



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 18064/2012

IN THE MATTER BETWEEN

19/3/2015

KEMPTON PARK TAXI ASSOCIATION

1st Applicant

E M MASINGA

2nd Applicant

P P LOLIWE

3rd Applicant

M N THOOBE

4th Applicant

M T E MKHONTO

5th Applicant

T A MAJOSI

6th Applicant

M J NDAWONDE

7th Applicant

T V THWALA

8th Applicant

and

F J MDAKA

1st Respondent

M J MODUPO

2nd Respondent

M MALATSI

3rd Respondent

B NGEMA

4th Respondent

D VILAKAZI

5th Respondent

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
2015/03/19	<i>[Signature]</i>
DATE	SIGNATURE

JUDGMENT

LEGODI, J

[1] On 3 March 2015, I reserved judgment in this matter. I also impressed upon the parties to seek to resolve the dispute amicably. This was after I was told that the fourth respondent has been killed some few weeks ago. They were to revert to this court before the handing down of the judgment. The dispute remains unresolved. I therefore proceed to deal with the issues argued before me. On the 6 September 2012, an interdict was granted against the respondents in the following terms:

"1. Interdicting and restraining the respondents or any other person/persons employed or controlled by the respondents, alternatively affiliated with the respondents from:

- 1.1 Directly or indirectly interfering with and/or hindering and/or undermining the duties, responsibilities and work of the second to eighth applicants;*
- 1.2 Conducting an illegal office under the name and style of the first applicant;*
- 1.3 Directly or indirectly intimidating any of the members of the first applicant;*
- 1.4 Acting as the executive committee member of the first applicant;*
- 1.5 Conducting general meetings on behalf of the first applicant;*
- 1.6 Collecting monies from the members of the first applicant;*
- 1.7 Writing letters which bears the letter-head, logo and name of the first applicant;*
- 1.8 Interfering with the operational system of the first applicant;*
- 1.9 Using the name of the first applicant to collect joining fees from the members of the public;*
- 1.10 Conducting patrol vehicles with printed name and logos of the first applicant;*

2. Interdicting and restraining the first respondent from:

- 2.1 Acting as a chairperson of the first applicant;*
- 2.2 Signing recommendation letters on behalf of the first applicant;*

3. Costs of suit".

[2] On the 13 November 2013 the applicants instituted the present proceedings in terms of which a relief is sought in the following terms:

- “1. *That the respondents be declared to be in contempt of the order granted by the above Honourable Court on the 6th of September 2012 under case no. 18064/12.*
2. *The Respondents be committed to prison to prison for a period of one (1) year and six (6) months, alternatively any other period as the Honourable Court may deem fit,*
3. The Respondents be ordered to pay the costs of this application;
4. Further and/or alternative relief”.

[3] The manner in which the respondents are alleged to have contravened the order is set out in the paragraph 14 of the founding affidavit. It reads:

- “14. *The Respondents deliberately and intentionally, continue to collect monies from the members of the applicant on a daily basis and the First Respondent deliberately and intentionally continue to act as a chairperson of the Applicant even though they are fully aware that they have been interdicted from doing so by the above Honourable Court”*

[4] Just as a brief background to the dispute, the first applicant is a taxi association called Kempton Park Taxi Association. The second to the eighth applicants are the Executive Committee members of the first applicant. The respondents were members of the first applicant until round about 2009 or 2010 when a dispute amongst its members arose. The dispute was about rotation system where the Taxi drivers were to rotate between the township and Kempton Park-Taxi ranks. The dispute arose because some of the taxi drivers did not wish to take local trips as it is not financially lucrative. The voluntary taxi association, (the first applicant) then split into two groups. The other group which split from the first applicant referred to themselves as Concerned Group of Kempton Park Taxi Association. The group created its logo, but bearing the names of Kempton Park Taxi Association.

[5] The Concerned Group established its own offices and rank. It also elected its Executive Committee Members. The office of the Registrar in terms of Gauteng Public Passenger Road Transport Act no. 7 of 2001 allegedly gave full recognition of the Concerned Group. Its Executive opened a banking account separate from that of the first applicant. An old and dilapidated building at the taxi rank which belonged to the municipality was renovated and turned into a fully furnished office where the Concerned Group conducts its business. Members of the Concerned Group stopped paying subscription fee to the first applicant. They paid their subscription fee to the Concerned Group. These members contribute voluntarily to the Concerned Group banking account. The Concerned Group are now independent from the first applicant. The taxi rank that has been established by the Concerned Group is not been shared with the members of the first applicant or any of the applicants.

[6] In paragraphs 12, 13 and 14 of the answering affidavit the first respondent states as follows:

"12.

The KETA group also has its own taxi rank and officers. There is no encroachment from each other save for the taxis that commute passengers to and from the township. Despite the fact that the concerned group members have the valid operating licences that allows them to operate as per operating licences, they are now confined to commute passengers from Kempton Park to the township and back.

13.

Despite the fact that the members of the concerned group can only commute passengers from Kempton Park to the township and back and their licences allows them to take passengers from Kempton Park to Johannesburg, they cannot do so as they are prevented by KETA members.

14.

Myself and the other Respondents, were the (sic) elected by the concerned group to run their affairs as the executive committee of the concerned group. It is within this context that the members contribute to the funds which is set up to facilitate the running of the office, for example the payment of the staff that works at the office and so forth.

[7] Now coming back to paragraph 14 of the founding affidavit, two questions arise. That is, whether the applicants have continued or continue to collect monies from the members of the first applicant. Secondly, whether the applicants managed to establish that the first respondent continued and is still continuing to act as a chairperson of the first applicant.

CONTINUING TO COLLECT MONIES FROM MEMBERS OF THE FIRST APPLICANT

[8] For this allegation, the applicants rely on paragraph 14 of the founding affidavit quoted earlier in this judgment. They also rely on the affidavits introduced in the replying affidavit marked annexure EMM1 and a receipt marked annexure EM2. Annexure EM2 is a receipt issued on 12 February 2013 to NJ Mphago in the amount of R21 000. The purpose of payment is indicated as "Joining Fee (driver)". Under 'authorized by'; there is a space for the treasurer, chairperson and secretary to sign. Based on the signatures thereon, it was argued that, the first respondent signed the receipt as the chairperson of the first applicant and that he thus contravened paragraph 2.1 of the order.

[9] Before I deal with the receipt, annexure EM2 and the affidavit attested to by NJ Mphago in relation thereto, I want to reiterate this: The applicant case must be made in the founding affidavit. A party will not without leave of the court be allowed to introduce new facts and seek to make out his or her case in the replying affidavit. Annexure EM2 and the affidavit in relation thereto should have been introduced and averred in the founding affidavit especially when dealing with the averments made in paragraph 14 of the founding affidavit. To allow such evidence introduced for the first time in the replying affidavit, in my view, would be prejudicial to the respondents.

[10] The respondents attempted to introduce the fourth affidavit to deal with the new facts introduced in the replying affidavit. Before I deal with the attempt, is worth doing to

quote how the respondents in their answering affidavit dealt with paragraph 14 of the applicants' founding affidavit. In the answering affidavit is stated as follows:

"34.

AD PARAGRAPH 14 THEREOF

I deny the contents herein. None of the Respondents mentioned in this affidavit, collects money from the Applicant's members. As I have mentioned, that the Applicant and the concerned group have virtually become two different or splinters groups therefore there is no working relationship of the concerned group has decided not to pay any contribution or subscriptions to the Applicant. Instead they have established their own executive to run their affairs as such their members contribute to the financial standing of the concerned group.

35.

I deny that I have acted as a chairperson of the First Applicant. I have been elected a chairperson of the concerned group to run its own affairs. Both members of the concerned group as well as the members of the First Applicant are aware of the fact that there is an executive established by the concerned group and that executive is running its own affairs.

