REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

02/11/2021
DATE

SIGNATURE

CASE NO: 20908/2021

In the matter between:-

MAEMU MICHAEL RAMUDZULI	Applicant
and	
COMMISSIONER OF THE SOUTH AFRICAN	
REVENUE SERVICES	First Respondent
THE SOUTH AFRRICAN REVENUE SERVICES	Second Respondent
MINISTER OF DEFENCE	Third Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 28 October 2021.

JUDGMENT

SKOSANA AJ

[1] This is an application wherein the applicant seeks the review and setting aside of two decisions taken by the first and second respondents ("respondents"), namely the decision for payment by the applicant of an amount of R48 437-50 as well as a one for seizure and forfeiture of the applicant's vehicle with registration no. FLC 572 L. The applicant further seeks an order directing the respondents to restore possession and control of his aforementioned vehicle and that the applicant be exempted from paying storage fees for the vehicle or alternatively that such storage fees be borne by the respondents. He also seeks an order for the return of mixed or various groceries which were found in the aforementioned vehicle and that such goods be restored to Mercy and Edward Munzhelele. The applicant further seeks ancillary orders in terms of which the Sheriff will be authorized to take the vehicle from the respondents and return it to him as well as declarators that the detention of his vehicle was unlawful and unconstitutional.

[2] The factual predicate of this case is as follows:

2.1 The applicant was travelling in his vehicle together with three passengers on 19 October 2020 when he was approached by the members of the defence force (SANDF) which resulted in the detention of his vehicle and the groceries that were contained therein.

[3] There is no dispute as to the fact that the applicant had three passengers in his vehicle. However, the identity of such passengers is in dispute. The applicant alleges that the passengers were one Zimbabwean citizen, Mr Caison Mbedzi as well as Mercy and Edward Munzhelele who are South African citizens. The respondents,[1] on the other hand, allege that all the three passengers were Zimbabwean citizens by the names, Edwin Dube, Rendani Ndou and Cecilia Mappumo, and were later deported to Zimbabwe.

[4] There are further two points of dispute between the parties, namely:

4.1 According to the applicant, he was arrested at Malala drift road, a place which could not be regarded as part of the borderline between South Africa and Zimbabwe. According to the respondents, the applicant was arrested at the borderline while trying to illegally export goods to Zimbabwe.

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[1] I refer to the first and second respondents as the respondents as the third respondent is not actively involved in the present proceedings.

4.2 According to the applicant, his vehicle was in motion and he was stopped by the SANDF members on that day. The respondents allege on the other hand that the applicant's vehicle was stationery when he was approached by the SANDF members. The applicant and his passengers were busy offloading the goods from the vehicle and some of them were already on the floor.

[5] After the applicant and his passengers had been arrested, they were taken to Beitbridge offices by the SANDF members were the vehicle and the goods were detained and detention notices issued, the purpose of such detention notices being to investigate in order to determine whether the goods are liable for seizure and forfeiture in terms of the Customs and Excise Act (CEA).

[6] On 21 October 2020, the applicant returned to Beitbridge offices to enquire regarding the detained vehicle whereupon a detention letter in terms of section 88(1)(a) was issued relating the actual circumstances surrounding the detention of his vehicle and which letter also requested information from him with a view to determine whether the vehicle is liable for seizure and forfeiture or not. According to the affidavits filed by the SANDF members, the vehicle of the applicant had been found along the borderline by the members of the SANDF who were patrolling the South African boarder in Musina along the Limpopo river. The vehicle was stationery and the applicant and the 3 passengers were offloading goods to be taken across to Zimbabwe. One of the passengers, Mr

Edwin Dube confirmed that they had no passports and that the goods were destined for Zimbabwe and he also attempted to bribe the members of the SANDF. The three passengers were eventually deported to Zimbabwe. It is therefore apparent, so the respondent contends, that the applicant and the passengers were transporting goods and/or assisting in exportation of goods at a place which is not a designated port of entry or exit and therefore violated the provisions of the CEA.

[7] On 26 October 2021, the applicant together with Mercy and Edward Munzhelele arrived at the SARS Beitbridge offices to claim the groceries. They were then issued with letters of detention for the goods. The respondents contend that these letters do not constitute an admission that the goods belonged to them and that they were passengers in the applicant's vehicle.

[8] On 28 October 2020, a notice of intent to seize the detained vehicle was issued which constitutes *prima facie* findings of the investigation. Having provisionally found that the goods had been dealt with contrary to the provisions of the CEA and that they are liable for forfeiture in terms of section 87(1) of the CEA, a forfeiture amount of R48 437-50 was imposed and the applicant was requested to make further representations in that regard.

