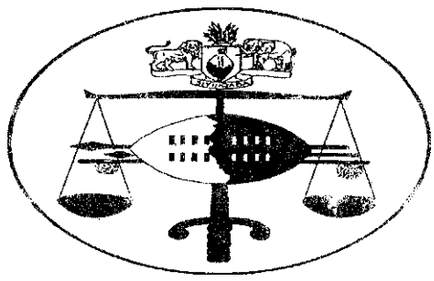

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE	CIVIL CASE NO. 1763/06

In the matter between:

MESHACK TIMOTHY SHABANGU	APPLICANT
VERSUS	
SWAZILAND INTERSTATE TRASPORT ASSOCIATION	RESPONDENT
CORAM:	ANNANDALE J.
FOR THE APPLICANT:	MR. M.MKHWANAZI
FOR THE RESPONDENT:	MR. S. MDLADLA

JUDGMENT
22nd SEPTEMBER 2009

[1] In this application for review the applicant seeks the following

relief:

> *"1. (a) Calling upon the Respondent to show cause why its decision of the 8th February 2006 should not be reviewed and corrected or set aside, (b) (To file the record of proceedings and its reasons).*
>
> *2. Setting aside the suspension of the applicant's vehicle, to wit: Make: Toyota HiAce Model: 2002 Engine No. 4Y208287".*

[2] It is common cause that the vehicle bears the registration number of SD 409 RL, which is not referred to in the Notice of Motion. Likewise it does not contain a prayer for costs.

[3] During the protracted period over which the matter has been pending, interlocutory proceedings dealt with the eu«eei of a purported late filing of the record of proceedings sought from the Respondent, as well as preliminary legal points dealing with jurisdiction of the High Court. In actual fact, the minutes of proceedings against

which the complaint is founded upon, have been filed well in time, as an attachment to the answering affidavit. In.his Judgment of the 20th July 2007, his Lordship Justice Maphalala held that a point of law *in limine,* namely that the High Court does not have jurisdiction to entertain the application, be dismissed and that costs be costs in the cause.

[4] in his founding affidavit, the Applicant states that he is a member of the Respondent and registered owner of the vehicle concerned. He filed a copy of its registration certificate, the so called "Blue Book". *Prima facie,* the official document supports his contention of ownership.

[5] He also says that the vehicle was used to convey passengers between Swaziland and various destinations in South Africa.

He fortifies this with a letter by the Respondent Association, addressed to a commercial bank, in support of a motor vehicle loan. The letter holds the Applicant to be a fully *pm*\ up member of the association and that if he purchases a vehicle to operate on his nine different international routes,

he would automatically and immediately obtain a cross border permit. He adds that the letter was to assist him in buying a further vehicle, in addition to the one that is the subject matter herein.

[6] Also attached to his founding affidavit is a copy of his Customs Union Permit, issued by the Ministry of Public Works and Transport. It refers to Mesh's Transport and the Toyota registered SD 409 RL, again the same vehicle in contention.

[7] The present dispute came to the fore when the Applicant received a letter from the Secretary General of the Respondent, dated the 8th February 2006. It is addressed to all Rank Marshalls and is titled "Suspension of Positions". It reads:

> *"Please be informed that the following vehicles have been suspended to operate on our ranks with immediate effect until further notice: 1) SD 409 RL 2) SD 675 NN (*tn}m.*

[8] The Applicant's cause is that prior to the suspension he was not given a hearing whereat he could defend himself against the decision to suspend his vehicle from operating on his approved and established routes. It is this decision that he wants to have set aside on review (emphasis added).

[9] However, he misses the point when he seeks to rely on a response by the association, in reply to a letter from his

attorneys, to shift his attack to a secondary issue. His attorneys wrote to the association on the 28th March 2006 regarding a decision to suspend the Applicant's vehicle, which was taken on the 27tri March 2006. They responded by saying that there: was "reliable information that the vehicle does not belong to (the Applicant)".

[10] It is not the decision of the 27th March 2006 that is sought to be

reviewed, but an earlier "decision" of the 8th February 2006.

[11] In the course of hearing argument herein, it was pointed out by the court that to a great extent, if not wholly so, the current application is

academic. There is no challenge to the real and factual permanent suspension, but a challenge to the interim suspension, which soon thereafter was again dealt with, with to the same effect.

[12] Where the Applicant misses the boat, so to speak, is to direct his attack against the letter of suspension dated the 8th February, instead of focussing his attack on the issue that really matters, namely the decision of the Respondent, taken on the 21st February 2006, whereby his "Kombi was suspended, but he was allowed to bring his own Kombi after paying a fine of E10 000 (sic)". No challenge to that decision, which has far more consequences than the present issue, has been brought before the High Court on review proceedings, even though the final decision was taken before he decided to take issue against the Respondent. No cogent reasons, or any reasons for that matter, were advanced as to how it came about that the aim of attack was directed against an insignificant but perceivec[5] injustice.

