THE HIGH COURT OF SWAZILAND

SWAZI COMMERCIAL AMADODA TRANSPORT ASSOCIATION

(SHISELWENI REGION)

1st Applicant

SHISELWENI INTERSTATE KOMBI ASSOCIATION

2nd Applicant

And

FOGO JAN DLAMINI

1st Respondent

DAVID MABUZA

2nd Respondent

JOYCE MATSENJWA .

3rd Respondent

SWAZILAND INTERSTATE TRANSPORT

4th Respondent

Civil Case No. 256/2003

Coram	S.B. MAPHALALA - J
For the Applicants	MR. J. MASEKO
For the 1st, 2nd, & 3rd Respondents	MR. MDLULI
For the 4th Respondent	MR. MDLADLA

JUDGMENT

(24/03/2002)

The Relief sought

The Applicants moved an application under a certificate of urgency on the 7th February 2003, for an order inter alia that a rule nisi be issued by the court for an order calling the Respondents to show cause why Respondents should not be interdicted from operating

within the Nhlangano bus terminus other than where all kombis and mini buses have been allocated to park and operate; Respondents should not be interdicted from interfering with the smooth running and/or

operations of the interstate kombis operating at Nhlangano bus terminus; Respondents be directed not to conduct themselves in a manner that is likely to provoke the breach of the peace at Nhlangano bus terminus particularly among the interstate kombi owners and/or operators including the drivers thereof.

Background.

The Applicants were granted the said rule nisi which was returnable on the 14th February 2003, in terms of prayers 2.1, 2.2, 2.3 and 3 of the notice of motion. In the meantime the 1st, 2nd and Respondents filed their opposing affidavits.

On the 21st February 2003, the matter appeared before court where the 4th Respondent who had not been joined in the initial application intimated that they sought to be joined in the proceedings as an interested party. The 4th Respondent was then represented by Mr. Mazibuko from Masina, Mazibuko and Partners. In that appearance the Applicants did not object to the joinder and 4th Respondent were then to file opposing papers in the main application.

The matter was then postponed to the 28th February 2003 and the rule extended to that date.

On the 28th February 2003, the matter appeared before Sapire CJ who further extended the rule to the 14th March 2003, in the contested motion. However, on the 12th March 2003, the matter took another twist. The 4th Respondent applied to be joined in the proceedings and filed an application under a certificate of urgency to that effect and also applied amongst other things that the rule nisi granted on the 7th February 2003, be discharged as it was sought under a cloud of controversy. Applicant having concealed certain material facts and thus breaching the principles of uberrima fides. The matter appeared before me where 1 allowed the Applicants to file opposing affidavits and that

the matter was to be argued the following day on the 13th March 2003 at 2.15pm Indeed. I heard submissions on the application for joinder and reserved any ruling for the following day the 14th March 2003 at 2.15pm.

On the 14th March 2003, I delivered my ruling granting the application for joinder and further ruled that the parties argue the matter on the merits. My ruling on the application for joinder will form part of this judgement for ease of reference.

The parties then made their submissions on the merits. Counsel filed Heads of Argument and argued at length in this rather sensitive and a potentially volatile dispute. In view of the urgency which attaches to this matter I reserved my judgement on the merits to today the 21st March 2003. The rule was accordingly extended.

The Parties.

The first Applicant is Swazi Commercial Amadoda Road Transportationat Association a juristic body registered in terms of the Protection of Names, Uniforms and Badges An No. 10 of 1969. The chairman of the 1st Applicant who deposed to the founding affidavit avers that the 1st Applicant has the capacity to sue and be sued in its own name. I must hasten to say, that the Respondents in their opposition has taken this point up that there is no evidence to show that 1st Applicant has such power. More of this aspect of the matter will be revealed in the course of this judgement.

The 2nd Applicant is Shiselweni Interstate Kombi Association a juristic body also with the capacity to sue and be sued. Again the 2nd Applicant's locus suandi is challenges the Respondent. Both the 1st and 2nd Applicant have their principal pilace of business is Nhlangano.

The 1st Respondent is Fogo Jan Dlamini a Swazi male adult of Ndubase are at
Nhlangano within the Shiselweni District.

The 2nd Respondent is David Mabuza a Swazi male adult of Holneck area in the Shiselweni District.

The 3rd Respondent is Joyce Matsenjwa a Swazi female adult of Nsongweni area.

The 4th Respondent who has been joined in these proceedings is the Swaziland Interstate Transport Association. An association duly registered according to the laws of the country with the capacity to sue and be sued in terms of its association. Clause 14 of the Constitution of the 4th Respondent gives it power to sue and be sued through its Chairman or its General Secretary.

The parties cited above are all involved one way or the other with the kombi business in Nhlangano. The bone of contention centres around the right to park and/or use a certain base within the bus terminus amongst intestate mini buses and/or kombis in Nhlangano.

The Applicants' case.

As I have already mentioned that the founding affidavit which launches the Applicants cause is by one Sonnyboy Masende Zwane who is the Chairman of the 1st Applicant.

The basis of the Applicants case is that the Shiselweni Commercial Transport Association (known as SCARTA) is one of four branches of the Swazi Commercial Amadoda Road Transportation Association body. This fact is, however, is denied by the General Secretary of the national body who has filed an affidavit disassociating his association with that of the 1st Applicant. More of this aspect of the matter will emerge in the course of this judgment where the issue of the 1st Applicant's locus standi comes to the fore.

Mr. Zwane deposes that the 1st Applicant as an affiliate of the regional body being the Shiselweni Transport Association is in charge of all operations at the Nhlangano new bus terminus/rank. It was granted this authority by the Nhlangano Town Council in a letter

marked "B". This letter is very important because the 1st Applicant case revolves around it and therefore, I find necessary to reproduce it in extenso, thus:

"12th December 2001

The Chairman

SCARTA

C/O Bus Rank

NHLANGANO

Dear sir,

NEW BUS RANK AGREEMENT:

The Shiselweni Regional SCARTA to be in-charge of all operations at the bus rank. In exercising its powers due cognisance of the other smaller transport associations shall be made. The structures as contained the SCARTA Constitution shall be used. The deployment of vehicles to be done by SCARTA after consultation with all other stakeholders.
Yours faithfully,

E.M. MOTSA TOWN CLERK."

There is also a lot of debate as to which body was given this power by this letter. The Applicants' version is that the letter gave them the power. On the other side of the coin the Respondents' version is that it gave SCARTA the power not the 1st Applicant (Swazi Commercial Amadoda Transport Association) with the acronym "SCATA" instead of "SCARTA" which is the national body.

The Applicant further attaches annexure "C" which is a working agreement regarding the management of the said bus terminus to buttress they position that they are the only body vested with the authority to manage the goings-on in the bus terminus. Again the Applicant faces the same impediment as in annexure "B" because according to the Respondents the said document mentions the Shiselweni Regional "SCARTA" not the 1st Applicant "SCATA".

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The Applicants avers at paragraphs 15, 16, 17 and 18 how the Respondents are interfering with the smooth running of the bus terminus to the detriment of other users thus the application for an interdict. The Applicants alleges that this has caused animosity between the 1st Respondent's drivers marshals and owners of the vehicles that use as their base the allocated area within the terminus. The situation is so serious that tensions are now heightened and may erupt into violence.

Mr. Zwane avers that the 1st and 2nd applicants have attempted to have the matter resolved amicably but the 1st Respondent has blatantly refused to meet Applicants.

The Applicants alleges that they have a clear right in paragraphs 24 and 25 of the founding affidavit. At paragraph 27 and 28 the Applicants avers that they have no other remedy other than the one sought i.e. interdict. The Respondents have refused and/or deliberately avoided meeting them with a view to harmonize the transport business in Nhlangano. At paragraph 29 the Applicants alleges that the balance of convenience is in their favour.

