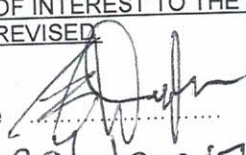


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO THE JUDGES: YES /NO
(3)	REVISED
Signature 	
Date.....29/11/2017	

CASE NO: 743/2016

In the matter between:

L L B BELEGGINGS BK

1ST APPLICANT

and

**MOROTHONG TAXI ASSOCIATION
REGONA TAXI ASSOCIATION
MPHEBATHO TAXI ASSOCIATION
POLOKWANE – TEMBISA TAXI ASSOCIATION
POLOKWANE – GERMISTON TAXI ASSOCIATION
MALESELA MOSES MODIBA
DAVID TSIRI
CHARLES LETA
CONNIE MASHALANE
PAUL MANCHIDI**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT**

BOLOCHANA JOHANNES MANZINI
 TAU SILAS SEBOPELA
 SOLLY PHOLOGA
 MALATJI BATA
 BOIKY NDLOVU
 PETER MASHALANE
 SILAS MACHETE
 MOGALE PHINEAS RAMMALA
 JOSIAS RABOTLHALE
 PAULO MASEKANA
 ALPHEW TEFU
 JOHANNES MOLETE
 EPHRAIM MOKOMA
 JOSIAS PHOFEDI
 GABRIEL NESUTHUNYE
 PETER MASHALANE
 LESIBA ALFRED KHWINANA
 STEVEN MOLOKO
 MADICE MOLOKO
 SASCO MOLOKO
 NDITSHENI RASHIVHOMBELA
 REUBEN MALATJI
 BUTI MOORE
 AMOS KGABI
 DAVID MANKGA
 FRANS CHUENE
 WILLY MASERA
 FREDDY MPHALO
 PHINEAS MAMOLOLA

11TH RESPONDENT
 12TH RESPONDENT
 13TH RESPONDENT
 14TH RESPONDENT
 15TH RESPONDENT
 16TH RESPONDENT
 17TH RESPONDENT
 18TH RESPONDENT
 19TH RESPONDENT
 20TH RESPONDENT
 21ST RESPONDENT
 22ND RESPONDENT
 23RD RESPONDENT
 24TH RESPONDENT
 25TH RESPONDENT
 26TH RESPONDENT
 27TH RESPONDENT
 28TH RESPONDENT
 29TH RESPONDENT
 30TH RESPONDENT
 31ST RESPONDENT
 32ND RESPONDENT
 33RD RESPONDENT
 34TH RESPONDENT
 35TH RESPONDENT
 36TH RESPONDENT
 37TH RESPONDENT
 38TH RESPONDENT
 39TH RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] This is an application in terms of which the Applicant sought an order to
- 1.1. declare the 6th to 39th Respondents to be in contempt of Court for allegedly failing to comply with the order issued by this Court as per Ndlovane AJ on 28 November 2016;; and
 - 1.2. direct that the 6th to 39th Respondents be committed to imprisonment for a period of time subject to certain suspensive conditions.
- [2] The 6th to the 39th Respondents are members of the First to the Fifth Respondents ("the Taxi Associations"). The Court order was granted against the five Taxi Associations and not their individual members.

[3] In terms of the order granted by Acting Judge Ndlovane dated 28 November 2016, it was ordered that:

- 3.1. The Respondents be interdicted from interfering, restricting and / or obstructing the members of the Applicant and their taxi associations and / or their affiliate members from utilising, accessing and / using the taxi rank facilities situated at ERF 299 in the township of Polokwane, with registration division LS TRANSVAAL, number 87 President Kruger Street, Polokwane;
- 3.2. That the members of the Applicant, their taxi associations and / or the affiliate members be allowed to operate the minibus taxis and have full access to the taxi rank facilities at Erf 299 situated at number 87 Pres Paul Kruger Street, Polokwane to load and offload passengers as per their respective operating licences without interference, intimidation's and / or obstructions by the Respondents and / or its members;
- 3.3. That the Respondents pay the Applicant's, such costs to be on a party to party scale.

- [4] The Respondents opposed this application and have raised a point *in limine* and also challenged the application on the merits. The point *in limine* raised is that of *lis alibi pendens*; that there is a pending litigation between the same parties based on the same cause of action in respect of the same subject matter.

Lis Alibi Pendens

- [5] On 10 March 2017 the Applicant issued an application proceedings against the First, Second, Third, Fourth and Fifth Respondents (the Taxi Associations) in this Court for the relief *inter alia*, calling upon the latter to show cause why they should not be found to be in contempt of the Court order dated 28 November 2016. The application, which was opposed by the Respondents was enrolled to be heard on an urgent basis on 23 March 2017. By agreement between the parties the matter was removed from the roll of 23 March 2017. Those proceedings are still pending between the parties and have not been re-enrolled and / or disposed of.
- [6] In the present application the same Respondents associations together with their respective individual members are again cited.

The Applicant again, in the present proceedings, seeks the same relief as against the associations and the individual members that they be found to be in contempt of the same Court order of 28 November 2016.

- [7] I agree with the Respondents' submission that there is a pending litigation between the same parties on the same cause of action in respect of the same subject matter.
- [8] It is trite law that when litigation has been instituted by one party against another, based on the same cause of action in relation to the same subject matter then such parties may not institute further proceedings against each other on the same subject matter whilst the initial proceedings have not been disposed of. In **Nestle (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA)** the Court held at page 548 J – 549 that:
- “The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation.*

Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before the tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its conclusion (res judicata). The same suit between the parties, should be brought once and finally.”