[13] In this regard, Mr. Mdladla argues on behalf of the Respondent that to make an order as prayed for

would be an order in *vacuo,* since the decision complained of has fell away when overtaken by a second decision, against which no relief is sought. At the time of the hearing, on enquiry by court, he indicated that in fact, the Respondent would have no qualms to withdraw its opposition to the application as it stands. He added that as a measure of its good faith, the Respondent would not insist on costs if the application was withdrawn or abandoned.

[14] Nevertheless, the Applicant wouid not have it so and wanted to pursue the application to the full extent. Rule 53 regulates the procedure by which reviews are brought for adjudication, including quasi judicial proceedings.

[15] In its answering affidavit, the Respondent association inappropriately deals with the merits of the second suspension, against which no relief is sought. This is propably n result of the Applicant's issues which he raised in his papers, as alluded to above, which also deals with the eventual suspension, following the initial suspension. It requires no further comment save to reiterate that it misses the ball.

[16] The contentious suspension, which is sought to be set aside on review, was allegedly decided on the 7th and conveyed to the Applicant on the 8th February 2006.

[17] It is common cause that the Applicant was neither present nor represented at that meeting. The minutes reflect that an issue arose as to whether Mr. Hobart Dlamini or Mr. Meshack Shongwe (the applicant) was the real owner of SD 409 RL. A resulution was then taken that "Mr. Shabangu be invited for clarification on the matter"(" and that Mr. Ndumiso Mtsetfwa's vehicle be further searched", to fully quote the resolution taken by the Respondent).

[18] Seemingly, one Mr. Sikhondze complained about having been dismissed by Dlamini and the executive committee wanted to know what business Dlamini had with Shabangu's /^nniic^nt'f-vehicle. Thereafter, Sikhondze was informed that his own suspension would be uplifted until the issue of Meshack Shabangu has been finalised.

[19] The significant aspect of the minutes is that no resolution was taken to suspend the vehicle of the Applicant from operating until the ownership issue had been resolved. Therefore, the resultant letter of the following day, was not issued on explicit or any authority of the Respondent, *ultra vires* by all indications. The Association simply did not apply its mind to the matter of suspension. Also, significantly and materially so, it did not resolve to suspend the vehicle from operating. Therefore, the Respondent did not conduct itself in any manner which could have offended the Applicant in any way. All that it did was to resolve that the Applicant "be invited for clarification on the matter".

[20] On such a trivial decision the maxim of *de minimis nan curat lex* would surely have applied, but in fact the object of complaint is not directed against the resolution,

[21] The resolution which was taken on the 7th February 2006 was only to invite the Applicant to clarify the matter of ownership of the contentious vehicle. That was done at a later date and it

resulted in a decision which is not challenged in this application.

[22] The present challenge lies against the letter of suspension dated the 8th February 2006. As shown, the executive of the Respondent did not take a resolution as reflected in the letter and as such, the only conclusion that can reasonably be drawn is that the author of the letter, one Sidumo Dlamini, the Secretary-General of the Respondent, did so without being properly authorised by Respondent to do as he did, or at all.

[23] By all accounts, the inescapable conclusion is that the letter of

suspension which is sought to be set aside was issued without a resolution to that effect having been taken by the executive committee of the Respondent. Whether the Secretary General did so on a misunderstanding or on a frolic of his own, is irrelevant. Simply put he was not authorised to do as he did, nor was he entitled to do it. On the papers before me, there is no assertion that the Secretary-General of the

Respondent has any authority, vested in himself, to interdict or suspend the Applicant's vehicle from operations. It also was not argued to be the position.

[24] It rather seems to me that in the course of bringing the application before court and arguing it, both counsel took it for granted that when the letter of suspension was issued, it had been done on authority of the Respondent. The assumption that it was so done is not unreasonable. It was only during the course of writing this judgment that a close scrutiny of the relevant minutes of the meeting of the 7th February revealed that no resolution was taken to interdict the Applicant's vehicle. It is also noted that at the time when the application was made, the minutes were not yet availed to the Applicant and he therefore could not have known about the absence of such resolution.

[25] Insofar as the resolution which was taken on the 14th February 2006 goes, if is neither prudent nor necessary to state whether it is proper or not, if it meets the required standards, or indeed what

the required standards are. It is not a decision subject to challenge in this matter at all. Despite the present application having been brought well after the 14th February 2006, the Applicant decided to limit the ambit of his application for review to the letter of suspension dated the 8th February, and not against the decision of the 14th February.

[26] It is for the abovestated reasons thus not necessary to enquire whether the executive committee acted incorrectly on the 7th February insofar as the Applicant is concerned. They did no wrong. Yet, the Applicant's vehicle was suspended from operations and it is that letter which is sought to be set aside on review.

[27] It is therefore ordered that is the application is to succeed. The

letter of suspension, dated the 8th February 2006 is ordered to be set aside, insofar as it purports to suspend the motor vehicle Toyota Hi Ace, engine number 4Y 208287, model 2002.

JUDGE OF THE HIGH COURT

[28] No order as to costs was prayed for, nor were counsel inclined to address the court in his

regard, save the concession made by Mr. Mdladla as aforestated, but directed to a potential application to withdraw of the matter. In the result, no costs order is made.