one has, however been warned for committing any offence. Applicant's representative also avers that any suspicions that the T-shirts could have been smuggled were quashed when ZIMRA officials said that they had no ground to suspect any smuggling. Applicant avers that the campaign season has started and it is urgent that they recover their T-Shirts and work on their campaign mission.

The application was filed on 10 May 2018. First respondent opposed the application on the ground that

> "Applicant and one Evans Singo were arrested on 11 May 2018 and taken to court jointly charged with smuggling. The matter was referred to the District prosecutor and is still pending." per paragraph 4 of the first respondent's affidavit.

At paragraph 7, first respondent avers that there are conflicting statements on the source of the T-shirts as a Tendai Dube has given conflicting statements on their acquisition and has also admitted to providing applicant with a fake invoice.

First respondent further avers that applicant ignores the fact that the Tshirts are exhibits in a criminal matter which has not been finalized. Applicant's representative has filed an answering affidavit to the effect that on 10 May 2018 in the morning himself and others went to first respondent in Beitbridge so that they could be updated on the developments of their matter. They had a copy of this urgent application. At the police station, they were received by first respondent who was initially courteous, friendly and accommodating. He advised them that no decision had been made on the release of the T-shirts. When he became aware of this urgent application it is alleged, he then became hostile and ordered that applicant's representative and the others be detained. Firs respondent sought to detain them despite the fact that this was the third time in eleven days that they had voluntarily gone to the police. They were then warned and cautioned and charged for smuggling. They were later taken to court on the charge of smuggling and the prosecutor declined to prosecute that particular charge as there was nothing to suggest smuggling from the facts.

The next question is therefore that has applicant satisfied the requirements for a temporary interdict on the aforestated circumstances. I held that it did. My reasoning was as follows:

Firstly on the facts, it is clear that, there was no reasonable ground proffered by the first respondent to substantiate a suspicion of smuggling. For eleven days after seizure of the T-shirts no charges were preferred against the applicant. Charges were seemingly preferred as punishment for launching this application.

The Zimbabwe Revenue Authority is the authority that manages the country's ports of entry and exit. They are also responsible for collecting revenue and ensuring that all customs formalities have been met. They have seemingly dissociated themselves from the circumstances of this case as they could not find any leads towards a conclusion that there could be smuggling.

The state has declined to prosecute the smuggling charge which is the charge that relates directly to the seizure of the T-shirts.

The first respondent is his opposing affidavit does not state the basis for the formulation of the reasonable suspicion that an offence of smuggling could have been committed. Instead, he says that the truck was seized after the driver could not give a satisfactory answer as to where they had obtained the T-shirts. That on its own cannot be a sufficient ground to formulate a reasonable suspicion that an offence has been committed (my emphasis).

It need not just be a suspicion, the suspicion that an offence has been committed must be a reasonable one, a well-grounded, factually sound suspicion.. There must be a reasonably valid set of facts that formulate the basis for a reasonable suspicion otherwise members of the public or peace loving citizens will be seriously inconvenienced in their day to day business if any suspicion by a police officer, even one plucked from the air, like this one, would entail restriction of freedom of movement and association as well as freedom to go about your day to day business. It is precisely this reason why the suspicion must be a reasonable one, because there must be a well-grounded reason to interfere with the rights of a citizen. Civil liberties are enshrined in the constitution, and before a police officer seeks to curtail same, he must have a well-grounded, justification for doing so in the form of a reasonable suspicion.

The online dictionary defines a reasonable suspicion as:

> "a legal standard for arrests and warrants, which is more than inchoate or unparticularised suspicion or "hunch", it must be based on "specific and articulable facts" taken together with rational inferences."

I hold the view that from first respondent's own opposing affidavit, facts that formulate the basis for a reasonable suspicion are not there. If there are no such facts the n it follows that the applicant has proved the first requirement for an interdict, that is, that it has a prima facie right not to be inconvenienced unnecessarily in the conduct of its business where there is absolutely no grain of reason to suspect that an offence has been or is about to be committed. In policing the police offices are encouraged to act fairly and reasonably, not arbitrarily so that civil liberties are not unnecessarily curtailed. That is precisely why a suspicion must be reasonable and well grounded. In the case of *Mabena v Min of Law and another* 1988 (2) SA 654 E at 658 the court had this to say or reasonable suspicion.

> "The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which may justify an arrest ----. However the suspicion must be based on solid grounds. Otherwise, it will be flightly or arbitrary and therefore not a reasonable suspicion."

I hold the view that first respondent's averments in the opposing affidavit do not pass this test. In the case of *Associated Newspapers of Zimbabwe Pvt Ltd* 2003 (2) ZLR 225 (H) the court held that on seizure of articles without warrant, there is need for the police to show that they believed, on reasonable grounds, that a warrant would be issued if it was applied for and that they believed on reasonable grounds that if a warrant had been sought, it would be granted and that seeking one would defeat the ends of justice.

A *prima facie* right has thus been established by the applicant in that there clearly does not seem to have been any solid facts upon which a suspicion that an offence of smuggling has been committed. Again, the prosecution declined to prosecute as he is the one who appreciates the essential elements of the offence of smuggling, which elements he can only point to the accused by way of charging him if he does have facts that formulate a *prima facie* case against the accused. It would appear ZIMRA also did not buy the first respondent's story as clearly there is absolutely no reason to believe that an offence of smuggling has been committed.

First respondent thus unfairly and arbitrarily, with no justification whatsoever, seized applicant's T-shirts and that is an injury to the applicant. Applicant also does not have another remedy against the first respondent. The balance of convenience favours that the application be granted seeing that there seems to be no justification at law for the continued holding of applicant's T-shirts.

It is for these reasons that the provisional order was granted as sought.

Majoko and Majoko, applicant's legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners