THE HIGH COURT OF SWAZILAND

NGWANE MILLS (PTY) LTD

Applicant

And

THE CHAIRPERSON OF THE NATIONAL

AGRICULTURAL MARKETING BOARD 1st Respondent

NATIONAL MAIZE CORPORATION 2nd Respondent

THE SWAZILAND NATIONAL GRAIN PRODUCERS ASSOCIATION 3rd Respondent

Civil Case No. 315/2003

Coram S.B.MAPHALALA – J

For the Applicant	Advocate Henning SC (Instructed by Maphanga, Howe, Masuku, Nsibandze)
For the 1st Respondent	Advocate W.H. Klevansky SC (Instructed by Zonke Magagula & Co)

For the 2nd Respondent MR. B. MAGAGULA

For the 3rd Respondent MR. B. SIGWANE

JUDGEMENT

(16/04/2004)

Introduction

The present application is a sequel to a similar application I heard and decided in a judgment I delivered on the 29th November 2002. In the latter application which was brought under a certificate of urgency, the Applicant sought for an order inter alia, declaring the 1st Respondent, not lawfully entitled to refuse the issue of a permit to the Applicant. Directing and compelling the 1st Respondent to issue a permit in terms of Regulation 4 (1) of the Import and Export of scheduled products forthwith. Costs of suit at attorney and own client scale payable by the Respondents including counsel's costs. This matter was argued at great length where at the end I issued an order in the following terms:

i) The lst Respondent was to consider the application of the Applicant within 10 days of the issuance of this order, and; ii) The Applicant was to pay wasted costs and that of counsel to be taxed.

The reasoning advanced in issuing the said order was that I found in the circumstances which prevailed at that time that the Applicant had launched the application prematurely, the 1st Respondent not yet having completed its decisional process. In the present application the Applicant seeks an

order formulated in the following terms:

1. An order calling upon the Chairperson of the National Agricultural

Marketing Board to show cause why the decision taken at Mbabane on the 10th December 2002, in. terms of which NAMBOARD refused the application of the Applicant dated the 17* October 2003, for the registration as an importer of white maize in terms of Act 13 of 1985 and Regulation 3 published in the Notice 142 of 2001 and for the issue of a permit in terms of Regulation 4 published in the Notice 142 of 2001 should not be reviewed and set aside,

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2. Ordering NAMBOARD to register the Applicant as an importer of white maize and to issue permits to the Applicant to import a maximum of 3,000 tons of maize per month, in terms of the legislation referred to in paragraph 1 above;
3. Order the Respondent to pay costs of this application;
4. Further and/or alternative relief.

All the parties have filed the required affidavits in this matter except the 3rd Respondent.
The parties in the litigation.

The Applicant is a company registered under the Laws of Swaziland, having its registered office at King Mswati III Avenue West, Matsapha Industrial Sites, Kingdom of Swaziland, where it conducts the business of millers of maize and wheat and producers of stock feeds.
The 1st Respondent is the National Agricultural Marketing Board (hereinafter referred to as "NAMBOARD"), a statutory body corporate established in terms of Section 3 of the National Agricultural Marketing Board Act, No. 13 of 1985. NAMBOARD is also a category "A" Public Enterprise Unit administered under the Public Enterprises (Control and Monitoring) Act, 1989.
The 2nd Respondent is a company duly registered and incorporated with limited liability in accordance with the company law of the Kingdom of Swaziland, with its principal place of business situate at llth Street, Matsapha Industrial Sites, Matsapha, District of Manzini, Swaziland.

The 3rd Respondent is a national association of grain producers in Swaziland. The background.

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For purposes of fully understanding the Applicant's application, it is necessary to outline the background facts relating to the Applicant's business and the maize industry in the Kingdom of Swaziland

The Applicant was established in 1989 as a miller of wheat in order to develop the wheat industry and encourage the Swazi farmers to produce wheat in the Kingdom.

Applicant's wheat mill was established in 1991 and is still the only wheat mill in Swaziland. The Applicant, in consultation with the Government of the Kingdom of Swaziland, saw this as an opportunity to develop the local wheat industry and to serve the local consumer. At this stage Applicant supplies wheat to 80% of the local market requirements.

During September 1998, the Applicant entered into the maize industry through the purchase of a maize mill from Swaziland Milling Company, a division of Swaki (Pty) Ltd. The purchase included movable property, silos and the mill plant and equipment, and the brand names.

A state owned corporation, the National Maize Corporation (Pty) Ltd, which was established in 1985 under the Companies Act, 1912 is the only organization which has been permitted to import maize into Swaziland. The shareholders of the National Maize Corporation are the Ministry of Agriculture and the National Agricultural Marketing Board ("NAMBOARD"). Maize and maize products are scheduled products in terms of the National Agricultural Marketing Board Act, 1985 and a permit is required to

import or export scheduled products. The National Maize Corporation effectively has a monopoly in respect of the import of white maize and the Applicant has therefore been compelled to purchase maize from it. The Applicant's requirements cannot be met by direct purchases made from local farmers.

