

KENNETH MUNGATI
ZIMBABWE REVENUE AUTHORITY
versus
PATRICK BAURENI

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 28 October 2022 & 21 March 2024

Civil Appeal

S Bhebhe, for appellants
T Tabana, for respondent

WAMAMBO J: This is an appeal against the judgment of the Magistrates Court sitting at Beitbridge Magistrates Court.

Before the Magistrate was an application for contempt of court pursuant to section 71(3) of the Magistrates Court Act [*Chapter 7:10*]. The respondent herein whom I shall refer to as Baureni in relation to proceedings before the Magistrate was the applicant in the Magistrates Court. The appellants herein were the respondents in the Magistrate Court.

Baureni was on 17 January 2021 arrested by the police along the Beitbridge Bulawayo highway. He was driving a Scania truck registration no AFG 0697. He was taken to Beitbridge Border Post where the truck and its contents were seized by ZIMRA officials.

Baureni was prosecuted at Beitbridge Magistrates Court for contravening section 182 of the Customs and Excise Act [*Chapter 23:02*]. On 8 October 2021 he was found not guilty and acquitted of the charge as mentioned above.

The order of the trial court appears at page 25 in the form of an extract from the Criminal Record Book of the Magistrates Court.

The verdict is therein recorded as follows: -

“Discharged at the close of the State case. Not guilty and acquitted. The truck and goods released back to the person from which it was seized.”

Baureni approached first respondent seeking the release of the truck and its contents in accordance with the court order. First respondent informed him that the Magistrates Court has no jurisdiction to order the release of the seized motor vehicle and its contents.

Baureni's legal practitioners wrote to the Commissioner General requesting compliance with the court order to no avail. Against the above background Baureni sought an order declaring appellants herein guilty of contempt of court for willful disregard of the court order and a refusal to comply with it.

The court *a quo* found for Baureni and made an order in the following terms: -

- “1. An application for contempt of court be and is hereby granted, the respondents are hereby declared to be in contempt of court order granted under case number BTB 158/21 dated 8 October 2021.
2. The 1st respondent is sentenced to 60 days imprisonment until full compliance with the order of the court under case number BTB 158/21 dated 8 October 2021 provided the term of imprisonment shall be wholly suspended on condition of respondents fully comply with the order of the court granted 8 October 2021 under case number BTB 158/21.
3. That the order constitutes and serve as a warrant for the arrest and detention of the 1st and 2nd respondents.
4. The respondent to pay costs of suit.

Unhappy about the above order the appellants filed a notice of appeal containing five grounds of appeal which grounds are couched as follows: -

1. The learned Magistrate in the court *a quo* erred by ruling that the 1st and 2nd appellant were in contempt of court proceedings for failing to comply with an order from the criminal court when the court order was issued against the State and not the appellants.
2. The learned Magistrate in the court *a quo* erred in facts and law by ruling that the criminal court had jurisdiction to order the release of the vehicle belonging to the respondent yet section 193(9) Customs and Excise Act [*Chapter 23:02*] only applies when a person is found guilty of committing an offense by a criminal court when in actual fact the same section applies regardless of whether a person is found guilty or not.
3. The learned magistrate grossly erred and misdirected herself on the law by ruling that section 193(9) of the Customs and Excise Act [*Chapter 23:02*] only applies when a person is found guilty of committing an offence by a criminal court when in actual fact the same section applies regardless of whether a person is found guilty or not.

4. The learned Magistrate in the court *a quo* grossly erred on a point of law by placing reliance on the judgment of *ZIMRA v Chouromwe No & others* HH 40/17 when the facts and issues in the Chouromwe case and the Baureni case are distinguishable.
5. The learned Magistrate in the court *a quo* grossly erred on a point of law by ruling that there is no legal basis for the applicants to continue holding on the respondent's vehicle when in actual fact there is a valid notice of seizure issued by the appellant against the vehicle in dispute which is still extant."

Mr *Tabana* for the respondent raised points *in limine* in his heads of argument, which he persisted with in oral submissions before us. According to him the points in limine are potentially dispositive of the matter.

The first point *in limine* he took is that the appeal is mute. He submitted that there is no longer a live dispute between the parties by reason of appellants complying with the order of the lower court. He further submitted that the matter stands resolved and that there is no dispute for this court to resolve.

It was submitted that appellants have acquiesced to the judgment and that it effectively perempts their rights to appeal.

The cases of *Dhliwayo v Warman (Private) Limited* HB 12/22 *Cohen v Cohen* 1980 ZLR 289 and *Mining Commissioner – Masvingo Mining Affairs Board, Minister of Mines and Mining Development v Finer Diamonds (Private) Limited* SC 38/22 were cited as authority for the proposal.

Mr *Bhebhe* for the appellants submitted on this point as follows. The cases cited by counsel for the respondent are distinguishable from this matter. In this case as an appeal from the Magistrates Court this does not automatically suspend the judgment appealed against. There should be an application for stay of execution pending appeal. Where one has executed judgment pending appeal this does not bar appellant from prosecuting the appeal. The situation is different when it concerns a High Court decision being appealed in the Supreme Court wherein an appeal automatically suspends a judgment. In this latter scenario if there is compliance then the judgment is perempted.

In support of his submissions Mr *Bhebhe* cited the case of *Ritenote Printers (Private) Limited v A. Adam and Company, The Messenger of Court, Harare* SC 15/2011. The case clearly does not speak to the issue as raised in this case.

Nowhere does the cited case touch on peremption. Nowhere does it distinguish peremption on appeal from the Magistrates Court against one emanating from the High

Court. There is no legislative provision referred to by Mr *Bhebhe* that elaborates that an appeal such as in this case is not barred by virtue of peremption.

In this case respondent raises the issue of peremption in his heads of argument. By the time this matter was set down appellant had read and considered *inter alia*, this particular point *in limine*. The respondent's heads of argument elaborately and in detail sets out the point *in limine* in seven paragraphs. Appellant did not in oral submissions seek to point out that appellant had not complied with the order of the lower court. It sought instead to rely on a matter which I have found clearly inapplicable to the circumstances of this matter.

Appellants by not challenging the averments that they complied with the order have clearly confirmed same.

For the avoidance of doubt I find that appellants complied with the order by the Magistrates Court.

In *Mining Commissioner – Masvingo N O Mining Affairs Board, Minister of Mines and Mining Development v Finer Diamonds (Private) Limited* SC 38/22 BHUNU JA at paragraphs 16-17 said:

“16 on that score the respondent has now placed reliance on the dictum in the case of *Dhliwayo v Warman Zimbabwe (Private) Limited* HB 12-12 where the court *a quo* said:

“According to the common law doctrine of peremption a party who acquiesces to a judgment cannot subsequently seek to challenge a judgment in which he has acquiesced.

“17 Undoubtedly the applicant by complying with the order he now seeks to appeal against acquiesced in the judgment of the court. He can now not be heard seeking to appeal against the judgment he has complied with. He cannot approbate and reprobate as it were. See *S v Marutsi* 1990(Z) ZLR 370 (SC) where the court observed that:

“It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other not both.”

The fact that appellants complied with the order deprives them of the right to appeal against the same order. This finding renders it unnecessary to deal with the other points *in limine* or the merits as it effectively disposes of the matter.

The appeal stands to fail with costs following the results.

I order as follows:

1. The appeal be and is hereby dismissed.

2. The appellants are to pay respondents costs jointly and severally one paying the other to be absolved.

WAMAMBO J.....

MUCHAWA J..... Agrees

ZIMRA, Legal Services Division, appellants legal practitioners

Tabana & Marwa, respondents legal practitioners