



IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1637/94

In the matter between:

FUMA MVUBU

Applicant/Respondent

and

HERMON GULE

1st Respondent/Applicant

ELDAH MNISI

2nd Respondent/Applicant

ELIAS CHARLES MAMBA

3rd Respondent/Applicant

Judgment

(26/5/95)

On this application, which is opposed, the Attorney General seeks under rule 42(1) of the High Court Rules to have rescinded an order made by this Court on 4th November 1994 setting aside on review a decision by the Road Transportation Board to grant a road transportation permit to Fuma Mvubu.

The basis for the Attorney General's application is that he was not served with the application upon which the order was obtained and that he was not joined as a party in these proceedings. He contends that as the principal legal adviser and sole legal representative of the Government of Swaziland (including its statutory boards, and in this particular case, the Road Transportation Board) he had to be served and that the failure to do so constituted a procedural irregularity, or error or omission, in consequence of which the order should be rescinded. In support of the submission, he cites rule

4(10) of the High Court Rules, section 2(1)(a) of the Limitation of Proceedings against the Government Act 1972, and sections 2 and 3 of the Government Liabilities Act 1967.

The history of the events leading up to this present application, as it appears from the available record, can be summarised in the following way.

The applicants for review, Hermon Gule, Eldah Mnisi and Elias Charles Mamba, filed their application on 20th September, 1994. The gravamen of their complaint was that in 1993 the Board had advertised an application by Mvubu for a permit to operate a public taxi service based at Matsamo Border Gate. They themselves did not seek to object to his application. Afterwards, however, they learned that the Board had granted Mvubu a permit to carry passengers between Matsamo Border, Piggs Peak and Mbabane. This, they said, differed materially from the description in the advertisement of the permit for which Mvubu's application was being made. If the advertisement had described the application accurately, they would have objected.

It was also alleged that whereas a taxi carries a maximum of three passengers on a non-scheduled route, in the permit that was actually issued Mvubu was authorised to carry up to 15 passengers and that he was operating a mini-bus service under it on a daily basis between Piggs Peak and Mbabane. There was a further allegation, which was not explained very clearly in the founding affidavit, that the meeting at which the Board granted the permit was not properly convened. It appears to be an allegation that the Board members considered Mvubu's application in its Secretary's office in the absence of public transport operators.

All of that is simply by way of explaining the nature of the proceedings. On this present hearing, the merits of the original application for review are not relevant.

Gule, Mnisi and Mamba brought their application against the Board and Mvubu as respondents, and served it on them. The Attorney General was not named as a respondent and the applicants themselves did not serve a copy of the proceedings on him.

Mvubu filed a notice of his intention to oppose the application. The matter was originally set down on 28th October. The Judge's note records that it was postponed "by consent" to the contested roll on 4th November.

On 4th November, the presiding Judge allowed the application and set aside the decision of the Board granting Mvubu the permit. The Judge's record indicates that there were no appearances by the Board or by Mvubu.

On 18th November, Mvubu then filed an application to have the court order set aside on various grounds, including an assertion that the application for review had been fatally defective because the Attorney General had not been cited as a party. On 1st December, the Attorney General gave notice under rule 30(1) of the High Court Rules that he would apply to the High Court to set aside the review proceedings on the grounds that he was not joined or served. These applications were heard on 2nd December. According to the presiding Judge's notes, the Attorney General then withdrew his application.

Mvubu's application was postponed for one week when it was then dismissed with costs.

On 14th December the Attorney General then filed the present application. He chose to swear the founding affidavit personally. In my experience it is very unusual for the principal law officer to the Crown to do that, although it was of course entirely a matter for him. In his affidavit he has stated that his attention was drawn to the review proceedings on 1st December. It is not explained how that came about.

Counsel for Gule, Mnisi and Mamba disputes that the Attorney General is the sole legal representative of statutory boards and in particular of the Road Transportation Board. He also disputes that there was an obligation to join or serve the Attorney General or that he has any direct and substantial interest in the matter.

The Road Transportation Board is established as a board by section 5(1) of the Road Transportation Act 1963 (No. 37 of 1963). It is

therefore a statutory board. Its functions are set out in the Act. These include considering and determining applications under the Act for the granting of road transportation service permits. In doing so the members of the Board must comply with the procedure prescribed by the Act. Applications must be notified publicly, the applicant and any objectors must be given a proper opportunity to be heard, and the members of the Board must in hearing and determining the application fairly. If the Board fails to do so, any interested party who is prejudiced by its decision may apply to this Court to review it. The High Court has inherent jurisdiction to review the proceedings of all inferior courts and tribunals. The Road Transportation Board is such a tribunal. This Court will not assume the functions of the Board. It is the duty of the members of the Board to carry out their responsibilities properly. But the High Court will ensure, where necessary, that their method of procedure is in accordance with the requirements of the law in the ways I have described.

Applications for review of the proceedings of an inferior tribunal are made under rule 53 of the High Court Rules. Under sub-rule (1), a person seeking the review save where any law otherwise provides, to proceed by notice of motion which is to be directed and delivered (in the case of a board) to its presiding officer or chairman "and to all other parties affected." The purpose of that of course is to afford them the opportunity themselves to be heard.

The Board is a public agency. Its members are appointed by the Minister for Works. They are paid from the public revenues. The other costs of administering the Board's operations are obviously met from the public revenues. The other function of the Board is to advise the Minister on matters relating to public road transportation. However, while it is not necessary on this application to go so far as to find that the Board is in all respects subject to the same strict requirements that apply to courts of law (which I do not consider to be the case), in their function of hearing and determining applications for permits I do not think that there is any doubt that the members are performing at the least what used to be characterised as a quasi-judicial function and that they have a duty to exercise their own judgment independently and impartially.

In my view the Government Liabilities Act 1967 (No. 2 of 1967) and the Limitations of Legal Proceedings against the Government Act 1972 (No. 21 of 1972) are not in point here. The expression "Government of Swaziland" means the executive Government. The purpose of the Government Liabilities Act 1967 is to authorise persons to sue the Government for any matter in respect of which he would have a ground of action in a competent court of law against an individual or a corporate body. Section 3 of the Act does not itself make it mandatory for a plaintiff or applicant in such a suit to cite or join the Attorney General the nominal defendant or respondent. It permits him to do so. The scheme of the Act is to enable persons to proceed against the Government.

The Limitations of Legal Proceedings Against the Government Act 1972 applies only to the case where legal proceedings are brought against the Government itself in respect of a debt (including however a debt arising in delict. The point of section 2(1) is to give the Government an opportunity to consider such a claim, by requiring that a written demand must first be made and that, ordinarily, legal proceedings may not be instituted before the expiry of a specified period of time after the demand is made. It is not for a court of its own motion to raise the point that no such demand has been made: see section 5(1).

In those cases in which a person does sue the Government of Swaziland as such, the mandatory procedural requirement that he must serve the proceedings at the office of the Attorney General is contained in Rule 4(10) of the High Court Rules. It is to be noted that the rule does not require the plaintiff or applicant to him as a party. The point of the rule is to ensure that the principal legal officer of the Crown receives the papers directly.

Even if the issues raised by the Attorney General are still open to be determined, at the time when Gule, Mnisi and Mamba began their proceedings I do not consider that it was incumbent on them to join or serve the Attorney General under any of the provisions cited on his behalf.

The Board is not on a proper view, in my opinion, the Government of Swaziland as such. It is a public agency. It is an agency of the Government. In exercising its functions in respect of permits, it is required to comply with the procedure laid down in the Act and, beyond that and because of the nature of its function under the Act, the common law rules of natural justice to the extent that they are not already reflected in the scheme of the Act and are not excluded expressly or by necessary implication by the Act.

What was in issue on the review was the method in which the members of the Board as an inferior tribunal, had sought to discharge their functions under the Act. Strictly speaking, under rule 53, the notice of motion for review should have been served on the chairman of the Board but no objection has been taken on that ground. There is no doubt that the members of the Board whose conduct was in issue had notice of the application for review.

It may be a useful practice, on application of this kind, to serve copies of the proceedings on the Attorney General. It is a matter of record that the methods by which the members of the Road Transportation Board have in recent years seen fit to go about their function of hearing and determining applications for permits have been challenged frequently and successfully on review in this court. It seems to me that it is obvious, in the interests of good public administration, for its members to have the benefit of guidance from time to time as it needs it from the Attorney General. But it does not follow that a private litigant, dissatisfied by the procedure of the Board, must as a matter of law or procedure join the Attorney General as a party to an application for review or serve notice of the application on him.

The Attorney General is the principal legal adviser to the Crown. The members of the Board, as members of a public agency, could and should in my view have consulted him themselves. In any event the order made on review does not affect the interests of the Government itself, in any way that would have necessitated its founder.

The application is dismissed. The costs must follow the event.

A handwritten signature in cursive script, appearing to read "D. Hull".

DAVID HULL

CHIEF JUSTICE