The Applicant has in the past applied for a permit to import maize which has been refused. "NAMBOARD" requires any person wishing to engage in importing and exporting scheduled products to register with and obtain a permit from NAMBOARD in terms of Section 6 of the National Agricultural Marketing Board Act, 1985. The regulations of 2001 for the import and export of scheduled products provide for

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registration of importers and exporters of scheduled products. In terms of Regulation 4 (1) the Board shall, upon registration of any person under Sub-Regulation 3, issue to that person a permit which shall entitle that person to import or export scheduled products.

The chronicle of events

On the 17th October 2002, the Applicant made an application for registration as an importer of white maize and the issue of the necessary import permit. The application for registration was in terms of Section 6 which was in the prescribed form and which was dated the 30th September 2002. The Applicant was issued a receipt in respect of its registration dated the 30th September 2002.

The application was in writing annexed to the Applicant's founding affidavit marked "B", it consists of affidavits and statements.

Subsequent to this letter the Applicant addressed further letters to NAMBOARD on 28th October 2003 and 29th October 2002, which letters are annexed as "G" and "H" respectively. Further letters were also addressed to NAMBOARD by the Applicant's attorneys of record on 31st October 2002, and 1st November 2002 (annexure "I" and "J" respectively). According to the Applicant there was no satisfactory response to the letters from NAMBOARD.

On the 5* November 2002, the Applicant brought an urgent application to this court (under Case No. 3331/02) against NAMBOARD for, essentially an order compelling NAMBOARD to issue a permit in terms of Regulation 4 (1) of the import and export of scheduled products regulations of 2001.

On the 29th November 2002, the court granted an order inter alia that the 1st Respondent is ordered to consider the application of the Applicant within 10 days of the issuance of the said order.

In a letter dated 10th December 2002, NAMBOARD informed the Applicant that its application was refused. The relevant portion of the letter annexure "K" reads:

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"The Board having considered the application has directed me to inform you that your application has not been granted.

The Board measured the interests of the local fanners and the need to encourage the local farmers by protecting them against cheaper imported white maize; the local availability of white maize; as well as the current high price of white maize and its products to the consumer and is of the opinion that, in the light of its mandate under NAMBOARD Act 13 of 1985, it is not in the overall interest of the agricultural industry in Swaziland to grant you a permit as requested.

The Board will continue to monitor the prevailing situation of the market with a view to reviewing its position on the importation of white maize should need arise".

On the 17th December 2002, the Applicant wrote to NAMBOARD for full and detailed reasons in writing for its decision referred to in the previous paragraph, to be furnished before or on 6th January 2003, (annexure "L").

NAMBOARD responded to annexure "L" on 10th January 2003. This letter annexure "M" reads:

1. "1. Your letter dated the 17th December 2002 addressed to the Chairman of NAMBOARD refers.

2. I have been directed by the Board to respond to your letter aforesaid as follows:

2.1 The minutes of the Board on any of its deliberations are confidential and cannot be distributed to persons who are not members thereof.

2.2 The Board is not obliged to furnish you with the information required on your letter under reference. Therefore your request cannot be acceded to.

3. The Board, however, wishes to assure your goodselves that it shall continue to monitor the situation and should the circumstances change in future your application would be considered should you wish to revive it".

The application for judicial review in casu is based upon the above cited letter and the following further facts and contentions.

Further facts and contentious founding the application for judicial review.

The Applicant contends that the decision-maker failed to apply the audi alteram parterm in that the covering letter to the application to NAMBOARD (annexure "F" concluded:

"Should your Board require further information or amplification, the Applicant would like the opportunity to address you orally..."

Therefore, contends the Applicant, the decision-maker failed to inform the Applicant of considerations which it considered detrimental to the Applicant, and on which the refusal was based.

According to the Applicant at paragraphs 12.2, 12,2.1, 12.2.2, 12.2.3 of the founding affidavit the Minister for Agriculture and Cooperatives (hereinafter referred to as "The Minister") precluded the decision-maker from exercising its discretion in respect of the application in that in a letter dated 4th November 2002, (annexure "N") the Minister informed NAMBOARD as follows:

"I hereby wish to remind NAMBOARD that the Ministry's policy regarding the importation of white maize into Swaziland has not changed. This therefore means that the National Maize Corporation (NMC) remains the sole importer of maize into Swaziland.

Should thereby (sic) a change in policy, the Ministry will direct accordingly".

Section 7 of the Act provides:

"The Minister may give directions of a general nature to the Board relating to the performance of its duties and the Board shall comply therewith".

In an answering affidavit filed on behalf of NAMBOARD in Case No. 333/02, its Acting Chief Executive Officer stated that NAMBOARD is bound by directions of a general nature given by the Minister. (Paragraph 4.1.5, 4.2 and 4.5 of the answering affidavit). In the preliminary answering affidavit the

same deponent on behalf of NAMBOARD stated that there exists a policy in terms of which NMC is the only organisation which has been permitted to import white maize into Swaziland.

