

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1339/2014

In the matter between:

QIBING TRANSPORT ASSOCIATION

1st Applicant

A.T. MPITI

2nd Applicant

T.G. LELALA

3rd Applicant

M.L. MOKOENA

4th Applicant

T.W. LIPHOLO

6th Applicant

M.E. LETELE

7th Applicant

N.E. RAKHOSI

8th Applicant

P.A. SHALE

9th Applicant

L.J. MPHATSE

9th Applicant

B.M. KHAMALI

10th Applicant

T.P. PHOMANE

11th Applicant

M.E. MOKUBELO

12th Applicant

M.C. LELALA

13th Applicant

O.P. PHALATSE

14th Applicant

and

**MEC FOR POLICE, ROADS AND TRANSPORT
FREE STATE PROVINCE)**

1st Respondent

CAPTAIN T. MOKHETHI

2nd Respondent

T.J. PHAHLO

3rd Respondent

**FREE STATE PROVINCIAL REGULATORY
ENTITY**

4th Respondent

MAHANAPUSO TAXI COMPANY LIMITED

5th Respondent

G. GUAI

6th Respondent

M.K. TEELE

7th Respondent

M.G. KHUTO

8th Respondent

G.P. LENCOE

9th Respondent

B.P. KORIBE

10th Respondent

D.E. RASEBOKE

11th Respondent

M.T. MOTSIE

12th Respondent

M.E. TSEKELO

13th Respondent

M.M. MALEFANE

14th Respondent

M.A. MPAPA

15th Respondent

M.I. MAMONE

16th Respondent

M. MOTSETSE

17th Respondent

S.S. MOLELEKOA

18th Respondent

F.J. MATOWANE

19th Respondent

K.K. MOLETE

20th Respondent

T.H. LEPOJA

21st Respondent

M.K. MORAKE

22nd Respondent

M.E. SILO

23rd Respondent

T.J. SETENE

24th Respondent

M.J. MOKONE

25th Respondent

M.J. MATLOTLO

26th Respondent

K.N. MOAHLODI27th Respondent**H.E. MANGESI**28th Respondent**I. NDLOVU**29th Respondent**M.D. LETEANE**30th Respondent**CORAM:**

LEKALE, J

HEARD ON:

27 MARCH 2014

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

17 APRIL 2014

INTRODUCTION AND BACKGROUND

[1] This is an opposed urgent motion for an order in the following terms:

- “1. Condoning the Applicants non-compliance with the rules relating to service, time period and permitting this application to be heard as one of urgency in terms of Rule 6 (12) of the uniform rules of the above Honourable Court.
2. Interdicting and restraining the Sixth to Thirtieth Respondents from operating the route from:-

- 2.1 Naledi Transport Center which is situated in Wepener, Bloemfontein, Welkom, Johannesburg, Klerksdorp, Carltonville, Westonaria and Rustenburg;
 - 2.2 Loading commuters at Naledi Transport Center;
 - 2.3 Interfering and disrupting the members of the first Applicants minibus taxi type operation at Naledi Transport Center.
3. Ordering the First and Second Respondent to release the following minibus taxis to the Second to Fourteenth Applicants.
 - 3.1 Nissan E20 with registration letters and numbers D[...]
 - 3.2 Toyota Quantum with registration letters and numbers M[...]
 - 3.3 Nissan E20 with registration letters and numbers C[...]
 - 3.4 Nissan E20 with registration letters and numbers D[...]
 - 3.5 Amandla with registration letters and numbers D[...]
 - 3.6 Amandla with registration letters and numbers D[...]
 - 3.7 Inyathi with registration letters and numbers F[...]
 - 3.8 Toyota Quantum with registration letters and numbers D[...]
 - 3.9 Toyota Quantum with registration letters and numbers F[...]
 - 3.10 Toyota Quantum with registration letters and numbers F[...]

- 3.11 Toyota Quantum with registration letters and numbers D[...]
- 3.12 Jim Bei with registration letters and numbers D[...]
- 3.13 Toyota Siyaya with registration letters and numbers D[...]
- 3.14 Toyota Siyaya with registration letters and numbers D[...]

- 4. That the service of the order be effected through:
 - 4.1 Attaching a copy thereof onto a fixed structure at Naledi Transport Center;
 - 4.2 Service of the South African Police Service, Wepener Police Station.
- 5. The South African Police Service, Wepener Police branch is herewith requested to maintain police presence at Naledi Transport Center to ensure proper enforcement of the order.
- 6. The First, Second, Third, Fifth to Thirtieth Respondents be ordered to pay costs of this application jointly and severally, the one paying the other to be absolved."

[2] The applicants are the Qibing Transport Association, a voluntary association of taxi operators together with its 13 members. The first respondent, on his part, is the Member of the Executive Council of the Free State Provincial Government responsible for police, roads and transport while the third and fourth respondents are officials attached to his department in

various capacities. The second respondent is a member of the South African Police Services (SAPS) holding the rank of a captain and placed as an operational commander for border police in the Free State. Fifth to and including thirtieth respondents are Mahanapuso Taxi Company, a voluntary association of long distance taxi operators together with 25 of its members.

- [3] Initially members of the fifth respondent were involved in operating long distance minibus taxi type transport in Wepener until they were joined in that activity by members of the first applicant. In order to obviate conflicts in that sector of public transport industry temporary permits or ad hoc authorisations lasting for three months at any given time were regularly issued by the fourth respondent to members of the first applicant and those of the fifth respondent.
- [4] Feeling aggrieved by the participation of members of the fifth respondent in the relevant sector, on 28 February 2014 the first applicant eventually secured a ruling from the Transport Appeal Tribunal (the TAT) which effectively set aside temporary operating licences issued to sixth to and including sixteenth respondents.
- [5] Armed with the decision of the TAT on 7 March 2014 the executive committee of the first applicant approached the drivers of sixth to and including sixteenth respondents' taxis at

the Naledi Transport Centre (the taxi rank) at Wepener and advised them accordingly. After a number of interactions between the applicants, members of the SAPS and sixth to and including sixteenth respondents a meeting was held in vain at the offices of the first respondent between the executive committee of the first applicant and the executive committee of the fifth respondent, among others under the chairmanship of the third respondent on 10 March 2014.

- [6] On 13 and 14 March 2014 disturbances flared up at the taxi rank which culminated in 14 minibus type taxis, belonging to the members of the first applicant, being taken by the police. The applicants, eventually, launched the present proceedings on the basis that the taxis in question were unlawfully impounded by the police patrol squad under the supervision of the second respondent and that members of fifth respondent are engaged in operating along the route from Naledi Transport Centre in Wepener to Welkom, Bloemfontein, Johannesburg, Carletonville, Rustenburg and back illegally and, thus, effectively load commuters from Naledi Transport Centre illegally.
- [7] First to and including fourth respondents (the law enforcing respondents) oppose the motion on effectively the grounds that the same is afflicted by non-joinder in that the applicants have failed to join the Minister of Safety and Security as the political head of SAPS and that the taxis involved were, in fact, not

impounded but seized by the police in terms of the provisions of section 20 of the Criminal Procedure Act No 51 of 1977 (the CPA). The fifth to and including thirtieth respondents (the taxi operating respondents) oppose the application firstly on the ground that it is not urgent and lastly on the basis that they are entitled to operate the routes along which they are operating.

DISPUTE

- [8] *Ante omnia* the applicants and the taxi operating respondents are at variance on whether or not the matter is as urgent as to warrant the attention of the court out of turn with Mr Burger, for the respondent taxi operators and their association, maintaining that all the grounds advanced by the applicants to show urgency fall short of the threshold.
- [9] On the part of the law enforcing respondents Mr Wessels, effectively, raises non-joinder of the Minister of Safety and Security *in limine* on the basis that in as far as the second respondent is a member of the SAPS and is effectively cited in his capacity as such, the former has direct and substantial interest in the matter and, in law, should and must have been joined as the respondent.
- [10] The parties are, further, in dispute over whether or not the 14 minibus type taxis belonging to second to and including 14 applicants were impounded unlawfully by the police patrol

squad under the supervision of the second respondent with Mr Wessels emphasising that such vehicles were, in fact, seized by the SAPS in terms of the CPA.

- [11] On the merits the dispute between the applicants and the respondent taxi operators is effectively limited to the question as to whether or not the applicants have a clear and exclusive right to the route in question regard being had to the relief they seek as well as the authorisations issued to all the parties involved.

CONTENTIONS FOR THE PARTIES

- [12] Mr Mashavha for the applicants submits that it is clear from the papers filed for and on behalf of the applicants that the matter is urgent as the thirteen applicants are unable to earn a living due to the unlawful impoundment of their vehicles as well as the unlawful interference with their right to trade along the relevant route by the respondents. It is further contended for the applicants that the application is not afflicted by non-joinder because the first respondent has been cited and it is clear from his title that he is responsible for, *inter alia*, police in the Free State. The applicants' case is further that seizure can only take place if there are criminal proceedings pending and in the present matter no such proceedings have been instituted. According to Mr Mashavha the licences of respondents seven to and including fourteen have been set aside by the TAT and,

as such, they do not have any right to operate the route in question. The fifteenth, seventeenth, eighteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fifth, twenty-sixth, twenty-eighth and thirtieth respondents simply do not have valid permits and/or licences to operate on the relevant route.

- [13] Mr Wessels is at pains to explain, *inter alia*, that the second respondent does not fall under the first respondent and that, if he allegedly acted in his capacity as a policeman, he represented or acted for and on behalf of the Minister of Safety and Security who should have been joined. The first respondent is not implicated by the applicants in their papers as far as the vehicles are concerned insofar as no allegation whatsoever is made that the alleged impoundment was carried out on his instructions or with his approval or consent. In Mr Wessels' view the second respondent is not in the position to comply with any order directing him to release the relevant vehicles because on his deposition he disputes that he is in control or possession of the same. The applicants have an alternative remedy in the form of section 31 of CPA to obtain the release of their respective vehicles. A special costs order is warranted insofar as the application against the law enforcing respondents is concerned regard being had to the fact that public funds are involved in opposing the matter.

[14] Mr Burger points out, *inter alia*, that the prohibitory interdict sought against the respondent taxi operators is vaguely couched and cannot be granted as the route referred to does not exist. Not even the applicants are authorised to operate such a route. All his clients are clearly in possession of authorisations to operate from Wepener to various destinations and back and not from the Naledi Transport Centre. The same applies to the applicants according to Mr Burger. The application against his clients is not urgent when the grounds advanced in support of urgency are carefully scrutinised.

APPLICABLE PRINCIPLES

[15] It is correct, as Mr Burger effectively submits, that in order for an urgent applicant to forge its own rules with regard to form and service subject to the court's control, it has to set out sufficient grounds which, in its view, render the matter urgent. Such grounds constitute a ticket which entitles such an applicant to board the bus ahead of other litigants so as to engage the court out of turn and thus jump the queue.

(See: **Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership and Others** 2006 (4) SA 292 (SCA).)

- [16] Mr Wessels correctly submits that a party which has direct and substantial interest in the result of litigation must, in law, be joined in the proceedings.

(See: **Standard Bank of South Africa (Pty) Ltd v Swartland Municipality** 2011 (5) SA 257 (SCA) at par [10].)

- [17] It is, further, correct as pointed out by Mr Mashavha that the operation of route- based public transport without an operating licence or permit is prohibited by the National Land Transport Act No 5 of 2009 (the NLTA).

(See: Section 50 of Act No 5 of 2009.)

- [18] The parties are correctly in agreement that in order for the applicants to succeed in their claim for a final interdict they need to establish, *inter alia*, a clear right to the route in question as well as absence of alternative suitable remedy.

(See: **Setlogelo v Setlogelo** 1914 AD 221.)

- [19] As Mr Wessels correctly reiterates, the political responsibility for policing resides with the Minister of Safety and Security as member of cabinet and not with the first respondent as member of executive council responsible for, inter alia, police in the Free State Province.

(See: Section 206(1) of the Constitution of the Republic of South Africa 1996.)

- [20] It is further correct, as Mr Wessels reminds the court, that according to the respondent friendly test which applies in the event of the existence of genuine dispute of fact on papers, a final order sought may be granted only if common cause facts and those facts alleged by the respondent justify such a relief or if the respondent's version is so farfetched or palpably implausible that the court is justified in rejecting it merely on papers.

(See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634H – 635C.)

- [21] It is further true, as submitted for the law enforcing respondents, that the State may, through the police and under certain circumstances, seize any article concerned in or reasonably believed to be concerned in the commission or suspected commission of an offence without a search warrant.

