

Sneller Verbatim/YH

IN THE HIGH COURT OF SOUTH AFRICA(TRANSVAAL PROVINCIAL DIVISION)PRETORIA

CASE NO: 5918/04

2005-03-24

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DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES/NO
(2) OF INTEREST TO OTHER JUDGES	YES/NO
(3) REVISED	<input checked="" type="checkbox"/>
DATE <u>3/5/05</u>	SIGNATURE <u>[Signature]</u>

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In the matter between

EXCLUSIVE TOBACCO PRODUCTS (PTY) LTD

First Applicant

APOLLO TOBACCO CC

Second Applicant

and

MINISTER OF FINANCE

First Respondent

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THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE

Second Respondent

JUDGMENT

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BERTELSMANN J: THE PARTIES:

The first applicant is Exclusive Tobacco Products (Pty) Limited, a company with limited liability duly registered in terms of the company laws of South Africa with principal place of business at Hanger 21, Rand Airport Road, Germiston, Gauteng.

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The second applicant is a close corporation duly incorporated

in terms of the provisions of the Close Corporations Act with the registered address of Hanger 21, Rand Airport Road, Germiston, Gauteng.

The first applicant describes itself as a registered importer, registered with the second respondent as the holder of a manufacturing warehouse licence, which enables the applicant to manufacture cigarettes. 5

The first applicant furthermore states that it does business as an importer, manufacturer, exporter and wholesale distributor of cigarettes. These cigarettes are known by the brand name "Exclusive". 10

The first respondent is the Minister of Finance of the Republic of South Africa in his official capacity, per address the State Attorney, Fourth Floor, South Towers, Fedsure Forum, Corner Pretorius and Van der Walt Streets, Pretoria, Gauteng. He is the political entity responsible for the administration of the Customs and Excise Act, 91 of 1964. 15

The second respondent is the Commissioner for the South African Revenue Service, appointed in terms of the South African Revenue Service Act, 34 of 1997,^o cited in his official capacity of per address Lehau le Sals Building, 299 Bronkhorst Street, New Muckleneuk, Pretoria, Gauteng. 20

The second respondent is the administrative authority burdened with the administration of the Customs and Excise Act, Act 91 of 1964. 25

The applicants are corporate entities in a group that was

described in the papers as the Apollo Group, controlled by Mr Delport.

THE RELIEF SOUGHT:

The applicants approached the court by way of notice of motion, and claimed the following relief:

- "1. It is declared that the licence "EXD 3" authorises the First Applicant to manufacture cigarettes for the local market; 5
2. The detention of the diamond die on 3 April 2003 is declared invalid and the Second Respondent ordered to immediately return the die to the First Applicant; (sic) 10
3. It is declared that the provisions of Section 35A(2) of the Act requires that no cigarettes not bearing a stamp imprint may be removed from a customs and excise manufacturing warehouse unless in terms of specific permission from the Second Respondent; (sic) 15
4. It is declared that until 5 May 2003 no permission was issued by the Second Respondent to the First Applicant to remove cigarettes not bearing the stamp imprint from its manufacturing warehouse; 20
5. It is further declared all removals from the manufacturing warehouse of the First Applicant's cigarettes bearing the diamond die impression up and until 5 May 2003 was lawful; (sic) 25
6. It is declared that Second Applicant is in lawful possession of seven diamond dies which include the die to be returned in terms of paragraph 2 above;

7. It is declared that Second Applicant is entitled to transfer the diamond dies in its possession to licensed manufacturers of cigarettes provided the Second Respondent is duly informed of the whereabouts of the diamond dies; 5
8. The Respondents and their officials are interdicted from attaining or seizing any equipment used by the first Applicant in the manufacture of cigarettes for the local or export market or in any manner prohibiting the manufacture of cigarettes of the "Exclusive Brand" for the local market by the First Applicant; 10
9. The Respondents and their officials are interdicted from retaining or seizing any diamond dies in possession of the Applicant;
10. No order to costs is made save to the extent the application is opposed, in which event the opposing Respondent(s) are to pay the costs at the attorney and own client scale inclusive of the cost of two counsel; (sic) 15
11. Such further and alternative relief the honourable court deems expedient in the circumstances." 20

The respondents opposed the application. The second respondent launched a counter application in which he sought the review and setting aside of the granting of the licence, annexure EXD3 to the founding papers, alternatively an order declaring that the Commissioner, the second respondent, was entitled to withdraw the 25

licence. An order was furthermore sought declaring that the applicants are not entitled to be in possession of five dies issued to T.H.D. Georgiades SA Cigarette Industry on 13 March 2001. The return of the dies to the second respondent was also sought, together with an appropriate costs order. The counter application precipitated a veritable deluge of paper, affidavits, annexures and supporting affidavits running to hundreds of pages were filed.

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When the matter was eventually enrolled, many, many months after the counter application had been launched, the applicants had not yet filed their replying affidavit. An application for condonation seeking to introduce not only a replying affidavit, but the entire record of criminal proceedings against Mr Delpont and others in the Pretoria Commercial Regional Court was filed.

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The annexures to the replying affidavit were disallowed, but the affidavit, which also stood as an answer to the counter application, was admitted with an appropriate punitive costs order.

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The applicants filed a reply to the counter application.

One of the grounds upon which the second respondent sought to revoke the licence was the alleged fraudulent conduct on the part of the applicants, through Mr Delpont and others, in selling cigarettes to the public without paying the necessary value added tax, and without ensuring that dutiable items and imported goods, that the applicants had allegedly dealt with, had been properly recorded in the documentation that the applicants are obliged to keep.

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One of the further grounds upon which the revocation of the licence was sought was an averment that the first applicant had, in

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a fraudulent conspiracy with others, sold cigarettes without ^{raising} (indistinct) value added tax thereon. Detailed allegations of fraud were made by former business associates of the applicant. These were dealt with in a very superficial fashion in the applicant's replying affidavit.

AS 3/5/2

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When this was pointed out to counsel during argument, he sought a further indulgence to introduce yet another set of affidavits in order to properly deal with the detailed averment of fraud and fraudulent conduct on the first applicant's part. This application was allowed with another punitive costs order.

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THE ISSUES:

Once the volume of paperwork had been stripped of unnecessary verbiage, the following issues emerged:

1. Had the licence held by the first applicant been issued properly, and if so, what did it authorize first applicant to do?
2. Was the Commissioner entitled to revoke the licence?
3. If so, was the Commissioner bound to do so in terms of either section 3(2) or section 60(2) of the Customs and Excise Act, Act 91 of 1964 ("the Act"), or was the second respondent entitled to a declaratory order by this court, that the licence was properly withdrawn?
4. Was there proper or substantive compliance with the provisions of the promotion of Administrative Justice Act, 3 of 2000?
5. What should happen to the dies in first applicant's

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possession?

6. Was there in fact an existing dispute in respect of which the court could issue a declaratory order?

^{Sixth}
THE FIFTH ISSUE:

JB 3/5/05

This part of the inquiry can be disposed of immediately. A court will not make an order on a matter that is either academic or is not brought before the court with the aim of resolving an existing dispute between the parties thereto. If no relief is necessary, no order ought to be granted: *SAPDC (Trading) Limited v Immelmann* 1989 (3) SA 506 (W).

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It is clear that in the present instance a very real and vigorous dispute exists between the parties.

The first applicant approached the court in order to obtain clarity on the issue whether the licence that it does hold, entitles it to manufacture cigarettes for the local market, even though it was granted in respect of cigarettes for the export market.

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In reply thereto, the second respondent not only disputed the first applicant's contentions, but sought the withdrawal of the licence on the grounds I have already alluded to. This counter application is vehemently opposed.

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Under the circumstances, a very real dispute exists between the parties that is capable of decision by way of a declaratory order.

THE FIRST ISSUE: Was first applicant's licence issued properly, and what are its terms?

A customs and excise warehouse is licensed in terms of section 60 of the Act read with the provisions of section 19 and section 21

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of the Act.