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According to the Applicant, another factor to be taken into consideration is that the shareholders and directors of National Maize Corporation (Pty) Ltd and NAMBOARD are interconnected, which eliminates impeccable impartiality and independence regarding decision-making. The shareholders of National Maize Corporation are the Ministry of Agriculture and Cooperatives and NAMBOARD The Chairperson of NAMBOARD is also a Director of NRC - the entity which presently enjoys (in the eyes of NAMBOARD) a statutory monopoly.

At paragraph 17 of the founding affidavit the Applicant contends that the decision-maker did not apply its mind properly to the matter in view of the following;

17.1.1 The prescription from the Minister which the decision-maker accepted as binding;
17.1.2 The failure by the decision-maker to apply the audi rule;
17.1.3 The misunderstanding by the decision-maker regarding the local producers;
17.1.4 The reasons furnished by the decision-maker which reflect ignorance or negation of the Applicant's case.
17.1.5 Applicant's common law right of legitimate expectation to obtain the required consent.
The decision-maker failed to apply its mind properly to the matter.

The Applicant proceeds at paragraph 18 and lists the ground for review as follows;

18.1 The decision-maker failed to apply its mind properly to the matter, and more particularly:

a) It failed to appreciate the nature of its statutory discretion and duty; and
b) It failed to consider the relevant facts, ignored relevant facts and took into account irrelevant considerations.

At paragraph 18.4 the Applicant contends that the decision-maker applied Government policy and ignored the statutory prescriptions to which it was bound. The decision-maker abdicated its discretion and followed the instructions of the Minister.

Further, at paragraph 18.8 the Applicant alleges that the action of the decision-maker is not rationally connected to;

18.8.1 The-purpose for which it was taken;

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18.8.2 The purpose of the empowering legislation;
18.8.3 The information before the decision-maker.
18.8.4 The reasons given by the decision maker.

The opposition
The 1st Respondent

Starting with the 1st Respondent the defence put forth is that the facts disclosed in its answering affidavit under Case No. 3331/02, read with the minutes of the special Board meeting held on 5th December 2002, and other relevant documents, reveal that it has acted lawfully, honestly, reasonably and rationally.

The answering affidavit deposed to by the Chairman of the 1st Respondent, Prince Mabandla Dhlamini reveals a number of defences to the Applicant's founding affidavit. A number of points in limine are raised in paragraphs 2 and 3 under the heading "special statutory remedies and "absence

of facts in support of an application for review", respectively. In the former it is contended in paragraph 2,6 that any person aggrieved by a decision of NAMBOARD not to grant a permit to import and export a scheduled product has a right to appeal to the Minister in terms of Section 8 of the NAMBOARD Act. Further, at paragraph 2.7 it is submitted that domestic remedies have not been exhausted and common law remedies are excluded. On the latter heading it is contended that the Applicant has failed to furnish any facts which reflect that the 1st Respondent's decision was:

3.1.1 Irrational or unreasonable; and/or
3.1.2 Procedurally unfair; and/or
3.1.3 Unsupported by reasons.

On the merits the 1st Respondent contends that pursuant to the order of this court dated 29th November 2002 under Case No. 3331/02 where inter alia the 1st Respondent was ordered to consider the application of the Applicant within ten days of issue of the order, 1st Respondent convened on the 5th December 2002, a special meeting of the 1st Respondent where, inter alia, the provisions of the court order were

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brought to the attention of the parties present at such meeting. A copy of the minutes of the special board meeting is annexed marked "PMD2".

According to the lst Respondent the minutes of the said meeting, read together with annexure "K" to the Applicant's founding affidavit, clearly reflect that the 1st Respondent acted honestly, reasonably and rationally.

It is further contended in this regard that it is relevant to record that on the 7th March 2003, the 1st Respondent handed the minutes of the Special Board Meeting held at Encabeni Boardroom on 5th December to the Applicant and the latter has not supplemented its founding affidavit after receipt thereof.

In paragraph 10 and 11 of the answering affidavit the 1st Respondent sought to demonstrate that the Board fully considered the consequences either to grant or refuse such application and that these were thoroughly investigated and debated by the Board.

In paragraph 12 the 1st Respondent dealt with issue that it failed to understand and appreciate the Applicant's case regarding local farmers and that this is denied. In this regard the court was referred to the affidavits of Nyoni and Sikhondze being annexure "GM4" and "GM5" to the 1st Respondent's answering affidavit under Case No. 3331/02.

In sum, the 1st Respondent's defence to the Applicant's allegations is that annexure "K" read together with annexure "PMD2" reflect inter alia, that the 1st Respondent acted honestly, reasonably and rationally, without bias or any apprehension of bias, and within the parameters of the law.

The 2nd Respondent

The 2nd Respondent intervened in terms of Rule 12 read with Rule 6 (27) of the rules of court and was accordingly joined in the main application. The affidavit in support of the application for intervention by its Managing Director Sifiso Stephen Nyoni provides its opposition to the main application as well.

