

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG: PRETORIA**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

17/7/2015
DATE


SIGNATURE

CASE NO: 72263/2012

In the matter between:

THE ROAD FREIGHT ASSOCIATION

APPLICANT

and

CHIEF FIRE OFFICER EMAKHAZENI

1ST RESPONDENT

EMAKHAZENI MUNICIPAL FIRE

EMERGENCY SERVICES (PTY) LTD

2ND RESPONDENT

EMAKHAZENI LOCAL MUNICIPALITY

3RD RESPONDENT

JUDGEMENT

1. In this application the applicant seeks an order declaring a certain "practice" operated by the respondents to be unlawful; an interdict preventing and restraining the respondents from continuing the said practice; and for an order granting the applicant leave to institute a class action on behalf of its members and others against the respondents holding each of them jointly and severally liable for the return of any sums of money paid to either the second and/or third respondent or to their attorneys, in consequence of the said unlawful practice.
2. The first and third respondents initially opposed the application but withdrew their opposition shortly before the hearing of the matter. The second respondent never opposed the application.
3. The applicant also moved for a punitive order of costs against the respondents as well as against the attorneys firm De Klerk Marais as well as the attorney Mr de Klerk *de bonis propriis*. It was agreed at the hearing of the application that the issue of costs be postponed *sine die*.
4. The applicant is a non-profit company which was established in 1975 to support its members who are road freight service providers. It is a facilitating body that influences the state of industry, roads, the upkeep of road infrastructure, road safety, freight security, drivers' interests cross-border transport, development funding for emergency operators, health, education, the fuel price, law enforcement, labour relations and many other issues related to road freight transport. It has approximately 750 members who are small, medium and large

sized trucking companies. The membership comes from all sectors of the trucking industry that operate "for reward" as well as "private" carriers.

5. The first respondent is the Chief Fire Officer: Emakhazeni Local Municipality who is the person contemplated in section 5 of the Fire Brigade Services Act, Act 99 of 1987 ("the Act") and who is the administrative functionary that performs the functions detailed in section 8, 9 and 10 of the Act. The first respondent is the third respondent's Chief Fire Officer.
6. The second respondent is Emakhazeni Municipal Fire & Emergency Services (Pty)Ltd, a private company with its registered office in Pretoria and which has, or at all material times had, Mr V. de Klerk, Mr A. Baker and Mr A. Manabile as its directors.
7. The third respondent is the Emakhazeni Local Municipality situated in the town of Belfast, Mpumalanga.
8. It is at the outset necessary to point out that the second respondent is an independent private company which has nothing to do with the third respondent as municipality. In fact, in terms of section 11 (2) (c) of the Companies Act, Act 71 of 2008, it is unlawful for a private company to make use of a name that implies or suggests or may reasonably mislead a person to believe incorrectly, that it is a municipal entity or that it is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any government or administration or any department of such a government or administration.

9. The present application resulted from numerous complaints from applicant's members to it resulting from what they perceived to be unnecessary, wrong and unlawful conduct by the third respondent as municipality. The applicant investigated these complaints and unravelled what the applicant referred to as a "practice", *i.e.*, a *modus operandi* perpetrated by the second respondent, as private company, and the third respondent, as municipality, which was unlawful and which also constituted a fraud perpetrated upon the applicant's members.
10. According to the evidence put forward by the applicant the practice perpetrated by the respondents, of which the second respondent was the main *dramatus persona*, constituted a fraudulent deception of the public and more particularly the members of the applicant. This was done by the second respondent masquerading as a municipality, or a section of the municipality, exercising statutory powers reserved for a municipality by the Act, and by performing bogus "emergency services" and then coercively exacting payment for such "services" allegedly on behalf of the third respondent as municipality.
11. Before briefly outlining the facts giving rise to the present application it is necessary to note that according to the evidence this particular unlawful practice that forms the subject matter of this particular application, has begun to crop up in other local municipalities as well.
12. As stated before the present application was launched in response to complaints regarding a practice adopted by the respondents in the Belfast area. It may be briefly summarised as follows: It often happens that at night, after driving long

distances, the trucks of the members of the applicant would park off the shoulder of the road or in open areas or at well illuminated parking areas near toll plaza's for an hour or two to enable the driver to rest before continuing with his journey. Employees of the second respondent, falsely claiming to be municipal officials working for the third respondent's fire brigade service, would then approach these trucks, wake up the driver and make as if there existed an emergency situation. They would then begin performing bogus "emergency services" which included giving the driver an alleged "medical examination", surrounding the truck with all sorts of paraphernalia, cordoning off the area, and generally creating the impression that a necessary emergency service needed to be performed. After a while the driver was allowed to proceed on his way.

13. In the days to follow the second respondent would then send an invoice to the trucking company involved charging them for "emergency services" rendered and further claiming that they were authorised to do so by various statutory provisions, most notably sections 9 and 10 of the Act. It is necessary at this point to refer briefly to section 8, 9 and 10 of the Act.

"8 Powers of members of service

(1) A member of a service of a controlling authority, including a chief fire officer, may, whenever he regards it necessary or expedient in order to perform his functions, perform any act, and may also-

- (a) close any road or street;
- (b) enter or break and enter any premises;
- (c) damage, destroy or pull down any property;
- (d) forcibly remove or cause to be removed from the scene any person who is in danger or who obstructs that member in the performance of his duties; and

- (e) take material or any object from any person: Provided that the owner of the material or object so taken shall be compensated therefor by the controlling authority concerned to an amount agreed upon by the controlling authority and the owner, or in the absence of such agreement, an amount determined by arbitration in accordance with the provisions of the Arbitration Act, 1965 (Act 42 of 1965).

(2) A member of a service of a controlling authority, including a chief fire officer, may, whenever he regards it necessary in order to perform his functions, order any inhabitant of the Republic who is not younger than 16 years and not older than 60 years to assist him in the performance of his functions on any particular occasion.

Salvaging of movable property

9(1) A chief fire officer may in the performance of his functions salvage, or remove and place in safe custody, any movable property which in his opinion is in danger.

(2) Any costs incurred by or at the request of a chief fire officer for the purposes contemplated in subsection (1), may be recovered from the owner or possessor of the property in question, and the controlling authority concerned has a lien on that property for the payment of those costs.

(3) If the costs referred to in subsection (2) are not paid within 30 days, or such longer period as may be determined by the controlling authority concerned, after that authority-

- (a) served a written request for payment thereof on the owner or possessor in question; or

- (b) if that owner or possessor cannot be traced, remitted such request by registered post to his last known address or published such request in both official languages in a newspaper circulated in the area concerned,

the controlling authority may sell the property in question by public auction and shall apply the proceeds thereof for the defrayal of those costs, while any balance shall on application be reimbursed to the owner or possessor in question.

(4) If no application for reimbursement of the balance is made within one year after the public auction referred to in subsection (3), that balance shall be forfeited to the controlling authority concerned.

(5) A certificate purporting to be signed by a chief fire officer and in which it is certified that the costs specified therein have been incurred for the purposes contemplated in subsection (1) shall on production thereof in a court of law be prima facie proof of the costs referred to in subsection (2).

(6) If the owner or possessor of movable property which in terms of subsection (1) has been salvaged or removed does not claim such property within 30 days after the controlling authority has made known in both official languages in a newspaper circulated in the area concerned that such property has been placed in safe custody, that controlling authority may sell the property concerned by public auction and apply the proceeds thereof for the defrayal of any costs incurred while any balance shall be employed by the controlling authority in respect of the maintenance of its service.

10 Fees

(1) A controlling authority may, subject to any condition contemplated in section 11 (2) (a), determine the fees payable by a person on whose behalf the service of the controlling authority is applied-

- (a) for the attendance of the service;
- (b) for the use of the service and equipment; or
- (c) for any material consumed.

(2) A person on whose behalf, in the opinion of the chief fire officer concerned, a service of a controlling authority has been employed, may in writing be assessed by that chief fire officer for the payment of the fees referred to in subsection (1) or any portion thereof.