Although section 19(1) refers to the Commissioner as the entity that may license a warehouse, it is clear that in terms of section 3(1) of the Act, the Commissioner can delegate the performance of any function to an officer or any other person under the control or direction of the Commissioner.

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It is clear from the provisions of section 19(2) of the Act that a warehouse is licensed either for storage of dutiable goods, or for the manufacture thereof.

Both types of license may be issued for the same premises, but it is clear that that would require express authorization in the licence.

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It is furthermore apparent from the provisions of section 19(4), 19(5), 19(6) and 19(7) that the licensee of a warehouse must keep comprehensive and accurate records of all goods either stored or produced in the warehouse, received therein or released therefrom.

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Unless proper records are kept, no control could be kept for purposes of taxation or the collection of excise duty over such warehouse.

The first applicant alleges that the licence issued to it entitles it to manufacture goods for the local market as well as for the export market. In particular, the first applicant contends that it is entitled to produce cigarettes for the local market. It claims to have been authorised by the terms of its licence to do so.

SP 3/5/05

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It is common cause that the licence was issued by Mrs Strauss, who is an official under the control of the second respondent. It is also common cause that she was duly delegated to do so.

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Apart from keeping appropriate records, section 35(A) of the Act provides that cigarettes and cigarette tobacco may only be packed in the manner and fashion as prescribed by the Commissioner, and must be given a specific stamp if removed from the warehouse for home consumption, and must not be so stamped if they are removed for export. 5

In respect of such stamping, dies are issued to manufacturing warehouses that produce cigarettes for the local market.

The manner and fashion in which a customs and excise manufacturing warehouse is to be licensed and the conditions under which it may conduct business are set out in section 27 of the Act, read with the rules that are issued therefore. 10

Apart from other provisions, rule 27(10) requires a detailed stock record to be kept on a daily basis.

Returns must be issued to the second respondent or the duly appointed officer as required by the latter. 15

A licence for a customs and excise manufacturing warehouse must be issued on the relevant form, accompanied by the necessary security.

It is the second respondent's case that the licence was issued in conflict with the administrative provisions for the issuing of such licences. The second respondent contends that the licence was not properly issued in the sense that it did not specify what activities the customs and excise manufacturing warehouse could undertake. 20
Furthermore, the persons applying on behalf of the first applicant to represent it for the issuing of the said licence, were not properly 25

authorised. In addition, the security bond was not properly obtained, because the persons applying therefor were not authorised by the first applicant and were not associated with the company.

From the terms of the application that was filed for the licence with Mrs Strauss, the second respondent's authorised official, it would appear that the proper specifications were not set out in respect of which the manufacturing warehouse was to be licensed.

An argument may consequently well be advanced that the issuing of the licence in its present form was irregular.

The mere fact that an irregularity occurred in the issuing of a licence does not, in itself, however justify the revocation thereof either by the court or by the issuing authority: *Rajah and Rajah (Pty) Limited and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (AD), and in particular on page 407D-H. At the bottom of the page, Holmes, JA, as he then was, states the following:

"Now I think it is clear that the Court will not interfere on review with the decision of a quasi - judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice. ... In principle it seems to me that the Court should likewise not interfere in the present case at the instance of the Council, whatever the precise nature of the present proceedings, since it is clear that there has been no prejudice to the public interest which the Council represents. The underlying principle is that the Court is disinterested in academic situations."

Had the somewhat irregular fashion in which the licence came

to be issued, been the only ground of complaint, there may have been some doubt whether the licence was indeed liable to be revoked.

If the business of the first applicant had been conducted in a regular fashion, and in particular, if proper records of its transactions had been kept, whatever administrative errors might have occurred in issuing the licence might have been resolved by administrative measures.

Mr Dunn SC pointed out correctly that the registration of the applicant's warehouse ought to have been for a rebate warehouse if cigarettes were to have been sold in the local market.

Had these been the only complaints, I am uncertain whether a revocation of the licence, rather than a proper new application and a reissuing of the licence in its proper form, for which the Act makes provision *inter alia*, if the provisions of section 60(2) are taken into consideration, would have been the correct solution.

For purposes of this judgment, I will accept that the licence was issued in such a fashion, regardless of its terms, that whatever errors may have occurred therein, did not *per se* endanger the public interest to such an extent that a revocation thereof would have been required.

THE SECOND ISSUE: Was the Commissioner entitled to revoke the licence?

I have already adverted to the fact that the papers ballooned to an inordinate extent once the counter application was launched.

One of the grounds upon which the second respondent based the counter application was the allegation that the Act had been contravened by the first applicant and its officials *inter alia*

Delport and Mr Pickard.

In particular, the charge was made that cigarettes had been introduced into the South African market without excise duty and VAT having been paid thereupon. These cigarettes were all of the Exclusive brand.

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These charges were supported by affidavits of employees and business associates of the applicant, inter alia a certain Reichert and a Mrs Schoeman, who both testified that they distributed large volumes of Exclusive cigarettes without VAT being paid thereupon and without the necessary excise payments having been effected.

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These affidavits were made in terms of section 204 of the Criminal Procedure Act and were obviously intended as evidence to be produced against the applicants in a forthcoming criminal prosecution.

Because of the fact that these affidavits and the documents annexed thereto are obviously intended for the purposes of future criminal prosecution, I will refrain from dealing therewith in any great detail.

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I prefer to base my conclusion on a different footing. The applicants are obliged to keep comprehensive records of all dealings in their warehouse and of all transactions in respect of goods that passed through it.

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On the assumption that they were entitled to sell cigarettes on the local market, they obviously had to pay the necessary taxes and duties thereupon.

This required, as I have underlined, comprehensive and detailed records of all cigarettes

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One would have expected that, had the applicants been innocent as they are entitled to claim they are, they would have been keen to demonstrate to the court in a convincing fashion that the records which they were obliged to keep, were indeed available.

Had this been the case, it would have been easy to provide the respondents and the court with copies thereof and to demonstrate that nothing untoward had occurred.

Unfortunately, the applicants were unable or unwilling to do so. The applicants applied, once argument by the respondents had already started, to supply the court with the full documentation to refute the allegations of fraud and dishonesty. Mr Delport promised that the applicants would provide proof from the books and records first applicant kept by way of schedules reflecting all ^{the} requirements documentation. This, he asserted, would be explained in an affidavit by one Mr Pickard or a Mr Horn, both employees of the applicant.

Unfortunately the applicant was unable or unwilling to produce these documents. Mr Pickard and Mr Horn indulged in general denials, but did not even deal with the schedules that Mr Delport promised would be made available.

It is also surprising that the applicants have never, throughout the course of this application which eventually ran to almost 4 000 pages, issued an express invitation to the respondents to come and inspect the documentation in their possession.

What explanations there were, were often of a nature that reeked of improbability and evasiveness. A prime example thereof is the way in which detailed allegations concerning the sale of Exclusive

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cigarettes in KwaZulu-Natal were dealt with by Mr Delport. An effort was made to suggest that the evidence did not emanate from an employee of the applicants, but was in fact the documentation of a rival company. It was suggested that the cigarettes referred to therein in fact were cigarettes marketed by British American Tobacco, and that the documentation was merely used for purposes of a marketing and training exercise. This improbable version was dealt a death blow by an employee of the competitor concerned, stating that the description of the cigarettes contained in applicant's papers could not refer to the competitor cigarettes, as the competitor did not market cigarettes of and under this description.

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Viewed in their entirety, the voluminous documents and affidavits which the applicants produced were either completely irrelevant or were couched in generalities clearly designed to evade the issue and to blur the contours of their actions as much as possible.

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The applicant's followed a well designed strategy of delaying the proceedings as much as possible. They clearly expected that, by filing thousands of pages of an irrelevant criminal record at the hearing, together with an application for condonation, *they would obtain R33/stc* ~~would lead to~~ an inevitable postponement of the matter, albeit with a punitive costs order.

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The further strategy that was employed was to create as many potential disputes on the papers as possible, and to persuade the court to refer the matter to evidence. These strategems, had they worked, would together in all probability have delayed the

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adjudication of this matter until the year 2007.

