IN THE HIGH COURT OF SWAZILAND

Civil Case No. 1668/2007

SWAZILAND COMMERCIAL AMADODA

ROAD TRANSPORTATION ASSOCIATION Applicant

And

THE MINISTER OF NATURAL RESOURCES 1st Respondent

THE PRICE CONTROLLER 2nd Respondent

THE ATTORNEY GENERAL 3rd Respondent

OIL INDUSTRY 4th Respondent

SWAZILAND PETROL RETAILERS

ASSOCIATION 5th Respondent

Coram: S.B.MAPHALALA-J

For the Applicant: MR. N. FAKUDZE

For the Respondent: MR KUNENE - Crown Counsel assisted by MR VTLAKATI -

Crown Counsel in the Aconrcy General's Chambers

JUDGMENT

25th May 2007

[1] This is an application brought under a Certificate of Urgency for an interim interdict declaring the Maximum Wholesale and Retail Prices of Petroleum Products Notice, Tuesday 8th May 2007 made pursuant to the Price Control Order 25/1973 null and void and unconstitutional and against the public interest.

[2] Ordering and directing the 1st and 2nd Respondents to issue a new Notice in strict conformity and adherence to the Price Control Order 25 of 1973 and the Constitution Act that such new Notice should only come into force after a period of 14 (fourteen) days or such other period equivalent to the number of days and that the Notice would have been in force.

[3] That pending the issuance of such Notice the *status quo ante* prior to the 8th May 2007 prevails.

[4] The application is founded on the affidavit of its Secretary-General one Duma Msibi who has averred therein that he has been duly authorized K> institute the present proceedings by virtue of a resolution of the Applicari: attached herein and marked "S1

[5] The Respondents oppose the granting of the above-cited orders aod have filed a Notice of Intention to Oppose accompanied by a Notice to Raise

Points of Law that should be sufficient to unseat the Applicant on the following grounds:

1. *Locus standi* - The Applicant lacks sufficient facts to show that the Applicant has *locus standi.* An association, whether corporate or incorporate, derives *locus standi* from its constitution. The Applicant ought to have attached its constitution to the Founding affidavit. The failure to do so is fatal to the Applicant's case.
2. The Applicant is bringing a representative application on behalf of its members. It is incompetent for an association to sue on behalf of its members where the members can sue in their individual capacities as members of that association.

[6] In arguments before court Counsel for the Respondents cited two cases in support of the first point of law raised being the South African case of *Bantu Callies Football Club vs Motlhamme and others 1978 (4) SA. 486 (T)* and the local decision in the matter of *Lawyers for Human Rights (SWDj and another vs Attorney General and Another - Civil Case No. 1822/2001.*

[7] On the second point of law the Respondents directed the court's attention to two South African decisions in the matter of *Ahmadiyyc Anyuman Ishaati - Islam Lahore (South Africa) and Another vs Muslin: Judicial Council (Cape) and Others 1983 (4) SA. 855 (cj ZL 864 B - F* anc that of *Congress of Traditional Leaders of South Africa vs Minister of Loco] Government, Eastern Cape and Others 1996 (2) SA. 898 (1X5/* at *905G.*

[8] On the other hand the Applicant oppose the above-cited points of **law** and in argument before me Counsel for the Applicant contended that in the case of *Bantu Callies Football Club (supra)* it was not stated as a requirement that an association must file its constitution.

[9] Counsel, for the Applicant further cited the South African case of *Tattersall and another vs Nedcor Bank Ltd 1995 (3) S.A. 222 A* where it was stated that when challenge to authority the ~weak minimum evidence sufficient rule" is applied and that authority can be proved by *aliunde* evidence. The court was further referred to the case of *Merlin Gerine (Pry) Ltd vs All Current and Drive Centre (Pty) Ltd and another 1994 (I) S.A. 659 (c)* where Conradie J stated the following:

"Moving for dismissal is not itself a right but a remedy for title right not to be unfairly proceeded against … where, however, as in the present case the resolution of the Applicant's board has only to be submitted to be accepted, there is really very little haam in allowing an Applicant to put his papers in order

[10] It was contended further for the Applicant that it is legally competent and capable to

sue in its capacity and it would be unprecedented thai its members should bring the application in their individual capacities.

[11] In this judgment I shall proceed to determine the points of law raised *ad seriatim*, thusly;

(i) Locus standi.

[12] The argument for the Respondent in this regard is that the Applicant ought to have attached its constitution to the Founding affidavit. The failure to do so is fatal to the Applicant's case.

[13] In this regard the Respondents rely on what was held in the South African case of *Bantu Callies Football Club (supra)* and the local decision in *Lawyers for Human Rights (supra).* In order to fully understand the argument I shall sketch briefly the findings in these two cases as follows:

[14] In *Bantu Callies Football Club (supra)* King J stated as follows:

"The rights and powers of a voluntary association are limited by the terms of its charter on constitution. The constitution defines whether an association is or not a *universitas* and confines its activities to what is expressly or impliedly contained therein"

[15] Masuku J in the case *Lawyers For Human Rights (supra)* adopted what was said in the case of *Moletlegi and Another vs President of Bophuthatswana and another 1989 (3) S.A. 119 B* that having considered relevant provisions of the respective constitutions of the Applicant he came to the view that both Applicants did not qualify IO be regarded as *universitas.*

