IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO. 8612/05

In the matter between:

CLEARING AGENTS, RECEIVERS & SHIPPERS	**APPLICANT**
and	
THE MEMBER OF THE EXECUTIVE COUNCIL	**FIRST RESPONDENT**
MINISTER OF TRANSPORT	**SECOND RESPONDENT**
COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICES	**THIRD RESPONDENT**

JUDGMENT

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1. In a sub-continental region as vast as Southern Africa with an often underdeveloped or non-existent system of public transport, a large market for cheaper second hand motor vehicles exists. This application has its origins in the opportunities presented to business people to satisfy that demand.

2. The members of the applicant seek to satisfy this demand from a supply of second hand vehicles which appears to exist in *inter alia* the Japanese market, but to some extent also the United Kingdom (in respect of heavy duty trucks, trailers and tractors) and Singapore (in respect of ordinary sedan passenger vehicles). The countries for which these vehicles are destined include mainly Lesotho, Botswana,

Swaziland, Zimbabwe, Zambia and Namibia, which I shall refer to as "the Southern African countries".

3. The gateway for these vehicles to the Southern African countries is through the port of Durban. The bulk of the second hand motor vehicles so delivered to the Durban port destined for the Southern African countries, is from Japan. It appears that there are stringent laws in Japan providing for the regular testing of aging vehicles, rendering prolonged ownership of aging vehicles costly and undesirable. That market is therefore constantly in search of markets to off load these unwanted vehicles, which in their terms flood their second hand markets, at a reasonable return.

4. The applicant is a *universitas* whose members are all involved in this niche market describing themselves as "clearing and forwarding agents" or "motor vehicle importers", or as the founding affidavit puts it, "both". According to the founding affidavit applicant has been formed in order to advance or safeguard the interests of its members by *inter alia* making representations to appropriate authorities where necessary, and instituting legal proceedings in order to protect such interests. The first respondent is the provincial minister for the province of KwaZulu-Natal charged with transport and the second respondent is the national minister of transport to whom the administration of the Road Traffic Act No. 93 of 1996 (hereinafter referred to as "the Act") is entrusted. First and second respondents made common cause in their opposition to the application and will hereinafter jointly be referred to as "respondents".

5. The vehicles involved are intended to be utilised in the Southern African countries only. They are expressly stated not to be destined for the South African market. In fact, it is common cause that applicant's

members do not register and/or licence these vehicles in the Republic. According to the founding affidavit, the vehicles are offloaded in Durban and are only driven in transit through South Africa to their respective destination (or in some cases warehouses). The applicant's members "import, or clear and forward (or both)" approximately 6 000 vehicles through the port of Durban every month.

6. There are essentially three methods by which these second hand vehicles are brought through Durban for export into the Southern African states, namely removal in bond, removal in transit and warehouse entries.

7. In respect of removal in bond and removal in transit, the procedure is essentially the same. Vehicles are removed in bond to Botswana, Namibia, Lesotho and Swaziland and are removed in transit to other countries in southern Africa. The procedure entails that the vehicles are physically delivered to the port of Durban by ship. As the vehicles are not intended for use in South Africa, the importers of the vehicles are generally from countries outside the Republic of South Africa. The importers, who according to Applicant, have title to the vehicles, employ the services of clearing and forwarding agents in South Africa, particularly in Durban, in terms of contractual agreements with them, to clear the vehicles and have them available for collection. Once the vehicles are collected by the importer or his agent, they have to get to their destination. This is achieved at present by the vehicles being driven in transit on South African roads until they exit South Africa, generally to the country of final destination or in certain instances, passing through other countries before reaching the country of final destination. This application concerns in particular the process of driving these vehicles in transit through the Republic.

8. Prior to the ships carrying these vehicles arriving at the port of Durban, the clearing and forwarding agents, in terms of agreements with the importers, receive bills of lading and invoices which identify the vehicles which are due to arrive. The clearing and forwarding agents concerned then process the bills of lading through the Department of Customs and Excise and furnish security to cover customs duties and value added tax. Thereafter landing dues are paid to the South African Port Operations and wharfage is paid to the National Ports Authority of South Africa. A delivery note is issued to the clearing and forwarding agent or importer by the South African Port Operations, which entitles the clearing and forwarding agent or importer to collect the vehicles from the port of Durban.

9. Whilst the vehicles are physically offloaded from the ship, the clearing and forwarding agent or importer applies for three day permits in terms of regulation 84(1)(b) of the regulations to the Act (the so-called "special permit") to enable the vehicles to be driven to a licensed roadworthy testing centre to ascertain whether the vehicles are roadworthy for transit purposes and if so, to obtain certificates of roadworthiness. These certificates are issued by the motor licensing bureau, (which falls under the jurisdiction of first respondent) and are intended only to allow the vehicles to be used for the limited purposes of testing for the issue of certificates of roadworthiness or to be driven to a special bonded warehouse for storage.