(3) Any person who feels aggrieved by an assessment contemplated in subsection (2) may within 14 days after receipt of that assessment object in writing against that assessment as such or the amount thereof to the controlling authority concerned.

(4) As soon as an objection contemplated in subsection (3) is received the chief executive officer of the controlling authority concerned shall without delay obtain written comment thereon from the chief fire officer and submit it together with the objection to the controlling authority, which may confirm, alter or revoke the assessment.

(5) A certificate purporting to be signed by a chief fire officer and in which it is certified that the assessment specified therein was made under subsection (2), shall on production thereof in a court of law be prima facie proof of the amount payable by the person mentioned therein."

14. It is thus clear that the second respondent by its actions assumed the identity of municipal officers acting within the course and scope of their duties and with the required authorisation. The vehicles used by the second respondent presented with a coat of arms and the name of the second respondent, however, without an indication that it was a private company and thus creating the impression that it was indeed an official action by the municipality in question. The paraphernalia used in the process and the manner in which the operation was performed, added to this perception.
15. The applicant received hundreds if not thousands of complaints from its members. The gist of their complaint was that this practice adopted by the respondents is an

improper use of statutory power designed to extort money from them. Apart from the illegality of the actions of those concerned, the common thread running through all the instances was that none of the trucks actually experienced an emergency or caused an emergency situation and that none of the drivers required medical care of any nature whatsoever.

16. Another communality of the incidents was the fact that apart from amounts ranging from between R5 000.00 to R10 000,00 being claimed from the trucking company concerned, alleged photographs of the scene were presented which were not of the particular scene and which were in fact the same photographs used in every case. On the evidence it is clear that these nightly operations was in fact an unlawful practice perpetrated by the respondents and more particularly by the second respondent as the central figure.
17. After the applicant launched the present application only the first and third respondents opposed the application but the second respondent did not do so. The applicant found this strange as it was, after all, the second respondent who was central to the manner in which the practice was implemented. But what was even more disturbing was that the attorneys firm De Klerk Marais, and more particularly Mr de Klerk, acted for the first and third respondents in opposing the application and filing the opposing affidavit. I shall return to this issue below.
18. In the answering affidavit the third respondent claimed that the second respondent is merely a private company that performs "administrative functions to the municipality". They denied that the second respondent performed the on-site

emergency services that the trucking companies were billed for and in fact claimed that the second respondent never even went out to the so-called emergency scenes.

19. Further investigations by the applicant showed, however, that the invoices purportedly sent to the trucking companies by the third respondent, were not sent by the third respondent at all but by the second respondent. The invoices also required that the money invoiced be paid directly into a bank account of the second respondent. Although the second respondent was never entitled to receive money or to receive money on behalf of the third respondent (even if a genuine emergency situation had existed), and although the second respondent was not entitled to render any service under the Act, the invoices created the impression that the second respondent was entitled to receive the money in terms of the provisions of the Act. This was thus another fraud perpetrated against the trucking companies as the second respondent was clearly masquerading as the municipality. It is therefore not surprising that the letterheads of the second respondent used for the correspondence, omitted the suffix (Pty)Ltd after its name. The clear inference is that this was done to deceive members of the public, including members of the applicant, into thinking that the letter came from a municipal department rather than from a private company. The second respondent was clearly unlawfully extorting money from the trucking companies.
20. The so-called emergency services were not, despite what the third respondent alleged in the answering affidavit, performed by the third respondent's Fire Brigade service. They were performed by the second respondent. In subsequent affidavits,

and more particularly by the first respondent, it was denied that he, as the chief fire officer, at any time acted in terms of the Act and more particularly section 10 thereof.