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The first ground for opposition advanced by the 2nd Respondent is that the application is defective and bad in law in that it has been prematurely brought before this court for the following reasons:

18.1 Ngwane Mills seeks an order for the review and setting aside of the decision NAMBOARD to

register it as an importer and to issue an import permit to it.

18.2 In addition to the order setting aside the decision of NAMBOARD, Ngwane Mills seeks an order directing NAMBOARD to register it as an importer and granting it a permit to import a maximum of 3,000 tonnes per month.

18.3 In terms of Section 8 of the NAMBOARD Act, a person aggrieved by a decision of the Board not to grant a permit to import maize may, within thirty days of his being informed of such decision, appeal to the Minister in writing whose decision thereon shall be final.

18.4 There is no indication in the main application that an appeal to the Minister was made and that the Minister has made a decision on the matter, nor is there any congent explanation why the remedies outlined in the Act have not been exhausted.

It is further submitted in this regard in paragraph 18.6 that Section 8 oust the jurisdiction of the court. In the circumstances, the court may only exercise jurisdiction in a review of the Minister's decision not prior to it.

The second ground of opposition advanced by the 2nd Respondent is that the Board exercises its power to grant permits for the importation of scheduled products to the directions by the Minister. This is contained in Section 5 read with Section 7 of the Act.

The 3rd Respondent

The 3rd Respondent has not filed any opposing affidavit in this matter, however, Mr. Sigwane who represented the 3rd Respondent participated in the arguments before me and submitted Heads of Arguments on behalf of his client. The argument advanced on behalf of the 3rd Responded is that in terms of the National Agricultural Marketing Board Act, 1985 under Section 4, the Minister for Agriculture appoints three persons who represent farmers. The reason why three representatives for farmers are appointed is to ensure that the interests of the farming community, including that of the 3rd Respondent are well safeguarded when the said Board has to sit and consider

the grant of import permits to any agricultural importer under Section 6 of the said Act. The lst Respondent ensures that the importation of scheduled agricultural products is regulated. 1st Respondent is guided by Government policy and the various interests of the organizations represented on the Board.

The arguments for and against.

This matter was argued over three days of full arguments where all parties filed very comprehensive Heads of Argument for which I am grateful to counsel who appeared in this rather sensitive and important matter. For the sake of convenience I shall address the issues raised in this matter under various heads, as follows; 1) the Board's response to the application; 2) dictation and abdication; 3) impartiality; 4) domestic remedies; 5) fairness; 6) audi alterant partem 7) absence of reasons; 8) applying the mind; 9) legality; 10) antecedent right to trade.

I shall proceed to consider the above questions ad seriatum: thus; 1. The Board's response to the application.

The response of the Board to the application can be gleaned from the Minutes of the Special Board Meeting held at Encabeni boardroom on the 5th December 2002, and I shall re-produce them herein in extenso, as it may be necessary for purposes of the present enquiry: thus;

"1.0 Chairman's Remarks

The Chairman thanked all the members and he explained why he called the meeting within a short notice. He said the meeting was called because of the outcome of the High Court judgment of the case between Ngwane Mills and NAMBOARD on the urgent application for white maize import permit.

It was explained that the judgment was that Ngwane Mills has made an urgent application to the High Court before the Board took the decision whether the import permit is to be granted or not and also Ngwane Mills did not make an appeal to the Minister as it is stated in the NAMBOARD Act.

2.0 The Board was advised to make its decision within ten days from the 2nd of December 2002. The Board -has to demonstrate complete autonomy when it takes the decision on the matter.

Minutes to be clearly written as they may be used as evidence in court. Members are urged to disregard the letter from the Hon. Minister of Agriculture and Cooperatives and exercise their own independent judgment based of the facts at hand. Merits and demerits of not issuing maize import permit to Ngwane Mills should be clearly stated. According to NAMBOARD Act No. 13 of 1985 the Board has the power to issue or not to issue permits of scheduled products".

Further, at paragraph 6 the issue of the Applicant's application is discussed at length as follows:

"6.0 Report on the High Court judgement on Ngwane Mills Maize Import Permit.

6.1 On the urgent application by Ngwane Mills on white maize import permit members deliberated on merits and demerits of the application by Ngwane Mills.

6.2 It was raised that the function of NAMBOARD is to regulate the import and export of scheduled products so that the local production is encouraged.

6.3 One member raised that it would be better if the meeting was after members have met with the Minister of Agriculture and Cooperatives.

6.4 Members requested the Chairman of the Board to inform them on the current situation of National Maize Corporation. The Chairman said it appeared there has been conflict between Ngwane Mills and National Maize Corporation but it has been corrected. The Board of National Maize Corporation advised its Chief Executive Officer on this conflict. He has been advised to deal with the issue impartially. Ngwane Mills does not want to buy from National Maize Corporation but other millers are buying from National Maize Corporation. National Maize Corporation at that time had 6 500 tonnes of white maize in stock.

6.5 National Maize Corporation is negotiating with other financial institutions like Swazi Bank to buy more maize. If it were not the financial constraints National Maize Corporation would be having more white maize in stock.