(See: Sections 20 and 22(b) of the CPA.)

- [22] It is, furthermore, correct that the State is obliged to return a seized article to a person from whom it was seized if such a person may lawfully possess the same and such article is not

required at the trial or no criminal proceedings are instituted in connection therewith.

(See: Section 31 of the CPA.)

- [23] The courts do not award attorney and client costs lightly and do so as an exception rather than a rule. The conduct of a party in proceeding with litigation may give cause to such punitive costs order.

(See: Herold v Sinclair and Others 1954 (2) SA 531 (A).)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [24] It is clear from common cause facts that the 13 members of the first applicant are currently without their minibus type taxis. It is, further, apparent from depositions on behalf of the applicant that the respondent taxi operators are allegedly operating taxi businesses in contravention of the provisions of section 50 of the NLTA. In my view the foregoing facts and allegations constitute the necessary basis for entertaining the motion as a matter of urgency.

- [25] The applicants did not gainsay the respondents' respective versions insofar as they did not file any replies thereto. It is, as such, not in dispute that the second respondent is employed by the South African Police Service and that he has, as his political

head, the Minister of Safety and Security. The said Minister has direct and substantial interest in the matter and should, as such, have been joined as a respondent.

[26] It is further correct, as submitted for the law enforcement respondents, that the police are, in law, entitled to seize articles engaged in the commission of crime. It is apparent *ex facie* the deposition of the second respondent that the minibus type taxis were left in the road and, as such, obstructed traffic. It is further probable, from the opposing papers, that the applicants have a suitable alternative to the present proceedings in the form of the relief which section 31 of the CPA provides.

[27] The applicants identified the route in respect of which they seek a restraining order against the taxi operating respondents as being from **“Naledi Transport Center which is situated in Wepener, Bloemfontein, Welkom, Johannesburg, Klerksdorp, Carletonville, Westonaria and Rustenburg”**. In order to secure such an order they need to establish a clear right to such a route. As the respondents correctly and effectively contend, such a route, if it exists, would commence at “Naledi Transport Center” in Wepener, as a starting point, and end at Rustenburg with Bloemfontein, Welkom, Johannesburg, Klerksdorp, Carletonville and Westonaria as detours or loading and off-loading stops along the route.

[28] It is clear *ex facie* authorisations presented by the applicants as exhibits that they have the right to convey passengers on trips from the taxi rank at the corner of Church and De Beer Streets, Wepener as a point of departure to specific taxi ranks in Welkom via specific taxi ranks in, inter alia, Bloemfontein and back to Wepener where their vehicles are to be stationed as well as from Wepener to Johannesburg and back. From Wepener to Klerksdorp and back. From Wepener to Carletonville and back and from Wepener to Westonaria and back as well as from Wepener to Rustenburg and back all via various taxi ranks along the route on each trip. The same applies to the taxi operating respondents with valid temporary authorisations. They all do not have the right to operate along the route identified in the notice of motion by the applicants as the one sought to be protected.

[29] The applicants, thus, fail to cross the first hurdle in order to secure the relief they seek.

COSTS

[30] The general practice with regard to costs is that the successful party is entitled to its costs. Mr Wessels for the law enforcing respondents effectively notified the applicants of his clients' intention to seek punitive costs against them insofar as he submitted abbreviated heads of argument to, *inter alia*, that effect. He submits that the application against the relevant

respondents is so devoid of merits that it warrants a special costs order regard being had to the fact that they are forced to employ public funds to oppose the motion.

[31] I am persuaded that the motion against first to and including fourth respondents is without merit and that, had the applicants not been litigation happy, they would have established the correct facts and not dragged them to court. Indeed public funds are involved.

ORDER

[32] In the result the application is dismissed with costs subject to what is set out *infra*.

[33] The applicants shall pay the costs of the first, second, third and fourth respondents on the scale as between attorney and client.

L. J. LEKALE, J

On behalf of applicants:

Adv M J Mashavha

Instructed by:

Hill, McHardy & Herbst Inc
BLOEMFONTEIN

On behalf of 1st to 4th respondents:

Adv M H Wessels SC

Instructed by:

State Attorney
BLOEMFONTEIN

On behalf of 5th to 30th respondents: Adv A H Burger SC

Instructed by:

Phatshoane Henney
BLOEMFONTEIN

/spieterse