QALISANI (PRIVATE) LIMITED **APPLICANT**

VERSUS

ZIMBABWE REVENUE AUTHORITY **1ST RESPONDENT**

AND

M MADONGORERE N.O **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 27 JULY 2011 AND 4 AUGUST 2011

Mr Chivaura for applicant
Mr P Ncube for respondents

Urgent Chamber Application

MATHONSI J: The applicant purchased 2800 pockets of potatoes for a total of R39 200-00 from National Fruit Suppliers of South Africa on 4 July 2011. It then engaged Achripel Trading (Pvt) Ltd, a clearing agent based in Beitbridge to declare and clear the potatoes for importation into Zimbabwe.

The potatoes were pre-cleared on 6 July 2011 using a permit which turned out to be fake and has been disowned by the issuing authority, the Ministry of Agriculture Mechanisation and Irrigation Development. Potatoes cannot be imported without a permit. The secretary of that ministry wrote a letter on 25 July 2011 which reads in part as follows:

> "The Commissioner General
> **ZIMRA**
>
> Attention: Mr G Pasi
>
> **RE: FRAUDULENT PERMIT – IMPORT PERMIT NUMBER 003344A**
> The above matter refers.
> The Ministry of Agriculture, Mechanisation and Irrigation Development would like to bring to your attention that permit number 003344A belonging to Qalisani Trading for 500MT of potatoes is not authentic.

Your usual co-operation is greatly appreciated.

C. Kabudura
For Secretary for Agriculture, Mechanisation and Irrigation Development."

Using that permit, in terms of which a release order was issued, the applicant imported the consignment of potatoes on 8 July 2011. Its vehicle was intercepted as it left Beitbridge border post resulting in the arrest of the applicant's driver Sikhumbuzo Mhlanga who readily admitted smuggling the potatoes. The consignment was seized by first respondent in terms of the Customs and Excise Act, [Chapter 23:02] on the basis that it was the subject of an offence.

The driver transporting the consignment appeared at Beitbridge Magistrates' Court on 12 July 2011 on a charge of contravening section 182 of the Customs and Excise Act, "smuggling". He pleaded guilty, was duly convicted and sentenced to a fine of US$300-00 or in default of payment, 1 month imprisonment. The trial magistrate did not order forfeiture of the consignment of potatoes but endorsed that the owner was free to make representations to the first respondent regarding their release.

It would appear that the applicant appealed to the Regional Manager of the first Respondent against the seizure on 12 July 2011 and that appeal was thrown out by letter dated 13 July 2011 addressed to the applicant's then legal practitioners Nyamushaya, Kasuso and Rubaya of Harare. The letter reads as follows:

"NOTICE OF SEIZURE NUMBER 018638L OF 8 JULY 2011.
I refer to your appeal letter dated 12 July 2011 in connection with the above mentioned subject.

Please be advised that the potatoes were seized in terms of section 47 of the Customs and Excise Act [Chapter 23:02] which prohibits the importation of certain goods into Zimbabwe. Any prohibited goods imported into Zimbabwe are a subject of an offence and the said goods shall be liable to forfeiture.
In this case the question of whether an offence was committed or not does not arise given that the accused has already been convicted by the courts.
A proviso to section 193 (16) of the Customs and Excise Act clearly states that any goods whose importation is prohibited in terms of section 47 of the Act cannot be released by the Commissioner.

Furthermore, my investigations have revealed that Import Permit number 003344A which was used for the importation of the potatoes in question is not authentic and has been disowned by the relevant ministry officials at Beitbridge Border Post.
In view of the above, I am not prepared to release the potatoes as this would be in contravention of current procedures and practice.
Yours faithfully

M. MADONGORERE
REGIONAL MANAGER"

After receiving the decision of the regional manager, the applicant decided to launch this urgent application seeking the following relief:

"TERMS OF FINAL ORDER SOUGHT

That 1st and 2nd respondents show cause to this Honourable Court why a final order should not be made in the following terms:

1. THAT the Respondents be and are hereby directed to release 2800-00 (sic) pockets of potatoes belonging to the applicant and facilitate their re-exportation into South Africa.
2. THAT in the event that the Respondents oppose the order herein sought should pay (sic) the costs of this application jointly and severally the one paying the other to be absolved.

INTERIM RELIEF SOUGHT (SIC)

Pending determination of this matter, the applicant is granted the following relief

1. THAT the Respondents be and are hereby directed to release 2800-00 (sic) pockets of potatoes belonging to the applicant and facilitate their re-exportation into South Africa."

Clearly therefore the interim relief sought by the applicant is the same as the final order sought. The courts have stated times without number that it is inappropriate for an applicant to seek interim relief which is final in nature because doing so means the applicant obtains final relief without proving its case.

As stated by Chatikobo J in *Kuvarega v Registrar General and Another* 1998(1) ZLR 188(H) at 192 G-H and 193 A-B, a pronouncement with which I am in agreement;

"As already pointed out, the application was filed on the Friday immediately preceding the Monday in which the election commenced. If the interim relief had been granted, the applicant would have obtained the substantive relief claimed before the return date and after the election she would not have had any reason to move for the confirmation of the order. There was nothing interim about the provisional relief sought. It would

> have provided the applicant with the relief she sought on the day of the election. The practice of seeking interim relief which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a prima facie case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a prima facie case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day."

In casu, the same point may be made that if the applicant is granted the interim relief it seeks, the potatoes will be released and re-exported to South Africa merely by the showing of a prima facie case and certainly without proof of the applicant's case. This is undesirable and as shall be shown later in this judgment, if this had been allowed to happen, the consequences would have been dire indeed. I agree with *Mr Ncube* for the respondents that the practice of seeking interim relief which is final in nature ought to be suppressed decisively.

It is critical to point out that when the applicant made the ex parte application seeking the relief I have referred to, it did not disclose in the application that its driver had already been convicted of smuggling and sentenced by a court of competent jurisdiction. This was in respect of the same consignment sought to be released for re-exportation to South Africa. The applicant did not disclose that the consignment was the subject of an offence in terms of the Customs and Excise Act. This was a very material non-disclosure especially to the extent that goods which form the subject of an offence are liable for forfeiture in terms of section 47(1) as read with section 188 of the Act.

More importantly, at the time this application was filed the applicant was aware of the decision of the first respondent contained in the letter of 12 July 2011 quoted above, which decision dismissed the appeal against the seizure of the potatoes. The applicant did not disclose that factor and yet wanted the court to substitute its own decision and order the release of the consignment. It was only my intervention in directing service of the application upon the respondents which saved the day.

Otherwise, I would have determined the matter without knowledge of these material facts which the applicant deliberately withheld from the court. Such non-disclosure relegates

the applicants conduct to the realm of dishonesty. In *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd and Another* 2001 (2) ZLR 551(H) NDOU J, quoting with approval The Civil Practice of the Supreme Court of South Africa by Herbestein and Van Winsen at 554D said;

> "The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court, so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully or mala fide or negligently, which might have influenced the decision of the court whether to make the order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure."

At 555C the learned judge went on to say;

> "The courts should, in my view, discourage urgent applications, whether ex parte or not, which are characterised by material non-disclosures, mala fides or dishonesty. Depending in circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of mala fides or dishonesty on the part of litigants."

I hold the same view. In the present case there is a glaring non-disclosure of material facts and misrepresentation designed to hoodwink the court into granting an order which applicant is not entitled to. *Gapare and Another v Mushipe and Another* HB 17/11 at page 5. *Mr Chivaura's* contention on behalf of the applicant that the conviction of the applicant's agent and the decision by the first respondent to dismiss the appeal against the seizure is not relevant because this court has inherent jurisdiction cannot be taken seriously. Section 218 (2) of the Act provides for strict liability of principals for the actions of their agents.

In any event, this court cannot lawfully order the release of the consignment of potatoes as doing so would override the provisions of sections 47, 182 and 188 of the Customs and Excise Act. *Triangle Ltd v Zimra* HB 12/11.

The goods were the subject of an offence and in terms of section 188(1) of the Act, they are liable to forfeiture. The first respondent seized the goods in pursuance of that provision. It would therefore be incompetent for me to order their release as doing so would cut against the clear provisions of the statute.

Therefore even on the merits the application cannot succeed. This should have been apparent to the applicant before this application was made and making it was an exercise in futility. In addition, the applicant exhibited high levels of dishonesty in keeping back facts

illustrating the lack of merit of the application. For that it should be visited with costs on an enhanced scale.

Accordingly, the application is dismissed with costs on an attorney and clients scale.

Messrs Masawi and partners, applicant's legal practitioners
Coghlan and Welsh, 2nd respondent's legal practitioners