



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 6/12

In the matter between:

**SWAZILAND COMMERCIAL AMADODA
ROAD TRANSPORT COUNCIL**

APPELLANT

AND

**THE PRINCIPAL SECRETARY
MINISTRY OF PUBLIC WORKS AND
TRANSPORT**

1st RESPONDENT

**THE ROAD TRANSPORTATION BOARD
NATIONAL TRANSPORT COUNCIL**

**2nd RESPONDENT
3rd RESPONDENT**

Neutral citation: *Swaziland Commercial Amadoda Road Transport Council v. The Principal Secretary Ministry of Public Works and Transport and 2 others (6/12) [2012] SZSC 22 (31 May 2012)*

CORAM:

**S.A. MOORE JA
M.C.B. MAPHALALA JA
A.E. AGIM JA**

Heard : 22nd May 2012
Delivered : 31st May 2012

Summary

Civil Appeal – power to grant applications for cross-border road transportation permits vested in the second respondent – third respondent’s function is merely advisory to second respondent – appeal upheld with costs on the ordinary scale

M.C.B. MAPHALALA JA

[1] This is an appeal against the judgment of the court *a quo* which refused to issue a declaratory order to the effect that the Road Transportation Board, cited herein as the second respondent, is the sole authority vested with the power to consider and grant applications for cross-border road transportation permits. The court *a quo* was of the view that issuing such an order would not be in the interests of transport operators but that the effect of such an order would be to restate the law that Parliament has put in place; the court *a quo* further held that issuing such an order would remove the power of the Board to make its own rules of procedure in terms of section 5 (8) of the Road Transportation Act No. 5 of 2007, and that the order would effectively amend the law yet this is a duty of Parliament.

[2] The appellant has raised two grounds of appeal: firstly, that the court *a quo* erred in law and in fact in refusing to grant the declaratory order on the basis that granting same would not be in the interests of transport operators but its effect would restate the law that Parliament has put in place.

Secondly, that the court a quo erred in fact and in law by holding that the grant of prayer 5 would remove the power to make its own rules of procedure in terms of section 5 (8) of the Road Transportation Act and consequently amend the law yet this is a duty of Parliament; prayer 5 sought an order directing the second respondent to consider applications for cross-border road transportation permits without first transferring the applications to the third respondent.

[3] The appellant brought an urgent application in the court a quo for three orders: firstly, declaring that the second respondent, being the Road Transportation Board, is the sole authority vested with the power to consider and grant applications for cross-border road transportation permits; secondly, declaring that the second respondent is precluded in law from delegating its powers to consider and grant applications for cross-border road transportation permits to any person, in particular the third respondent, being the National Transport Council; thirdly, directing the second respondent to consider applications for cross-border road transportation permits without first referring any applicant to the third respondent.

[4] The appellant represents transport operators in the country on the basis of permits issued to them by the second respondent. It further alleged that on

the 20th December 2011, its members approached the second respondent and moved applications which are always verbal for cross-border road transportation permits; and, that they were advised verbally to first obtain approval of the third respondent who grants such approval by issuing a passenger list.

[5] The appellant argued that the second respondent is the only body vested with the power to consider and grant cross-border transportation permits in terms of the Road Transportation Act; the appellant further argued that the second respondent does not have the right to delegate its powers to the respondent or to any other person. The appellant further argued that the Regulations establishing the third respondent do not grant it the power to consider applications for cross-border road transportation permits or to issue any passenger list in respect of a cross-border road transportation permit.

[6] The application was opposed by the respondents; and they denied that the appellant is the supreme transport body in the country and argued that the third respondent is the Supreme transport body representing all transport operators in the country.

[7] The respondents conceded that the Regulations establishing the third respondent do not grant it the power to issue passenger lists; however, they argued that the Regulations vest upon the third respondent the power to exercise overall management of road transport operations and to give advice to the second respondent on the regulation and operation of public road transportation services.

[8] The respondents further conceded that the appellant is the only body that has the power to consider cross-border road transportation permits. However, they denied that the second respondent has delegated its powers and duties to the third respondent. The respondents argued further that the third respondent merely checks whether the procedure of first getting a recommendation from their Transport Associations has been followed; and, whether all the relevant documentation has been checked by the third respondent. No legislation exist giving powers to the third respondent to execute these functions.

[9] Certain members of the appellant filed supporting affidavits to the application confirming that they made applications for the cross-border road transportation permits to the second respondent and that they were referred to the third respondent.

