



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 66/2013

In the appeal between:

SIMON MNUMZANE VILANE

APPELLANT

VS

JUSTICE NXUMALO

1ST RESPONDENT

SAMUEL HLATSHWAKO

2ND RESPONDENT

THULANI DLAMINI

3RD RESPONDENT

SOLOMON HLOPHE

4TH RESPONDENT

MBUSO MNDZEBELE

5TH RESPONDENT

MENZI VILANE

6TH RESPONDENT

Neutral citation:

Simon Mnumzane Vilane vs Justice Nxumalo & 5 Others
(66/2013) [2014] SZSC31 (30 May 2014)

CORAM:

A.M. EBRAHIM, JA
M.C.B. MAPHALALA, JA
DR. B.J. ODOKI, JA

Heard

15 May 2014

Delivered

30 May 2014

Summary

Civil Appeal – contempt proceedings – appellant lodged an application for an order committing the first to the fifth respondents for contempt of court – the basis for the application was that the said respondents were defying a court order issued by the court *a quo*

in the appellant's favour revoking permit No. 3414 – application dismissed on the basis that the Board had revoked the permit prior to the issuance of the court order – held that the court *a quo* did not misdirect itself in making the said finding – appeal accordingly dismissed with costs.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] The appellant instituted motion proceedings before the court *a quo* on the 16th August 2012 calling upon the Road Transportation Board to show cause why its decision to transfer permit No. 3414 to the sixth respondent and further renew the said permit should not be reviewed, corrected and/or set aside. He further sought an order directing the Road Transportation Board to revoke permit No. 3414 which it had earlier issued to the sixth respondent.

[2] It is common cause that the original holder of permit No. 3414 was Henry Ntonto Vilane who died in 2007; and, the deceased several children including the appellant, Ben Vilane, Antony Vilane, Pauline Vilane and Dominic Vilane. It is not in dispute that the sixth respondent is the biological son of Antony Vilane, since deceased, who was an executor in the Estate of the late Henry Ntonto Vilane. Antony Vilane died in 2007, and, the permit was transferred to the sixth respondent on behalf of the Estate. On the 20th December 2010, the Master of the High Court sent a memorandum to the Road Transportation

Board authorising the transfer of permit No. 3414 to the appellant; however, it would seem this was not done notwithstanding a resolution by the beneficiaries of the Estate to that effect.

[3] The appellant is the holder of permit No. 3579 which operates on the Siteki/Manzini route as does permit No. 3414; and, the operating time-schedule is the same. The appellant contends that on the 29th October 2010, the Road Transportation Board withdrew permit No. 3414 from the sixth respondent for two reasons: firstly, the bus for which the permit was used belonged to Dumsane Vilane and not the sixth respondent; secondly, the permit had to be transferred to the appellant as the executor of the estate of Henry Ntonto Vilane. The contention by the appellant is that permit No. 3414 should not be competing for passengers with his permit No. 3579 since it was withdrawn by the Board. The appellant further contends that the Board subsequently renewed permit No. 3414 after its withdrawal without advertising the renewal application and calling for objections; hence, the issue of two permits to different persons to operate the same route and time-schedule.

[4] On the 20th September 2012 the Road Transportation Board cancelled permit No. 3414; and, the secretary of the Board Mandla Ntshalintshali advised the sixth respondent of this decision in writing on the 21st September 2012. On the 28th September 2012, Justice Maphalala PJ issued an order directing the Board to revoke permit No. 3414 which had been issued to the Sixth respondent.

- [5] It is therefore apparent from the evidence as well as the Record of Proceedings that when the appellant instituted contempt proceedings against the first to the fifth respondents, permit No. 3414 had already been revoked by the Board. The answering affidavit deposed by the respondents shows clearly that the court order issued on the 28th September 2012 was overtaken by events.
- [6] In the replying affidavit the appellant denied that permit No. 3414 was cancelled and argued that the Board merely changed the number allocated to permit No. 4147, and that the permit was reissued with a different number but the same route and time-schedule; hence, it was clashing with his permit No. 3579. In view of the dispute of fact whether or not permit No. 3414 was revoked, Maphalala PJ directed that oral evidence should be heard. On the 4th October 2013 oral evidence was led by the appellant as well as the secretary of the Board Mandla Ntshalintshali. It transpired from the evidence adduced that after permit No. 3414 had been withdrawn by the Board, the sixth respondent lodged a fresh application on the 9th January 2012 for the same route and time-schedule as permit No. 3414; and, in the absence of any objection, permit No. 4147 was granted. Accordingly, Maphalala PJ discharged the *rule nisi* issued by the court on the 28th September 2012 directing the cancellation of permit No. 3414.
- [7] The appellant lodged a Notice of Appeal against the judgment of the court *a quo*. Three grounds of appeal were advanced: Firstly, that the Learned Judge

erred by not applying his finding in the earlier judgment that if it is found that the sixth respondent was still carrying on the same service as he previously did under permit No. 3414, then the application should succeed. Secondly, that the Learned Judge erred by not finding that the appellant in the court *a quo* had established that the sixth respondent was still carrying on the same service under permit No. 4147 as he previously did under permit No. 3414, and, that the respondent had not contested those facts. Thirdly, that the Learned Judge erred by not finding that the Road Transportation Board lacked *bona fides* and had consciously devised ways of circumventing the relief that the appellant was seeking.

- [8] During the hearing of the appeal, counsel for the first to the fifth respondents lodged a Notice to Raise Points of Law. In essence counsel's contention was that the Record of Proceedings was incomplete for want of the transcript on the oral evidence led in the court *a quo*. However, such an objection is not competent on the basis that the judgment of the court *a quo* sufficiently incorporates the evidence led. In light of Rule 30 (5), of the Rules of this Court, the absence of the transcript cannot vitiate the appeal. The rule provides the following:

“30. (5) The appellant in preparing the record shall, in consultation with the opposite party, endeavour to exclude therefrom documents not relevant to the subject-matter of the appeal and to reduce the bulk of the record so far as practicable. Documents which are purely formal shall be omitted and no document shall be set forth more than once. The record

shall include a list of documents omitted. Where a document is included notwithstanding an objection to its inclusion by any party, the objection shall be noted in the index of the record.”

- [9] Counsel for the first to the first to the fifth respondents further argued during the hearing of the appeal that the application *a quo* was defective on the basis that it was not served personally upon the said respondents in accordance with Rule 4 (2) (j) which provides the following:

“4. (2) Service under sub-rule (1) shall be effected in one or other of the following manners:

...

- (j) where the process or application to the court is for an order affecting the liberty of the respondent, or is for an order for dissolution of a marriage, restitution of conjugal rights, judicial separation or nullity or marriage, the process or application therefor shall be served by delivery of a copy thereof to the respondent personally, unless the court for good cause shown gives leave for such process or application to be served in some other specified manner.”**

- [10] The following facts are apparent from the Record of Proceedings: Firstly, that the Notice of Intention to Oppose indicate that the Attorney General was representing the respondents, meaning that they have been served and had knowledge of the application. Secondly, the first respondent has deposed to the answering affidavit, which is evidence that the respondents had knowledge of the application. Thirdly, Rule 53 of the High Court Rules expressly provides

that all proceedings for the review of a decision of a Board shall be by way of notice of motion directed and delivered to the chairman of the Board. Again this shows not only that the application was served upon the first respondent as chairman of the Board but that he deposed to the answering affidavit as evidence that he had knowledge of the proceedings. Accordingly, the contention regarding improper service cannot succeed.

[11] This appeal cannot succeed in light of the undisputed evidence that after the Board had withdrawn permit No. 3414 on the 29th October 2010, the sixth respondent lodged a fresh application on the 9th January, 2012 for the same route inclusive of the time-schedule. No objections were lodged by the appellant, and the application was granted under permit No. 4147.

[12] It is common cause that permit No. 3414 was for a long time utilized by the executors of the Estate of Henry Ntonto Vilane. It should be pointed out that the Estate was not joined in the proceedings as an interested party; however, the respondents did not raise any objection in this regard.

[13] Section 3 as read together with section 12 of the Road Transportation Act No. 5/2007 provides that no person shall operate a transport service without a road transportation service permit issued by the Road Transportation Board established in terms of section 4 of the Act. The functions of the Board are provided in section 6 of the Act as follows:

“6. Functions of the Board are to:

- (a) Consider applications for or relating to the granting, renewal, amendment, suspension or cancellation of certificates and permits;**
- (b) Determine the demand for public passenger and freight transport;**
- (c) Keep or cause to be kept, registers of all permits issued, and any other register or data base as is required to properly administer road transportation; and**
- (d) Advise the Minister on any matter relating to the transportation of goods and passengers, (giving special consideration to the elderly and passengers with physical disabilities), by road in Swaziland or any matter incidental which the minister may refer to the Board.”**

[14] A reading of section 6 together with section 7 shows that the powers of the Board are not restricted to the granting, renewal or amendment of the road transportation permits but also the suspension and cancellation of the permits. A person aggrieved by the decision of the Board may appeal to the Road Transportation Appeal Board established in terms of section 9 of the Act.

[15] Sections 8 and 11 of the Act deal with appeals and provide the following:

“8. A person aggrieved by a decision of the Board may appeal to the Appeal Board and section 11 of this Act shall apply with regard to such appeal.

...

11. (1) A person:

- (a) whose application for a permit has been refused;**
- (b) who has opposed the granting of a permit where such permit has been granted; or**
- (c) who holds a permit where such permit has been suspended or cancelled;**

May appeal against the decision of the Board, to the Appeal Board.

(2) The decision of the Appeal Board shall be final.

(3) Prior to giving notice of appeal, the appellant and any other party having an interest in the matter shall, on request, and on payment of the prescribed fees, be furnished by the secretary of the Board with the reasons for the Board’s decision.”

[16] It is not in dispute that the appellant did not object to the application for the granting of permit No. 4147 as required by section 14 of the Act which provides the following:

“14. (1) Before considering an application, the Board shall cause notice thereof to be published in the Gazette and in a newspaper circulating in Swaziland setting out briefly the particulars of the application.

- (2) The notice shall state where the application may be examined by interested persons and shall call upon any person objecting, to lodge with the secretary to the Board and to send the applicant his objections in writing together with the grounds of objections by registered post within 14 days after the publication of the notice.**
- (3) Every objection shall be accompanied by such fee as may be prescribed.**
- (4) The secretary to the Board shall give written notice to every person who has made application and has indicated that he wishes to appear in support of the application, and every person who has objected to the application, of the time and place at which the application will be considered.**
- (5) The notice shall be given not less than fourteen days before the application is considered.**
- (6) The notice shall be deemed to have been received by the person to whom it is addressed four days after the date it is posted if posted to the address notified by him to the secretary for that purpose.**
- (7) If a person fails to notify the secretary of such an address, no notice shall be required to be given to him.”**

[17] Accordingly, the appeal is dismissed. No order as to costs.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

I agree

DR. B.J. ODOKI
JUSTICE OF APPEAL

For Appellant

Attorney S.C. Dlamini

For Respondents

Attorney General's Chambers

DELIVERED IN OPEN COURT ON 30 MAY 2014