IN THE HIGH COURT OF SWAZILAND

CASE NO. 3931/09

HELD AT MBABANE

BETWEEN

JACOB MASHABA

AND SIXTEEN OTHERS... **APPLICANTS**

AND

THE MUNICIPAL COUNCIL OF MANZINI. THE MINISTER OF PUBLIC WORKS **FIRST RESPONDENT**

AND TRANSPORT... THE MINISTER OF HOUSING AND URBAN DEVELOPMENT ... THE COMMISSIONER OF POLICE-SWAZILAND **SECOND RESPONDENT**

COMMERCIAL AMADODA TRANSPORT ASSOCIATION... LOCAL KOMBI ASSOCIATION... SWAZILAND INTERSTATE TRANSPORT ASSOCIATION... **THIRD RESPONDENT FOURTH RESPONDENT FIFTH RESPONDENT SIXTH RESPONDENT SEVENTH RESPONDENT**

CORAM **AGYEMANG J ESQ.**

FDR THE APPLICANTS: **S. DLAMINI**

FDR THE RESPONDENTS: **ESQ.**

K. MDTSA

DATED THE 14TH DAY OF DECEMBER 2009

JUDGMENT

In this application, the applicants seek orders in the following terms: An order:

1. Condoning the applicants' non-compliance with the rules of this court regarding forms, time limits et al;
2. Granting the applicants special leave to bring the instant suit against the first respondent in terms of S116 (3) of the Urban Government Act 8 of 1969;
3. Reviewing, correcting and setting aside the decision of the first respondent made on or about the 9th of October 2009, relocating all public service vehicles entering the city of Manzini from the East to the Satellite Bus Rank;
4. Reviewing, correcting and setting aside the decision of the second respondent made on or about the 7th of October 2009, relocating all public service vehicles entering the city of Manzini from the East to the Satellite Bus Rank;
5. Setting aside the notice issued by the first respondent in terms of S.4 of the Manzini Public Service vehicles bye-laws 1970 and published in the Swazi Observer on 9th October 2009;
6. Pending finalisation of the review application, the respondents and those acting at their behest be forthwith interdicted and restrained from

   preventing the applicants buses from using the main bus rank in furtherance of their businesses;
7. Directing members of the Royal Swaziland Police force to give effect to the orders made by this court in the matter;
8. Costs of the application;
9. Further and/or alternative relief.

The first applicant has instituted this suit for himself and as representative of sixteen

other public transport owners, having been so authorised by them per an instrument exhibited in this court as marked JM1. The first respondent, is a statutory body with power of suit which carries out the duties of local government within the Manzini Municipality. The second, third, and fourth respondents are cited in their official capacities. They are the Minister responsible for Public Works and Transport, the Minister for Housing and Urban Development, and the Commissioner responsible for the Police Service in the Kingdom of Swaziland. The fifth, sixth and seventh respondents are Associations of transport operators. These are the matters giving rise to the present suit:

The municipality of Manzini has for many years, provided a place for stopping, parking and the conduct of business by transport operators. This place has traditionally been referred to as the Bus Rank. In the recent past, responding mainly to a need to decongest the Bus rank by reason of the sheer number of vehicles using that place for the conduct of business, the first respondent decided to construct another bus rank. The new bus rank thus constructed became known as the satellite bus rank (referred to hereafter as the SBR), while the original one was generally referred to as the main bus rank (hereafter referred to as the MBR). From all accounts, the SBR has not performed the task for which it was constructed, being to decongest the traffic at the MBR simply because transport operators have shunned it. It has been the assertion of the transport operators - justifying their refusal to operate from there, that there is no business there as it is farther away from the hub of commercial activity than the MBR so that operators who park there find themselves losing out to pirate transport providers as well as competitors who operate from the MBR. The result is a loss of income.

This refusal to use the SBR has been a subject of disquiet and consternation to the first respondent which has the duty to manage the affairs of the municipality. For this reason, a number of consultations regarding the use of the SBR have been held between the first respondent and certain persons purporting to represent the interest of the transport operators. Some of these persons have held themselves out as representing certain associations cited herein as respondents.

On the 7th of October, 2009, a meeting (being fourth in a series of such), was held at the

Ministry of Public Works and Transport. Present, were: the Minister for Public Works and Transport, the Minister for Housing and Urban Development, and some transport operators from Manzini. Consequent upon that meeting, the first respondent placed a notice in the newspaper of 9th October 2009 which redirected public service vehicles entering Manzini from the east to use certain routes, stopping places and drop off zones as outlined in a diagram contained in the notice. Public service vehicles entering Manzini from the west were also directed to use other routes, stopping places and drop-off zones as provided in a diagram. The effect of this was that public service vehicles entering Manzini from the east were asked to park and carry out their business of transporting passengers from the SBR instead of the MBR while such traffic entering Manzini from the west continued to operate from the MBR.

The applicants herein are transport operators whose vehicles enter Manzini from the east, and who being aggrieved by the said notice which has kept their vehicles out of the MBR where they have carried out their business for many years, have brought the present suit.

The present suit seeks inter alia, a review of the decision of the first respondent allegedly dictated by the second respondent at the meeting of the 7th of October 2009.

This application invokes the review jurisdiction of the court conferred on it by
Rule 53 of the High Court Rules.