21. Investigations by the applicant also discovered that the attorney, Mr de Klerk, issued summons against the trucking companies, apparently on behalf of the third respondent, for payment of these invoices, whilst Mr de Klerk was also at all relevant times a director of the second respondent. Another attorney of the firm, Mr A. Manabile was also at one point a director of the second respondent.
22. The detail of what the applicant uncovered was described in a very comprehensive supplementary founding affidavit. The facts as they unfolded in no way resembled the facts disclosed in the answering affidavit filed by de Klerk Marais on behalf of the first and third respondents. Instead, it appeared that an elaborate scheme was created by second respondent to improperly and unlawfully create the impression that the third respondent has been exercising a statutory power under the Act entitling it to payment for a necessary emergency service performed. I have already referred to the basic features of this scheme or practice and it is not necessary to refer to the report that the applicant filed in this regard.
23. As could be expected, the applicant's investigations gained momentum despite the third respondent's two interlocutory applications designed to try and keep the supplementary founding affidavit out of court. These attempts failed. The supplementary answering affidavit filed in response to the supplementary founding

affidavit was, however, riddled with inconsistencies and was exposed as a fabrication in the replying affidavit filed by the applicant.

24. Is not necessary to refer to the lies and inconsistencies which appears from the papers as a whole. I shall merely refer to a few salient features. It appeared that the incident reports and the certificates in respect of the separate incidents were not genuine and appeared, instead, simply to be generic blueprints that were reproduced over and over again. This supports the evidence that they were never proper emergency scenes and that no proper inspections had been done at those scenes but had indeed been a hoax. Scenes were staged and documents forged as part of the fraudulent scheme to exact money from trucking companies. The third respondent attempted to rebut this evidence but could not do so despite being called upon to present the relevant documentation in order to do so.
25. From affidavits filed subsequently on behalf of the first and third respondents it appears that earlier affidavits were drafted on their behalf by Mr de Klerk and that they had signed same without reading it before doing so. They also referred to facts and averments that were not within their knowledge and others which they denied. They accused Mr de Klerk of being the true architect of the various untrue versions. As far as the respective versions of the first and third respondent are concerned, I need at this point to merely make two remarks. First of all, I agree with the submission on behalf of the applicant that it is hardly likely that the aforesaid unlawful and illegal practice could have been perpetrated without the assistance of a person or persons in the employ of the third respondent. Secondly, even if the first respondent and the other high-ranking officials of the third

respondent had to a degree been duped by Mr de Klerk, it is difficult to imagine how this could have been done so successfully, and done to such a late stage of the proceedings, if they had paid but the slightest of attention to the duties and responsibilities attached to their posts.

26. On 11 July 2014 the court granted an interim anti-dissipation order in respect of a bank account of the attorneys firm and three bank accounts of the second respondent. On the return day the rule *nisi* was confirmed. The judgment is reported as Road Freight Association v De Klerk Marais Inc & Others [2014] ZAGPPHC 770 (10 October 2014).
27. In summary, apart from the fact that no emergency situation ever existed and was merely the front under which the second respondent acted during its nightly escapades, it could also not provide such services with or without the permission of the first or the second respondents. Its actions were unlawful and in contravention of the provisions of the Act. The manner in which payment for the "service" was exacted from the members of the applicant was similarly fraudulent and in contravention of the relevant statutory provisions.
28. In paragraph 3 of the amended Notice of Motion the applicant asks for leave to institute a class action on behalf of its members against the first, second and third respondents holding each of them jointly and severally liable for the return of any sums of money paid to either the second or third respondents or to the attorneys, De Klerk Marais Inc, in consequence of the unlawful practice referred to above and in the founding affidavit. In support for this relief I was referred to a number of

decisions including the one of J.P.H. Pretorius and another v Transnet Second Defined Benefit Fund and others, (GDP) Case nr. 25095/13 (31/7/14) per Makgoba J.

29. The causes of action envisaged for the refund of the money due to the members of the applicant are that of fraud and one or more of the *condictiones*. In my view these causes of action would provide members of the public, such as is the case *in casu*, with a claim for a refund in circumstances where money was unlawfully exacted under an impermissible exercise of public power. I am satisfied that such a claim would serve to protect the constitutional rights of the applicant's members for the reason that any exercise of public power, including a statutory power, is always a constitutional matter as is the exercising of any power by or on behalf of an organ of state. To that end the applicant has standing under section 38 (e) of the Constitution.
30. A court ought to certify a class action if it is in the interest of justice to do so. In the instant case I am satisfied that such certification would be in the interest of justice. The class for which the applicant intends to act, has identifiable members and the causes of action referred to above raise triable issues. The issues of law and fact which might arise appear to be common. The applicant is the most suitable class representative.
31. At this point it is unclear which of the members of the applicant have paid monies to the second respondent and/or the third respondent. These factors will become apparent through the discovery process when the funds collected by these entities

are traced. As far as the quantum of the claim is concerned, the amount cannot at this stage be determined. Due to the peculiar circumstances of this case I am satisfied that an order similar to the one made by Makgoba J in the Pretorius matter should be made.

