IN THE HIGH COURT OF SWAZILAND

(HELD AT MBABANE)

CASE NO.: 2447/06

In the matter between

CITY COUNCIL OF MANZINI **Applicant**

and

THE SWAZILAND INTERSTATE

TRANSPORT ASSOCIATION **1st Respondent**

TRANS NATIONAL (PTY) LTD
t/a ZEEMANS TRANSPORT **2nd Respondent**

MATTER HEARD ON 1st AUGUST 2006 JUDGMENT
DELIVERED ON: 3rd NOVEMBER 2006

CORAM: P.Z. EBERSOHN J.

FOR APPLICANT: **ADV. P. FLYNN**
Instructed by ROBINSON BERTRAM

FOR 1st RESPONDENT: **ATT. S.V. MDLADLA**
FOR 2nd RESPONDENT: **ATT. T.A. MANZINI**

JUDGMENT

EBERSOHN J:

[1] The prayers in this urgent application read as follows:

> **"1. That the rules in relation to service time limits as provided for by the rules of the Honourable Court be and are hereby dispensed with in that this matter be enrolled as one (of) urgency.**
>
> **2. That the Respondents be ordered to remove their concrete barriers or any other objects that has been placed at the entrance and exit points of the Applicant's premises known as the Satellite Bus Rank, Manzini.**
>
> **3. That a rule nisi be and is hereby issued and to be returnable on a date to be determined by this Honourable Court in the following terms:**
>
> > **3.1. That the Respondents be interdicted and restrained from interfering in any way whatsoever with the operations of Satellite Bus Rank.**
> >
> > **3.2. That the Respondents be and are hereby ordered to comply with the memorandum of understanding entered into between the Applicant and the First Respondent on the 2nd May 2006.**
> >
> > **3.3. That the Second Respondent be interdicted and restrained from entering Applicant's premises known as the old bus rank for purposes of servicing the its cross-border(sic) route and that it be ordered to re-locate to the new bus rank known as the Satellite Bus Rank.**
> >
> > **3.4. That the Second Respondent be interdicted and restrained from inciting other cross-border passenger operators to re-locate back to the old bus rank or instigating such re-locating.**
>
> **4. That prayers 3.1 to 3.4 operate as an interim interdict pending the final determination of this application.**
>
> **5. The Commissioner of Police or the Station Commander for the Manzini Police Station be and are hereby authorised and directed to take such lawful action as may be necessary to ensure that the order granted is complied with, and to maintain peace and order and to prevent any violence against the employees of the Applicant.**
>
> **6. That the Applicant be granted such further and/or alternative relief as this Honourable Court may deem fit."**

[2] On the 13 th July 2006 Mabuza J granted an interim order in terms of prayers 1, 2, 3.1, 3.2, 3.2, 3.3, 3.4, 4 and 5 with the return date being the 28th July 2006.

[3] The return date was anticipated by the 2nd respondent to the 19th July 2006 and the matter came before me.

[4] It was clear that the matter was not ripe for hearing and Mr. Mdladla who appeared for the 1st respondent indicated that he intended filing an answering affidavit and Mr. Flynn, who appeared for the applicant also indicated that the applicant intended filing a replying affidavit.

[5] Having heard argument on the 19th July 2006 I made the following order:

> **"1. The Rule is extended until the final determination of the matter.**
>
> **2. The 1st Respondent is to file its answering affidavit by 16:30 on the 20th July 2006.**
>
> **3. The Applicant is to file its replying affidavit by 12:00 on Monday the 24th July 2006.**
>
> **4. Comprehensive heads of argument is to be filed by all the parties by 16:00 on Tuesday the 25th July 2006.**
>
> **5. The matter is postponed for hearing to the 27th July 2006 at 8:30.**
>
> **Costs are reserved."**

[6] The 1st respondent filed an answering affidavit on the 20th July 2006.

[7] The applicant filed replying affidavits to the answering affidavits of the 1st and 2nd respondents on the 24th July 2006.

[8] The applicant filed heads of argument on the 25th July 2006.

[9] The respondents filed their heads of argument late and, in fact, when the matter was called on the 27th July 2006, the heads of the 1st respondent did not reach me.

[10] It was clear that the matter could not proceed and the matter was postponed to 8:30 roll on the 1st August 2006 before me and the respondents were ordered to file

condonation applications.

[11] The condonation applications were filed.

[12] After hearing argument both condonation applications were granted by me and the question of costs of the 19th July 2006, the 27th July 2006 and of the condonation applications were argued. I reserved my judgment in that regard.

[13] It appears that on the 2nd May 2006 the Municipal Council of Manzini (the "Council") and the Swaziland Interstate Transport Association, the 1st respondent, signed a document bearing the heading **"MEMORANDUM OF UNDERSTANDING"** in respect of a bus rank facility which was constructed on certain land of the Council. This document was attached as annexure "MCC2" to the founding papers. Clause 3 thereof reads as follows:

> **"3. This agreement shall come into effect on the .....and shall subsist indefinitely, unless otherwise terminated in terms of this agreement."**

No date was filled in in the space left for the date.

[14] In terms of clause 4 thereof the Council would keep the facility clean and in a good state of repair and in terms of clause 5 thereof the Association would manage the facility and in terms of clause 5.3 will have to:

> **"Be responsible for control over and discipline of public transport personnel within the facility who contravenes laid down rules and regulations".**

[15] It appears that after certain traffic congestion was encountered the Council constructed a Satellite Bus Rank. This caused some unhappiness amongst operators and passengers which led to repercussions which gave rise to the bringing of the urgent application.

[16] The founding affidavit was attested to by one Bheki Hlatshwayo, the acting City Clerk of the Council. He did not attach a resolution of the City Council on Manzini empowering him to bring the application (See **Thelma Court Flats (Pty) Ltd. v Mc Swigin** 1954 (3) **SA** 457(E) and **Pretoria City Council v Meerlust Investments Ltd.** 1962(1) **SA** 321 **(A)** at 325(D)) but the respondents did not attack his authority and this point need not be dealt with further.

[17] Paragraphs 12 and 13 of the founding affidavit read as follows:

> **"12.**
> **On the evening of the 9th July 2006 the Applicant was advised that the Executive members of the of the First Respondent that(sic) some of their members were erecting concrete barriers to block the entrance and the exit points of at(sic) the Satellite Bus Rank. The Council dispatched some of its officials to go and observe what was happening. It wherein(sic) it transpired that members of the First Respondent which were in their numbers, already placed Jersey Barriers and other objects to block entrance and exit point of the new bus rank. Due to the fact that the members of the Respondents have previously been violent and assaulted one of our officials Mr. Madoda Dlamini or City Engineer, in fear of their lives our staff members retreated and went to the Manzini Police Station to seek intervention in this matter. In fact they threatened assault employees of the Applicant if they tried to remove the barriers. They were armed with bush knives, axes and were charging towards our employees.**
>
> **13.**
> **Whilst the management of the Applicant was still at the manzini Police Station, they were again advised the Respondents were now removing the concrete that had been placed at the old bus rank to prevent its use. They let in some of their vehicles into the rank much against the agreement signed between the parties as reflected in annexure "MCC2". They camped at the old bus rank for the night to ensure that the City Council Staff does not close the entrance point of the rank."**

[18] For a reason which was not explained in the founding affidavit not one supporting and/or verifying affidavit of one of the alleged many Council officers were attached to the founding affidavit and the Court was faced with inadmissible hearsay matter. This aspect was also not rectified in the replying affidavits although the Applicant was duly challenged on this point as will be illustrated later herein.

[19] The 1st respondent's response to the two paragraphs are to be found in paragraphs 10 and 11 of their answering affidavit deposed to by one Sidumo Dlamini, the

secretary of the 1st respondent, which paragraphs read as follows:

"10.

AD PARAGRAPH 12
I note the contents herein. I have no knowledge of the same and the Applicant is put to strict proof thereof.

11.

AD PARAGRAPH 12
I have no knowledge of the contents herein and I further note that same are hearsay."

[20] In paragraphs 5 and 6 of its replying affidavit the Applicant stated the following with regard to paragraphs 10 and 11 of the 1st respondents answering affidavit:

5. **AD PARAGRAPH 10**
We reiterate the contents of paragraph 2 contained in the Applicant's founding affidavit and this transgression was also witnessed by members of the po;lice as well who alerted the Applicant.

6. **AD PARAGRAPH 11**
It is unfortunate that the 1st respondent does not substantiate why they are of the view that the contents of the relevant contents (sic) of our founding affidavit are hearsay. In that regard 1st Respondent has the onus of adducing facts substantiating that our evidence is hearsay. So far, that is lacking and we will reiterate the contents of our paragraph 13."

[21] Who erected the barriers etc. was thus not proven by the Applicant.

[22] In an affidavit attached by the 2nd respondent to its notice anticipating the return date one Robinson Martin Zeeman stated inter alia:

"5.
I submit that the interim Order granted by the above Honourable Court is oppressive and unjust and highly inconvenient to the 2nd respondent. I refer the above Honourable Court to the Opposing Affidavit filed on behalf of the 2nd Respondent which is annexed hereto marked annexure "B".

6.

I wish to highlight the following:

6.1. The 2nd Respondent operates a fleet of big buses whose capacity ranges between 65-100 passengers. The Satellite Bus Rank which the 2nd Respondent had been directed to relocate to was not designed for big buses but for Kombis and sprinters which are much smaller in size.

6.2. The big buses do not fit in the parking bays.

6.3. The Satellite Bus Rank exit leads to a steep hill and this will cause damage to the buses when fully loaded.

6.4 On the 14th July, 2006 my brother and co-director of the 2nd respondent, NELSON ZEEMAN, demonstrated to the City Engineer who is an employee of the Applicant that the Satellite Bus Rank is too small by taking him for a ride on one of the Respondent's big buses.