Mr. Maseko for the Applicants advanced very forceful arguments the essence of which is that the Applicants have fulfilled all the requirements for a final interdict, viz i) clear right, ii) irreparable harm and iii) that Applicants have no other remedy. The court was referred to text by Prest, The Law and Practice of Interdicts at page 42 in this connection. However, this remains to be seen in this case.

The Respondents' case.

In opposition an answering affidavit of the 1st Respondents has been filed where he related his version of events. In the said affidavit the 1st Respondents has raised points of law which are couched in this fashion:

"3. Before I get into the merits, I wish to raise the following points of law:

3.1. I have been advised and verily believe that the Applicant's application is misdirected in that it is directed to me in my personal capacity yet all that I am

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doing at the Nhlangano bus rank I am doing it in my official capacity as a branch chairman of the Swaziland Interstate Kombi Association and therefore the Swaziland Interstate Kombis' Association should have been cited in these proceedings as I am mandated by it to look into its members' interests at the Nhlangano bus rank.

3.2. I have been advised and verily believe that both first and second Applicants being associations cannot at law seek an order directing anyone who is not their member to be guided by their rules and

regulations. Their rules and regulations only bid their members and not third parties.

3.3. I have been advised and verily believe that the Applicants cannot apply for the order they seek for the reason that they have in particular 1st Applicant failed to follow the terms and conditions of annexure "B" of their application in that they never bothered at any stage to consult the Swaziland Interstate Kombis' Association, it being a stake-holder and as such they came before court with dirty hands.

3.4. Further, the 2nd Applicant's members have willfully violated a court order issued by the Nhlangano Magistrates Court on 30th January 2003, and they are continuing to so violate it and as such they cannot now seek the assistance of the
court with further dirty hands.

3.5. 1 have been advised and verily believe that the Applicants ought to have realized that there is bound to be a serious disputes of fact in these proceedings and therefore commenced this proceedings in an action form other than the present form which would have necessitated the leading of oral evidence to resolve the disputes. The disputes can be summarized as follows:

i) I dispute that I have threatened, assaulted and breached any place at the Nhlangano bus rank.

ii) I maintain that 1st Applicants' members who are the soul cause of the violence and it appears that they derive pleasure in it.

iii) I deny that there is any agent of mine by the name of Joyce Matsenjwa and marshal by the name of David Mabuza but state the only David Mabuza I know is a marshal under my authority as branch chairman for the Swaziland Interstate Kombis Association.

On the merits the 1st Respondent avers that it is the Applicant who are the cause of the conflict in the Nhlangano bus rank and as a consequence a court order was obtained from the Nhlangano magistrates Court restraining members of the Applicant from acts of violence and intimidation.

The 1st Respondent took strong exception to the manner the Applicants obtained the interim order of the 7th February 2003. According to him "the Applicants have gone behind my back to steal the order without serving me with the papers and within hours of the court order being granted they were able to serve me. It is not true that I am hard to find as I also have an office at Nhlangano which is known to Applicant and my wife stays at home at Ndubase. I have never avoided Applicants. The papers were deliberately not served on me and they went ahead to mislead this honourable court into believing that I am hard to find yet that is false". I must say in passing that these allegations by the 1st Respondent were not challenged by the Applicants in the replying affidavits of Mr. Zwane.

A supporting affidavit of the 2nd Respondent is filed where he averred that he was not in the employ of the 1st Respondent but does work under the Swaziland Interstate Kombis Association who are his employers. He also stated that the violence at the Nhlangano bus rank is not caused by the 1st Respondent but is caused by members of the Applicants who on many occasions will leave their parking bays to lure customers from their parking bays to their kombis and if any customer resist then force will be used to induce fear by the Applicants.

The supporting affidavit of one Mcedi Magagula is filed to buttress what the 1st Respondent stated in his answering affidavit.

It is not clear on the papers why the 3rd Respondent is cited in these proceedings, as there are no specific acts attributable to her in the whole dispute. It would appear to me that

there is no case against the 3rd Respondent. It is for this reason that I would discharge the rule in so far as it relates to her forthwith.

Coming to the 4th Respondent who is represented by Mr. Mdladla a founding affidavit of one Sidumo Dlamini is filed in opposition thereto. I must say that the 4th Respondent bases its opposition on the founding affidavit filed in the application for joinder which I have mentioned earlier on in this judgment.

Reverting to tenor of this affidavit a point of law in limine is also raised that the application is fatally defective in that the affidavit attached to the notice of motion does not support the notice. The Applicant in the notice is cited as Shiselweni Commercial Amadoda Transport Association (Shiselweni Region) whereas the Applicant in the affidavit is cited as Shiselweni Commercial Transport Association.

4th Respondent also makes the point that was made by 1st and 2nd Respondents that annexure "B" confers authority on the Swaziland Commercial Transport Association (Shiselweni Region) with the acronym "SCARTA" and not the Shiselweni Commercial Transport Association (SCATA). The point made here is that it is only "SCARTA"

who is vested with the powers to regulate the activities at the Nhlangano bus terminus as per annexure "B" and "C" attached to the Applicants papers.

Another point of great substance in this matter was raised by the 4th Respondent which point was also raised by the 1st and 2nd Respondents as I have alluded to that on the 7th February 2003, there was a meeting at the Road Transportation Board, which meeting had been convened by the Swaziland Commercial Road Transport Association (SCARTA). The 1st and 2nd Respondents were present. The agenda of the meeting was to discuss the confusion at Nhlangano because, there were two conflicting platforms for cross border operations. The meeting was adjourned for the lunch hour. After the lunch hour, before the end of the meeting, the 1st Respondent was served by Mr. Maseko the 1st Applicant's attorney with a court order. According to the 4th Respondent the fact of the matter is that the said application was drafted and issued on the 7th February 2003. At all

material times since 9.00am that day the 2nd Applicant had been in the company of the 1st Respondent at Mbabane at the offices of the Road Transportation Board. The 2nd Applicant left the meeting and instructed his attorneys to institute the application before court. The 2nd Applicant was aware of the whereabouts of the 1st Respondent. At the time the order was obtained the 1st Respondent representing the 4th Respondent, was at the Road Transportation Board. The Applicants attorneys knew where to serve the 1st Respondent. Surprisingly the 4th Respondent was never cited notwithstanding that Applicants knew well that 1st Respondent was acting in his capacity as officer of the 4th Respondent. The 4th Respondent as a consequent cries foul and contends that this application is a clear abuse of the court process. On this point Mr. Mdladla argued that the Applicants are guilty of non-disclosure of a material fact and that on this ground alone the rule issued on the 7th February 2003, ought to be discharged forthwith.

In support of the 4th Respondent's case there is an interesting affidavit of one Duma Msibi who is the General Secretary of the Swaziland Commercial Amadoda Road

Transport Association. He makes very interesting revelation in this affidavit which are not complimentary to the Applicants case at all. Firstly, he reveals that his association "SCARTA" has been entrusted by the Swaziland Government with the responsibility of regulating transport in the country. The second revelation is shocking in that he confirms what was said by the 1st, 2nd and 4th Respondents that they were at the meeting at the Road Transportation Board where the issue of Nhlangano bus terminus was being discussed. The 1st Respondent was served with court papers and the meeting could not proceed. Indeed the minutes of that meeting confirms this state of affairs. Equally, startling is the third revelation where Mr. Msibi deposed at paragraph 4 of his supporting affidavit that the 1st Applicant is not a branch of the association and that Applicants formed their own association as evidenced by their constitution. The

authority they seek to have is exclusively preserved for (SCARTA) and not the Shiselweni Transport Association. If this is true it would mean that the Applicants have been masquerading as SCARTA in their notice of motion, it appears to me that the probabilities are that it is so. The 1st Applicant therefore, is a mere imposter and has obtained an order of court through

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chicanery. However, I am still going to closely examine this state of affairs as I progress with this judgement to remove any doubt that this is so.

