NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 10062/2011

In the matter between:

ENKANINI INVESTMENTS CC t/a PAPERA AFRICA Applicant

and

THE COMMISSIONER, SOUTH AFRICAN REVENUE SERVICES Respondent

JUDGMENT

ANNANDALE A.J. :-

[1] From 2003 until 5 July 2011, the applicant, ENKANINI INVESTMENTS CC ("Enkanini") conducted business as the operator of an SOS bonded warehouse at 78 Brickhill Road, Durban under a licence issued in terms of the Customs and Excise Act No. 81 of 1964 ("the Act"). Its business related to the importation in

bond of second hand vehicles destined for sale to countries outside of the South African customs union. On 5 July 2011, representatives of the respondent, the Commissioner for the South African Revenue Service[1] ("the Commissioner") inspected the bonded warehouse and detained computers, documentation and all the vehicles in the warehouse and thereafter locked and sealed it. The respondent's representatives took the computers and documents away and by locking the warehouse precluded the applicant from trading in the approximately 222 second hand vehicles which were on the premises at the time.

[2] It is apparent that in no small measure the Commissioner's actions on 5 July 2011 were actuated by the assumption, erroneous as it turns out, that the applicant's licence was subject to a condition that it could only import vehicles which it owned.

[3] Once the Commissioner established the true licence conditions he placed no further reliance on the question of ownership of the vehicles but nonetheless maintains that his detention of the warehouse, its contents and the documentation and records is justified by virtue of the fact that at the time of the inspection, a number of irregularities were discovered.

[4] Those listed by the Commissioner are as follows:

---

[1] The respondent was incorrectly cited by the applicant as The Commissioner, Customs & Excise

[4.1] bills of lading found on the premises were made out to the holders of other licensees of SOS warehouses;

[4.2] the suppliers' invoices were made out to concerns other than the applicant;

[4.3] although the applicant was able to indicate payments into its bank account (allegedly being in respect of payments received for the motor vehicles), these could not be reconciled with any particular invoices;

[4.4] whereas the warehouse was authorized to store 94 motor vehicles, at least 220 motor vehicles were stored in the premises;

[4.5] in fact vehicles were found to be parked one on top of the other which is in contravention of the Commissioner's requirements, which is that each vehicle must have its own designated parking bay;

[4.6] the applicant was unable to produce delivery documents in respect of the vehicles;

[4.7] the applicant was unable to produce invoices from its clearing and forwarding agents relating to these vehicles.

[5] Enkanini's response to these discoveries is somewhat vague and evasive. It appears however to amount to a bald denial in respect of those allegations regarding documents and a contention that the offences are in any event of a minor and administrative nature. The applicant however states in its founding affidavit that 220 motor vehicles have been detained and it is not disputed that the warehouse was only authorised for the storage of 94 motor vehicles.

[6] Enkanini claims that the inspection of its premises was for the purpose of harassing the applicant into providing information about another warehouse, referred to in the papers as Nagoya. This is denied by the Commissioner although it is common cause that documentation was found in the warehouse reflecting Nagoya's address. The Commissioner does not however rely on any connection between the applicant and Nagoya to justify his actions.

[7] Following the inspection on 5 July 2011 there was an exchange of correspondence between Enkanini and the Commissioner. It is clear from this correspondence that from the time of the inspection the Commissioner was conducting investigations which were not limited to the question of ownership[2]. In response to the first letter from the applicant's attorneys dated 5 July 2011, the day of the inspection, part of the Commissioner's reply recorded his appreciation for the co-operation tendered in the letter and to "*welcome your assistance with compiling all relevant documents to finalise this investigation as swiftly as possible*". In its founding affidavit the applicant refers to this remark as the Commissioner

[2] See annexure "H" paragraph 4 at page 70

promising a speedy conclusion to the investigation when this was patently not what had been said[3].

[8] When further enquiries were made by the Enkanini's attorneys towards the end of July 2011 for details of the potential contraventions of the Act which would warrant the sealing of the bond store, the Commissioner responded by advising that the review of the documentation detained was in progress but due to its volume it wasn't possible at that point to confirm when the process would be finalised. The Commissioner did however undertake to ensure that every effort was made to expedite the process so that he could arrive at a decision.

[9] There followed certain telephonic communications between the applicant's legal representatives and the Commissioner in the course of which the Commissioner's representatives proposed releasing to Enkanini some of the documents they had removed from the premises in order that Enkanini prepare schedules containing information that the Commissioner required for its investigations. The applicant rejected this proposal. Its counter-proposal was that the Commissioner re-open the bond store and allowed Enkanini to trade and then Enkanini would undertake to assist the Commissioner in the preparation of the schedules he required for his investigations.

[10] On 10 August 2011 the Commissioner indicated that he wanted to meet the applicant to discuss the matter. The applicant states that as the Commissioner did

---

[3] Founding affidavit paragraph 19 at page 28

not indicate what he had in mind for the meeting, the applicant didn't see the purpose and instead addressed a letter to the Commissioner offering a "revolving lien" on stock on the premises.

[11] This offer was refused by the Commissioner. A meeting did however take place on Monday 29 August 2011 at which settlement was discussed but a resolution could not be reached.

[12] Before that meeting, and on 23 August 2011, Enkanini's attorneys had written to the Commissioner recording their belief that there was no basis on which the Commissioner could allege ownership issues relating to the vehicles then in the bond store and stating that the applicant was proceeding to the Durban High Court for relief that the applicant be entitled to continue trading subject to a revolving lien over 150 vehicles.

[13] When the meeting did not resolve matters the applicant launched an urgent application on Thursday 7 September 2011 setting the matter down for hearing the following Tuesday 13 September.

[14] The application dealt not only with the detention of the Brickhill Road warehouse but also with Enkanini's application to relocate another bonded warehouse in respect of which it holds a separate licence.

[15] That licence relates to premises situate at 55 – 57 Pine Street. Enkanini wanted to move the warehouse to 282 Point Road. Enkanini made application for what it called the transfer of this bond store in February 2011.

[16] Enkanini states that it modified the Point Road premises to comply with the respondent's requirements and an inspection was conducted in March 2011 as a result of which the respondent's representatives "*approved the facility*".

[17] This appears from the correspondence on which Enkanini relies to overstate the position somewhat as in April 2011, after the inspection, Enkanini wrote to the respondent recording that the official who had conducted the inspection had been satisfied "regarding documentation" but that approval of the premises had yet to be received. Consequently, Enkanini asked for a "*temporary special storage*" until the approval was issued.

[18] The temporary permission was not granted and it was only on 23 August 2011, the same day that Enkanini's attorneys wrote to the respondent regarding the detention of the Brickhill Road premises and their contents, that the issue was raised with the respondent. On that day Enkanini's attorneys demanded that the application be granted within four days that is to say by 29 August 2011, the day the meeting was held.

[19] The respondent has advised in his answering affidavit that the application has been refused and reasons for the refusal will be furnished to Enkanini forthwith, following which it is entitled to pursue an internal appeal in terms of section 77A – H of the Act and/or review proceedings.

[20] By way of final relief, Enkanini seeks orders setting aside the sealing of the warehouse and the detention of vehicles and documents as well as an order directing the Commissioner to issue it with an SOS licence for premises at 282 Point Road for September to December 2011.

[21] Pending the finalization of that application, the applicant seeks an order that it be entitled to continue operating from 78 Brickhill Road and suspending the sealing of the warehouse and the detention of the vehicles as well as all the equipment and documents. The interim relief thus seeks to achieve the same result as the final relief. The respondent however accepted that the present application should be adjudicated on the basis applicable to interim relief.

[22] Although Enkanini states in its founding affidavit that it intends pursuing an internal appeal in terms of sections 77A to D of the Act, the interim relief sought in the application was not designed so as to operate pending the outcome of such appeal or review but simply pending the finalization of the application.

[23] Coupled with the interim relief is an order that there will at all times be at least 150 motor vehicles on the premises and that a lien in terms of section 114 of the Act shall exist at all times over 150 vehicles on a revolving stock basis. No interim relief is sought in the notice of motion in respect of the licence for 282 Point Road.

[24] Contrary to what is required[4] the applicant did not specify upon which sections of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") its application was based. Instead, it contented itself with the bald statement that the respondent's conduct was unlawful and purported to effect an omnibus invocation of sections 6(2)(a) to (i) of PAJA. The very general and unspecified nature of the applicant's complaints made it extremely difficult, if not impossible, for the Commissioner to deal with the application.

[25] The Commissioner raised the fact that the applicant has not complied with section 96 of the Act which requires one month's prior notice of proceedings to be given to the respondent. The Commissioner contends that the provisions of section 96 are peremptory and can only be waived or reduced with his consent or failing that by the Court. In the present matter, Enkanini had neither made application to the Commissioner nor requested the Court for the period to be reduced. Mr Pammenter, who appeared on behalf of the Commissioner, submitted that

---

[4] **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at [26] and [27] / 507 B – D and Cele v South African Social Security Agency and 22 Related Cases 2009 (5) SA 105 (D) at [48]**

Enkanini's failure to comply with section 96 was an absolute bar to the present application.

[26] From the respondent's answering affidavit it is evident that a detailed audit is being conducted of the applicant's business for the past two years but that this process has not yet been completed. Consequently, no decision regarding the vehicles and documents has yet been made by the Commissioner as that will only follow once the audit has been completed and if anomalies are suspected as a result of the findings of that investigation.

[27] In its heads of argument and at the hearing, Enkanini claimed that the delay in completing the audit was unreasonable. That was not however a challenge raised pertinently in its founding affidavit and not therefore a matter the Commissioner dealt with to any extent in his answering affidavit. The Commissioner does however explain that the audit is a mammoth task relating to 4000 motor vehicles imported during the last two years.

[28] The applicant has refused to hold meetings or assist the respondent by preparing schedules which would link documentation to the vehicles and failed to comply with requests for the provision of documents. Mr Kemp, who appeared on behalf of the applicants, explained the applicant's attitude in this regard by stating that what the Commissioner had asked for was not something which he was entitled to ask for in terms of the Act. The Commissioner, he submitted, was expecting the

applicant to conduct the respondent's audit for it and this was not a legitimate demand. The respondent had seized all of the applicant's documentation which would be necessary to conduct the audit and, so argued Mr Kemp, he should proceed to do what he felt was necessary.

[29] For present purposes it is not necessary for me to decide whether those requests fell within the ambit of section 101 of the Act, as Mr Pammenter submitted. Suffice it to say that should the applicant adopt such an attitude it can hardly complain at this stage about the length of time the audit and investigation has been taking[5]. All the more so in a self-regulating industry and where s102(4) of the Act provides that where the question arises whether goods have been lawfully dealt with it is presumed that the goods have not been lawfully dealt with until the contrary is proved. This places an onus on the applicant in proceedings such as these to prove the lawfulness of its conduct.

[30] However, the Commissioner does not have *carte blanche* and is obliged to finalise his investigations within a reasonable time[6]. Were the Commissioner not to focus his attention first on the vehicles currently at the premises and finalise at least that portion of the audit expeditiously, the court dealing with this matter on the next occasion may well view the matter differently.

[31] As matters stand at present then:

---

5 Cf **Commissioner, South African Revenue Service v Saleem 2008 (3) SA 655 (SCA) at [12] – [13]**

6 **Commissioner, The South African Revenue Service v Trend Finance (Pty) Ltd & Another 2007(6) SA 117 (SCA)**

[31.1] The Commissioner is in the process of conducting an audit and investigations which have not yet been finalised, due at least in part to the fact that the applicant has elected not to co-operate with the respondent in this regard.

[31.2] It is not possible for the Commissioner at this stage to say to what extent the applicant may be guilty of contraventions of the Act and which of those contraventions pertain to the vehicles currently being detained.

[31.3] If any of those vehicles presently detained are involved in contraventions of the Act they may be subject to seizure and ultimate forfeiture under the provisions of the Act.

[32] Whilst it is so that the Commissioner is in possession of all of the applicant's documentation which it needs to conduct the investigation and that it does not have to keep a seal on the warehouse to finalise the investigations, it is only once those investigations are complete that the Commissioner will be in a position to determine whether there have been contraventions of the Act and, if so, which of those contraventions relate to the vehicles currently in the warehouse. If the applicant were permitted to commence trading with the vehicles currently on the floor there is every prospect, given the admitted contravention of the licence conditions pertaining to the number of vehicles permitted to be on the premises at

any given time, that the applicant will have been permitted to deal in vehicles which are subject to seizure and forfeiture in terms of the Act. Such a situation cannot be countenanced.

