

IN THE COURT OF APPEAL OF SWAZILAND

HELD IN MBABANE

APPEAL CASE NO. 29/97

In the matter between

PHILIP DLAMINI APPLICANT

And

THE CHAIRMAN, ROAD

TRANSPORTATION BOARD 1st RESPONDENT

ATTORNEY GENERAL 2nd RESPONDENT

Coram Kotzé P

Shreiner J A

Browde J A

JUDGEMENT

BROWDE J A:

This is an appeal from an order issued by Dunn J in the High Court. That order arose in the following circumstances.

The appellant made application on 12 June 1996 to the 1st respondent (the Board) for a road transportation permit. The application was refused by the Board. The appellant thereupon brought an application to the High Court by way of notice of motion in which he asked the court to review the decision of the Board, to set it aside and to direct the Secretary of the Board to issue the permit sought by the appellant in his original application.

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In his founding affidavit the appellant made the following allegations, inter alia:

- i) His application had complied with all the statutory requirements and was for authority to operate on the Bhunya/Mhlambanyatsi/ Mbabane/Ezulwini route.
- ii) The application was duly advertised and there were no objections to the issue of the permit sought. In fact the service which the appellant applied for had been requested by the Bhunya community as it would be convenient for school going children and workers.
- iii) Despite the fact that the appellant had employed a road transportation consultant to represent him at the hearing the Board refused the application because in its view the application had been

abandoned. This misconception came about because of the emphasis placed by the appellant on the service to the school children. This led the Board to say that the nature of the application had changed and that it had become an application for a school bus.

This required, so it found, a new application. This overlooked the facts alleged on oath by the appellant that the application made no mention of a school bus and the majority of children in any event use the same buses as adults.

He went on to state that the view adopted by the Board was grossly unreasonable and that one can only infer mala fides from it. It is also stated under oath by the appellant that the Board had "absolutely no reason to refuse to issue the permit to me"

The application made by the appellant for the relief set out above was served on the Board (the 2nd respondent plays no part in this matter since he is cited only in his capacity as the legal representative of the 1st respondent) but it filed no answering affidavit and apparently chose not to contest the matter at all since it did not appear before the court a quo when the matter was heard.

The application came before Dunn J who, for reasons which are not before us, made an order in the following terms:

The 1st respondent is directed after due notice to all parties concerned, to hear and determine the application filed by the applicant on the 12 June 1995.

It is against that order that the appellant seeks relief on appeal before us. Once again the respondent Board has made no effort to oppose the relief sought by the appellant - there is no appearance on its behalf in this court and despite service of the appellant's attorneys heads of argument on the respondents legal representatives i.e. the Attorney General no reply thereto has been received in this court. It is not without significance in the circumstances, that attorney S.C. Dlamini draws attention in those heads to the fact that

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in the appellant's supporting affidavit it is alleged that the Board acted dishonestly and had no reason to refuse the application. As I have pointed out there is nothing before us to show any interest by the Board in these proceedings.

Mr. Dlamini has also directed our attention to the fact that the grounds of appeal' which were served on both respondents indicated clearly that it has always been the intention of the appellant to ask this court to make an order which would have the effect granting the application originally brought and ordering the 1st respondent to issue the permit. Mr. Dlamini has based his argument on two propositions namely:

i) In view of the facts that the 1st respondent has seen fit not to reply to the allegations made in the affidavit filed by the appellant, the court will accept the latter's allegations of fact as correct for the purposes of the application. I agree with that proposition see e.g.

Ebrahim v Georgoulas 1992 (2) SA 151.

ii) There are certain circumstances in which a court will, when it decides to set aside a decision of a quasi judicial body such as a licensing board or other board of that kind, direct the board to issue the licence or permit, as the case may be. In the case of Livestock and Meat Industries Control Board vs Garda 1961 (1) SA 342 the SA Appellant Division held that although the matter

will be sent back to the Board if there is no reason for not doing so, in essence it is a question of fairness to both sides. The court has a discretion to be exercised judicially upon a consideration of the facts of each case.

In his work on Administrative Law at page 687 et seq. Baxter deals with the situations in which courts have recognized that they would be justified in correcting a decision of a public authority and substituting their own.

Two of those situations are pertinent in casu namely:

- i) Where further delay would cause unjustifiable prejudice to the applicant and;
- ii) Where the tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

In my judgement both these situations are present in this matter. The 1st respondent has displayed such a disregard to all that has been said under oath by the appellant about its conduct that one can only assume that either the 1st respondent agrees with the allegations or else that it has allowed matters of a serious nature to go unchallenged because of its incompetence. In either case I am of the view that it would be unfair to force the appellant to again appear before the 1st respondent to ask for a permit which on the facts before us the appellant is entitled to have.

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Consequently I am of the view that Dunn J erred in making the order which he did and the appeal should succeed.

The following order is made:

- i) The decision of the Road Transportation Board of 14th September 1996 dismissing the appellants application number 06825 is set aside;
- ii) The 1st respondent is directed to issue permit no. 06825 to the appellant in the terms sought by the appellant
- iii) The 1st respondent is ordered to pay the costs incurred by the appellant both in the court a quo and in this court,

BROWDE, J A

I agree

KOTZÉ, P

I agree

SCHREINER, J A

Delivered at Mbabane this.....Day of October 1998