

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5090/2012

In the matter between:

THE PROVINCIAL COMMISSIONER:
SOUTH AFRICAN POLICE SERVICE

Applicant

versus

POWER S TSHABALALA

1st Respondent

MAHUNGRA CAR WASH

2nd Respondent

HEARD ON: 25 APRIL 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 9 MAY 2013

INTRODUCTION AND BACKGROUND:

[1] On 15 December 2012 the applicant caused a rule *nisi* to issue on an urgent basis calling upon the respondents to show cause, if any, why, *inter alia*, the following orders should not be made final:

“2.1 The respondents are prohibited from hosting or allowing any event or activity as defined in the Safety at Sports and Recreational Events Act No 2 of 2012 at the venue of Mahungra Car Wash, without being in

possession of the required certificate in terms of the said Act.

2.2 The respondents are ordered to pay the costs of the application.

3. Paragraph 2.1 will serve as an interim relief with immediate effect pending final determination of the application.”

[2] This is the extended return day and the respondents have since filed answering papers effectively opposing the application on mainly the ground that it was not necessary for the applicant to approach the court for the said order, because the first respondent advised the officials of the applicant on 14 December 2012 that the proposed event had been cancelled.

[3] The applicant, on his part, delivered replying papers which effectively dispute that the respondents advised him, through his officials, that the event was cancelled and, further, maintains that he, in any event, was entitled to seek the intervention of the court in the circumstances of the matter.

[4] The applicant is the Provincial Commissioner of the South African Police Service in the Free State and acts in his capacity as such.

[5] The first respondent is the sole member of a close corporation which owns the second respondent.

- [6] On 7 December 2012 the first respondent submitted an application for risk categorisation in terms of the Safety at Sports and Recreational Events Act (SASREA) in respect of a recreational event scheduled to take place from 13 to and including 22 December 2012 at the business premises of the second respondent so as to coincide with the national elective conference of the African National Congress (ANC).
- [7] On 13 December 2012 the applicant was advised by the Events Safety and Security Planning Committee (the ESSPC) that its meeting of the same date agreed to categorise the event as medium risk.
- [8] The applicant's co-ordinator was, however, not satisfied with the assessment and arranged another meeting for 14 December 2012, which resolved to recommend that the event be graded a high risk.
- [9] Thereafter and on the same day the applicant submitted an urgent recommendation to the National Commissioner of the South African Police Service for an approval of an urgent application to this court to stop the proposed event.
- [10] The respondents were notified of the categorisation of the event as high risk on 15 December 2012 at 11h45 when the relevant notice was served on the first respondent. The court order was, on its part, granted a few hours thereafter around 15h00.

ISSUE IN DISPUTE

[11] The parties are, effectively, in dispute over whether or not it was necessary for the applicant to secure the order in question regard being had to the respondents' assertion that the event had already been cancelled by that time and the applicant's officials had been informed accordingly.

THE APPLICANT'S CONTENTIONS

[12] Mr Rautenbach contends, on behalf of the applicant, that it is not probable that the first respondent advised the applicant's officials that the event was cancelled and, if he had done so, the meeting of 14 December 2012 would, most probably, not have proceeded.

[13] It is, further, submitted for the applicant that, even if the first respondent had made such a disclosure, the applicant was still, in the circumstances of the instant matter, entitled to approach the court regard being had to the nature of the risk involved and the fact that the respondents never, in the past, applied for risk categorisation.

THE RESPONDENTS' CONTENTIONS

[14] Mr Pienaar submits at length, for the respondents, that the applicant effectively relies on alleged reasonable apprehension of harm in support of the application insofar as

there is no evidence of any act of interference with his right to safeguard the safety of persons and property.

[15] It is, further, submitted for the respondents that, when the recommendation was made for approval of the present proceedings on 14 December 2012, there existed no such reasonable apprehension of harm on the part of the applicant because the respondents had not yet even been notified of the refusal of categorisation as at that stage.

[16] The interim interdict granted was not even supported by the material properly before the court according to Mr Pienaar.

[17] There exists a dispute of fact, which cannot be resolved on the papers, as to whether or not the first respondent advised the applicant's officials on 14 December 2012 that the event had been cancelled. The issue should, therefore, be decided in favour of the respondents in line with the respondent friendly test applicable in matters of the present nature.