[10] The second respondent is a creature of statute; it was established in terms of section 4 of the Road Transportation Act No. 5 of 2007. In the conduct of its meetings, the Board is empowered to make its own rules of procedure in terms of section 5 (8) of the Act. Section 5 further provides that the first meeting of the Board shall be held at such time, date and venue as the Minister may determine; all subsequent meetings shall be held at such time and venues as the chairperson may determine.

[11] Section 6 of the Act provides the following:

“6. The functions of the Board are to-

- (a) consider applications for or relating to the granting, renewal, amendment, suspension or cancellation of certificates and permits;
- (b) determine the demand for public passenger and freight transport;
- (c) keep, or cause to be kept, registers of all permits issued, and any other register or data base as is required to properly administer road transportation;
- (d) advise the minister on any matter relating to the transportation of goods and passengers, (giving special consideration to the elderly and passengers with physical disabilities) by road in Swaziland or any matter incidental which the Minister may refer to the Board.”

[12] Section 7 of the Act further provides for the general powers of the Board which include the power to suspend or cancel the permit. Section 8 provides that “a person aggrieved by a decision of the Board may appeal to the Road Transportation Appeal Board established in terms of Section 9 of the Act.

[13] It is apparent from the Road Transportation Act that the second respondent is the sole authority vested with the power to consider and grant applications for cross-border road transportation permits; this power includes renewals, amendments, suspension and cancellation of the permits. It is also apparent from the Act that the second respondent does not have the power to delegate these powers to anyone including the third respondent.

[14] The respondents do not claim either to have the powers vested in the second respondent. In paragraph 13 of its Opposing Affidavit, the respondents state the following:

“The second respondent is the only one that considers applications for cross-border permits. It only refers to the third respondent who checks whether the procedure of first getting a recommendation from their association has been followed and having all the relevant documentation checked by the third respondent.”

[15] At paragraph 10 of its Opposing Affidavit the respondents state the following:

“Whilst the Regulations establishing the third respondents do not specifically grant it power to issue passenger lists, they clearly vest in it power to exercise overall management of road transport operations and to give advice to *inter alia* the second respondent on the regulation of public road transportation services. The issuing of passenger lists is an administrative function which is properly exercised by the third respondent.”

[16] The third respondent was established by the Minister for Transport in terms of section 36 (g) of the Act. The section provides the following:

“The Minister may by notice in the gazette make regulations consistent with this Act establishing a National Transport Body representing all transport associations in Swaziland and comprising members of the national freight and regional passenger transport organizations.”

[17] The functions of the National Transport Council are outlined in Regulation 5 of “The Establishment of Road Transport Council Regulations of 2010. These Regulations” are made in terms of Legal Notice No. 9 of 2010. Regulation 5 provides the following:

“5. The Road Transport Council shall-

- (a) exercise overall management of road transportation operations;
- (b) advise the Road Transportation Department and the Minister on the regulation of the public road transportation services;
- (c) nominate persons to be appointed by the Minister as members of the Road Transportation Board or the Road Transportation Appeals Board; and
- (d) perform such other functions as may be necessary to give effect to its function under these Regulations.”

[18] It is evident from both the Act as well as the Regulations made by the Minister pursuant to powers conferred upon him by the Act that the functions of the third respondent are merely advisory to the second respondent, the Minister, the Road Transportation Department as well as the Appeal Board. The second Respondent as the creature of statute and established by Parliament is superior to the third respondent which is established by the Minister in terms of secondary legislation. It is therefore a contradiction in terms for the third respondent to “exercise overall management of road transportation operations” in the country when the Road Transportation Board as well as the Road Transportation Appeal Board established by Parliament exist.

- [19] Being an advisory body, the third respondent can only offer advice when same has been sought; otherwise, it cannot legally be seen to be proactive and acting in a supervisory role over the second respondent. The office of the Attorney General in consultation with the Minister is duly advised to initiate the process of amending Regulation 5 in general and Regulation 5 (a) in particular to reflect the advisory capacity of the third respondent.
- [20] The second respondent has no authority to refer applications for cross-border road transportation permits to the third respondent for their consideration before the application is considered by the second respondent. There is no provision in the Act for such a delegated authority.
- [21] Similarly, it is unlawful for the third respondent to grant passenger lists in the absence of an enabling legislation to do so; this is a function of the second respondent which has the power to grant cross-border road transportation permits in terms of the Act.
- [22] Accordingly, the appeal is upheld with costs on the ordinary scale.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

S.A. MOORE
JUSTICE OF APPEAL

I agree:

A.E. AGIM
JUSTICE OF APPEAL

For Applicant
For Respondent

Attorney M. Mabila
Attorney V. Manana

DELIVERED IN OPEN COURT ON 31st MAY 2012.