As I have stated earlier on in this judgment that Mr. Maseko for the Applicants argued with all the force in his command. Counsel for both 1st, 2nd and 3rd Respondents Mr. Mdluli also advanced formidable arguments against the confirmation of the rule and he filed very useful Heads of Argument. Mr. Mdladla for the 4th Respondent also argued forcefully and filed comprehensive Heads of Argument. I have read the papers filed of record and have also considered the issues very carefully.

This matter has presented me with a conundrum of issues and for the sake of clarity and a sense of order I shall proceed to examine these questions under a number of heads, thus:

a) Whether the Applicants have locus standi , and is so, whether they have shown a clear right;

b) Whether the Applicants have shown that their right has been violated;

c) That they do not have another satisfactory remedy;

d) The issue of non-disclosure of a material fact and the consequences thereof.

e) The duty of counsel to the court.

f) The issue of costs.

g) The court's observations.

h) The court order.

I shall proceed to address these matters sequentially, thus:

a) Whether the Applicants have locus standi and if so, whether the Applicants have shown a clear right.

The 1st Applicant is Swazi Commercial Amadoda Transport Association (Shiselweni Region) - SCATA, however in its founding affidavit at paragraph 3 it calls itself the

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Swazi Commercial Amadoda Road Transportation (SCARTA) and attached annexure "A" being a certificate of registration in terms of the Protection of Names, Uniforms and Badges Act No. 10 of 1969 where it is registered as the Shiselweni Commercial Transport Association (SCTA). From the above it is not clear who the 1st Applicant is. It is not clear whether it is moving this application as SCAT, SCARTA or SCTA. To compound the confusion no constitution is attached to the 1st Applicants papers to show whether the 1st Applicant is a corporate body of the nature of a universitas personarum and therefore is a legal persona.

The same applies to the 2nd Applicant save for the certificate in terms of the Protection of Names, Uniform and Badges Act no Constitution of the said Association is filed and therefore it is impossible to discern whether the said body is of the nature of a universitas personanim and thus has powers to sue or

be sued. In the case of Lawyers for Human Rights (SWD) and Human Rights Association Swaziland and the Attorney General Civil Case No. 1822/2001.a full bench of this court considered the requirements for a universitas in a thorough exposition of the law in this regard.

In Morrison v Standard Building Society 1932 AD 229 at 238, Wessels JA propounded the applicable principles in the following language:

"In order to determine whether an association of individuals is a corporate body which can sue in its own name, the Court has to consider the nature and objects of the association as well as its constitution, and if these show that it possesses the characteristics of a corporation or a universitas then it can sue in its own name ... A building society is not a partnership in any shape or form. One member of a building society is not the agent of the others and his acts cannot bind his fellow members. Nor can a member of such a society he held liable for the debts of the society. The society exists as such quite apart from the individuals who compose it, for these may change from day to day. It has perpetual succession and it is capable of owning property apart from its members".

In casu, I find that a matter of fact and law that the applicants have not shown on the papers that they have the necessary power to sue and be sued in their own name.

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This flaw in both the 1st and the 2nd Applicant does not give them locus standi to move these proceedings.

However, for the sake of completeness I would proceed to determine the issues, assuming I had found that they have locus standi whether they have shown a clear right as one of the requirements for a final interdict. In this regard the 1st Applicant relies on annexure "B" being a letter from the Nhlangano Town Council which according to the 1st Applicant's contention grants the 1st Applicant authority to be in charge of all operations at Nhlangano New bus terminus. The 1st Applicant also relies on annexure "C" being a working agreement regarding the management of the said bus terminus. However, on closer examination the said documents do not support the Applicants' assertion. Annexure "B" which I have already reproduced in extenso earlier on in this judgment in a letter directed to the Chairman of SCARTA and reads in part "The Shiselweni Regional SCARTA to be in-charge of all operations at the bus rank. In exercising its powers due cognisance of other smaller transport associations shall be made. The structures as contained the SCARTA constitution shall be used. The deployment of vehicles to be done by SCARTA after consultation with all other stakeholders". This certainly does not refer to either the 1st or the 2nd Respondent because they are not SCARTA.

