HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 22366/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE:8 JULY 2021
SIGNATURE:

In the matter between:

RUGGED-LAVA GROUP (PTY) LIMITED	Applicant
and	
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES GENERAL K J SITHOLE N. O.	First Respondent
MAJOR GENERAL MAMOTHETI	Second Respondent
BRIGADIER MABULE N. O. HEAD OF CENTRAL FIREARMS REGISTRY	Third Respondent
COLONEL PN SIKHAKHANE N. O.	Fourth Respondent
THE FIREARMS APPEAL BOARD	Fifth Respondent

J U D G M E N T

This matter has been heard in open court and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

This is an application for the urgent review of the refusal of an in-transit permit for conveyance of firearms imported by a company registered in Lesotho via O. R Tambo International Airport (ORTIA).

[2] The parties

2.1 The applicant is Rugged-Lava Group (Pty) Ltd, a company registered in Lesotho with registration number 2012/1500. It is licensed to trade in arms and ammunition in Lesotho and has a valid permit to import the firearms that form the subject matter of this application, being 200 9mm CZ handguns, into Lesotho. It is represented in South Africa in respect of the transaction for the importation by a shipping agent, Natco SA International Transports (Pty) Ltd, a South African Company.

2.2 The respondents are the National Commissioner of the South African Police Services (SAPS), the General in charge of Firearms, Liquor and Second Hand Goods (FLASH) under which the Central Firearms Registry resorts and a Colonel P.N Sikhakhane, being the actual decisionmaker in respect of the in-transit permit in question, in her capacity as the commander for Arms Control, Permits and Authorisations. The Firearms Appeal Board has also been cited as a respondent.

[3] The application for the in-transit permit

3.1 The relevant facts are largely not in dispute. They are these: the applicant obtained orders for the firearms in question (the aforementioned handguns) from private individuals in Lesotho for their own use. The applicant then purchased and ordered the firearms from the manufacturer. As Lesotho is a landlocked country, the applicant will need an in-transit permit in order to convey the firearms from ORTIA across the borders of South Africa to Lesotho. The applicant intends doing so via air transport, for which purpose it has contracted (or will contract) SA Airlink who has the necessary air transport permit in respect of firearms (incidentally issued by Colonel Sikhakhane). The firearms would, prior to its transportation to Lesotho, never leave ORTIA where it would be held in a bonded warehouse. Apart from traversing South Africa, the firearms will actually never otherwise enter the country.

3.2 In order to legally complete the relatively simple fly-in, fly-out transport operation described above, Regulation 63(1) of the Firearms Control Regulations, issued in terms of the Firearms Control Act, 60 of 2000 (the FCA) and published in GNR 345 of 26 March 2004, provides that "*a person who will, for commercial purposes, carry in transit through the Republic of South Africa, firearms or ammunition – (a) must lodge an application for an in-transit permit at the office of the Central Firearms Register before making arrangements for the transport of the firearms or ammunition ...*".

3.3 The need for an in-transit permit derives from section 73(2) of the FCA which prohibits a person form carrying a firearm in transit through the Republic without being in possession of the necessary permit.

3.4 In-transit permits may, in terms of section 74(1) of the FCA not be issued to a person who is not a "fit and proper" person to hold such a permit. In terms of section 75, further, the permit must specify the conditions upon which it is issued and such other information as may be prescribed.

3.5 The requirements prescribed in Regulation 63, and added to by Col Sikhakhane in her answering affidavit, with reference to the required accompanying documentation, are the following:

- The application must be submitted by completing a SAPS 520(a) form;

- Proof of authority from the exporter from the country of origin (export permit) and the importer into the country of final destination (import permit) must be supplied;

- An "end-user" certificate as contemplated in section 17 of the National Conventional Arms Control Act, 41 of 2002 must be produced;

- A computer printout or typed list, reflecting all the serial numbers of all the firearms purchased must be produced (for this purpose, Col Sikakhane insists on an invoice, reflecting these particulars);

- A "consignment note" from the transporter (who possesses a transport permit) must be submitted as well as particulars of the intended route and mode of transport;

- A certified copy of proof of payment of the prescribed amount of R140.00 (one hundred and forty Rands);

16 In addition, Col Sikhakhane insists that the application must be accompanied by a copy of the identity document or passport of the "responsible person" applying on behalf of the juristic person.

17 The manufacturer had informed the applicant in October 2020 that the consignment of firearms had been dispatched by it, which prompted the applicant to apply for the in-transit permit on 3 November 2020. The applicant was not, however, informed when the firearms would be shipped from Brazil and neither was its shipping agent aware thereof until the firearms arrived at OR TIA on 29 November 2020 where they are still being kept under guard and lock and key. The applicant submits that its application, a copy of which was annexed to its notice of motion, complied with all the prescribed requirements.

