



IN THE HIGH COURT OF SWAZILAND

Civil case No: 1451/12(B)

In the matter between:

SIMON MNUMZANE VILANE

APPLICANT

AND

THE CHAIRMAN OF THE ROAD

TRANSPORTATION BOARD

FIRST RESPONDENT

THE MASTER OF THE HIGH COURT

SECOND RESPONDENT

Neutral citation:

*Simon Mnumzane Vilane And The Chairman Road
Transportation Board (1451/12B) [2013] SZHC43 (2013)*

Coram:

M.C.B. MAPHALALA J,

For applicant
For Respondent

Attorney Siboniso Dlamini
Crown Counsel V. Manana

Summary

Civil Procedure – application to review, correct or set aside the decision of the Board – Common Law grounds of review discussed – the application is granted with costs on the ordinary scale.

**JUDGMENT
28th FEBRUARY 2013**

- [1] This application was brought on a certificate of urgency. The applicant sought and was granted a rule nisi calling upon the respondents to show cause, if any, why the decision of the Road Transportation Board dated 12th December 2012 should not be reviewed, corrected or set aside. The Board had issued an order refusing to issue a replacement permit to the applicant in respect of permit No. 2457; he further sought an order directing and compelling the Road Transportation Board to issue him with a replacement permit in respect of permit No. 2457. He also sought an order directing the first respondent to pay costs of suit at attorney and client scale and the second respondent to pay costs only in the event of unsuccessful opposition.
- [2] The applicant alleged that permit No. 2457 originally belonged to his late father Henry Ntonto Vilane who passed away in 1985; after his death, his eldest brother Ben Facob Vilane used the permit. On his death, it was used by his other brother Antony Vilane who died in 2007.
- [3] The applicant argued that his surviving siblings subsequently agreed that he should utilise the permit; and, that he has since operated for a period of six years. He attached a certificate of consent.
- [4] By letter dated 1st June 2011 the Board instructed the applicant to make a fresh application of the said permit in his own name in order to replace Antony who was reflected in the permit as the holder. Pursuant thereto the Board directed

him to surrender permit No. 2457 so that it could be cancelled before issuing a replacement permit to the applicant. The Board further caused him to depose to an affidavit with regard to the surrender of the permit for purposes of a replacement; thereafter, he was required to write an application letter in respect of the replacement permit.

[5] The applicant argued that he had to bear the costs of the application which included payment of fees to the town council in Siteki, fees to the Board as well as fees for advertising. He alleged that he further incurred costs fitting a new windscreen and repainting the bus as required by the police before he could obtain the police recommendation.

[6] The application was heard on the 11th December 2012. The Board refused the application on the basis that the motor vehicle did not belong to him. The applicant argued that he had a legitimate expectation that the permit would be replaced, when considering that the application had been renewed for the past six years on the basis of the same documents.

[7] On the 7th September 2012, the High Court issued an order compelling the Board to issue permit No. 2457 in his name; however, the Board issued a temporary permit in the name of Antony Vilane. The applicant argued that the Board committed a gross irregularity by basing its decision on an issue which

was not raised at the hearing as well as failing to abide by the decision of the High Court issued on the 7th September 2012.

[8] The applicant argued that the matter was urgent on the basis that the current permit expires on the 28th February 2012; and, that failure to issue a replacement permit on or before the said date, would ruin his economic life irreparably, and, that he would lose his means of livelihood.

[9] The application is opposed by the first respondent. In his answering affidavit, he argued that permit No. 2457 was applied for by Tony Tinyo Vilane on the 13th August 1990, and that the application was approved on the 4th March 1993. He argued that the applicant as well as the beneficiaries to the Estate of Tony Vilane have failed to submit a Liquidation and Distribution Account; and, that the Board could only effect transfer of the permit upon the production of the said account. The first respondent argued that the Board was only enjoined to issue permits to applicants who have ownership of motor vehicles.

[10] In his replying affidavit the applicant denied that the original holder of the permit was Tony Tinyo Vilane, but that it was Henry Ntonto Vilane. He referred the court to annexure “RA1”, a letter written by the second respondent and addressed to the Board confirming his allegations.

