



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1611/14

In the matter between

BABAZILE JOYCE KHUMALO

Applicant

and

**THE ROAD TRANSPORTATION BOARD
THEMBI DORIS TSABEDZE**

**1st Respondent
2nd Respondent**

Neutral citation: *Babazile Joyce Khumalo v The Road Transportation Board* (1611/2014) [2015] SZHC 80 (30 April 2015)

Coram: **MAMBA J**

Heard: **17 April, 2015**

Delivered: **30 April 2015**

- [1] Administrative law – application for review of a decision of the Road Transportation Board cancelling the applicant’s permit as a result of the applicant, as the permit holder, not being the rightful owner of the motor vehicle to which the permit relates.
- [2] Administrative law – Road Transportation Board empowered to grant, transfer, suspend, cancel and renew Road Transportation permit subject to specified grounds or when relevant grounds are established.
- [3] Administrative Law – Road Transportation Board empowered to suspend or cancel a permit granted by it where certain facts are established as stated in section 7(1) of the

Road Transportation Act 5 of 2007. The Board is, however, per s7 (5) of the Act, legally enjoined to observe the rules of natural justice; namely, to hear the permit holder, before taking decision to cancel a permit as such cancellation has serious adverse consequences on the property rights of the permit holder.

- [1] This is a review application wherein the applicant seeks *inter alia* to set aside the decision of the first respondent cancelling the applicant's Road Transportation Permit Number 1023. This permit was granted by the said respondent to the applicant on 20 August 2014.
- [2] I should mention that when this application was initiated, Thembi Doris Tsabedze, the 2nd Respondent, was not joined in these proceedings. She was joined later in the proceedings after the 1st respondent had objected to her exclusion or non-joinder. The parties then agreed to her joinder and this agreement was made an order of this Court. This was on 6 February 2015.
- [3] Both respondents have filed their respective answering affidavit and they have both vociferously opposed this application. The 2nd respondent has also filed what I may call a counter-application claiming *inter alia*, an order
 - 3.1 That pending finalization of the matter the status quo prevailing before the interim order of 21 November 2014, be maintained, ie,

allowing permit 1023 to operate using motor vehicle WSD 312 AH
[and]

3.2 An order directing the 2nd respondent [Phakama Investments] to forthwith cease servicing the Mbabane-Manzini route under the aforementioned permit number 1023, using motor vehicle registered YSD 161 AH belonging to 2nd respondent and now styled Sam & Sons.’

[4] The aforesaid counter-application is opposed by the respondents herein save the 2nd respondent, ie, Phakama Investments who, despite having been served with the papers herein, has not filed any documents in opposition thereto.

[5] First, I shall deal with the main application. The essential or relevant facts herein are brief and largely simple.

They are these:

5.1 The applicant is the widow of the late Samuel Bhutana Khumalo who was the permit holder of the relevant permit and also the registered owner of motor vehicle WSD 312 AH.

- 5.2 Upon the death of Bhutana Khumalo, the applicant was appointed the Executrix of his estate. In terms of the final liquidation and distribution account of that estate, motor vehicle WSD 312 AH became the property of the applicant and The Road Transportation permit, ie, 1023 was transferred into her name. She was also authorized to use motor vehicle CSD 576 AH in respect of the same permit.
- 5.3 The said permit is annexed to her papers as annexure BJK 1. It states that it is ‘valid form 20 August 2014 to 19 September 2014.’
- 5.4 Sometime after the grant or transfer of the permit to the applicant, the 1st respondent received a complaint from the 2nd respondent that motor vehicle WSD 312 AH did not infact belong to the applicant but belonged to the 2nd respondent.
- 5.5 By letter dated 29 August 2014 (annexure BJK 2) the 1st respondent informed the applicant as follows: (For reasons which shall emerge presently, I quote this letter in its entirety).

Dear Sir/Madam,

RE : MALPRACTICE ON PERMIT 1023

The Road Transportation Board has learnt of an alleged malpractice on your **permit 1023**. It is alleged that motor

vehicle **WSD 312 AH** operating or that has operated on your permit does not belong to you but to **Thembi Doris Tsabedze**.

Pursuant to this allegation, the Road Transportation Board invites you to appear before it on **16 September 2014 at 0900 hours** at the Road Transportation Department Boardroom Ministry of Public Service and Transport Headquarters in Mbabane to afford you a chance to clear yourself of these allegations.

By copy of this letter, the person leveling the allegation **Colisani Izinhliziyo (c/o Thembi Doris Tsabedze)** is invited to appear before the Road Transportation Board too.

You are advised to honour this invitation and failure to heed to this call shall be viewed as Contempt of the Board, and further action shall be taken thereto.

Yours faithfully

P M Ntshalintshali

SECRETARY-ROAD TRANSPORTATION BOARD

5.6 After representations were made to the first respondent by all the interested parties, the first respondent came to the conclusion that motor vehicle WSD 312 AH belonged to the second respondent and not the applicant. It was further conclusively established before the first respondent that the said motor vehicle had been registered in the name of the applicant's late husband and subsequently the applicant herself in order to facilitate the use of the motor vehicle in question by the applicant in respect of the relevant permit. This was thus a registration of convenience to overcome or subvert the requirements of the Road Transportation regulations. This fact was known to both the applicant and the second respondent and also the relevant sector association of public Transport Operators or service providers. This arrangement had, however, been concealed from the first respondent, who had in good faith, granted the grant, renewal and transfer of the permit in question; first to the late husband of the applicant and later to her.