6.5. The City Engineer acknowledged the problem with regard to the exit leading to a steep hill and suggested, just like the other employee's of the Applicant as averred in my Opposing Affidavit, that we should use the designated ENTRY POINT as an exit, and use the designated EXIT POINT as an entrance.

6.6. It was pointed out to the City Engineer that this suggestion is not only unworkable but highly dangerous and unlawful. This will lead to problems with the 2nd Respondent's insurers in the event of any accidents.

6.7. The above cited method is also highly dangerous because there are no adequate road-markings.

6.8. The fact that the 2nd Respondent is being encouraged to break traffic laws clearly shows that the Applicant failed to consult with the respective stakeholders when the Satellite Bus Rank was designed.

6.9. The 2nd Respondent's passengers will be subjected to walking a distance of some 4-5 kilometres in order to get interconnecting transport. As averred in my Opposing Affidavit we specialize in transporting hawkers and mineworkers. It is clearly unfair to expect them to walk such a long distance with heavy goods. Taxis and for-hire's are not allowed at the Satellite Bus Rank.

7.

On the other hand, the inconvenience or harm, if any, to be suffered by the Applicant is minimal. The reasons why the application was brought on a Certificate of Urgency have been overtaken by events, particularly because all parties to the main action have undertaken not to engage in any form of violence.

8.

The 'unlawful scenario' which the Applicant relies on as a ground for

urgency thus no longer subsists."

[23] In the 2nd respondent's answering affidavit Robinson Martin Zeeman dealt with the allegations in the founding affidavit.

[24] In paragraph 5.1 thereof he attacked the legality and validity of the said Memorandum of Understanding in that it allegedly did not comply with the **Manzini Pubic Service Vehicles Bye-Laws, 1970** ("the Bye-Laws") issued under section 77 of the **Urban Government Act No. 8/1969.**

[25] In paragraph 6.1.1 he referred to the fact that there was no date of commencement in Clause 3 of the Memorandum of Understanding.

[26] In paragraph 6.2.1 he referred to the fact that the Memorandum of Understanding in clause 17 thereof expressly provided that **"the validity of the agreement is conditional upon the Parliamentary Select Committee's written approval of permanent relocation of the interstate vehicles into the facility...,"** which undoubtedly is a suspensive condition.

[27] In paragraph 6.2.2 he stated that the suspensive condition referred to in paragraph [20] of this Memorandum has not been fulfilled.

[28] In paragraph 7 of the affidavit he stated that the Executive Committee of the 1st Respondent was not mandated to sign the Memorandum of Understanding and that they acted contrary to what was resolved and that their signing of the Memorandum of Understanding was null and void.

[29] He also stated the following in the affidavit:

> **"7.1.7 On and about the 30th May, 2006 employees of the Applicant who were under Police guard erected a concrete barrier to prevent access to the section of the Manzini Bus Rank which is normally used by kombi and sprinters. This was done to force members of the 1st respondent who operate kombis and sprinters to(sic) on cross border routes to re-locate to the Satellite Bus Rank.**

7.1.8.1 I submit that members of the 1st Respondent who then relocated to the Satellite bus rank did not do so voluntarily but were forced by the actions of the Applicant in erecting a concrete barrier at the entry to the manzini bus rank. Furthermore, the fact that members of the 1st respondent are challenging the memorandum of Agreement(sic) shows that they have not acquiesced or are not acting in compliance with the same.

[30] I now turn to the answering affidavit filed by the 2nd respondent and duly signed by ROBINSON MARTIN ZEEMAN.

[31] the 2nd respondent replied as follows to paragraphs 12 and 13 of the founding affidavit:

"11.

AD PARAGRAPH 12

11.1 The contents of this paragraph are unknown to the 2nd respondent and I can neither admit or deny same.

1. **It is important to note that there are no allegations of violence being perpetrated by employees of the 2nd respondent.**

2. **Furthermore, the 2nd Respondent's employees have not engaged in the acts alleged in this paragraph.**

12.

AD PARAGRAPH 13

The contents of this paragraph are unknown to the 2nd respondent and I can neither admit nor deny the same."

[32] In paragraphs 24 and 25 of the Applicant's replying affidavit it deals with paragraphs 11 and 12 of the 2nd Respondent's answering affidavit as follows:

"24. AD PARAGRAPH 11:

The issue here is that the 2nd Respondent has directly and indirectly contributed to the chaos. It has directly contributed by inciting other taxi operators to block the entrance and exit points of the Satellite Bus Rank, and then invade (sic) the old rank. Indirectly, the 2nd

respondent has contributed to the chaos by refusing to move to the new satellite bus rank, and consequently creating a situation whereby it was unfairly competing with the other transporters, in that all the customers that would go to the old bus rank would automatically be serviced by the 2nd Respondent exclusively. This caused discontent amongst the other members of the 1st Respondent, hence they then revolted to the entire move to the new Interstate Bus Rank.I reiterate that on the said Sunday the members of the Respondents blocked the entrance and exit points of the Satellite Bus Rank and removed the barriers that the Applicant erected at the entrance of the old bus rank and invaded the old bus rank in total defiance of the agreement between the parties.

25. AD PARAGRAPH (SIC) 12 AND 13

It is reiterated on behalf of the Applicant that both the members of the 1st Respondent and the 2nd Respondent were taking the law into their own hands and they ushered in the present untenable situation.

[33] Paragraph 17 of the founding affidavit reads as follows:

"17.

With regard to the third (sic) Respondent, despite our letter dated the 29th June 2006 advising that it must also move its fleet of buses to the new Satellite rand, they have flatly refused. In our view it is their conduct that has incited the other transport operators from going back to the bus rank. The letter to the second respondent is annexed hereto marked "MCC9". It is against that background that Applicant also seeks an (sic) specific order against the second Respondent compelling it to move to the new Satellite Bus Rank where the other public operators who service routes to South Africa operate from."

[34] In response to paragraph 17 of the founding affidavit and annexure "MCC9" thereto, Zeeman stated the following in paragraph 16 of his affidavit:

"16.

AD PARAGRAPH 17:

3. **The 2nd respondent acknowledges receipt of annexure "MCC9" but submits that there is no legal obligation on it to relocate to the satellite bus rank.. This letter is in pursuance of a void agreement, alternatively, an agreement which is not yet effective.**

4. **The 2nd respondent denies that it has incited other operators to go back to the manzini bus rank or refuse to use the satellite bus rank.**

16.3 The 2nd respondent submits that the design of the satellite bus

rank is not conducive t o the big buses that it operates since it is designed to be used by kombis and sprinters which are much smaller in size.

5. **The big buses do not fit in the parking bays. The exit leads to a steep hill and when loaded it will cause damage to them.**

6. **At the meeting held with the Applicant's officials the above was pointed out and the Applicant's response was that the buses should use the designated ENTRY to the bus ranks as an exit point. I pointed out to the officials that using this method if exiting bus rank would not only be unlawful but highly dangerous because the road markings are not designated for that purpose. This would clearly be a danger not only to the members of the public but to other road users in the vicinity.**

7. **Apart from the high risks of accidents it was pointed out that should any of the 2nd respondent's buses get involved in an accident the Swaziland Royal Insurance Corporation would decline to compensate for any losses incurred because the buses would be deemed to have been driving(sic) unlawfully in the circumstances.**

8. **The 2nd respondent also brought up the issue regarding the lack of interconnecting transport for its customers, namely hawkers and mineworkers. The satellite bus rank is isolated and is some 4-5 kilometres from nth Manzini Bus rank where there is interconnecting transport. In particular, hawkers carry large loads of merchandise and it would clearly be unjust and unfair to expect them to carry large loads over such a long distance. The 2nd Respondent has an arrangement with mineworkers who travel in large groups on specified dates and when they arrive they need to get interconnecting transport.**

9. **At the meeting referred to by the Applicants all the above issues were raised. Whilst acknowledging that we had genuine concerns for our specialized cross border passenger service the Applicant did not offer any solutions but simply insisted that we should move.**

16.9 Quite conveniently the Applicant has not revealed to this Court what was discussed at the meeting of the 20th June ,2006. The Applicant in the circumstances, is being cagey with vital information leading(sic) to the letter it issued ("MCCV9")."

[35] The Applicant responded as follows to paragraph 16 of the 2nd respondent's answering affidavit:

"28. AD PARAGRAPH 16

De facto there is an agreement which has an effected (sic) date, as I have explained above. The wrong agreement which was the initial draft without and effective date had been annexed on the initial

papers. But legally, there is an agreement which exist which has got an effective date which has already been annexed to the papers marked "R2". It is therefore not accurate to say the letter is in pursuant of a void agreement, because the agreement is valid and it is in existence.

29. AD PARAGRAPH 16.2

The Applicant reiterates that 2nd Respondent had incited the other operators to return back to the Manzini Bus Rank. Both directly and indirectly as
I have explained above. If the 2nd Respondent had moved to the Satellite bus Rank together with all the other transporters, the members of the 1st Respondent who had already moved there, would not have revolted. The conduct of 2nd Respondent posed unfair competition to them, as the latter enjoyed the usage of the old bus rank inclusively. The issue of the design of the Satellite Bus Rank is not new in this matter. During the consultations with the relevant stakeholders, this issue was raised and it was taken into consideration by the Applicant and certain changes were made on the certain structures that it previously constructed. For instance, certain barriers were moved to accommodate the size of vehicles which are owned by the 2nd Respondent. The changes were effected. The Satellite Bus Rank as it stands, can accommodate the size of the buses that are owned by the 2nd Respondent. This is further evidenced by the fact that, when the Select Committee made recommendations as can be seen in page 15 of annexure "CCM1" paragraph 3, the Applicant complied with the recommendations accordingly and now the Satellite Bus Rank is conducive to accommodate the buses of the 2nd Respondent's size. The court is further urged to see the contents of the letter and submissions of the director of the road transportation board Mr John Bongwe. It is annexed to "CCM1".

30. AD PARAGRAPH 16.3 AND 16.4

It is not true that big buses do not fit in the new Satellite Bus Rank. There is sufficient space for the big buses to park. An arrangement has been made that a certain area be designated for purposes of parking for the big buses. The argument that the exit leads to a steep hill is not peculiar to the 2nd Respondent. The Applicant cannot be held responsible for a geographical disposition which does not solely affect the 2nd Respondent, but affects all other vehicles. It is a general principle that sometimes roads will ascend and sometimes descend. So to argue that the 2nd Respondent will not utilise the satellite bus rank, because the road exit to a steep hill is unreasonable to say the least. All other vehicles are subjected to the same condition, so why

should the 2nd Respondent be treated differently. Further, steep hills can be found anywhere. Along the route from Manzini to Johannesburg, there are many stops on steep hills. For instance at the Mountain Inn robots as you get into Mbabane, there is a stop on a hill.

31. AD PARAGRAPH 16.5

It is not true that any of our officials has ever suggested that the exit point should be used as entry points. What we said is that, whatever teething problems that the 2nd Respondent might encounter, the Applicants's officials are available to attend to them and to provide a solution to. In fact the Applicant has made the following changes to the rank since its completion to accommodate big buses:-

10. **Initially there was height control bar which Applicant has removed.**

11. **We designated a specific area within the rank a distance from the shelters where the big buses will park.**

12. **We erected a prefabricated office to be used by marshals appointed by the 1st Respondent.**

32. AD PARAGRAPH 16.6

In the light of the denial made in the prescinding (sic) paragraph and in view of the submissions that I have made in the prescinding (sic) paragraph, it follows that as long as the 2nd respondent have followed all lawful traffic road signs and rules, and their insurance policies are valid, there is no reason why the Swaziland Royal Insurance Company would decline their claims in the event of an accident. The Applicant has never said exit points should be used as entry points.

33. AD PARAGRAPH 16.7

The issue of interconnecting transport is also not new. What has transpired is that, the executive of the 1st Respondent actually said this was a business opportunity for its members. They can still establish and ply a route between the old bus rank and the new bus rank, because they are in the business of transporting people. So it there is a need, then they should apply to the Road Transportation Board for a permit to ply the route between the old bus rank and the new bus rank. Be that as it may, it was agreed that one of their transporters was going to provide a shuttle bus to ferry customers from the old rank to the new satellite bus rank.

34. AD PARAGRAPH 16.8

It is incorrect that we never addressed genuine concerns of the 2nd Respondent. As I have stated above, the Applicant at its own expense removed certain barriers and poles in the satellite rank to accommodate the big buses that are owned by the 2nd respondent. The court should not be given a wrong impression. A test was also done using one of the longest buses belonging to the 2nd Respondent. It was able to drive through and exit the satellite rank.

35. AD PARAGRAPH 16.9

It is incorrect that the Applicant is being cagey with vital information. We have even annexed to these papers marked "R3", the minutes relating to the discussions of the 20th."

[36] Paragraphs 18.4 and 18.5 of the founding affidavit read as follows:

"18.4 The Applicant is seized with the task of managing the operation and functioning of all bus ranks within its jurisdiction. Therefore, if the relief sought is not granted the Applicant will not have control over the operation of the bus rank. If this situation is allowed to continue it would lead to chaos, as bus operators will do as they please and that will make the whole city ungovernable.

18.5 The general public has been advised and they have all along been accustomed to the fact that the Interstate Transport is now based at the new Satellite Bus Rank. The new unlawful scenario that has been ushered in by the Respondents will cause confusion, as members of the public will not know where to And transport going outside of the country. That will cause inconvenience and unnecessary delays.

[37] The 2nd respondent replied as follows to paragraphs 18.4 and 18.5 of the founding affidavit:

"20.

AD PARAGRAPH 18.4

13. **The 2nd Respondent admits that the Applicant is seized with the management and control of the operations of all bus ranks within its jurisdiction but submits that this power is to be exercised within the strict confines of the relevant legislation namely the URBAN GOVERNMENT ACT and its BYE-LAWS. The Applicant is a creature of statute and derives its power therefrom and as such it**

cannot act in total disregard of its enabling legislation.

14. **The 2nd Respondent denies that if the relief sought is not granted the Applicant will lose or not have control over operations at the manzini bus rank for the following reasons:**

15. **Prior to erecting the concrete barrier denying kombi and sprinter operators access to the other section of the bus rank there was no chaos. The chaos which the Applicant is complaining about is the result of its own making. The Applicant is designating the satellite bus rank for use by cross border operators failed to comply with the consultative procedures set out in the aforequoted BYE-LAWS.**

16. **If members of the police force are called upon to restore peace and enforce mutually agreed conditions for the use of the manzini bus rank operators will not do as they please and the whole city will not be ungovernable as alleged.**

21.

AD PARAGRAPH 18.5

21.1 The Applicant's allegations contained in this paragraph are not supported by the facts. Interstate transport, that is kombis and sprinters began operating from the satellite bus rank as a

result of the blockade by the Applicant on the 1st June, 2006 -a period of some <u>six weeks</u> . This is a very short period of time and it can hardly be argued that general public is now accustomed to this arrangement.

17. **In any event it took a notice published in a local newspaper to inform the public of the changes imposed by the Applicant and the 2nd respondent argues that it can take another notice in the print media, broadcasts media and television to undo the same.**

18. **The 2nd Respondent denies that it has ushered an unlawful scenario and submits that it is the Applicant's unlawful actions which caused the present situation.**

19. **The 2nd Respondent denies that confusion in the minds of the general public will be created. The 2nd Respondent runs a specialised cross border passenger service in that it deals strictly with hawkers and mineworkers. Trips for both hawkers and mineworkers are set for specific dates and departure times in accordance with the permit issued by the Road Transportation Board. The segment of the market which the 2nd Respondent services is clear about where to find transport which is relevant to**

their needs.

20. **The 2nd Respondent submits that if it continues operating from the manzini bus rank this will not cause any confusion, inconvenience or unnecessary delays as alleged by the Applicant. It is worthy to note that the Applicant does not provide any details as to how the inconvenience will be caused, and to whom, and how the delays will be occasioned and by whom. This is a bald allegation unsupported by any factual analysis."**

[38] Paragraphs 37 and 38 of the Applicant's replying affidavit reads as follows:

37. AD PARAGRAPH 18

It is denied the directive is unlawful, it emanates from a lawful agreement between all stakeholders, which as sanctioned by their mother body SCARTA and the relevant government being the Road Transportation Board.

38. AD PARAGRAPH 19

We have annexed hereto an agreement which has an effective date. It is clear that the 2nd respondent has all along been labouring under a misconception that it is void. It is strange that the 2nd Respondent is denying that they blocked the new satellite rank. After the Court had issued a rule nisi the concrete barriers were removed by the Respondents."

[39] SCARTA has now been referred to in this matter for the first time. Who SCARTA is the court has not been told and on what basis SCARTA could act on behalf of anybody this court has also not been told.

[40] It is also clear that the Applicant was adding new material which should have been raised in the founding affidavit and also added more inadmissible hearsay matter.

[41] Zeeman also pointed out in paragraph 25 of his affidavit that the Applicant's right to manage the old bus rank is a right granted in terms of the Bye-Laws and that designation of old the bus rank still stands and has not been repealed.

[42] It is necessary to deal with another aspect now. After the Memorandum was

signed the Council caused a notice to be published in a newspaper called the Times of Swaziland the text of which notice reads as follows:

> **"The Municipal Council of Manzini would like to inform the public that with effect from June ,2006, The Swaziland Interstate Transport Association will; no longer use the old/current bus rank but will move to the Manzini Cross-Boarder(sic) International Rank (Satellite bus rank)."**

[43] It is clear that neither the procedure prescribed by section 3 of the quoted Bye-Laws has not been followed by the Council nor did the notice published comply with the provisions of section 3 of the Bye-Laws.

[44] Some members of the first respondent moved an urgent application in this court under case no. 1890/06 seeking an order that the council be interdicted from evicting them from the Manzini Bus Rank. As the events which the applicants in that application wanted to stop did not yet happen and as the papers were not clear with regard to the urgency the application was dismissed by this court.

[45] Another similar urgent application to this court under no. 1946/06 followed but was dismissed as the court held that the matter was not urgent.

[46] In the evening of the 9th July 2006 the Council was apparently advised that some executive members of the first respondent and other members thereof were placing concrete barriers to block the entrance and exit points of the Satellite Bus Rank.

[47] The urgent application to this court then followed and the interim interdict granted.

[48] A special costs order was also sought by the applicant.
[49] The respondents pursued the following points of law:

21. the applicant has failed to establish all the requirements for a final interdict;

22. the Memorandum of Understanding was void a initio for lack of

compliance with the provisions of The MANZINI PUBLIC SERVICE VEHICLES BYE-LAWS, 1970 issued under section 77 of the URBAN GOVERNMENT ACT, 1969, and the 2nd respondent submitted that the applicant has failed to substantially comply with the provisions thereof and therefore any purported action by the applicant is void a initio:

23. it is in any case invalid on another ground namely that the date of coming into operation did not appear in the agreement;

24. further documents were attached by the applicant to its replying affidavit to which the respondents could not respond and that the respondents were therefore prejudiced;

25. a copy of the Memorandum of Understanding with a commencement date was one of the new documents which was now produced by the applicant;

26. the applicant has not pleaded any facts with regard to the fulfilment of the suspensive condition contained in clause 17 of the Memorandum of Understanding before the Court. Clause 17 reads as follows:

> **"SUSPENSIVE CONDITION: The validity of this agreement is conditional upon the Parliamentary Select Committee's written approval of the permanent relocation of the interstate vehicles into the facility, a position which would be communicated in writing by Council to the Select Committee. The same shall be form part of this agreement and it shall be annexed hereto."**

27. as the Select Committee of Parliament did not consent to the agreement as is required in the agreement it is not valid;

28. as the Memorandum of Agreement did not come into operation none of the respondents were bound to perform any of the obligations set out

therein.

[50] Mr. Flynn who appeared for the applicant argued with regard to the applicability or not of the Bye-Laws, that section 3 thereof by using the word "may" indicated that either the procedure prescribed by the Bye-Laws could be followed by the Council or that by way of an underhand agreement, like the Memorandum of Understanding, the same purpose could be achieved by the Council. Mr. Flynn did not read section 3 correctly. The word "may" relates only to the fact that the Council "may from time to time" determine routes, stopping places or stands and the word "may" does not give a choice to the Council which procedure it wanted to adopt and follow. It is so that an underhand agreement entered into between the Council and some body of operators would not be binding on the general public and the Council could not act in terms thereof against them. The Court did not have a copy of the Bye-Laws during argument stage.

[51] The matter was fully argued and I went on leave and despite all my requests for a copy of the Bye-Laws without which the judgment could not be finalised I obtained a copy in Mbabane only after I returned on the 23rd October 2006. It is necessary to quote the applicable Manzini Bye-Laws in full. It reads as follows:

"MANZINI PUBLIC SERVICE VEHICLES BYE-LAWS, 1970 Date of commencement 30th May 1969

Citation:

1. These bye-laws may be cited as the Manzini Public Service Vehicles Bye-laws, 1969.

Interpretation:

2. In these regulations -

"Board" means the Town Management Board of Manzini;.

"bus" means a public service vehicle permitted by the Road Transportation Board to convey more than 5 passengers;

"Minister" means the Minister for Local Administration;

"Public service vehicle" has the same meaning as in the Road Transportation Act, No. 37 of 1963;

"Road Transportation Board" means the Board established under section 5 of the Road Transportation Act, No. 37 of 1963;

"stand" means a place fixed by the Board as provided in regulation

3 as place where public service vehicles may be parked and held ready to ply for hire;

"Stopping place" means a place fixed by the Board as provided in regulation 3 as a place for passengers to alight from or board a bus; and

"taxicab" means a public service vehicle permitted by the Road Transportation Board to convey a maximum of five passengers.

Determination of routes, stopping places or stands.

3. (1) The Board my from time to time by resolution determine -

(a) routes to be followed by buses;

(b) the stopping places and stands for public vehicles;

and shall prepare a plan showing the routes, stopping places or stands so determined.

(2) Whenever a resolution is passed under paragraph (1), the Board shall publish in a Gazette and at least one newspaper circulating in its area, a notice -

(a) stating that a copy of the resolution and the plan is lying for public at the office of the Board, and that any person may, free of charge, inspect the same and take copies or extracts therefrom during such hours as shall be specified in the notice;

(b) Calling upon any person who has any objection to lodge his objection in writing with the Secretary not later than a date to be specified in the notice, which date shall be not earlier than twenty-one days after the date of the last publication of the notice.

(3) Where no objection under paragraph (a) is received by the Secretary, the resolution shall come into operation on a date to be specified by the Board by notice published in the Gazette.

(4) Where objections are received by the Secretary the matter shall be referred to the Minister who may sanction the resolution with or without modification, as he may deem fit, or he may refuse to sanction the resolution which shall then lapse.

(5) The decision of the Minister in terms of paragraph (4) shall be notified in the gazette and where the resolution has been sanctioned by the Minister either with or without modification, the date from which the resolution comes into operation shall be stated in the notice.

Temporary alterations.

4. The Board may, after giving such notice as it deems fit, temporarily, divert the routes to be followed by buses, or alter or cancel any stopping places or stands for public service vehicles, during such period as the notice may specify.

Demarcation of stopping places and stands

5. The Board shall erect, place and maintain such signs, notices or marks as it deems necessary to indicate the stopping places or stands which have been determined in the terms of regulation 3.

Buses

6. (1) When a resolution made as provided in regulation 3 has come into operation -

(a) a driver of a bus operating within the urban area shall follow the route determined by the Board for that bus;

(b) a passenger shall not be permitted to alight or board a bus except at a stopping place;

(c) no person shall park, or cause or permit a bus to be parked in a public place, other than on a stand set aside for that purpose by the Board.

(2) A driver of a bus who-

(a) follows a route other than that determined by the Board; or

(b) stops a bus for the purpose of permitting a person to alight from or board the vehicle at a point other than a stopping place,

shall be guilty of an offence.

(3) A person who -

(a) having been requested by the conductor or driver of a bus not to alight from or board the vehicle at a place other than a stopping place thereafter does so;

or

(b) contravenes paragraph 1 (c);

shall be guilty of an offence.

Taxicabs.

7. (1) When a resolution under regulation 3 has come into operation a taxicab shall not be allowed to stand still for hire other than at a taxicab stand fixed by the Board, or subject to the provision of any other law, at the owner's premises.

(2) The owner of a taxicab permitted to operate in the Board area shall, before commencing to transport passengers for hire in such vehicle, cause to be painted, stencilled or otherwise placed on the rear or side of the vehicle, or above it, the word "TAXI" in letters not less than 127 mm (five inches) in height.

29. **The driver of a taxicab may pick up or drop a person at any point within the Board area when called or hired, as the case may be.**

30. **A person who contravenes paragraph (1) or (2) shall be guilty of an offence.**

Obstructing stopping places or stands.

8. A person, other than the driver of a duly authorised public service vehicle, who stops or parks a vehicle in a place fixed as a stopping place or stand or stand for public service vehicles shall be guilty of an offence.

Penalties.

9. A person who is guilty of an offence under these regulations is liable, on conviction, to a penalty not exceeding two hundred emalangeni, or, in default of payment, imprisonment for a period not exceeding six months.

[52] It is clear that there was non-compliance on the part of the applicant with the strict

provisions of the Bye-Law. The Memorandum of Understanding is not compliance therewith and the (new) Satellite Bus Rank has not been given legal status. (See **Schierhout v Minister of Justice** 1926 **AD** 99 at 109 where Innes CJ stated

> **"And the disregard of peremptory provisions is fatal to the validity of the proceedings effected."**

[53] Under the circumstances it was wrong on the part of the Council to unlawfully block and close up the existing Bus Rank and to force operators and the passengers to only use the (new) Satellite Bus Rank.

[54] The fact that a copy of the Memorandum, of Understanding now with a date filled in in paragraph 3 thereof, came to light and was filed with the excuse that a draft copy without the date therein was inadvertently used in the Court application by the applicant, did not change anything except raising the question how it came about that a draft copy without the date was attached to the founding papers. This has not been explained under oath by the applicant. When and where the copy with the date on it was found was also not explained.

[55] Why Mabuza J was not informed at the time of the applicant moving the urgent application that the Memorandum of Understanding which was put before her did not contain a date when it would come into operation and why she was not informed about the fact that the suspensive condition contained in clause 17 of the Memorandum of Understanding has not been fulfilled, has also not been explained by the Applicant. She was a;so not informed of the existence of the Bye-Laws so as to enable her to consider whether the Bye-Laws were applicable or not.

[56] It is also unfortunate that the Applicant resorted to hearsay to a considerable extent in its papers, especially in the founding papers. It certainly calls for this Court to censure the Applicant.

[57] When the respondents raised the issue of the Bye-Laws not having been complied with the Applicants tried to get past that hurdle by arguing that it was not applicable and that the underhand agreement namely the Memorandum of Understanding, sufficed. This argument was most disingenuous.

[58] As the applicant did not identify any of the parties who allegedly removed the concrete barriers at the old bus rank and erected the barriers at the new bus rank it is difficult to comprehend on what basis the applicant could say with certainty that it was the 1st Respondent and the 2nd Respondent who did it. Why affidavits wherein the specific people were named were not filed by the Applicant is not understood. Perhaps the Applicant was of the opinion that the making of general averments would suffice and would perhaps be safer.

[59] To sum up:

a) the founding papers were not drawn up in compliance with the rules regarding applications and for that matter urgent applications;

b) why Mabuza J was not informed of the flaws in the applicants papers and of the existence of the Bye-Laws has not been explained;

c) why it was necessary for the applicant to slip in documents by way of the applicant's replying affidavit to the 2nd respondent's answering affidavit and why these documents were not made part of the founding papers was also not explained;

d) why the applicant did not comply with the peremptory provisions of the Bye-Laws has not been explained by the applicant.

[60] This Court is not impressed by the applicant's high handed conduct and the manner in which the application was dealt with and Mabuza J. being misled by the Applicant and this Court considered awarding attorney and client costs against the applicant but have decided against it but will take it into consideration when dealing with the costs reserved.

[61] The interim order will accordingly be discharged with costs.

[62] This Court must make a ruling with regard to the costs referred to in paragraphs [5] and [12] of this judgment.

[63] It was wrong of the 2nd respondent to anticipate the return date to the 19th July 2006, well knowing that the matter could not be heard on that day because the matter was not ripe for hearing as the 1st respondent still had to file an answering affidavit and the applicant had to file a replying affidavit. The 2nd respondent will therefore be ordered to pay the costs of the 1st respondent on the 19th July 2006 and the fees of counsel are certified in terms of rule 68 and no order is made in favour of the applicant with regard to the costs of that day as a punitive measure.

[64] With regard to the costs of the 27th July 2006 no order with regard to costs will be made and no order of costs in favour of the applicant is made as a punitive measure against plaintiff.

[65] With regard to the costs of the applications for condonation by the 1st and 2nd respondents I make no order.

[66] I accordingly make the following order:

> **1. The interim rule is discharged and the applicant is ordered to pay the party and party costs of the 1st and 2nd respondents and the fees of their counsel are certified in terms of rule 68(2).**
>
> **2. The 2nd respondent is to pay the costs of the 1st respondent of the 19th July 2006 and the fees of counsel are certified in terms of rule 68(2).**
>
> **3. No order as to the costs of the 27th July 2006 is made »**
>
> **4. There will be no order as to the costs of the condonation applications of the 1st and 2nd respondents which were granted**

P.Z. EBERSOHN

JUDGE OF THE HIGH COURT