[9] After considering the applicant's representations, a further notice of intent to seize the vehicle was issued to the effect that the factual findings were that

there had been an attempted illegal exportation of the goods. The findings were as follows:

9.1 That the vehicle was caught loaded and also offloading goods which were being carried by passengers and being exported to Zimbabwe through the Limpopo river which is an unauthorized port of entry or exit.

9.2 Both the goods and the vehicle were dealt with contrary to the provisions of the CEA which rendered both of them liable for forfeiture and consequently liable to seizure.

9.3 That reliance had been placed on the evidence obtained from the members of the SANDF in regard to the occurrences at the time of the interception of the vehicle.

9.4 That there had been a contravention of sections 38 and 39 of the CEA read with section 83 thereof.

9.5 That, a letter of demand of the amount of R48 437-50 having been issued on 02 November 2020 as a condition for the release of the vehicle to be complied with not later than 16 November 2020, there had been no such compliance therewith. Instead, a court order from the Magistrates' Court of Musina was received directing that the vehicle should be

released, which order was successfully challenged for rescission by the respondents.

[10] Thereafter the applicant was given another opportunity to make representations as to why the vehicle should not be forfeited. On 25 November 2020, Sikhala attorneys submitted representations on behalf of the applicant. After such representations had been considered, a decision was made that the vehicle should be ceased. The respondents therefore contend that the vehicle and the goods were lawfully seized in compliance with the CEA read with the Promotion of Administrative Justice Act no. 3 of 2000 ("the PAJA").

Determination

[11] Mr Mhlanga, who represented the applicant, contends that there is no real dispute of fact between the parties in that the respondents have contradicted themselves in the papers. He supports this contention as follows:

11.1 That according to the detention letter dated 21 October 2020, the applicant's vehicle was intercepted at Malala drift road. However, later on in their affidavits, the respondents state that the interception took place at the borderline.

11.2 That a statement referred to in such detention letters was not provided to the applicant.

11.3 That no statements from the alleged Zimbabwean passengers were furnished by the respondents and therefore the names alleged by the respondents are a fabrication.

11.4 That the respondents had issued the detention letters to the Munzhelele's only, which fact is not in dispute.

11.5 The applicant also disputed that Malala drift road is along or close to the borderline.

11.6 That the respondents did not consider the statement by one Mboneni to the effect that the applicant had not been arrested at the borderline.

[12] On the basis of the above, the applicant contends that this court should take a robust approach and grant the application. Alternatively, should the court not be inclined to do so, it ought to refer the matter to oral evidence or to trial in terms of Rule 6(5)(g) of the Uniform Rules.

[13] When the detention letter relied upon by the applicant is closely examined, it states that the applicant's vehicle was intercepted while the SANDF officials were patrolling along the borderline between South Africa and Zimbabwe at Malala drift road. There does not seem to be a decipherable difference between

the detention letters and what is stated in the affidavits filed on behalf of the respondents with regard to the location where such interception had occurred. They still reflect a version that the interception took place at the place or location situated somewhere along the borderline.

[14] I agree with the respondents' counsel, Mr Mothibi that it would be unreasonable to expect the respondents to have filed statements or affidavits from the Zimbabwean persons who were suspects in the matter. In any event, they could not be forced to make statements which in all probability would be self-incriminating. The respondents were left with no option but to rely on the statements and affidavits of the officials from the SANDF. They filed four such affidavits. In essence, such affidavits convey and corroborate each other that the applicant's vehicle was found stationery along the borderline offloading goods with a view to illegally export them over to Zimbabwe and that one of the Zimbabwean persons, a Mr Dube tried to bribe them. It is not explained anywhere by the applicant as to why the SANDF members would have falsely implicated the applicant with such a serious offence nor is it alleged that anyone of them knew the applicant before that date.

[15] The detention letters issued to Edward and Mercy Munzhelele were clearly not meant to confirm that they were passengers in the applicant's vehicle or that the goods belonged to them. It was merely to confirm that they had claimed the goods and therefore furnished with documents to prove that they had

lodged such claim and were given an account of the reasons for the detention of the goods.

[16] The respondents further argued that the issue of detention has been superseded by the issue of seizure and forfeiture. The applicant erroneously focused on whether or not the detention of the vehicle and the goods was proper which does not require compliance with the *audi* principle when regard is had to the scheme of the CEA.