10. Once certificates of roadworthiness are obtained, application is made to the same motor licensing bureau for 21 day permits in terms of regulation 84(1)(b) of the regulations to the Act (the so-called "temporary permits") to be issued, which permit the vehicles being driven on South African roads, only in transit. Once the 21 day permits have been obtained, the vehicles are driven to a site utilised by the Department of Customs and Excise for inspections, which inspections

are intended to ascertain that the details of the vehicles are the same as those appearing on the bills of entry, the certificates of roadworthiness and the 21 day permits. If all is in order, the Department of Customs and Excise authorise the vehicles to be released and they are then driven out of the Republic. When the vehicles leave the South African border, an entry is made by the Department of Customs and Excise confirming that the vehicles have left the country. This is usually done on the reverse side of the bills of entry and these documents, (called an "acquittal") are then returned to the clearing and forwarding agent, who in turn, hands the same over to the Department of Customs and Excise in Durban and the security facility is reinstated.

11. Insofar as warehouse entries are concerned, the same procedure is followed, save that the vehicles are generally imported into South Africa (for subsequent export purposes) by importers based in South Africa. These importers then utilise special bonded warehouses in which to store the vehicles until a purchaser/s for the vehicles can be obtained in a foreign African country.

12. The position at present is that the overwhelming majority of these second hand vehicles delivered to the port of Durban are, utilising the provisions of regulation 84 and the permits provided for therein, prepared and then driven in transit through and out of South Africa under their own power. The only alternative would be for the vehicles to be transported by motor carrier, of which there is apparently a short supply and which the applicant alleges carries significant cost implications. Respondents make the point that the practice of using the special and temporary permits for the purpose applicant's members use them, is confined to the Province of KwaZulu-Natal.

13. The central issue for determination in this application is accordingly the entitlement or otherwise of the applicant's members to the issue of the special three day and temporary twenty-one day permits in respect of the vehicles, thereby permitting these vehicles to be driven on their own power by road in transit through South Africa.

14. According to the applicant, the business of importation, clearing and forwarding of these second hand imported motor vehicles to other countries has developed into an industry over a period of approximately 8 or 9 years (first and second respondents maintain that it is approximately 3 years).

15. On or about 25 May 2005 a letter was addressed on behalf of the Director General of the Department of second respondent regarding the interpretation of regulation 84 of the National Road Traffic Regulations issued under the Act. This letter records:-

> "RE : INTERPRETATION OF REGULATION 84 OF THE NATIONAL ROAD TRAFFIC REGULATION UNDER THE NATIONAL ROAD TRAFFIC ACT, 1996 (ACT NO. 93 OF 1996) – TEMPORARY OR SPECIAL PERMIT
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> 1. It has come to the attention of the Department of Transport that imported vehicles which are destined for our neighbouring states are being issued with a temporary or special permit issued in terms of regulation 84 of the National Road Traffic Regulation, under the National Road Traffic Act, 1996 (Act No. 93 of 1996) which allows for these vehicles to be operated on a public road contrary to provisions of the regulations.
>
> 2. In terms of regulation 84 (1) of the National Road Traffic Regulations a temporary permit may be issued to a *person* referred to in regulation 84 (1)(a) as *being the owner of an unregistered or unlicensed motor vehicle to operate such motor vehicle on a public road, if such motor vehicle is to be delivered by or to such owner who is a motor dealer* as contemplated in the Act.

3. Furthermore, a special permit issued in terms of sub-paragraph (b) may only be issued to motor vehicles that are intended to be registered and licensed in the Republic. It is quite clear from the context of the sub-paragraph read in its entirety that the intention of the legislature is to enable unregistered and unlicensed motor vehicle to be operated on a public road for the purposes referred to in sub-paragraph (enclosed as Annexure A for ease of reference).

4. Accordingly, it is quite clear from the discussion highlighted above that both the temporary or special permit were not intended to be issued to motor vehicles transversing through the Republic.

5. Furthermore, taking cognisance of our commitment in terms of Article 3.2 of SADC Protocol and Article 24 of the SACU agreement to promote an integrated transport policy and freedom of transit such motor vehicles may transported through piggy-back on a vehicle complying with all the requirements of the National Road Traffic Act.

6. In view of the aforementioned, you are hereby advised that, with effect from 1 July 2005, the issuance of temporary or special permits, for imported, in-transit vehicles, is to be discontinued.

Your co-operation in this regard is appreciated."

16. This letter was followed shortly thereafter by a letter dated 2 June 2005 from the Head Transport of the Department of first respondent, recording *inter alia*, that it has been noted that imported vehicles which are destined for neighbouring countries are being issued with a temporary or special permit, referring to the provisions of regulation 84 and concluding with the view that:-

"3. The provisions mentioned above do not accommodate for the issue of temporary and special permits to motor vehicles in-transit. Vehicles transversing through the Republic may be transported legally through "Piggy Back", on a vehicle complying with all the requirements of the National Road Traffic Act (Act No. 93 of 1996).

4. All Registering Authorities are therefore requested to discontinue the issuing of Temporary or Special permits for vehicles "in-transit" and imported, with immediate effect from 1 July 2005."

In terms of this letter all registering authorities are therefore requested to discontinue the issuing of temporary or special permits for vehicles "in transit" and imported, with effect from 1 July 2005."

17. As a result of these two last-mentioned letters, applicant brought an urgent application ("the main application"). The urgency alleged by applicant was dealt with, by first and second respondents providing a suitable interim undertaking. The main application was also followed shortly thereafter with a request by first and second respondents for security for the costs of the application, and when that was not complied with, a substantive application for security for costs ("the security application"). Both the main application and the security application were argued before me.

