

IN THE HIGH COURT OF SWAZILAND

CASE NO. 1363/08

In the matter between:

**SWAZILAND COMMERCIAL AMADODA
BUS OWNERS TRANSPORT ASSOCIATION APPLICANT**

AND

**THE PRINCIPAL SECRETARY IN THE MINISTRY
OF WORKS AND PUBLIC TRANSPORT 1st RESPONDENT**

THE ROAD TRANSPORTATION BOARD 2nd RESPONDENT

INTERSTATE KOMBI ASSOCIATION 3rd RESPONDENT

CORAM: MAMBA J

FOR APPLICANT: M.MABILA

FOR 1st & 2nd RESPONDENTS: MS MLAMBO

FOR 3rd RESPONDENT: M.J. MANZINI

JUDGEMENT

10th October, 2008

[1] The Applicant is the Swaziland Commercial Amadoda Bus Owners Transport Association, a voluntary association established in terms of a constitution (vesting it with the power to sue and to be sued in its own name), having its principal place of business at Madoda in the District of Manzini.

[2] The 1st Respondent is the Principal Secretary in the Ministry of Works

and Public Transport, cited herein pursuant to section 76(2) of the Constitution of Swaziland Act (2005), duly represented by the Attorney General.

[3] The 2nd Respondent is the Road Transportation Board, a statutory body established in terms of section 5 of the Road Transportation Act (1963), and also represented by the Attorney General.

[4] The 3rd Respondent is the Interstate Kombi Association, an association with the power to sue and to be sued in its own name, having its principal place of business in the District of Manzini.

[5] It is common cause that the issues involved in this application are similar to those under case 4553/07 before this court. This judgement therefore applies mutatis mutandis to that case as well.

[6] It is common cause further that

- (a) "the discretion to issue (or refuse) a cross border [transport] permit is vested on the 2nd Respondent (a department under the supervision of the 1st Respondent)."
- (b) the second Respondent is not permitted, in law, to delegate these powers to the third respondent herein and
- (c) Both the Applicant and 3rd Respondent are competitors in the Road Transportation or passenger service in Swaziland and as the name of the 3rd Respondent indicates, the 3rd Respondent is a role

player in this business even outside Swaziland. The countries included in its sphere of business are those in the common customs area; being Botswana, Lesotho, South Africa and Swaziland.

[7] Whenever an application for a cross-border permit is made to the second Respondent, the second Respondent always, but informally notifies the 3rd Respondent about such application before making a decision thereon. The Applicant argues that this referral by the 2nd Respondent amounts to the 2nd Respondent delegating its powers and functions to the 3rd Respondent, and this is unlawful and must be interdicted by this court. The Applicant has, based on this alleged unlawful delegation of powers applied for an order:

"3. Declaring the referral of Applications for cross-border permits to 3rd Respondent unlawful, invalid, ultra vires the Road Transportation Act (1963) and unconstitutional. 4. Interdicting and restraining the 3rd Respondent (and its members) and or interfering or disturbing the operations of the Applicant (and its members) in any manner whatsoever."

[8] The 1963 Act referred to above was of course repealed by section 37(1) of the Road Transportation Act 5/2007 which came into force on the 29th February 2008. The Respondents, and in particular the 2nd Respondent denies that it has at any stage or occasion abdicated or delegated its functions or powers to the 3rd Respondent. The 2nd Respondent avers that what it has done has been to consult the 3rd

Respondent before deciding on whether to grant a cross-border application or not, and that this is normal and desirable in the Road Transportation industry. This is particularly vital in relation to regional or inter-state permits where each country has its own Road Transportation services and Transport Operators. The 2nd Respondent is supported by the 3rd Respondent in this regard who states that;

"Applications are referred to us, not for consideration, but for the Board to find out if the route will be safe for the passengers in the event other associations not known to our counterparts in South Africa transport passengers to their territory, and this is a highly volatile issue in South Africa which has resulted in the deaths of many innocent passengers who become victims of disputes amongst the warring associations, the [bone] of contention being the routes serviced by the Associations."

[9] The first two respondents have taken a point in limine that "in terms of section 8 of the Road Transportation Act 5 of 2007, a person aggrieved by a decision of the Board may appeal to the Appeal Board and section 11 of that Act shall apply with regard to that Appeal." The Respondents argue that the Applicant, being aggrieved by the decision of the 2nd respondent should have taken its grievance by way of appeal to the Appeal Board and not this court. It has failed, it is argued, to exhaust the internal remedies available to it and this application must be dismissed on that ground.

[10] S8 of the Act reads as follows:

"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."

This section refers to a decision made by the 2nd Respondent in refusing or allowing an application, or in suspending or cancelling a permit under section 7(1) or 17 (3) of the Act and should in my judgement be restricted to those matters only. It does not relate to any other decision of the Board. The complaint herein has got nothing to do with the grant or refusal of an application or suspension or cancellation of a permit by the 2nd Respondent. It is based on a practice, which the Applicant alleges is a failure by the 2nd Respondent to exercise its powers. These provisions are not applicable in this case and this point is dismissed.

[11] The Applicant has not alleged or shown that any application for a cross-border Road Transportation permit was ever granted or turned down by the 3rd Respondent or for that matter heard or actually determined by the 3rd Respondent. On the other hand, the Respondents have submitted that, because of the nature of the circumstances of the cross-border transport industry, it is vital that it has to seek the advice and input by the 3rd Respondent, who is better placed to give the necessary advice and information. The 2nd Respondent has submitted that, ultimately the decision taken on every such application is its decision. The advice given by the 3rd Respondent whilst taken into consideration, does not constitute the decision by the 2nd Respondent. There is nothing to gainsay this and I find nothing wrong with the 2nd Respondent consulting and seeking advice from the 3rd Respondent or any other body or organization with the relevant expertise in the industry concerned. The 2nd Respondent does not need a law authorising it to solicit for advice or to consult any one, including 3rd

respondent on matters falling within its operational jurisdiction.

[12] For the above reasons, the Applicant has failed to show that the 2nd Respondent has either abdicated its responsibilities or delegated its functions to the 3rd Respondent in relation to Application for cross-border transportation permits.

[13] The Application is accordingly dismissed with costs.

MAMBA J