36.

Furthermore, the authorities in the Department of Roads and Transport in Gauteng, are aware of the fact that the concerned group runs its own affairs and even in the meeting that are being convened by the authorities, they required their representation from the concerned group by its elected executive.

[11] It is clear that the scanty averments made in paragraph 14 of the founding affidavit are in the first place, lacking in particularities. Secondly, it would not survive the answer thereto as quoted above. The applicants had no excuse and did not ask this court indulgence to allow such new information in the replying affidavit. But most importantly, it is the information which should have been included in paragraph 14 of

founding affidavit. The information was not prompted by the answer as set out in paragraphs 34, 35 and 36 of the answering affidavit.

[12] Now, dealing with the fourth affidavit, the respondents sought to introduce three applications. The first application is said to be in terms of Rule 6(15). That is, to strike out the respondents' replying affidavit in its entirety. The so called 'Application1' is mentioned in paragraph 3 of the fourth affidavit. "APPLICATION 2' is also set to be in terms of subrule (15). It is an application to strike out the applicants' seven supporting affidavits annexed to the applicants' replying affidavit. "APPLICATION 3' is said to be in terms of Rule 6(5)(e), that is, for leave to file a further affidavit in response to the applicants' answering affidavit.

[13] The difficulty with all these application is that they have not been brought in accordance with sub-rules (1) and (11). Sub-rule (1) provides that save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. On the other hand, subrule (11) provides that, notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a Judge.

[14] The underlining is my own emphasis. The form of the written 'notice of motion' is prescribed in the First Schedule. Such a form is also applicable to interlocutory applications under subrule (11). Secondly, insofar as applications under subrule (11) are concerned, the application must be set down at a time assigned by the registrar or as directed by the judge. None of these had happened with regard the three applications cited by the respondents in their answering affidavit. Effectively, the applications were not properly before the court. Leave to file further affidavit under subrule (5) (e), should also have been brought by way of an application on notice. It was on the basis of all of these that I refused to hear argument on the three applications.

ANNEXURE EM2 AND AFFIDAVIT THERETO

[15] Coming back to the alleged contravention of the court order, as I said, the applicants argued that annexure EM2 is a clear proof of contravention of the court order

and in particular paragraph 1.6 of the order. In terms of paragraph 1.6 of the order, the respondents are interdicted from collecting money from the members of the first applicant. Annexure EM2 and the supporting affidavit introducing it were pleaded for the first time the replying affidavit. The respondents were therefore not given the opportunity to answer thereto. One would be careful to attach any value to the information, if to do so, will prejudice the respondents. But, most importantly, there are worrying factors with regards to annexure EM2. The receipt EM2 bears 12 February 2013 as the date on which it was issued. But, in paragraphs 2, 3 and 4 of the affidavit introducing annexure EM2 is stated:

- "2. On (Date:16-05-14), I went to no. 28 Pretoria Road KETA house in Kempton Park, which at all material times I believed this is the registered office of Kempton Park Taxi Association.*
- 3. On my arrival, I discussed my intention to be a member of Kempton Park Taxi Association. I was assisted by Mr FAMANDA JOHNSON MDAKA who presented as the chairperson of Kempton Park Taxi Association.*
- 4. I paid the amount of R21 000 in cash and handed to Mr Mdaka FJ for joining fee and he presented me with the receipt/recommendation letter annexed as "A".*

[16] Then in paragraphs 6, 7 and 8 of the affidavit is recorded:

- "6. On the 20 February 2014, I went to the General Meeting of Kempton Park Taxi Association. I was shocked that Mr Mdaka FJ was not seated at table of executive committee and Mr Mdaka FJ confirmed that he is not the chairperson, one Mr EM Mosima and his executive are in charge of the Association. Mr Mdaka FJ further indicated that he and his group will go back to the legitimate office as members.*
- 7. On 12-02-13 I went to No. 03 West Street Standard Bank Building Kempton Park, which is the legitimate office of Kempton Park Taxi Association.*

