

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case No. : 930/12

In matter between:

Toz Moeng	1 st Applicant
T. M Leeuw	2 nd Applicant
M. J Mokito	3 rd Applicant
M. M Tladi	4 th Applicant
S.E Tsoeu	5 th Applicant
M. G Segalo	6 th Applicant
S. Phelane	7 th Applicant
M.N.A Agosi	8 th Applicant
T. G Thekiso	9 th Applicant
T. P Ntomane	10 th Applicant
D. Mere	11 th Applicant
M.I Letswanyo	12 th Applicant
P. M Seliane	13 th Applicant
M. J Khomo	14 th Applicant
M.S Mojanaga	15 th Applicant
M.S Mofokeng	16 th Applicant
S. Nyathe	17 th Applicant
M.K Mokalake	18 th Applicant
M. S Mohale	19 th Applicant
S. G Mokhobo	20 th Applicant
M.S Selebano	21 st Applicant

and

The Greater Bloemfontein
Taxi Association

1st Respondent

Free State Provincial Taxi Registrar

2nd Respondent

CORAM: **CJ MUSI, J et LEKALE, J**

HEARD ON: 25 MARCH 2013

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 16 MAY 2013

[1] It is a truism that in any association of like-minded people there will be those who hold a different view. How those differences are managed can, in some cases, be determinative of the harmonious co-operation between the association's members and in extreme cases it can cause the demise of the association. This is not an extreme case.

[2] The Greater Bloemfontein Taxi Association (first respondent) is a voluntary association of taxi owners and operators in

Bloemfontein. The applicants are members of the JB Mafora Central Route (JB Mafora), also known as Route 120, a sub-committee of the first respondent. Members of JB Mafora have, in terms of their permits, exclusive right to operate on Route 120. The second respondent, who does not oppose the application, is the Free State Taxi Registrar. No relief is sought against him as he was cited only in as far as he might have an interest in the matter.

- [3] Some members of JB Mafora launched this application to review and set aside a decision of the first respondent and to compel it to comply with its disciplinary procedure within 30(thirty) days of the finalisation of this application, failing which, that the first respondent be interdicted from continuing with the disciplinary inquiry which it had instituted against the applicants. The applicants also sought an order compelling the first respondent to adhere to its constitution with regards to controlling the use of Route 120 by its members, who are not entitled to operate on the route.

- [4] During 2010 members of JB Mafora lodged complaints with the first respondent about some of its members who operate on Route 120 without permits and illegal operators (pirates).
- [5] The applicants alleged that the first respondent failed to exercise control over its members who are still operating on Route 120 without permits. The first respondent alleged that it received vague and unsubstantiated complaints which it investigated, without success. Due to the fact that none of its members were identified by the complainants, it requested the local traffic department to police the route vigorously in order to root out pirates and members who operate on the route without permits (a taxi operates on specific routes stated in the permit).
- [6] The applicants alleged that the first respondent instructed them during 2010 to increase their fare for commuters travelling on Route 120 from R5.00 to R6.00. The first respondent on the other hand alleged that the decision to increase the fare as stated by the applicants was taken at a properly constituted general meeting during 2007.

- [7] The applicants decided not to increase the taxi fare because pirate and unauthorised operators did not increase their fare and therefore commuters made use of the cheaper option. According to the applicants they lodged complaints with the first respondent wherein they pointed out their plight and requested the first respondent to address their problem. The first respondent failed to do so. The first respondent denied that any complaints were laid and alleged that certain members of JB Mafora completely disregarded the resolution to increase the fare.
- [8] The first respondent decided to institute disciplinary proceeding against, *inter alia*, JB Mafora's chairperson and secretary. They were summoned on 31 January 2011 to appear, before the disciplinary committee, on 7 February 2011 by the chairperson of the disciplinary committee of the first respondent.
- [9] The disciplinary inquiry did not begin on 7 February 2011 and has still not commenced. The parties blame each other for the delay. It is not necessary to discuss the reasons for

the delay except to mention that the disciplinary inquiry was postponed on numerous occasions.

