

**IN THE HIGH COURT OF SWAZILAND HELD**

**AT MBABANE**

Civil Case **No.** 1668/2007

**SWAZILAND COMMERCIAL AMADODA  
ROAD TRANSPORTATION ASSOCIATION**

**And**

**THE MINISTER OF NATURAL RESOURCES THE  
PRICE CONTROLLER THE ATTORNEY  
GENERAL OIL INDUSTRY  
SWAZILAND PETROL RETAILERS  
ASSOCIATION**

Coram

For the Applicant For the  
Respondents

1<sup>st</sup> Respondent 2<sup>nd</sup>

Respondent 3<sup>rd</sup>

Respondent 4<sup>th</sup>

Respondent 5<sup>th</sup>

Respondent

S.B. MAPHALALA- J MR. N.

FAKUDZE MR M. VILAKATI -

Crown Counsel in the

Attorney General's Chambers

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**JUDGMENT**

**18th June 2007**

[ 1 ]The Applicant has brought an urgent application seeking an order as follows:

1. Dispensing with the usual forms and procedures relating to the institution of proceedings and service as provided for in the rules of the above Honourable Court and to hear the above matter as a matter of urgency.
2. That a rule *nisi* do issue returnable on the Friday day th; 25<sup>th</sup> day of May 2007 calling upon the Respondents to show cause why:
  - 2.1 The Maximum Wholesale and Retail prices of Petroleum Products Notice, Tuesday 8<sup>th</sup> May 2007 made pursuant to the Price Contrail Order 25/1973 should not be declared null and void and unconstitutional and against the public interest; 2.2 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents should not be ordered and directed to issue a new notice in strict conformity and adherence to the Price Control order 25/1973 and the Constitution Act; and
  - 2.3 That any new notice issued pursuant to prayer 2.2 above should only coming to force after a period of 14 (fourteen) days or such other period equivalent to the number of days that the above mentioned notice would have been in force; and
  - 2.4 Pending the issuance of any new notice the *status quo* are prior to the 8\* may 2007 prevail.
3. That the 1<sup>a</sup> and 2<sup>nd</sup> Respondents and any other Respondent who oppose this application be ordered to pay the costs hereof jointly and severally
4. Granting such further and/or alternative relief as to this Honourable Court seems meet

[2] Initially the Respondents raised two points *in limine* touching on the *loci standi* of the Applicant and these were dismissed by the court on 25th May 2007, and the Respondents then filed fully :1 edged Answering affidavits on the merits of the dispute.

[3] The brief facts of the matter are that the Applicant is an association duly incorporated in terms of the company laws of Swaziland in the public transport business. According to the Applicant its members consume a large

**quantity of petroleum products on a daily basis by virtue of their business.**

**on their**

**On the 8 May 2007, the 2<sup>n</sup> Respondent caused to be issued a Legal Notice in terms of Section 5 and 10 of the Prices Control Order No. 25 of 1973 to which the maximum wholesale and retail prices of petroleum products were increased. According to the Applicant the said Legal Notice has been issued unprocedurally and unlawfully and contrary to the provisions of Section 253 of the Constitution Act of 2005 of Swaziland. The Applicant further avers that the 4<sup>th</sup> and 5<sup>th</sup> Respondents have proceeded from the 8th day of May 2007 to act upon the unprocedural and unlawful increase of the alleged prices to the prejudice of the Applicant and its entire members.**

**[4] In paragraphs 14, 15, 16, 17 and 18 of its Founding affidavit the Applicant has made averments on urgency alleging, *inter alia*, that as the alleged Notice was not passed lawfully the Applicant could not then budget properly for the increase and as such the continued enforcement of the Legal Notice is a major financial setback to the Applicant's members as most of its members are servicing huge bank loans to manage their businesses and the present position will cause irreparable financial harm to such businesses.**

**[5] In opposition to this application the Respondents have filed Answering affidavits of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents where the defence is outlined. In the Answering affidavit of the Acting Principal Secretary of the Ministry of Natural Resources and Energy (hereinafter referred to as the "Ministry") Mr Bremer Nxumalo outlines in great detail the basis of the Respondents' opposition. The salient feature of this opposition is a general outline on how fuel prices are fixed In view of the importance and**

sensitivity of this dispute I shall proceed to outline this background of how fuel prices come about.

