

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 464
MC 09/2021

GENERATION TRANSPORT & LOGISTICS (PTY) LIMITED **Petitioner**
(rep. by Pesi Pardiwalla)

and

MINISTER OF FINANCE, ECONOMIC PLANNING AND TRADE **Respondent**
(unrepresented)

Neutral Citation *Generation Transport and Logistics (Pty) Limited v Ministry of Finance, Economic Planning and Trade* MC 09/2021 [2021] SCSC 464 (26th July 2021)

Before: Vidot J

Summary Refusal of import permits for vehicles already imported into the country on the ground that there was a Moratorium in place; whether such moratorium was lawful

Heard: 08th July 2021

Delivered: 26th July 2021

RULING

VIDOT J

Background

[1] The Petitioner has filed a petition for judicial review of a decision of the Respondent, refusing import permits to import seven Toyota Glanza vehicles and which reasons for such decision are captured in letters dated 24th November 2020 and 04th December 2020. In fact, the latter letter which is the impugned letter is signed on behalf of .the Minister of

Finance, Economic Planning and Trade by the Principal Secretary of the Department of Trade of that Ministry, Ms. Cellia Mangroo. The decision communicated in the said letter is that import permits for seven (7) out of eighteen (18) vehicles imported into the country by the Petitioner were refused. The reasons for such refusal are identified below. The vehicles were not released by the Customs Department and still being retained by the Respondent.

- [2] The primary objection for the refusal of import permits was that payment for vehicles were made subsequent to a moratorium made on 07 April 2020 which placed a ban on importation of vehicles, including certain exceptions, such as where payments for vehicles had been made prior to the coming into force of the moratorium.
- [3] This application is made pursuant to Article 125(c) of the Constitution read with Rule 2(1) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules (“the Rules”). In terms with Rule 6(1) of the Rules this Court made a Ruling dated 13th April 2021 granting leave to the Petition to proceed. This Court further ordered that a copy of the Ruling be served on the Respondent. That was done on the 16th April 2021. The Respondent was served with a copy of the Petition but failed to appear before Court either personally or by counsel. Therefore, the case was fixed for hearing ex-parte.
- [4] The Petitioner prays to Court for Orders of certiorari and mandamus against the Respondent and order for payment of damages against the Respondent in favour of the Petitioner. These claims of damages are explained below.

The Petitioner’s Case

- [5] The Petitioner is and was at all material times a company incorporated under the Companies Act 1972, and engaged in the business of importing and selling of motor vehicle and accessories.
- [6] The Respondent is a Government Minister responsible for the Department for Trade, and was exercising or purporting to exercise powers under the Custom Management (Prohibited and Restricted Goods) Regulations 2009 (SI 41 of 2019) as amended.

- [7] In August 2020, the Petitioner had lodged with the Department of Trade permits to import into Seychelles eighteen (18) Toyota Glaza motor vehicles. When the vehicles landed into the Country, the Respondent did not release seven (7) of them on grounds of insufficient satisfactory evidence to confirm that some payment for the vehicles had been made prior to a moratorium announced by the Respondent on 07th April 2020. That moratorium as above stated purportedly sought to impose a ban on importation of vehicles, including certain exceptions, such as where the importer had made a payment to its supplier before 07th April 2020.
- [8] Payment was made by bank transfers on the 19 March 2020, 31 March 2020 and 06 April 2020 respectively. In all the Petitioner made a payment of United States Dollars One Hundred and Eighty Thousand (US\$180,000/-) to its supplier, Amma Motors, of Mumbai, India as deposits for several vehicles
- [9] The Petitioner claims that the Moratorium has no force of law and in any case could not operate to affect the determination of the Petitioner's application for permit of the seven vehicles which had been ordered prior to the Moratorium. The Petitioner has also made full payments for those vehicles and satisfied the purported requirements of the Respondent. The Petitioner wrote to the Respondent on the 25th November 2020 submitting several documents showing payments for these vehicles and requested a reconsideration of a letter issued by the Respondent dated the 24th November 2020, refusing release of the vehicles.
- [10] By an email dated the 10 December 2020, the Petitioner received a letter from the Principal Secretary of the Respondent dated 04 December 2020, informing the Petitioner that the documents submitted to the Respondent do not sufficiently prove that there was a foreign exchange payment from the Petitioner to the supplier for the vehicles and that the Respondent was maintaining its decision to refuse the import permits.
- [11] By letter dated 14th December 2020, the Petitioner responded to the letter of the 04th December 2020 and submitted further copies of records, including extract of its bank account statements showing payment for the vehicles which was made to the supplier

before 07 April 2021, all of which have been exhibited. The Respondent is yet to answer to that letter of 14th December 2020.

