REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ✓

Date: ***29th November 2022*** Signature: _____

CASE NO: 045833-2022

DATE: 29TH NOVEMBER 2022

In the matter between:

AFRICAN SHADES TRADING (PTY) LIMITED	First Applicant
AST RECYCLING WESTERN CAPE (PTY) LIMITED	Second Applicant
AST RECYCLING KZN (PTY) LIMITED	Third Applicant

and

THE SOUTH AFRICAN DIAMOND AND PRECIOUS METALS REGULATOR	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	Second Respondent
THE NATIONAL HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Third Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	Fourth Respondent
THE MINISTER OF MINERAL RESOURCES & ENERGY	Fifth Respondent
THE INTERNATIONAL TRADE COMMISSION OF SOUTH AFRICA	Sixth Respondent

Coram: Adams J

Heard: 22 November 2022

Delivered: 29 November 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 29 November 2022.

Summary: Urgent application – Uniform Rule of Court 6 (12) – interim interdictory relief –

Precious Metals Act – different interpretations of legislation – applicant's *prima facie* right based on its interpretation of Act – provided interpretation is sustainable, applicant should be granted relief – respondents interdicted from interfering with applicants' business.

ORDER

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(1) The non-compliance by the applicants with the Uniform Rules of this Court, in regard to service and time limits, is condoned and this application is permitted to be heard as one of urgency in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.

(2) The non-compliance by the applicants with the statutory notice period to the fourth respondent under section 96 of the Customs and Excise Act, 1964 is condoned and the notice period is reduced to 2 days.

(3) The detention of the first applicant's goods comprising eight drums of spent catalytic converters weighing 2 637 kilograms in terms of the fourth respondent's detention notice of 26 October 2022, under reference number SC-CC-02-A1, is hereby set aside and the goods are released to the first applicant for export purposes, on the basis that a refining licence is not required.

(4) The detention of the first applicant's goods comprising one pallet and two drums of spent catalytic converters weighing 659 kilograms in terms of the fourth respondent's detention notice of 18 November 2022, under reference number SC-CC-02-A1, is hereby set aside and the goods are released to the first applicant for export purposes, on the basis that a refining licence is not required.

(5) The first to fourth respondents are interdicted and restrained from confiscating, detaining, disposing of or in any way interfering with the acquisition, possession, disposal or export by the applicants of crushed catalytic converters in powder form whether in the purported exercise of the powers entrusted to the South African Police Service under the Precious Metals Act 37 of 2005 ('the Precious Metals Act') or in terms of the Customs and Excise Act 91 of 1964 ('the Customs Act') on the basis that a refining licence is required.

(6) The relief in prayers 3 to 5 *supra* shall operate as an interim interdict pending the outcome of Part B of this application.

(7) The fourth respondent be and is hereby ordered and directed to ensure that a copy of this order relative to part A is made available and circulated to all Customs officials stationed at ports of entry of the Republic of South Africa.

(8) The costs of Part A of this application are reserved for determination at a hearing convened for purposes of Part B.

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the first applicant (African Shades), the second applicant (AST Western Cape) and the third applicant (AST KZN) for interim interdictory relief against the first respondent (the Regulator), the second and third respondents (the SAPS), and the fourth respondent (SARS). All three the applicants are in the business of recycling of catalytic converters and in

the business of exporting such recycled catalytic converters in crushed and powder form. Pending the determination of final relief sought in part B of the notice of motion, the applicants seek an order, on an urgent basis, interdicting and restraining the first to fourth respondents from confiscating, detaining, disposing of or in any way interfering with the acquisition, possession, disposal or export by the applicants of crushed catalytic converters in powder form. Additionally, the first respondent applies for orders setting aside the detention of their goods – comprising *inter alia* eight drums of spent catalytic converters – and for an order releasing to the first applicant such goods for export purposes.

[2]. In part B the applicants apply for final relief in the form of declaratory orders to the effect that their acquisition, possession, grinding, crushing, disposing of and exporting catalytic converters in powder form, do not involve the acquisition, possession or disposal of 'unwrought precious metal' or 'semi-fabricated precious metal' as defined in the Precious Metals Act[1]. In a nutshell, what the applicants are applying for in Part B of this application is a declaratory order that their business of and the processes involved in the recycling of catalytic converters do not implicate the provisions of the Precious Metals Act and in particular that they are not required to apply for and be issued with a 'Refining Licence' as contemplated and envisaged in s 7 of the Precious Metals Act. The applicants will therefore contend in Part B that they do not violate any of the provisions of the Precious Metals Act. There are other ancillary relief applied for in Part B, but it is however not necessary for purposes of this judgment for those to be detailed.

