



IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 2159/94

In the matter between:

LAZARUS MAKAMA

Applicant

and

THE ROAD TRANSPORTATION BOARD

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

SANDILE DLAMINI

3rd Respondent

Judgment

(7/6/95)

On this application Mr. Makama, who operates an authorised public transport service, seeks to have set aside on review a decision of the Road Transportation Board made on 19th July 1994 renewing Mr. Dlamini's road transportation permit No. 09115/94. He also seeks a further order on review directing the Board to hear and determine an objection admittedly lodged by him to the renewal of the permit.

Mr. Makama's application for review was itself filed on 9th December 1994. His founding affidavit does not address the reasons for the passage of almost five months in the meantime.

The circumstances leading to the application for review are in certain respects unusual. In July 1992, Mr. Dlamini applied successfully to this court by way of review to set aside a decision of the Road Transportation Appeal Board refusing him a permit to operate an

unscheduled kombi/taxi service between Mbabane and Manzini. In consequence of that decision on review, the Road Transportation Board issued him Permit No. 09115 to operate a passenger service between Manzini and Mbabane using one Nissan 15 seat vehicle for one year from 21st July 1992.

Then on 3rd February 1993, it issued him a further permit (described as a "replacement" and numbered 09115/93) authorising him to use a vehicle of the same kind of vehicle on an "express" service between Manzini and Mbabane from 29th June 1993 until 30th June 1994.

Before the expiry of this permit, Mr. Dlamini duly gave notice in accordance with the Road Transportation Act 1963 (No. 37 of 1963) of an application by him for its renewal. For his part, Mr. Makama lodged and served an objection to its renewal in accordance with the Act.

It then fell to the secretary to the Road Transportation Board, as required by section 10(3) of the Act to notify Mr. Makama as an objector of the time and place at which the application would be considered. It is common ground between Mr. Makama and Mr. Dlamini that the secretary failed to discharge this duty. The Board, which has been cited with the Attorney General as a party to this present application, and duly served, has not sought to dispute this.

Subsequently, in June 1994, Mr. Dlamini applied to this court directly for an order increasing the number of taxis/kombis that he could operate under Permit No. 09115 to three. Upon that application, he obtained on 15th July 1994 an order of this court, the tenor of which was to amend the order of this court made on "20th" July 1992 so as to correct or set aside the decision of the "Road Transportation Board" made on 29th April 1992 dismissing Mr. Dlamini's application for a permit to operate "three" unscheduled kombi/taxi services between Mbabane and Manzini.

Thereafter on 19th July 1994, the Road Transportation Board issued to Mr. Dlamini a permit (under the number 09115/94) authorising him to operate three specified fifteen seat vehicles on an express service between Manzini and Mbabane from that day until 30th June 1995.

It is not one of Mr. Makama's grounds of review that it was not upon to Mr. Dlamini to obtain from this court, in the way and on the terms on which he did so, a variation of the order of this court made on review in July 1992 in respect of Mr. Dlamini's earlier appeal. On the contrary, in his founding affidavit he appears to have accepted that the order amending the earlier order on review was made properly and to rely on it. With very great respect it is not apparent to me that this right.

Mr. Makama's application discloses four grounds on which he seeks to review the Board's decision of 19th July 1994, i.e.:

- (a) the Board admittedly failed to notify him of the time and place of Mr. Dlamini's application to review his permit before 30th June 1994, notwithstanding that Mr. Makama was an objector:
- (b) The permits issued by the Board to Mr. Dlamini for the periods 1992/1993, 1993/1994 and 1994/1995 respectively were not in accordance with the order made by this court in 1992 (as amended in 1994) because they purported to permit a service between Manzini and Mbabane and not between Mbabane and Manzini.
- (c) In renewing Mr. Dlamini's permit for the year 1994/1995, the Board had not complied with the Act:
- (d) In the alternative, the Board wrongly applied this court's order of 15th July 1994 prospectively rather than retrospectively.

I agree with counsel for Mr. Dlamini that there is nothing in the second of these grounds. The secretary to the Board was in breach of his statutory duty on failing to notify Mr. Makama of the time and place of the hearing of the application for renewal of Mr. Dlamini's permit for the year 1994/1995. According to its own tenor the decision of this court on 15th July 1994 was addressed to the issue of a permit for the period 1992/1993. On any interpretation, it did not

relieve the Board of its duty to comply with the statutory requirements of the Act in considering Mr. Dlamini's application for the renewal of his permit for the year 1994/1995. The Board failed to comply with these requirements.

I do not agree with the submission made for Mr. Dlamini, which is expressed in his opposing affidavit in paragraph 12, that Mr. Makama's objection was invalid because it could only be entertained on a fresh application (i.e. presumably, one for renewal for the year 1995/1996) and that a renewal may only be refused if the applicant has contravened the Act. Moreover, one practical consequence of the order which Mr. Makama obtained from this court in July 1994 is that the Board has permitted him to operate three vehicles for during the year 1994/1995 otherwise than in accordance with the statutory requirements of the Act. Mr. Makama was never a party to the proceedings in this court in 1994.

The history of this matter must be a matter of concern. On this application for review Mr. Makama has joined and served both the Board and the Attorney General. Neither has appeared in opposition. The application to this court last year, in my view, was very unusual; in any event the Board has for the year 1994/1995 renewed Mr. Dlamini's without having complied with the procedural requirements of the Act and it has done so in such a way as to authorise him to use not one but three vehicles on his service. As a matter of record, as I have just observed in another case, this Board is frequently the subject of successful challenge on review because of its failure to comply with the procedure prescribed by the Legislature in the Act. This court does not intervene on review to take over the functions of the Board in granting permits. It acts only to ensure that the Board observes the correct procedure for hearing and determining applications relating to road transportation permits.

The importance of insisting on that procedure in a system of commercial licensing will be obvious.

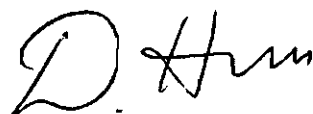
In the objection that he lodged in 1994 to the application for renewal, Mr. Makama alleged that Mr. Dlamini had obtained his then

existing permit fraudulently. That is a very serious allegation. It was not particularised in the objection itself; more importantly, it has not been addressed on this present application.

The other grounds in the objection all appear to me to relate to matters which would have been equally applicable in respect of the terms of the permits which Mr. Dlamini held prior to the 1994/1995 year. It has not been suggested that Mr. Makama opposed the initial grant or first renewal of that permit.

Nearly five months passed from the time when the permit for 1994/1995 was granted until the filing of this application for review however. The reasons for that passage of time have not been addressed. The permit that has been issued for this present year will expire shortly. After some hesitation, the view I take is that in the exercise of my discretion, I should decline to grant the relief now sought. Apart from anything else, I see very little practical point in doing so. If Mr. Dlamini pursues the renewal of his permit this year however, the Board will have to comply with the statutory requirements. In considering whether to renew the permit for three vehicles, it will have to keep in mind that the tenor of the order of this court in 1994 was not to require it to do so for the year 1994/1995 or any subsequent year. If it fails to observe the requisite procedure, its decision may be subject to swift review on the part of any aggrieved party.

The application is on that basis refused, but with no order as to costs in the circumstances.

A handwritten signature in dark ink, appearing to read 'D. Hull', is written above the printed name.

DAVID HULL
CHIEF JUSTICE