- [12] The Petitioner alleges that the Respondent's finding that the documents submitted by the Petitioner do not sufficiently prove that payment for the vehicles was effected to the supplier before 07th April 2020 and the Respondent's failure to respond to the further documentary proof of payment mentioned hereabove, are irrational, unreasonable and arbitrary.
- [13] The Petitioner further argues that the Respondent's reliance on the moratorium to deny the Petitioner the import permits to import the seven vehicles is also irrational, unreasonable and unlawful and in any event in excess of his powers under the Customs Management (Prohibited and Restricted Goods) Regulations 2009 (as amended)
- [14] The Petitioner also avers that as result of the Respondent's refusal of the import permits and the delayed delivery of such determination, the Petitioner has incurred damages by way of demurrage and storage costs and would also be liable to an increase of Excise Tax and, by consequence, the amount of Valued Added tax (VAT) payable
- [15] In view of this refusal to release these seven vehicles, the Petitioner has prayed for the following Orders;
- (i) A declaration that the Moratorium of the Respondent on the on the 07th April 2020 relating to the importation of the vehicles had no legal authority and or should not have affected the Petitioner's import permit applications in respect of the seven Toyota Glanza motor vehicles;
 - (ii) Make a declaration that the determination of the Respondent of 24 November 2020 and 04 December 2020 refusing to approve the import for those seven vehicles is irrational, unreasonable and unlawful and in any event in excess of the respondent's powers under the Customs Management (Prohibited and Restricted Goods) Regulations 2009 (as amended);

- (iii) Issue an order of certiorari quashing the Respondent's determination of the 24 November 2020 and 04 December 2020, aforesaid;
- (iv) Issue an order of mandamus ordering the Respondent to determine the Petitioner's import permit applications in respect of the seven vehicles within a reasonable time and in accordance with law;
- (v) Grant an order condemning the Respondent to pay damages to the Petitioner as follows:
 - (a) The sum of SR402,000.00 being the demurrage and storage charges aforesaid, with interest at the commercial rate of 12%;
 - (b) SR368,578.99 being the excess Excise Tax aforesaid payable at the clearing of those seven vehicles; and
 - (c) SR55,286.84 being the additional amount of VAT payable for the clearing of those seven vehicles.
- (vi) Grant such further or other relief as may seem just in the circumstances; and
- (vii) Grant costs of these proceedings to the Petitioner.

[16] The Petitioner supported all its averments and claims with relevant documents that were exhibited with the Petition.

Failure to attach certified copy of materials or originals of documents

[17] The Petitioner is challenging both letters of 24 November 2020 and that of 04 December of 2020. These letters and documents attached to the Petition are not originals and have not been certified. Rule 2(1) of the Rules provides that such application shall be made by petition accompanied with an affidavit and Rule 2(2) states that “[T]hat the Petitioner shall annex to the petition a certified copy of the order or decision sought to be canvassed and originals of documents material to the petition or certified copies thereof

in form of exhibits.” The Petitioner did not comply with the requirement of Rule 2(2). I am of the opinion that this requirement is mandatory.

[18] In **Ex-parte Tornado Trading & Enterprise EST. v PUC and Procurement Review Panel XP150 of 2018** (decided on 04 July 2018) this Court applied the rules of procedures strictly. That was an application for leave to proceed in a judicial review matter. In support of a strict application of Rule2(2), I cited **Viral Dhanjee v James Alix Michel SCSC CP 03/2014** where in it was held that “*applicants might be hurt when petitions or applications are dismissed due to legal technicality. But in the long run, rule of law will be hurt, if we allow some procedural irregularities continue...*” In the Tornado case I also cited **Ratnam v Cumarasamy [1964] 3 All ER 933** where it was held that “ *rules of court must prima facie be obeyed, and in order to justify a court extending the time which some steps in procedure require to be taken, there must be some material on which the court can exercise its discretion* “.

[19] Nonetheless, on appeal, in **Tornado Trading & Enterprise EST v PUC and Procurement Review Panel** (delivered on 28 November 2018) the Court of Appeal decided to accept the uncertified impugned decision. Therefore, the Court of Appeal appears to be suggesting that the Court has some latitude to allow an uncertified impugned document to be attached to such judicial review petition.

[20] In any case I find that the Respondent would not have been prejudiced since the letters and some documents exhibited emanate from the Respondent whilst they were also in receipt of documents emanating from the Petitioner.

Was the letter of the 04 December a final decision?

[21] Were the Respondent’s letters of 24 November 2020 and that of 04 December 2020 were unlawful, unreasonable and irrational. I am of the opinion that though the former letter has relevance to the Petitioner’s action, only the latter should be considered the impugned decision for which the application for judicial review is being sought. It is trite that a person dissatisfied with an action of judicial or quasi-judicial body should have exhausted all processes and remedies made available before filing a case for judicial review. The

Respondent in making the decision as an adjudicating authority sets a process to be followed. The Respondent is an adjudicating authority because it falls within the definition of Article 125(7) of the Constitution which provides that;

“For the purposes of clause (1)(c) adjudicating authority includes a body or authority established by law and which performs a judicial quasi-judicial function”

[22] It is clear that by the letter of the 04 December 2020, the Respondent was making a final decision. It makes reference to additional document particularly bank statement that the Petitioner needed to have served on the Respondent to show that payment for the vehicles were made prior to 07 April 2020 when announcement of the Moratorium was made. The letter goes on to add *“..... we regret to inform you that the request to reconsider the refusal of import permit for the 8 vehicles in question, based on the additional documents provided, cannot be considered”* . Furthermore, the Petitioner has responded to that letter by letter dated 14 December 2020 and to date no response has been forthcoming. The Petitioner has, as discussed below followed the appeal process as laid down the Customs Management (Appeal and Administrative Decisions) Regulations 2012. Therefore, the matter is properly before Court.

