

QINGSHAM INVESTMENTS (PRIVATE) LIMITED  
versus  
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE  
CHIGUMBA J  
HARARE, 15 February 2017 and 29 March 2017

### **Urgent Chamber Application**

*J. Samukange, & C. Venturas*, for the applicant  
*A. Moyo*, for the respondent

CHIGUMBA J: Did the applicant in this matter set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike? See *Mayor Logistics Private Limited v Zimbabwe Revenue Authority*<sup>1</sup>. This court is imbued with discretion by r 240 of its rules, to amend the relief sought in an urgent application where the interim relief sought is similar to or has the same effect as the final relief sought. This discretion may only be properly exercised in circumstances where a matter is found to meet the requirements of urgency, otherwise a court would be justified in finding that such a matter where similar relief is sought is not urgent, and to remove the matter from the urgent chamber roll. This rule is premised on the inappropriateness of having interim relief, which is supported by prima facie evidence, be similar to final relief, which must be supported by proof on a balance of probabilities.

A certificate of urgency must establish the basis on which a matter is certified urgent, and its purpose is to assist the court to decide whether a matter is indeed urgent. It must complement

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<sup>1</sup> CCZ 7-2014 @ p 14-15

the founding affidavit, even though it is an independent opinion by a practising legal practitioner, an officer of the court, that indeed from the averments in the founding affidavit and the circumstances of the case, the matter deserves to jump the queue and be given preference. In granting an interim interdict, whose requirements are settled, the court must be guided by the dicta that ‘an interdict cannot be granted against past invasions of a right, and that, there can be no interdict against lawful conduct. See *Mayor logistics (supra)*.<sup>2</sup> These are the two issues which arise for determination in this matter, whether the matter is urgent, and whether the requirements of an interim interdict have been met.

The applicant filed an urgent chamber application for return of goods on 2 February 2017 in which the following order was sought:

“INTERIM RELIEF

Pending the determination of this matter the applicant is granted the following relief:-

1. That the respondent and anyone claiming rights through it be called upon to show cause why a final order should not be made on the following terms;
  - (a) That the respondent is hereby ordered to immediately and forthwith release the goods listed under ‘Annexure C’ without any condition or restriction pending the determination by the Acting Commissioner General or the High Court (Fiscal Court)
  - (b) That the respondent pays the transport and storage charges up to the time of the release of the goods listed.

TERMS OF FINAL ORDER

2. That the respondent and anyone claiming rights through it be called upon to show cause why a final order should not be made on the following terms;
  - (a) That the respondent pay all storage and transport charges for the goods removed from applicant’s premises.
  - (b) That the respondents be interdicted from interfering with applicant’s operations at its premises.
  - (c) That the respondent delivers the applicant’s goods to its premises immediately and forthwith.
  - (d) That the respondent pay costs on an attorney and client scale.”

The founding affidavit was deposed to by Mr. *Davison Farao*, in his capacity as the managing director of the applicant, a private limited company which trades as Rhino Blankets. Applicant as established in 2010 and is a manufacturer of blankets, duvets, batting, sheets and pillows. He averred that applicant imports raw materials from textile industries in China and South Africa. It paid duty for some raw material which it had imported via Beitbridge and Forbes

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<sup>2</sup> @ p8-9

boarder posts, in terms of Statutory Instrument 6301-2000 (the SI). According to this SI, which has now been amended (Statutory Instrument 19-2016-Control of Goods (Open and general Import Licence (No 2) (Amendment Notice) 2016 (No 6), the process is that once goods arrive at a boarder post, the container is examined by junior officials of the respondent, the revenue authority, before being placed under physical examination by respondent's senior officials. The goods in question are not subject to seizure, having undergone the prescribed procedure at the boarder posts.

On 29 December 2016, respondent's officials visited applicant's premises and placed certain goods (3803 bales pile fabric - 258604 kilogrammes) under embargo and issued a notice of seizure which states that;- the goods were seized on the basis of reasonable grounds to believe that they were liable for seizure. The applicant was advised to write to the Regional Manager, 8<sup>th</sup> Floor, Kurima House Harare, and that, in terms of s 193 (6) of the *Customs & Excise Act* [Chapter 23:02], the Commissioner may release the goods from seizure, or declare them to be forfeited, or dispose of the goods out of hand if they are dangerous or perishable. The note advises that written representations may be made to the Port Manager for the release of the goods, within three months of the date of the notice. Proceedings for the recovery of the goods or for payment of compensation for any goods disposed of by the Commissioner, may also be instituted on 60 days prior written notice, within three months of the date of the notice in terms of s 196 of the Act. Failure to utilize any of the remedies provided by the Act will result in the goods becoming the property of the state without compensation.