[4] The refusal decision:

On 20 April 2021, Colonel Sikhakhane refused the in-transit permit on two grounds stated in a letter by her, being the following:

> "i. *The applicant, juristic person details is not registered in terms of Section 7 of the Firearms Control Act 60 of 2000. The company does not have registration number (FAR number).*
>
> ii. *The transporter to be used (Comair Flight Services) does not hold a permit to transport firearms*".

In her answering affidavit, the Colonel explains more fully the first ground for refusal as follows:

> "...*having regard to Regulation 13(3)(b) it would not be competent in law for the applicant to be issued with an in-transit*

permit because it is not registered nor incorporated in accordance with the laws of the Republic".

[5] The review

5.1 As set out in their answering affidavit, the first ground of refusal relied on by the respondents (including Colonel Sikhakhane), is based on the wording of Regulation 13(5)(b), the relevant part of which reads as follows:

> "*13. General provisions regarding applications required in terms of the Act:*
>
> *(1)* ...
>
> *(5)(b) the application must be accompanied by proof of the registration or incorporation, as the case may be, of the juristic person in accordance with the laws of the Republic*".

5.2 From the outset, two things must be noted:

- The first is that the FCA does not prohibit foreigners from conveying firearms through the Republic. In fact this is an often occurrence in the case of natural persons of which the applicant has furnished examples in its papers.

- The regulations may legitimately regulate the implementation of the FCA, but cannot prohibit that which the FCA does not prohibit. This is an application of the trite principle that subordinate legislation cannot override the legislation itself in terms of which it has been promulgated.

5.3 All that section 74 of the FCA prescribes, is that "*an import, export or in-transit permit may be issued to a person who is a fit and proper person to hold such permit*". There is no evidence to suggest that the applicant is not such a person.

5.4 In respect of a natural person applying for such a permit, Regulation 13(9)(b) states that "*for the purpose of an import, export or in-transit permit contemplated in Chapter 8 of the Act, the Registrar may, in respect of a non- citizen who is not resident in the Republic of South Africa, accept such set of fingerprints as may be expedient in the circumstances*".

5.5 There is no similar provision for what method of identification or verification would be required for a non-resident (or "non-citizen") who is a juristic person. The closest related provisions are the general provisions regarding juristic persons applying for permits, namely that contained in Regulation 13(5), which I now quote here in full: "*13(5) When the applicant is a juristic person – (a) the Registrar may require additional information to the information requested in the application form, in respect of any person who is in control of the juristic person or is responsible for the management thereof, (b) the application must be accompanied by proof of the registration or incorporation, as the case may be, of the juristic person in accordance with the laws of the Republic of South Africa*".

5.6 Regulation 13(5)(b) can go no further than require confirmation of the incorporation of the applicant (as a foreign registered company) in similar fashion as this court has accepted its *locus standi* as such "*in terms of the laws of the Republic of South Africa*". The sub-regulation talks about *additional information"* and cannot be interpreted wider to the effect that it means that a juristic person applying for an in-transit permit may only be

a South African registered juristic person. This would impose a prohibition or limitation not contained in the Act. The reliance by the decisionmaker on such a purported prohibition is therefore misplaced and does not constitute a valid reason for having refused the permit.

5.7 As to the second ground referred to in paragraph 4 above, the applicant indeed initially indicated that it intended using Comair Flight Services, who does not have the necessary transport permit. A refusal to issue a permit, should this have remained the case, would have been justified, but by the time Colonel Sikhakhane eventually made her decision, she has already been informed that SA Airlink, to whom she had issued a transporter's licence, would be used. The learned Colonel's objection that the initial application had not been amended (other than by way of correspondence) or that no confirmation had been received from SA Airlink, are no valid reasons for refusal and any confirmation could, in the circumstances of this case, simply have been added as a condition to the issue of the permit, had that been the actual concern.

5.8 I therefore find that the refusal to issue the in-transit permit, on the reasons supplied at the time of such refusal, was not in accordance with the FCA and the Regulations. The first reason is not authorized by the empowering legislation and the second reason implies that relevant considerations were ignored. These grounds therefore fall foul of Sections 6(2)(e)(i) and (iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[6] <u>The respondents' remaining objection to the relief claimed:</u>

6.1 Despite the above, the respondents objected to a review of the refusal being contemplated at all, due to the fact that a right of internal appeal still existed. The applicant states that it could not exercise this right as no notice

as contemplated in Regulation 89(c) has been issued which would have enabled it to do so and furthermore, having regard to the length of time it took to obtain a decision on its initial application, it fears that any appeal process would extend beyond the period of validity of its importers permit, not only rendering the matter moot, but which would also lead to irreparable harm. The indications from the respondents' papers are further that any decision on appeal which might favour the applicant would, in its view, be "precluded by law". If this is the stance of the respondents, which includes the Appeal Board, then any internal appeal based on such a foregone conclusion, would serve nothing but a delaying purpose. I am therefore satisfied that sufficient exceptional circumstances exist to allow the review to proceed as contemplated in section 7(2)(c) of PAJA, without the exhaustion of an internal remedy.

