IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL NO.

In the matter between:

SANDILE KENNETH DLAMMI APPELLANT

and

CHAIRMAN, ROAD TRANSPORTATION BOARD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

3RD RESPONDENT

CORAM : LEON J A

: STEYN J A

: TEBBUTT J A

FOR THE APPELLANT :

FOR THE RESPONDENTS :

JUDGEMENT

Leon J A:

In this case the appellant is the operator of a mini bus service in respect of which he had been granted a permit by the Road Transportation Board of which the first respondent is the Chairman. These permits are valid for one year and are required to be renewed annually.

On the 19th December 1996 the appellant brought an urgent application in which he sought an order that the decision of the first respondent dated 18th September 1996 refusing his renewal application for a permit be reviewed, corrected and/or set aside pending the outcome of that application. He also sought an order that a mandamus be issued compelling and directing the Road Transportation Board through its Secretary to issue permit number 09115 to the appellant pending the outcome of the application and that the first respondent be directed to furnish the

Registrar of this Court with the record of the proceedings on review, if any, within 14 days.

The application was opposed by the Sibusiso Transport Association as an intervening third respondent.

The application came before Sapire A C J (as he then was) in the High Court who refused the application. It is against that decision that this appeal is brought.

This matter has a long and fairly complicated history.

It is common cause that the appellant is the holder of a permit in terms of which he operates a non-scheduled mini bus service between Manzini and Mbabane. The permit was issued in 1992 a copy of which is annexure SKD1 while annexure SKD2 is a copy of the last permit issued. The former permit allows the appellant to transport passengers between Manzini and Mbabane by means of a 16 seater Nissan vehicle. It is dated the 21st July 1992 and is valid for one year. The last permit is dated 14th November 1996, is valid for one year and permits the carriage of passengers between Manzini and Mbabane by means of a taxi service using three vehicles each seating 16 persons.

When the appellant applied for the renewal of his 1996 permit for one year the Board declined to do so. The Road Transportation Board however issued temporary certificates to him some of which were issued as a result of applications to the High Court.

The last of these applications was launched on the 16th December 1996 which caused the High Court to issue the following Order on the following day:-

"1. The decision of the first respondent not to decide on the question of applicant's application is set aside.

2. The first respondent is asked to hear the application forthwith and furnish full reasons for any decision it is to take."

According to annexure SKD4 the Board considered the application on 17th December 1996 when

it refused the application. Its reasons are attached. In those reasons the Board sets out the history of this matter from which it appears inter alia that a permit was granted from 25th August 1994 to 30th June 1995 in respect of three 15 seater vehicles and the same applies to the following year. According to the appellant in his original application made as far back as 1989 he had applied for a permit in respect of three vehicles.

In the course of setting out the history of this matter the Board begins in 1991 when the appellant's application for a non-scheduled 3 seater bus was refused on the ground that the area was adequately served. The appellant's appeal to the Appeal Board failed. The appellant then went to the High Court on review which succeeded in the High Court on 17th July 1992. The reasons then proceed as follows:

"7. The applicant got a permit issued on the 21st July 1991 expiring on the 30th June 1993 based on the Court Order for one vehicle a non-scheduled 15 seater minibus instead of a taxi he originally applied for.

8. The Board realised that the permit so granted was based on an application that was altered for the purpose of misleading the Honourable Court to believe that the applicant had originally applied for three combis and yet he had applied for a taxi service as indicated in the preceeding paragraphs. This is further proved by the nullification of the second order annexure marked "G" as rectified by order annexure "H". (I pause to observe that there was such an amendment to the Order.)

9. On the grounds that applicant's matters have never been proper and that the Board at no stage ever granted a permit to applicant, Board finds it difficult to renew what never existed. The Board

consequently refuses to renew the permit applied for."

It is not correct for the Board to say that it never granted a permit. On the contrary it did and it renewed it from time to time and for varying periods. What I understand the Board to be saying is that it was wrong to have granted a permit and it had done so because of an order of the High Court which had been misled by the appellant. That it is in dispute. Indeed the applicant alleged that he had applied for a permit for three vehicles in 1989.

For the sake of completeness I should add that one of the appellant's competitors one Lazarus Makama launched an application seeking an order setting aside the renewal of the applicant's permit by the Board on 19th July 1994. That application was refused by Hull CJ on 31st May 1995 in a judgement which I have difficulty in understanding and to which it is not necessary to

refer any further.

The appellant's first ground of complaint is that he was not heard on the 17th December 1996 when the Board, in consequence of the High Court Order, met to consider the application for renewal of the permit. He contends, therefore, that the principles of audi alterant partem were not complied with. It is true that the appellant was not heard on that date but, according to the reply by the Board, he was heard on the 11th December 1996 when the application for the renewal was first heard. He was therefore given a hearing and therefore there was no need to hear him again. I am of the opinion that this is an adequate answer to the point subject to the qualification that it was necessary for the Board to apprise the appellant of the fact that it intended to hold that the permit and/or the renewals thereof had not been properly granted in the first place. It should not keep such matters up its sleeve but should afford an applicant an opportunity of dealing with them. (See BAXTER: ADMINISTRATIVE LAW pp.545 - 580 and the cases there cited.) However the papers are silent on the question as to what transpired at the hearing on the 11th December 1996, the appellant makes no point of this, and I mention it only for the guidance of the Board.

I should add that in paragraph 4 of his replying affidavit the appellant does not deny that he was heard at the hearing held on the 11th December 1996. On this point I accordingly agree with the views and conclusion of the learned Judge a quo who held that there had not been a failure to comply with the audi alterant partem principle.

The next ground of attack is that the Board committed a grave irregularity by purporting to review what had gone on in previous years. The Board was supposed to consider the application for renewal of the permit to cover the 1996/7 trading year. The appellant contends that, with regard to decisions made in previous years, the Board was functus officio. The appellant points out that the permit issued in 1992 was pursuant to successful review proceedings which he had instituted; if the Board was dissatisfied it could have taken the matter on appeal and cannot seek to do so four and half years later.

The learned Judge a qua correctly held that there were numerous disputes of fact on the papers

with regard to what precise permit was originally applied for by the appellant and that these could not be resolved on the papers. However he dismissed the attack on the Board's decision by holding firstly that the appellant should have exhausted his remedies by appealing to the Road Transportation Appeal Board and in any event the matter complained of was not a matter for review but appeal.

He cites DURBAN CITY COUNCIL AND ANOTHER VS LOCAL ROAD TRANSPORTATION BOARD 1964(3) SA 244(D) at 255 and the judgement on appeal sub nom LOCAL ROAD TRANSPORTATION BOARD AND ANOTHER VS DURBAN CITY COUNCIL 1966(1) SA 586(A) at P.594.

In the first mentioned case Miller J said this at page 258-

"Nor am I able to interpret the Act to give local boards the power to review their own previous decisions and to decide that certificates issued or renewed or transferred by them in the discharge of their duties and in the exercise of their discretion in terms of the Act were wrongly issued or renewed or transferred and to set aside their own decisions. For that, in effect, is what the Local Board purported to do in December 1993, when it refused the applications for certificates granted or renewed by it."

And that, in my view, is precisely what the Board did in the present case. Whether the permit or permits were wrongly granted or whether any of them were granted in pursuance of an Order of Court seems to me to be beside the point. They were granted by the Board which in effect, purported to review its previous decisions. That constitutes an illegality.

As to whether such illegality is a matter for review or whether the appellant was bound to proceed by way of an appeal is made clear by the judgement on appeal where Holmes J A said this at page 549:-

"Reviewing all the foregoing it seems that the legislature has made ample and effective provision for redress on appeal in regard to the wide range of matters incidental to the general application of the Act and that in respect of such run - of - the mill matters (my underlining) there may be..... a necessary implication of an ouster of the Court's jurisdiction pending exhaustion of the remedy of an appeal..... But I can find no sufficient basis for holding that there is a necessary implication of such an ouster of the Court's power to entertain a review in regard to matters such as an illegality or a material illegality committed by the local Board which fall outside the purview of its jurisdiction....."

This is such a case for the Board committed an illegality in purporting to set aside its earlier

decisions. It acted ultra vires, the appellant was not obliged to proceed on appeal but was entitled to take the decision of the Board on review. The abovementioned decision is direct authority for both those conclusions.

This is not a case where the merits of the decision are being attacked and where an appeal not a review is the appropriate remedy. This is a case where the legality of the decision is attacked: where the Board acted ultra vires. It is also clear that in such circumstances review is the appropriate and permissible procedure. (See also BAXTER: ADMINISTRATIVE LAW (supra at pp. 305 et seq and the cases there cited). At page 307 in fine the learned author concludes that where the public authority had no power to do what it did the Court is entitled to interfere on review. There are certain other cases cited by the appellant which support the above conclusion but to which it is not necessary to refer, (of also TAKHONA DLAMINI VS PRESIDENT OF THE INDUSTRIAL COURT AND NANTEX (SWAZILAND) (PTY) (LTD) CIVIL APPEAL 23/1997 (unreported).

The learned Judge a quo accepted the correctness of the earlier abovementioned decisions

referred to but held, wrongly in my view, that the Board had not reviewed its earlier decision or decisions. He was correct in pointing out that the grant of a permit is not a guarantee of permanent renewal. There may be cases where the operator has conducted his business unlawfully or where in a particular year he has put the lives of his passengers in danger. That may happen in a particular year and may justify the Board in refusing to renew a permit. The examples are not exhaustive. But this is not such a case. This is a case where the Board exceeded its powers by in effect setting aside earlier decisions made by itself.

In reaching the above conclusion I have not overlooked the fact that in some instances the Board issued permits in consequence of an order of the High Court. The Board could have taken those decisions on appeal to this Court but foiled to do so. Those decisions were then binding upon the Board which had no discretion to refuse to implement the decisions of the High Court. In this respect there is a point of distinction between the facts in this case and the remarks of Miller J referred to earlier herein. But the fact remains that it was the Board which issued the permits. To the extent that the Board relies upon the fact that the appellant deliberately misled the Court

that it an allegation of fraud which is hotly disputed. Fraud must always be proved by the party alleging it and this has not been proved on the affidavits nor did the Board apply for the hearing of oral evidence.

In the DURBAN CITY COUNCIL case (supra) Miller J said this at page 255 (H):

"While I accept that there may be circumstances in which a local board would be entitled to go behind a certificate apparently regular on the face of it and to refuse to renew it because it was not in fact a certificate fit for renewal (e.g. in a case when it is not disputed (the underlining is mine) that the certificate had been obtained by fraud) I am not persuaded that it may in all and any circumstances discharge the functions which properly belong to a Court of law."

These remarks are of application to this case.

So too are the following comments by Holmes J A in the aforesaid case on appeal at page 598 (C -D):-

"by wrongly holding that de jure there were not certificates in existence, and therefore there was nothing capable of being renewed, the local Board never applied its mind to the issue before it. That was an irregularity justiciable on review."

In the present case there were permits in existence granted by the Board which was in any event bound by the Orders of the High Court. As I have said earlier if it was of the view that those Orders had been wrongly granted it should have taken the matter to this Court but it failed to do so.

As has been stated earlier herein it is not possible to resolve the question of the alleged fraud by the appellant in favour of the first respondent for the reasons given. That does not mean that the Board (the first respondent) is prevented from taking whatever civil or ciminal proceedings it may be advised in respect of the alleged fraud.

In my judgement the appeal, must be allowed with costs and the judgement of the Court a quo

altered to one granting the application with costs.

R. N. LEON J A

I agree:

J. H. STEYN J A

I agree:

P. H. TEBBUTT J A

Delivered on this 25TH day of September, 1998.