AIROADEXPRESS (PROPRIETARY) LIMITED	Appellant
and	
THE CHAIRMAN OF THE LOCAL ROAD TRANSPORTATION BOARD, DURBAN	1st Respondent
THE SOUTH AFRICAN TRANSPORT SERVICES	2nd Respondent
MARKET SERVICE STATION TRANSPORT (PRIVATE) LIMITED	3rd Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

AIROADEXPRESS (PROPRIETARY) LIMITED	Appellant
and	
THE CHAIRMAN OF THE LOCAL ROAD TRANSPORTATION BOARD, DURBAN	1st Respondent
THE SOUTH AFRICAN TRANSPORT SERVICES	2nd Respondent
MARKET SERVICE STATION TRANSPORT (PRIVATE) LIMITED	3rd Respondent

Coram: Kotzé, Miller, Joubert, Van Heerden et Grosskopf, JJ A

Heard: 5 November 1985

Delivered: 27 February 1986

J U D G M E N T

KOTZÉ, J A :

This...../2

This appeal arises out of proceedings in the Natal Provincial Division. On 23 December 1983 BROOME J granted an urgent rule nisi to the present appellant (as applicant). On 17 August 1984, after the rule had been extended several times, KUMLEBEN J discharged the rule with costs. Four days later the lastmentioned learned Judge granted leave to appeal to this Court - hence the present proceedings. Reasoned judgments were delivered in both the rule nisi and the return day proceedings and are respectively reported in 1984(3) S A 65 and 1984(4) S A 593 (sub nomine Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and others). Since I do not propose to indulge

in...../3

in unnecessary repetition, this judgment should be read with the reported judgments.

To the terms of the rule nisi set out by KUMLEBEN J at 595 D- 596C should be added par 4(b):

> "the applicant be and is hereby ordered ... to note and prosecute an appeal to the National Transport Commission in accordance with the provisions of the Road Transportation Act No. 74 of 1977, as amended, and the regulations published thereunder, against the first respondent's decision given on 15 December 1983 not to grant and issue to the applicant the said public permits."

The appeal to the National Transport Commission (NTC)

had...../4

had been duly noted on 20 December 1983.

The appellant, first respondent and second respondent were represented before us. The third respondent filed an affidavit to the effect that it adopted the argument presented on behalf of the second respondent.

KUMLEBEN J correctly, in my view, points out that there are differences between the nature of the authorisation which the appellant enjoyed for five years up to 31 December 1983 and the nature of the authorisation applied for on 26 September 1983. Yet I agree with BROOME, J that

"(o)ne...../5

"(o)ne must look at the substance and not the form of this particular application and that it would be unfair to adopt a strict legalistic approach ... by categorising these matters as either applications for a renewal or applications for a new certificate ... When one looks at the facts of this case one finds that what is intended should happen and the permission which is sought to come into operation after 1 January 1984 is the same applicant, the same operator, conveying the same goods between the same points, enjoying the patronage of the same customers and in fact even employing the same drivers and same staff. In other words, without elaborating any further, it is fundamentally the same service with one difference and one difference only, that is, the vehicles involved. Up to 31 December there were 17 one-ton bakkies. Thereafter there are two bigger trucks. So really, when one takes what I believe to be a sensible

view...../6

> view of the facts of this case, a realistic view, one finds that what the applicant is seeking to do is substantially the same as it has been doing lawfully with one difference and one difference only, that is, using two larger vehicles (to comply with what it apparently believes is the policy as evidenced by the amendments to the Act) instead of a number of smaller vehicles."

(At 76I-77B).

(In regard to the marked apparent difference between the carrying capacity of the seventeen one ton vehicles on the one hand and the two twenty-two ton vehicles on the other hand, one should bear in mind the explanation referred to by KUMLEBEN, J at 605 B-E).

BROOME, J found that

(a) appellant...../7

(a) appellant established a well-grounded apprehension of irreparable harm if relief be withheld from it (at 69E-70 E);

(b) the balance of convenience favoured the grant of the rule applied for (ibid);

(c) no other satisfactory remedy was available to appellant (at 71F-I);

(d) appellant established prima facie that the local board adopted a wrong approach to the application (at 73 A-C), made out a powerful case on the merits likely to succeed on appeal to the NTC (at 73 H-I) and the application was wrongly refused on the merits (at 74 D-F).

KUMLEBEN J agreed that requisites (a), (b) and (c) for an interim interdict were established (at 605 i f - 606 A). In regard to (d) he had reservations: see at 603 H - 605 I. My view in this connection can be stated briefly. The virtually uncontradicted evidence (of Nicole and Mentrup) referred to by BROOME, J at 67 E-G, established that with effect from January 1978 the appellant brought into operation a specialised form of overnight door-to-door motor carrier transportation between the Reef and Durban which, in the public interest, is both necessary and desirable. The rail services offered by second respondent and the services of the other respondents are neither satisfactory nor sufficient.

Moreover,...../9

Moreover, it seems to me that regard being had inter alia to

(i) the reasons furnished by the local board in the Ratner and Collett Agencies application, Von Bratt's failure to dissociate himself therefrom in clear terms and Muller's unconvincing declaration that he neither thought of nor mentioned the said reasons to Von Bratt in the course of their deliberations;

(ii) Botha's statements to Van der Berg;

(iii) the undue importance attached to the amendment to sec 1(2)(ℓ) of the Road Transportation Act, 74 of 1977 (the Act) by Act 8 of 1983; and

(iv) the unconvincing reasons given by the local

board...../10

board for its refusal of appellant's application (one such reason, unconfirmed by evidence, e g being that the board "felt" that a 22 ton trailer restricted to 10 hours travelling time could not travel between the Reef and Durban without exceeding the speed limit);

substantial grounds exist to support the contention that at least portion of the causa relied upon in the founding affidavit has been substantiated. The said causa takes the form of a submission that the local board in refusing to grant the application:

"(a) applied the wrong principles in that it approached the hearing of the

application...../11

application and the decision which it had to make upon the basis that the legislature did not intend that road transportation of the kind applied for should be granted by a Local Board:

(b) failed to apply or keep in mind the relevant provisions of the Act when arriving at its decision and accordingly failed to exercise its statutory duty;

(c) approached the exercise of its statutory duty upon the basis that the application should have been heard and considered by the National Transport Commission and not by a Local Board in that local boards should not be called upon to decide applications of this kind and accordingly should not grant them;

(d) was prompted by some ulterior motive or some policy of which it did not inform the applicant at any time during the course of the proceedings;

(e) failed to apply its mind to the issues between the applicant and the respondents;

(f) acted...../12

(f) acted arbitrarily and capriciously;

(g) relied on irrelevant considerations and wrong principles;

(h) failed to appreciate the nature and limits of the power to be exercised by it;

(i) relied on irrelevant considerations and wrong principles."

Each of the above grounds (a)- (i) is an appropriate ground upon which the Supreme Court may, pursuant to its inherent power, review and correct the proceedings of a body such as a local board established in terms of section 4 of the Act. But, as I shall endeavour to point out, they are at the same time grounds which may be advanced on appeal to the NTC.

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The factual background can be summed up briefly:

(a) For five years from January 1978 to 31 December 1983 the appellant provided a transportation service which served the public interest.

(b) No alternative satisfactory service exists.

(c) The service referred to in (a) lapsed by virtue of legislative enactment.

(d) The local board refused an application by

the...../14

the appellant to replace the service referred to in (a) by a fundamentally similar service.

(e) In essence the refusal referred to in (d) arose out of a failure to exercise an unfettered discretion in that the local board refused the application because of a wrong impression that the Act as amended prohibited the grant of the permits applied for.

It is against the said background that the crucial legal submission relied upon by the appellant has to be decided. The said submission, strongly contested by the respondents, is that the Supreme Court is endowed with power to grant public road transportation permits

by ...../14(a)

by mandatory order affording interim protection pending an appeal to the NTC in circumstances where a local board's decision is apparently vitiated by irregularity. None of the authorities cited to us deals directly with the problem posed. It has to be determined largely on principle.

In...../15

In terms of sec 8 of the Act any person who has applied to a local road transportation board for the grant of a public road carrier permit and is affected by any decision of such board, may appeal against the decision to the NTC which may reject the appeal and confirm the decision or uphold the appeal wholly or partially, set aside the decision and substitute therefor any other decision which the board could have given or remit the matter for fresh consideration. It follows that the NTC possesses powers similar to those which the Supreme Court possesses in terms of its review jurisdiction. These powers exist side by side and do not exclude each other. What is significant is that

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the NTC is not endowed with any power to afford interim relief pending an appeal to it.

On the material before us a strong prima facie case has been made out that the permits applied for were wrongly refused by reason of the local board's wrong belief that the Act as amended precluded the grant of the certificates. In the event of such proof the Court would, upon application to it, be empowered under its review jurisdiction to set the matter right by directing the grant of the permits or by referring the matter back for proper consideration. (Cf W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board ant others, 1982(4) S A 427 (a)). The NTC is empowered,

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in terms of its statutory appellate jurisdiction, to afford like relief. In either event, i e a review to the Supreme Court or an appeal to the NTC, a delay in the delivery of judgment after 31 December 1983 would cause loss and hardship to the appellant. In deciding what I have referred to above as the crucial legal submission, it is convenient first to consider the approach adopted by our Courts in resolving problems of this nature where interim relief is sought pending main proceedings in the Courts themselves and thereafter to consider whether different considerations apply pending the final decision of a statutory functionary.

The question has in the past frequently arisen

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in regard to the renewal of liquor licences. For more than half a century interim relief in the form of mandatory orders to prevent prejudice or injustice has been decreed in several of the provinces. I will refer to a few of the better known cases.

Morkel and others and Hahne v Johannesburg Licensing Court, 1914 TPD 395 was a case in which applications

for...../19

for the renewal of liquor licences were refused. An error of procedure by the licensing authority led to a refusal of the applications resulting in "hardship" and "injustice" to the applicants. The Court (MASON, J) set aside the refusal and referred the matter back to the licensing authority for a proper hearing. The next sitting of that authority would not take place soon and the Court granted an interim order that a temporary licence be issued. The learned Judge said at pp 397-8:

> "With reference to the other part of the application, namely, for an interim order authorising the applicants to carry on business until the rehearing, that really is an application to the Court to allow them to carry on business without a licence. I am not at all

satisfied...../20

satisfied that the Court has authority to give any such order. But I think, taking into consideration the Cape cases, and the words of the statute, the Court can give relief. Supposing the licensing court had wished to take a considerable time to consider the position, I think they would have been entitled, under sec. 27, to issue a conditional licence to the applicants, saying, 'You can carry on your business meantime, while we are considering this matter, or for such and such a period, till we can determine exactly what is to be done with your licences.' I propose acting on what I believe to be the power of the licensing court, and, under the circumstances, directing the president of the licensing court to sign a certificate for a licence to the various applicants until such time as the licensing court has reconsidered and dealt afresh with the matter."

In Golomb v Pretoria Liquor Licensing Court,

1917 TPD 1 - also a case where a renewal of a liquor licence was refused on an improper ground - GREGOROWSKI, J said:

> "It seems to me that this question of a licensed dealer carrying on his business during the interim when he has a dispute as to the correctness of the decision of the licensing Court in refusing his licence is a casus omissus in the Ordinance. It would certainly be a great hardship, if in a matter of renewing a licence the licensing court had gone wrong and in this way deprived the applicant of his right and the matter could not be heard by the Court at once, that during the interim the applicant should be debarred from carrying on his business. There is no provision made by the law for such a case, and yet extraordinary loss might be entailed if a business

had...../22

had to be closed entirely for a few days. ... There is a precedent where the Court has come to the assistance of an applicant for the renewal of a licence under circumstances like the present, namely, Morkel and Others v. Johannesburg Liquor Licensing Court (1914 T.P.D. 395). The safe course for me to adopt is to follow that decision and to give exactly the same relief here as was given there."

In De Fraetas v Cape Licensing Court, 1922 CPD 350, - a similar case - GARDINER, J said at 350-1:

"In the present case the licensee was successful upon an application for review in obtaining the setting aside of the proceedings of the Licensing Court, and an order was made on the Licensing Court to call a further meeting to consider his application.

Against...../23

> Against that judgment the Licensing Court has appealed,and this appeal cannot be heard until three months will have expired. It would be obviously unjust to the licensee if, pending the appeal, he were required to cease carrying on business. My attention had not been directed to any specific authority by which I can grant the extension, but I think that the Court has a general power when the hearing of an appeal is pending to do what may be necessary to secure that neither party shall be prejudiced."

That portion of the above extract dealing with the "general power" of the Court was quoted with approval and followed by MATTHEWS, A J P in Patterson v Umvoti Liquor Licensing Board, 1932 NPD 766 - also a case in which the issue of a liquor licence was directed

pending...../24

pending the return day of a rule nisi.