The grounds for the application are the following:

10. That the decision was *ultra vires* the provisions of S. 3 of the Manzini Public Service Vehicles Bye-laws of 1970;
11. That the decision was arrived at arbitrarily without reference to the objections if any of interested persons;
12. That the first respondent et al violated the constitutional requirement of giving a person to be adversely affected by an administrative decision, a hearing in accordance with the tenets of natural justice;
13. That the decision being unfair, was unreasonable in the circumstances, as it was a fact well known to the first respondent that the use of the

SBR had previously led to loss of business for other operators who refused to use same for that reason. **THE APPLICATION (MERITS)**

It is the case of the applicants as canvassed by learned counsel, that the decision of the first respondent to relocate east-bound commercial vehicle traffic to the SBR was taken irregularly or arbitrarily, or *ultra vires* the provisions of S. 3 of the Manzini Public Service Vehicles Bye-law under which it was purportedly taken. As aforesaid, the decision was the one taken on the 7th of October 2009 in a meeting of stake-holders and in respect of which a notice was published in the Swazi Observer of the 9th of October 2009. The said notice has had the effect of relocating public service vehicles that enter Manzini from the east and have operated from the MBR for years, to the SBR. The applicants allege that the said decision has adversely affected the businesses of the applicants, as many of their customers, unwilling to make the trudge to the SBR (which is farther from the main commercial area than the MBR), have often accessed alternative means of transport. Pirate kombi operators also are said to have taken advantage of the situation created by the first respondent, to "steal" the customers of the applicants. This has allegedly led to loss of income for the applicants which has in turn affected the ability of the applicants to repay the loans and other facilities they have accessed to purchase their vehicles.

Elaborating on the grounds set out before now and under which this application for review has been brought, learned counsel for the applicants contended, that the process of making the said decision did not comply with S. (3) of the said bye-laws which prescribed that notice had to be given to the public for a period of twenty-one days after which any individual who would be adversely affected could lodge an objection.

To that extent, the decision was said to have been made *ultra vires* S.3 of the bye-laws.

He contended also that the applicants had thus been denied the opportunity of lodging an objection which would have amounted to being heard on the matter before the decision which had affected them adversely was taken. Denying the allegation of the first respondent that the applicants were heard as they were represented in various

consultative meetings held on the matter of the use of the SBR, learned counsel alleged that the minutes of 7th October 2009 showed that two of the applicants: Dumisane Vilane and Thamsanqa Mkhombe attended. These persons he said, had denied that they attended the meeting as representatives of the applicants as indeed the applicants had confirmed. Learned counsel submitted that it was thus evident that not all the applicants were given a hearing although they should have been. Citing the case of ***Administrator Transvaai and Ors v. Traub and Ors. 1989*** *(4)* ***SA 731 (A),*** learned counsel submitted that every individual to be affected had to be consulted before the decision was taken. He submitted further that the minutes of the meeting of 7th October 2009 showed that the decision the subject of complaint in this suit had been taken by the second respondent alone and that he had forced the decision down the throats of all present without reference to pertinent matters, and that it was not reached at a consensus.

He contended that to that extent, the said decision was made arbitrarily.

Learned counsel further submitted that the applicants were not given a hearing before the said decision was taken which affected them adversely and that the said failure was also a breach of the first respondent's duty to act fairly. This inter alia was because the applicants as users of the MBR for many years had a legitimate expectation to continue to use the MBR and thus to be heard when a decision altering such was to be made It was submitted on behalf of the applicants also, that the first respondent breached a statutory duty when it failed to comply with S. 4 of the bye-laws under which it purportedly acted. This was because the decision took effect on the 9th of October 2009, the date of the publication and so apparently no notice was given, and furthermore, although said to be temporary, the period of its operation was not specified.

He submitted that in any case, S. 4 of the bye-laws was inconsistent with the rights of individuals guaranteed by the Constitution and was thus void, in accordance with S. 78 of the Urban Government Act 8 of 1969 which provided for the voiding of laws found to be inconsistent with other laws of the land.

Learned counsel contended also, that the decision was unreasonable in the circumstances as it was made within a background of information made known by persons who had used the SBR to the first and second respondents (as evidenced by the minutes of various meetings, and was the subject of a report before Parliament), that its location adversely affected the business of transporting passengers.

Lastly, it was contended on behalf of the applicants that that the applicants were vested with a right of challenge in this court, by the provisions of Ss 21 and **33** of the Constitution of Swaziland which right to administrative justice, had allegedly been violated by the respondents in their failure to give the applicants a hearing before they took the decision that had affected them adversely.

It was canvassed that all these matters grounded the instant application for review.

POINTS IN LIMINE:

The first respondent in its answering affidavit raised certain points *in limine* being that the application ought not to be heard as an urgent matter, and furthermore, that the applicants had not shown that they had a clear legal right which ought to be protected by the grant of the interim interdict they seek, nor had they demonstrated that the balance of convenience was so tilted in their favour, as to justify the grant of an interdict.

The first respondent also averred that there were disputes of fact arising out of the affidavits which ought to be determined by the court, a task that could not be performed by this court in the hearing of an application. Attacking the procedure adopted by the respondents in bringing the application, the first respondent urged the court to discountenance this suit as it did not conform to the procedural requirements set out in Rule 53 of the High Court Rules, nor were they entitled to the grant of a special leave to bring this suit seeing that beyond the fact that the applicant's notice to the first respondent contained in a letter dated 16th October 2009 was defective, no special circumstances had been alleged justifying the grant of the special leave sought. The first respondent contended also that the applicants' failure to cite the Attorney-General as a respondent was fatally defective as was the fact that the applicants who operated

businesses duly registered as companies had brought the suit in their own names instead of in the names of the companies who were the aggrieved persons.

The second, third, and fourth respondents also raised points in *limine* which echoed those raised by the first respondent. These were regarding the issue of urgency, and also that there were dispute of facts which could not be determined in the application.

