IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 7700/2010

In the matter between:

SIKANDER TRADING COMPANY LIMITED Applicant

and

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

SIRPAT INVESTMENTS CC Second Respondent

CH SIKANDER TRADERS CC Third Respondent

J U D G M E N T

Delivered on 14 September 2010

WALLIS J

[1] The Applicant, Sikander Trading, is the owner of 58 second-hand motor vehicles imported from Japan into South Africa. According to its affidavits it imported these vehicles with the intention of finding purchasers for them in countries outside the South African customs union[1] and exporting the cars from this country to their ultimate destination. In that event no import duty or VAT would be payable in respect of the importation of the vehicles, provided that during

1 South Africa, Botswana, Namibia, Lesotho and Swaziland are the members of the Customs Union. Hence the cars had to be exported further afield.

the period they were in South Africa they were held in a customs and excise warehouse[2] or a special customs and excise warehouse,[3] which is commonly referred to as an SOS warehouse.[4]

[2] After being landed in South Africa the 58 cars in question were taken to an SOS warehouse operated by the Second Respondent, Sirpat Investments, under a licence issued in terms of the Customs and Excise Act 91 of 1964 ('the Act'). This was in terms of an agreement between Sirpat and the third respondent, a close corporation formed to act as Sikander Trading's agent in South Africa. The agreement was concluded on 15 July 2009 and provided for the storage in Sirpat's warehouse of used imported motor vehicles on a consignment basis. On 10 April 2010 after an inspection of the warehouse the Controller of Customs issued a notice for the detention of the vehicles in terms of s 88(1)(a) of the Act. Thereafter on 28 April 2010 the vehicles were seized in terms of s 88(1)(c) of the Act. Some correspondence took place thereafter between a representative of Sirpat and the third respondent and the Controller's office. On 3 June 2010 attorneys representing Sikander Trading wrote to the Commissioner: South African Revenue Service formally applying for the 58 vehicles to be released to their client in terms of s 93(1) of the Act subject to certain conditions. In the absence of a decision on that application notice to commence these proceedings was given to the Commissioner in terms of s 96(1)(a) of the Act on 23 June 2010 and the application was launched on 5 July 2010.

2 Established in terms of s 19 of the Customs and Excise Act 91 of 1964.
3 Established in terms of s 21 of the Act.
4 If not kept in such a warehouse duty and VAT would be payable but might be clawed back if the vehicles were subsequently exported.

[3] The purpose of the application is to compel the Commissioner to make a decision on Sikander Trading's application for the release of the vehicles in terms of s 93 of the Act. To that end Sikander Trading invokes the provisions of s 6(2)(g) of PAJA,[5] which provides that a court has the power to review an administrative action consisting of a failure to take a decision. The Commissioner accepts that he has not yet made a decision. Sikander Trading contends that there has been unreasonable delay on his part in taking the decision and accordingly that renders his failure to do so reviewable.[6] If it is successful in that contention it asks for an order that he take the decision and certain ancillary relief in regard to the contents of the decision, but the latter is dependant on its success in reviewing the failure to take the decision. Accordingly that must be addressed first.

[4] The legal background against which the review must be determined is relatively straightforward. It is common cause between the parties and correctly so that the taking of a decision by the Commissioner under s 93(1) of the Act constitutes administrative action.[7] It is not disputed that where an application is made under s 93(1) the Commissioner is under a duty to take a decision, that is, either to accede to the application, whether or not subject to conditions, or to refuse it. No time period is prescribed within which that decision must be taken and accordingly it must be taken within a reasonable time. If there is unreasonable delay in taking it the failure is reviewable. In that event it is proper for the court to grant a *mandamus* compelling the administrator to take the decision in question together with any ancillary relief that may be appropriate in all the circumstances.

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5 Promotion of Administrative Justice Act 3 of 2000.
6 S 6(3)(a) of PAJA.
7 *Commissioner: South African Revenue Services v Trend Finance (Pty) Limited and Another* 2007 (6) SA 117 (SCA) at para [25].

[5] The narrow issue on which this review turns is therefore whether the Commissioner has delayed unreasonably in taking a decision on Sikander Trading's application under s 93(1). Whether he has done so is a question of fact depending on all the circumstances.[8] It is for Sikander Trading to demonstrate that there has been unreasonable delay on the part of the Commissioner.

[6] The statutory background against which the issue of unreasonable delay must be considered is as follows. In terms of s 87(1) of the Act:

'Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed … shall be liable to forfeiture wheresoever and in possession of whomsoever found.'

Under s 88(1)(a) an officer employed by the Commissioner on any duty relating to customs and excise may detain any goods at any place for the purpose of establishing whether they are liable to forfeiture under the Act. Such goods may be detained for a period of time reasonable for the purposes of the investigation contemplated by the section, but no longer.[9] In terms of ss 88(1)(c) and (d) of the Act the Commissioner may seize goods that are liable to forfeiture under the Act.

[7] In this case the 58 motor vehicles were detained and then seized by the Commissioner. Although in the correspondence, and at places in the affidavits, there are suggestions that the vehicles were not liable to be seized or liable to be forfeited, Sikander Trading's case is not based on a challenge to the lawfulness of the detention and seizure. Its case is based squarely on the failure to take a decision

8 *Vumaszonke v MEC for Social Development, Eastern Cape and Three Similar Cases* 2005 (6) SA 229 (SECLD) para 39; *Sibiya v Director-General : Home Affairs and Others and Fifty-five Related Cases* 2009 (5) SA 145 (KZP), para [24].

9 *Commissioner: South African Revenue Services v Trend Finance (Pty) Limited and Another, supra* para [29].

to return the vehicles to it in terms of s 93(1). That section proceeds on the basis that the goods in respect of which an application has been made were 'detained or seized or forfeited under this Act'. The case must therefore be determined on the footing that the detention and seizure were lawful and remain lawful. Accordingly no decision is called for on the lawfulness of these actions.

[8] Turning then to s 93(1) it provides that:

'The Commissioner may, on good cause shown by the owner thereof, direct that any … goods detained or seized or forfeited under this Act be delivered to such owner, subject to:

(a) payment of any duty that may be payable in respect thereof;

(b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and

(c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such … goods plus any unpaid duty thereon.'

In terms of s 93(3) any person who alleges that they are the owner of any goods has the burden of proving such ownership to the satisfaction of the Commissioner. It is a necessary pre-requisite to the Commissioner making a decision favourable to the applicant for relief under the section that the Commissioner is satisfied on this point. This creates a potential problem.

[9] Before these proceedings were launched Sikander Trading had not satisfied the Commissioner that it was the owner of the vehicles. That is not surprising. Two letters from Sirpat to the Controller of Customs in Durban after the vehicles were detained and seized had said that the vehicles were to be brought into South Africa and consigned to Sirpat. Cuscon cc, the agent retained by Sirpat and the third respondent to represent their interests, had written to SARS on 19 May 2010

saying that under the agreement between Sirpat and the third respondent the vehicles 'would be sold to SIRPAT on consignment basis'. This was repeated in a further letter dated 26 May 2010 when SARS had pointed out to Cuscon that the bills of entry variously reflected Tokyo Africa c/o Sirpat Investments; Tokyo Africa t/a CH Sikander Trading; Sirpat Investment t/a CH Sikander Trading; Tokyo Africa Trading and Tokyo Africa t/a Sirpat Investment as the importer and consignee of the goods. In other words the Commissioner's representative had been told expressly that the vehicles were in the warehouse because they had been sold to Sirpat on consignment. That was potentially at least inconsistent with Sikander Trading retaining ownership of the vehicles.

[10] When attorneys were appointed to act in this matter they wrote to SARS on the basis that their client was the third respondent, that is the local South African agent, not Sikander Trading. The first occasion on which it was claimed that Sikander Trading was the owner of the cars was in a letter from the attorneys dated 3 June 2010. In reply, on 14 June 2010, SARS asked for proof of ownership. The response was to refer to an affidavit signed by Mr Choudhry in which he claimed that Sikander Trading was the owner of the cars. He said that the vehicles had been purchased at various vehicle auctions in Japan and that he was attaching to the affidavit 'documentation substantiating the purchase by Sikander of these vehicles'. The majority of the documents provided are shipping lists and copies of bills of lading that are of little assistance in identifying ownership of the vehicles. A few of the documents had potentially more relevance as they appeared to be in the form of invoices. However they were in Japanese and on any basis clearly did not relate to all 58 vehicles. It is no surprise therefore that in the opposing affidavit the representative of the Commissioner complained that documents had been

furnished in Japanese and that 'it is impossible for the Commissioner to tell therefrom, whether these documents related to the acquisition of the vehicles by the applicant, and if so, at what price'. In the circumstances the Commissioner placed Sikander Trading's ownership of the vehicles in dispute.

[11] When the matter was argued it seemed to me that this might pose a fatal stumbling block to the application's success. I suggested to counsel for Sikander Trading that the section requires that the Commissioner be satisfied that the person applying for the release of the goods is the owner of those goods, before the Commissioner can exercise any discretion under s 93(1). In this case the Commissioner was clearly not so satisfied. The reply was that it is for the court to determine the question of ownership. However, not only is that a debatable proposition but there is a clear dispute of fact on this issue not capable of being resolved on the papers. After some debate and as a result of a tender made by counsel for the Commissioner the application was adjourned for a week during which time Sikander Trading was to furnish additional documents with a view to satisfying the Commissioner that it is indeed the owner of the vehicles. When the application resumed the Commissioner accepted, in the light of further evidence furnished by Sikander Trading, that Sikander Trading owns the 58 vehicles.

[12] That does not necessarily mean that the issue of ownership is no longer relevant to the case. Until agreement was reached between the parties at the resumed hearing on 24 August 2010 the Commissioner had not been satisfied that Sikander Trading was the owner of the motor vehicles. In other words the Commissioner's contention that the application was premature, at least in that respect, was clearly correct. It is not apparent to me that it is open to a person

seeking relief under s 93(1) to complain that the Commissioner has taken an unreasonable time to make a decision under that section when it is clear that the Commissioner is not satisfied of that person's ownership of the goods concerned. Only once the Commissioner is satisfied on that point is it open to the Commissioner to consider such an application on its merits. Whether it would be permissible to review the Commissioner's adverse decision on the question of ownership or a failure to take a decision on that point, and if so whether it is permissible to join a review on that matter with a review of the failure to take a decision on the merits of the claim for relief under s 93(1) are difficult questions. The application for review did not seek to deal with them save by way of the contention that ownership had been adequately proved. The Commissioner's views on ownership were not canvassed in the papers beyond the statement that the Commissioner did not at the stage of filing the answering affidavit admit that Sikander Trading was the owner of the vehicles

[13] It may be that the application should be dismissed on that ground alone. However I am reluctant to do so because Mr Pammenter SC, who represented the Commissioner, did not ask for the application's dismissal on this narrow basis. Furthermore a judgment confined to that narrow ground would not address the real dispute between the parties. In addition it would require a decision on difficult questions of law on which I have not had the benefit of full argument. I accordingly prefer to dispose of the case on the assumption that the issue of Sikander Trading's ownership of the vehicles does not provide an obstacle to the grant of the relief that it seeks.

[14] Turning then to the question whether the Commissioner has unreasonably

delayed in responding to the application under s 93(1) of the Act, it is necessary to recount briefly the history of the matter. The vehicles were detained on 10 April 2010 and seized on 28 April 2010. Initially the response to this came from Sirpat by way of a letter dated 4 May 2010. The letter is somewhat confusing but accepts that in various respects there have been breaches of the Act and the licence held by Sirpat. These are blamed on a former employee and on the local representative of the third respondent, a Mr Javed. The response to this was a letter from the Controller of Customs saying that Sirpat had acted unlawfully and contrary to its obligations with SARS in the following respects:

'1. Fifty-eight vehicles stored in the above-mentioned bonded warehouse are not the property of the licensee.
2. You have entered into the contract with a third party without permission from the Controller.
3. Bond register was not available at time of inspection.
4. The vehicles were not parked in numbered bays.'

In his replying affidavit Mr Choudhry, on behalf of Sikander Trading, characterises these complaints as being in the first instance 'irrelevant to the facts at hand' and in the second instance to involve administrative contraventions of Sirpat's licence 'in relatively minor respects'.

[15] I am unable to agree with these criticisms. The basis for the suggestion that these contraventions are irrelevant to Sikander Trading is the proposition that they relate only to the activities of Sirpat. However, that overlooks the fact that once it is accepted that Sikander Trading is the owner of the vehicles it follows that it is also the importer of those vehicles in terms of the definition of that expression in s 1(1) of the Act. The entitlement to remove the goods in bond is an entitlement

vested in Sikander Trading, but it is in turn subject to compliance with the provisions of the Act, most notably the requirement that the goods be kept in either a customs and excise warehouse or an SOS warehouse. As Sikander Trading was the party that wished to benefit from removing the goods in bond and then exporting them from South Africa, without incurring an obligation to pay import duty or VAT, it seems to me that there is force in the Commissioner's contention that it was for Sikander Trading to ensure that it complied with the statutory conditions under which it is permissible to do this. Nothing is said about the enquiries it made in this regard, such as for example asking to see Sirpat's licence, and it is plain that little if any attempt was made to comply with the requirement, which provides that the SOS warehouse is:

'approved for storage and sale for export of second-hand cars imported by the warehouse licensee only under section XVII of Schedule No.1 to the Customs and Excise Act …'

[16] Whilst it may not have been necessary that Sirpat should have been the owner of the vehicles (a matter on which I express no opinion) it was clearly a requirement that Sirpat should be the importer of any vehicles stored in its warehouse. A brief consideration of the definition of "importer" in s 1(1) of the Act suggests that Sirpat was not the importer of the vehicles. The agreement between Sirpat and the Third Respondent relied on was simply an offer to store 'imported motor vehicles … on a consignment basis'. But the bills of entry do not say that Sirpat was in fact the consignee of the vehicles and it was not in all cases claimed to be the importer of the vehicles. No doubt because he was aware of this problem, Mr Mahomed, who wrote the initial letter on behalf of Sirpat, said that he had told Mr Javed that he could only keep his cars as consignment stock and that they would have to come into the country under Sirpat's name. On the face of this

factual material, which has not been satisfactorily explained by Sikander Trading, it cannot be accepted that Sikander Trading was not a party to the breaches of the Act arising from these vehicles being in Sirpat's SOS warehouse.

[17] As to the other matters, whilst they are administrative in nature, they are of substantial importance in enabling the Commissioner to regulate and oversee this trade and ensure that it is not abused. There is an obvious potential for abuse in that, as is said on behalf of the Commissioner, unscrupulous operators have in the past abused the system by diverting vehicles to countries within the customs union including South Africa. That obviously results in a substantial loss to the *fiscus* because neither import duty nor VAT is paid on vehicles so diverted. It seems to me entirely proper that the Commissioner should require careful compliance with the laws and regulations governing the importation of such vehicles to prevent such abuse and detect it where it occurs. Thus if a person holding a warehouse licence proposes to make the facilities of the warehouse available to a third party under contract there is every reason why the Commissioner should be made aware of that and should approve the terms of the contract. In that way the Commissioner can ensure that the third party does not abuse this regime. Then the requirement that the bond register should be available at the time of inspection is intended to facilitate an inspection. If inspectors arrive (and surprise inspections are a necessary aspect of enforcement) but the bond register is not available the inspection may be stultified. Similarly if the vehicles are not parked in numbered bays as reflected in the bond register the inspectors will be hampered in identifying the vehicles and correlating the information they obtain from the inspection with the documentary records in respect of vehicles. To characterise these as being administrative faults of a minor nature seems to me incorrect.

[18] In its correspondence with SARS Cuscon accepted that the latter two breaches had occurred but challenged (on an incorrect factual basis) that the other two items referred to by SARS involved breaches of the Act. When Cuscon dropped out of the picture a firm of attorneys was instructed to represent Sikander Trading. On 3 June 2010 they wrote the letter embodying the application under s 93(1). As I have noted the application for review was brought on 5 July 2010. Accordingly the approach adopted on behalf of Sikander Trading is that it was unreasonable for the Commissioner not to reach a decision on its application within a period of one month. The issue is whether it is justified in adopting this stance.

[19] The letter of 3 June 2010 sets out certain background to Sikander Trading's business in paragraphs 4 to 10 and the application itself is contained in paragraphs 11 to 22 of the letter. Those paragraphs read as follows:

'Application under section 93

11. Sirpat advised CH Sikander that it held a Customs and Excise licence issued in respect of SOS warehouse 2913. A copy of the licence is attached marked "C".
12. By the very conclusion of the agreement marked "B" and confirmation of the licence marked "C" CH Sikander was lead to believe that it was allowed to store vehicles in the SOS warehouse of Sirpat. At no stage did Sirpat suggest that this was not permissible.
13. The wording of the licence contains the following remarks:

    "Approved for storage and … (*illegible)* … for export of second hand cars imported by the warehouse licensee only under section XV11 of Schedule 1 to the Customs and Excise Act of 1964 (as amended) vehicles may not be sold to the BLNA countries. This licence is only valid for the period of 12 months from the period thereof."
14. The wording of the licence is ambiguous since it is not clear whether it is only the licensee who may store vehicles in the warehouse or whether such vehicles may only be imported

under section XV11 of Schedule 1 of the Customs and Excise Act.

15. Section XV11 of Schedule 1 provides for vehicles, aircraft, vessels and associated transport equipment. We can only assume that this is not actually what was intended by SARS. The fact of the matter however is that the licence is capable of being construed that only vehicles, aircraft, vessels and associated transport equipment under section XV11 of Schedule 1 may be stored in the warehouse.

16. It is trite law that it is permissible to enter goods into a warehouse on a consignment basis. Neither the Act nor the Rules thereto preclude a third party from storing goods in a bonded warehouse. This is an aspect usually covered under the conditions of the licence. As discussed, the licence in question is ambiguous and by no means clear as to what was being stipulated.

17. There is absolutely no evidence of any wrongdoing on the part of Sikander Japan or CH Sikander regarding the entry of these vehicles into the SOS warehouse in question.

18. Rather, it would appear that the state of affairs that have given rise to this matter were caused by:

18.1 Sirpat concluding an agreement with CH Sikander contrary to what is now apparently allowed by SARS; and

18.2 The wording of the SOS warehouse licence in question being ambiguous.

19. Sikander and/or CH Sikander should not be held liable for any wrongdoing by Sirpat. Instead SARS should take appropriate action under the licensing and penal provisions of the Act.

20. SARS has expressed some concern about the Customs clearance documentation. Although the documentation is certainly not beyond criticism, there is no evidence of any intention to mislead SARS or of any wrongdoing. The discrepancies in the documents clearly arise out of the consignment and storage agreement between Sirpat and CH Sikander. For this reason, documentation has interchangeably referred to Sirpat and CH Sikander and "Sirpat t/a CH Sikander".

21. On the basis of the information available, it is respectfully submitted that <u>the owner has established good cause</u> as to why the vehicles in question should be released to the owner in terms of the discretion allowed to the Commissioner under section 93 of the Act.

22. We refer you to the case of Dumah v Klerksdorp Town Council 1951 (4) SA 522 (T) where the court held that "good cause" means any fact or circumstance that would make it just or equitable to do so.'

[20] It is apparent from this that the primary basis for Sikander Trading's application is that neither it nor its local agents had been guilty of any wrongdoing and that the problems that had arisen were occasioned by Sirpat concluding an agreement with the agent 'contrary to what is now apparently allowed by SARS' and that Sirpat's SOS warehouse licence is ambiguous. On that basis it was contended that Sikander Trading should not be held liable for any wrongdoing by Sirpat. There is a passing reference to concerns that SARS had expressed about the customs clearance documentation but all that is said in this regard is that 'there is no evidence of any intention to mislead SARS or any wrongdoing'. The discrepancies are attributed to the terms of the agreement between Sirpat and the third respondent.

[21] The factual position was by no means as clear-cut as is suggested in this letter. As already pointed out Sikander Trading (and its agent on its behalf) had an important obligation under the Act in regard to the storage of the vehicles. In terms of s 87(1) of the Act any goods warehoused or otherwise dealt with contrary to the provisions of the Act or in respect of which any offence under the Act is being committed are liable to forfeiture. At best for Sikander Trading it had made no attempt to ensure that what it was doing complied with the provisions of the Act and there was every reason for the Commissioner not to accept the suggestion that the fault lay exclusively on the side of Sirpat. In addition Sirpat had laid the blame on the third respondent.

[22] In regard to the customs clearance documents it was accepted that they were not beyond criticism and contained discrepancies. In those circumstances it is not clear on what basis the attorneys could simply assert that there was no evidence of any intention to mislead SARS or of any wrongdoing. The explanation it gave in regard to the documents was inconsistent with the contents of those documents, a matter that had previously been pointed out to Cuscon when they were representing Sirpat and the third respondent in making representations to SARS. The absence of any explanation for the discrepancies clearly provided a ground upon which the Commissioner could, at the very least, have significant reservations about the assertions being made on behalf of Sikander Trading.

[23] I stress that I am not concerned with whether those flaws in the application under s 93(1) would have justified the Commissioner in refusing the application outright at that stage. That is, however, academic because the Commissioner's response, in a letter dated 14 June 2010, was twofold. Firstly it referred the attorneys to its previous letter of the 24 May 2010 to Cuscon, which contained the important information about the various entities reflected as importer and consignee on the bills of entry and explained in some detail why the use of Sirpat's SOS warehouse was in breach of the Act and the terms of the licence. Secondly it sought particular information in a number of respects in regard to the different paragraphs of the letter of application. In particular it sought information about the background furnished by the attorneys to the relationship between Sikander Trading and Sirpat. As this formed a focus of the argument on behalf of the applicant and founded an allegation that the Commissioner was engaged on a "fishing" expedition it must be explored in a little detail.

[24] Paragraph 7 of the attorneys' letter of 3 June 2010 reads as follows:

'In or around July 2009 CH Sikander [the third respondent] concluded an agreement with Sirpat in terms of which it was agreed that the motor vehicles would be entered into the SOS warehouse of Sirpat situated at 84 Smith Street on a consignment basis. The salient terms of the agreement were that:

7.1 Ch Sikander would pay a fixed monthly rental in respect of storage for the premises;

7.2 Sirpat would be entitled to market the vehicles and that in the event of any sale, would be entitled to payment of a commission of such sales;

7.3 CH Sikander was entitled to continue to also market the vehicles on its own;

7.4 the keys and control of the premises would be held by Sirpat who also staffed the premises. Sirpat was to keep all the relevant customs documentation as required. In other words Sirpat had complete control over the premises and the vehicles until the vehicles were despatched for export on conclusion of a sale.' (My insertion)

[25] This statement was fundamental to identifying the basis upon which the 58 vehicles had been placed in Sirpat's warehouse. In broad detail it accurately summarised some of the key provisions of the agreement between Sirpat and the third respondent. However, the Commissioner wanted information about the implementation of that agreement. Accordingly in the letter of 14 June 2010 he sought proof of the payment by the third respondent of the fixed monthly rental and:

'7.2 A list of vehicles that Sirpat had sold and proof of payment of the commission paid to Sirpat is to be provided.

7.3 A list of vehicles that CH Sikander Trading cc has marketed and sold and proof of funds received into the account of CH Sikander Trading is to be provided.'

In regard to the agreement itself SARS said that it reserved the right to discuss the details of 'consignment goods' but requested Sikander Trading to submit a

statement of account together with the proof of payment for all goods exported into the Republic of South Africa for the period 1 July 2009 to current, that is the period of the agreement between Sirpat and the third respondent. Furthermore the third respondent was requested to provide a statement of account of all vehicles sold and proof of payment thereof for the same period.

[26] Manifestly the production of this information would have enabled the Commissioner to determine whether the actual relationships between Sikander Trading, Sirpat and the third respondent were as described in the application for relief under s 93(1). If, in response to their requests, appropriate documents had been produced that showed that the agreement had been implemented in accordance with its terms this would have been highly material to Sikander Trading's assertion that the problems that had arisen were attributable to errors of administration and form rather than errors of substance in regard to the treatment of these vehicles. On the other hand if the sales records showed conduct inconsistent with that agreement or if they revealed that vehicles had been imported and not exported to destinations outside the customs union, that would naturally fortify a suspicion that the 58 vehicles might have been imported on a basis other than that claimed by Sikander Trading. Again I stress that I do not make any finding that this was so. It would not be appropriate for me to do so. I merely point out that the nature of the information sought by the Commissioner was clearly pertinent to a proper consideration of the application in terms of s 93(1) of the Act. Accordingly the response by Sikander Trading to this request is highly material.

[27] Sikander Trading's approach was not helpful. It described the letter of 14 June

2010, written in response to the application dated 3 June 2010, as a 'long-awaited response' that 'smacks of a fishing expedition rather than a *bona fide* attempt at dealing with the issue in hand'. In regard to the Commissioner's requests for information referred to in paragraph [26] it is simply said that the written agreement between Sirpat and the third respondent 'contains the terms that were agreed' and rehearsed those terms. No proof of payment of the monthly rental was furnished. In regard to the requests for list of vehicles, proof of payment, proof of the receipt of funds and a statement of account, it said:

'Sirpat Investments did not sell any vehicles. We are instructed that all records of the warehouse were seized by SARS. Ch Sikander is unable to provide any details sold by it. Such details will, however, be reflected in the records.'

Not only was this reply unhelpful but it transpires also that it is factually incorrect. It was not dealt with in the founding affidavit, but in the answering affidavit the following was said:

'Firstly, the records of the warehouse were not "seized" by the Commissioner. They were handed to the Commissioner on 22 April 2010 by Mr Aboobaker of the firm Cuscon (that is the firm that wrote the letter at "A15" to "A17"). These documents were not accounting records. They were four lever arch files containing what appeared to be copies of SAB 500 bills of entry and certain invoices prepared in the name of the third respondent. At the time the applicant and second respondent were represented by Mr Mahomed of attorneys Omar & Associates.'[10]

Although it was assumed that copies of these documents had been made before they were handed to the Commissioner there was nonetheless a tender to make the documents available to the attorneys. On that basis it was said that there was a considerable amount of information and documents outstanding that the Commissioner's representatives believed would be relevant to the question whether the applicant should be granted relief in terms of s 93(1) of the Act. Over

10 Para 35(c) pp 193 – 194.

and above that it was said that a perusal of the documents had given rise to further queries 'which could be relevant to any decision to be made by the Commissioner in terms of section 93' and examples of those queries were given. It was said that these gave rise to a concern that either the applicant or the third respondent had been flouting the law or circumventing the Commissioner's requirements regarding the importation, storage in bond and exportation of second-hand motor vehicles.

[28] In reply to these statements the applicant shifted its ground. It said that the records being requested related to goods that were not themselves liable to forfeiture but other goods no longer in Sirpat's warehouse. On that basis it said that there were no grounds to detain the vehicles in the warehouse. That is of course a *non sequitur*. On the basis that the past conduct of Sikander Trading, Sirpat and the third respondent could well cast light on their intentions in relation to the seized vehicles the information requested by the Commissioner appears on the face of it to be pertinent. It is certainly impossible on the information before the court to characterise it as an unreasonable request.

[29] What is even more peculiar about the replying affidavit is the response in relation to the documents that had been furnished to the Commissioner. It will be recalled that in the letter of 15 June 2010 it was expressly said that the details being sought by the Commissioner would be reflected in these records. It was now said:

'In relation to the four lever arch files referred to by the first respondent the applicant has subsequent to the delivery of the first respondent's answering affidavit had reference to those files once more. These seem to be primarily documents obtained from the second respondent and the clearing and forwarding agent.'

There is a passing claim that the documents reflect no wrongdoing on the part of the applicant. Somewhat surprisingly then in view of its acknowledgement of the irrelevance of the contents of the four lever arch files to the Commissioner's request, it is later said:

'[128] I am unable to understand the first respondent's point in stating that the applicant has not made any of its records available to the Commissioner when on its own version, the applicant has done that.'

[30] The position is therefore that the Commissioner sought information from Sikander Trading that was on its face pertinent to a proper consideration of the application under s 93(1). Whilst there is nothing in the section to indicate that the Commissioner is obliged to request such information it is clearly in accordance with a fair administrative procedure that the Commissioner should do so when that will facilitate the making of a fully informed and fair decision on the application. Sikander Trading at first adopted the approach that the information required was in the documents already in the possession of the Commissioner and when it was shown that this was incorrect it has done nothing more. It might not have been appropriate for the Commissioner, in the face of this obduracy, simply to refuse the application. He does after all owe obligations of fair administrative action even to obdurate parties. Instead the Commissioner has adopted the approach that he requires this information in order to reach a fair decision. In doing that the Commissioner cannot be faulted.

[31] It follows that the complaint by Sikander Trading that there has been unreasonable delay in dealing with its application for relief under s 93(1) of the Act is unfounded. That being so the application for review must fail and it is

unnecessary for me to deal with other issues that were raised such as the availability of an internal remedy in respect of Sikander Trading's complaint.

[32] The application is dismissed with costs.

DATE OF HEARING	17 and 24 AUGUST 2010
DATE OF JUDGMENT	14 SEPTEMBER 2010
APPLICANT'S COUNSEL	MR G D HARPUR SC
APPLICANT'S ATTORNEYS	SHEPSTONE AND WYLIE
DEFENDANTS' COUNSEL	MR C J PAMMENTER SC
DEFENDANTS' ATTORNEYS	THE STATE ATTORNEY