The applicant denied having been served with a copy of the letter dated 25 November 2016, which is attached to its papers, or a letter dated 14 November 2016, in which a sum of USD\$2 219 413-69 was claimed by the respondent as duty. A dispute arose between the parties as to whether or not the goods in question were subject to SI 6301-2000. On 17 January 2017, the applicant appealed to the Commissioner General after their appeal to the Regional manager was unsuccessful. In the letter of appeal, the applicants advise that the value of the goods imported is USD\$600 000-00, and that the goods were properly imported under SI 6301. The applicant denied smuggling the goods, and averred that the respondent would not be prejudiced if the goods which it placed under embargo were to be released pending the determination of the appeal by the Commissioner General in terms of the Act. The parties appeared before me in

chambers at a case management conference where they were directed to file heads of argument. On 15 February 2017 judgment was reserved in the matter after hearing the parties in chambers.

The respondent raised various points in *limine* in its heads of argument. The first one pertained to the propriety and legal effect of seeking an order which is final in effect as interim relief. The second one disputed the urgency of the matter, the third one went to the requirement that domestic remedies be exhausted first, and the fourth one pertained to the failure to comply with the provisions of the Customs and Excise Act. On the merits, the respondents contended that the requirements of an interim interdict had not been met. Let us consider the preliminary points one by one.

(a) Draft Order

The respondent contended that the applicant is seeking what is in effect a mandatory interdict, an order directing it to release goods and to pay storage and transport costs. This relief is final in nature, and improper. To support this contention, the respondent referred the court to the following line of cases: *Econet Wireless Private Limited v Trustco Mobile Pty Ltd & Anor*<sup>3</sup>, where the court stated that:

“It is correct that in general terms court should not grant interim relief which is similar to or has the same effect as the final relief prayed for. The reason for this is obvious. Interim relief should be confined to interim measures necessary to protect any rights that stand to be confirmed or discharged, as the case may be, on the return date. See *Kuvarega v Registrar General 7 Anor 1998 (1) ZLR 188 (H) @ 193 A-C* (interim relief is granted on showing a prima facie case)...although the learned Judge in that case did not suggest that such a defect renders an application a nullity, it seems to me that, whilst no hard and fast rules can be laid down, there may be cases where a court would be justified in holding, in such a situation, that the application is therefore not urgent and should be dealt with as an ordinary court application... the court itself, may amend the relief sought in terms of rule 240 of the High Court Rules...”. See also *Zimbabwe Revenue Authority v Packers International Pvt Ltd*,<sup>4</sup> and *Delta Beverages Pvt Ltd v Zimbabwe Revenue Authority*<sup>5</sup>

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<sup>3</sup> S-43-13

<sup>4</sup> SC 28-16 @p20

<sup>5</sup> HH 811-16 @p7

In response to this preliminary point, the applicant contended that the interim relief sought was different from the final relief sought, because it sought the immediate release of the goods in the interim, and an interdict on the return day. The applicant referred the court to the *Kuvarega (supra)*, where the court said that ‘if the effect of the interim relief is to obtain the substantive relief sought, the litigant would obtain final relief without proving his case’. It is this court’s view that the interim relief sought by the applicant is indeed a mandatory interdict in effect as contended by the respondent. It seeks to compel the release of the goods placed under embargo, and to compel payment of costs. Costs usually follow the cause, which means costs are subject to proof on a balance of probability, not *prima facie* evidence, which is all that is required to justify *prima facie* relief. We accept that we have the discretion conferred in terms of r 240 of the rules of this court to change the terms of the relief sought so this preliminary point, although it is upheld, is not necessarily fatal to the application before us. It goes to the question of urgency, and not to the merits of the application.

(b) Urgency

It is now settled that:

“A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it”. See *Dilwin Investments Private Limited t/a Formscaff v Jopa Engineering Company Ltd*<sup>6</sup>.

It is also trite that:

“A party favored with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike”.

