

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 604/08

In the matter between:

TANYA INVESTMENTS

APPLICANT

AND

**THE COMMISSIONER OF
CUSTOMS & EXCISE**

1st RESPONDENT

THE COMMISSIONER OF POLICE

2nd RESPONDENT

CORAM: MAMBA J

FOR APPLICANT: MR M. MABILA

FOR RESPONDENTS: MR M. FAKUDZE

JUDGEMENT

11th March, 2008

[1] The Applicant company operates or runs a bonded warehouse which is situated at Simthco building in Matsapha. This business is licensed. Such license was,

however, suspended by the first Applicant; the Commissioner of Customs and Excise, by letter on which the first Respondent's date stamp dated the 22nd day of February 2008 is affixed.

[2] In the letter referred to above, the first Respondent stated inter alia, that

"You are hereby informed your licensing as a storage warehouse keeper ...from 26th April 2007 dated 30th April 2007 ... is being suspended in terms of section 60 (2) (b) (i) of the Customs and Excise Act 21 of 1971.

The suspension is with effect from 23rd February 2008 and any goods stored therein will be detained under customs supervision, pending completion of investigations."

[3] On the 23rd February, 2008 the first Respondent, assisted by members of the Royal Swaziland Police Force "stormed Applicant's premises and proceeded to seize the goods" which are the subject of this application "without giving the Applicant any explanation whatsoever," says the Applicant.

[4] It is not clear on the papers when such letter was served on the Applicant. The Applicant avers that it was served with this letter or notice after 11 am on the 25 day of

February 2008 after launching its application.

[5] The goods impounded by the Respondent comprise a huge consignment of cigarette boxes of various kinds or brands, in excess of five thousand. The exact figure, according to the Applicant is five thousand one hundred and sixty seven boxes. The Respondents, however, say five thousand and forty six full boxes of cigarettes were impounded and taken away, including one box whose contents are only half full. This is also contained in the detention notice which has been filed as AG2. The goods are particularised in this notice. The date stamp on AG2 is the 24th February 2008.

[6] Following the seizure and removal of the goods as stated above, the Applicant has filed this application alleging that it has been despoiled of such goods by the Respondents and want these goods to be returned to its possession and or custody ante omnia.

[7] The Respondents deny that they are guilty of an act of spoliation. They aver that the Respondents are, by law, empowered under section 60(l)(b)(i) of the Act "to suspend, withdrew or cancel the licence of the Applicant, [and] in the absence of a licence the Applicant may not operate" a Bonded Warehouse business and consequently the

suspension of the licence disentitled or divested the Applicant of the right to be in lawful possession of the goods, "hence their seizure".

[8] The Detention Notice referred to above gives the reason for the Detention of the goods as "Contravention of section 60(2)(b)(i)" of the Act. The notice further advises the importer or the person from whom the goods have been seized that the goods "have been detained under section 108 of the" Act.

[9] Neither of the two notices issued by the first Respondent and referred to above specify the nature of the contravention that has been committed by the applicant that has necessitated the suspension of the License and the subsequent detention of the goods. The Respondents' opposing papers do not assist in this regard either. It was because of this inadequacy or deficiency on the papers that after hearing arguments and considering the provisions of the Act, I ordered that the first Respondent must file a supplementary affidavit stating the nature of the contravention of the Act allegedly committed by the Applicant and the nature, extent and expected or estimated duration of the pending investigations. Such an affidavit has been filed and the Applicant has also responded thereto.

[10] The contraventions alleged by the first Respondent are that :

(f) In the past, goods warehoused by the Applicant and declared destined for specified importers in Mocambique were not sent to Mocambique from the Applicant's warehouse but to some other undeclared and unauthorized destinations and persons. The places and persons stated in the documents accompanying the goods are fictitious.

(g) Whilst there are documents in the possession of the Applicant showing that such goods exited from Swaziland to Mocambique through the relevant Border Post, there are no documents at the Swaziland and Mocambiquan borders witnessing these transactions or passage of goods.

(h) The Applicant has failed to keep a stock register at its warehouse - showing goods received and dispatched by it. Some of the goods kept and confiscated at the Applicant's warehouse are without proper documentation.

(d) Notwithstanding that the acquittals in the possession of the Applicant indicate that the goods stated therein were handled through the Lomahasha Border Post, no transaction by the Applicant through

that border appears in the Record Book kept by the Controller at that post.

(e) The Applicant has failed to report to the first Respondent goods allegedly stolen from its warehouse but has only made such report to the Police.

(i) Some goods destined for the Applicant have been detained in a warehouse in Johannesburg.

(j) The Applicant has failed to inform or alert the first Respondent whenever removing goods from its warehouse despite several warnings by the first Respondent who are empowered to supervise such removal of goods up to their point of departure.

[11] Save to say that I do not understand how the failure to keep records by the first Respondent's personnel and Mocambiquan border officials and the issue stated in (f) above should be attributable to unlawful or wrongful conduct by the Applicant; these allegations, if true, are very significant and material breaches of the Licence conditions. And the financial implications or consequences thereof are very substantial for both parties. For instance, 987 boxes of imported cigarettes were not declared as such but as mineral water. This resulted in a substantially lower levy of

import charges being imposed and when the false declaration was uncovered, it attracted a substantial further payment of a sum of money by the culprit to the fiscus. This fraudulent declaration, however, has been denied by the Applicant and it does not appear on the documentary evidence before me that the Applicant had anything to do with the transaction. The false declaration was made by Mr Alberto Tinga of Mocambique. No link between him and the Applicant has been alleged by the Respondents.

