**NOT REPORTABLE**

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 10066/2011

In the matter between:

TRUDY TRADING CC
t/a MECCA MOTORS — Applicant

and

THE COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE — Respondent

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**JUDGMENT**

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**ANNANDALE A.J.** :-

[1] On 21 February 2005 the respondent[1] granted the applicant a licence to conduct the business of a bonded warehouse from premises situate at 375 Point Road subject to the Customs and Excise Act 81 of 1964 ("the Act"). The licence was

[1] who was incorrectly cited as "*The Commissioner, Customs and Excise*" but who is in fact The Commissioner, South African Revenue Services

initially issued as an annual licence but on 7 December 2009 a permanent licence was granted in respect of these premises.

[2] The Point Road warehouse was an "SOS Warehouse" for the storage of second hand vehicles in bond and was allocated the number SOS 2425.

[3] The applicant contends that on 24 November 2010 it asked the respondent for permission to extend its Point Road operation to premises at 1 Ordnance Road until 31 January 2011 because it did not have sufficient space to store all its vehicles at 375 Point Road. According to the applicant, its request was granted the same day it was made. Curiously, the permission is said to be given "*as per vehicles listed*" although no list of vehicles was attached to the request for permission. The respondent has no record of having received the request for an extension and disputes the validity of the purported extension.

[4] Also on 24 November 2010, the applicant requested permission to move certain vehicles from another bonded warehouse it had under number SOS 2492 at 65 NMR Avenue to the new premises at 1 Ordnance Road. The applicant states this permission too was granted within a day. The respondent has no record of having received this request either and disputes the validity of the document in terms of which the permission was apparently granted.

[5] It is not however in dispute that on 3 February 2011 the applicant delivered to the respondent a request that it be permitted to move its bonded warehouse SOS2425 permanently from 375 Point Road to 1 Ordnance Road.

[6] The applicant claims that on 1 February 2011, that is to say before the request for a permanent relocation was delivered to the respondent, it was given another temporary extension until the end of February 2011. The applicant has not adduced a request for this further extension which consequently appears to be entirely fortuitous. The validity of this extension is likewise disputed by the respondent. The apparent author of the letter granting this extension has deposed to an affidavit in these proceedings denying that he ever signed the letter which is therefore, on the face of it, a forgery.

[8] On 7 March 2011, after the previous permission had already run out, the applicant applied for a further temporary extension of three months. This was received by the respondent but it is common cause that the extension sought was never granted.

[9] Even were the extensions genuine therefore, it is clear that from 1 March 2011 the applicant did not have any permission, temporary or otherwise, to run a bond store from the premises in Ordnance Road. Despite this, it continued to do so until 19 July 2011 when representatives of the respondent arrived at the premises and detained 108 vehicles in terms of section 88(1)(a) of the Act as well as a

variety of documentation and the applicant's computers which latter items were removed from the premises. During the course of the inspection blank supplier invoices were found on the applicant's premises but there is a dispute about the manner in and place at which these documents were found.

[10] Although it is not clear whether this occurred during the course of the inspection, in July 2011 the respondent's representatives were shown the letter referred to in paragraph [3] above which, on the face of it, gave the applicant permission to move vehicles from Point Road to Ordnance Road.

[11] Communication between the parties after the inspection and detention in an attempt to resolve matters, did not bear fruit.

[12] Consequently, on 1 August 2011, the applicant's attorneys wrote to the respondent demanding a letter stipulating which provisions of the Act the applicant was said to have contravened, and advising that, absent the letter, the applicant intended approaching the High Court on an urgent basis for an order setting aside the seizure and detention and re-opening the bonded warehouse so as to allow the applicant to trade, import and sell vehicles. Nothing is said in that letter regarding the application for a permanent relocation of the bonded warehouse from Point Road to Ordnance Road.

[13] The respondent replied to that letter the same day. In the letter he also advised that the application for a permanent re-location had been rejected. The respondent placed on record that although the applicant had requested permission to move vehicles from the Point Road warehouse (SOS2425) to Ordnance Road, the vehicles were in fact moved from the NMR warehouse (SOS2492) and that this transfer was unauthorized and consequently in contravention of the Act.

[14] This stance means that the respondent was ignorant of the request and apparent permission in respect of the NMR warehouse and was disputing the validity of the document upon which the applicant had relied for the transfer of the vehicles from the NMR warehouse. It also means that the respondent was, at that stage, not disputing the validity of the request in respect of the Point Road warehouse.

[15] The respondent also recorded the fact that blank supplier letterheads had been found on the applicant's premises which was a serious contravention of Section 80(1)(h) of the Act.

[16] The respondent refused the applicant's request to have the bond store opened due to the pending investigation it was conducting and the seriousness of the alleged contraventions it had found.

[17] The applicant intends pursuing an internal appeal in terms of section 77 A - D of the Act against the locking of the warehouse and the detention of the vehicles and

records as well as the decision to refuse the relocation of the bond store to the Ordnance Road premises.

[18] On 29 August 2011 the applicant's attorney once again wrote to the respondent this time setting out the applicant's response with regard to the alleged contraventions and advising that the applicant intended launching urgent proceedings. The applicant's response in respect of the alleged contravention of the Act in respect of the vehicles moved from the NMR warehouse was to rely on the letter apparently granting permission.

[19] This letter was served on the respondent together with a copy of the founding affidavit which had been deposed to the same day.

[20] On 7 September 2011, and before a response to the letter of 28 August 2011 was received, the applicant launched the present application as one of urgency, setting it down for hearing less than a week later on 13 September 2011.

[21] As final relief the applicant seeks an order setting aside the respondent's decision to lock the warehouse and detain the vehicles. No relief is sought in respect of the refusal to allow the relocation of the Point Road warehouse.

[22] Pending the finalization of the application the applicant seeks an order uplifting the locking of the warehouse and detention of the vehicles and entitling it to run

an SOS warehouse from the Ordnance Road premises. In return, as it were, it tenders a lien over 54 vehicles in the warehouse on a revolving stock basis. The interim relief thus seeks to achieve the same result as the final relief.

[23] The matter then came before me on 28 September 2011 on the question only of interim relief.

[24] The respondent contends that the application is fatally defective for want of compliance with the notice provisions in section 96 of the Act. As the respondent has filed an answering affidavit (albeit under extremely tight time constraints) and all the relevant information is before me, I will determine the question of interim relief assuming, without deciding the issue, that lack of compliance with s96 does not constitute an absolute bar to litigation such as the present.

[25] Interim relief is generally aimed at preserving or restoring the *status quo* pending the final determination of rights[2].

[26] An applicant for interim relief is ordinarily required to show, *inter alia*, that it has a *prima facie* right to the relief sought[3]. This is usually achieved by *prima facie* proof of facts that establish the existence of a right in terms of substantive law[4].

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2 C B Prest Interlocutory Interdicts, page 2
3 **Setlogelo v Setlogelo 1914 AD 221 at 227**
4 **Simon NO v Air Operations of Europe AB 1999 (1) SA 217 (SCA) 228**

[27] In cases such as the present however, where the applicant was, on its own version, operating without the required licence, it must show a strong *prima facie* case that it will succeed with its internal appeal or ultimate review[5].

[28] As is apparent from the exposition of the facts set out above, there are a number of disputes of fact. For present purposes it is not necessary to determine these by virtue of the facts which are common cause.

[29] At the time that the warehouse was locked and vehicles and documents detained, the applicant did not possess a valid bond store licence for those premises. It was consequently operating in contravention of the Act which in itself renders the vehicles then on the premises subject to forfeiture in terms of the Act in due course.

[30] It is no answer to this state of affairs to suggest, as did Mr Kemp who appeared with Ms Olsen for the applicant, that the blame for the applicant's unlawful conduct should be laid at the feet of the respondent for not having processed the application for a relocation of its bond store licence more expeditiously. The applicant was well aware as at 1 March 2011 that any permissions which it may have had had lapsed. It did not approach a court at that point on an urgent basis and ask for an extension of the *status quo* until such time as a final decision could

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[5] **Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban & Others 1986 (2) SA 663 (A) at 673 B - E**

be made on its application but chose instead to conduct its activities in contravention of the Act.

[31] The *status quo* which existed prior to the locking of the warehouse was thus an unlawful one.

[32] The relief which the applicant seeks therefore amounts to permission to resume these unlawful activities when it has no right whatsoever to carry on the business of a bond store from those premises. In addition, the fact that the applicant traded in this unlawful manner would manifestly give the respondent good grounds to refuse the application for a licence.

[33] Mr Kemp submitted that the respondent did not rely on the fact that the applicant had been trading from the Ordnance Road premises without a licence as one of the reasons to justify its decision to refuse the application for a relocation of the licence in the letter of 1 August 2011 and consequently he cannot rely on that fact now.

[34] The submission is predicated upon the assumption that the letter contains all the reasons for the decision. That is by no means clear given that the initial request made no mention of the relocation application and simply queried what contraventions of the Act were said to justify the detention on 19 July 2011. The response letter of 1 August 2011 records two grounds which warranted that

detention, to wit, the transfer of vehicles without permission and possession of blank supplier letterheads.

[35] That does not necessarily mean that these contraventions of the Act were the reasons for the refusal to relocate the bond store. They seem rather to be the reasons for the detention and are clear grounds for a reasonable suspicion of contraventions of the Act and accordingly detention in terms of the Act[6].

[36] In his answering affidavit the respondent points out that the applicant has never requested reasons either for the detention or the refusal to relocate the warehouse. In respect of the latter application the respondent says that is self-evident from his affidavit "*that there are numerous grounds which would have obliged (him) to refuse the application*".

[37] In any event it is not apparent from the papers when the respondent discovered the true state of affairs about the licence and whether he was aware of the actual position at the time he wrote the letter refusing to re-open the warehouse. The letter of 1 August 2011 refers to a pending investigation which implies that matters beyond those mentioned in the letter were still being investigated.

[38] Assuming in the applicant's favour for the moment however that the respondent was aware of the true position regarding the licence at the time but did not rely on it, Mr Kemp correctly accepted that the appeal tribunal would be at liberty to take

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[6] **SARS v Saleem 2008 (3) SA 655 (SA) at [9]**

such matters into account and could further substitute its decision for that of the respondent.

[39] On that basis it is in my view highly unlikely that any internal appeal regarding the refusal of the relocation of the licence would succeed. The fact that the applicant was trading without a licence at the time of the detention also means that the vehicles at present on the premises may be subject to seizure and forfeiture because they have plainly been dealt with contrary to the Act.

[40] The applicant therefore cannot demonstrate a strong *prima facie* case that it will succeed with its internal appeals or ultimate review.

[41] To grant the applicant the interim relief it seeks would be, in effect, to permit it to continue trading unlawfully with vehicles liable to seizure and forfeiture and this is not a state of affairs I am prepared to countenance.

[42] I consequently grant the following order:

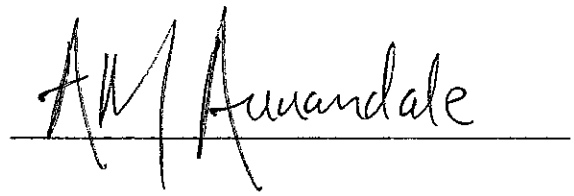
1. The application for interim relief is dismissed.

2. A *rule nisi* is issued in terms of paragraph 2 of the notice of motion which will extend until confirmed or discharged in due course.

3. The parties are given leave to file such supplementary affidavits as they may be advised to deal with the question of final relief.

4. The applicant is directed to pay the costs occasioned by the application for interim relief, including those of the opposed hearing on 28 September 2011, such costs to include those consequent upon the employment of two counsel.

5. All other questions of costs are reserved.



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| DATE OF HEARING: | 28 SEPTEMBER 2011 |
| DATE OF JUDGMENT: | 26 OCTOBER 2011 |
| APPLICANT'S COUNSEL: | MR K J KEMP SC, with MS L OLSEN |
| RESPONDENT'S COUNSEL: | MR C J PAMMENTER SC, with MR A D COLLINGWOOD |
| APPLICANT'S ATTORNEYS: | STRAUSS DALY |
| RESPONDENT'S ATTORNEYS: | LIVINGSTON LEANDY INC |