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<sup>6</sup> HH 116-98

See *Mayor Logistics Private Limited v Zimbabwe Revenue Authority*<sup>7</sup>, *Document Support Centre Private Limited v Mapuvire*<sup>8</sup>. In the case of *Triple C Pigs & Anor v Commissioner General Zimra*<sup>9</sup>, the court, in giving guidance on the exercise of its discretion in an urgent application, opined that it must:

“...consider whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen*”.

In raising this preliminary point, the respondent contends that the applicant has failed to show why it deserves preference because there has been no unlawful act on its part. The respondent avers that its actions are justified in terms of the provisions of ‘the CEA’ (Customs and Excise Act), whose s 193 (1) accords its officers the power to seize any goods on the basis of a reasonable belief that the goods are liable for seizure. The section provides that:

“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”.

In terms of s 193(2) Of ‘the CEA’, goods are liable for seizure if they are:

“(a) liable to forfeiture under his Act or any other law relating to customs or excise; or  
b) the subject matter of an offence under or a contravention of any provision of-  
(i) this Act or any other law relating to customs and excise; or  
(ii) any enactment prohibiting, restricting or controlling the importation or exportation thereof;  
Notwithstanding the fact that no person has been convicted of such an offence or contravention”.

The respondent submitted that, in terms of s 204 of ‘the CEA’, the owner of seized goods has the burden of proving that seized goods are not liable for seizure. The provision provides that:

“When any goods are stopped, seized or placed under embargo under this Act...if any question arises as to whether duties have been paid on the goods...the burden of proof of the affirmative of these facts shall be on the person who owns, owned or claims such goods...”.

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<sup>7</sup> CCZ 7-2014

<sup>8</sup> 2006 (1) ZLR 232 (H) 243G; 244A-C

<sup>9</sup> HH7-07

It is common cause that on 22 November 2016 an embargo was placed on the goods in question in terms of s 192 (1) of 'the CEA'. The embargo was based on reasonable belief that s 174 (1) of 'the CEA' had been breached by the applicants in that there was a misclassification of the goods which resulted in incorrect customs duty being paid. The respondent contends that the applicant has not discharged the onus on it to show that the classification of the goods was correct. It is common cause that the respondent has powers of seizure in terms of 'the CEA', and that the goods may only be released upon payment of the correct duty.

The respondent contends further, that the certificate of urgency is inadequate, and that it fails to establish the basis upon which the matter is certified as urgent. The court was referred to the case of *Central African Building Construction Company Private Limited v Construction Resources Africa Private Limited & Ors*<sup>10</sup> for guidance on this aspect. It is trite that a certificate of urgency can only complement the founding affidavit, and that it constitutes a check and a balance against the abuse of the urgent chamber book, that is why an officer of the court is enjoined to apply his or her mind to the facts of the case and to independently verify whether it deserves preferential treatment. See *Inyanga Downs Orchards v Edward Buwu*<sup>11</sup>, *Mayor Logistics (supra)* @ p14-15, *Laval Investments Private Limited v B A Ncube Holdings Private Limited t/a Airport Road Filling Station*<sup>12</sup>, *Fairdrop v Zimra Supra*, *Rudolph & Anor v Commissioner of Inland Revenue & Ors*<sup>13</sup>.

It is our informed view, based on the guidance which has emanated from the superior courts, that, the applicant's contention that it has a prima facie right derived from s 3 of the Administrative Justice Act, as well as s 68 of the Constitution, is not sustainable at law. In the case of *Mayor Logistics v Zimbabwe Revenue Authority*<sup>14</sup>, we were unequivocally guided as follows:

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<sup>10</sup> HH 39-09 @p3

<sup>11</sup> HH108-10

<sup>12</sup> HB 158-04

<sup>13</sup> 1994 (3) SA 771 @ 775 C-D

<sup>14</sup> CCZ 7-14 @p8-9

“It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct”. (my emphasis)

We find that the respondent has demonstrated satisfactorily that it is entitled to place an embargo on the goods in question. There is therefore no evidence on which the applicant can establish a *prima facie* right, especially in light of its failure to discharge the onus on it to prove that the correct duty was paid. If the respondents are entitled to embargo the applicant’s goods, such conduct, being lawful conduct, cannot be interdicted. If the respondent is entitled to embargo the applicant’s goods, or there is a dispute which is pending resolution as to whether or not the Regional Manager correctly found the goods to have been misclassified resulting in underpayment of duty, the applicant does not have a *prima facie* right which entitles it to have the matter prioritised over other litigants in general, and other litigants in the same boat. We find the certificate of urgency to be woefully inadequate and deficient, informed as it was by the founding affidavit which fails to establish a *prima facie* right to the interim relief sought.