I should point out that there are examples of cases which point the opposite way. One of the most notable of these is the case of Groenkloof Drankhandelaars (Edms) Bpk and another v Liquor Licensing Board, 1965(1) SA 866(C) in which CORBETT, J , as he then was, declined, pending an appeal, to extend the validity of a licence the renewal of which had been refused in order to permit the sale of stocks. The ratio of the decision was that the Court did not possess the jurisdiction to grant the relief prayed - to exercise such a jurisdiction would be to "usurp ... the functions of the liquor licensing boards".

The...../25

The cases of Morkel, Golomb, De Fraetas and Patterson all deal with the renewal of liquor licences and may be regarded as examples (there are many other) of the "product of judicial ingenuity" and "sound authority" referred to by Baxter (Administrative Law, p 690). The instant case, apart from the fact that it is concerned with a different statute, also differs from the above cases in that an interim order is sought pending a decision of the NTC and not of the Court and that in form it is not an application for renewal but for a new grant. The latter point of distinction is, in my view, unimportant: the said position is in essence no different from an application for renewal since, as pointed

out...../26

out above, the application is fundamentally for the continuation of the pre-existing service. As far as the other point of distinction, viz that the interim relief sought is unrelated to Court proceedings, is concerned I can find no indication in the Act that the power of the Supreme Court to grant interim relief (if it exists) is excluded. On the contrary such power seems to be impliedly recognised by the Act.

Sec 8(A), as inserted by sec 5 of .. - Act No 91 of 1980, provides:

> "Whenever the commission or a board has, in the case of a public permit authorizing the conveyance of persons for reward, imposed a requirement or condition that such conveyance shall

be...../27

be undertaken at tariffs approved or laid down by the commission or that board, as the case may be, and the commission or the competent board thereafter on application in terms of section 12(2), or the commission thereafter in the exercise of any power conferred upon it by section 8(2)(b)(i) or (2)(c), amends that requirement or condition by increasing any of the tariffs so approved or laid down, the coming into operation of the tariffs so increased shall not be suspended pending final judgment in any proceedings in a court of law in connection with such amendment."

The above section expressly excludes the jurisdiction of courts of law in respect of tariff increases and tends to show that the legislature was only concerned to prevent interim interference in that respect. A further indicator against an intention

to...../28

to exclude the power of the Court is the failure of the legislature to endow the NTC with power to afford interim relief.

In the instant case the order of the local board has not yet been set aside and it may be argued that confirmation of the rule will run counter to the local board's order. Setting aside of the order could, at the earliest, take place when the NTC decides the appeal. That may involve a long delay. I cannot accept that if it can be shown in a case of this kind that the appellant must inevitably succeed in the appeal, interim relief pending the determination thereof

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can lawfully be withheld solely by reason of an order which cannot conceivably be sustained. I am of the view further that in principle the same approach should prevail where a strong prima facie case is established that the permits applied for were wrongly refused. In my view the principle applied in the De Fraetas type of case should be extended to a case like the present. The decision in that case is based on the existence of a "general power" or, put differently, an inherent jurisdiction to grant pendente lite relief to avoid injustice and hardship. An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances

are...../30

are present and where but for the exercise of such power a litigant would be remediless as is the case here.

I would allow the appeal with costs - such costs to include the costs of two counsel - and substitute in the stead of par (i) of the order in the Court a quo the following:

(i) that the rule nisi is confirmed with costs.

JUDGE OF APPEAL

JOUBERT, J A) agrees

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LL Case No. 319/1984

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

AIROADEXPRESS (PROPRIETARY) LIMITED Appellant

and

THE CHAIRMAN OF THE LOCAL ROAD TRANSPORTATION BOARD, DURBAN First Respondent

THE SOUTH AFRICAN TRANSPORT SERVICES Second Respondent

MARKET SERVICE STATION TRANSPORT (PRIVATE) LIMITED Third Respondent

CORAM: KOTZé, MILLER, JOUBERT, VAN HEERDEN et GROSSKOPF, JJA

HEARD: 5 NOVEMBER 1985

DELIVERED: 27 FEBRUARY 1986

JUDGMENT

/VAN HEERDEN, JA ...

VAN HEERDEN, JA:

I have had the advantage of reading the judgment of Kotzé, JA, but, with respect, do not agree with the conclusion reached by him.

