# IN THE HIGH COURT OF SWAZILAND

Held at Mbabane — Case No. 816/16

In the matter between:

**PHUMZAKHELE (PTY) LTD t/a PHUMZAKHELE BUS SERVICE** — **Applicant**

**And**

**THE CHAIRMAN OF THE ROAD TRANSPORTATION BOARD** — **1st Respondent**

**WONDER INVESTMENTS (PTY) LTD t/a EMAVULANE TRANSPORT** — **2nd Respondent**

**THE ATTORNEY-GENERAL** — **3rd Respondent**

**Neutral citation:** *Phumzakhele (PTY) LTD t/a Phumzakhele Bus Service vs The Chairman of the Road Transportation Board & 2 Others (816/16) 2016 SZHC 127 (21 July 2016)*

**Coram:** Hlophe J

**For the Applicant:** Mr. S. Gama

**For the 1st & 3rd Respondents:** Mr. Carcachal

**For the 2nd Respondent:** Miss. N. Ndlangamandla

**Date Heard:** 30 June 2016

**Date Handed Down:** 21 July 2016

***Summary***

***Contempt proceedings – Following certain review proceedings, High Court refers matter back to the 1st Respondent to "address the issues relating to the timetable clashes within 21 calendar days" – As a result of Applicant's failure to attend the hearing after registered letters sent to him; the 1st Respondent dismisses "the matter related to case 4092/2008 on Applicant's failure to appear before the Board" on certain specified dates – Applicant who had now engaged a new firm of Attorneys does not disclose these developments – Unclear whether Applicant was aware of these developments whose correctness is however beyond dispute – Whether there is, from the facts of the matter, a basis to contend there was non-compliance with an order of court – It transpires forthwith that Applicant's erstwhile attorneys had filed an appeal to the Road Transportation Appeals Board which was itself dismissed – Applicant's new attorneys institute current proceedings for contempt of court alleging failure by the First Respondent to comply with an order of court – Whether in reality First Respondent can be said to have failed to comply with the order of court – Court of the view Applicant's relief not in contempt proceedings if it was not satisfied with the decision reached by the***

***first Respondent as the court order was compiled with – Consequently application cannot succeed and should be dismissed – As a result of first Respondent's failure to respond to numerous letters, an answer to which may have obviated these proceedings, each party will bear its costs.***

## JUDGMENT

[1] The Applicant and second Respondent are owners and operators of public transport in the form of buses under the styles Phumzakhele Bus Service and Emavulane Transport respectively. The buses owned by these parties ply the Matsamo – Piggs Peak – Mbabane route, each for his own account which makes them competitors.

[2] The facts suggest that the Applicant was granted the permit to ply this route prior to the second Respondent. In fact when the second Respondent applied for a Permit to operate or ply the said route to the Road Transportation Board, the Applicant, in exercise of a right accorded it by the relevant statute, objected to the Road Transportation Board against the grant of the said Permit contending that there were clashes on the times applied for by the Applicant and those already governing its

permit. It would appear that notwithstanding the objection concerned, the Board granted second Respondent the Permit prayed for.

[3] Contending that there was an unfair competition between them and that the times for operating their permits were clashing in the sense that they had intervals that were too short between them, the Applicant instituted review proceedings to this court way back in 2008.

[4] On the 19th March 2009, this court per Mabuza J. issued an order whose thrust was to revert the matter to the First Respondent for it to address the clashes in the timetables of the Applicant and the second Respondent. I here talk of the thrust and not of the specific order because of what eventually happened when the actual order was uplifted from the court file where the Honourable Judge had recorded it. In reality the order uplifted was not on all fours with that recorded by her Ladyship. These different orders should no doubt affect the outcome of this matter differently. The different orders were, beginning with that appearing ex-facie the court file and followed up by the one supposedly uplifted, respectively couched in the following terms:

4.1 That recorded on the court file read:-

**"19/03/09 by consent it is ordered:**

- **That the matter is hereby referred back to the 1st Respondent to address the issues relating to the timetable clashes within 21 calendar days.**
- **That the 2nd Respondent pays the costs of case 1488/2008 and not case 4092/2008"**.

**Signed (…..)**

As this order which was actually issued by the Honourable Judge was never uplifted, it was never served.

4.2 The supposedly uplifted version of the order which was served read as follows:

**"Having heard counsel for all the parties it is hereby ordered as follows:**

1. **The matter is referred back to the Road Transportation Board for adjudication on the time clashes and cause of complaint after having heard the parties and a decision to be made within twenty-one (21) calendar days.**

2. **That the first Respondent (sic) to pay the costs of the second Respondent's application under**

**Case Number 1488/2008 but not (under) Case Number 4092/2008**.

**Thus given under my hand and seal at Mbabane on this the …day of March 2009.**

**Signature (….)**
**Registrar "**

[5] By way of comment, it is obvious that the order purporting to have been uplifted and eventually served on the first Respondent, is markedly different from that recorded by the hand of the Honourable Judge ex-facie the court record or file. Whereas the Honourable Court directed that the clashes per the timetables be "addressed"; within a specified period the supposedly uplifted order talked of 'adjudication on the time clashes and the cause of complaint after having heard the parties". Clearly the under lined phrase in the order uplifted is not there on the express order by the Learned Judge. I add that the underlined phrase is not just superficial but it brings about a different colour to the matter as it expressly presupposes a rehearing of the matter before the Road Transportation Board, with all the parties being heard before that decision is made. With the benefit of hindsight on what happened when this matter was to be heard in court, one cannot fault the first Respondent for having dealt with the matter in the manner it did. This shall become apparent later on in this judgment.

On the other hand, the Honourable Judge's order did not expressly make the rehearing of the matter necessary as did the order uplifted and served.

[6] It merits mention at this point that the habit of preparing court orders using different words than those used by the court is not proper and should cease. No one is allowed to add to or delete from what the court said as it would no doubt have framed an order in a certain way as an expression of its serious consideration of a matter. It is important that the words are captured as they were to avoid complications. Having read both these orders particularly the one served coupled with an understanding of what transpired before the Board, then the contempt proceedings may never have been lodged had the order as pronounced by the Honourable Judge been uplifted and served verbatim as it was very clear and required no interpretation.

[7] The versions of the parties begin to differ on what happened after the issuing of the order in court and the service of the one supposedly uplifted upon the first Respondent. The case advanced by the Applicant in its papers is that the first Respondent has refused, failed and or neglected to heed the order issued by the High Court per Mabuza J because it has to this day allegedly not addressed the issues relating to the timetable clashes between the parties as directed by the court. This

alleged refusal, failure or neglect to heed the order of the High Court is said to have persisted notwithstanding numerous letters calling for compliance with the order of court. Numerous such letters were indeed annexed to the application in support of this contention.

[8] It is crucial to point out that the letters in question can easily be said to be in two categories. There are those for the earlier years, such as 2010 and 2011, which were obviously issued by the Applicant's erstwhile Attorneys, M. C. Simelane and Company and those issued recently around 2014. These latter letters were issued by the Applicant's current attorneys. In such letters, the Applicant, through its attorneys complained mainly of there not having been compliance with the order of court as well as to not having received responses to its said letters. As a matter of fact there does not seem to there ever having been a response to the said letters and this contention by the Applicant does not seem to have been disputed.

[9] The version of the Respondents who opposed the application, was a denial that the order had not been complied with. The First Respondent for instance contended that it had complied with the court order and had

set the matter down for hearing twice, it having on each occasion invited the Applicant to attend by means of a registered letter to no avail as the Applicant would on each such occasion not attend for no reasons advanced than as shear disappearance and that this persisted notwithstanding a postponement of the matter to give Respondent a last chance. Although the proof of such invitations was not initially there it was eventually brought to court by means of a supplementary affidavit, whose effect was to move the first Respondent's assertions closer to the realm of reality as opposed to that of conjecture, which was the case before the said proof could be availed. Ofcourse the admission of this affidavit was not in issue.

[10] According to the Respondents the intended hearings with the Applicant having been properly served through a registered letter on each occasion were meant for the 16th June 2011 and the 14th July 2011. When the Applicant would allegedly not attend on the 16th June 2011, the matter was set for the 14th July 2011. When the Applicant once again failed to attend on that date, the matter was dealt with. The outcome of that hearing is recorded as follows in a letter obviously dated 21st June 2011 in error when it was meant to read 21st July 2011:-

**"The Board decided that;-**

**(1) The matter related to Case No. 4092/2008 is dismissed on failure to appear before the Board on 16 June 2011 and 14 July 2011".**

[11] The Respondents contend further that after this decision had issued the Applicant's matter as reverted to the Road Transportation Board by this court was heard and finalized. The Applicant had, through its erstwhile attorneys referred to above, noted an appeal against the said decision to the Road Transportation Appeal's Board, which was itself dismissed.

[12] On the basis of the foregoing contentions, the Respondents clarified that it was not true that first Respondent had not complied with an order of court. It maintained that had been done by setting the hearing dates as revealed in the foregoing paragraphs and invited the Applicant for the hearing of the matter. It was the Applicant who would not attend resulting in the Board eventually dismissing the matter. Although acting through its erstwhile attorneys, the Applicant had appealed against that decision to the Road Transportation Appeals Board, the appeal was itself dismissed. This means that the Applicant cannot realistically complain of a court order that was allegedly not compiled with.

[13] Before dealing with the applicable law in contempt of court matters I must digress and point out that the application serving before this court is somewhat a misnomer. This I say because it did not only seek to enforce an order of court arising from a review application but it also sought an order reviewing the same decision said to be violated by first Respondent. At the commencement of the matter I raised this anomaly with counsel for the Applicant who conceded such proceedings were a misnomer and made it clear he was abandoning the relief seeking to review the same decision being enforced.