Once the grain (what little there was in the applicant's case) was separated from the chaff (of which there was a great deal), it became clear that the applicants designedly failed to meet the charges of non-compliance with the provisions of the Act and the failure to pay Value Added Tax head-on. They chose to obfuscate and to disseminate, to create a dust cloud and to obscure the issues. 5
RB 3/5/05

In that they have failed.

From the foregoing, it is clear that the activities which the applicants indulgeⁱⁿ, endanger the public interest and undermine important revenue provisions. RB 3/5/05
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It is indubitably in the public interest that their licence be revoked. It is clear that the second respondent is prejudiced by the way in which the first applicant abuses the licence that was issued to it. 15

The second respondent has therefore established that it is entitled to have the licence revoked.

Because of the fact that the Act is premised on a system of self accounting and self assessment, the failure to keep proper records strikes at the very root of the statute and undermines the second respondent's ability to perform its function: *First National Bank of South Africa Limited trading as Wesbank v Commissioner, South African Revenue Service and Another, First National Bank of South Africa Limited trading as Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at 781C-E. 20
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THE THIRD ISSUE:

Is the second respondent entitled to revoke the licence by obtaining a declaratory order?

As I have set out before, the Act provides both in section 3(2) and in section 60(2) thereof for the revocation of inter alia a licence.

Section 3(2) is in general terms:

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"2(a) Any decision made and any notice or communication signed or issued by any such officer or person (having been empowered by a delegation of the Commissioner's powers and functions) may be withdrawn or amended by the Commissioner or by the officer or person concerned (with effect from the date of making such decision or signing or issuing such notice or communication or the date of withdrawal or amendment thereof) and shall, until it has been so withdrawn, be deemed, except for the purposes of this sub-section, to have been made, signed or issued by the Commissioner."

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Section 60(2) reads as follows:

"60(2) The Commissioner may, subject to review by the High Court -

(a) Refuse any application for a new licence or refuse any application for a renewal of a licence if -

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(i) The applicant -

(aa) Does not comply in respect of such application with the requirements specified by the rule or any condition

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imposed by the Commissioner;

- (bb) Has made a false or misleading statement with respect to any material fact or omits to state any material fact which was required to be stated in the application for a licence; 5
- (ii) The applicant or any employee of such applicant has -
- (aa) Contravened or failed to comply with the provisions of this Act; or
- (bb) Has been convicted of an offence 10
under this Act; or
- (cc) Has been convicted of an offence involving dishonesty; or
- (dd) Failed to comply with any condition or obligation imposed by the 15
Commissioner in respect of such licence:
- Provided that sub-paragraphs (aa) to (cc) shall not apply in respect of an employee if the applicant proves that he was not a party 20
to or could not prevent any such act or omission by such employee; or
- (b) Cancel or suspend for a specified period any licence -
- (i) If the holder of such licence - 25
- (aa) Is sequestrated or liquidated or

- (bb) No longer carries on the business for which the licence was issued or
- (cc) Is no longer qualified according to the qualifications prescribed in the rules; or 5
- (dd) Failed to pay any amount demanded under this Act within 30 days from the date of such demand; or
- (ii) If the holder of such licence or the employee of such licensee has - 10
- (aa) Contravened or failed to comply with the provisions of this Act; or
- (bb) Been convicted of an offence under this Act; or
- (cc) Been convicted of an offence involving dishonesty; or 15
- (dd) Failed to comply with any condition or obligation imposed by this Act or by the Commissioner in respect of such licence; 20

Provided that sub-paragraphs (aa) and (cc) shall not apply in respect of an employee if the holder proves that he was not a party to or could not prevent any such act or omission by such employee; 25

Provided that before a licence is cancelled or

suspended, except when any demand for any amount remains unpaid for a period exceeding 30 days from the date of the demand, the Commissioner shall -

- (a) Give 21 days' notice to the licensee of the proposed cancellation or suspension; 5
- (b) Provide reasonable information concerning an allegation and grants for the proposed cancellation or suspension; 10
- (c) Provide a reasonable opportunity to respond and make representations as to why the licence should not be cancelled or suspended." 15