In a number of cases, most of which are discussed in my brother's judgment, a temporary interdict in the form of a mandatory order was decreed against licensing boards or similar bodies. It should be stressed, however, that in those cases the appropriate authority's refusal to grant a licence, a permit or the like had been set aside by the court and the matter referred back for a rehearing. The interim relief then took the form of an order directing the authority to issue a temporary licence pending a rehearing of the original application (or, in De Fraetas's case, 1922 CPD 350, pending the hearing of an appeal against the setting aside of the proceedings of a licensing court). A perusal of the passages quoted by Kotzé, JA, from the relevant judgments

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leaves the distinct impression that the courts experienced difficulty in justifying the grant of the temporary orders. In cases decided in the Cape Provincial Division it was said that the basis upon which such an order may be granted is that a court has the power to order its judgment to be carried into execution. See, e g, Freedman v Herbert Liquor Licensing Board and Others, 1946 CPD 255, 259. I must confess that I have some difficulty in following that reasoning. If, as a sequel to the successful review of the proceedings of an administrative authority such as a licensing board, the matter is remitted to the board for reconsideration, it appears to me that the judgment is "carried into execution" when, and only when, the application is reconsidered by the board. Be that as it may, the above cases are not in point in the present matter for the simple reason that the appellant did not seek an order setting aside the decision of the Local Road Transportation Board, Durban

("LRTBD"). Nor has it been found that, irrespective of the relief claimed by it but having regard to the contents of the opposing affidavits, the appellant made out a sufficiently clear case for the setting aside of the refusal of its application by the LRTBD.

In other cases in which the applicant sought to invoke the court's review jurisdiction, interim relief has been granted pending the court's final decision as to whether the decision of the administrative body should be set aside. See Pietermaritzburg City Council v Local Road Transportation Board, 1959 (2) SA 758 (N), and Patterson v Umvoti Liquor Licensing Board, 1932 NPD 766. It can be gleaned from the report of the decision of this Court in Local Road Transportation Board and Another v Durban City Council and Another, 1965 (1) SA 586 (A), that similar relief was granted by Miller, J, in the court below when, pending the return day of a rule nisi, the Local Board was ordered to grant the applications refused

by it. I shall revert to these cases.

I am aware of only one case in which interim relief was granted pending the hearing of an appeal to a statutory body. In Sing and Co (Pty) Ltd v Pietermaritzburg Local Road Transportation Board and Another, 1959 (3) SA 822 (N), the applicant had appealed to the National Transport Commission ("NTC") against the respondent Board's suspension of motor carrier certificates held by the applicant. The court granted a rule calling upon the Local Board and the Commission to show cause why an order should not be granted staying the suspension pending the appeal, the rule to operate as an interim interdict pending the return day. Jansen, J, said, however (at p 824):

> "The very urgency excludes a full investigation into the facts and the law, and it allows only of a superficial approach which might well be erroneous."

It is convenient at this stage to consider what

/the ...

the appellant would have had to establish in order to obtain an order setting aside the decision of the LRTBD and a further order, which would have had final effect, directing that Board to issue to the appellant the two permits in issue. It is trite law that the power of a court of law to interfere with a decision of a board such as the LRTBD is narrowly circumscribed. The following dictum of Holmes, JA, in Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd, 1976 (1) SA 887 (A) 895, concerning the justiciablity of a decision of the NTC applies with equal force in regard to that of a local board:

> "... right or wrong, for better or worse, reasonable or unreasonable, its decision in ... [its special field] ... stands and is not justiciable in a court of law, unless it is vitiated by proof on review in the Supreme Court that it failed honestly to apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice; in other words that, considered de jure, it failed to decide the matter at all. Such failure

> would, for example, be proved, if the Commission's opinion is arbitrary, capricious, mala fide, or the result of an unwarranted adherence to a fixed principle."

But even if such a decision is set aside, it does not follow that a court will direct a local board to exercise its functions in a manner determined by the court, e g by issuing a permit. On the contrary, since the issue of a permit is in the discretion of the board and not of the court, the ordinary course is to remit the matter to the board for reconsideration. In special cases the court may, however, order the board to issue a permit. This Court has held that "it is a matter of fairness to both sides": Livestock and Meat Industries Control Board v Garda, 1961 (1) SA 342 (A) 349. But in the absence of exceptional circumstances such as bias or gross incompetence on the part of the board, or a long delay occasioned by an arbitrary decision, a court will not order the issue of a permit unless the only proper decision of the board on remittal would be to grant

the application. Cf Garda's case, supra, at p 349; Johannesburg City Council v Administrator, Transvaal and Another, 1969 (2) SA 72 (T) 76; Vries v Du Plessis, N O, 1967 (4) SA 469 (SWA) 482.