Expanding on these points, learned counsel for the first respondent at the first, abandoned the issue of urgency by reason of the delay occasioned since the application was filed at the High Court.

With regard to the interim interdict sought, learned counsel submitted that the applicants had not met the requirements for the grant of an interdict. He contended that the applicants had not demonstrated that they had a legal right, a *sine qua non* for such an application. He asserted that the applicants who were not owners or lessees of the MBR and were mere licensees of the first and second respondents, had acquired no right by reason of long use. He submitted that even if the applicants had acquired rights, such rights had to be subject to other rights such as those of the owners who had a right to determine whether the MBR could accommodate other commercial transport. Lastly on this point, learned counsel submitted that the applicant's case must be shown to have a reasonable prospect of success in order to entitle them to

the grant of an interim interdict. This, he said, was not the case in the present instance.

On the balance of convenience, learned counsel maintained that should the interdict be granted, the first and second respondents stood to suffer greater inconvenience than the applicants in view of the fact that the MBR was congested and could no longer accommodate all the buses and kombis coming into Manzini. Furthermore, that the congestion which was affecting ratepayers in the municipality who could not move about with ease, would return, and in addition to affecting the ease of access, compromise the safety of commuters. Lastly he contended that the infrastructure, including the bridge of Meintjies Street towards the MBR was showing structural strains and would be adversely

affected by the grant, of an interdict which would return matters to the *status quo ante.*

Learned counsel also averred that matters such as: whether or not the applicants' herein were represented in the consultative meetings (as claimed by the respondents and denied by the applicants); whether or not the second responded dictated the east-west route phenomenon as contained in minutes produced by the applicants which reflected same but was challenged by the respondents; whether or not the applicants were losing customers to other operators leading to financial loss which the respondents have denied, all amount to dispute of facts which may not be determined in application proceedings such as the instant suit, see: ***South African Veterinary Council andAnor. v. Szymanski 2003 (4) SA 42 (SCA).***

Learned counsel also denied that the decision of the first respondent was *ultra vires* its powers for it was in terms of S.4 of the Bye-laws and not S. 3

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which in any case was not a peremptory and vested in the first respondent a discretion. Nor did it violate Ss 21 and 33 of the Constitution as the decision complained of did not relate to the rights of a person appearing before it. Learned counsel for the third, fourth and fifth respondents associated himself with these arguments.

In response to the points raised in *limine,* learned counsel for the applicants submitted that the court should be concerned with the merits of the application rather than upholding technical points in line with the recent trend of courts which is to uphold substantial justice rather than technical justice. In this regard, he contended that although there might be some dispute of fact regarding the participation of some of the applicants in consultative meetings with the respondents, there was no dispute regarding the fact that the majority of the applicants were not consulted before the first respondent implemented **its** decision to divert east-bound traffic to the SBR. He elaborated that of the applicants, sixteen in number, only five were named as having participated in consultations as evidenced by the minutes of meeting exhibited by the applicants as marked JM1. This clearly meant he submitted, that no matter who participated therein, not all the applicants were consulted regarding the decision. He invited the court to note

that the persons who were in the consultative meetings had sworn to affidavits that they did not attend as representatives of the other applicants or any association and that in any case, the applicants had denied that they belonged to any association. Learned counsel contended that the disputes thus arising, were not such as would interfere with the court's determination of the issue of the lack of consultation/hearing.

On the right of the applicants to an interdict, learned counsel further contended that the clear right of the applicants in respect of which they qualify for the grant of the interdict sought, was that they had used the MBR for a long time, and by that had acquired a right to be heard when that right was being taken away. This he contended was not done. On the balance of convenience, learned counsel alleged that the applicants many of whom had purchased their vehicles through loans and other facilities, stood to suffer hardship arising out of the loss of income. This matter he claimed, would also affect their ability to access financing as financial institutions would use the routes they plied to project and assess their income when the applicants applied for facilities. He seemed to be saying that a poor route would not give favourable projections and may affect the grant of facilities. This, he said tilted the balance of hardship in favour of the applicants rather than the respondents.

The respondents in their answering affidavits further alleged certain matters that were canvassed in argument by learned counsel for the said parties. In an affidavit sworn to by one Ellinah Wamukoya, self-described as the Town Clerk of the first respondent, the first respondent gave a background to the said decision. It was the case of the first respondent that the decision to relocate the east-bound traffic from the MBR to the SBR, was arrived at after consultations with stake-holders including the third to seventh respondents herein, the second and third respondents as representative of the central Government, and rate payers. The first respondent alleged that in the several meetings held with stake-holders, the concept of another bus rank was brought into being as an answer to the matter of congestion at the MBR caused by many buses and kombis using same. Thus was the SBR constructed to meet that need. The first respondent recounted