[10] On 30 November 2011 the first respondent communicated the impugned decision to the applicant's legal representative, Mr Matee. The relevant part of the letter reads as follows:

"We have tried all to meet your clients half way, but it yielded no results. The only thing that we are realizing is that, your clients are now causing a lot of conflict with other operators of other routes. This matter is getting out of control. We are unable to even start to talk about a fare increment with other routes as petrol has gone up.

The executive has resolved to close all files of route committee and all operators who operate in this route (sic). This means that, no operator will be assisted administratively, e.g. special permits, transfer, replacement, renewals and all other things that will need the office to help them with (sic). This is with effect from delivery of this letter and acknowledgement of receipt."

[11] On 9 December 2011 the applicants responded as follows to the letter dated 30 November 2011:

"We hereby notify that our office is currently open for negotiations with regard to the contents of your correspondence

instant, and further request that you kindly reinstate the closed file of the members of the JB Mafora central route (sic).

Further, in the interim, we kindly request that you assist the JB Mafora central route members to acquire permits from the executive board and that you kindly provide our office with regard to the time, date and venue of the disciplinary hearing (sic).

Kindly take further notice that we await to receive your response to this letter on or before the 12th December instant failure upon which legal steps will be embarked on (sic)."

[12] On 12 December 2011 the first respondent responded as follows:

"We agree to the continuation of the disciplinary hearing. We are available for the hearing and this was held back due to your client's noncompliance. The decision given on the letter send to yourself will still be in force until the hearing has been finalised (sic)."

[12] The parties unsuccessfully attempted to find a suitable date to hold the disciplinary hearing. On 22 February 2012 the applicants' legal representatives wrote the following letter to the first respondent:

“We have received instructions to move an application to the High Court against yourselves (sic).

It is our instructions that you did not follow the proper procedure in terms of your Constitution in closing our clients' files and therefore our clients have an option to appeal such a decision.

It is our further instructions that considering the fact that we are already out of the prescribed time period to lodge an appeal, we should request consent from yourselves to approach the High Court without having lodged an appeal in this matter.

We humbly request that you should revert to the author hereof within 24 hours of receipt of this letter, failure upon which we will have no other option but to presume that proper consent has been granted (sic).”

- [13] According to the applicants, the constitution of the first respondent provides for an internal appeal remedy. They alleged that the appeal remedy is only available to members when disciplinary action has been instituted in accordance with the constitution and as no disciplinary action has been taken in accordance with the constitution they cannot invoke the internal appeal remedy.

[14] Mr Greyling, on behalf of the applicants, argued that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is applicable because the impugned decision was an administrative action taken by the first respondent while exercising a public function.

[15] He based his argument on the definition of administrative action in PAJA. Administrative action in terms of PAJA *inter alia* means any decision taken, or any failure to take a decision, by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. (See section 1 of PAJA for the definitions of a decision and empowering provision.)

[16] A decision on the other hand is defined as any decision of an administrative nature made, proposed to be made, or required to be made as the case may be, under an empowering provision, including a decision relating to issuing, suspending, revoking or refusing to issue a licence, authority or other instrument.

[17] An empowering provision is defined as a law, a rule of common law, customary law, or an agreement instrument or other document in terms of which an administrative action was purportedly taken.

[18] It is common cause that the first respondent is a voluntary association with a constitution. Mr Greyling argued that the constitution is the instrument (empowering provision) in terms of which the decision not to assist with the issuing of special permits, transfers, renewals etc. was taken. According to him that decision had a direct external legal effect because the applicants were denied permission to operate their businesses on any other route and they cannot transfer or renew their permits whilst other members of the first respondent were allowed to do so.

[19] Mr Snyman, on behalf of the first respondent, in his heads of argument, accepted that the review was properly brought in terms of PAJA. During argument before us he changed tact and argued that PAJA is not applicable because the decision was not an administrative decision. His main argument was

however that the applicants did not exhaust their internal remedies as catered for in the first respondent's constitution.