[16] In *PJimandiya Anyuman Ishaati (supra)*, it was held, *inter alia* that if the

constitution of an association makes it clear that such association has the characteristic of a *univeristas*, this would be decisive of ibe issue it can sue in its own name. It would only be in those instances where the constitution is not clear that one could have regard to the activities of an association in order to determine whether those activities are such *zs to* constitute the association a *universitas*. The facts of this case are clearly stated in the head-note as follows:

The first Plaintiff described itself as "a voluntary association of Muslims" constituted in terms of a written constitution. Its members were said to be commonly referred to as "Ahmadis". It alleged that the first Defendant (a voluntary association of sheiks, imams and theologians) had wrongfully and maliciously propagated to Muslims in South Africa defamatory mater concerning its members, to wit, that all Ahmadis were non-Muslims, were apostates from Islam, were non-believers, that they rejected the finality of the prophethood of Muhammed and that they were therefore to be denied admittance to all mosques, denied the right to bury their dead in any Muslim cemetery and that all business and social intercourse with Ahmadis should be prohibited. The first Plaintiff, together with the second Plaintiff (who joined the action as a member of the first Plaintiff and in his individual capacity), claimed (a) as against all the Defendants, an order declaring that the members of the first Plaintiff were Muslims and as such were entitled to ail such rights and priviledges as pertain to Muslims, (b) as against the first Defendant, an order interdicting it from propagating false and defamatory matter concerning the members of the first Plaintiff, (c) as against the second Defendant (the trustees of a particular mosque), an order declaring that the first Plaintiffs members were entitled to admittance to the mosque, and (d) as against the third Defendant (the trustees of a Muslim cemetery), an order declaring that the members of the first Plaintiff had me same rights of burial in the cemetery as pertained to all Muslims. The Defendants excepted to the first Plaintiffs particulars of claim on the grounds that it had no *locus standi* to bring such claims. They argued their exception on two bases. Firstly, they argued that the firs: PJaimiff had not alleged that it as such had suffered the wrongs which were tie foundation of its action, but that such wrongs had been suffered by its *members*. The first Plaintiff thus sought relief on behalf of its members, which it had *locus standi* xo co GO ibex behaif in that it had no direct interest in the proceedings or the relief sought *sod* isai oo power to bring a representative action on behalf of its members or to protcci or safeguard the interests of its members in relation to the dispute. Secondly, they argued rifcar *tic* first Plaintiff had no *locus standi* to institute that part of the action that rdated 'jo oefenation in that it, as an association, was not capable of being deferral. OH a proper ante jactation of the particulars of claim it was bringing a represeaitatrve action cm gehaEf of its members which it was not competent or able to bring. The first Plaintiff argued that the exception was incompetent because, apart from an examination of its constitution, evidence would be necessary as to the activities of the association before the court could decide whether it was a *universitas* or not

[17] Counsel for the Applicant further referred to the South African case of *Congress of Traditional Leaders of South Africa (supra)* where the Applicant's essential complaint was that the application of the Transition Act to rural areas in the Eastern Cape deprived traditional leaders of their powers in terms of various legislation which was not specified by the Applicant, which powers were in some sense entrenched in substantive provisions of the Constitution Act.

[18] The Respondents raised certain points *in limine,* amongst others that on the papers deponent to the Founding affidavit had no authority on behalf to institute the application or to depose to the affidavit and that Contralesa had no *locus standi* to bring the application in that it did not have a direct and substantial interest in the subject matter of the litigation, and that the court had no jurisdiction to enquire into the validity of certain of the legislation attacked by the Applicant. The Applicant conceded the latter point. It was held, *inter alia,* with regard to the question of whether or not the Applicant had *locus standi,* that the law as it stood at present did not permit the bringing of representative or class actions save in those circumstances now specified in Section 7 of the Constitution Act. I must mention that in this case the court referred to anxragsi other cases that of *Ahmadiya (South Africa) (supra).*

[19] After considering all the cases cited in this dispute I am inclined to follow what was suggested by Counsel for the Applicant **in** line with what was decided in the South African case of *Tattersall and Another (supra)* where it was stated that when challenge to authority the [4]Nveak minimum evidence sufficient rule" is applied and that authority can be proved by *aliunde* evidence. The reason I have adopted this approach is that the present matter is very important to many people in this country and I am of the considered view that it would be folly for this court to dismiss such a case on mere technical objections and leave the gravamen of the case undecided. I do appreciate that the South African cases may have dealt with issues in the realm of company law but I am

of the considered view that the legal principles propounded in those decisions can **find** application in cases similar to the one before court.

(ii) A representative application.

[20] Coming to the second point *in limine* that the Applicant is bringing a representative application on behalf of its members. Again in this regard in view of the facts of the matter I am inclined to agree with the Applicant. The Applicant is legally competent and capable to sue in its capacity representing its members and I agree with the Applicant's Counsel that it would be unprecedented that its members should bring the application in their individual capacities. Here we have hundreds of thousands affected people around the country.

[21] In the result, for the afore-going reasons I would dismiss the points of law raised by the Respondents and further state that costs reserved to themain application. Further Respondents to file their opposing affidavits and Applicant granted leave to file its constitution as *aliunde* evidence as stated in the *Tattersall* case *(supra).*

S.B.MAPHALALA

JUDGE