6.6 It was raised that if the Chief Executive Officer of National Maize Corporation have been contacting NAMBOARD Acting Chief Executive Officer when making the purchasing decision such problems could have been avoided by National Maize Corporation.

6.7 One member said it is understood that maize is available but at what price. There is a great concern about the price charged to the consumer. It was raised that at that time National Maize Corporation was charging E300.00 more per tonne.

6.8 It was raised that there is no guarantee that if Ngwane Mills is granted with white maize import permit the price will drop. It was stressed that all private companies

are after profits out of the poor local consumer. NAMBOARD will not be able to control Ngwane Mills when it charges high prices because it is a private company. NAMBOARD's mandate is to control import and export of scheduled products not prices. NAMBOARD can discuss with National Maize Corporation the price issue as a fellow parastatal organization, but with Ngwane Mills it is impossible for NAMBOARD to discuss the price issue.

6.9 It was reported that if Ngwane Mills is given an import permit it will be difficult to control it because currently it has been enjoying the wheat rebate from South Africa, but Ngwane Mills does not want to honour the facility. It exports flour to South African markets.

6.10 It was raised that one might argue that allowing monopoly of maize importation is allowing the high price but if we allow import permit of maize farmers will turn to the production of sugar and the country will not produce white maize which is the staple food. The country will depend on the imports. To encourage local production of maize, local farmers should be protected against the lower prices of the imported white maize. The SACU agreement states that the countries may protect their local industries.

6.11 To stabilize prices at National Maize Corporation government needs to subvent NMC as it was mentioned in the stakeholders meeting. It was stressed that NAMBOARD in allowing the indiscriminate importation of white maize will be contradicting with the Government policy which is to encourage farmers to grow maize to attain self-sufficiency.

6.12 Members said we should think of the future, if the import permit is granted and there is surplus the local farmer will suffer and the price of maize will drop and the farmer will not be able to make a living. One member raised that the issue of local farmer's is clear. What do we do with the high price because price of maize is high in South African region?

6.13 In response to that it was said National Maize Corporation need to be advised on its mandate of stabilizing the price of white maize. It has to consult other stakeholders on the price issue.

6.14 One member asked what will happen if Ngwane Mills is not given a permit. The response was the Ngwane Mills might go t court. If it goes to court we have to state the power of NAMBOARD in issuing of permits. NAMBOARD may grant or refuse to grant an import permit.

Resolutions

(i) NAMBOARD should not issue white maize import permit to Ngwane Mills.
(ii) The Acting Chief Executive Officer should reply Ngwane Mills stating clearly that as per Board's resolution the white maize import permit will not be granted to him. The Board has measured the interest of the local farmers

and the need to encourage the local production by creating awareness to the farmers for the need to the local industry. iii) As a regulating body NAMBOARD should discuss with National Maize

Corporation the price issue. iv) To mention that it is not a monopoly but constant monitoring is required so that we review the system in the future, v) The Chief Executive Officer of National Maize Corporation should contact

NAMBOARD in the pricing issue as a facilitator. If National Maize Corporation applies for an import permit he should discuss with

NAMBOARD".

It would appear to me on a fair assessment of the above excepts of the minutes of the Board that the Board demonstrated complete autonomy when it took a decision and members were urged to

disregard the letter from the Minister of Agriculture and Cooperatives and to exercise their own independent judgment based on the facts at hand the merits and demerits of not issuing a maize import permit (see item 2).

At item 6.1 of the minutes the members deliberated the merits and demerits of the application of the Applicant. At item 6.2 the function of NAMBOARD was discussed. At items 6.8, 6.9, 6.10, 5.13 the Board considered in great detail the application by the Applicant inter alia that there was no guarantee that if the Applicant was granted a white maize permit the price would drop the 1st Respondent's mandate was to control the import and export of scheduled products not prices.

In my mind, the facts as re-produced above, reveal that the Board acted lawfully, honestly, reasonably and rationally, in the circumstances.

It is clear from the minutes of the Board that it did not simply follow the instruction of the Minister or decided in advance to refuse the application or abdicate its power or did not properly apply its mind, (see Baxter, Administrative Law, at page 85, 416, 417 and Hoexter et al, The New Constitutional and Administrative Law Vol. 2 at page 165 - 166). In the case of Schoolbee and others vs Mec for Education, Mpumalanga & another, 2002 (4) S.A. 877 [1] the court in South Africa when applying the promotion of Administrative Justice Act No. 3 of 2000, stated that the said Act was in large part a partial codification of administrative law with specific

reference to administrative actions. The court further held that in a constitutional state rationality, reasonableness, fairness and openness were very important considerations in the evaluation of the exercise of statutory power under judicial review.

In casu, as I stated above the facts reveal that the decision of the Board was supported by reasons as reflected in the minutes and that the Board acted rationally, reasonably and fairly. Therefore, it would appear to me that the Applicant cannot succeed under this head.