[33] The so-called "*revolving lien*" tendered by Enkanini as security does not detract from this nor can it operate as a panacea for any contraventions of the Act that may be established in due course. Firstly, the vehicles presently at the premises may themselves be subject to seizure and forfeiture and allowing these vehicles to be let into the trade permits contraventions of the Act which cannot be cured by seizing and possibly forfeiting other vehicles, even assuming that it is competent in terms of the Act to forfeit vehicles in respect of which no contravention has been committed, something in respect of which I have considerable doubt. In addition, if it turns out that the vehicles at the applicant's premises on a revolving stock basis subsequent to the sale of the 220 vehicles currently there were likewise the subject matter of contraventions of the Act and themselves also liable to forfeiture, such notional security as would be provided by the revolving lien is manifestly illusory. But there is a further and more substantial problem with the tendered security. The vehicles in question are imported in bond. They may not be sold in the Republic of South Africa and they consequently provide the Commissioner with no security at all. If subject to forfeiture they are destroyed rather than sold because any sale in South Africa would be in contravention of the Act.

[34] But the whole question of security really misses the point in my view. These vehicles are not subject to the payment of import duty and VAT because of the circumstances surrounding their importation. If they are found to be subject to contraventions of the Act the Commissioner's interest is in enforcing compliance with the provisions of the Act not obtaining a financial penalty in the form of payment of import duty and VAT. The security as tendered therefore serves no purpose.

[35] I have already mentioned that the preferential relief as formulated in the notice of motion did not extend to the question of the temporary licence for the Point Road premises. The matter was however argued before me as if there were a claim for relief in this regard. To the extent that it might be contended on behalf of the applicant that this was understood between the parties although not specifically claimed in the notice of motion I propose to deal with that question briefly.

[36] Enkanini contends that the decision in **Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others 1986 (2) SA 663 (A)** is authority for the proposition that a court can order the issue of an interim licence and that sections 8(1)(c) and (e) of PAJA contemplate such relief.

[37] The applicant in **Airoadexpress** had lawfully provided a transportation service until it lapsed by virtue of legislative enactment. The respondent refused an application to replace the service with a fundamentally similar service because it

laboured under the impression that the amended legislation prohibited the grant of the permit applied for whereas, in fact, it did not[7].

[38] Given the similarity of the services, the reason for which the first service terminated and the fundamental error underlying the refusal of the licence for the new service, the applicant had shown it had a "strong *prima facie* case" that the refusal of the licence would in due course be set aside.

[39] The court held that where an applicant established a strong prima facie case that the permits were wrongly refused, interim relief could not be withheld solely by reason of an order which could not be sustained[8].

[40] The Court in **Airoadexpress** was concerned with the continuation of a pre-existing situation[9]. What Enkanini seeks however is the grant of a new licence. Although it is true that it has run another bonded warehouse from different premises, that does not entitle it as of right to a licence in respect of the new premises at Point Road. Licences attach to specific premises and considerations applicable to one may not be applicant to another.

[41] Until such time as the reasons for the refusal of the licence are known and Enkanini's response to these reasons is supplied, it is quite simply impossible to

---

7 page 673 B - E
8 At 676 B – C and cf 678 H
9 See the judgment of Kotzé JA (writing for the majority) at 675 E - G

determine whether the refusal is such as to warrant relief in the form of a temporary licence.

[42] The question can therefore only properly be determined when the issue of final relief is dealt with and this was, in all probability, why the notice of motion did not envisage the licence question forming part of the interim relief.

[43] For all of these reasons therefore I dismiss the application for interim relief with costs. The respondent sought costs on a punitive scale due to what he referred to as the highly aggressive and confrontational approach adopted by the applicant which included the persistent and unwarranted allegations of a personal nature against the respondent and his functionaries. This prayer was however abandoned by Mr Pammenter at the hearing.

[44] I consequently make the following orders:

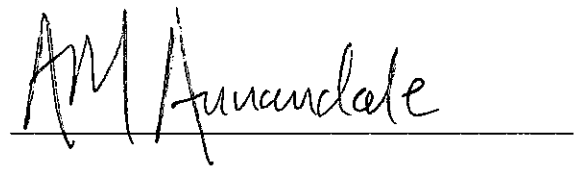
1. A *rule nisi* is issued in terms of paragraph 2 of the notice of motion which will extend until confirmed or discharged in due course.

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

3. The application for interim relief is dismissed.

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.

5. All other questions of costs are reserved.



DATE OF HEARING:	28 SEPTEMBER 2011
DATE OF JUDGMENT:	26 OCTOBER 2011
APPLICANT'S COUNSEL:	MR K J KEMP SC
APPLICANT'S ATTORNEYS:	ZAIN FAKROODEEN & ASSOCIATES
RESPONDENT'S COUNSEL:	MR C J PAMMENTER SC
RESPONDENT'S ATTORNEYS:	LIVINGSTON LEANDY INC