- [9] This principle of *lis alibi pendens* finds application in the circumstances of the present case as the current application is on all fours with the proscription of the principle. On this ground alone the current application falls to be dismissed.

Merits of the Application

- [10] For the sake of completeness and in order to finally determine the main issues between the parties in this application, I shall proceed to deal with the merits of the application.

- [11] The following issues are common cause between the parties:

11.1. On the 28 November 2016 this Court issued an interdictory order against the First to the Fifth Respondents in favour of the Applicant; and

11.2. The First to the Fifth Respondents are aware of the existence of the Court order.

The issue in dispute is that the Respondents violated the said Court order.

[12] The pre-requisites for the Court to be satisfied that there has been a contempt of Court in such proceedings are:

- 12.1. there is an existing Court order;
- 12.2. the Respondent was served with or notified of the Court order;
- 12.3. that the Respondent has not complied with the Court order; and
- 12.4. that the non-compliance was willful and *mala fide*.

See: **Fakie NO v CC 11 Systems (Pty) Ltd 2006 (4) SA 326 (SCA)**. At paragraph [42] of the **Fakie** case Cameron JA held that once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to the willfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and *mala fide*, contempt will have been established beyond reasonable doubt.

[13] In **Readam SA (Pty) Ltd v BSB International Link CC and Others 2017 (5) SA 183** Sutherland J said the following:

“[9] The decision in Fakie NO v CC 11 Systems (Pty) Ltd 2006 SA 326 (SCA) ([2006] ZASCA 54) (Fakie) is the leading authority on contempt on this sense. Upon its authority, a willful and mala fide defiance must be established beyond a reasonable doubt. No onus of proof rests on a person accused of contempt, but a burden to adduce evidence from which an inference of absence of willfulness or mala fides can be deduced does rest on such a person, once proof is adduced of the existence of an order, service on the person, and non-compliance. The objective of contempt proceedings always embraces a public interest dimension. Such orders are both coercive (i.e to compel compliance) and punitive.”

[14] What lies at the heart of the dispute in this application is whether the Respondents have complied with the Court order or not. The Applicant herein bears the onus of proving beyond reasonable doubt that the Respondents violated an order of this Court.

[15] The factual basis upon which the Applicant avers that the Respondents have violated the Court order are contained in paragraphs 59, 60 and 61 of the Founding Affidavit. The following are the allegations:

- “59. Our members proceeded to the taxi rank and attempted to conduct their business activities and were obstructed, intimidated and restricted by members of the 1st to 5th Respondents at the taxi rank. They were also assaulted, harassed and some were robbed of their belongings by members of the 1st to the 5th Respondents.*
- 60. During this process the 5th to 8th Respondents who are members of the First Respondent were inciting violence against our members and also encouraged their members to violate the Court order as granted by this Honourable Court.*
- 61. Our members were further prevented from accessing the taxi rank to conduct their business activities. This led to them approaching Polokwane Police Station to open criminal cases against members of the First Respondent and as a result two cases were registered being Cas: 641/02/2017 and Cas: 658/02/2017.”*

[16] The allegations in paragraph 59 are denied by the Respondents. The Applicant makes bald, wide and unsubstantiated allegations of obstruction, intimidation, restriction, assault and harassment by unidentified members of the 1st to 5th Respondents. There are no concrete or tangible facts placed before me to support these allegations. The Applicant should have placed solid evidence before me to prove, beyond reasonable doubt that certain identified individuals who are linked to the 1st to 5th Respondents were involved. It dismally failed to do so.

[17] In paragraph 60 of the founding affidavit the Applicant purports to link the 5th to 8th Respondents to an act of inciting violence and encouragement of other members to violate the Court order. The Applicant states these as a fact. However, the same deponent in the initial founding affidavit of the aforesaid pending case of 23 March 2017 stated the following:

"I have been reliably informed that the 5th to 8th Respondents are inciting violence against our members and also encouraged their members to violate the Court order which is granted by this Honourable Court"

It is now clear that this allegation constitutes hearsay evidence. The Applicant cannot now claim to have positively and personally identified the 5th to 8th Respondents as culprits when it is apparent that he was initially informed by some unknown informants.

[18] Regarding the contents of paragraph 61 of the founding affidavit, the Applicant fails to state who in particular prevented its members to access the taxi rank and does not state against whom the two criminal cases were opened. It could have been easy for the Applicant to furnish the names of the suspects from the police case dockets and / or from the complainants' statements in the dockets.

[19] In my view the Applicant has not discharged the onus of proving beyond reasonable doubt that any of the Respondents have violated the Court order. What has been placed before me are some bald and unsubstantiated allegations of non-compliance with the Court order. The Applicant has failed to make out a case for contempt of Court against the Respondents.

[20] The Application is accordingly dismissed with costs on party and party scale.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on	:	27 November 2017
Judgment Delivered	:	30 November 2017
For Applicant	:	Adv. Knoetze
Instructed by	:	J L Rahlagane Attorneys c/o P E Mashola Inc Polokwane
For 3rd & 18th Respondents:		Phokoane Phasha Attorneys Polokwane
For the rest of the Respondents up to 39th	:	Adv. Sibiya
Instructed by	:	Makgoba Kgomo Makgaleng Attorneys Polokwane