Mr Dunn SC explained during argument that the Commissioner had chosen the route of obtaining either a cancellation by the court or a declaratory order rather than availing himself of the provisions of the statute because he wished to avoid the impression that he was acting administratively against the applicants while he was embroiled with them in litigation, initiated by them. 20

Whatever the reason, it is clear from the statutory provisions that they do not aim to exclude the authority of the court to deal with any issues arising from the Act. The court's jurisdiction is not restricted by the administrative provisions. 25

There is judicial authority for a resort to litigation rather to an

administrative procedure in instances where licenses fall to be revoked. The *Rajah* matter, referred to above, was preceded by an application in this court reported as *Ventersdorp se Stadsraad v Rajah en Andere* 1959 (4) SA 251 (T), where the court held under similar circumstances that its power to revoke a licence or authority, could not be restricted by the mere fact that the issuing authority could have availed itself of administrative procedures to obtain the same result.

It is consequently clear that the respondent could approach the court for relief.

As far as the form of the relief is concerned, I am of the view that this is not an appropriate case to exercise the court's review jurisdiction. The authority that had itself issued the licence, or granted the right, could revoke the licence itself through the provisions of section 3(2). A review would therefore be inappropriate. However, it is clear that if the Commissioner can exercise the power in terms of section 3(2) to revoke the statute, he is also entitled to a declaratory order.

As far as the provisions of section 60(2) are concerned, it may well be argued that the applicant cannot complain that the administrative procedure prescribed by this section has not been followed to the letter. In fact, the applicant has been given a much longer period in which to consider its position than the 21 days that the Act prescribes. The reasons why the licence should be withdrawn, have been set out in detail in the inordinately voluminous papers filed in this respect.

The applicant has had more than ample opportunity to put its case before this court and to meet the allegations against it.

Under the circumstances, section 60(2) may be applicable, but I prefer to rely on the provisions of section 3(2) for the order that I intend to make. 5

Once a declarator has been issued, there is nothing standing in the way of an order made *mero motu* by the court in terms of which the applicant is required to deliver the licence to the statutory authority.

THE FOURTH ISSUE: 10

Had the provisions of Act 3 of 2000, the promotion of Administrative Justice Act, been complied with?

Because of the fact that I have held that the second respondent is not bound to follow administrative action, the provisions of the promotion of Administrative Justice Act are not per se applicable. 15

In as much as they may be relevant, however, I am of the view that, as I have set out above, no rights of the applicant to fair administrative action can be said to have been infringed.

THE FIFTH ISSUE: THE DIES:

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Once it is clear that the applicant is no longer entitled to a licence, it may also not possess dies with which to mark goods intended for export. 20

THE ORDER:

- 1 The application is dismissed with costs.
2. It is declared that the Commissioner is entitled to withdraw the licence, annexure EXD3, to the founding 25

papers.

3. It is declared and ordered that the licence be returned to the Commissioner immediately and that all reference thereto in the records of the Commissioner be deleted inasmuch as they indicate that it is a valid licence in the first applicant's possession. 5
4. It is declared that the applicants are not entitled to be in possession of any dies originally issued to T.H.D. Georgiades SA Cigarette Industry.
5. The applicants are ordered to return any or all dies in their possession to the second respondent immediately. 10

COSTS:

The costs are to be paid by the applicants, on the party and party scale with the exception of those proceedings in respect of which punitive costs orders were issued by the court. The costs are to include the costs of two counsel. 15

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**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO : 5918/2004

In the matter between :

**EXCLUSIVE TOBACCO (PTY)
APOLLO TOBACCO CC**

1ST Applicant

2ND Applicant

and

**THE MINISTER OF FINANCE
THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE**

1ST Respondent

2ND Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTICE THAT the abovementioned Applicants hereby apply for leave to appeal against the whole of the judgment of Bertelsman J delivered on 24 March 2005 on the following grounds :

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That by ordering Applicants on the 17th March 2005 at 15h00 to deliver their Supplementary Affidavits before 10h00 on 18th March 2005 Applicants were unreasonably denied sufficient time to prepare Affidavits in support of Applicant's contentions.

2

In not finding that a bona fide factual dispute existed on the documents before Court as to whether the Applicants delivered to 2nd Respondent all relevant documents, including source documents, with reference to the sales of Exclusive cigarettes.

3

By finding that the Applicants did not furnish 2nd Respondent with the relevant documentation including source documents pertaining to their business in respect of the manufacturing and sales of Exclusive cigarettes.

4

By finding that it was required of Applicants that Applicants present their full documentation regarding their business pertaining to Exclusive cigarettes to Court.

- 3 -

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By finding that the alleged failure to provide the said documents is sufficient grounds to entitle 2nd Respondent to revoke the Applicant's manufacturing license.

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By revoking 1st Applicant's manufacturing license and ordering 1st Applicant to deliver same to 2nd Respondent.

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By ordering 1st Applicant to deliver the diamond dies in its possession to 2nd Respondent.

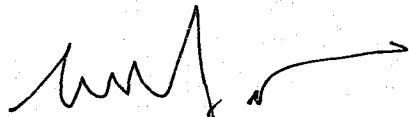
8

By not referring the aforesaid dispute to evidence.

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Applicants are not in possession of the typed Judgement and reserve their right to amplify or amend the grounds for appeal once the typed Judgement becomes available.

DATED AT PRETORIA ON THIS th 29 DAY OF MARCH 2005



BUITENDAG'S INCORPORATED
ATTORNEYS FOR APPLICANT
876 PRETORIUS STREET
ARCADIA, PRETORIA
(Att : Mr M Anderson/EXC1/001)
(Tel : (012) 430-7697/082 777 96723)
Fax : (012) 342-2278

TO : THE REGISTRAR OF THE
ABOVE HONOURABLE COURT

AND

TO : THE COMMISSIONER FOR SOUTH
AFRICAN REVENUE SERVICES
c/o THE STATE ATTORNEY
8TH FLOOR, OLD MUTUAL CENTRE
167 ANDRIES STREET
PRETORIA
(DC DU TOIT/728/2004/1016/L1)

Copy received hereof this day of
March 2005

ESTABLISHED BY THE DEPARTMENT OF JUSTICE
PRIVATE/SAK/PRIVATE AND 1001

2005-03-29

PRETORIA 0001
STATE ATTORNEY

For THE FIRST RESPONDENT

ONTVANG SONDER BENADELING VAN RECHT
ACCEPTED WITHOUT PREJUDICE

AND
TO : THE MINISTER OF FINANCE
c/o THE STATE ATTORNEY
8TH FLOOR, OLD MUTUAL CENTRE
167 ANDRIES STREET
PRETORIA
(DC DU TOIT/728/2004/1016/L1)

Copy received hereof this day
of March 2005

B. Spoor 11.05
For THE SECOND RESPONDENT

STAATSPROKURIEUR PRIVAATSAK/PRIVATE BAG X91
2005 -03- 29
PRETORIA 0101 STATE ATTORNEY

ONTVANG SONDER BENADELING VAN
ACCEPTED WITHOUT PREJUDICE

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

Case Number : **5918/2004**

In the matter between : _____

EXCLUSIVE TOBACCO PRODUCTS (PTY) LTD
APOLLO TOBACCO CC

First Applicant

Second Applicant

And _____

THE MINISTER OF FINANCE
THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

First Respondent

Second Respondent

**NOTICE OF AMENDMENT OR AMPLIFICATION OF THE APPLICANT'S
GROUNDS FOR LEAVE TO APPEAL**

KINDLY TAKE NOTICE that the abovementioned Applicants will on 6 May 2005 at 09h00 or so soon thereafter as the Counsel for Applicants can be heard, apply for an order that :

1. The Applicants amend or amplify their grounds of appeal of the Notice of Application for Leave to Appeal dated 29 March 2005 by adding the following grounds :

2.