that after its construction, the refusal to use same by transport operators led to a decision made at a meeting, for members of the fifth respondent (bus operators) to relocate to the SBR which they did. Unfortunately, the bus operators who started using the SBR on the 21st of September 2009 came back with a report that there was inadequate patronage of their services leading to financial loss as their passengers were using the services of kombi operators at the MBR, hence their decision to revert to the use of the MBR. A task team appointed to look into the matter reported to the consultative meeting which then, on 29 of September 2009, decided that from October 5, 2009, all public transport entering Manzini from the east should use the SBR. Present at these meetings were Mr. Thamsanqa Mkhombe and Dumsane Vilane among the present applicants who were alleged to be representatives of the Lubombo Bus Association at the meetings. Transport operators affected by this decision sought the intervention of the Prime Minister who directed the Ministries involved to look further into the matter. Thus was the meeting of 7th October (the subject of the complaint in this suit), brought about. It was the version of the first respondent that at that meeting wherein all stakeholders were involved, two propositions were made: that the traffic from the east into Manzini should use the SBR, and also, that, a task team should be made to look into the matter and come up with recommendations. Both of these were accepted hence the decision to implement the first immediately as an interim measure through the invocation of the first respondent's powers under S. 4 of the bye laws. The said notice was thus published upon the recommendation of the consultative meeting where stakeholders were represented. The first respondent averred that pursuant to the suggestions made at the meeting, a twelve-member task team was appointed by the second respondent at the meeting to look into the matter, towards a more permanent solution. The task team was later expanded following complaints about lack of a wider representation, to include some of the. applicants herein: Thamsanqa Mkhombe and Dumsane Vilane, Mrs. B. Nkosi and Nicholas Magagula.

According to the first respondent, the effect of the notice published under S. 4 of its bye-laws was that more than one hundred public operators including buses, sprinters and

kombis were immediately relocated to the SBR pending the finalisation of matters after the task team had completed its work. Learned counsel contended on behalf of the first respondent, that the notice published by the first respondent was not *ultra vires* its powers as it had acted within its powers vested in it by S. 4 of the bye-laws. He submitted that the first respondent as a local authority had been given powers to enable it guard the interests of the community and that to that extent, where statute had vested it with discretionary powers, the decision which was based thereon was not justiciable as long as same was exercised honestly and fairly. He submitted that in any case, the *ultra vires* doctrine was not a ground in a review application and that the court would only intervene where it was demonstrated that the public authority acted without power which was not the case in the present instance. He contended that the first respondent had the power to temporarily divert routes and stopping places in accordance with S,

4 of the bye-laws, which it exercised per the notice issued under S. 4 by its officers under its delegated authority in accordance with S. 38 of the Urban Government Act 1969, and which it subsequently ratified. Learned counsel further submitted that the right to a hearing was inapplicable when the first respondent acted under the said S. 4. This was because it was after the task team had presented its report that the first respondent may make a recommendation under S. 3 which would then require consultation. The right to a hearing had thus not accrued.

He contended also that the doctrine of legitimate expectation was inapplicable in the present instance as the requirements for such did not obtain *in casu.* These included that there was a promise or a settled practice, see: ***Chairperson, Walmer Estate Residents' Community Forum and Anor. V. City of Cape Town and Ors. 2009 (2) SA 175 (C)*** and factors such as a clear, unambiguous, and unqualified representation lawfully and competently made by the decision maker which had given rise to a reasonable expectation relied on, see: ***South African Veterinary Council and Anor. V. Szymanski 2003 (4) SA 42 SCA.***

He submitted that although the right to a hearing had not accrued to the applicants, the applicants had received a hearing through their representatives: the Bus and Kombi

Associations and some of the applicants herein who were at the consultative meetings.

Denying that its decision was unreasonable, the first respondent in its answering affidavit, alleged the following:

That the idea to implement the east-west traffic routing was suggested by the Kombi and Bus Association as an answer to the congestion which not only affected ease of movement of vehicles and ratepayers, but was affecting the structural soundness of the bridge and the Meintjies Street. The first respondent averred that the reason why the first experiment with buses at the SBR failed was that their competitors remained at the MBR. In the present instance, all east-bound public traffic would park at the SBR so that no competitor offering the same services for the same route would be at the MBR to 'steal' passengers and put the operators using the SBR at a disadvantage.

The first respondent averred that the reasonableness of the decision was borne out by the fact that all east-bound public vehicle traffic (constituting one third of the public transport vehicles coming into Manzini), was using the SBR without complaint of financial loss (except for the applicants herein). Furthermore, that the transport operators carry the same number of passengers as they did at the MBR, a matter that was confirmed by the task team that investigated the allegation of pirate kombis "stealing" the passengers and did not find same to be the case.

At the close of all the arguments, the following matters came out as issues for determination:

14. Whether or not the applicants are entitled to the grant of an interim interdict;
15. Whether or not the applicants failed to comply with the High Court Rules rendering the application fatally defective;
16. Whether or not there are disputes of fact that cannot be determined in the instant, application;
17. Whether or not the decision of the first respondent contained in the notice of 9th October 2009 was *ultra vires* its powers;
18. Whether or not the decision of 7th October 2009 was arrived at arbitrarily:

19. Whether or not the applicants were entitled to a hearing;

20. Whether or not the decision of the respondents and the notice consequent upon it was unreasonable;

21. Whether or not the decision ought to be reviewed (amounted to irregularity).

With regard to the interim interdict sought, the pertinent question to be answered is: upon what matters may the court in the exercise of its discretion grant the applicants herein the interim interdict they seek? It is settled law that foremost requirement is that the applicants must demonstrate that they have a clear right, which is a substantive right and which ought to be protected by the court see: ***Sanachem (Pty) Ltd v. Farmers Agricare (Pty) Ltd and Ors 1995 (2) SA 781;*** also ***Pretoria Estate Co. Ltd v. Rood's Trustees 1910 TPD 1084.***

Yet even where the applicant has established a prima facie right, regard must be had to competing rights and interests; the court must then weigh the balance of convenience referred to rather aptly in English law as the balance of hardship. The court may also not grant an interim interdict if it is not demonstrated that the applicant can succeed in the substantive application for the grant of a final interdict.

In casu, on the right of the applicants, the incontroverted fact is that the first and second respondents are the owners or have the right to possession of the MBR which the applicants are insisting they ought to be permitted to continue to use. What rights if any do the applicants have in the MBR which ought to be protected by the court?