[3]. From the above, it is clear that an issue central to the dispute between the parties is whether or not the conduct of the applicants, in exporting what is referred to by the applicants as 'spent catalytic converters in powder form' without a refining licence, is unlawful. The Regulator and the SAPS are of the view that such conduct is indeed unlawful, whereas the applicants, on advice from Counsel and other legal practitioners, are of the view that it is not. The dispute therefore requires an interpretation of the relevant provisions of the Precious Metals Act. And it is the case of the applicants that, on a proper interpretation of the said

[1] The Precious Metals Act, Act 37 of 2005;

provisions, they are not obliged to have a refining license for purposes of the conduct of their business as set out above.

[4]. It is on the basis of their interpretation of the relevant provisions that the SAPS (Crime Intelligence) – on 26 October 2022 – detained the first applicant's goods comprising eight drums of spent catalytic converters weighing 2 637 kilograms, which was scheduled for export to Europe. The applicants contend that they are not subject to the statute and that the detention of the first applicant's goods is unlawful. The detention is based on an incorrect interpretation of the statute, so it is submitted on behalf of the applicants, and any future detentions based on the same interpretation of the statute will likewise be unlawful.

[5]. The events of 26 October 2022 were preceded by events dating back to 2018. In particular, on or about 15 June 2018, officials of the first respondent conducted an inspection of the first applicant's premises in Kew, Johannesburg. Subsequently, the Regulator, in a written communiqué dated 2 December 2019 addressed to the first applicant, advised the first applicant and recorded that unwrought and semi-fabricated metals were found on the premises and that the first applicant was required to be in possession of a precious metal refining license. The failure to produce a refining license, so the communiqué advised, was in contravention of sections 4, 5 and 7 of the Precious Metals Act. The first applicant was given thirty days to produce such a license or to apply for one.

[6]. The first applicant took legal advice on the matter and formed the view that it did not require a refining license. The regulator was advised accordingly and the first applicant continued its business operations, until 23 August 2022, when a Sergeant Abrahams from the SAPS (the Hawks) attended a meeting at the premises of the first applicant, at which meeting he advised the first applicant that it is the stance of the SAPS that the first applicant was required to apply for a refining license since its activities were subject to the issue of a refining license in terms of section 7 of the Precious Metals Act. The first applicant was also advised by Abrahams that he would be returning in three months, at which point, so he stated, the first applicant should be in possession of a refining licence, failing which there would be 'a problem'.

[7]. The next stop was Wednesday, 26 October 2022, on which date the first applicant had lined up eight drums of spent catalytic converters in crushed powder form for export to Europe on an Air France flight, which was scheduled to leave OR Tambo International Airport at 18:50. At approximately 16:09 the first applicant learned from Abrahams that the drums had been detained. This event triggered this urgent application.

[8]. This dispute relating to the interpretation of the relevant provisions of the Precious Metals Act is not one which is required to be adjudicated by me. What I am required to decide in the applicants' application for interim interdictory relief is whether the applicants have made out a case for such relief. Importantly, the question to be answered is whether the applicants have demonstrated that they have a *prima facie* right, entitling them to the interim relief. The point is simply whether the applicants' interpretation of the relevant provisions is at least viable, and, if so, whether such an interpretation gives rise to a right on which to base interim relief.

[9]. The latter part of the enquiry, in my view, is simple. It goes without saying that, if the applicants are not required to possess a refining licence for purposes of them conducting their recycling business, then there is no reason for the first to fourth respondents to interfere with such business. They would have a right to possess the spent catalytic converters and to export same as part of their business and trade. Moreover, in vindicatory claims it is factually presumed unless the contrary is shown, that the applicant will suffer irreparable harm if the interdict sought is not granted. In that regard, see *Stern v Ruskin NO & Appleson*[2].

[10]. As regards the enquiry relating to whether the applicants are required to possess refining licences to conduct their business, the relevant facts in the matter are, in my view, instructive. It is not necessary to deal with the facts in detail. The following summary will suffice.

[11]. Every vehicle fuelled by diesel or petrol has a catalytic converter that contains a monolith with precious metals such as palladium, platinum and

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[2] *Stern v Ruskin NO & Appleson* 1951 (3) SA 800 (W) at 813B-C;

rhodium, all of which are embedded in the substrate of the honeycomb of the exhaust. The precious metals that go into these components are a rare and finite resource. It is therefore important to recycle them when the vehicle comes to the end of its life, or when the converters themselves must be replaced.

[12]. In the manufacture of the catalytic converters the precious metals are dissolved in a solution, which is then applied to a ceramic base and baked to cause the previous metals to adhere to the ceramic base. The ceramic base is then built into the exhaust system.