[6] According to the Acting Principal Secretary the prices of fuel are not decided locally. The international oil markets and the exchange rates, which in turn are influenced by geo-political factors, primarily determine domestic prices. The international prices are inherently volatile and change daily. Therefore, it is imperative that domestic fuel prices are adjusted on a regular basis. In this country the Price Controller adjusts prices on the recommendation of the Fuel Pricing Committee (The "committee"). The committee comprises of all the key stakeholders in the fuel industry. These include the Applicant in these proceedings, fuel companies operating in Swaziland Government of the Kingdom of Swaziland, the Central Bank and the Petrol Retailers Association.

[7] The Ministry monitors the fuel price situation closely and die fuel prices are adjusted (increased or decreased) in line "with movements in the international oil markets. The prices are adjusted on a regular basis, usually monthly, depending on the international oil price outlook.

[8] The Southern African Customs Union (with the acronym "SACU") countries which includes Swaziland, adopted a pricing mechanism, which tracks the movement of international prices on a dairy basis and prices are adjusted in line with the pricing model. The adjustments are made such that the oil companies, who procure the fuel, do not **benefit unfairly** from the domestic fuel price that is higher than the market prices. By the same token

consumers should not benefit unfairly from a domestic price that is far lower than the market prices.

[9] According to the Respondents the following example illustrates the sentiments expressed above. In January 2007, average market prices were lower than domestic prices. The market price of diesel on the one hand was 560 cents per litre. This situation necessitated a price decrease. The committee recommended a 15cents price decrease on diesel. In April 2007, the market price of unleaded petrol 95 was 647.549 cents per litre. In the same month the domestic price of unleaded petrol 95 was 600 cents per litre. This situation necessitated a price increase. The committee recommended a price increase of 35 cents per litre. A copy of the fuel price adjustment since April 1996 is annexed and marked "BN1".

[10] In Respondents' Answering affidavit it is contended further in paragraph 9 thereof that Applicant does not state which provision of Section 253 that Respondents have infringed. Neither is it stated how the violation of the Constitution has occurred. However, in the interests of building an indigenous constitutional jurisprudence Respondents' assume in the Applicant's favour that their complaint is that the recent price increases are inconsistent with Section 253 (2) of the Constitution. The Respondents deny that the power conferred upon the "Ministry" by the impugned provisions of the Price Control Order ("the Order") constitute subordinate legislation. The exercise of the power bestowed by the impugned provisions is purely administrative and hence not subject to parliamentary control in the manner envisaged by Section 253 (2) of the Constitution.

[11] Alternatively it is contended for the Respondents that if the exercise of power, which is under attack, is subsidiary legislation there was no obligation to lay the fuel price increase before each chamber of Parliament. The practice in other Commonwealth jurisdictions is that in cases where delegated legislation has to come into effect urgently, it (subordinate legislation) is laid before Parliament after the date of commencement. In this regard the Respondents avers that fuel prices are inherently volatile, prices have to be regularly adjusted so as to be in line with movements in the international oil markets. Fuel price adjustments fall into the category of instruments that have to come into effect urgently. Further alternatively, Parliament was not in session at the time the current adjustments in the fuel price was effected. The practice in other jurisdictions is that it is unnecessary to lay subordinate legislation before Parliament where the legislature is in recess or has been prorogued.

[12] In paragraph 12 thereof the Respondents aver that since the commencement of the Constitution (8\* February 2006) there has been not less than 9 adjustments of the prices of fuel. Five of the adjustments have been increases and four were decreases of the price. The Applicant did not seek to vindicate the Constitution by challenging the adjustments.

[13] In arguments before me both Counsel filed very comprehensive Heads of Arguments and I must state that Respondents' Counsel filed written Heads of Arguments later and thus the delay in me issuance of this judgment. I must further state that I appreciate both Counsel in advancing these Heads of Arguments in this rather sensitive and important case touching on many lives in this country.

