CLAYTON KASOSERA
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 13 & 21 October 2021

SPECIAL PLEA

G R J Sithole, for the plaintiff
T L Marange, for the defendant

MANZUNZU J: The plaintiff issued summons against the defendant seeking, *inter alia*, the release of his motor vehicle a Toyota Fortuner, 2016 model.

The undisputed facts of the matter are that the plaintiff imported the motor vehicle from South Africa through Beitbridge border post in April 2019. On 15 September 2020 the motor vehicle was seized by the defendant (ZIMRA) for non-payment of customs duty. The plaintiff contends that the customs duty was paid in full hence his claim for the release of the motor vehicle.

Summons were issued on 14 April 2021 and were served on the defendant on 15 April 2021. On 20 April 2021 the defendant filed an appearance to defend. In its plea the defendant raised the following special pleas:

a) That the plaintiff's claim has prescribed in terms of section 193 (12) of the Customs and Excise Act, Chapter 23:02.
b) That the plaintiff has failed to comply with section 196 (1) of the Customs and Excise Act, Chapter 23:02.
c) That plaintiff has failed to comply with rule 12 of the High Court Rules, 1971.

In reply the plaintiff denied breach of any of the provisions referred to by the defendant.

WHETHER THE CLAIM HAS PRESCRIBED:

The answer to whether or not the plaintiff's claim has prescribed lies with the interpretation of sections 193 (12) and 196 of the Act.

The plaintiff's motor vehicle was seized by the defendant in terms of s 193 (1) of the Customs and Excise Act, Chapter 23:02. (the Act) which provides that

> "(1) 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."

Subsection (3) referred to above prohibits seizure of an article which is more than 6 years after the seizure became due which is not the case in casu.

Section 193 (12) of the Act provides that;

> "(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); or
> (*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), <u>after which period no such proceedings may be instituted</u>." (emphasis is mine).

This means a party who makes a choice to sue for the recovery of a seized article must do so within three months of the notice of seizure. The right to sue within three months is exercised subject to s 196 of the Act. This means there are certain things in s 196 which go along with the exercise of the right to sue.

Section 196 (1) of the Act under the heading, "Notice of action to be given to officer" is couched as follows;

> "(1) 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*]."

This means in addition to observing the three months' notice required by section 193 (12) of the Act, a party must give 60 days' notice to the Commissioner of one's intention to sue.

Mr *Sithole* for the plaintiff said there is an ambiguity created by s 193 (12) and s 196 (2) of the Act which must be interpreted in favour of the taxpayer. In the written heads part of the argument surrounds the use of the word "may" in s 193 (12) where it says "after which period no such proceedings <u>may</u> be instituted." It was argued in the written heads that "may" has no peremptory import therefore the plaintiff could sue even after three months. That in my view is an erroneous interpretation of the provisions of s 193 (12). I believe plaintiff realized this line of argument was not sustainable. This is why Mr *Sithole* silently did not persist with

it in the oral argument. In the absence of any explanation I consider the line of argument as abandoned. I think it was well informed to do so. The use of the word may in the context of the section does not extent the period within which to sue beyond the three months.

What then remains to be considered is whether the two sections create an ambiguity as advanced by Mr *Sithole*. He said the plaintiff must benefit from s 196 (2) of the Act in that the claim prescribes after 8 months. Mr *Marange* for the defendant argued there was no ambiguity. He said the three months limit in s 193 applies to seized goods and the 8 months limit in s 196 (2) applies to any other civil proceedings other than proceedings to recover seized goods.

Section 196 (2) of the Act has this to say;

> "(2) Subject to subsection (12) of section *one hundred and ninety-three*, any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law."

This sub-section sets a time limit of 8 months within which a party can bring civil proceedings, other than proceedings brought under s 193 (12) for the recovery of seized articles which is set at three months.

The words; "subject to subsection (12) of section *one hundred and ninety-three*," within the context of this subsection can be substituted with the words, "other than what is provided in sub section, apart from, with the exception of…."

Section 196 (2) therefore excludes the application of s 193 (12) in it. This means when s 193 (12) says "subject to section 196" it relates to section 196 (1) only in respect to the giving of notice. In other words s 196 (2) is saying the civil proceedings referred to in this subsection do not include those referred to in s193 (12). Section 193 (12) becomes a stand-alone section from s 196 (2). In order to avoid confusion, s 196 (2) has expressly excluded the provision of s 193 (12).

Mr *Sithole* relied on the case of *Dube* v *Zimra* HB 2/14. A reading of the case is not helpful to the resolution of the prescription period. It was to do with an immigrant's rebate for a returning resident and it was an action brought outside the 8 month prescription period. The case is distinguishable in that it fell under s 196 (2) and not s 193 (12) as the present case.

I find no ambiguity at all in the reading of sections 193 and 196 of the Act.

In *Machacha* v *ZIMRA* HC 2134 of 2010, a case which is on all fours with the present matter the court had this to say;

> "In terms of section 193 (12) the application of this nature has to be made within three months of the notice of seizure being given to the owner of the vehicle. *In casu*, the Notice of Seizure was given to Murada on 10 June 2010. This application was filed about four months after this date. This means that his cause of action based on unlawful seizure has prescribed – *Harry* v *Director of Customs* 1991 (2) ZLR 39 (H) and *Murphy* v *Director of Customs and Excise* 1992 (1) ZLR 28 (HC)."

In casu the plaintiff has acted four months after the three months. The plaintiff's claim has prescribed and ought to be dismissed. I find no need to deal with the other two pleas, In any event the defendant conceded a notice in terms of s196 (1) of the Act was given by the plaintiff. On the other hand plaintiff concedes its failure to use the right form of the summons which is form 2.

Disposition

The plaintiff's claim be and is hereby dismissed with costs.

Nyika and Associates, plaintiff's legal practitioners