18. The relief claimed in the Notice of Motion in the main application is in the following terms:

"(a) It is hereby declared that the interpretation by the Department of Transport, of the Province of KwaZulu Natal, of Regulation 84 of the National Road Traffic Regulation, promulgated under the National Road Traffic Act, Number 93 of 1996, contained in MLB circular number 29/2005 (a copy of which circular is annexed to the Applicant's Founding Affidavit in this matter as Annexure "A"), dated 2 June 2005 is incorrect and that upon a proper construction thereof, the said Regulation does accommodate for the issue of temporary and special permits in respect of imported second hand motor vehicles intended to be driven in transit on South African roads, for the purpose of export'

(b) the directive to all registering authorities, contained in paragraph 4 of the aforesaid circular, to discontinue the issuing of temporary or special permits for imported second hand vehicles "in transit"; with effect from 1 July 2005 is declared to be invalid and is hereby set aside alternatively, is reviewed and set aside in accordance with the provisions of Section 6 of the Promotion of Administration Justice Act, No. 3 of 2000, or alternatively in terms of the common law;

(c) it is hereby declared that the interpretation of the aforesaid Regulation by the Department of Transport, as contained in its circular dated 25 May 2005, issued by the Director General: Transport (a copy of which is annexed to the Applicant's Founding Affidavit as Annexure "B") is incorrect and that upon a proper construction thereof, the said Regulation does accommodate for the issue of temporary and special permits in respect of imported second hand motor vehicles intended to be driven in transit on South African roads, for the purposes of export;

(d) the directive contained in paragraph 6 of the aforesaid circular of the Department of Transport, for the discontinuation of temporary or special permits for imported in-transit second hand vehicles to be issued is declared to be invalid and is hereby set aside, alternatively is reviewed and set aside in accordance with the provisions of Section 6 of the Promotion of Administration Justice Act, Number 3 of 2000, alternatively in terms of the common law;

(e) the costs occasioned by this Application, including those consequent upon the employment by the Applicant of two Counsel, are to be paid by the First and Second Respondents, jointly and severally, the one paying the other to be absolved, save in the event of opposition hereto by any of the other Respondents or any other interested party, in which event such order as to costs shall issue as the above Honourable Court considers appropriate;

(f) further or alternative relief."

19. The papers filed in the main application are extensive, it being the contention of applicant that notwithstanding the application being one for a proper interpretation of regulation 84, applicant had to present its claim for declaratory relief against the correct factual background. Much effort has been expended on the part of both applicant and first and second respondents on the motivation for the interpretation of regulation 84 favoured by each of them, in the case of first respondent with reference to the abuses which occur and which will allegedly persist if the interpretation contended for by applicant was to be

accepted. That evidence is in my view largely, and in some instances totally irrelevant.

20. At the heart of the relief claimed is the proper interpretation of regulation 84 of the National Road Traffic regulations promulgated under the Act. Insofar as that enquiry entails a consideration of any background facts, where there is a dispute as to those facts, the matter will have to be decided on first and second respondents' version, in accordance with the well-established test in Plascon-Evans Paints v Riebeeck Paints (Pty) Limited 1984 (3) SA 623 (A).

21. The relevant provisions of regulation 84 provide as follows:-

> "84. Circumstances in which motor vehicle may be operated on public road under temporary or special permit
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> (1) A person who desires to operate on a public road a motor vehicle which has not been registered and licensed, and may not otherwise be so operated, may
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> (a) if he or she is the owner of such motor vehicle, obtain a temporary permit in respect of such motor vehicle in order to operate such motor vehicle on a public road as if it is registered and licensed, if such motor vehicle is to be –
>
> (i) delivered by or to such owner, who is a motor dealer; or
>
> (ii) registered and licensed in terms of this Chapter, but only during the period permitted for such registration and licensing; or
>
> (b) obtain a special permit in respect of such motor vehicle in order to operate such motor vehicle on a public road as if it is registered and licensed for purposes of –
>
> (i) testing such motor vehicle;
>
> (ii) proceeding to or returning from a place where repairs are to be or have been effected to such motor vehicle;
>
> (iii) reaching an examiner of vehicles or mass measuring apparatus'

(iv) repossessing such motor vehicle, as contemplated in Regulation 69(2).

(2) A temporary permit –

(a) shall not be issued in respect of a motor vehicle referred to in Regulation 138(1) unless a certification of roadworthiness in respect of such motor vehicle is submitted; or

(b) which is blank, may only be issued to a motor dealer.

(3) The owner of a motor vehicle which is licensed and cannot comply forthwith with the provisions of regulations 35 or 36, may obtain a temporary permit in order to operate the motor vehicle on a public road.

(4) ..."

22. Regulation 1 provides that in the regulations, an expression defined in the Act has that meaning unless the context indicates otherwise.

23. Applicant contends for a wide, general interpretation of the words used. It contends that if it fortuitously means that the regulations, properly construed, were capable of being interpreted to permit the purpose for which applicant's members utilize the regulations, then so be it. That is no doubt so. Respondents contend that the regulation, properly interpreted in the context of the Act and the regulations as a whole to determine the intention underlying the legislation, does not permit the interpretation placed thereon by applicant.