[14] For the Applicant it was argued that the Respondents in enacting the offending legislation the provisions of Section 252 (2) of the Constitution Act has not been followed and as such the said legislation must be declared null and void. The offending legislation constitutes subordinate legislation as envisaged by Section 253 (1). That Section 253 (4) clearly provides that should such subordinate legislation not be desired to be tabled before both chambers for the required period such permission should be obtained from parliament. Herein the court is faced with the unconstitutionality of the legislation presently in force and where a prayer for invalidity is made, the issue of whether a law is invalid or not does not depend on whether, at the moment when the issue is considered, a particular person's rights are threatened or infringed by the offending law or not. In this regard the court was referred to the South African case of *Ferreira vs Levin N.O. and others*, 1996 (1) SA. 984 (cc). The court was also referred to the case of *Vryen Hock and others vs Powel N.O. and others* 1996 (1) SA. 984 (cc).

[15] The Applicant further contended that it is not the functions of the court to fill a *lacunae* in pre-constitutional statutes to save them from invalidity. In this regard the court was referred to the legal authorities in *Coetze vs Government of the Republic of South Africa; Matiso and others vs Commanding Officer; Port Elizabeth Prison and others* 1995 (4) SA. 631. The court was also referred to the South African case of *5 S vs Makwayane and another* 1995 (3) SA. 391 (C) where it was stated that when a court is faced with interpretation based on comparative foreign case law, what has to be borne in mind is, that it is the South African Constitution which has to be construed and such to be done with due regard to South African legal system, history and circumstances and structure and language of South

**Africa's own constitution. South African courts can derive assistance from public international law and foreign case law but not bound to follow it.**

**[16] Applicant's Counsel further referred the court to Section 140 (2) of the Constitution read in line with Section 172 (1) of the South African Constitution. The court was further referred to Hoexter, *The New Constitutional and Administrative Law* at page 277 - 279; *Johannesburg Consolidated Investments Co. vs Johannesburg Town Council* 1903 T.S. 111 and the case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) S.A. 674. Furthermore the court was referred to the case of *Port Elizabeth Municipality vs Prut N.O. and another* 1996 (4) S.A. 318 (E) to the general proposition that the courts should be slow to refuse to exercise jurisdiction where a decision in the public interest and may put an end to similar disputes.**

**[17] For the Respondents, it was contended that the issue in this application is whether the power conferred on the 3<sup>rd</sup> Respondent by Section 5 and 10 of the Price Control Order is subordinate legislation as envisaged by Section 253 (2) of the Constitution; and if so what is the appropriate remedy?**

**[18] Counsel for the Respondents submitted that confining the constitutional issue to the Legal Notice impugned by the Applicant in this application could lead to anomalous results. The irregular results would be that the unchallenged exercises of the power conferred by Section 5 and 10 of the Order are lawful but the challenged exercise of power is invalid.**



[19] The Respondents cited the English case in *Minister of Home Affairs (Bermuda) vs Fischer* [1979] 3 *ALL E.R.* 21 (PC) where Lord Wilberforce presided and propounded the classical statement that respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. Section 253 (1) of the Constitution defines "subordinate legislation" as "any instrument having the force of law made under an Act or Parliament" a literal interpretation of this definition would widely expand the scope of subordinate legislation and include instruments that are clearly not subordinate legislation.

[20] In this regard the Respondents contend that Section 251 (1) of the Constitution provides little assistance in answering the above question. However, Section 261 (3) of the Constitution states that the Interpretation Act can be used as an aid to interpreting the Constitution- Section 2 of the Interpretation Act defines subordinate legislation as a regulation, rule, bye-law or order made or given under the authority of an Act, Order-in-Council, Ordinance or Proclamation. It is contended for the Respondents that the expression "subordinate legislation" in Section 253 of the Constitution means a regulation, rule, bye-law or order. Section 5 and 10 of the Price Controller Order does not empower the Price Controller to make regulations, rules, bye-law or orders. Therefore, the power of the Price Controller is purely administrative and not legislative.

[21 ] The Respondents further contends that what is more the custom and usage of legislative practice in Swaziland is that where the legislature intends to delegate its law-making powers it uses a form of words that

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occurs so frequently that it can be characterized as a formula. The formula specifically empowers the public officer or body to make regulations, rules, bye-laws or orders. The formula has not been used in Sections 5 and 10 of the Price Control Order.

[22] On the contention by the Applicant that the power conferred on the Price Controller is legislative because Section 19 of the Order creates an offence it is without merit. In this regard Counsel for the Respondent cited the Criminal Procedure and Evidence Act which creates offences in Section 43 but does not follow that power conferred on a public officer by the act is legislative. For example the power of the Director of Public Prosecutions in Section 4 can hardly be classified as legislative neither can the power of a peace officer to arrest without a warrant in Section 23. The Respondents contend in sum that the power conferred by Section 5 and 10 of the Order is purely administrative, it does not amount to subordinate legislation. There was no obligation on the 1<sup>st</sup> Respondent to comply with the provisions of Section 253 (2) of the Constitution. The Respondents contend that on this ground alone the application should be dismissed with costs.

[23] The alternative argument advanced by the Respondents in the event that the court disagrees with them and concludes that the power conferred on the Price Controller is legislative is that there was no obligation on the 1<sup>st</sup> Respondent to "lay" the recent price adjustment of fuel before each chamber of Parliament. The Respondents' version, which the court has to accept, is that the prices of fuel is inherently volatile and has been adjusted on a regular basis. In addition there is no dispute that at the time of the last fuel price adjustments the legislature was not in session. Section 253 of the

Constitution does not deal with a situation where Parliament is not in session or has been prorogued and subsidiary legislation has to come into effect as a matter of urgency. In this regard Respondents directed the court's attention to parliamentary practice in other Commonwealth countries.

[24] In this regard the Respondent cited the practice in England that it is a convention in that country that subsidiary legislation that has to come into effect urgently need not, prior to the commencement, be "laid" before each chamber of the legislature when Parliament is not in session or has been dissolved.

[25] The Respondent further dealt with constitutional remedies in paragraphs 6.1, 6.2, 6.3, 6.4 and 6.5 of their Heads of Arguments.

[26] In paragraphs 7.1, 7.2, 7.3 and 7.4 Respondents advanced arguments on costs citing the Lesotho case of *Attorney General vs Mopa (2002) AHRLR 91 (LeCA)* where the following principle governing costs in constitutional matters was stated by Gauntlett JA:

"... litigants should not be deterred by the threat of an adverse costs orders from approaching a court to litigate an alleged violation of the Constitution If the issues raised by such a litigant: are advanced in good faith and not vexabously. and are important and controversial, the court is concerned not to penalize the Applicant

[27] The first question for consideration is whether Section 5 and 10 of the Price Control Order is subordinate legislation as envisaged by Section 253 (2) of the Constitution, and if so what is the appropriate remedy If not. I ought to dismiss the application without any further ado.

[28] Before attempting to answer this vexed question I pause to outline the relevant sections of the Act and the provisions of the Constitution which apply in this dispute.

[29] Section 5 of the Price Control Order provides as follows:

**"5.(1) The controller may from time to time by notice in the Gazette or, with the authority of the Minister, in the case of any particular person, by notice in writing:-**

5. **fix the maximum price at which any goods may be sold by any person to any other persons;**
6. **fix the maximum price at which any person may purchase any goods from any other person;**
  - (c) **fix the maximum charge that may be made by any person for any- specified service;**
  - (d) **prohibit any person. from making any charge for any specified service".**

[30 Section 10 of the above-cited Order provides the following:

- "10 (1) The controller may from time to time by notice in the Gazette or, with the authority of the Minister, in the case of any particular person, by notice in writing, prohibit the sale of any goods or the rendering of any services subject to conditions specified in such notice, or the refusal to sell any goods or render any services except subject.to conditions so specified whether the maximum price for the sale of such goods or the maximum charge for the rendering of such services has been fixed under this order or not.**
- (2) Any such prohibition may relate to any<sup>7</sup> goods or services or to any CLASS of goods or services and may vary in respect of different goods or services or classes of goods or services or classes or categories or persons.**

7. Without prejudice to the generality of the powers conferred on the controller by subsection (1), he may under such subsection by notice in the Gazette or, with the authority of The Minister, in the case of any particular person, by notice in writing, prohibit the sale of goods subject to conditions in terms of which, if the purchase price or other consideration is payable by installments, less than the portion of the purchase price or other consideration specified in the notice shall or may be paid in cash amount of money or in goods at the time the agreement is entered into and the full purchase price or other consideration shall or may be paid over a longer period than that specified in the notice.

8. For the purposes of the application of a notice such as referred to in subsection (3):-

9. substantial compliance with any condition specified in such notice shall be regarded as compliance with such condition; and

10. payment by means of a negotiable instrument (other than as promissory note) payable on demand to the seller or his order or to bearer shall be regarded as payment to the extent to which the amount due under such negotiable instrument is, within twenty- one days of delivery thereof to the seller, paid to the seller or his order or to the credit of his account, or that of his order, with a banker".

[31] Section 253 of the Swaziland Constitution reads *in extenso* as follows:

"Subordinate legislation.

" 253 (1) An Act of parliament may make provision conferring functions on a joint sitting of the chambers of parliament with respect to any subordinate legislation (that is to say any instrument having the force of law made under an Act of parliament) and for the summoning and procedure of a joint sitting for the purpose of the exercise of those functions (2) Every subordinate legislation shall before commencement be laid before each chamber of Parliament for a period of at least fourteen days.

11. **Subject to the provisions of subsection (4), if during the period of fourteen days that legislation is not called upon for debate by motion of any member, then the legislation shall be deemed to have been approved by the chamber concerned.**

12. **Where the legislation is called up for debate, that legislation shall only come into force when after the debate the chamber concerned resolves to approve the legislation with or without any alterations.**

13. **The provisions of subsection (2) and (4) inclusive shall not apply where a chamber resolves by a two-thirds majority of all its members that it shall not be necessary for the minister concerned to place the legislation in question before the chamber for the prescribed period.**

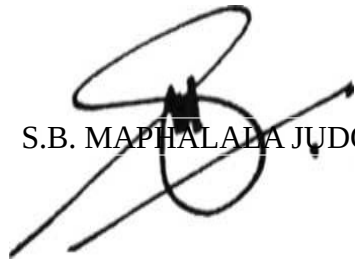
[32] I must state however, that the relevant subsection for purposes of this dispute before court is subsection 2 thereof.

[33] In my assessment of the arguments by the parties in this regard it appears to me that the contention advanced by the Respondents is correct on the facts of the matter. The Applicant has contended that the power conferred on the Price Controller is legislative because Section 19 of the Order creates an offence. It appears to me that this contention is without merit. The Criminal Procedure and Evidence Act creates offences but n does not follow that power conferred on a public officer by the Criminal Procedure and Evidence Act is legislative. For example the power of the Director of Public Prosecutions can hardly be classified as legislative neither can the power of a peace officer to arrest without a warrant. It appears to me that the power conferred by Section 5 and 10 of the Order is purely administrative, it does not amount to subordinate legislation. There was no obligation on the 1<sup>st</sup> Respondent to comply with the provisions of Section 253 (2) of the Constitution.

[34] The expression 'subordinate legislation' in Section 253 of the Constitution means a regulation, rule, bye-law or order. Section 5 and 10 of the Price Controller Order does not empower the Price Controller to make regulations, rules, bye-laws or orders. Therefore, the power of the Price Controller is purely administrative and not legislative. I further agree with the Respondents' contention that what is more the custom and usage of legislative practice in Swaziland is that where the legislature intends to delegate its lawmaking powers it uses a form of words that occur so frequently that it can be characterized as a formula. The formula specifically empowers the public officer or body to make regulations, rules, bye-laws or orders. The formula has not been used in Section 5 and 10 of the Price Control Order. It would appear to me that on this ground the application should be dismissed.

[35] On the alternative argument advanced on behalf of the Respondents although now academic in view of what I have said in paragraph [34] *supra* and even if it is found that I was wrong in coming to this conclusion I am of the considered view that Swaziland being a member of the Commonwealth of Nations would follow the conventions which exists in these countries. The convention in England is that subsidiary legislation that has come into effect urgently need not, prior to commencement be "laid" before each chamber of the legislature when Parliament is not in session or has been dissolved, (see *Wade H.W.R. Administrative Law, 6th Edition (1988) 853*). On the facts of the present case the subsidiary legislation would be death with following this international norm

**[36] In the result, for the afore-going reasons the application is dismissed with costs.**



S.B. MAPHALALA JUDGE