Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **1286/2024**

In the matter between:

TRESPING MANUFACTURING (PTY) LTD Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

CORAM: JP DAFFUE J

HEARD ON: 11 MARCH 2024

DELIVERED ON: The order was granted on 11 MARCH 2024 and the reasons delivered on 13 MARCH 2024

REASONS

[1] On 11 March 2024 I dismissed an urgent application by the applicant, Tresping Manufacturing (Pty) Ltd. Due to the urgency of the matter and other urgent applications that needed my attention, I indicated that my reasons would follow in due course. These are my reasons.

[2] On 5 March 2024 the applicant issued an urgent application out of this court, seeking the release and handing over of a truck with registration number […], two trailers and a consignment of textile. A costs order was also sought against the Commissioner for the South African Revenue Services (SARS), cited as the respondent.

[3] On 6 March 2024 the application was served on SARS. It was directed to file its notice of intention to oppose by not later than 15h30 on 8 March 2024. SARS did so. The application was enrolled for hearing on Monday, 11 March 2024 at 10h00. 8 March 2024 was a Friday. SARS, through its Pretoria attorneys, prepared an answering affidavit. This was served at 22h36 (after half past ten) on Friday night on Kambule Attorneys Inc, the applicant's Bethlehem attorneys, by making use of the email address set out in the notice of motion. The next morning, Kambule Attorneys acknowledged receipt of the answering affidavit.

[4] SARS went out of its way to ensure that all relevant information was placed before the court for a proper hearing of the matter notwithstanding its submission that the matter was not urgent at all. Its answering affidavit was also served on the Bloemfontein attorneys at 09h14 on Monday morning where after it was filed at court. I, being the judge on duty to deal with urgent matters, received the following documents less than half an hour before the start of the hearing:

a. SARS' answering affidavit;

b. applicant's notice to oppose the SARS' notice in terms of rule 47 requiring security to be provided;
c. applicant's practice note and its heads of argument;
d. an email indicating that SARS' heads of argument and practice note had been served already at 10h31 on Sunday, 10 March 2024; and
e. SARS' heads of argument and practice note.

[5] The two counsel met me in chambers before the hearing whereupon I requested applicant's counsel, Mr Mphuloane, to get instructions as to whether the applicant intended to ask for a postponement to file a replying affidavit. In court, I enquired what was the applicant's attitude pertaining to the filing of a replying affidavit. There was uncertainty and I allowed another five minutes to get proper instructions. Eventually I was told that no replying affidavit would be filed and that the applicant forfeited the right to file same.

[6] It is common cause that the applicant is a *peregrinus* of this country. SARS' counsel, Mr Mothibe, indicated at the onset that he was prepared to argue the matter notwithstanding the fact that security in the amount of R400 000 was sought in terms of rule 47, but not provided.

[7] I requested Mr Mphuloane to deal with the following three issues in argument:
a. urgency;
b. applicant's alleged *locus standi*; and
c. applicant's non-compliance with section 96 of the Customs and Excise Act 91 of 1964.

[8] The golden thread through Mr Mphuloane's argument was that his client faced the proverbial double jeopardy, the reason being that the applicant had already been fined to pay R1 500, where after the matter was regarded 'closed'. Consequently, SARS was not entitled to keep the vehicles and consignment any longer and/or to seize them as this would amount to a further penalty which was not allowed in law. This argument, dealing with the merits of the matter, does not hold any water. The court is not asked to review or appeal the imposed penalty. In any event, it related to

incorrect documentation pertaining to the weight of the transported freight. I do not intend to deal with this issue any further. Herein later I shall briefly deal with the merits.

[9] On 8 February 2024 the truck, trailers and consignment were detained in terms of section 88(1)(a), read with section 87 and 102 of the Customs Act. SARS established serious issues pertaining to the incorrect importers' code number. Further suspicion was also raised pertaining to the applicant's business pertaining to twenty-nine entries into the country since 2023. No answers could be given pertaining to the questions asked about the applicant and the imports.

[10] It is accepted that detention must be for a reasonable period only for the purpose of establishing whether the goods or the vehicles were liable to forfeiture in terms of section 87 of the Customs Act.

[11] On 21 February 2024 Ms Kambule of Kambule Attorneys contacted the relevant SARS official for the first time in writing. Correspondence ensued. SARS *inter alia* required a lease agreement of the truck for movement of the consignment from Lesotho to South Africa. This was communicated in a letter of 4 March 2024 addressed to Kambula Attorneys. On the same day a further letter was addressed pertaining to the customs process, requesting clarity on the use of the particular code number as well as other aspects. These two letters were attached to the answering affidavit, but unlike as could be expected, the applicant decided not to attach these important letters to its founding affidavit. Also, the queries were not dealt with at all.

