



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1803/12

In the matter between:

CHARLES MAFIKA NDZIMANDZE

Applicant

and

SWAZILAND REVENUE AUTHORITY

Respondent

Neutral Citation: *Charles Mafika Ndzimandze vs Swaziland Revenue Authority (1803/12)*
SZHC 03 [21 FEBRUARY 2013]

Coram: **MAPHALALA PJ**

Heard: **21 DECEMBER 2012**

Delivered: **21 FEBRUARY 2013**

Summary: (i) Before court is an Urgent Application for the release of motor vehicles seized by the Respondent in terms of section 88(1) (c) and 108 of the *Customs and Excise Act*.

(ii) That pending the determination of the appeal the Applicant is not able to use his motor vehicles causing him “unnecessary inconvenience”.

- (iii) That this court finds that this does not qualify to be regarded as “good grounds for the exercise by the court of its general discretion in his favour”.
- (iv) As a result, the Application is dismissed with costs on the ordinary scale.

The Application.

[1] The Applicant Charles Mafika Ndzimandze filed before this court an Application under a Certificate of Urgency against the Respondent, the Swaziland Revenue Authority for an order in the following terms:

- “1. That the normal Rules pertaining to the launching of applications be dispensed with and that this Application be disposed of on an urgent basis in terms of the provisions of Rules 6(25) (a) and (b).
- 2. The Applicant be and is hereby granted interim relief on the following terms:-
 - 2.1 The seizure in terms of section 88(1) © of the Customs and Excise Act and the placement under embargo of a BMW 750i and Mercedes Benz ML500 in terms of section 108 of the aforesaid Act be set aside pending the finalization of this Application;
 - 2.2 The seizure order and embargo as set out in prayer 2.1 above be set above on condition that the Applicant be ordered not to sell and/or dispose of the BMW 750i motor vehicle and/or the Mercedes Benz ML500 motor vehicle, pending the finalization of this Application.

- 2.3 The Applicant be entitled to utilize the BMW 750i and Mercedes Benz ML500 motor vehicle as owner thereof on a daily basis pending finalization of the Application.
- 2.4 The Respondent be ordered to register the BMW 750i motor vehicle in the Kingdom of Swaziland, the 14% sales tax having been paid to the Respondent in the amount of E73, 712.24.
3. A declaratory order be and is hereby entered in the following terms:-
 - 3.1 The seizure of the Applicant's two motor vehicles and placement of an embargo thereon in terms of section 88(1) © of the Customs and Excise Act is unlawful;
 - 3.2 The Sales Tax payable on the two motor vehicles is to be based on their respective prices as used vehicles.
4. The Respondent be ordered to pay the costs of this Application, including costs of Counsel as certified in terms of Rule 68 of the High Court rules.
5. Further and/or alternative relief."

[2] The Applicant has filed a founding affidavit where he has related the background to the case leading to the dispute between the parties. Pertinent annexures are also filed in support thereto.

[3] The Respondent oppose the above orders and has filed an opposing affidavit deposed to by the Commissioner General setting out the defence of the Respondent against the averments of the Applicant in the Founding Affidavit mentioned in paragraph [2] *supra*.

[4] The Applicant has not filed a replying affidavit in accordance with the Rules of this Court. The matter came for arguments on the last day of the session being the 21 December, 2012 where the court heard the arguments of the parties.

The Application before Hlophe J.

[5] As a prelude to the present Application it is imperative to state that on the 8 November, 2012 the matter appeared before my brother *Hlophe J* where the learned judge issued a judgment on the 3 December, 2012 for an order in the following terms:

“41.1 The motor vehicles concerned are to be forthwith taken for evaluation by a lawfully appointed evaluator or assessor, failing which one appointed by agreement between the parties, to determine their true value before they are released to the Applicant.

41.2 The Applicant be and is hereby ordered to pay to the Respondent 14% Sales Tax based on the value of the motor vehicles as shall have been determined by the assessor or evaluator appointed in terms of order 1 above, which should incorporate the amounts already paid.

41.3 There having been losses and successes on both ends, each party to bear its costs.”

[6] Therefore, the Application before me is a sequel to the judgment by *Hlophe J* as stated above in paragraph [5].

The issue for decision before this court.

[7] The gravamen of the case before this court is whether the Applicant's ground for seeking the release of the motor vehicles (putting into execution the judgment appealed against) pending the determination of the appeal is that, not being able to use his motor vehicles causes him "unnecessary inconvenience".