The applicants are all transport operators who have for many years operated out of the MBR and they have done so as licensees of the first respondent, the public authority. The right of use which is at the license and permission of the first respondent thus has to be exercised subject to the superior right of the owner or one with a right to possession. This is more so when that owner/possessor is the local authority entrusted with the caretakership of the community's properties and is vested with wide powers for the execution of its mandate. Furthermore, the publication of the notice of 9th October 2009 giving effect to its decision of the 7th of October 2009, was done under its bye-laws. In

an application such as the instant one seeking an interdict against the one with the right to possession, the court has to have regard to the competing interests of the one with the superior right, in considering whether the applicants are entitled to an interdict.

It is my view that the applicants have not shown that they have a legal or other substantial right as against the first respondent which must be protected by the grant of the temporary interdict sought.

On the balance of convenience, the applicants have submitted that by reason of an alleged loss of income arising out of decreased patronage, they have suffered financial distress and stand to suffer even more harm, a matter that will affect their credit rating with the financial institutions from whom they have obtained facilities.

As learned counsel for the third to fifth respondents pointed out, this assertion has remained a mere allegation unsupported by cogent evidence such as bank statements or record-keeping ledgers that may substantiate the allegation of financial loss during the period under discussion. On the other hand, the allegation of congestion at the MBR seems to be supported by various minutes of meetings exhibited in this application by both sides: M1-M7 exhibited by the first respondent, and JM 2, JM4, and a Parliamentary Report: JM5 exhibited by the applicants. While the first respondent has not offered corroborative evidence of the structural strains of the bridge and the Meintjies Street, it suffices that it has been demonstrated that a return by the applicants to the MBR will return it to the congested state acknowledged by even the applicants, to be a grave problem that requires a solution (as per the said documents they exhibited). The balance of convenience is thus manifestly in favour of the first respondent whose ability to manage the MBR and take care of the infrastructure of the municipality could be seriously impaired if the interdict were granted. This clearly speaks against the grant of the interim interdict sought, see: ***Verstappen v. Port Edward Town Board and Ors. 1994 (3) SA 569; also Johannesburg Consolidated Investments Co. Ltd*** *v.* ***Mitchmor Investments 1979 (2) 397.*** In my view also, an interdict (temporary or otherwise) was not the only remedy that could be pursued by the applicants herein. This was because on their showing, the reason for the reluctance of all the transport

operators to use the SBR was primarily financial, which situation arose out of unfair competition, it seems to me that if pirate kombis were indeed taking advantage of the relocation and putting transport owners to hardship, such a circumstance could be addressed by the first respondent, working with the Police to put into place a mechanism that would prevent such operation by pirate kombis. Passengers who could no longer access any other form of transportation to the areas of commute would have no choice but to go to the SBR. This could be brought about through consultation especially with the task team or even the first and fourth respondents directly. Nor was an interdict the appropriate remedy to seek for its effect will be to return to the *status quo ante* which by all accounts, is a problem requiring a solution.

The applicants have also failed to demonstrate that there is a real likelihood of success in the main matter. It is trite learning that if an applicant may very likely not succeed in getting a final interdict, it does no one good to grant him an interim one. The party against whom it is granted who goes on to succeed in the main action is unfairly penalised and may not be compensated adequately with the award of damages, see:, see: ***SA Motor Racing Co. Ltd and Ors. v. Peri-Urban Areas Health Board and Anor. 1955 (1) 334;*** also ***CD. of Birnam Ltd and Ors. v. Falcon Investments 1973 (3) SA 838 AT 854*** *(H)*

In casu, the applicant's case, based inter alia on an alleged legitimate expectation of being given a hearing, was countered by the assertion of the respondents that the right to a hearing had not accrued under S. 4 of the bye-laws under which the first respondent acted or in the alternative, that the applicant through their representatives were given a hearing.

The applicants' contention also that the decision and the notice aforesaid were in violation of Ss. 21 and 33 of the Constitution of the Kingdom was also met with the response that those provisions did not apply to the present matter. The applicants did not in their replying affidavit counter allegations contained in the first respondent's answering affidavit in terms strong enough to demonstrate that there was a reasonable prospect of success in the substantive matter.

For all these reasons, I am inclined to dismiss the application for an interdict and I exercise my discretion to dismiss same accordingly.

I now come to the review application and consider the points raised *in limine.* With regard to the point raised on the non-joinder of the Attorney General, learned counsel for the first respondent appeared to have abandoned same in argument before the court. This court will thus not concern itself with it. So was the matter of the alleged non-cornpliance with Rule 53, for it too was not dealt with in argument. It seems to rne however, that there was substantial compliance with that rule of procedure. I must add that with regard to what was not complied with, the applicant's prayer for condonation must suffice to save the suit.

Accordingly, I grant the applicants' prayer for condonation and hold that such defect is not fatal to the suit.

I also grant the applicant the special leave sought to bring this application in accordance with S.116 (3) of the Urban Government Act 8 of 1969. Although an issue regarding the lack of locus standi of the applicants was raised as a point in limine, it was not clear what, regarding the locus standi of

the parties the first respondent had taken issue with. This is because while in the first respondent's answering affidavit, it attacked the capacity of the applicants to sue in their own names instead of in the names of their companies, in a supplementary answering affidavit the challenge was with regard to the applicant's alleged failure to demonstrate that they were entitled as a matter of right to a hearing where the first respondent exercised its powers under S. 4 rather than S. 3 of the bye-laws. The former issue was apparently abandoned in favour of the latter by learned counsel in argument. In any case it seems to me that this matter ought not to be determined as a point in limine as it forms the basis of the merits of the application. I will therefore deal with it at a later time.

It is apparent then that the matters of alleged procedural irregularity raised as points in limine will not succeed as they have not been found to be fatal to the application.

Are there disputes of fact which cannot be determined in an application? It seems to me that there are and upon this matter alone, the present application stands to be dismissed, see: ***South African Veterinary Council and Anor. V. Szymanski (supra).*** I say so for the following reasons: The main matter of complaint in this application is that the applicants were entitled to a hearing (which was denied them), before the decision which effectively put them out of the MBR and sent them to the SBR was reached. To substantiate this allegation, the applicants have alleged first of all, that the notice of 9th October 2009 was published in contravention of S. 3 of the bye-laws aforesaid, and was not even in total compliance with S. 4 thereof under which it was purportedly made. They have contended that S. 4 of the bye-laws is in any case unconstitutional as it allegedly derogates from the right of a party adversely affected by a decision to be heard before an administrative action is taken against him.

The applicants have also relied on the doctrine of legitimate expectation which vests a person with a right to be heard before a decision affecting a status quo is made. The doctrine has been invoked on the ground that the applicants who for a very long time have used the MBR (a substantive benefit, advantage or privilege) have the reasonable expectation to continue to use same for which reason a policy/decision which denies them the use thereof ought not to have been made without affording them a prior hearing. The applicants have also relied on Ss 21 and 33 of the Constitution regarding this right of hearing.

In this application the court has been called upon to determine whether the respondents (more particularly the first and second respondents) could lawfully and properly take the decision they did in the meeting of 7th October 2009 and publish the notice of 9th October 2009, without affording the applicants, clearly affected by same, a hearing. The applicants rely on minutes purportedly taken in the meeting of 7th October 2009 to allege a lack of consultation, arbitrariness and unreasonableness of the decision which was implemented per the notice of 9th October 2009. First of all the minutes JM4 which set out inter alia that the second respondent highhandedly dictated the policy which was later set out in the notice of 9th October 2009, has been challenged as not being the

proper certified minutes of the meeting. And indeed, the document exhibited as marked M7 by the first respondent purporting also to be the minutes of the same meeting, was duly signed by the Chairperson thereof. This document reflected that representatives of various stakeholders including the Bus Association, the Interstate Cross-border chairman and General Secretary, the SCARTA, Local Kombi Association - Chairman and Secretary all provided an input which resulted in the decision implemented by the notice of 9th October 2009. The question then is: which version may be relied on as the true reflection of matters that took place at the meeting, considering that the decision of that meeting is the subject of review in the manner it was arrived at.

The first respondent has alleged that certain persons were present at the consultative meetings and that they represented the applicants herein. This has been vehemently denied by the said persons themselves and by the applicants. Since at the core of this case, is an allegation that there was no consultation that involved the applicants herein, this matter of the applicants having been consulted through their representatives cannot be glossed over. Learned counsel for the applicants has contended even if there was a dispute of fact, that the fact that only five out of seventeen persons were involved in the consultations, did not derogate from the crux of the matter, that not all the applicants were consulted as they should have been, as enunciated ***in Administrator, Transvaal and Ors. V. Traub and Ors 1989 (4) SA 731*** This argument is not tenable in face of the allegation that the applicants who were present, at the consultative meetings attended as representatives of the other applicants. In face of this, the court must determine upon evidence led, whether the said persons provided representation for the applicants as the first respondent alleges, or whether they attended in their own right. While the former circumstance would negate the applicant's allegation of non-participation, the latter circumstance will buttress their case that they were not granted a hearing. This is a clear dispute of fact which must be determined by evidence and upon which the instant application stands to be dismissed. I recognise however that the court has a discretion even in such a case to call oral evidence rather than dismiss the application. It is for this reason, and also with regard to the admonition by the Court of Appeal contained in ***Shell***

that I do not at this point terminate the matter by dismissing same upon a point raised in limine.

Was the first respondent's notice of the 9th of October 2009 *ultra vires* its powers?

It seems to me that it was not. I say so for the following reasons: the said notice was said to have been issued in terms of S. 4 of the Manzini Public Service Vehicles Bye-laws, 1970. I reproduce the relevant portion thereof:

"The public is hereby notified that from the 9th October 2009, all public service vehicles entering Manzini from the east shall temporarily use the routes, stopping places and drop-off zones outlined in the diagram below, All other routes, stopping places and drop-off zones previously followed are hereby cancelled..." (Diagram supplied).

The said S. 4 of the bye-law reads:

"Temporary alterations.

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 vehicles during such period as the notice may specify".

S. 3 thereof reads:

"Determination of routes, stopping places or stands

1. *The Board may from time to time by resolution determine -*
   a. *Routes to be followed by the 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 the 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 inspection 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 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..."* The applicants have alleged that the notice of 9th October was purportedly made under S. 3 but that the procedure therein of giving the public a hearing was not adhered to so that the first respondent's act was *ultra vires* the said provision.

It is not clear why the applicants brought such a case alleging that the first respondent's act was *ultra vires* S. 3 when the notice itself left no doubt that the act was being done under S. 4 aforesaid. Still, this court must determine whether the complaint is justified and will require the interference of the court through the exercise of its review jurisdiction.