[17] Section 88(1) authorizes the respondents to detain vehicles or goods at any place for the purpose of investigating or establishing whether they are liable for forfeiture under the CEA. Nothing in this section requires a pre-hearing before that detention occurs. The detention of the applicant's vehicle and the goods was therefore lawful.

[18] The seizure and forfeiture was conducted in terms of section 87 of the CEA. Such seizure and forfeiture are compulsory as long as the respondents comply with the provisions of the PAJA. The applicant failed to establish as to which provision of the CEA or of the PAJA was violated by the conduct of the respondents. On the other hand, the respondents have set out in detail the statutory source for their action. I have therefore not been placed in a position to find that the conduct of the respondent was unlawful and/or unconstitutional as alleged by the applicant.

[19] This is also supported by the case quoted in the applicants' heads of argument, being ***Vincent and Pullar Ltd v Commissioner for Customs and Excise***[2], where it was stated:

> *"The only ground upon which the court could declare a seizure as invalid, would be if it were made illegally. The court has no discretion in regard to the question as to whether or not the breach of Customs regulations was one which is so serious as to justify a seizure and forfeiture".*

[20] Even if I am wrong in my analysis of the facts and the conclusion I have reached above, the next hurdle for the applicant is that there is a dispute of fact which cannot be resolved on affidavit. In paragraph 8 of their heads of argument, the respondents set out the points of factual dispute, being the following:

20.1 The place where the applicant's vehicle was intercepted;

20.2 Whether it was stationery or moving;

20.3 The identity of the passengers who were found in the vehicle; and

20.4 The contentions made by the respondents' witnesses as opposed to those made by the applicant.

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[2] 1956 (1) SA 51 (N).

[21] To this, I add that there is also a dispute as to whom do the goods that were found in the vehicle belong and whether Edward and Mercy Munzhelele were in the applicant's vehicle at the time of detention. There also seems to be a disagreement as to the geographical location of Malala drift road in relation to the borderline and whether the applicant and his passengers were in the process of illegally exporting the goods across the borderline which was at a place which was not authorized port of entry or exit.

[22] In my mind, there would be no doubt that such dispute of fact was foreseeable or simply known to the applicant before the institution of the application. This is supported by what transpired in the rescission application that was brought against the judgment of the Magistrates' Court of Musina. In paragraph 11 of its answering affidavit in the present application, the respondents allege that the Magistrates' court order was reconsidered, recalled and set aside on the basis that there were material disputes of fact. In response to this, at paragraph 13 of his replying affidavit, the applicant states that he admits that the court order was set aside on 17 November 2020 and that he places "*on record that the Court's order was set aside on the basis that there were dispute*(sic) *of fact and that I must exhaust all internal process of SARS prior to approaching the Honourable court for a suitable relief against the respondent(s).*" [my underlining]. Oddly, Mr Mhlanga tried to argue that such court order was set aside not because there were disputes of fact but merely

because the applicant had not exhausted the internal remedies. This was rather misleading in view of what is clearly confirmed in the applicant's replying affidavit.

[23] Having stated the above, I am of the view that this application falls to be dismissed also on the basis that it cannot be decided properly on affidavit and that having been known to the applicant prior to the institution of the application, such order would be just. Rule 6(5)(g) requires, as a general rule that an application for the hearing of oral evidence be made *in limine* and not once it has become clear that the applicant is failing to convince the court on the papers.[3] It is clear that, though the court has a wide discretion, once the matter cannot be resolved on paper, the application must be dismissed unless the applicant is able to proffer exceptional circumstances for such an order.[4]

[24] I see no reason nor was any pointed out to me why the costs in this matter should not follow the result.

[25] In the result, I make the following order:

1. The application is dismissed with costs.

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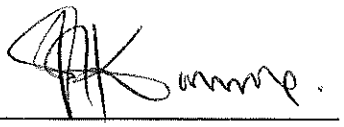
[3] Law Society Northern provinces v Mogami 2010 (1) SA 186 (SCA) at 195(C).
[4] Joh-Air (Pty) Ltd v Rudman 1980 (2) SA 420 (T) at 428-9.



DT SKOSANA
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing:	26 October 2021
Date of judgment:	28 October 2021

Appearances:

For the Applicant:	Adv N.G Mhlanga Instructed by Sikhala Attorneys Inc. c/o Muzila Attorneys Central Towers Building Suite 304 Pretoria
For the First and Second Respondents:	Adv W.N Mothibe Instructed by Gildenhuys Malatji Attorneys 164 Totius Street Harlequins Office Park Groenkloof Pretoria
For the Third Respondent:	No appearance