2. Dictation and abdication

The accusation by the Applicant is that the Board was dictated upon and ultimately abdicated its power. This attack eminates from a letter dated 4th November 2002, (annexure "N") from the Minister informing NAMBOARD as follows:

"I hereby wish to remind NAMBOARD that the Ministry's policy regarding the importation of white maize into Swaziland has not changed, This therefore means that the National Maize Corporation (NMC) remains the sole importer of maize into Swaziland. Should there by (sic) a change in policy, the Ministry will direct accordingly..."

To support its case, in this regard the Applicant has cited what is said by Baxter (supra) at 442 where the learned author states:

"Discretionary power vested in one official or body may not be usurped by another .... This constitutes an unlawful dictation and a failure by the person upon whom the power has been conferred to exercise his own discretion"

The Applicant further relies on the dicta in the case of Cineland (Pty) Ltd vs Licensing Officer Hhohho District and others 1977 - 78 S.L.R 106 where the following was stated; and I quote:
"I can conceive of no greater irregularity than for the Government to instruct a licensing officer, the official appointed for that very purpose pursuant to the enabling statute, that an application is to be postponed, and to follow this up with a letter, while the matter is still subjudice, that the Government has refused the grant of an additional cinema in Mbabane..."

It appears to me that the answer to this vexed question lies within the provisions of the NAMBOARD Act as to the delegation of the Minister's powers to the Board and the applicability of the Act.

It would appear to me that in this regard Mr. Magagula for the 2nd Respondent is correct in his submissions that the NAMBOARD Act is a delegation of the powers of the Minister to the Board.

The National Agricultural Marketing Board ("NAMBOARD") is created by Section 3 of the National Agricultural Marketing Board Act, 13 of 1985. In terms of Section 5 (a) of the Act the Board may "register ... importers ... .of scheduled products".

Section 6 (a) of the Act provides that the Board may, in the exercise of its function in terms of Section 5,

"Require any person wishing to engage or who is engaged in importing and exporting scheduled products to register with and obtain a permit from the Board"

The Act provides in Section 7 that:

"The Minister may give directions of a general nature to the Board relating to the performance of its duties and the Board shall comply therewith".

Clearly, therefore from the above it appears that the exercise of the powers by the Board in terms of Section 5 is subject to any directions given to it by the Minister under Section 7. Section 7 empowers the Minister to give "directions" or a "general nature" to the Board relating to the "performance of its duties" and the "Board shall comply therewith" therefore, it is within this legal framework that the letter from the Minister to the Board should be viewed.

In this regard the submissions made by Mr. Magagula for the 2nd Respondent compels me to conclude that the Board, if one has regard to the provisions of the Cereals Act exercises powers delegated by the NAMBOARD Act, and is an instrument through which the Minister exercises powers vested in him in terms of the Cereals Act. It appears to me that the contentious letter from the Minister was

a directive issued in terms of Section 7 of the Act. It is a directive restating the Government policy regarding the importation of maize into Swaziland. It should be further noted that the import of the letter is of a general nature and there is nothing in it which suggests that the Minister was dealing specifically with the Applicant's application.

The minutes of the Board show clearly that the Board considered the application and applied its mind. The following is recorded at item 2.0 "the Board was advised to make its decision within ten days from the 2nd December 2002. The Board has to demonstrate complete autonomy when it takes the decision on the matter... members are urged to disregard the letter from the Hon. Minister of Agriculture and Cooperatives and exercise their own independent judgement based of (sic) the facts at hand. Merits and demerits of not issuing maize import permit to Ngwane Mills should be clearly stated. According to NAMBOARD Act No. 13 of 1985 the Board has the power to issue or not to issue permits of scheduled products".

It was further contended for the Applicant that the referral by the Board to the Minister constitutes an unlawful abdication of power. However, in my view on the basis of what happened in the Special Meeting of the Board and as reflected in the minutes of that meeting re-produced above (especially item 2.0 therein) I am unable to say that the Board abdicated its powers as alleged by the Applicant.

I hold therefore, for the above reasons that in casu on the facts the Applicant cannot succeed on this leg of the argument.

It appears to me further that the above reasoning apply to other Heads of Argument advanced by the Applicant viz 4) impartiality; 6) fairness; 9) applying the mind and therefore for the sake of brevity I hold that the views expressed under 2nd Head apply in the other Heads I have just mentioned. I will not therefore address these Heads individually. Therefore the subsequent numbering of the remaining grounds will follow a rather haphard fashion.

3. Domestic remedies

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The Respondents contends that

"Domestic remedies have not been exhausted and common law remedies are excluded".

The Applicant however contends that having regard to the involvement of the Minister in the application, the contention by the Respondents is untenable. In the Cineland case, supra at page 109 G this court observed:

"How can an Applicant hope to succeed in an appeal to him when the Government, of which he is a member, has decided in advance that the application should be refused?"

The Applicant further contends in this regard that the authorities are in any event destructive of this contention. The reference to " any decision of the Board" in Section 8 of the Act contemplates a decision reached as a result of valid proceedings by the Board where the complaint is the illegality or fundamental irregularity of the decision of the Board, a challenge to the court is appropriate.