[14] This matter is about contempt of court. Such proceedings are brought to enforce an order of court where there has been a deliberate or willful or *mala fide* failure to comply with such an order. It remains uppermost in my mind that this matter is not about the correctness or otherwise of the act of compliance with the order of court. I say this because it is easy from the facts herein for one to find himself having to digress and start considering the correctness or otherwise of the act of compliance with the order of court.

[15] According to the Applicant's papers filed of record the contempt was in the first Respondent failing to convene a hearing of the matter to address

the time table clashes. It is clear from the facts of the matter that there is no basis for the alleged contempt of court because the matter as reverted to the first Respondent by this court was dealt with except that it was in Applicant's absence after he failed to attend notwithstanding his having been duly called to do so on at least two occasions. I have no doubt the dismissal of a matter for non-appearance by a party is one of the recognized ways of dealing with it. Ofcourse in the context of these proceedings – contempt of court proceedings – the correctness or otherwise of that decision is of no moment.

[16] Given that civil contempt has been defined as the willful and *mala fide* refusal or failure to comply with an order of court by among others **Herbstein and Van Winsen's, <u>The Civil Practice Of The Supreme Court of South Africa,</u> Fourth Edition, Juta and Company** at page 815 and such cases as ***Holtz v Douglas and Associates (OFS) CC en'n ander 1991 (2) SA 797 (O) at 802 C***, it is apparent from the facts of the current matter that in a case where the first Respondent set down and sought to address the timetable clashes as directed by this court but would not do so because of Applicant's failure to attend, it cannot be said to have willfully and mala fide failed to comply with an order of court.

[17] Digressing from the case as pleaded in Applicant's papers, it was submitted by the latter's counsel in court that it was wrong for the first Respondent, and was in fact proof of the alleged contempt, that instead of addressing the time table clashes even in the absence of the Applicant as directed by this court per Mabuza J, the first Respondent had decided to dismiss the matter on the basis of the Applicant's failure to attend. It was contended further that it should not have done so as it could have simply addressed the timetable clashes even in Applicant's absence because it knew what these clashes in the timetable were.

[18] There are several challenges with this contention by the Applicant. Firstly the order it had supposedly uplifted through its attorneys and served on the first Respondent as quoted in paragraph 4.2 above, directed that there had to be an adjudication on the clashes after a hearing meaning that the first Respondent could not have dealt with the matter in Applicant's absence. A dismissal of the matter on the absence of the Applicant as a party for the second time running cannot realistically amount to a failure to hear the matter and cannot therefore found contempt of court.

[19] Secondly, the submission concerned was no longer in line with the case as pleaded which the Respondent had come to court to meet. The position is trite that a party stands or falls by his founding papers. The basis of the contempt could not be established for the first time in court during submissions if they differed from those pleaded in the papers filed of record. To allow this to happen would render nugatory the whole idea of, of filing papers in advance by each party in court. The purpose of the disclosure of the case to be met by the other side in the papers is to ensure that a party is made fully aware of the case he has to meet before going to court so that he prepares himself accordingly. It would therefore not be fair to allow a different case to be advanced during the hearing of a matter to the detriment of a party who should have been made aware of the case against him through the papers

[20] Thirdly, given that civil contempt turns on whether there was a willful or wreckless disregard of the court order, there cannot be liability for contempt of court in circumstances like the present, where the first Respondent believed it was entitled to dismiss the matter serving before it because of non-attendance or non-prosecution of it by the interested party even if it were shown to have been erroneous in its belief. It may well be that Applicant's relief lied elsewhere and not in contempt proceedings.

For the proposition that there will be no liability for contempt of court if there is neither willful nor reckless disregard of the court order, reference is made to ***Trencor Services (PTY) LTD v Muller T/A SA Trucking 1983 (4) SA 893 (C)*** at 894 G.

[21] As indicted above whether or not it was appropriate for the Board to treat the matter in the manner it did simply because the Applicant did not attend the hearing including what the true meaning of the order reverting the matter back to the Board for addressing the timetable clashes, by the High Court was, those are in my view not matters that fall for determination in the context of contempt of court proceedings which are more about whether or not the first Respondent willfully or recklessly refused to comply with an order of court. Since I have found in the contrary in this regard, I do not need to go further.

[22] For the foregoing considerations I have come to conclusion that the Applicant's application cannot succeed and I make the following order:

1. The Applicant's application be and is hereby dismissed.

2. Given the failure by Respondents to respond to the Applicant's correspondence on an alleged failure to comply with an order of court which would have no doubt enabled Applicant to properly decide whether or not to institute these proceedings, each party will bear its costs.

**N. J. HLOPHE**
**JUDGE - HIGH COURT**