IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 1319/04

In the matter between:

DUMSANI ZWANE — APPLICANT

VERSUS

SWAZILAND INTERSTATE TRANSPORT ASSOCIATION — 1st RESPONDENT

SIDUMO DLAMINI N.O. — 2nd RESPONDENT

CORAM: MAMBA J

FOR APPLICANT: MR T. M. MLANGENI

FOR RESPONDENT: MR S.V. MDLADLA

JUDGEMENT 10th

JUNE, 2008

[1] This is a review application wherein the applicant seeks for an order that

> "The decision of the first Respondent in terms of which the Applicant's membership in the 1st Respondent was terminated, which decision was communicated by the 2nd Respondent to the Applicant by letter dated 20tn March 2003, be and is hereby reviewed and set aside."

[2] The first Respondent is a voluntary association of Local Taxi operators who operate their business within and outwith the borders of Swaziland and was formed in the mid-eighties. The Applicant is one of its founding members. He, from inception remained a member until his membership was terminated by the Respondent by letter addressed to him and dated the 20th March 2003. This letter has been filed as annexure 'A' herein.

[3] The Applicant was told in the said letter that his membership in the 1st Respondent was being terminated because he had failed to attend "at least three consecutive Annual General Special General and or Extra Ordinary General meetings ...without reasonable cause." The meetings he is said not to have attended are specified in the letter. It is not insignificant that the first of such meetings was held on the 2nd day of October 1999 and was an Annual General meeting. In all, the Applicant is said to have missed a total of nine meetings, the last having been on the 1st March 2003; just nineteen (19) days before the letter terminating his membership was written.

[4] The Applicant wants the first Respondent's decision reviewed and set aside because it was taken without him being first notified and called upon

to show cause why such a decision should not be made by the first Respondent. In short he complains that he was entitled to be heard but was not heard before such a decision could be taken.

In his words, his "dismissal from the association came as a shock to me because, prior to that, I had absolutely no inkling that there was any intention or any reason to terminate my membership, ... and failure to give me an opportunity to be heard, is in violation of the audi alteram partem rule and renders the purported dismissal illegal and therefore liable to be set aside."

[6] This application was filed with the Registrar of this court on the 13th May, 2004 and the first Respondent successfully took the point that the Application had been filed rather late - after the date and communication to the Applicant that his membership had been terminated. On appeal, however, the Supreme court reversed the decision of this court and ordered that:

> "1. The order of Justice S.B. Maphalala dated 16th February 2007 in terms of which the point in limine was upheld is hereby reversed.
>
> 2. The review application is to be heard on the merits before the High Court.
> 3. Costs of the Appeal are to be costs in the application for review."

[7] It is on the basis of the above order that I heard the application. After hearing submissions from both sides, I allowed the application for review with costs - setting aside the first Respondent's decision to terminate the Applicant's membership and these are my reasons for doing

so.

The first Respondent accepts, albeit impliedly that the Applicant was entitled to be heard on the issue before the decision to expel him from the Association was taken. The first Respondent submits that the Applicant was indeed and in fact afforded the opportunity to be heard on the matter. First Respondent avers further that the Applicant did make representations to it before the decision to expel him from the association was taken. He told the Association that as a Seventh Day Adventist adherent (Sabathan) his religious commitments prevented him from attending these meetings as they were all held on Saturday. These representations or reasons by the Applicant were considered and found to be insufficient by the first Respondent. In this regard the first Respondent states as follows: (per paragraphs 7 and 14 of its answering affidavit)

> "It is not true that the Applicant was not aware or that he had no inkling, there was an intention to terminate his membership. The Applicant was called on numerous occasions before the appropriate body in terms of the constitution and he was asked to give his reasons for failing to attend meetings as required by the Constitution. The Applicant gave his reasons and such reasons were not satisfactory. This was communicated to him and this is as far back as August 1994. ...The Applicant was called and he gave his reasons and he was advised to appoint an individual to attend these meetings on his behalf and notwithstanding that he failed."

[8] The first Respondent has not denied that the Applicant was not called upon to show cause, if any, why he should not be disciplined or expelled from the association for having absented himself from the meetings for which he was accused of failing to attend and for which he was eventually

expelled from the Association.

[9] For purposes of this application, in the absence of a denial by the Respondents, I have to accept and do accept as a fact that the Applicant was not notified or afforded the opportunity to state his case why he had not attended the meetings stated in the letter of his expulsion. These meetings are different and separate from those in respect of which he was afforded this chance in 1994.

[10] The first Respondent had no right to assume that the Applicant would give a similar explanation for the later meetings as those for which he had been called upon to explain in 1994. The fact that he was heard in 1994 for those specific meetings, did not excuse the 1st Respondent from giving him the chance to be heard in respect of the meetings he failed to attend beginning with the meeting five years later, in 1999. This is more so because the Applicant was not expelled from the Association following the unsatisfactory reasons he put forward in 1994. Indeed the reasons for his failure to attend the meetings for which he was expelled and his failure to appoint a proxy or an agent to attend the meetings on his behalf as advised, may not have been the same as for the earlier meetings and may have been sufficient or constituted good cause and therefore excusable as provided in the Association's Constitution. The first Respondent was therefore obliged to go through the process before arriving at the conclusion or decision to expel the Applicant from the Association. This is what procedural justice and in particular the audi alteram partem rule is all about.

[11] Referring to **R v NOMVETI 1960 (2) SA 108 LAWRENCE BAXTER - ADMINISTRATIVE LAW** at 538 states that

> *"one can ...conceive a great many advantages to be gained by hearing the other side. This is illustrated in **R v NOMVETI** where a removal order issued to a resident of a location was set aside for want of natural justice. Although the resident had been warned that action might be taken against him, and although he was plainly in default and therefore ostensibly liable in terms of the relevant legislation to be removed, a hearing might well have led to the removal order's not being issued: as Wynne J explained, there might have been a genuine misunderstanding or a reasonable explanation of the default, and by affording the resident an opportunity to put his case the disputants might perhaps have been able to reach a mutually satisfactory agreement."* (footnotes omitted).

I agree

MAMBA J