8. *I consulted with the legitimate executive committee of the Association, and was advised that application for membership were closed in 2006 and Mr Mdaka FJ should return me my money”.*

[17] The sequence of events as described in the affidavit can be summed as follows:

- 17.1 That on 16 May 2014 Mr Mphago paid R21 000 joining fee to the first respondent and a receipt was issued. That cannot be correct. The receipt as per annexure EM2 was only issued on the 12 February 2013. That is more than a year before he allegedly met with the first respondent on the 16 May 2014.
- 17.2 That on the 20 February 2014 Mr Mphago attended the general meeting convened by the first applicant and that it became clear in that meeting that the first respondent was not an executive committee member. The statement too cannot be correct inasmuch as Mr Mphago gives the impression that he attended the meeting after he had met with the first respondent and caused to pay R21 000. The receipt was issued on the 12 February 2013 and the alleged meeting was on 20 February 2014. These two events, according to the affidavit would have occurred on the 16 May 2014 and thereafter. For example, if the receipt was a genuine one, it would have been issued on the 16 May 2014 and not the 12 February 2013.
- 17.3 That on the 12 February 2013 he consulted with executive members of the first respondent, when he was advised that he had been crooked of his R21 000 by the first respondent. As I said, it cannot be true because by that time, he had not as yet met with the first respondent as suggested in paragraphs 2, 3 and 4 of Mr Mphago's affidavit quoted in paragraph 15 of this judgment. But what is even most striking is that, the receipt annexure EM2, was issued on the same date Mr Mphago had allegedly consulted with the executive committee members of the first applicant and told that he had been crooked into paying the R21 000. This raises the questions: Did Mr Mphago perjure himself? Or is annexure EM2 a product of fraud? Things as they are, point to that direction.. No reliance can be placed on

annexure EM2 to prove contravention of paragraph 1.6 of the order quoted in paragraph 1 of this judgment. Therefore, it would have made no point to give the respondents an opportunity to bring proper application on notice for relief as envisaged in subrules (5) (e) and (15) of Rule 6. I now turn to deal with the other alleged contravention of the order of the 6 September 2012.

ACTING AS A CHAIRPERSON OF THE FIRST APPLICANT

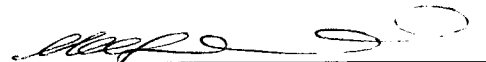
[18] In terms of paragraph 2.1 of the order, the first respondent Mr Mdaka is interdicted and restrained from acting as a chairperson of the first applicant. The averment to the alleged contravention are made in paragraph 14 of the founding affidavit quoted in paragraph 3 of this judgment. Counsel for the applicants submitted that averments in paragraph 14 of the founding affidavit should be seen in the context of paragraph 1 of the answering affidavit and also in the context of annexure EM2. I have already dealt with annexure EM2. No value could be attached for reasons already.

[19] As regard paragraph 1 of the answering affidavit, the contention was that, the first respondent on his own version had admitted to have acted contrary to the prohibition in terms of paragraph 2.1 of the order. In paragraph 1 of the answering affidavit, the first respondent stated:

"I am an adult male businessman, a chairperson of the concerned group of Kempton Park Taxi Association with its office at Corner PRETORIA ROAD TAXI RANK OFFICE, KEMPTON PARK".

[20] The alleged admission of contravention of the order should be seen in the context of what is stated in paragraph 34 to 36 of the answering affidavit. The paragraphs are quoted in paragraph 10 of this judgment. Clearly, the admission is not unequivocal. Secondly, it must be seen in the context of the history of the dispute between the parties as outlined in paragraphs 4 to 6 of this judgment. I am therefore not satisfied that the necessary prerequisites for contempt of court and committal, have been established.

[21] Consequently the application is hereby dismissed with costs.


M F LEGODI
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JUDGMENT HANDED DOWN ON:**03 MARCH 2015**
19 MARCH 2015