In this regard the court was referred to the case of Golube vs Oosthuizen 1955 (3) S.A. 1 (T) where the general rule was enunciated as follows:

"The mere fact that the legislative has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to the court of law should be barred until the aggrieved person has exhausted his statutory remedies".

The court was further referred to the cases of Welkom Village Management Board vs Letenu 1958 (1) S.A. 490 (AD) and to Rose Innes, Judicial Review of Administrative Tribunals in South Africa, 75. Furthermore, that where the issue is one which involves fundamental considerations of legality, it is highly unlikely that the court will require that the Applicant to exhaust domestic remedies, (see Local Road Transportation Board vs Durban City Council 1965 (1) S.A. 586 (AD) at 592 H -594 D and Baxter op cit, 723)

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Section 8 of the Act provides that any person aggrieved by the decision of the Board not to grant an import permit may within 30 days appeal to the Minister in writing whose decision shall be final.

In this regard I agree with the submissions advanced for the 2nd Respondent that the provisions of Section 8 should be considered together with Regulation 2 under Schedule II of the Cereals Act which grants the Minister absolute discretion to grant or refuse a permit. It appears that the intention of the legislature was clearly to replace common law remedies by statutory remedies and to make the Minister the ultimate arbiter with regards to the issue of licences, (see Baxter op cit 723 - 4 and the authorities therein cited. See also Madrassa Anjun Islamia vs Johannesburg Municipality 1917 A.D. 718 at 723).

In the leading case of Madrassa (supra) Solomon JA's thought that, as a general principle, the provisions of statutory remedies implies that the ordinary remedies are replaced, though he accepted that this presumption would be rebutted by clear evidence to the contrary in the statute concerned.

The legislature intended to limit the remedies available to persons aggrieved by a refusal to grant a permit to mere administrative procedures, I am again in agreement with Mr. Magagula in this respect that appealing to the Minister would have provided an effective redress mainly due to the complexities of issues involved which are inextricably intertwined with policy. However, it is my view that it would be otherwise if the Board acted illegally. In casu it has been shown that the Board acted in terms of powers vested in it by the Act.

In sum, therefore, under this Head of Argument I find that the Applicant has approached this court without exhausting local remedies.

5. Audi alteram partem.

The Applicant's contention in this regard is premised in a dictum in the South African case of South African Roads Board vs Johannesburg City Council 1991 (4) S.A. 1A

at page 10 H -1 where the following was enunciated as regards the common law requirement of audi alterant partem:

"Comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights".

In Administrator, Transvaal and others vs Zenzile and others, 1991 (1) S.A. 21 (A) at 37 E-F the court quoted from an English judgment as follows;

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not, of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a charge".

The author Baxter, op cit 546 put it this way:

"In order to enjoy a proper opportunity to be heard, an individual must be properly appraised of the information and reason which underlie the impending decision to take action against him".

The Applicant in this regard relied further on the eases of Yuen vs Minister of Home Affairs 1998 (1) S.A. 958 C, 965 B - C, Foulds vs Minister of Home Affairs and others 1996 (4) S.A. 137 (W), 143 B - C and the case of Logbro Properties CC vs Bedderson No. and others 2003 (2) S.A. 460 (SCA) at 471 - 472, paragraph 23 - 25.

The gravamen of the Applicant's case in this regard is that despite its request to be heard the Board failed to afford a hearing to the Applicant.

However, the stance adopted by the Respondents is that the Board was under no obligation to hear oral submissions by the Applicant. Annexure "K" to the Applicant's founding affidavit read together with annexure "PMD2" hereto clearly reflects that the application was considered fully by the Board, and the consequences either to grant or refuse such application were thoroughly investigated and debated by

the Board. 1 am persuaded by the arguments advanced for the Respondents as reflected in "PMD2" that the following issues were discussed by the Board.

10.9 The judgment of the High Court of Swaziland (item 1, paragraph 2);

10.9.2 That the board had to demonstrate complete autonomy when it took a decision and members from the Honourable Minister of Agriculture and Cooperatives and to exercise their own independent judgment based on the facts at hand - the merits and demerits of not issuing a maize import permit (item 2).

10.9.3 The functions of NAMBOARD was discussed (item 6.2);

10.9.4 There was no guarantee that if the Applicant was granted a white maize permit the price would drop... The first Respondent's mandate was to control the import and export of scheduled products not prices (item 6.8).

Further issues which came under debate in that meeting of the Board are found in paragraphs 10.9.6, 10.9.7, 10.9.8 10.10, 10.11 of the answering affidavit of the Chairman of the Board. In this regard I refer to the case of Davies vs Chairman, Committee of the J.S.E 1991 (4) S.A. 43 where Zulman J stated the following principles pertaining to judicial review:

(1) The conduct of a statutory body exercising quasi-judicial functions is subject to review by the Supreme Court

(2) The issue before a court on review is not the correctness or otherwise of the decision under review. Unlike the position in an appeal, a court of review will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official, for a review does not as a rule import the idea of a reconsideration of the decision of the body under review.

(3) The remarks of Innes CJ in Johannesburg Consolidated Investment Co. vs Johannesburg Town Council continue to apply.

(4) A court has limited jurisdiction in review proceedings and supervises administrative action in appropriate cases on the basis of "gross irregularity".
(5) There is no onus on the body whose conduct is the subject matter of review to justify its conduct. On the contrary, the onus rests upon the Applicant for review to satisfy the court that good grounds exist to review the conduct complained of.
(6) The rules relating to judicial proceedings do not necessarily apply to quasi-judicial proceedings.

(7) The body whose conduct is under review is entitled, subject to its own rules, to determine the rules of procedure it will follow.
(8) The rules of natural justice do not require a domestic tribunal to apply technical rules of evidence observed in a court of law, to hear witnesses orally, to permit the person charged to be legally represented, or to call witnesses or to cross-examine witnesses.
(9) A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been "a failure of justice". A mere possibility of prejudice not of a serious nature will not justify interference by a superior court, (my emphasis).

For present purposes it is my considered view that points 7, 8 and 9 cited above apply in the present case.

In casu having regard to annexure "K" to the Applicant's founding affidavit read with annexure PMD2 referred to by the respondent. It does not appear to me that the non-appearance of the Applicant has resulted in a failure of justice. In this regard see also Jockey Club of South Africa and others vs Feldman 1942 A.D. 340 at 359 and that of Larson and others vs Northen Zululand Rural Licensing Board 1943 N.P.D. 40.

For the above-mentioned reasons I have come to the considered view that the Applicant cannot succeed under this ground.

7. Absence of reasons.

On the 17th December 2002, the Applicant requested "full and detailed reasons" for the decision of the Board and further requested a copy of the minutes of the relevant meeting of the Board (per Vol. I. 109 -110).

In a letter dated 16th January 2002. the Board refused to give reasons and stated inter alia.
"2.1 The minutes of the Board on any of its deliberations are confidential and cannot be
distributed to persons who are not members thereof. 2.2 The Board is not obliged to furnish you with information required on (sic) your letter under reference. Therefore your request cannot be acceded to" (per Vol. I page 111).

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The Applicant contends in this regard that it is understandable why the Board failed to give reasons for its decision. The decision was not based on reason. It was argued in this connection that in the case of Padfield and others vs Minister of Agriculture, Fisheries and Food & others 1968 AC 997 at 1006 - 1007 B it was said:

"If the Minister is to deny the complainant a hearing - and a remedy he should at least have good reasons for his refusal: and, if asked, he should give them. If he does not do so, the court may infer that he has no good reason".

It appears to me in casu that the minutes of the Board suffices in this regard.

Therefore, I rule that the Applicant cannot succeed under this head and further on the basis of the dicta I have cited in the Davies case (supra) that the court in review proceedings is concerned with irregularities which result in a "failure of justice". The mere possibility of prejudice is insufficient.

The remaining issues for determination are (9) legality and (10) antecedent to trade and I have come to the view that further discussion thereto would be pointless having regard to my views in the other points, more particularly the issue of exhausting local remedies.

This leaves me with only one outstanding matter, that of costs. The issue of costs.

Counsel for the 2nd Respondent contended that the Applicant has approached this court without exhausting local remedies and without basis in law and in fact should be penalised with a punitive costs order. The Applicant was aware that it had to exhaust the remedies provided for in the Act prior to approaching this court on review. Despite its knowledge, it decided to disregard the law and proceeded to bring review proceedings.

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It was argued further for the 2nd Respondent that the Applicant's conduct aforesaid has prejudiced the 2nd Respondent who had to incur huge costs to oppose the matter and this prejudice can appropriately be compensated by an award of costs on a punitive scale.

Counsel for the 1st and 3rd Respondents also adopted the same stance as that of the 2nd Respondent.

Counsel for the Applicant, however argued per contra that it believed its cause in approaching the court as it did. The case for the Applicant in this regard was premised on the dicta in the Cineland case supra at 109 G where the court asked "how can an Applicant hope to succeed in an appeal to

him when the Government of which he is a member, has decided in advance that the application should be refused?" The Applicant contended that costs should be on the ordinary scale.

The award of costs is a matter wholly within the discretion of the court (see Fripp vs Gibbon & Co. 1913 A.D. 354). Herbstein et al, The Civil Practice of the Supreme Court of South Africa (4th ed) at 703 states that this is a judicial discretion and must be exercised on the grounds upon which a reasonable man could have come to the conclusion arrived at.

It is a fundamental principle that, as a general rule, the party who succeeds should be awarded his costs (see Herbstein (supra) at page 705 and the cases cited thereat.

An award of attorney-and-client costs will not be granted lightly, as the court looks upon orders with disfavour and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have (see Herbstein (supra) at page 717 and the cases cited in footnote 146 thereof).

In the present case, my view is that the Applicant has exercised its right to obtain a judicial decision on a legitimate complaint. Therefore I would award costs in the ordinary scale.

In the result, on the above-mentioned reasons the application is dismissed with costs to include costs of counsel to be taxed in terms of Rule 68 of the High Courts Rules.

S.B MAPHALA

JUDGE