APPLICABLE LEGAL PRINCIPLES

[18] The parties are correctly in agreement that the requirements for a right to claim a final interdict are as follows:

18.1 a clear right;

18.2 an act of interference with that right or a reasonable apprehension of harm to that right;

18.3 absence of any other satisfactory remedy to the applicant. (See **Setlogelo v Setlogelo** 1914 AD 221.)

[19] The test of apprehension of harm or interference is objective in the sense that the court determining the matter must decide whether or not there is any basis, on the facts before him, for the entertainment, by the applicant, of a reasonable apprehension. (See **Seligman Brothers v Gordon** 1931 OPD 164 and **Nestor and Others v Minister of Police and Others** 1984 (4) SA 230 (SWA) at 244.)

[20] The answer as to whether or not the fact that the respondent has given an undertaking not to interfere with the applicant's rights renders it unnecessary for the applicant to apply for an interdict depends on the facts of the case, with the ultimate question being whether or not there exists a reasonable apprehension of harm, on the part of the applicant, despite such an undertaking. (See **Mcilongo N.O. v Minister of Law and Order and Others** 1990 (4) SA 181 (ECD).)

ANALYSIS OF FACTS AND APPLICATION OF LEGAL PRINCIPLES

[21] It is common cause between the parties that, although the event in question was scheduled to take place from 13 December 2012 – 22 December 2012, it, in fact, did not take place at any stage before the order was secured.

- [22] The parties are, further, in agreement that the respondents committed no act of interference with the applicant's right to safeguard the physical wellbeing and safety of persons and property at any stage prior to the issue of the order in question.
- [23] It is, furthermore, not in dispute that after the notice declining to grade the event in question was served on the first respondent, nothing suggesting that the respondents were intent on hosting the event without such categorisation was exhibited by the respondents.
- [24] The applicant, effectively, contends in replying papers that the nature and extent of the alleged undertaking were such that it would not have been necessary for the applicant to approach the court for the order if such an undertaking was made. The determination of the existence of such an undertaking is, as such, essential in respect of the event of December 2012 on the applicant's version.
- [25] The question in the instant matter is, however, whether or not there exists a reasonable apprehension, on the part of the applicant, that the respondents will host or allow any recreational event or activity notwithstanding the absence of the relevant certificates in terms of SASREA when regard is had to the general nature of the order, which is not limited to the event scheduled for December 2012. The fact that an undertaking was made by the respondent is, in my view, one of the factors which may negate the existence of such an

apprehension on the part of the applicant. As the court pointed out in **Mcilongo N.O. v Minister of Law and Order and Others**, *supra*, at 186D – E such a fact is, however, not decisive of this issue.

- [26] The applicant, therefore, generally bears no particular duty to disprove the existence of such an undertaking in order to entertain a reasonable apprehension of harm. He only has to prove, on a balance of probabilities, the reasonable apprehension in question. His failure to move for referral of the issue to oral evidence is, thus, not *per se* fatal to his case.

- [27] There exists nothing, on the facts of the present matter, to form the basis for entertaining a reasonable apprehension that the respondents will interfere with the applicant's right by hosting events without complying with the prescripts of SASREA. On the contrary, the evidentiary material before me shows that the first respondent cancelled an order for alcoholic beverages intended for the event of December 2012 on the evening of 13 December 2012.

- [28] In their opposing papers the respondents, further, contend *in limine* that the applicant is guilty of non-joinder insofar as the holder of a valid liquor licence, who applied for a special licence to sell all kinds of liquor at the event in question, was not joined as a respondent. The point in question was, however, correctly not persisted in before me in heads of argument filed for the respondents and in oral submissions.

The point was, with respect, simply badly taken insofar as the said licence holder has no direct and substantial interest in the relief which the applicant seeks although he may have a commercial or economic interest in the matter. (See **Standard Bank of South Africa Ltd v Swartland Municipality** 2011 (5) SA 257 (SCA).)

COSTS

[29] The respondents are entitled to their costs in line with applicable practice regarding costs.

ORDER

[30] The application is, therefore, dismissed.

[31] The rule *nisi* is discharged.

[32] The applicant shall pay the respondents' costs.

L.J. LEKALE, J

On behalf of applicant: Adv J.S. Rautenbach
Instructed by:
State Attorney
BLOEMFONTEIN

On behalf of respondents: Adv C.D. Pienaar
Instructed by:
Honey Attorneys
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