24. The Act is a piece of national legislation, with the object of providing for road traffic matters which are to be applied uniformly throughout the Republic in all the provinces and for matters connected therewith. Second respondent, is empowered in terms of section 75 of the Act to make regulations not inconsistent with the provisions of the Act in respect of any matter contemplated, required or permitted to be

prescribed in terms of the Act. The purpose of the Act is amongst others to regulate the introduction, registration and licensing of motor vehicles and the use of them in the Republic.

25. The regulations must accordingly clearly be considered in conjunction with and in the context of the provisions of the Act. In considering the "context" regard must be had not only to the language of the statute, but also its matter, its apparent purpose and scope and within limits, its background. See *Jaga v Dönges; Bhana v Dönges* 1950 (4) SA 653 at 662G-H. This is also in line with classical contextualism, also referred to as *ex viscribus actus* approach to statutory interpretation, which emphasises that a particular provision of the statute is to be understood as part of the more encompassing legislative instrument in which it has been included. Accordingly regard must be had to the Act and regulations as a whole. Attention should not be focused on a single provision in isolation from and to the exclusion of all others, so as to avoid an otherwise wholly wrong conclusion – see S v *Looij* 1975 (4) SA 703 (RAD) at 705C-D; *Transvaal Consolidated Land and Exploration Company Ltd v Johannesburg City Council* 1972 (1) SA 88 (W) at 94F-G.

26. In more recent times the purposive approach to interpretation has found favour with our courts. However, it has been long recognised that giving effect to the policy or object or purpose of legislation is an accepted strategy of statutory interpretation – see *Stellenbosch Farmers Winery Ltd v Distillers Corporation (SA) Ltd* 1962 (1) SA at 473 (F). *Nationale Vervoer Kommissie v Salz Gossow Transport* 1983 (4) SA 344 (A) at 357A and *Stopforth v Minister of Justice: Veenendwal v Minister of Justice* 2000 (1) SA 113 SCA at paragraph 21. A purposive interpretation can also be restrictive, precisely because it is purposive – see *Soobramoney v Minister of Health, KwaZulu Natal*

1997 (12) BCLR 1696 (CC) at paragraph 17 and *SA National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) at paragraph 28.

27. It is common cause between the parties that there is a general prohibition in terms of the legislation against the importation of certain vehicles. This general prohibition is subject to certain exceptions. The vehicles in which applicant's members are interested or concerned with, do not fall into any expressly excepted category.

28. On the wording of the regulations themselves, a person may only operate a motor vehicle on a public road, if the motor vehicle has not been registered and licensed and thus may not otherwise be so operated, as if it is registered and licensed;

(i) if he or she is the owner of such motor vehicle; and

(ii) if this motor vehicle is to be delivered by or to such owner, who is a motor dealer.

The words "such motor vehicle" refers to a motor vehicle which has not been registered and licensed and may not otherwise be so operated on a public road.

29. First and second respondents maintain that "such motor vehicle" which has not been registered and licensed, does not refer to all motor vehicles which exist or happen to be in the Republic of South Africa, but only includes motor vehicles intended to be registered in the Republic of South Africa, not motor vehicles never intended or destined to be registered in the Republic of South Africa. They argue that regulation 84 must be considered in conjunction with and interpreted in the context of the whole of the Act and the regulations. Accordingly, the enquiry should be one as to whether the provisions of the Act, permit

the issue of these permits to the vehicles, to examine the regulations themselves to determine whether the issue of the permits in respect of the vehicles can find consistency with and be harmonized with the issue of the permits, and finally to examine regulation 84 itself. They submit that regulation 84 must be confined in its operation to vehicles destined to be registered in the Republic of South Africa and becoming part of its vehicle population and not to the temporary vehicles just passing through.

30. The following appears from a brief examination of the Act and regulations:

(a) The point of departure is section 4 of the Act. Any motor vehicle to be used and operated on the South African roads must firstly be identified in terms of the National Traffic Information System (NaTIS), also referred to as the "register of motor vehicles". In terms of section 4 of the Act":-

"(1) The registration and licensing system of motor vehicles for each province shall be as prescribed.

(2) All motor vehicles shall be registered and licensed unless the contrary is prescribed in respect of specific cases."

All motor vehicles accordingly need to be registered and licensed unless the contrary is prescribed;

(b) This requirement of registration and licensing appears to pervade the whole operation of Act, the regulations and the South African vehicle population. In essence it requires that every vehicle to be used and operated on South African roads must first be introduced, registered and identified on the National Traffic Information System. It follows that vehicles destined for beyond the Republic of South Africa do not require to be so registered and licensed. Indeed, it was not Applicant's case that the vehicles its members deal with are to be registered

and licensed in the Republic of South Africa. Respondents submit that regulation 84 is predicated on and underpinned by this requirement of registration and licensing in section 4;

(c) There are a number of regulations which deal with registration and licensing which expressly provide for exceptions to this requirement of registration and licensing. These include amongst others regulation 4 (which contains a deeming provision in respect of vehicles separately registered and licensed in terms of any law of a prescribed territory, and which are in the Republic), regulation 5 (which deals with specific categories of motor vehicles which are exempt from registration) and regulation 43 (regarding manufacturers, builders who modify motor vehicles and importers who obtain a letter of authority). None of these categories includes the kind of vehicle Applicant's members are concerned with;.