- [11] The applicant took issue with the first respondent for failure to acknowledge the certificate of consent signed by his siblings who are the beneficiaries in the estate. Similarly, he argued that he had submitted the liquidation and distribution account to the Board so that it could effect transfer of the permit. He annexed a copy of the account which he had submitted to the Board.
- [12] The applicant argued that during the hearing of the application, the Board did not take issue with the fact that the motor vehicle was registered in the name of another person; however, this became the basis for the Board's refusal of the application. He has since annexed copies of the registration document as well as a computer printout from the motor registry showing that he is the owner of the motor vehicle.
- [13] He argued, correctly, that the Board had circumvented the Court Order issued on the 7th September 2012 which directed it "to renew and issue permit No. 2457 to the applicant", and, not merely a temporary permit in the name of Antony Vilane or Tony Vilane. Similarly, he argued correctly that he did not need to appeal the decision of the Board before reviewing it as alleged by the first respondent; that he is at liberty to review or appeal the Board's decision.
- [14] It is not in dispute that the surviving siblings of the applicant signed a certificate of consent allowing applicant to take transfer of the permit. Similarly, it is not in dispute that the applicant submitted to the Board a

liquidation and Distribution Account duly signed by the Master of the High Court as the basis for the transfer of the permit. According to him this was telling that the Master of the High Court is not opposing the transfer. It is also not in dispute that the High Court on the 7th September 2012 issued a Court Order directing the first respondent to forthwith renew and issue permit No. 2457 to the applicant with costs of suit; however, it is common cause that the first respondent merely issued a temporary permit in the name of the late Anthony Vilane. It is also not in dispute that the Board directed the applicant to surrender the permit and undertook to issue him with a replacement permit; however, the Board has failed to abide by its undertaking.

[15] The basis for the refusal to grant the permit is that the motor vehicle is not registered in the applicant's name. The first respondent does not deny that this was not an issue during the hearing. After receiving the outcome of the application, the applicant rectified the problem identified by the first respondent and registered the motor vehicle in his name. I agree with the applicant that there is no need in the circumstances to burden him financially by requiring that he commences the whole application process "de novo".

[16] It is trite law that where review proceedings succeed, the matter is remitted to the statutory functionary for a proper consideration. However, this court retains a discretion where circumstances allow to issue the appropriate order; this discretion has to be exercised judiciously with a view to advance the

interests of justice and fairness. See the case of *Greyling & Erasmus (PTY) Ltd v. Johannesburg LRTB* 1982 (4) SA 427 AD at 449.

[17] The circumstances in the present matter are such that the applicant should be granted the permit when regard is to paragraphs 14 and 15 above. There is no need to remit the matter to the Board. At this juncture I am reminded of the words of Lord Denning in the case of *Breen v. Amalgamated Engineering Union* (1971) 1 All ER 1148 (CA) at 1153 h–j where he said the following:

“It is now settled that a statutory body, which is entrusted by a statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard...”

[18] It is apparent that the applicant has not been treated fairly by the first respondent in light of the historical evidence. This includes the submission of the certificate of consent signed by the beneficiaries of the Estate, the letter by the Master of the High Court not opposing this application, the submission by the applicant of the Liquidation and Distribution Account as required by the first respondent as the basis for the transfer of the permit, the Court Order issued by the High Court directing the first respondent to issue the permit to the applicant, the failure of the Board to honour its undertaking upon the surrender by the applicant of the permit as well as the failure by the Board to acknowledge the change of ownership of the motor vehicle into the name of the

applicant. The directive by the first respondent to the applicant to commence the whole application process *de novo* in light of the apparent delays and costs involved is grossly unreasonable and unfair.

[19] The Supreme Court of Swaziland in the case of *Takhona Dlamini v the President of the Industrial Court and Another* Appeal case No. 23/ 1997 quoted with approval the judgment of *Corbett JA* in the case of *Johannesburg Stock Exchange v. Witwatersrand Nigel Ltd* 1988 (3) SA 132 at 152 A-D where *Corbett JA* stated the following:

“Broadly, in order to establish review grounds it must be shown that the President failed to apply his mind in the relevant issues in accordance with the behest of the statute and the tenets of natural justice.... Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *malafide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.”

[20] Having regard to the evidence before me, I have come to the conclusion that the decision of the Board was grossly unreasonable.

[21] Accordingly, I make the following orders:

- (a) The decision of the Road Transportation Board dated 12th December 2012 refusing to issue a replacement permit to the applicant in respect of permit No. 2457 is hereby reviewed, corrected and set aside.
- (b) The Road Transportation Board is directed and compelled to forthwith issue a replacement permit in respect of permit No. 2457.
- (c) The first respondent is directed to pay costs of suit to the applicant on the ordinary scale.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT