

Saxton

CASE NO 10104/2005

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

In the matter between

SAXTON TRADING (PROPRIETARY) LIMITED
t/a KDG AUTO EXPORT

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL :
TRANSPORT KWAZULU-NATAL

First Respondent

MINISTER OF TRANSPORT FOR THE
REPUBLIC OF SOUTH AFRICA

Second Respondent

COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES

Third Respondent

Delivered :
17 November 2005

J U D G M E N T

LEVINSOHN J :

This urgent application for interim relief is brought against the background of the following facts and circumstances.

On or about 2nd June 2005 the National Department of Transport issued a circular No. MLB 29/2005 instructing all motor vehicle registry authorities to desist from issuing temporary or special permits to motor vehicles in transit in terms of Regulation 84 of the National Road Traffic Regulations. This directive was based on the Department's interpretation of the foregoing regulations.

It appears that for some years these permits had been issued to importers of motor vehicles which had landed in the Durban harbour and were destined for delivery across South Africa's borders in neighbouring countries. The vehicles in question were then driven by road to their respective destinations.

The Department's said directive prompted an entity calling itself "Clearing Agents, Receivers and Shippers" (hereinafter referred to as the "clearing agent") to launch an application in this Division for an order essentially declaring the Department's said directive to be unlawful. That application was brought under Case No 8612/2005. It was opposed and came before Koen AJ on 6th September 2005. Prior to that pending the decision of that application the respondents (in that application) undertook not to implement the directives referred to above.

At that stage, namely 27th June 2005, the present applicant which describes itself as a motor dealer and importer of motor vehicles had also been affected by the said directive and contemplated bringing similar proceedings.

The present applicant's attorneys entered into negotiations with the respondents' attorneys with a view to concluding a similar interim arrangement. I quote the relevant portion of the letter addressed to the respondents' attorneys dated 30th June 2005 : -

"As discussed with your Mr Ori, kindly indicate whether the Department of Transport and other necessary authorities are willing to allow our client permission similar to that granted to the Applicants under Case No 8512/05.

In the event that consent is indeed granted it will be on terms that our client will bring its application within ten (10) court days of the consent granted, and ask that our Application be heard simultaneously with Application under Case No 8512/05.

Kindly indicate as a matter of urgency your client's decision in this regard and note that if consent is not granted we will have to bring an application on an urgent basis and this letter will be used to support the urgency of the application."

The reply received read as follows : -

"We confirm having advised as follows : -

- (i) the interim relief granted in the Application under Case No 8512/05, which was in effect a Class Application, is not specific to the members of the Applicant and will accordingly apply to you client as well; and
- (ii) the proviso, however, as applicable to Applicant's members is that the permit in question can only be obtained at the Durban Motor Licensing Authorities which are situate at Goble and Umbilo Roads."

In a letter dated 15th August 2005 the respondents' attorneys wrote as follows : -

"We confirm having consented to the papers in the above matter being served on ourselves as the representatives of the First and Second Respondents. The Third Respondent is represented by the State Attorney, more specifically Mr Patrick Kevin.

Your Mr Parsee had indicated to the writer on or about the 30th June 2005 that you intended moving an Application on grounds that differed from those traversed in the Application under Case No : 8512/05 (DCLD) and furthermore that you intended setting same down for hearing on the 5th September 2005. Your Mr Parsee further indicated that the above papers would be served on us "shortly".

The papers were only served on us on the 28th July 2005 and our Answering Affidavit is due on or before the 30th instant. You may need to reply to our Affidavit and Heads of Argument would also need to be filed.

In the premises it would not be practical to argue both matters on the 5th September 2005.

We accordingly suggest that we await the outcome of the Applicant under Case No : 8512/05 and then make a decision on the Application under Case No : 10104/05."

To sum up so far, the factual position was that the respondents agreed to an interim arrangement which was along the lines agreed to with the clearing agent. It was obviously intended that this latter application be consolidated with the

present applicant's proceedings. This seems to me to have been a sensible and convenient course to have followed. In the event this did not occur because of the respondents' difficulties set out in the above quoted letter.

There is in my view a strong probability that the parties initially intended that the interim relief insofar as it applied to the present applicant would endure *pendente* the consolidated applications. When this did not happen the respondents' attorneys pertinently did not draw the applicant's attention to the fact that the interim arrangement was to lapse or to fall away. It is highly unlikely that if it was not to actually participate in the first application, the present applicant would submit to a situation where it simply abided the result of that application. In my view the interim agreement concluded remained in force.

Koen AJ delivered judgment on or about 11th November 2005. The learned judge in a fully reasoned judgment held that the registry authorities were not empowered to issue the temporary permits and that the pre-existing practice in terms of which such permits were in fact issued was *ultra vires*. Following upon this the respondents notified the present applicant that the issuing of these permits would cease. Applicant's attorneys asserted that this threatened action contravened the interim agreement which had been concluded previously, namely that such permits would continue to be issued *pendente* the decision in the application.

The test for the grant of an interim interdict is well known and authorities need not be cited. Whether to grant the interdict depends in the final analysis on the exercise by the Court of a discretion after weighing the strength of the *prima facie* case established as well as the balance of convenience.

It is self-evident that no matter how strong the balance of convenience if the proposed conduct to be sanctioned by the interim relief is unlawful it would be a grossly improper exercise of a discretion to grant such interim relief so as, as it were, to perpetuate unlawful conduct. This is not that class of case where the *prima facie* case is weighed on the basis of factual versions that emerge on affidavit. The case stands or it falls on the interpretation of fairly straightforward legislative provisions. This Court now has before it a fully reasoned judgment which declares this very conduct to be unlawful.

Counsel for the applicant has submitted that the judgment of Koen AJ is either clearly wrong alternatively it falls to be distinguished since in the present case the applicant is a dealer in motor vehicles and not a forwarding agent.

At the level of an application for interim relief and obviously not having had the benefit of full argument on the issue, I am able only to express a *prima facie* view after having read the applicable regulations and carefully considered Koen AJ's judgment. (See *Mariam v Minister of the Interior and*

Another 1959 (1) SA 213 at 218 E). My *prima facie* view is that it is very unlikely that the Court considering the merits of the present applicant's case will hold that Koen AJ was clearly wrong. I am persuaded that that other Court will be disposed to accept and follow his reasoning. It follows therefore that it is unlikely that that application will succeed and therefore the applicant's case is open to very considerable doubt. Weighing that against all the other factors in the case, I am disposed in the exercise of my discretion not to grant interim relief. I am however prepared to direct the Registrar to afford the applicant an expedited date of hearing.

In the result the application is dismissed with costs. The Registrar is directed to afford the opposed application under this case number such preference on the opposed roll as he/she is able.

A handwritten signature in black ink, appearing to be a stylized name, possibly 'L. M. M.', written in a cursive style.

DATE OF JUDGMENT : 17 NOVEMBER 2005

DATE OF HEARING : 16 NOVEMBER 2005

COUNSEL FOR APPLICANT : MR M. PILLEMER SC with him
MR P. D. QUINLAN

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INSTRUCTED BY : THE STATE ATTORNEY -
KWAZULU-NATAL, DURBAN