Further annexure "C" viz Nhlangano Bus Rank Working Agreement dated the 12th December 2001, with the motto "we show the way and others follow (sic) follow" is a three paged document. Throughout the document the Shiselweni Regional SCARTA is granted powers to be in-charge of all operations at the bus rank. Again there is no mention of either the 1st Applicant or the2nd Applicant.

Furthermore, the supporting affidavit of Duma Msibi has diminished any chances of either the 1st Applicant or 2nd Applicant claiming a right let alone a clear right in the running of the Nhlangano bus terminus. Mr. Msibi who is the General Secretary of SCARTA has unequivocally stated SCARTA's position as regards the 1st Applicant in the following language at paragraph 4. "I further confirm that 1st Applicant is not a

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branch of the Association and that they (sic) formed them (sic) their (sic) own Association as evidenced by their constitution. The authority they seek to have is exclusively preserved by the (SCARTA) and not the Shiselweni Commercial Transport Association".

It is abundantly clear from the above that the Applicants have not shown a clear right which entitles them

to a final interdict.

b) Whether the Applicants' have shown that their rights have been violated.

In this regard I have studied the papers before me and it appears to me that on a balance of probabilities the papers show that it is either the 1st or 2nd Applicant together with their members who breach the peace that exist at the Nhlangano bus rank. The court Order by the Nhlangano Magistrates issued on the 30th January 2003, is testimony of the fact the 1st and 2nd Applicant members are the instigators of the violence at the Nhlangano bus terminus. That order still stands as it has not been appealed against by the Applicants.

In all probabilities, I find that the Applicants have not proved that they have a right and that right is being violated or wrong actually committed or reasonably apprehended. The requirement enunciated in the celebrated case of Setlogelo vs Setlogelo 1914 A.D. 221 at 227 has not been met in casu.

c) That they do not have another satisfactory remedy.

It would appear to me that the Applicants have another equally available relief from the Road Transportation Board being the Board responsible for issuing, renewing and revoking of road passenger permits. Evidence before court suggests that Applicants have refused to abide by judgment by the Road Transportation Board in relation to this matter. A meeting was called by the Board of all stakeholders in the transport business to discuss inter alia the thorny issue of the Nhlangano bus terminus. The 1st and 2nd Applicants were represented in that meeting but instead of participating in the resolution of the

dispute the 1st Applicant opted to rush to this court to obtain a court order. In these circumstances it can hardly be said that the Applicants had no other satisfactory remedy available to them. Again the Applicants have failed to prove this requirement as, per the dicta in Setlogelo (supra) at 227.

d) Whether there are disputes of fact in casu for a grant of a final interdict.

According to the writer R.G. Mckerron, The Law of Delict (7th ED) (Juta) at page 140 the learned author states the following: "A final interdict is usually obtainable only on action, but it may be granted on motion if the facts in issue are not in dispute". (see Prinsloo vs Shaw 1938 AD 570 and also Hilleke vs levy 1946 AD 214). The present application is replete with disputes of fact the most notorious being the issue as who has the authority to administer the Nhlangano bus terminus.

Again on this ground the Applicants would not have succeeded in obtaining a final interdict on the facts.

e) The issue of non-disclosure.

It is common cause that the interim order was granted in the absence of the Respondents. It is also common cause that the Respondents were not served with the application prior to the order being granted. The explanation given by the Applicants when it launched the application for this was that at paragraph 33 of the founding affidavit. "It has been (sic) possible to serve this application before hearing as the Respondents live in the outskirts of Nhlangano, and this being very far from Mbabane and the court. Further the 1st Respondent has two homesteads one in Ndubase and another in the Republic of South Africa. The 1st Respondent can hardly be found in the homestead and since the whole issue started he has been avoiding the Applicants".

