NNAUDI VICTOR NWEKE

Versus

THE DIRCETOR OF CUSTOMS AND EXCISE N.O.

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 18 OCTOBER 2002

E. Marondedze for applicant
Ms P. Dube for respondent

Judgment

CHIWESHE J: The applicant seeks an order compelling the respondent to release into his possession certain goods seized from house number 3 Glamogen Road, Queens Park East, Bulawayo.

The applicant stays at the above address. He is in the business of buying goods for resale. On 20 October 2000 the applicant was away on business. On his return he found that officers from the respondent's office had seized his goods under notice of seizure No. 173620 D. Displeased by this occurrence the applicant duly made representations to the respondent's officers for the release of the goods. He also furnished them with documents pertaining to the importation of the goods copies of which are filed of record as annexure "C". However, the respondent remained convinced that these goods had not been customs cleared and wrote to the applicant's legal practitioners accordingly. The applicant however insists that the documentary evidence so furnished to the respondent prove that the respondent's allegations that the goods were smuggled are baseless. He has thus sought the assistance of this court to recover his goods.

This application is however doomed to fail. Ms *Dube* for the respondent argued that the application was fatally flawed for want of compliance with the provisions of the State Liabilities Act [Chapter 8:15] and section 196 of the Customs and Excise Act [Chapter 23:02] in that notice had not been given to the respondent of the applicant's intention to sue the respondent, a state entity. The applicant was obliged to give sixty days written notice of its intention. It did not do so. The requirement to give such notice is mandatory. The applicant has argued to the contrary, pointing to two letters filed of record which he says satisfy the requirements of that Act. But there are other hurdles to be cleared by the applicant.

Firstly, the probabilities of what transpired are clearly in favour of the respondent's version of events. In its opposing affidavit, the respondent states that it was tracking goods imported in container number CMBU 2227720, covered by Rail Advice Note Number 25009 and Bill of Lading Number DX BW 66764 delivered at the applicant's address of residence. The container, according to the respondent, was fraudulently released from the shipping line at the Manica Container Depot, Bulawayo against a clearance form 170. This form had been fraudulently acquired and processed, resulting in prejudice to the fiscus in the sum of $234 011,47. The container was delivered to applicant's residence, by one D. Dube, a driver with Container Depot, Bulawayo. According to the respondent, the documents tendered by the applicant do not relate to the goods in question. Instead the documents refer to importers in Harare and have no link to the container consigned to Bulawayo and delivered to the applicant's residence.

The applicant disagrees with the respondent's version of events. He argues that the goods seized had nothing to do with the said container. The probabilities as indicated, given the facts, favour the respondent's version of events. The court is entitled to draw the inference that the container was destined to the applicant's address where, in any event, imported goods which had not been cleared were found. The respondents acted, it appears, on detailed and reliable information leading to the seizure of the goods. In my view the applicant's documents do not discharge the onus on him to prove that the goods found in his possession were properly cleared.

Secondly, I agree with Ms *Dube* when she submits that there are disputes of fact in this matter which disputes can only be resolved by way of action and not by way of application. The factual disputes centre on such questions as to when the seized goods entered the country, the point of entry, the amount paid by way of duty and documentary proof thereto, why the Manica Depot driver led the respondent to the applicant's residence, whether the goods found at the residence had been cleared and the fate of the missing container.

For these reasons I would dismiss the application. In terms of section 196(2) the Customs and Excise Act it is proper that the respondents, a public institution sustained by the tax payer, be enabled to recover all expenses in relation to this application. Accordingly, it is ordered as follows.

1. That the application be and is hereby dismissed.
2. That the applicant pays costs on the attorney – client scale.

Messrs Sibusiso Ndlovu & Partners, applicant's legal practitioners
Coghlan & Welsh respondent's legal practitioners