Appeal Process

[23] Section 2 of the Customs Management Act 2011, (S.I 60 of 2012) Customs Management (Appeal and Administrative Decision) Regulations 2012 provides that a person dissatisfied with a decision of Customs may appeal against that decision within 60 days of the day that person has been served with that decision. Though not captured as such the letters of 24 November 2020 and 04 December 2020 are clear appeals of decisions of the Respondent not to issue import permits for the seven vehicles. These letters were not issued out of time and the Respondent considered the letters and maintain his position. Therefore, the only options available to the Petitioner was to file for judicial review.

The Moratorium

[24] The Petitioner submits that the Moratorium is illegal inasmuch as it does not have the force of law. On that basis, the Petitioner contends that the decision of the Petitioner was

wrong, irrational, unreasonable and unlawful. In **SF Hybrid Motors (Pty) Limited v The Commissioner General & Anor.**[2010] MC107/2019, which similar to this case dealt with refusal to grant import permits for vehicles, based on a Policy that was then in place, this Court held that such a policy was not law. It had not been promulgated into law. The same position was adopted in **Cable and Wireless (Seychelles) Limited v Minister of Broadcasting and Telecommunication** MC42 OF 2017 [2018] 343 (delivered on 09th April 2018; see also **Talma v Ministry of Land Use and Housing (MC 65/2014)**[2015] SCSC 733.

[25] Therefore, similarly since this Moratorium had not been translated into law, it could not be applied to refuse the Petitioner permits to import the seven vehicle. Therefore, the decision per the letter dated 04 December 2020, was unlawful, irrational and unreasonable.

Illegality, Unjustified and Unreasonable

[26] Judicial review in essence is about the function or capacity of court to provide remedies for people adversely affected by unlawful government action. If a body that derives power under statutes makes decision that affect personal rights of persons, such decision should be amenable to challenges if the citizen is unsatisfied with decisions taken.

[27] The Judicial Review Handbook (6th Edition ; Hart Publications) at page 7, Michael Fordham QC state that “*Judicial review is the Court’s way of enforcing the rule of law; ensuring that public authorities’ functions are undertaken according to law and that they are accountable to law, Ensuring in other words, that public bodies are not “above the law”*”

[28] It was stated in **Trajter v Morgan [2013] SLR 329;**

“The jurisdiction confers by this process determines the legality, as distinct from substantive merits of the decision of the adjudicating authority, in this case the Minister. Judicial review is a means by which the courts necessarily ensure that administrative bodies act within the powers laid down by the law rather than by whim or fancy.”

[29] I therefore find that the decision or action of the Respondent was illegal. The Respondent acted on a moratorium which itself did not have the force of law as it had not been promulgated into law. Not only was the action illegal, it was unreasonable and unjustified.

Determination

[30] Therefore, I proceed to make the following Orders;

- (viii) Declare that the Moratorium of the Respondent on the 07th April 2020 relating to the importation of the vehicles had no legal authority and or should not have affected the Petitioner's import permit applications in respect of the seven Toyota Glanza motor vehicles;
- (ix) Declare that the determination of the Respondent of 24 November 2020 and 04 December 2020 refusing to approve the import for those seven vehicles is irrational, unreasonable and unlawful and in any event in excess of the Respondent's powers under the Customs Management (Prohibited and Restricted Goods) Regulations 2009 (as amended);
- (x) I issue an order of certiorari quashing the Respondent's determination of the 24 November 2020 and 04 December 2020, aforesaid;
- (xi) I issue an order of mandamus ordering the Respondent to determine and give a reply to the Petitioner's import permit applications in respect of the seven vehicles within the next 14 days;
- (xii) Grant an order condemning the Respondent to pay damages to the Petitioner as follows;
 - (d) The sum of SR402,000.00 being the demurrage and storage charges aforesaid, with interest at the commercial rate of 12%;
 - (e) SR368,578.99 being the excess Excise Tax aforesaid payable at the clearing of those seven vehicles; and

(f) SR55,286.84 being the additional amount of VAT payable for the clearing of those seven vehicles.

(xiii) The Respondent shall also pay costs of these proceedings to the Petitioner.

Signed, dated and delivered at Ile du Port/ Victoria on 26th July 2021

M Vidot J