10. By finding that the Applicants did not keep a proper record of stock or of all goods either stored or produced in the warehouse or received therein or released there from.
11. By finding that the allegations concerning the sale of Exclusive cigarettes in Kwazulu-Natal did not emanate from an employee of the Applicants but was in fact the documentation of a rival company was improbable.
12. By finding that the Applicants followed a strategy of delaying the proceedings as much as possible.
13. By not finding that the Applicants *bona fide* relied on the advice of their legal representatives in compiling the affidavits filed in support of the Applicants' application and in opposing the Respondents' application.
14. In finding that there is a dispute between the parties the Court should have found that inherent in the dispute is a *bona fide* factual dispute and should have referred the matter for oral evidence.

15. The Court should have found that the license as issued allows for the manufacture of cigarettes for the local market.
16. The finding that the warehouse ought to have been registered for a rebate warehouse if cigarettes were to be sold in the local market is factually incorrect. There is no such requirement in the Act and registration of a manufacturing warehouse to manufacture cigarettes on the local market is in no way dependant on rebate of any nature. Registration as a rebate user can influence the manner in which raw materials are dealt with and accounted for but is not a prerequisite to register as a manufacturer for the local market.
17. The finding that the charges of introducing cigarettes into the South African market without exise duty and VAT being paid thereon are supported by affidavits of employees of the Applicant is factually incorrect. No affidavits of employees of the Applicant were submitted in support thereof.
18. Applicant in fact only manufactured cigarettes for the local market for a very short period. It is common cause between the parties that those cigarettes were duly accounted for.

19. The promise of Delport to incorporate schedules of the documents were based on the application for leave to file further affidavits based on the understanding that a reasonable period will be available to file the affidavits. The finding that Mr. Horn indulged in general denials is factually incorrect. In fact no affidavit of Mr. Horn could be filed in the limited time provided to the Applicants and no affidavits of Mr. Horn form part of the papers.
20. The finding that the Applicant never expressed an invitation to the Respondents to come and inspect the documentation is factually incorrect. In fact there is documentary proof in the form of a letter addressed to the Respondents where the Respondents were invited to appoint an independent auditor to inspect and evaluate the documentation.
21. The finding that the activities of the Applicant endanger the public interest and undermine revenue provisions is not substantiated by the undisputed facts before the court. It is common cause between the parties that the Applicants are subjected to and comply with various controls and regulatory provisions of the Act.

22. The undisputed facts before court does not substantiate a finding that the Applicant abuses the licence. In fact the finding that the court in essence makes is that the Applicants did not keep records in the manner it is supposed to do.

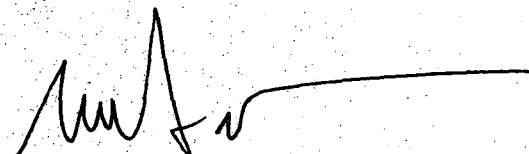
23. Court therefor errs in its' finding that the Second Respondent is entitled to revoke the licence.

~~24. The Court erred in finding that the Second Respondent was not obliged to act in terms of the provisions of Section 60(2) of the Act. The Second Respondent is a creature of statute and as such obliged to follow the statutory prescriptions which were especially enacted to deal with the revoking and cancellation of licences issued in terms of the provisions of the statute."~~

2. That the costs of this application will be costs in the application for leave to appeal.

KINDLY enrol the matter accordingly.

DATED at PRETORIA on this 5th day of MAY 2005



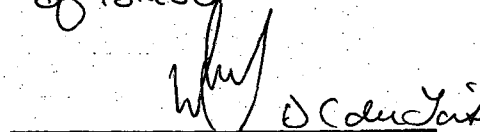
BUITENDAG'S INC
Attorneys for Applicants
4th Floor, Hatfield Plaza Office
Towers, Hatfield, Pretoria
(Ref : Anderson/EXC1/0001)

TO : THE REGISTRAR
HIGH COURT
PRETORIA

AND TO : THE COMMISSIONER FOR SOUTH
AFRICAN REVENUE SERVICES
C/o STATE ATTORNEY
8th Floor, Old Mutual Centre
167 Andries Street
Pretoria
(Ref : D C du Toit/728/2004/1016/L1)

Copy hereof received on this
5th day of MAY 2005

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