[13]. At the recycling stage, the catalytic converters arrive as loose solid spent catalytic converters. The casing is removed, and the catalytic converters are cut out of the steel casing and crushed into a powder form which is then sampled and paid for based on the 'Platinum Group Metals' (PGM) content. The value of the spent catalytic converters depends on the number of precious metals they contain which is determined using the most advanced technology on the market to accurately and reliably analyse the metals contained within each catalytic converter.

[14]. The catalytic converters in their powder form are then packed into twenty litre drums for final shipment to specialised international refineries in Belgium and other countries too. No refining, sorting or extraction of the PGM takes place following the crushing and grinding of the catalytic converter. What is placed in the drums in crushed powder form is the entire substratum of what was previously the catalytic converter. None of this is seriously disputed in answer to the case made out by the applicants.

[15]. It is the case of the applicants that the PGMs that are ultimately found in the catalytic converters will have been previously refined and manufactured into specific products (i e fabricated). The applicants do not undertake any formal manufacturing, value add or other process but merely change the state of the catalytic converter (a manufactured and used product) by undertaking a grinding and crushing process which transforms the converter from a solid manufactured article into powder form.

[16]. The point is furthermore that after a precious metal is manufactured, it cannot revert to an unwrought precious metal or to a semi-fabricated state – which are the terms used in the Precious Metals Act – and will always remain a manufactured product. This is consistent with that part of the definition of 'unwrought precious metal', which speaks of a precious metal that 'has not undergone any manufacturing process'. In this instance, the catalytic converter even in crushed form is a manufactured product and the precious metal content thereof can no longer be regarded as unwrought precious metal, nor can it be construed as suddenly reverting back from its fabricated state to a semi-fabricated state.

[17]. There appears to be merit in the applicants' case in that regard. There is no refinement of the precious metals contained in the catalytic converter – it had previously been refined. Nor do the applicants undertake any industrial process of any sort in respect of the precious metals crushed and placed into drums for export. At first blush, therefore, the provisions of the Precious Metals Act are not implicated.

[18]. In light of the aforegoing, I am of the view that the applicants have demonstrated a *prima facie* right, even if it is open to some doubt. The point is simply that the provisions of the Precious Metals Act is open to an interpretation that the applicants have the right to conduct their businesses and their trades without the need to be issued with refining licences. On first principles, therefore, the first to fourth respondents should not interfere with those rights. As submitted by Mr Miltz SC, who appeared on behalf of the applicants together with Ms Dreyer, Mr Bester and Mr Sechaba, it is a right rooted in the common law and now enshrined in section 22 of the Constitution. The applicants are entitled to invoke the protection of this Court to guard against the unlawful interference by the respondents with this right and moreover, are entitled in terms of section 34 of the Constitution to have the dispute with the first to third respondents concerning the proper scope of the Precious Metals Act determined by means of a fair hearing before a Court of law.

[19]. As regards the other requirement for the granting of interim relief, namely a well-grounded apprehension of irreparable Harm / Injury reasonably apprehended, there can be little doubt that, if the interim order is not granted, there is a real risk that the impact on the business of the applicants will be disastrous.

[20]. As for balance of convenience, it is so, as submitted on behalf of the applicants, that the applicants have conducted their businesses in the export of used catalytic converters for many years, to the knowledge of the respondents. The respondents' interference with the applicants' business is recent. If interim relief is refused but final relief is granted in due course, the businesses of the applicants and livelihoods of many people will be destroyed. The first respondent does not deny this.

[21]. The balance of convenience therefore favours the granting of the interim relief in favour of the applicants.

[22]. As far as the absence of a suitable alternative remedy is concerned, the applicants plainly have no suitable alternative remedy. Not only is a damages action in due course unlikely to provide adequate redress for the substantial violation of the applicants' rights in the interim but it is likely to have a severely negative impact on their business and the many people that rely on it. I agree with the contention by the first applicant that the conduct of the first to fourth respondents is likely to drain the applicants' cash flow to such an extent that the applicants probably will find themselves unable to prosecute any future litigation, which will no doubt be costly. The relief claimed in this application is appropriate in that it will obviate the need for the applicants to vindicate their position in due course with a damages action too late to salvage the business of the applicants.

[23]. There are two more aspects raised by SARS, which I need to deal with and to which I now turn my attention very briefly.

[24]. SARS contends that the statutory notice, as required by s 96 of the Customs and Excise Act[3] ('the Customs Act') is defective. Secondly, they aver that the goods were declared under the incorrect tariff heading.