- [20] Mr Snyman's argument relating to the exhaustion of internal remedies is, in my judgment, dispositive of this matter. That requirement applies with equal force to decisions that fall within the purview of PAJA and those that fall outside of its scope when taken by a voluntary association. I found Mr Greyling's arguments, in relation to the applicability of PAJA, compelling. Although he did not elaborate much, if the facts of this matter and the issues that fell to be decided allowed me to venture definitively into the applicability of PAJA to the first respondent's decisions I would, in all probability, have agreed with Mr Greyling. I say this for the following reasons. The first respondent controls the taxi business in and around Bloemfontein. Its constitution provides that it was *inter alia* formed to structure and manage passenger transport in the Free State in general and Bloemfontein in particular. It has the power to issue *ad hoc* special permits to members to transport commuters to destinations outside of the operator's designated route. It can therefore affect the right of taxi operators to be issued with *ad hoc* special permits. It keeps

files of all its members and assists them administratively with special permits, transfers, renewal of permits etc. It decides the tariffs payable, its increase and, although very unlikely, its decrease. If it does not issue a special permit the taxi operator may not venture beyond his/her allocated route, which in turn affects the commuting public who use such taxis. It has a duty, in terms of its constitution, to inform the second respondent, a public functionary, of the outcome of disciplinary hearings and grievances. It issues permits with the full knowledge of the second respondent. Members of the public must, in terms of its constitution, lodge complaints about drivers and operators to it. It is a well known fact that the government, in terms of its taxi recapitalization policy, has given large sums of money to taxi operators in exchange for scrapping their vehicles or buying new vehicles. It provides transport services to the public. In many places it is the only mode of public transportation. In **President of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)** at para [173] it was said that:

“There are many private institutions which, for historical or practical reasons, are privately controlled, although their activities manifestly

affect members of the public and give rise to considerable public interest and, at times, public concern.”

The activities of the first respondent can in my view be seen as an example of such a private institution. It is unnecessary for me, as I demonstrate hereunder, to make any definitive finding. I return to the requirement that a litigant should generally first exhaust his internal remedies before resorting to the courts.

Section 7(2) of PAJA provides:

“ 2(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[21] The same holds true, with the necessary changes, as I will show presently, for voluntary associations. My conclusion in

relation to this issue renders it unnecessary for me to make any definitive decision on whether PAJA applies to decisions of the first respondent or not. In short, whether PAJA applies or not, if I find that the internal remedies as catered for in the first respondent's constitution were not followed or exhausted and that no good reasons for the non-compliance have been proffered then the application cannot succeed.

- [22] The constitution of a voluntary association constitutes a contract between its members. The rights and duties of the members and those elected or appointed in terms of the constitution are governed by the constitution in all matters affecting the association's internal governance and management. Ordinarily a dispute such as this – between members of a sub-committee and the “mother-body” – is governed by the law of contracts. If the contract (constitution) between the parties contains a dispute resolution mechanism, that route should first be exhausted before recourse is taken to the court. The court will grant relief to the aggrieved party in exceptional circumstances when the internal remedies as agreed upon by the parties have not been exhausted. **See Constantinides v Jockey**

Club of SA 1954 (3) SA 35 (C) at 44 B; Turner v Jockey Club of South Africa 1974 (3) SA 633 (AD) at 657. Du Preez en Andere v Nederduitse Gereformeerde Gemeente, De Deur 1994 (2) SA 191 (W) at 194 G – 195 A.

[23] It has been said that were a litigant has other remedies open to him/her there was no necessity for him/her to invoke the aid of the courts until he/she had exhausted those remedies. See **Jockey Club of South Africa and OthersV Feldman 1942 AD 340 at 360.**

[24] Clause 10 of the first respondent's constitution deals comprehensively with its grievance procedure. Its centrality to the issue under consideration necessitates its reproduction in this judgment. It reads as follows:

“GRIEVANCE FUNCTION

10.1 MAIN OBJECTIVE

10.1.1 The main objectives of the grievance procedure is to enable a member, group of members, or a member of the community public to raise, and cause an adjudication of a matter which he or she or they may feel aggrieved about. The basic principle underlying the grievance

procedure is that all parties must be intent on equitably resolving the grievance at the earliest stage.