[12] The Applicant has denied any wrong doing and has pointed out that there is no documentary proof that it is involved in the matters being investigated by the first Respondent. I am unable to discern any involvement by the Applicant in these transactions that the Respondents are investigating. The allegations are to say the least, wide and general.

[13] I turn now to consider the provisions of the Act relevant to this application. First, in suspending the Applicant's licence and confiscating the goods, the first Respondent said it was acting on the powers granted to it by section 60(2)(b) (i) of the Act, which provides that:

"(2) The Commissioner may, subject to an appeal to the Minister, whose decision shall be final_ ... (b) refuse any application for a renewal of any licence or cancel or suspend for a specified period any licence if the

applicant or the holder of such licence, as the case may be_
(i) has contravened or failed to comply with the provisions of this Act." (The emphasis has been added by me).

[14] From the above, it is clear to me that this section envisages a hearing by the Commissioner before a decision or determination is made by him to suspend a licence. Again, in determining whether or not a contravention of the Act has been made, the Commissioner must hold a hearing and give the licence holder the chance to be heard before a decision is taken on such issue. That the licence holder must be heard is clear from the fact that once a decision has been made e.g. to suspend a licence, the aggrieved party has a right to appeal to the Minister. I find neither rhyme nor reason why there should be an appeal to the Minister when there was no right to be heard before the Commissioner. In any event, the Act does not expressly excuse the Commissioner from observing the audi alteram partem rule in exercising his powers under section 60(2)(b)(i) of the Act.

[15] There can be no doubt that the suspension of the Applicant's licence adversely affects the Applicant's existing rights to carry out its business as a Bonded Warehouse. Such rights may never be taken away from the licensee

without a hearing and at the whim of the first Respondent.

[16] This court, has however, not been called upon to make any declaration, determination or finding pertaining to the suspension of Applicant's trading licence. Applicant seeks a spoliation order; that is to say, that the goods removed from its possession and custody by the Respondents be restored to its possession.

[17] One notes again that the Act requires the first Respondent to state the period within which a licence is being suspended. The suspension may therefore not be indefinite. In casu, the notice of suspension merely advises the Applicant that the suspension is with effect from the 23rd February, 2008 and what is to happen to the goods pending completion of investigations.

[18] The Detention Notice as quoted above states that the goods are being detained under section 108 of the Act. That section provides that:

"108. If any officer has reason to believe that the correct duty has not been paid on any goods or that there has been or may be in respect of any goods ... a contravention of this Act or any other law relating to the import or export of goods, he may place an embargo on such goods, ...wheresoever found, and no

person shall remove such goods ... from the place indicated by the officer, or in any way deal therewith except with the permission of the officer, until the embargo has been withdrawn."

[19] The first Respondent is empowered under this section to place an embargo on the particular goods that are the subject of the complainant offence or would-be offence. There is no allegation by the Respondents that the goods in question in these proceedings have been involved or used in the commission of a Contravention of the Act or that the first Respondent has reason to believe that the correct duty has not been paid on these goods or that there has been or

may be in respect of such goods, a contravention, in the future, of the Act.

[20] Accepting for the moment that the Respondents are investigating the general operations of the Applicant, there is nothing in the papers before me indicating that the goods detained are in any way the subject of the pending investigations. The sole reason for detaining the goods by the first Respondent is that, the Applicant's licence having been suspended, the Applicant has no lawful right to deal with the goods as a Bonded Warehouse. That may be true,

but I do not think that it necessarily or automatically follows that the Applicant is not entitled to even to their mere possession and custody. For instance, the Applicant may have the physical custody of the goods under an embargo by the Respondents as contemplated in Section 108. The relief of mandament van spolie is a right of possession and not a right to possession. In ordinary grammatical meaning, to embargo is to prohibit or forbid something from leaving a specified place. It may of course also mean to seize or confiscate something or to encumber something in a particular way.

[21] Section 88(l)(a) of the Act empowers an Officer or a member of the Police force to detain any goods at any place for the purpose of establishing whether such goods are liable to forfeiture under the Act. These goods may be detained wheresoever found or at a place determined by the officer concerned. An Officer in this case refers to a person employed on any duty relating to customs, fiscal excise under the authority of the first Respondent.

[22] In terms of section 87(1) goods liable to forfeiture are those goods that "have been imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to this Act or in respect of which any offence under this Act has been committed." In casu, the Respondents

have not shown or even alleged that the goods detained herein are liable to forfeiture because they have been either "imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to this Act or [are] in respect of which any offence under this Act has been committed" The Respondents are investigating alleged past transgressions by the Applicant with regards to the latter's dealing with goods other than those detained herein. Consequently, if the goods have not been shown to be liable to forfeiture, they may not be detained on the strength of the provisions of Section 88(1) of the Act. Their seizure and detention by the Respondents is illicit or unlawful. The Respondents have not denied that the Applicant was in possession of the goods when the goods were impounded. Respondents have also not denied that such possession was established or ensconced to ground a claim for spoliation.

[23] There is a dispute of fact on the number (quantity) of boxes of cigarettes that were actually seized and are being detained by the Respondents. I cannot resolve this dispute on the papers filed herein. There is, however, no reason why the application should not succeed at least on the number of boxes of cigarettes admitted by the Respondents.

[24] To that extent the application succeeds with costs.

MAMBA J