The *ultra vires* doctrine is invoked for the court to interfere with an act of a public authority such as the first respondent, where it performs an act that it has no power to do. In casu, did the first respondent have the power to do what it did per the notice of 9th October 2009? It seems to me that it did. A perusal of the two provisions of the bye-laws aforesaid: Ss 3 and 4, shows that while the first respondent, intending to determine the routes, stopping places and stands of public vehicles, may do so by resolution which would come into effect only after the public had been given a hearing (S. 3), it may bring about a temporary change in such routes stopping areas and stands after giving notice of such, without the input of the public (S. 4). It seems to me that contrary to the

assertion of learned counsel for the applicants, there is no right apparent or inherent in the application of S.4 by the first respondent, for any member of the public, whether or not adversely affected by an act pursuant to it, to be heard. Nor may such right be implied, for the intendment, is the exclusion of the right of hearing. Although the *audi alteram partem* rule of natural justice requires that where a public official is to give a decision which may adversely affect an individual, that person must be given a hearing, it is also recognised that there are circumstances in which a statute may expressly or by necessary implication exclude such right. In such a case, the court may not imply such right, see: per Centlivres CJ in ***R. V. Ngwevela 1954 (1) Sa 123 at 127 F;*** also, ***Sachs v. Minister of Justice 1934 AD 11 at 38.***

I am persuaded of this, upon a reading of the two provisions: S 3 and S 4 of the said byelaws. It is evident that the two provisions were designed to serve different purposes. It is apparent that while S. 3 which would permanently (or at least for long periods) alter routes, stopping places, and stands used by public vehicles and thus affect the rights and interests of members of the public, was designed to ensure that this was not done without giving persons to be affected a hearing, S. 4 was purposefully placed in the bye-law to allow for the first respondent, tasked with the duty of managing the community of Manzini and **its** properties, to be able where the occasion demanded it, to escape the burden of delay and due process and act quickly and decisively for a limited time.

I have no doubt that it is because the input of the public including persons to be adversely affected thereby is excluded in such a circumstance, that the said provision demands that every such act be temporary. I see in this no violation of the Constitution, for the applicant's right to be heard in this

Instance has been temporarily superseded by the first respondent's right and duty to maintain public order and discipline and to preserve public property, and **I** must add, there is no evidence that the said right was exercised for improper motives. S. 4 of the bye-law under which the notice of 9th October 2009 was published, will thus not be held to be inconsistent with the Constitution on the application of S. 78 of the Urban Government Act 8 of 1969 as canvassed by learned counsel for the applicants. The first

respondent then clearly had a right to divert the routes temporarily under S. 4 of the bye-law in the instant situation as an interim solution of the problem of the congestion of the MBR, while the task team carried out its work.

The notice issued by the first respondent's officers under delegated authority was thus not *ultra vires* the powers of the first respondent, and will not be interfered with by this court.

I cannot help but comment on the fact that learned counsel for the applicants seemed to approbate and reprobate on this matter of the notice, for while he contended vehemently that it was the act of the first respondent done ultra vires its powers, he also in the same breath, denied that it was even the act of the first respondent seeing that it was not preceded by a Board resolution. The answer to the first I have already given. The answer to the second is found in S. 38 of the Urban Government Act which empowers the first respondent to delegate its powers to its officers. In any case, the first respondent ratified the notice at a later date by resolution dated 12th November 2009 and such ratification is lawful, see: ***Baeck & Co. V. Van Zummeren and Anor. 1982 (2) SA 120 (C).***

Having heid thus, it wiil still be remiss of me not to comment on the notice itself and to examine whether being within the first respondent's powers, its content was so flawed by reason of the shortness of the notice and the lack of a specified period of its operation that it ought, to be set aside as being in breach of a statutory duty.

First of all on the question of the period of notice, such was placed at the discretion of the first respondent by the words: "as it deems fit", The first respondent had absolute discretion to determine the period of notice. It seems to me that this discretion granted the first respondent, was consistent with the entire power contained in S. 4, which is that if the exigency of the situation dictated it, the first respondent, dispensing with all considerations except for providing a solution to a problem requiring the alteration of routes et al, may give such notice as seemed appropriate in the circumstances. This could span a few hours to a number of days. It must not be forgotten that the notice came two days after the first respondent per its officers was involved in consultative meetings with stake-holders. The first respondent then desirous of bringing about a

needed change without delay in order to ease congestion while the stake-holders waited for the report of the task team, chose to make the notice take effect on the day it was published. By reason of the words contained in the bye-law: "The Board **may, after** giving such notice **as it deems fit...**" (my emphases), it seems to me that this court may not fault the first respondent for clearly, the use of the word "may" and the expression "as it deems fit", placed a discretion in the first respondent on what and when the notice should take effect before it proceeded to alter the routes et al, temporarily. The first respondent thus had to exercise same having regard to circumstances known to it. That the notice was so short as to appear to be not sufficient notice at all, will not render same void. The failure also to stipulate the exact period of a notice said to be temporary in operation will not constitute a breach of a statutory duty for which the notice may be set aside. As with the time of notice, the use of the word 'may', a directory and not peremptory expression, the omission will not be held to be a violation of the provision of the bye-law, see: ***Essack v. Pietermaritzburg City Council and Anor. 1973 (3) SA 946.***

Was the decision of the 7th of October 2009 arrived at arbitrarily? The applicants in their founding affidavit set out how the decision which was given effect by the notice of 9th October 2009, was arrived at. It was their story that at the said meeting, the second respondent as Minister for Public Works and Transport, informed the meeting of his peers and other stakeholders that he was there to dictate a solution to the problem of congestion at the MBR and in that regard, matters that could or could not be talked about. He then allegedly, flaunting his power, hijacked any discussion of the matter and dictated that with immediate effect all public transport vehicles entering Manzini from the east were to use the SBR whilst those from the west would continue to operate at the MBR.