5.7 The above arrangement or agreement was viewed by the first respondent as unlawful and a malpractice that could not be condoned by it in terms of the applicable law. It thus cancelled Permit Number 1023. This decision was taken in its meeting of 23 October 2014 and

communicated to the applicant through its letter of 28 October 2014. This decision is made absolutely clear by the first respondent in its answering affidavit herein. However, it has since been provisionally renewed and extended pending finalization of these proceedings.

[6] It is not for this court in this review application, to determine or decide whether or not the first respondent was correct in its factual assessment of the evidence presented before it. It is also, not the function of this court in these proceedings to ascertain the correctness or otherwise of the legal conclusion covered at by the first respondent on that issue. Whether or not this court would have reached those conclusions, is again, irrelevant in these proceedings.

[7] Significantly or crucially though, is the fact that the first respondent is a creature of statute. It derives its powers and duties from the enabling legal instrument; in this case the Road Transportation Act 5 of 2007. Section 4 (1) of that Act establishes the first respondent. The general powers of the first respondent are stated in section 7 of the Act.

[8] Section 7(1) of the Act provides that:

'7 (1) In the performance of its functions under this Act, the Board may suspend or cancel a permit if-

(a) a material condition imposed in the granting, renewal or amendment of such permit is not complied with by the holder thereof;

(b) the holder of the permit has been convicted of an offence relating to the carrying out of his transport operations, industry, trade or business;

(c) in the case of a permit authorizing passenger transport, the holder of the permit, or an employee of such holder, has been convicted of an offence which, in the opinion of the Board, discloses a disregard for the safety of the passengers carried on a motor vehicle used by such holder or the public using public road; or

(d) in the case of a route permit or an area permit, the Board is of the opinion that the operator-

(i) has insufficient motor vehicles capable of carrying out the service authorized; or

(ii) does not service the route or area concerned within three (3) months of the date of issue of the permit or

of the date upon which such operator undertook to provide such service in his application;

(iii) fails, for any reason, for a continuous period of three (3) months, to provide service authorized by the permit, or

(e) in the opinion of the Board, the holder of the permit has submitted false or forged documents or has made a false declaration relating to the permit concerned, or relating to any other permit issued to him.’

[9] From a reading of the above provisions, it is plain to me that the first respondent has the power to cancel a permit granted by it. This must, however, be on proof of certain laid down facts, circumstances or eventualities. These include, as stated in 7(1)(e), the making or submission of false information to the Board in relation to a particular permit or any other permit held by the maker of that statement. In the present case, although the first respondent did not specifically state that it was acting in terms of any specific section of the Act, it is clear to me that it had the power to cancel the permit in question based on the fact that it was satisfied upon the evidence before it, that motor vehicle WSD 312 AH did not belong to the

applicant. The ownership of the vehicle in question was essential or at least relevant because the permit itself clearly states that:

‘Notice : The permit is not valid if:

1. Permit holder and vehicle owner is not the same.’

This may also be viewed as a material condition imposed on the grant of the permit as envisaged in section 7(1) (a).

[10] It is vitally important to emphasise that although the essence of the malpractice complained of by the first respondent touched on the ownership of the motor vehicle in question, the sum total of the complaint was the unauthorized and unlawful use of the permit and the fact that the applicant had supplied or submitted false information to the Board relating to the actual grant or transfer of the permit. The grant of the permit was irrevocably tainted by this false information. The false information rendered the permit invalid as stated on the face of the very permit itself inasmuch as the holder thereof was not the same as the owner or operator of the vehicle in question. Ownership of the vehicle to which the permit relates is a crucial or essential factor or consideration in the application because it directly affects the applicant’s ability or lack thereof to adequately carry out the business operations applied for.

[11] Again, it is worth mentioning that after hearing evidence on its meeting of 16 September, 2014 the 1st respondent resolved *inter alia*, to invite the applicant ‘to show cause why the permit should not be cancelled.’ This was by letter dated 22 September 2014. (See MRTB 5). This was a clear recognition of the fact that a cancellation of the permit was a potentially adverse and drastic step to take. It had the potential to adversely affect the rights of the applicant in a very significant way and therefore such a decision could not be taken without hearing the applicant thereon – prior to it being made or taken. Such a step is again specifically demanded by section 7(5) of the Act. Thus, the decision to cancel or recall the permit was only taken after affording the applicant the chance to be heard on why such cancellation should not be made.

[12] From the above, it is plain to me that there is no merit whatsoever in this application and it is hereby dismissed. The rule nisi that was granted on 21 November 2014 is hereby discharged.

[13] I now examine the second respondent’s counter-application. This application is premised or predicated on the existence of permit 1023. That permit, I have concluded, was lawfully cancelled by the first respondent. It

does not exist anymore. Consequently, this application is likewise dismissed.

[14] The applicant and the second respondent were both involved in the scam that culminated in the grant of the permit based on false or incorrect information. Both parties knew that the information was false. Both parties also knew that this was contrary to the rules and regulations governing applications before the first respondent. They nonetheless went ahead with such scam simply because it suited them then. When that agreement fell apart, the second respondent that reported the scam to the first respondent and the upshot of that report was this application and the interim application that was filed by the second respondent. They have both failed in their bid to have this court reverse or set aside the decision of the first respondent. The only winner in these proceedings is the first respondent. I order that only the first respondent is entitled to an order for costs herein. The applicant and the second respondent are hereby ordered jointly and severally, each paying, the other to be absolved, to pay the first respondent's costs of these proceedings.

MAMBA J

For the Applicant : Ms. N. Ndlangamandla

For 1st Respondent : Ms. N. Kunene

For 2nd Respondent : Mr. N.E. Ginindza