[12] Having provided some background, it is necessary to deal with the first issue, to wit, urgency. The applicant tried to make out a case in paragraph 7 of the founding affidavit. It vaguely alleged why it would not be afforded redress at a hearing in due course. It referred to the use of the truck. It never indicated that it was the owner of the truck and trailers. In fact, it is apparently not the case. It also failed to show who was the owner of these vehicles, notwithstanding repeated requests by SARS. There is no specific allegation as to who would suffer damages if the truck and trailers were

detained pending further investigation. There is also no indication as to who will suffer damages if the consignment is kept pending the investigation. I would have expected the applicant to show that it will suffer damages in the regard, for example because of non-payment by the buyer and importer of the consignment due to the failure to deliver. It might have been a situation where the importer who stands to lose profit as a result of not being able to sell the goods for which it has paid, has threatened to claim his losses from the applicant. Nothing is said in this regard.

[13] I have to an extent already dealt with the issue of lack of *locus standi*. Clearly, the applicant is not the owner of the truck and trailers. It also failed to allege and prove that it has a right to apply to court for the release to it of these vehicles. No lease agreement or any other agreement has been relied upon to prove the applicant's entitlement to possession notwithstanding requests from SARS to provide same. Therefore, there is a dearth of evidence pertaining to the identity of the owner and the applicant's right to claim possession of the vehicles.

[14] Section 96(1) of the Customs Act provides that no process by which any legal proceedings are instituted against *inter alia* the Commissioner may be served before the expiry of a period of one month after delivery of a notice in writing, setting forth clearly and explicitly the cause of action, the name and place of abode of the person who institutes such proceedings and the name and address of his/her attorney or agent, if any. The applicant also failed to comply with the rules issued in terms of the Customs Act, specifically rules 96.01 and 96.02, pertaining to the completion of form DA96. Such form has not been filed.

[15] The failure to comply with section 96(1) and the abovementioned rules is fatal as these constitute peremptory requirements. Service of the section 96 notice prior to institution of proceedings is a jurisdictional condition precedent for the asking of relief from the court. In *Commissioner for SARS & Others v Dragon Freight (Pty) Ltd and Others*[1]*,* the SCA, relying on a decision of the full court in *Prudence Forwarding* stated that non-compliance with section 96 is fatal, quoting from paragraph 28 of the full court judgment which reads as follows:

[1](751/21) [2022] ZASCA 84; [2022] 3 All SA 311 (SCA); 85 SATC 289 (7 June 2022).

'… It was therefore incumbent upon them to serve the relevant notice and to obtain the agreement of the Commissioner or the sanction of the court to reduce the one month period in respect of the new cause of action involving a review of the seizure decision. This was not done. … and neither the Commissioner or the court agreed to a reduced period, the jurisdictional conditions precedent were not fulfilled, and the court accordingly lacked jurisdiction to grant the final relief it granted, … .'

[16] Although unnecessary for the adjudication of the application, it is necessary to deal briefly with the merits of the application. Section 4(8)(A)(a) provides that any officer may stop, detain and examine any goods while under customs control in order to determine whether the provisions of this Act or any other law has been complied with. Sub-section (b) provides that the release of goods may be stopped at any time while such goods are under customs control. After levying the administrative penalty referred to above, but while the items were still under 'stop note' and pending payment of the penalty, SARS officials found reason to become suspicious. Therefore, the truck, trailers and goods were detained in terms of section 88(1)(a) of the Act. The applicant was requested to provide relevant documents and to explain the use of the importers' code 707070. This code is often used to hide records of importation and make it difficult for SARS to track and trace the whereabouts of consignment post clearance inspection. Also, the power of attorney of the applicant's attorneys was also required. There was no compliance. Section 88(1)(a) provides for detention of goods to establish whether they are liable to forfeiture or not in terms of section 87. I refer to *Dragon*[2] *supra* as well *Commissioner for South Africa Revenue Services v Trend Finances (Pty) Ltd.*[3] In *Trend Finances* the SCA stated as follows:

'… In terms of the words of that section, such detention is 'for the purpose of establishing whether . . . goods are liable to forfeiture under this Act'. A limitation must be read into that section to the effect that the right to detain goods only endures for a period of time reasonable for the investigation which the section contemplates to be made, but no longer. …'

In casu, a reasonable period of detention has not expired by the time the application was moved, particularly insofar as the goods were detained on 8 February 2024 and the applicant has notwithstanding several requests failed to provide the required

[2]At para 44.
[3](162/06) [2007] ZASCA 59; [2007] SCA 59 (RSA); 2007 (6) SA 117 (SCA) (23 May 2007) at para 29.

information and/or documents. It is also apparent that the Commissioner has decided to take further steps and intend to issue a notice of intent to seize.

[17] Consequently, the application was dismissed with costs.

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JP DAFFUE J

On behalf of the Applicant:	Adv PS Mphuloane
Instructed by:	Kambule Attorneys Inc c/o Mokhomo Attorneys BLOEMFONTEIN
On behalf of the Respondent:	Adv WM Mothibe
Instructed by:	Maponya Inc c/o Honey Attorneys BLOEMFONTEIN