From the above it is clear that for all intents and purposes the order of the 7th ultimo was granted ex parte.

Having brought the proceedings ex pane, it is trite law that the Applicants have an obligation to the court to disclose fully the true circumstances and facts pertaining to the application; Roper J in the case of De Jager vs Heibrow and others 1947 (2) S.A. 419 (w) said the following and I quote:

"It has been laid down, however, in numerous decisions of our court that utmost good faith must be observed by litigants making ex parte applications, and that all material facts must be placed before the court (see Re: Leysdorp and Pieterburg Estates Ltd 1903 T.S. 254; Crowley vs Crowley 1919 T.P.D. 426). If any order has been made upon an ex parte application, and it appears that material facts have been kept back which might have influenced the decision of court whether to make the order or not, the court has a discretion to set aside the order on the ground of non-disclosure (Venter vs Van Graan 1929 T.P.D. 435; Barclays Bank vs Gilfs 1931 T.P.D. 9; Hillman Bros vs Van Den Heuvel 1911 W.L.D. 41). It is not necessary that the suppression of the material fact shall have been wilful or malafide" (my emphasis).

Margo J in the case of Cometal Nometal vs Corlana Enterprises 1981 (2) S.A. 412 expressed the same sentiments at page 414 (G - H) in the following terms; and I quote:

"It seems to me that, among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has breached the uberrima fides rule, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the court might have been influenced by proper disclosure in the ex parte application, the consequences, from the point of doing justice between parties, of denying relief to the Applicant on the ex parte order, and the interest of innocent third parties, such as minor children, for whom protection was sought in the ex parte. Application".

Further, authority can be found in the following: Herbstein at el The Civil Practice of the Supreme Court of South Africa (4th ED) at 367; Nathan Barnett and Brink, Uniform Rules of Court, 1977 (2nd ED) at page 58; Spieg vs Walker 1947 (3) S.A. 499 and Stanley Matsebylu vs Aaron Mavimbela Civil Appeal No. 54/1999, that if there are any material facts that might have influenced the court's decision and such facts are wilfully, negligently or in bad faith withheld, the court will as a rule set aside or rescind its earlier order.

In casu, it is my considered view, that on the reading the Applicants' founding affidavit Mr. Zwane who deposed to this affidavit has failed to make a full and frank disclosure of all the relevant facts which were within his knowledge at the time the application was launched on the 7th February 2003.

There is clear evidence which is in sharp contrast to what Mr. Zwane told the court at paragraph 35 of his affidavit that he was in a stakeholders meeting on the 7th February 2003, and the 1st and 2nd Respondents were also present in that meeting. Mr. Zwane left that meeting during the lunch break to launch these proceeding. The statement by Mr. Zwane at paragraph 35 was made under oath, and thus Mr. Zwane has purjured himself. The affidavit of Duma Msibi put the matter beyond doubt that 1st and 2nd Applicants were present in the meeting of the 7th February 2003 where 1st and 2nd Respondents were also present. As I have mentioned earlier on the modus operandi of that meeting amongst other things was to find a lasting solution to the feud which had engulfed the affairs of the Nhlangano bus terminus.

Applicant at paragraph 27 and 28 alleges that the Respondent have refused and/or deliberately avoided meeting them with a view to harmonise the transport business in Nhlangano. However, this statement cannot be correct when viewed in the context of the meeting of all the stakeholders on the 7th February 2003 called by the Road Transportation Board. This is another example of bad faith on the part of the Applicants.

For the reasons advanced above and also on the basis of the legal authorities I have cited the rule can be discharged on this ground alone.

f) The duty of counsel to the court.