[8] The question for determination therefore is whether this qualifies to be regarded "as good grounds for the exercise by the court of its general discretion in his favour". This court heard arguments of the parties regarding the pros and cons of this aspect of the matter. I shall outline these arguments in the following paragraphs for a better understanding of the issue for decision.

(i) The Applicant's arguments.

[9] The nub of the Applicant's arguments is outlined in paragraph 7 of Mr. Mlangeni's Heads of Arguments to the legal proposition that the present Application is an appeal to this court to exercise its discretion in favour of the Applicant. In doing so this court

should consider the extent of the prejudice to either party, occasioned by the present state of affairs i.e. the vehicles that it is submitted that:

- “9.1 release of the motor vehicles pending the appeal occasions no prejudice to the Respondent. If there is fear of sudden depreciation the vehicles can be evaluated before being released;
- 9.2 on the other hand, prejudice to the Applicant is obvious and need not be labored;
- 9.3 at this point in time the Applicant has judgment of Court in his favour and there is no need to subject him to the present hardship.

[10] All in all, it is contended for the Applicant that the scales of justice require that the motor vehicles be released to the Applicant pending the appeal, subject to any reasonable conditions that this court may impose.

(ii) The Respondent’s arguments.

[11] The attorney for the Respondent also submitted arguments before this court and also filed very useful Heads of Arguments for which I am grateful.

[12] The nub of the arguments of the Respondent is that the courts have held and it has become a settled legal principle that a party seeking to execute or enforce a judgment which has been appealed must satisfy the court that there are good grounds for the exercise by the court of its general discretion in his favour. The attorney for the Respondent cited the South African case of *South Cape Corporation (Pty) Ltd vs Engineering Management Services (Pty) Ltd 1977(3) SA 534 (A)* at page 546 where *Corbett JA* stated the following:

“Approaching the matter on principle, one starts with the basic rule that the due noting of an appeal suspends the operation of the judgment and that if the party in whose favour it has been given wishes it to be put into execution, he must make special application for leave to do so. He being the claimant for relief must satisfy the court that there are good grounds for the exercise by the Court of its general discretion in his favour. This means that the overall onus of establishing a proper case for the grant of leave to execute would rest upon the Applicant and, if at the end of the hearing the court were left in doubt as to the essential facts or as to whether it was an appropriate case for the grant of leave, then the Application should be refused.”

[13] Mr. Manzini for the Respondent contends that in this case the Applicant’s only ground for seeking for the release of the motor vehicle (putting into execution the judgment appealed against) pending the determination of the appeal is that, not being able to use these motor vehicles causes him “*unnecessary inconvenience.*”

[14] That this does not qualify to be regarded as “good grounds for the exercise by the court of its general discretion in his favour.”

[15] That the court is also requested to take into account that the Applicant has made false allegations in support of this Application to the effect that the Respondent has not noted the appeal yet the appeal was noted on the 16th December 2012, that is 3 days before Applicant deposed to the affidavit in support of this Application which affidavit was signed on the 13th December, 2012.

[16] In support of the arguments advanced above in paragraph [15] the Respondent's attorney made arguments in paragraph [29] of his Heads of Arguments.

The court's analysis and conclusions thereon.

[17] Having considered the above arguments of the attorneys of the parties I agree *in toto* with the summary of the Respondent's attorney at paragraph [26] of his Heads of Arguments of the issue for decision. That in this case the Applicant's only ground for seeking the release of the motor vehicles (putting into execution the judgment appealed against) pending the determination of the appeal is that of not being able to use his motor vehicle causes him “unnecessary inconvenience.”

[18] In my assessment of the arguments of the parties against the principles of law stated in the *South Cape Coronation (Pty) Ltd* case *supra* I cannot say that Applicant had advanced good grounds for the exercise by this court of its general discretion in his favour. In this regard I am persuaded by the submissions of the Respondent in paragraph [28 and [29] of the Heads of Arguments.

[19] In my considered view I do not think the Applicant's averment of "unnecessary inconvenience" constitute good grounds stated in *South Cape Coronation (supra)* for this court to exercise its general discretion in his favour.

[20] Furthermore, in my assessment of the arguments of the parties the question that vexed this court was whether this court can release these motor vehicles which have been placed under an embargo of section 88(i) (C) 108 of the *Custom and Excise Act* pending an appeal against the judgment of *Hlophe J.* These motor vehicles are under a legal embargo. In my view, this court cannot release these motor vehicles without infringing the tenor of the embargo under section 88(i) of the Act.

[21] In the result, for the foregoing reasons the Application is dismissed with costs on the ordinary scale.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE

FOR APPLICANT : Mr. T. Mlangeni

FOR RESPONDENT : Mr. M. Manzini