32. I have already mentioned that the issue of the costs of this application shall be postponed *sine die*.

33. In the result the following order is made:

1. Regarding the respondents' "practice" (described more fully in the founding affidavit) of invoking the provisions of sections 1, 9 and 10 of the Fire Brigade Services Act, Act 99 of 1987 of charging a fee to trucking companies for the purported performance of "primary incident management services" and "scene safety services" in the manner described and in the circumstances articulated in the four illustrative case studies (described more fully in the founding affidavit):

1.1 it is declared that such "practice" is unlawful; and

1.2 the respondents are interdicted from continuing the said "practice".

2. Subject to paragraphs 3 and 4 below, the applicant is hereby granted leave to institute a class action under section 38 (c) and/or (e) of the Constitution of the Republic of South Africa on behalf of its members against the first, second and third respondents holding each of them jointly and severally liable for the return of any sums of money paid to either the second or third respondent or to their attorneys, De Klerk Marais Inc,

in consequence of the unlawful "practice" referred to in the previous paragraph and in the founding affidavit.

3. Save for the applicant's members who elect to "opt out" of the class action certified in paragraph 2 above, the applicant is hereby permitted to act as the representative of all of its members.

4. The applicant is also permitted to act as the representative of all trucking companies who are not its members but who nevertheless elect to "opt in" to the class action certified in paragraph 2 above.

5. The second and third respondents are hereby directed to furnish the applicant's legal representative within 30 days of date of this order the full details of all amounts paid to them by trucking companies pursuant to the aforesaid "practice" which details must include the name of each and every trucking company that paid money, the amount paid by each trucking company, the bank account into which such money was paid, the date upon which such money was paid, an indication whether such payment was made pursuant to an invoice by the second and/or third respondents or a letter of demand issued by either of them or their attorneys or consequent upon the institution of legal proceedings brought by their attorneys on their behalf.

6. The applicant is ordered to give notice to its members by e-mail and/or e-mailed publication in a newsletter distributed to all of its members of the proposed class action certified in paragraph 2 above, advising them that they may elect to "opt out" of the said class action.

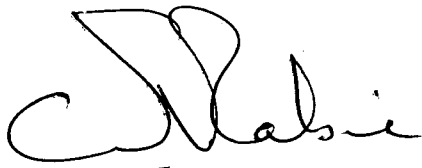
7. The applicant is ordered to give notice to the broader class of trucking companies which paid money to either the second or third respondents or their attorneys pursuant to the aforesaid unlawful "practice" so that they may elect to "opt in" to the aforesaid class action, such notice to be given by publication once in the Sunday Times newspaper in English and once in the Rapport newspaper in Afrikaans and once in the City Press newspaper in Xhosa and Zulu and once in the Soweton newspaper in Setswana, Sesotho and Zulu.

8. Publication of the aforesaid class action as referred to in paragraphs 6 and 7 above shall include a summary of the relief sought against the respondents/defendants and others together with full details of the applicant's attorneys of record

9. The applicant is ordered to file an affidavit with the Court within 30 days of receiving the details referred to in paragraph 5 above as furnished by the second and third respondents and their attorneys, confirming to the Court that there has been compliance by the respondents and their attorneys and also that there has been compliance with the publication requirements referred to in paragraphs 6, 7 and 8 above.

10. The applicant is ordered to institute the class action certified in paragraph 2 above within 30 days from the date of filing the affidavits referred to in paragraph 9 above.

11. The issue of costs is postponed sine die.

A handwritten signature in black ink, appearing to read 'C.P. Rabie', written above a horizontal line.

C.P. RABIE

JUDGE OF THE HIGH COURT