I wish to make a few comments on the conduct of Mr. Maseko for the Applicants in this matter. Mr. Maseko knew when the application was launched that the contents of paragraph 35 of the Applicants' founding affidavit were not true because an hour after the

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order was granted the 1st and 2nd Respondents were served with the application and also the court order. For the duty of counsel which he owes to the court I refer to the case of Barlow Rand Ltd vs Lebos and another 1985 (4) S.A. 341 where the well-known passage in the book by CH Van Zyl "The Theory of Judicial Practice of South Africa (Vol. 1)" which was published as far back as 1921 were the following pearls of wisdom were expressed:

"Now, these general remarks may be said to be axioms applicable to all professions and callings of life, but still it is with regard to legal practitioners that they have mostly occupies the attention of the Courts and of the public. The origin and development of these principles, I shall now endeavour to illustrate. Some of the duties of an attorney are by lawyers better understood than can be fully described. There are many canons of duty which have not yet been in print but (apply) not only to oneself and to one's client, but also to the Bench and to the public. This duty on the part of an attorney is not a servile thing; he is not bound to do whatever his client wishes him to do. However much as act or transaction may be to the advantage, profit or interests of a client, if it is tainted with fraud or is mean, or in any way dishourable, the attorney should be no party to it, nor in any way encourage or countenance it. Better far to part with such a client forever, though he may have been till then 'the goose that laid the golden eggs'. 'Honestly' in law, as in everything else, is always and after all, 'the best policy'. The law exacts from an attorney uberrima fides - that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth. There must be meticulous accountancy, a minute high sense of honour and incorrigible intergrity".

In casu, Mr. Maseko failed dismally to live up to this ancient axiom which is one of the pillars of the legal profession. 1 condemn with in the strongest terms the actions of counsel in this regard.

g) The issue of costs.

Counsel from the Respondents moved the court to impose costs at attorney- and-own client as it is their view that the launching of this application was tantamount to an abuse of the process of this court. Mr. Maseko on the other hand opposed that costs should be levied at this scale.

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The leading case on the award of costs on an attorney and client basis in Nel vs Waterberg Randbouwers Ko-Operaative Vereeniging 1946 AD 597, interpreted in Mudzimu vs Chinhoyi Municipality & another 1986 (3) S.A. 140 (ZH).

The grounds upon which the court may order a party to pay his opponents attorney-and-client costs include the following: that he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious or frivolous (see Real Estate & Trust Corporation vs Central India Estates Ltd 1923 W.L.D. 121). In casu, I have found that the 1st Applicant perjured himself in the founding affidavit of Mr. Zwane. The affidavit was made in bad faith in view of the meeting of the 7th February 2003, where he was present and 1st and 2nd Respondents were also present. The order of the 7th February 2003 was obtained through stealth. An order for costs at attorney-and-own client is appropriate in this case to mark the court's displeasure on the conduct of the Applicants. It will be so ordered.

h) The Court's observations.

After reading the papers filed of record it appears to me that the situation at the Nhlangano bus terminus is volatile and that acts of violence where loss of life and property is imminent. It is also apparent from the

papers filed of record that there is a long standing feud between the 1st and 2nd Applicant's association with the Respondents and that various steps have been taken in the past to resolve these differences. It also appeared to me that the meeting called by the Road Transportation Board on the 7th February 2003, was called inter alia to resolve the matter amicably. However, this meeting was rudely interrupted when 1st and 2nd Applicants took the matter to court and obtained an order in their favour. In the circumstances of the case I would urge the Road Transportation Board together with the leadership of SCARTA to reconvene a similar meeting as a matter of urgency of the various parties to sit around the table to resolve this matter as time is of the essence. I would also implore the legal representatives of the various parties in this matter to impress on their clients the need to find a peaceful solution and to desist from resorting to acts of violence. Failure to heed this call would

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lead to a state of anarchy at the Nhlangano bus terminus at the expense not only of disputants but also the general public which uses those facilities at the bus terminus

h) The court order.

For my part, for the reasons I have advanced above the rule nisi granted on the 7th February 2003, is discharged forthwith. The order by the Nhlangano Magistrate Court of the 30th January 2003 is to prevail.

The 1st and 2nd Applicants are to pay costs of this suit levied at attorney-and-own client scale.

S.B. MAPHALALA

JUDGE