The first requisite for a claim to an interdict is a clear right. Interim relief may, however, be granted if the applicant establishes a prima facie right, "even if open to some doubt". (In order to obviate repetition I shall henceforth not restate the qualification in inverted commas. I shall also not refer to the further requisites for either a final or interim interdict.) In the present context the use of the word "right" is apt to be somewhat misleading. An applicant for a permit cannot be said to have a right to a permit in the sense that e g an owner has a right in respect of the corporeal thing owned by him. In so far as the principles relating to the granting of an interim interdict may be applicable when an unsuccessful applicant for

/a ...

a permit seeks to obtain interim relief, it may perhaps be more accurate to speak of the establishment of a prima facie case. But whatever the correct terminology may be, it follows from what has been said above that such an applicant must at least prima facie show not only that the decision of the board should be set aside, but also that because of the existence of special circumstances the board should be directed to issue a temporary permit. It is, I conceive, substantially on this approach that interim interdicts were granted in the Pietermaritzburg City Council, Patterson and Durban City Council cases, supra.

In those cases the applicants obtained interim relief pending a final decision of a court of law. In the present case the appellant sought to obtain such relief pending the decision of the NTC on the appeal noted to it. According to the judgment of Kotzé, JA, this point of distinction is unimportant since i) there is no indi-

/cation ...

cation in the Road Transportation Act (74 of 1977) that the power of the Supreme Court to order interim relief is excluded, and ii) a court has an inherent jurisdiction to grant such relief to avoid injustice and hardship, at all events if a strong prima facie case is established that permits applied for were wrongly refused. For the reasons which follow I am in respectful disagreement.

According to Van der Linde, Institutes 2.1.4 7, an applicant for an interdict who is unable to prove a clear right may obtain interim relief in order to enable him to establish his right "in een volledige Regtsgeding". The author therefore envisages a later and final determination of the existence of the right in question. Hence, as is stated in Joubert, The Law of South Africa, vol 11, p 297, an interim interdict does not involve a final determination of the rights of the parties and does not affect such a determination. In short, an interim interdict serves to adjust the applicant's interests until the

/merits ...

merits of the matter are finally resolved. That final decision has to be arrived at by a court of law or, conceivably, another body or person such as an arbitrator. Consequently a temporary injunction does not necessarily constitute interim relief in the above sense: if an applicant seeks an interdict which is to be operative for a fixed or determinable period, it may still be final in its nature and effect: Fourie v Uys, 1957 (2) SA 125 (C) 126; Cape Tex Engineering Works (Pty) Ltd v S A B Lines (Pty) Ltd, 1968 (2) SA 508 (C) 530.

In passing I should point out that Van der Linde's formulation of the requisites for an interdict has always been followed by our courts: Nathan, The Law and Practice Relating to Interdicts, p 5. Nor, in my view, does the decision of the Court of Holland, referred to by inter alia Kersteman, Hollandsch Rechtsgeleerd Woordeboek, s n Mandament Poenaal, p 275, detract from that formulation. As I read Kersterman's

summary of the relevant facts, the wife of the husband who claimed an interdict prohibiting her from molesting him, did not dispute the essential facts on the basis of which he alleged that her conduct was vexatious. Her only defence was that, although she had committed adultery, her husband had forgiven her and that subsequently they had lived together as spouses. Hence she denied that in visiting her husband daily she had been acting vexatiously. It follows that the real dispute between the parties, i e, whether her husband had condoned the adultery, would have arisen in the divorce proceedings instituted in Delft. As Kersterman says: "dog dit alles diende op de principale zaake."