(d) In respect of vehicles imported into the Republic, section 5 of the Act is to the effect that all second-hand motor vehicles introduced require to be identified and introduced and registered on NaTIS;

(e) Once registered on NaTIS pursuant to section 5 and regulations 7 to 16, if not destined for a motor dealer (as the case with new motor vehicles), but for a private individual, special permits can be applied for in terms of regulation 84 (1) (b) in respect of such registered vehicles to transport them to the relevant testing station for the purpose of obtaining a roadworthy certificate and, where they cannot immediately be registered in the name of the particular titleholder, a temporary permit may be issued in respect of such registered vehicle in terms of regulation 84 (1) (a), (2) and (3);

(f) On purchasing a motor vehicle registered on NaTIS, the titleholder is compelled to register the motor vehicle in his name in terms of regulation 7;

(g) In terms of regulation 18, subject to the provisions of regulations 19 and 20, every motor vehicle in the Republic, unless exempt from licensing because it is exempt from registration in terms of regulation 5, shall, whether or not it is operated on a public road, be licensed by the owner of such motor vehicle, in accordance with the provisions of Chapter 3 Part I of the regulations, with the appropriate registering authority;

(h) In respect of any subsequent sale of a motor vehicle to a further owner and titleholder, a certificate of roadworthiness is required in terms of regulation 138 (in certain circumstances), as well as in respect of those classes of motor vehicles referred to in regulation 142. It is in this context again that the need for a temporary permit in terms of regulation 84 (1) (a), (2) and (3) and for a special permit in terms of regulation 84 (1) (b) may arise. Depending on the context of any subsequent sale and the parties thereto, it might be possible to operate a vehicle in this transitional period under motor trade numbers (commonly referred to as "garage plates") pursuant to regulation 69, in respect of a vehicle "which may not otherwise be operated on the public road", which will allow the vehicle to be used on a public road under such motor trade number;

(i) Any transfer from an importer to the owner or subsequent owners, accordingly requires details to be registered and the vehicle to be licensed. It is clear that from the regulations and the Act as a whole, that from the time that a vehicle is introduced, its details and that of its title holder and sometimes owner are captured and are required to be updated for the vehicle to be used lawfully on South African roads. This obligation remains until the vehicle is eventually scrapped. It is

the obligation of the titleholder to ensure that the vehicle is registered. It is the obligation of the owner in terms of regulation 18 to ensure that the motor vehicle is licensed. Once the vehicle has become licensed, any subsequent sale will result in the vehicle becoming second-hand;

(i) Irrespective of whether a vehicle is to be used on the road, there is an obligation to license the vehicle, as appears from regulation 18.

31. The requirements of registration and licensing of vehicles are in my view all pervasive. It might happen that a particular vehicle has not yet been registered and/or licensed, thus creating the need for a special permit to be issued and in specific instances, possibly even a temporary permit (for example to move a vehicle from the Province of KwaZulu-Natal to Gauteng, after a certificate of roadworthiness has been obtained as required by regulation 84 (2) (a)). However, the provisions of regulation 84 are always to be employed only during the hiatus which exists before registration and/or licensing, but always as a step towards achieving proper registration and/or licensing of a vehicle in the Republic. Temporary permits may also be used while obtaining number plates for a vehicle as required in terms of regulations 35 and 36, for dealers to move vehicles from one dealership to another. It follows, in my view, that the provisions of regulation 84 cannot be applied for the purposes Applicant wish them to apply to, where permits are issued in respect of vehicles which are not intended to be registered and licenced in the Republic.

32. In my view, the underlying purpose of the Act and the regulations is to regulate the registration and licensing of motor vehicles which form part of or are intended to become part of the South African vehicle population, including the ownership and use of them in the Republic.

There does not appear to be any provision in the Act or the regulations for vehicles in transit to be driven on South African roads where those are not required to be licensed and registered and are not intended to be licensed and registered in South Africa. Any motor vehicle in the Republic shall, whether or not it is operated on a public road, be registered by the title holder thereof in accordance with the provisions of Part 1 under Chapter III of the regulations with the appropriate registering authority.

33. The vehicles *in casu* simply do not appear to fall within the purview of any of the exceptions. It is not Applicant's case that the vehicles its members deal with are "... to be registered and licensed in terms of this Chapter". On the contrary. Accordingly, regulation 84(1) does not find application, as it, in my view, only applies to vehicles to be registered on the RSA registration system. The rhetorical question may be posed as to why NaTIS should be burdened with details of all these other vehicles simply passing through in transit, being really in the nature of "goods". There is no need or purpose whatsoever for these vehicles to be licensed in the Republic. It follows, in my view, that the relief claimed in paragraphs (a) and (c) of the Notice of Motion must fail.

34. If I am correct in my above conclusion, then it would not be competent to issue any permit, whether a temporary permit or a special permit in terms of regulation 84 in respect of vehicles which are merely in transit and not destined to be registered and licensed in the Republic. That would be the end of the enquiry and disposes of the relief claimed in paragraph (a) and (c) to the Notice of Motion.

35. In any event, a temporary permit can in my view only be issued in terms of regulation 84 in respect of "such motor vehicle", if delivered by or to such owner who is a motor dealer.

36. Irrespective of whether the word "delivered" is intended to convey an actual *tradition* and passing of actual ownership, as contemplated in the common law, as opposed to a delivery by such owner for some other purpose other than the passing of ownership, such as some form of *detentio*, the use of the words "owner", and "motor dealer" require closer scrutiny.

37. "Owner" is defined in the Act to mean:-

> "...in relation to a vehicle ...
>
> (a) the person who has the right to the use and enjoyment of a vehicle in terms of the common law or a contractual agreement with the title holder of such vehicle;
>
> (b) any person referred to in paragraph (a) for any period during which such person has failed to return that vehicle to the title holder in accordance with the contractual agreement referred to in paragraph (a); or
>
> (c) a motor dealer who is in possession of a vehicle for the purpose of sale,
>
> and who is registered as such in accordance with the regulations under section 4, and "own" or any other like word has a corresponding meaning."

38. "Motor dealer" is defined in the Act to mean:-

> "... any person who is engaged in the business of buying, selling, exchanging or repairing motor vehicles required to be registered and licensed in terms of this Act or of building permanent structures onto such vehicles and who complies with the prescribed conditions".

39. Applicant contends for a wider interpretation of the words "owner" wherever it appears in regulation 84, in accordance with paragraphs (a), (b) and (c) of the definition of "owner" in the Act. It is however clear in my view, that the phrase "and who is registered as such in accordance with the regulations under section 4 ..." is additional and must be read conjunctively with the provisions of either paragraph (a), (b) or (c), depending on whichever finds application.

40. Applicant further points out that there are no provisions regulating registration of ownership "in accordance with section 4...". Section 4, set out above, provides for registration, but there are of course no regulations under section 4. The regulations are promulgated in terms of the powers contained in section 75 of the Act, although there are regulations dealing with matters of registration which are dealt with in terms of section 4. The Afrikaans text refers to "ooreenkomstig die regulasies kragtens artikel 4". That, purposively interpreted, is the meaning to be ascribed to that phrase. In that context there are a number of regulations in respect of or under section 4 dealing with registration of ownership such as for example regulations 3 to 37, 52 to 68, 84 to 90 and 335 to 336.

41. In my view, an interpretation of the definition of "owner" in the Act that will assign a meaning to every word used and which would not render them superfluous or unnecessary is to be preferred. I cannot envisage any other plausible purposive interpretation of the definition of "owner" and more specifically the phrase "and who is registered as such in accordance with the regulations under section 4" than that the definition of owner means a person registered as such in terms of the empowering provision and obligation in section 4 of the Act. To hold otherwise would be to negate the effect of the words "and who is registered as such in accordance with the regulations under section 4".

The phrase is perhaps best understood by reading in a comma after the word "...regulations".

42. If the owner referred to in regulation 84 in relation to a vehicle is per the definition of "owner" in the Act, a person registered as such in accordance with regulations under section 4, then there would be no need to obtain a temporary permit in respect of such vehicle as such motor vehicle would not be one which has not been registered, (although it may conceivably not yet be licensed).

43. The "owner of such vehicle" or "such owner" in regulation 84(1)(a), must in the context of that regulation, unless it means a person who has not yet been licensed as the owner, mean something other than the owner as defined in the definition in the Act, probably "an owner" as understood in the common law to whom delivery of the vehicle with the requisite intention to pass ownership has been effected. Alternatively, Respondents argued that to make sense of regulation 84 the words "as if he or she is to become the owner" must be read in. In my view that is a preferred interpretation of the word "owner" in the context of regulation 84.

44. "Such owner" in regulation 84(1)(a)(i) must in any event be one "who is a motor dealer". None of applicants members is even colloquially referred to as a motor dealer. Applicant referred me to the dictionary meanings of the word "engaged" and argued that applicant's members were "engaged in the business of buying, selling, exchanging or repairing motor vehicles..." and thus were "motor dealers. I am not persuaded that applicant's members are engaged in such business of buying, selling, exchanging or repairing vehicles. Regardless of the merits of that argument, applicant's members are not engaged in the

selling of "motor vehicles required to be registered and licensed in terms of this Act..." and in my view accordingly cannot qualify as motor dealers.

45. To the extent that special permits and temporary permits may have been issued in respect of such vehicles in transit in the past, such issue was in my view not authorised in terms of the regulation and accordingly were *ultra vires* and not in accordance with the constitutional principle of legality – see *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at 400F-401A. The fact that the regulation might have been interpreted in a specific manner in the past does not in my view mean that such an incorrect interpretation and the unauthorised conduct arising therefrom must be perpetuated into the future. The way a particular provision has been interpreted in the past, is merely a consideration which may be taken into account – see Dinkel v Union Government 1929 AD 150 at 165. Following from my above conclusion, the issuing of special and temporary permits in the province of KwaZulu-Natal was not authorised in terms of regulation 84 and had to be stopped. As such there was no decision as contemplated in the Promotion of Administrative Justice Act no. 3 of 2000 (hereinafter referred to as "PAJA") which had been made and to which the provisions of that Act could apply – see Frans v Munisipaliteit van Groot Brakrivier 1997 (3) BCLR 346 (C). Applicant's members simply have no enforceable rights flowing from the Act or the regulations and in particular regulation 84, entitling them to have temporary and special permits issued in respect of their vehicles.

46. It is accepted that an administrator must act in terms of and in accordance with the terms of an empowering statute or other law and not beyond the terms thereof – see *Pharmaceutical Manufacturers*

Association of South African and Another; In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu Natal* 1998 (2) SA 900 (CC) and *The Monastery Diamond Mining Corporation (Edms) Bpk v Schimper* 1983 (3) SA 538 (O) at 586. Whatever the motivation for having issued such permits, the mere fact that they were issued irregularly or unlawfully, cannot be used in a claim to perpetuate the issue of permits which are unlawful – see *Hoisain v Town Clerk, Wynberg* 1960 (AD) 236, *Haupfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C), *Singh v Group Areas Development Board* 1964 (4) SA 391 (D), *The Monastery Diamond Mining Corporation v Schimper (supra)* and *Durban City Council v Glenmore Supermarket and Café* 1981 (1) SA 470 (D) at 478E-F.

47. The past irregular and unlawful issue of the permits, regardless of whatever expectation it might have created in the minds of applicant's members, did not create a legitimate expectation, as the representation or expectation was not one which was competent and lawful for the administrative decision maker to make. Consequently any reliance placed thereon cannot be legitimate – see *SA Veterinary Council and Another v Szymanski* 2003 (4) BCLR 378 (SCA) at 383C-H, *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 559E-G and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paragraph 216.

48. A legitimate expectation cannot, in my view, be created where such expectation would be in conflict with the empowering legislation under which the particular administrative authority acts, nor should it infringe legally protected rights and interests or amount to a practice which is in conflict with statutory common law rights.

49. Applicant has, in the alternative to the declaratory relief claimed, contended that the directives by second respondent and first respondent directing the discontinuation of the issuing of temporary or special permits for imported second hand vehicles "in transit" with effect from 1 July 2005, was invalid and fell to be set aside, alternatively be reviewed and set aside in accordance with the provisions of section 6 of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA") or alternatively in terms of the common law.

50. Even assuming in favour of applicant that those directives amounted to the exercise of a decision, it was a decision to bring to an end what was unauthorised or illegal. In my view, this does not amount to a decision as contemplated in PAJA. Even if I am incorrect in that regard, I do not believe that it constituted "administrative action" as envisaged in the definition of that phrase in section 1 of PAJA.

51. The definition of "administrative action" means any decision taken or any failure to take a decision, by an organ of State .... which adversely affects the rights of any person and which has a direct, external legal effect, but does not include certain executive powers or functions of the national executive including the powers or functions referred to in section 100 of the Constitution.

52. If my above conclusion that the issue of temporary and special permits in respect of the motor vehicles *in casu* is prohibited by law, there can be no enforceable rights on the part of the members of applicant flowing from the Act and/or regulations entitling them to have temporary and special permits issued in respect of the vehicles.

53. Expressly excluded from the definition of "administrative action" is furthermore the situation contemplated in section 100 of the Constitution. That section provides that when a province does not fulfil an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations.

54. That in essence, was all second respondent sought to achieve and which first respondent sought to give effect to.

55. The main application accordingly falls to be dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

56. It still remains to consider the merits of the security application. First and second respondents rely on the fact that applicant is a *universitas* and that none of its members shall attract liability in their personal or representative capacities in terms of the constitution of applicant. Attention is also drawn to the fact that applicant was constituted on or about 8 February 2005, being the date coinciding more or less with the time when the importation of second hand vehicles into the Republic of South Africa and the issuing of temporary and special permits in respect of such second hand vehicles, came under the spotlight. The inference ought to be drawn is that applicant was formed at a time when it was anticipated that the practice of issuing such permits was to be discontinued and that litigation was likely to ensue, specifically that applicant was envisaged as the vehicle for pursuing such litigation.

57. With reference to the provisions of section 13 of the Companies Act, No. 61 of 1973 and the equivalent provision in regard to close corporations, respondents contend that the fact that applicant is not a company or close corporation, does not preclude first and second respondents from seeking security. It is contended that applicant's argument to the contrary in that regard is untenable in the light of the provisions of rule 47.

58. Rule 47 of the Uniform Rules of Court deals with the procedures for requesting security but does not indicate the type of case in which one party is entitled to demand security for costs from the other. It deals only with the purely procedural aspects of the matter. Accordingly, recourse must therefore be had to the common law and to other statutory provisions which deal with security for costs.

59. *In casu*, there is no statutory provision dealing with security for costs in respect of a *Universitas*. The enquiry is therefore purely one as to whether the common law makes provision for such security for costs to be furnished.

60. Applicant does not fall into the common categories of *peregrini* or unrehabilitated insolvents. It is also not a situation where first and second respondents seek to make out that the application is vexatious *per se*, although there is some suggestion that the timing of the formation of applicant is a strategic ploy to avoid liability for costs. It is, of course, a common law principle that where a party to litigation is a man of straw and litigates in a nominal capacity, a court may order such party to furnish security for costs – see *Mears v Brooks Executer*

and Mears' Trustee 1906 TS 546 at 550; *Pillemer v Israelstam and Shartin* 1911 WLD 158.

61. Although it might have been possible to say that applicant has no interest in the subject matter of the action (it certainly does not appear to have an immediate and direct financial interest), it is not the real applicant and is really in a position of a nominal applicant.

62. The learned authors in *Herbstein and von Winsen – The Civil Practice of the Supreme Court of South Africa – 4th Ed.* at page 342 state that:-

> "It may be that where the process of the court is being abused by a man of straw being put up as a plaintiff while the real party shelters himself behind the dummy, the court will order security for costs to be given. But it must be clearly shown that the plaintiff is such in name only and that he possesses no property."