[25]. The s 96 notice was sent electronically by the applicants on 9 November 2022, and comprised of a covering letter, as well as the requisite form, setting out the cause of action and requesting the Commissioner to reduce the notice period.

[26]. In my view, the said notice meets the requirements of s 96 of the Customs Act, which reads:

'(1) (a) (i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act 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 is to institute such proceedings (in this section referred to as the "litigant") and the name and address of his or her attorney or agent, if any.

(ii) Such notice shall be in such form and shall be delivered in such manner and at such places as may be prescribed by rule.

(iii) No such notice shall be valid unless it complies with the requirements prescribed.'

[27]. The purpose of the s 96 notice is to afford SARS notice of the nature and basis for the claims that a litigant intends to bring against it. I am persuaded that the applicants have complied with the provision. Furthermore, the applicants have, in my view, made out a case for the reduction of the one-month period provided for in para (a) of the section. The interest of justice requires such a reduction.

[28]. Lastly, I need to deal with urgency. And, in that regard, there can be little doubt that commercial urgency has been proven by the applicants. It is so, as contended on behalf of the applicants, that the absence of substantial redress is a strong indicator of urgency, and that absence of substantial redress does not mean irreparable harm. It means that the applicant may obtain redress in future, but it may not be substantial. The damage that would be suffered by the applicants in the absence of interim protection simply cannot be alleviated

[3] The Customs and Excise Act, Act 91 of 1964;

substantially in the ordinary course. In fact, as I have found above, the applicants would suffer irreparable harm if the urgent relief sought is not granted.

[29]. For all of these reasons, I am of the view that the applicants should be granted the relief sought by them on an urgent basis. As far as costs are concerned, my view is that the appropriate order should be one in terms of which costs are reserved.

Order

[30]. Accordingly, I make the following order: -

(1) The non-compliance by the applicants with the Uniform Rules of this Court, in regard to service and time limits, is condoned and this application is permitted to be heard as one of urgency in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.

(2) The non-compliance by the applicants with the statutory notice period to the fourth respondent under section 96 of the Customs and Excise Act, 1964 is condoned and the notice period is reduced to 2 days.

(3) The detention of the first applicant's goods comprising eight drums of spent catalytic converters weighing 2 637 kilograms in terms of the fourth respondent's detention notice of 26 October 2022, under reference number SC-CC-02-A1, is hereby set aside and the goods are released to the first applicant for export purposes, on the basis that a refining licence is not required.

(4) The detention of the first applicant's goods comprising one pallet and two drums of spent catalytic converters weighing 659 kilograms in terms of the fourth respondent's detention notice of 18 November 2022, under reference number SC-CC-02-A1, is hereby set aside and the goods are released to the first applicant for export purposes, on the basis that a refining licence is not required.

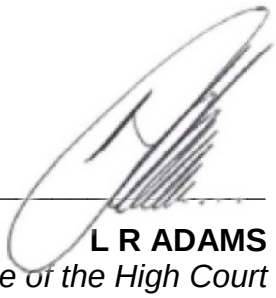
(5) The first to fourth respondents are interdicted and restrained from confiscating, detaining, disposing of or in any way interfering with the acquisition, possession, disposal or export by the applicants of crushed

catalytic converters in powder form whether in the purported exercise of the powers entrusted to the South African Police Service under the Precious Metals Act 37 of 2005 ('the Precious Metals Act') or in terms of the Customs and Excise Act 91 of 1964 ('the Customs Act') on the basis that a refining licence is required.

(6) The relief in prayers 3 to 5 *supra* shall operate as an interim interdict pending the outcome of Part B of this application.

(7) The fourth respondent be and is hereby ordered and directed to ensure that a copy of this order relative to part A is made available and circulated to all Customs officials stationed at ports of entry of the Republic of South Africa.

(8) The costs of Part A of this application are reserved for determination at a hearing convened for purposes of Part B.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	22nd November 2022
JUDGMENT DATE:	29th November 2022 – judgment handed down electronically
FOR THE FIRST, SECOND & THIRD APPLICANTS:	Adv Ivan Miltz SC, together with Advocates C Dreyer, C C Bester and M Sethaba
INSTRUCTED BY:	Fluxmans Incorporated, Rosebank, Johannesburg
FOR THE FIRST RESPONDENT:	Advocate Z Ngwenya
INSTRUCTED BY:	Cliffe Dekker & Hofmeyr Incorporated, Sandton
FOR THE SECOND & THIRD RESPONDENTS:	Advocate L Kalashe
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE FOURTH RESPONDENT:	Advocate K Kollapen
INSTRUCTED BY:	CMS RM Partners Incorporated, Sandton
FOR THE FIFTH & SIXTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance