IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2715/2003

In the matter between

MAGALELA NGWENYA Applicant

vs

THULANI MAS IN A N.O Respondent

MINISTRY OF AGRICULTURE AND

COOPERATIVES HEREIN REPRESENTED

BY THE ATTORNEY GENERAL OF

THE KINGDOM OF SWAZILAND 2nd Respondent

NATIONAL AGRICULTURAL

MARKETING BOARD 3rd Respondent

Coram

J. P. Annand ale, AC J

For the applicant Attorney P.M. Shilubane

For the 3 rd Respondent Advocate D. Smith

Instructed by Robinson Bertram Attorneys

JUDGMENT

22 April 2005

[1] This application is to set aside on review, "the findings made against the applicant" by the Commission of Enquiry which was set up by the second respondent in October 2000 and chaired by the first respondent, to investigate and enquire into the operations of the third respondent. Initially, it was sought in addition to order the first respondent to furnish a transcript of the commission's proceedings and further to commit him to prison for contempt of court due to an alleged failure to comply with an order of this court of the 19th June 2001 in the same matter.

[2] At the hearing of argument the applicant's attorney informed the court that the latter two matters fell by the wayside and that only the commission's findings were still sought to be set aside on review.

[3] At the onset, I need to acknowledge that the judgment herein has been delayed inordinately long. I agreed to hear the matter as no other judge was available and informed counsel that a delay was to be

anticipated due to a number of factors. Even so, it was not possible to prepare the judgment within an extended reasonable time and for this delay I have regret for the inconvenience caused to the parties.

[4] On the 16th October 2000 the then Minister for Agriculture and Cooperatives issued Legal Notice No. 128 of 2000 to establish a Commission of Enquiry into the operations of the third respondent, (NAMBOARD). A further Notice followed thereafter, wherein the first respondent was designated as chairman of the Commission. The objects of the commission was to "investigate and enquire into the operations of NAMBOARD", with activities stated to be inter alia an examination of the financial administration and management in general, further to determine the causes of mismanagement and losses experienced if such were to be found. It also had to determine the effects of external travel by top management and its financial implication:, their employment contracts and adherence to conditions, their relationship with the Board and such like matters. The commission was specifically enjoined to make specific recommendations on its various mandates and to present its report thereafter.

[5] The applicant was the Chief Executive Officer of NAMBOARD and he did not receive an accolade of praise, according to him, since he states in para 7 of his founding affidavit I hat:

"...the commission made the following finding;-, against me which appear from page 36 - 42 annexed hereto marked MG3. A considerable number of these findings are defamatory. As a result of the commission's findings my contract of employment with NAMBOARD was not renewed."

[6] He chose not mention or particularise any of these alleged "defamatory findings" and the allegation of non renewal of his contract of employment is an unsubstantiated bald allegation.

[7] Nevertheless, from a perusal of "annexure MG3", which is Part IV of the commission's report, headed "Findings" in respect of its nine different terms of reference, it is clear that much of it does not impact on the applicant but relates to other issues. Insofar as the applicant specifically is mentioned, he certainly did not win their praises.

[8] Amongst other aspects, it reads that:

"The Chief Executive Officer is not a team leader, and is extremely suffering from a bad temper."

"The Chief Executive Officer's management style is dictatorial."

"The Chief Executive Officer has spent Board funds without Board authority and at times without the budget."

"...extensive external travels by the Chief Executive Officer... have impacted negatively... resulted to (sic) huge financial expenditure...".

"...the Chief Executive Officer spends most of Board time and resources attending to his long term training on the MBA programme than on attending to the management of the organisation."

"...Chief Executive Officer acted ultra vires of the law, when converting some employees who were pensionable into fixed contract terms...".

"...the Chief Executive Officer ... enjoy(s) benefits outside (his; contract terms...".

"The Chief Executive Officer fiddles with realistic budgets and adjust them to impress the Board".

"...the purchase of the KB Isuzu Double Cab purchased by the Chief Executive Officer with the Board's funds was unauthorised... and no budget provision for it."

[9] There are various other instances where worse than unflattering references are made the Chief Executive Officer of NAMBOARD, the applicant herein.

[10] The non specific reference by the applicant to all of the findings of the Commission of Enquiry is a broad sweep against it and effectively requires that all of the findings must be scrutinised by the court, trying to extract from it that which the applicant might have deemed to be "defamatory".

[11] The non renewal of his contract of service is a factual conclusion that he incorporates in his complaint without any reference to the source of his assumption.

[12] He further states, also in paragraph 7 of his founding affidavit, that the first respondent held the commission in his absence and that he was only able to obtain a copy of the report on the 20'h June

2002.

[13] The first respondent denies the allegations and states that he was subpoenaed to appear but failed to attend. The Secretary of the Commission, Sipho Nxumalo, specifically con firms in his supporting affidavit that he himself subpoenaed (he applicant to appear before the commission but that he refused to do so.

[14] The accountant of the 3r respondent, its Acting Chief Executive Officer at the time the Commission was set up and who deposed to the answering affidavit of the 3rd respondent, Ms Gladys Masuku, also confirms that the applicant was subpoenaed to appear before the commission but says that he "chose not to be present".

[15] The heart of the application to set aside on review the findings of the commission insofar as it pertains to the applicant, is stated in paragraph 9 of his affidavit. It reads that:

"9.1 The 1st respondent wrongfully and unlawfully contrary to the audi alteram partem rule and in contempt ol court refused to allow me to appear before the aforesaid commission with my attorneys as morefully appears from a copy of the judgment in para 9.2 below.

9.2 The proceedings of the commission were grossly irregular in that they were conducted in my absence and as a result I had no opportunity to cross-examine these witnesses who gave evidence against me in as much as I was entitled to do so in terms of the provisions of the Commissions of

Enquiry Act, 35 of 1963 and in terms of the Court Order in Civil Case No. 729/2001 (annexure "MG5")"

[16] As mentioned at the onset, it has become common cause that no order is sought anymore to commit anyone to prison due to contempt of court, also to abandon an order initially sought to compel delivery of a transcript of the proceedings of the commission.

[17] To this, the first respondent flatly denies any wrongdoing. He says that he was not aware of the Court Order referred to and that it is the applicant who has himself to blame for not appearing before the commission after he was subpoenaed to do so. There was no denial or refusal to let him appear and do as he now complains being deprived of.

[18] The third respondent correctly refers to the gist of the judgment of this court which the applicant refers to. Therein it was held that pending finalisation of the matter, the applicant "shall not be required to appear before the commission, if properly called upon to do so, without being entitled to legal representation, inclusive of the right to cross examine any witnesses.'[1]

[19] The effect of that order is that the applicant's appearance at the commission was to include a right to legal representation and cross examination in the event that he was subpoenaed to appear before it. It also directed the chairman to provide him with a transcript of the record of the commission since its inception as well as documentation and/or reports which implicate him in the performance of his duties as Chief Executive Officer of NAMBOARD, not less than 10 days prior to the dale of hearing by the

commission.

[20] These aspects were a prerequisite to him being required to appear before the commission. It is thus implicit that if lie be subpoenaed to appear, he must have had the papers for at least ten days and furthermore, that legal representation and cross examination may not be denied.

[21] Accordingly, it is somewhat anomalous for the third respondent to now state that "there was no order for the respondents to provide the record within a certain amount of time" (para 9.2 of the third respondent's replying affidavit).

[22] The approach of the first respondent, to state that he was not aware of the court order as it was not served on him, is difficult to understand. He was the second respondent in the matter wherein the order was given. The effect of the order was to require the commission to give the Chief Executive Officer a fair hearing - if he was to receive a subpoena to attend and appear, it would be subject to the stated provisos.

[23] He also states that the Chief Executive Officer (applicant) ignored the subpoena to appear before the commission. What he does not state is whether he refers to a subpoena before or after the date of the Order of the 19 June 2001. The applicant also does not help in this regard. If the position was that the applicant was subpoenaed to appear before the commission after the 19 June 2001, being the date of the order but contrary to the proviso stated above, the position would have been clear. But as things now stand, there is only the allegation that the applicant was "denied" to appear, as well as the contention that he failed to appear in response to a subpoena, resulting in a "refusal" to appear.

[24] From the report of the commission, which is dated June 2001, it is clear that the commission requested and received an extention of time until the 30th April 2001 to finish its business (page 4 of the report). Part II of the report, headed "Methodology" clarifies the position of the respondents. Regarding legal representation, it reads that:

"Before the commission led evidence, on the first day of the hearing, the Chief Executive Officer Mr. M.N. Ngwenya (the present applicant) in writing introduced to the commission an attorney, Mr. Jabulani Motsa from the firm of attorneys, S. A. Nkosi and Company, as legal representative of NAMBOARD (my emphasis) in the enquiry.

The Commission demanded a Board resolution to write the letter and also authorising the legal representation. The attorney failed to submit the Board resolution and further, the Chairman of the Board of Directors was asked to confirm NAMBOARD legal representation as stated by the Chief Executive Officer, the chairman denied the Board ever resolving that it should legally be represented and also mandating the Chief Executive Officer to write the letter introducing legal representation of the Board in the proceedings of the commission. The commission then barred the attorney from attending its proceedings."

[25] The order of this court referred to above required the commission to allow the applicant legal representation, not NAMBOARD. From the report, it seems that NAMBOARD did not have legal representation at the enquiry, since its Board did not deem it necessary to so decide. Also ex facie the report, it seems that the attorney who was refused an audience was not mandated to act for the

applicant, but that he was sought by the applicant to act for NAMBOARD.

[26] The report goes on to state that it indeed refused to provide a transcript or record of the proceedings to the applicant "on the ground that the Chief Executive Officer was not the subject matter of the commission, but he will be called as a witness." As is clear from the Order of Court, the Chief Executive Officer himself was entitled to appoint his own attorney to represent himself at the commission, if he was called upon to appear. There is a distinction between the person of the applicant himself and NAMBOARD. It is the latter which was refused representation, not the former. The report goes on to state that

"The Commission subpoenaed the Chief Executive Officer to come before it to give evidence and be subject to questioning by the commission on the 20'" March 2001. The Chief Ex ec.ijivc Officer did not deny receiving the subpoena but refused to appear before the commission and infact defaulted to attend as subpoenad to appear before the commission."

In the ruling of the 19th June 2001, the position of the applicant was that he was not required to adhere to the subpoena since it was not served on him personally by the prescribed official, namely the Messenger of Court.

The upshot of the matter therefore seems to be that the commission did not subpoena the applicant after the ruling of the 19th July 2001. By that date, the enquiry had closed. Before that time, the applicant was subpoenaed to appear before the commission but he decided not to attend, for various reasons, like

his problem with the service of the subpoena. Whether NAMBOARD itself had legal representation or not is not the issue insofar as the applicant himself is concerned. If he did attend, he was entitled to legal representation.

It therefore seems an odd statement for the applicant to aver that the commission "refused to allow (him) to appear before it with his attorneys." From the report of commission it appears otherwise -it refused NAMBOARD, the enity, not the applicant, to be represented. Nor did it refuse the applicant to appear - to the contrary, it sought his attendance by issuing a subpoena which apparently was not correctly served by the authorised person. Mr. Sipho Nxumalo, who was the Secretary of the commission, states in his confirmatory affidavit that he was the person who subpoenaed the applicant to appear before the commission and "that he refused to do so." What he does not state is whether he issued or served the subpoena.

The applicant's replying affidavit was not deposed by the applicant himself but by his attorney, for some unstated reason. In it, Mr. Shilubane declares that he has read the affidavits of Vuyile Dlamini, Sipho Nxumalo and Gugu Jonga. No affidavits were filed by Dlamini or Jonga. In his affidavit, filed in the Book of Pleadings at page 53 he admits the first four paragraphs of Dlamini's affidavit (which is not before me) but regarding the other two, it is tacit.

This prompted me to search for the unknown affidavits in the Registrar's file, where I found a further bound book of pleadings in this same matter, dated the 29th September 2004 and filed with the Registrar on the 4 November 2004. The book of pleadings used by the court all along, also at the hearing of the matter, is dated the 3rd August 2004 and filed on the same date. However, the newer version of the Book of Pleadings is devoid of the applicant's replying affidavit, made by attorney

Shilubane, on page 53 thereof - instead, at the same page number 53, there is a replying affidavit by the applicant himself.

This confusing state of affairs is misleading to the court and smacks of something untoward. Furthermore, the newer Book of Pleadings does not contain the report of the commission whereas the earlier version does contain it. The newer book contains as part of its 69 numbered pages some annexures to the replying affidavit of the applicant, not contained in the older book with its 115 numbered pages.

When the matter was argued, it was not brought lo my attention that there are different books of pleadings which contain different papers, like the two replying affidavits, by the applicant himself and by his attorney. It begs the question which replying affidavit must be considered by the court. By the time I had the opportunity to prepare this judgment, the delay was already inordinately long, due to quite a number of factors. To refer the matter back to court and hear argument as to which set of papers to use will inevitably cause much further delay. I therefore considered to use only the book of pleadings which I used in court at the hearing, which was filed by the applicant's attorney on the 3rd August .2004. On further reflection and to avoid prejudice to the applicant himself due to an unexplained but hardly excusable mistake of his attorney, I nevertheless decided to consider the affidavit of the applicant himself, which is contained in the later version of the Book of Pleadings.

In the event, it increases the confusion in Ngwenya's application. In paragraph 3 of his replying affidavit, he refers to his own annexure "MG5" as authority that this court found that the Commission of Enquiries Act was relevant to certain paragraphs in his founding affidavit. Annexure "MG5" is a letter dated the 25th January 2001 by his attorney wherein a copy of his employment contract, a

transcript of the record of the proceedings of the commission and other documents are requested fiom the Secretary of the Commission. It has no bearing at all on its stated purpose.

He also refers to annexure "MG6" in order to rely on it as proof for his contention that the first respondent refused that the applicant himself be legally represented at the hearing before the commission. There is no annexure which is marked "MG6".

The applicant then relies on his annexure "MG7" as authority for his contention that the court order was served on the first respondent's attorneys. His annexure "MG 7" in fact is a letter from the Chairman of NAMBOARD dated the 7th May 2001 wherein the applicant is requested to return a motor vehicle, cellphone and credit card to the Board, following his suspension.

This trend continues and does not auger well for a proper understanding of his case. For some reason he further chose to annex the minutes of a Board meeting held en the 25th March 1997. This annexure "MG 4" is not referred to n 1 is replying affidavit and does not seem relevant to the preseie' matter at all. In his founding affidavit he referred to another annexure "MG4", it being a newspaper clipping.

I am constrained to refrain from making very appropriate remarks on this sorry state of the two replying affidavits of the applicant and his attorney.

From the first replying affidavit of the applicant, deposed to by his attorney, no issue is taken with the statement by Sipho Nxumalo, who said that he subpoenaed the applicant, and who disputes any refusal

by the commission to hear the applicant. The remainder of applicant's replying affidavit, made by his attorney, concerns the issues raised in the prayers for relief that were abandoned.

From the second replying affidavit of the applicant, deposed to by himself, over and above the anomalies already mentioned above, further problems arise.

In paragraph 9, he says that he did "make out a case for review in as much as it is common cause that the first respondent chose not to hear my side of the story before making she findings set out in the amended Notice of Motion."

Firstly, there is no "amended Notice of Motion" before me. Both Books of Pleadings contain one and the same notice, dated the 14th November 2003. The indexes and ontenis of neither Book of Pleadings refer to or confirm a notice to amend or an amended Notice of Motion.

[43] Secondly, it is not common cause at all that the first respondent chose not to hear the applicant. To the contrary, the issue that is common cause is that the applicant was subpoenaed - he was invited to the party, so to speak, but he is the one who chose not to be heard. He went to the extent to seek the intervention of the court to prevent the commission from hearing him, unless the subpoena is served by the Messenger of Court, that his own attorney be allowed to represent himself and that he is given a transcript of the proceedings ten days before his required attendance.

[44] A further misdirection of the applicant is in paragraph 10 of his reply. He says that he "specifically

asked to appear before the commission with (his) attorney but that this was refused." That is not the position. It rather seems that he wanted NAMBOARD to be represented. The commission's report is clear - the applicant introduced in writing an attorney as legal representative of NAMBOARD, which was refused as there was no resolution by the Board to do so.

[45] Further, in paragraph 10, he says that he did not obtain a final order (following the ruling of the 19th June 2001) "...because the 1st respondent was to apply for a rescission of the order which they never did." This is in the face of the contention of the 3rd respondent (para 10.2) that between the 19th June 2001 until the present application dated the 16th October 2003, he never set the matter down to be finalised.

[46] As if the applicant had not made enough mistakes, he compounds it when regard is to be had to paragraph 12 of his reply. Therein he states that "... the 3rd respondent will have to prove the allegations against me in open court, it cannot rely on the commission's findings which would in any event be hearsay." He also denies that he misappropriated any funds or abused his privileges.

[47] He is quite correct to say so. The commission conducted an investigation and made its findings and drew its conclusions. None of it can be brought against the applicant in court - it is not evidentiary material admissible as evidence against him. He says it is hearsay. If he had any fear of judicial proceedings to be brought against him as result of the commission's report, he did not say so. If he had any fear of disciplinary proceedings on the same basis, he also did not say so. In the event that any of these unexpressed fears might materialise, it would then be addressed in the appropriate forum. He was

not heard by the commission, whatever the reason may be.

[48] A final aspect of the papers is the delay in bringing the application for review to court. It is common cause that the report was completed in June 2001 and presented it to the Minister on the 22nd day that month. The applicant himself sayr; that he was only able to obtain a copy of the report a year later, the 20th June 2002.

[49] If he was anxious to challenge the report, he may well, as a last resort, have come to court to seek an order to obtain a copy. He did not. Also, from the 20th June 2002, he delayed further, filing his present application, which is dated the 16th October 2003, some six days later with the Registrar. He delayed his application for a review and setting aside of the report for a very long time. No period within which an application for review has to be made is specified in Rule 53 or in the common law. It has to be done "within a reasonable time", which is reverted to further down in this judgment. If he relies on the ruling of the 19th June 2001 to explain his dilatory conduct, he misdirects himself. He states in para 10 of his founding affidavit that "to date, the first respondent has failed to furnish me with the transcript notwithstanding the order of court...". The order he refers to requires him to be furnished with a transcript only in the event that he again be subpoenaed to appear before the commission, not "...in order to take legal advice thereon...".

[50] With regard to this latter aspect of delaying the application, the respondents plead that it will unduly prejudice them if the report of June 2001 is now to be set aside on review. As said, by the applicant's own admission, he took some sixteen months before bringing the application, with an

invalid reliance on a misreading of the ruling in June 2001. He offers as explanation for the delay that he required a transcript of the proceedings "to take legal advice."

[51] At best, he is not hampered by a 180 day limitation imposed by section 7(1) of the South African Promotion of Administrative Justice Act, as it does not apply in Swaziland. Yet, 18 months is a long period, which may be condoned by the court under appropriate circumstances.

[52] The applicant does not pray for condonation for the late filing of this revised application in his papers. This was done from the Bar by his attorney, who had it that the applicant only received the Report of the commission as late as the 4th December 2003 at which time he became aware of the findings of the commission. This contention flies in the face of the applicant's own version that the received it on the 20 June 2002 (para 7 of his founding affidavit).

[53] The applicant may have delayed 6 months, but it also needs to be borne in mind that the report itself was made in June 2001 - well over two years before the application to set it aside.

[54] When the matter is considered objectively, I cannot find sufficient cause to find that the delay is anything else but unreasonably long. Even if the merits of the application may have been meritorious, which it is not, the delay itself is sufficient to refuse the application, as has been done by the South African Appellate Division in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978(1) SA 13(A). Finality has to be reached at some or other time and where the delay is as long as in the present matter, I hold the view that that time had come and gone by late October 2003. He did not even deem it fit to include a prayer for condonation of his lateness and delay in bringing the review

application. As stated, his attempt to justify a delay does not hold water.

[55] Further, he has not shown that he has failed in any other remedy, or that he has none. At the hearing of argument, it was brought to the attention of the court that the applicant has a pending matter in the Industrial Court, arising from the result of the report. There is no allegation of any criminal or civil proceedings against him due to the report.

[56] Counsel for the respondents referred to various authorities, inter alia Harnaker v Minister of the Interior (965(1) SA 372(C) at 380-B; Chauke v Provincial Secretary Transvaal and Others 1994(4) SA 715(T) at 719 G - H; Stellenbosch Municipality v Director of Valuations and Others 1993(1) SA (C) at 5 G - H; Sedgefield Ratepayers and Voters Association and Others v Government of SA and Others 1989(2) SA 685(C) at 696D; Lion Match Co. Ltd v PPW & AWU and Others 2001(4) SA 149 SCA para 29; Scoft and Others v Hanekom and Others 1980(3) SA 1182(C) at 1192-G, 1193- B a n d 1194-A.

[57] The thread that runs through these authorities could be reduced to the basic issue, namely that there is a factual issue, to determine firstly whether the review proceedings were brought beyond a reasonable time and secondly, a discretionary issue, namely to decide whether or not to condone or overlook the delay. Further, that it is not expected or even desired from an applicant to state all of the delaying factors in the founding affidavit - this could rather be detailed in a reply to prejudicial matters raised by a respondent, when issue is taken to the delay. A delay in mounting an attack on the matter sought to be set aside on review must thus not only be unreasonably long but to such an extent that where necessary, if not in the founding papers, at least it be more fully explained in the replying

affidavit.

[58] As said, the applicant's delay to bring the matter on review is objectively and factually overly delayed. The reasons advanced for the delay do not provide persuasion to condone the delay, based on incorrect assumptions and presumptions.

[59] There is yet another facet that deals a further blow to the application, namely whether the report which is sought to be set aside is reviewable at all. It is trite that an administrative decision is reviewable. In casu, no administrative decision per se is sought to be set aside. If an administrative decision is under attack, one of the grounds to do so is the manner i n which it has been reached. Presently, the attack is against the manner in which the Commission of Enquiry conducted the enquiry into the affairs of NAMBOARD and its senior management, amongst other things. The applicant, in his capacity of chief Executive Officer was also a subject of the enquiry. He as person and lie as Chief Executive Officer was adversely commented upon.

[60] The complaint that forms the essence of the review application is that the applicant himself was not heard by the commission. As said above, he contends incorrectly that the commission refused to hear him. They wanted to hear him but he is the one who would not appear to be heard, as aforesaid. Fact of the matter remains that the audi alteram partem principle was not adlvued to. For this he blames the Commission, but if fault is to be apj tioned, it falls on the applicant and not the Commission. In the final analysis, it is not an administrative decision that adversely affect.-; the applicant, which he seeks to overturn, but findings and recommendations that he has it against.

[61] If the Minister were to act on the basis of these findings and recommendations, it then becomes an administrative decision. There is no such decision before court to review it. If the enquiry on which such administrative action is exclusively based is inherently flawed, it may be a different matter. For present purposes, there is no such issue which has to be determined.

[62] When all of the above aspects of the present application are considered, I cannot find any justification to grant the relief which the applicant seeks. The application therefore stands to be dismissed, and it is so ordered.

[63] Costs follow the outcome of the event, and includes the costs of counsel for the three respondents, which is certified under Rule 68(2), following the application therefor, especially so when regard is to be had to the consequences that would have followed in the event that the report of the Commission was to be set aside more than three years after the final event, following the Gazetting of it as long ago as October 2000.

JACOB P. ANNANDALE

ACTING CHIEF JUSTICE