

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE No. 1649/99

In the matter between

SABELO R. MASUKU

APPLICANT

Vs

MANDLA DLAMINI

1st RESPONDENT

AMBROSE DLAMINI

2ND RESPONDENT

THEMBA SITHOLE

3rd RESPONDENT

Coram

SB. MAPHALALA- J

For the Applicant

MR. S. MASUKU

For the Respondents

MR L. MAMBA

JUDGEMENT (21/10/99)

Maphalala J:

The applicant filed an urgent application on the 7th July 1999, and the matter came before Sapire CJ where a *rule nisi* in the following terms was recorded:

1. The respondents are restrained and interdicted from:

- a) Interdicting in any manner whatsoever with the conduct by the applicant of his business in terms of his licence.
- b) Respondents are prevented from allowing applicant access to any portion of the parking facility at the Manzini bus rank.
- c) Respondents are further interdicted from interfering with the applicant in the Section Board and discharge of passengers at the facility designed for such purpose at the Manzini bus terminus.

2

- d) Respondents are interdicted from preventing the applicant in any way from carrying his business in plying the route in terms of the licence.
- e) This order is to be served on the Manzini City Council, The R. T. B. and also the respondent's attorneys'.

The applicant filed his founding affidavit outlining his cause of action. The respondents filed their opposing papers with pertinent annexures. In turn, the applicant replied to the averments raised in the respondent's opposing affidavit.

The substantial issues in this dispute are adequately outlined in my judgement on the same matter delivered on the 8th October 1999, where I ruled that there was a dispute of fact in this matter and referred the matter to oral evidence. The said judgment is attached for the sake of completeness. It appeared to me and seemed to be common cause that the crux of the matter is whether or not applicant was a member of the Swaziland Local Kombis Transport Association, (hereinafter referred to as the "Association"). If it was proved that applicant is not a member then the actions of the respondents would be *ultra vires* and the applicant had to succeed in his application. If on the contrary it is proved that he is a member then he was obliged to follow the Association's resolutions. This, therefore was the contentious issue. It was in this spirit that the court heard *viva voce* evidence. I must

say though that I was taken aback by Mr. Masuku's submissions after the hearing of oral evidence that it did not matter whether the applicant is a member of the association or not. To me it appeared to be common ground even when the matter was initially argued that this was one of the determinant issues in this case.

After hearing evidence on both sides it became abundantly clear to me that the applicant is a member of the association, albeit not playing a major role in the affairs of the Association. It also came from the evidence that the applicant was instrumental in the establishment of this association. He was once a Chairman of this association and was relieved of his duties because of absenteeism. Applicant has not resigned nor was he expelled from the Association. It is very strange that applicant does not divulge this in his founding papers. This was a material omission in the applicant's founding papers. There he gives the court the impression that the respondents are unknown to him and running an association he has no knowledge of. Applicant was not candid to the court and failed to take the court to its confidence when he obtained an order before the learned Chief Justice in the absence of the other side when there was prior agreement between the parties that the matter was to be postponed for arguments.

Having come to the conclusion that applicant is a member of the Association one is left to examine whether the resolution passed by the Association and the other operators at the Happy Valley Motel is legally binding to its members. It appears that the Association has not been registered in terms of the relevant laws. This Association can be classified as a voluntary Association, which in law is a legal relationship, which arises from an agreement between two or more persons to achieve a common, lawful object, primarily other than the making and division of profits. These in law can be classified as:

3

- i) Those duly registered as companies under company legislation, and governed by such legislation;
- ii) Those which are corporate bodies under the common law, known as universitates;
- iii) Those which remain unincorporated at common law, called unincorporated associations.

The association under examination would surely fall under the second class mentioned above.

In deciding the question of corporateness a court will consider the constitution of the Association, and its nature, objects and activities (see *Morrison vs Standard Building Society* 1932 AD. 229).

In the case in casu the association does have a constitution which at Clause 3.1 reads as follows:

"3.1. To manage and promote transport operation business of its members in a form of conveying passengers or goods throughout the Kingdom of Swaziland in any public road for reward in accordance of the (sic) Government Road Transportation Act".

It was within this framework that the meeting of operators was called at the Happy Valley Motel on the 22nd June 1999, as there was a general complaint that kombis with a base point in Lobamba were no longer conveying commuters to those designated destinations but were left stranded on the new highway. In that meeting the operators with a view to cure that mischief resolved that the Association be mandated to draw a new roster (see paragraph 7 of the minutes of that meeting). It is further recorded in those minutes that the motion was seconded by all the operators.

It is also worthy of note that applicant cites the respondents in their individual capacities knowing fully who they represent. Applicant tried to distance himself from the Association when it suited him. He cannot be allowed to blow hot and cold.

For the above reasons I hold that the applicant is bound by the resolution taken by the operators on the 22nd June 1999, it is totally incorrect to portray the respondents as loose cannons going about imposing their personal whims and caprices to helpless operators.

I thus discharge the rule and applicant to bear costs.

S. B. MAPHALALA

JUDGE