If in the present case the rule nisi were to be confirmed, no court of law would in the future have to make a final determination of the merits (or demerits) of the applicant's case, and more particularly of the question of whether the LRTBD commited a reviewable

/irregularity ...

irregularity. Nor will that be the function of the NTC on appeal to it. It is true that that body possesses powers similar to those which the Supreme Court may exercise in terms of its review jurisdiction. But the grounds on which such powers may be invoked by a court are entirely different from those on which the NTC may exercise its appellate jurisdiction. It is clearly not the only function of the NTC to ascertain whether a local board properly exercised its discretion (cf Golden Arrow Bus Services v Central Road Transportation Board and Others, 1948 (3) SA 918 (A) 924.) On the contrary, an appeal to the NTC involves a rehearing in the fullest sense of the word. As was said in National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd, 1972 (3) SA 726 (A) 734-5:

> "The Commission is not a court. It is a body of men appointed for their expertise in their particular field. It is not bound by rules of judicial procedure.

/It ...

> It is not obliged to hear oral evidence. It is not required to keep a record of the proceedings. It can reach its decision in its own way, so long as it honestly applies its mind to the issue: observes the requirements of natural justice, such as audi alteram partem; and bears in mind any relevant statutory provisions, such as sec. 13 (2) of Act 39 of 1930, as amended. In terms of reg. 57 it may consider further information which the local board did not have before it. And it is not obliged to give reasons for its decision."

And (at p 735):

> "It follows that, on appeal, the issue before the Commission is not whether it is persuaded that the local board was wrong. The Commission comes to its own decision. The most that can be said about the decision of a local board, and its reasons, is that these constitute a factor which the Commission will bear in mind."

(Chetty's case was decided under Act 39 of 1930 and the regulations promulgated in terms of that Act. However, for present purposes there does not appear to be any material difference between the provisions of that Act and its regulations and those of Act 74 of 1977 and its regulations.)

/In ...

In a somewhat loose sense it may be said that in the present case the same question which arose before the LRTBD will have to be answered by the NTC, viz, whether the appellant should be granted the permits in question. But even if the NTC were to decide that question on the same facts and information placed before or available to the LRTBD, it will do so in the exercise of its own, independent discretion. Consequently, on the assumption that the LRTBD did not improperly exercise its discretion, the NTC may without committing a reviewable irregularity arrive at a different decision.

At most the appellant made out a *prima facie* case, albeit a strong one, that the LRTBD committed a reviewable irregularity and that had that Board properly exercised its discretion it would have granted the application. It follows that if the rule *nisi* were to be confirmed, the appellants on the strength of a *prima*

/*facie* ...

facie case, would obtain an interdict which, although temporary in duration, will have final effect. This conclusion is borne out by the fact that in terms of the order proposed by Kotzé, JA, the rule is to be confirmed with costs. Whatever decision may be given by the NTC on appeal will not affect the order as to costs, and as appears from the decision of the Full Bench of the Eastern Cape Division in E M S Belling Co of SA (Pty) Ltd and Others v Lloyd and Another, 1983 (1) SA 641 (E) 644, there are sound reasons for not awarding the costs relating to an interim interdict to a successful applicant in the absence of exceptional circumstances.

It is said that if it can be shown that in a case of the present kind an appeal to the NTC must inevitably succeed, "interim relief" pending the determination thereof cannot be withheld solely because the order of the local board has not been set aside. It is also

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said that the same approach should prevail where a strong prima facie case is established that the permits in question were wrongly refused. In my opinion there are at least two answers to this line of reasoning. Firstly, if an applicant establishes that his appeal to the NTC must inevitably succeed, it may be said that he has made out a clear case, as distinguished from a prima facie case, for relief with final effect. Secondly, I find it difficult to imagine circumstances in which an applicant can show that his appeal will definitely or even probably succeed. I say so because his prospects of success on appeal cannot be assessed merely with reference to the proceedings before the local board, and particularly the evidence and information placed before or available to that board, and the reasons furnished by the board for its decision. In terms of s 9 of the Road Transportation Act the NTC may inter alia allow any person affected by or interested in a matter before it to give evidence or make oral representations or to call witnesses

/and ...

and lead evidence relevant to such matter. The NTC may therefore be called upon to exercise its original discretion on evidence, information and representations substantially different from that which the local board had to consider. It would furthermore appear that it may allow an "interested" person, who was not a party to the proceedings before the local board, to oppose the appeal. Hence a court approached for an interdict pending an appeal to the NTC cannot assess the nature of the evidence etc on which at some future date the NTC will exercise its discretion.

In sum: In my view the appellant is not entitled on the strength of a prima facie case to obtain an interdict which is final in effect. I would therefore dismiss the appeal.

H.J.O. VAN HEERDEN, JA

MILLER, JA CONCURS