We find that the applicant did not treat the matter as urgent, since the embargo was imposed on 22 November 2016, the seizure on 29 November and their application on 2 February 2017. The applicant’s explanation for the reason why it failed to treat the matter as urgent was not supported by any *prima facie* evidence and could not be accepted by the court. We would not go so far as to find that the applicant’s urgency is self-created, but certainly the papers show that the applicant failed to protect its rights when the need to act arose in November, and even in December 2016. See *Reverend Tony Tshuma & Ors v Clement Nyathu & Anor*<sup>15</sup>, *Zimbabwe Anti-Corruption Commission v Sydney Ushe*<sup>16</sup>. We find that, not only is this matter not urgent, but the applicant has not exhausted those domestic remedies provided by s 193 of ‘the CEA’.

The court must not be seen to be usurping the decision of an administrative authority before it has been made, otherwise the doctrine of separation of powers will be offended. By the applicant’s own admission, the appeal to the Commissioner General is pending, and there is another remedy provided, that of the final appeal to the Fiscal Court. On the need to exhaust

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<sup>15</sup> HB133-15

<sup>16</sup> HB 534-15

domestic remedies see *Bato Star Fishing Pty Ltd v Minister of Environmental Affairs & Tourism & Ors*<sup>17</sup>, *Affretair Private Limited & Anor v MK Airlines Private Limited*<sup>18</sup>, *Mhanyami Fishing & Transport Cooperative Society Limited & Ors v Tge Director General Parks & Wildlife Management Authority & Ors*<sup>19</sup>. It is trite that a matter cannot be treated as urgent unless the applicant does not have other suitable, adequate, alternative remedies. We find that the matter is not urgent because the requirements of urgency have not been met; the applicants did not act when the need to act arose, they sat on their laurels, there is no *prima facie* evidence that they were misled by officers of the respondent, the applicant has other suitable alternative remedies, the balance of convenience favors allowing the appeal process to go through to finality, there is no unlawful conduct which may properly be interdicted by this court even on an interim basis.

(c) Domestic Remedies

The applicant is obliged to exhaust domestic remedies by seeing the appeal process through, the Commissioner General is currently seized with the matter and has not given a substantive decision as to the misclassification of the goods, their alleged miscalculation of duty, and the propriety of the embargo and seizure. The need to exhaust domestic remedies was set out in the case of *Girjac Services Private Limited v Mudzingwa*<sup>20</sup>. This preliminary point is upheld.

(d) Requirement to give sixty days notice in terms of s 196 (1) Customs And Excise Act (CEA)

It is common cause that that the applicants are required to give 60 days notice before instituting any legal proceedings and that they did not do so, as required by s 196 (1) of ‘the CEA’. See *Ronald Machacha v Zimbabwe Revenue Authority*<sup>21</sup>, *Care International in Zimbabwe v ZIMRA*

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<sup>17</sup> [2004] ZACC 15; 2004 (4) SA 490 (CC) @ par45,

<sup>18</sup> 1966 (2) ZLR 15 (S)

<sup>19</sup> HH 92-11

<sup>20</sup> 1999 (1) ZLR 243 (SC) @ 249 B-E

<sup>21</sup> HB 186-11 @p2

*& Ors*<sup>22</sup>, *TM Supermarkets Private Limited v ZIMRA*<sup>23</sup>. Clearly, in the absence of such notice, this matter is not properly before us. The preliminary point is upheld.

### Disposition

We find that this matter is not urgent because the interim relief prayed for is final in effect, and improperly sought on the basis of prima facie evidence. This would not have necessarily been fatal if the substantive requirements of urgency had been established, if the applicant had not been seeking to interdict lawful conduct, or if the applicant had exhausted domestic remedies and discharged the onus on it to show that the goods in question were properly classified and the correct duty imposed. The applicant did not give the requisite sixty days notice before instituting these proceedings, rendering this application not properly before the court. All the preliminary points raised are accordingly upheld. We do not find it necessary to delve into the merits of the main matter. The application is removed from the urgent chamber roll. Costs shall follow the cause.

*Venturas & Samukange*, applicant's legal practitioners  
*Kantor & Immerman*, respondent's legal practitioners

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<sup>22</sup> HH 373-15

<sup>23</sup> HH304-16