This decision it was alleged was made without legal basis and without regard to the representations by the stake-holders including those who had worked from the SBR and had left because of the lack of patronage leading to financial loss. It was also made without regard to this well-known fact of low patronage thereat, contained in a

parliamentary report which having been produced after giving transport operators due hearing, had made recommendations including that the SBR could only be successfully operated by cross-border kombis. All these were said to be contained in the minutes of that meeting exhibited by the applicants as JM4.

The said minutes have however been challenged by the first, second and third respondents who aver that the correct minutes are contained in the document marked M7. I have already pointed out that M7 was duly signed by the chairman. As I have said before now, there is a dispute regarding which document represented the true minutes of the meeting and I have said that such cannot be determined in an application. But the two different minutes bring out this point: that the matters relied on as constituting the arbitrary nature of the decision, are in dispute. I cannot then make a finding of fact that the decision was arrived at arbitrarily, a matter relied on in this application for review.

Were the applicants entitled to a hearing and if so, were they given one before the notice of 9th October which has relocated them from the MBR to the SBR was published?

The applicants have alleged that they were entitled to a hearing under S. 3 of the said bye-laws. Learned counsel for the applicant has further contended that there ought to be implied a right of hearing under S. 4, for such right inheres in the very nature of the provision.

The applicants have also alleged that by reason of long user, they have a legitimate expectation of being heard before such benefit/advantage, enjoyed for so long, is taken away.

They have also alleged that their right to be heard is enshrined in Ss 21 and 33 of the Constitution of the Kingdom.

They have alleged that in spite of all these they were not heard and thus, that the decision failed to adhere to the *audi alteram partem* principle of natural justice and so ought to be set aside upon review. I reiterate, that the applicants were not entitled to be heard where the first respondent exercised its powers under S. 4 of the bye-law and in this regard, I have explained that S. 4 was enacted for a purpose that might be defeated and act done under it were said to require a procedure of holding consultations. This is

because S. 4 permits the first respondent for a limited time only, to bypass procedures that should normally take place in pursuance of a lawful purpose (such as giving affected persons a right of hearing), and act with expedition.

For this reason, the applicants could not have a legitimate expectation to be heard when the first respondent was acting under S. 4 of the byelaws, for there was no practice (regular or otherwise,) of giving a hearing in such a circumstance, see: ***Chairperson, Walmer Estate Residents' Community Forum and Anor. V. City of Cape Town and Ors. 2009 (2) SA 175 (C)*** With regard to the rights set out under Ss 21 and 33 of the Constitution, it seems to me that those provisions are inapplicable in the present instance. This is because whereas S. 21 deals with the right to a hearing before a court or adjudicating authority in respect of a civil rights and obligations and criminal charges, S. 33 deals with administrative justice where a person appears before such authority and decisions are to be taken regarding him in consequence. These situations are quite distinct from a citizen's rights in so far as a public authority's actions may affect same, the situation *in casu.*

Yet although the applicants may not be heard under S. 4 of the bye-laws, their right to be heard under S.3 as persons to be affected by such permanent alterations of routes et al is undoubted. In this regard, I consider worthy of note, the steps taken by the first respondent under S. 3 of the bye-law in the publication of a notice under the said provision in the 2nd December 2009 edition of the Times of Swaziland. This leaves me with no conclusion that the first respondent did not have an improper motive to deny the applicants a hearing when it exercised its power under S.4 of the bye-law. The right to a hearing has thus accrued to the applicants following the said publication of the 2nd of December 2009.

It cannot also be ignored that attempts at providing a forum for consultation/hearing for stake-holders regarding which there has arisen a dispute of fact as to whether or not the applicants were given a hearing, were made. I have said that a determination of this dispute of fact cannot be made in this application.

Was the decision of the 7th of October 2009 contained in the notice of 9th October 2009

unreasonable? It seems to me that it was not.

I say this having taken into consideration the previous failed experiments and the reason therefor, contained in various minutes of meetings with stakeholders, especially the meeting of 25th September 2009 where bus operators asserted that there was no business at the SBR. I have also noted the same complaint contained in the Parliamentary Report exhibited as marked JM5. I have noted that the complaint of financial loss is said to be the result of other operators including pirate kombis 'stealing' the passengers of those involved in the experiments. In the present instance all operators from the east being,

buses, kombis et al are to operate from one bus rank. This will cut out the unfair competition of operators plying the same route and operating from the MBR, the circumstance that led to a loss of income and 'no business' experienced in the previous experiments. In the light of this and having regard to the weighty problem of the congestion at the MBR with its attendant problems of lack of ease of movement and access, as well as infrastructural difficulties, the decision to relocate one-third of the traffic at the MBR to the SBR was not unreasonable in the circumstances.

For all these reasons, it is my view that the applicants have not made out a case for the review of the decision of 7th October 2009 or the notice in consequence of 9th of October 2009.

The application must therefore fail and is accordingly dismissed.

Yet it will be remiss of me not to have regard to pertinent matters that have given rise to this suit. It is for this reason that I make the following orders:

22. That the first respondent should forthwith, amend the notice of the 9th of October 2009 to stipulate the period of its operation;
23. That the first and fourth respondents: being the Municipal Council of Manzini and the Commissioner of Police, should provide a mechanism that will deter the operation of pirate kombis so as to prevent them from transporting passengers along the route plied by the operators at the SBR. I order that action on this be

taken immediately. I make no order as to costs.

MABEL ANYEMANG

HIGH COURT JUDGE