63. *In casu*, applicant is the applicant in name only. It possesses no property and in opposition to the application, no evidence that it does possess property has been tendered. The real parties who insist on the relief claimed, namely the members of applicant, effectively shelter themselves behind applicant as a dummy.

64. Applicant contends that costs are in fact being saved by the relief being claimed in the name of applicant, as first and second respondents would otherwise have faced numerous individual applications by the individual members of applicant. Nothing precluded the individual members of applicant, at very little additional costs, if any, to have all joined in as separate applicants in the same application claiming the same relief against first and second respondents.

65. Indeed, before the extended legal standing provided to persons to enforce rights in the Bill of Rights, now contained in section 38 of the Constitution of the Republic of South Africa, applicant would probably not have had the required *locus standi in iudicio* to have claimed the relief – see *Natal Fresh Produce Growers' Association and Others vs Agroserve (Pty) Ltd and Others* 1990 (4) SA 749 (N) at 758G and *Transvaal Canoe Union and Another v Butterelt* 1986 (4) SA 207 (T).

66. The extended *locus standi* conferred in section 38 of the Constitution relates to the enforcement of a right arising from the infringement or threatened infringement of a right in the Bill of Rights contained in the Constitution. The declaratory relief claimed in paragraphs (a) and (c) to the Notice of Motion do not involve any such right. Just administrative action is a right contained in the Bill of Rights, section 33 and although the right to just administrative action has largely been codified in PAJA, it has been recognised that there is still a residual right to just administrative action arising from the operation of the right guaranteed in section 33 of the Constitution, insofar as that may not now have been provided for in the national legislation which had to be enacted, being PAJA.

67. Assuming that the directives of first and second respondents might constitute the possible violation of a right in the Bill of Rights, which could confer *locus standi* upon applicant in terms of the provisions of section 38(c), section 38(d), or section 38(e), the same might not necessarily be said in respect of the declaratory relief in paragraphs (a) and (c) to the Notice of Motion. A challenge to applicant's *locus standi* was however not raised in the answering affidavit and I accordingly do not express any definitive views on applicant's *locus standi* to have claimed the relief in paragraph (a) and (c) of the Notice of Motion. What it does, however, in my view signify is that applicant is a mere

nominal party in regard to that relief and that there is probably some justification for the inference sought to be drawn by first and second respondents that applicant is simply used as the vehicle to pursue the present litigation, as it would not leave applicant's members exposed to any adverse costs order and would really leave first and second respondents with an empty shell against which to execute for any costs order in their favour, in the event of them being successful in their opposition to the relief claimed.

68. I would accordingly ordinarily have been inclined in principle to order the furnishing of security for the costs of the application. Applicant however further contends that there had been an unreasonable delay on the part of first and second respondents in requesting the security. It is so that the provisions of rule 47(1) provide that a party entitled and desiring to demand security for costs from another shall, as soon as is practicable, after the commencement of the proceedings deliver a notice setting out the grounds on which such security is claimed and the amount demanded. The main application was launched as a matter of urgency on 21 June 2005. The notice in terms of rule 47(1) was served on 21 July 2005. It is accordingly contended that a delay of one month does not constitute service "as soon as practicable".

69. In my view a delay of one month is not unreasonable. It is unfortunate that the security application had to be heard together with the main application, but this was to some extent as a result of the conduct on the part of applicant's attorneys who by 5 August 2005 had agreed to furnish the security, save that applicant required the amount thereof to be determined by the Registrar. The willingness to provide security was however subsequently withdrawn and a letter from applicant's attorneys dated 17 August 2005 stating that when they had "proffered

the sum of R75 000,00, we did so without seeking our client's instructions", is somewhat startling.

70. It has been held that a failure to demand security at an early stage is not fatal, but that it is merely a factor to be taken into account in the exercise of the court's discretion – see *Fedgen Insurance Co. Ltd v Border Bag Manufacturing (Pty) Ltd and Another* 1995 (4) SA 355 (W) and *ICC Car Importers (Pty) Ltd v A Hartrodt SA (Pty) Ltd* 2004 (4) SA 609.

71. In the absence of any proof that applicant would be able to satisfy any costs order made, I believe that first and second respondents were entitled to persist with their application for security for costs. The effectiveness of such an order, coming after the main application has been heard, and judgment has to be delivered thereon is debateable, particularly also where the issue of any security in respect of any possible subsequent appeal is a totally separate matter (see section 20(5) of the Supreme Court Act No 59 of 1959). However, the furnishing of security might have an effect on other procedures which might arise before an appeal is in fact pursued. These considerations do not in my view deny first and second respondents their right to claim such security and to obtain an appropriate order in their favour.

72. I accordingly direct applicant to furnish security for first and second respondents' costs of the application in an amount to be fixed by the Registrar of this Court in accordance with the provisions of rule 47 and that applicant is directed to pay the cost of the application for security, such costs to include the costs consequent upon the employment of two counsel.

73. To summarize:

(a) The main application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel;

(b) In respect of the security application, I direct applicant to furnish security for first and second respondents' costs of the application in an amount to be fixed by the Registrar of this Court in accordance with the provisions of rule 47 and that applicant is directed to pay the cost of the application for security, such costs to include the costs consequent upon the employment of two counsel.