6.2 A further objection by the respondents to the application, is that the firearms have entered the country prior to the granting of the in-transit permit. The "arrangement" of such an importation, amounts to a criminal offence, disentitling the applicant to the relief it seeks, so the respondents argue. Colonel Sikhakhane puts it as follows in her answering affidavit: "*On this score alone, the applicant contravened Regulation 63(1)(a) and (b) and stand to be charged as envisaged in regulation 110...* ". In addition, the respondents contend that the firearms might be illegally be in the country. In this regard, however, the Colonel says: "*... it is now apparent from the reading of the applicant's papers that the firearms are stored at OR Tambo International Airport. I am however advised that for purposes of this answering affidavit, I need not deal with the criminal implications of this issue*".

6.3 Whether the firearms have actually entered South Africa where it is held in bondage in "no man's land" as the applicant puts it, is open to some doubt. Once an in-transit permit is issued, the practical effect would be that the firearms would be on the next plane to Lesotho. Whether criminal sanctions should still be preferred regarding the "arrangement" of importation for the purpose of conveyance to another country prior to the actual issuing of an in-transit permit, should not be a bar to this. It is also not clear whether a conviction could be secured on the fact that the firearms had been shipped prior to the issuing of the in-transit permit if that had been done without the knowledge of the applicant, but even so, that does not now disqualify the applicant from obtaining the permit.

6.4 In heads of argument submitted on behalf of the respondents, it was submitted that, even if the refusal is reviewed and set aside, the applicant should still not be granted relief because the application was in the name of the applicant as a juristic person and not in the name of a nominated natural person and that the end-user certificate does not provide for a description of the firearms.

6.5 I am of the view that the applicant has, if one takes into account all the documents submitted to the respondents, substantially complied with all the requirements. This is further illustrated by the Form 520(a) annexed to the applicant's notice of motion, which caters for the requirements of Regulation 63. Once the reasons for the refusal given by Colonel Sikhakhane on 20 April 2021 fall by the wayside, then the granting of the permit should be a foregone conclusion. Any outstanding issue such as those now raised *ex post facto*, could have been or can notionally still be be added as conditions.

6.6 In terms of section 8 of PAJA, once an administrative decision found to be reviewable and is set aside, a court is entitled to make any order it deems just and equitable in the circumstances. In exceptional circumstances, this may include relief to the effect that the decision is overturned. Having regard to the specific facts of this case, the time elapsed and the reasons why the refusal is set aside, I find that this is a sufficiently exceptional case to warrant such an order.

[7] Costs

Despite the fact that the decision complained of has been set aside, there are a number of facts which could and did give rise to the fact that the permit was not at the outset ready to be issued with the particulars then supplied and for which the applicant is to blame. The applicant also, in my view, inappropriately accuses the respondents, and in particular, Colonel Sikhakhane, of either bias or incompetence. I find this to have been unwarranted. Cumulatively, I am of the view that this is a proper case where, despite the applicant's success, each party should pay its own costs.

[8] Order

In the premises, I grant an order as follows:

1. It is declared that the Applicant need not exhaust the internal administrative remedies as set out Section 7 of the Promotion of Administrative Justice Act, 3 of 2000 and the Firearms Control Act, 60 of 2000;

2. The decision of the Fourth Respondent dated the 20th of April 2021 to refuse applicant's in-transit permit, is reviewed and set aside;

3. The First, Second and Third Respondents, and whosoever may be delegated to do so, are ordered to issue an in-transit permit to the applicant based on the completed in-transit document SAPS 520 attached as Annexure **"A"** to the applicant's amended Notice of Motion (together with the supporting annexures thereto) within **5 (five)** days from the service of this order together with the said Annexures;

4. Each party is to pay its own costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 18 June 2021

Judgment delivered:8 July 2021

APPEARANCES:

For the Applicant:	Adv. M Snyman SC
Attorney for Applicant:	MJ Hood & Associates, Rivonia
For the Respondents:	Adv.M Rasekgala
Attorney for Respondents:	State Attorneys,Pretoria