10.1.2 The main purpose of such adjudication is to-

- a) Avoid conflict;
- b) Settle disputes promptly;
- c) Provide a vehicle for the efficient functioning of the Association;
- d) Recognize the rights of members;
- e) Create a mechanism whereby members may obtain a fair hearing against a practice that may appear to be unjust.

10.2 **INTERPRETATION AND REQUIREMENTS**

10.2.1 Grievance is any dissatisfaction or feeling of having been wronged on the part of a member or group of members regarding membership and matters pertaining to the duties, actions and participation of a member or group of members of the Association.

10.2.2 The grievance procedure further provides for a formal framework for the fair and equitable resolution of complaints, grievances and disputes.

10.2.3 The grievance procedure should ensure-

- a) That grievances are aired and brought to finality; and
- b) Settlement of grievances as close to the point of origin as possible.

10.2.4 The grievance procedure should not serve as an appeal mechanism against disciplinary steps taken in terms of the disciplinary procedure.

10.2.5 Every attempt should be made to settle difficulties by discussion. The grievance procedure should only be entered into if it is proven that such discussions have failed.

10.3 GREIVANCE COMMITTEE

- a) A grievance committee must be elected at the AGM consisting of:
 - (i) A chairperson referred to in clause 4.1 (a) a (vii); and
 - (ii) **Three (3)** other members (excluding conditional members) of which one must be appointed at the first meeting of the Grievance Committee to serve as its secretary.”

[25] In terms of clause 10.4 the grievance procedure to be followed is contained in Annexure C to the constitution. Annexure C states the following:

“PROCEDURE WITHIN AN ASSOCIATION:

- (a) A member or group of members within the Association must complete a grievance form (see example attached)
- (b) The completed and signed form must be submitted to the grievance committee of the Association.
- (c) The chairperson of the grievance committee must in consultation with aggrieved member/ group of members determine a date on which such member/ group of members must present their grievances to such committee.
- (d) The date must not be later than three days after submission of the grievance form.
- (e) The chairperson of the grievance committee must prepare a report on the proceedings of the grievance committee for submission to the Executive Committee. The report must contain the decision of the Committee and the reasons thereof.
- (f) If the aggrieved member or group of members is not satisfied with the decision of the grievance committee such member or group of members must notify the chairperson of the grievance committee within 7 (seven) days after such decision accordingly, and the matter must be

referred to the Regional Taxi Council's Grievance Committee by the chairperson of the grievance committee within seven (7) days after notification by the member or group of members.

- (g) The chairperson of the Regional Taxi Council's Grievance Committee must in consultation with the aggrieved member or group of members determine a date on which such member/ group of members must present their grievance to committee.
- (h) The date must not be later than seven (7) days after the submission of the grievance form.
- (i) The chairperson of the Regional Taxi Council's Grievance Committee must prepare a report on the proceedings on the proceedings of the Grievance Committee. The report must contain the decision of the Committee and reasons therefore.
- (j) The decision of the Regional Taxi Council's Grievance Committee shall be final.

[26] It is common cause that the applicants did not make use of the grievance procedure. They did not give any reason why they did not comply with the prescripts of the constitution.

[27] Mr Greyling submitted that the grievance procedure could not be invoked because clause 10.2.4 proscribes its use.

Clause 10.2.4 reads:

“The grievance procedure should not serve as an appeal mechanism against disciplinary steps taken in terms of the disciplinary procedure.” (My emphasis.)

[28] Mr Greyling argued that the impugned decision was a disciplinary sanction imposed by the first respondent on the applicants. It was therefore a form of discipline and therefore the grievance procedure could not be utilised.

[29] I disagree. The disciplinary procedure is comprehensively set out in Annexure B to the constitution. Annexure B deals with the investigation and institution of disciplinary proceedings after a complaint has been lodged. It *inter alia* governs how “the accused” must be informed about the complaint and that both parties should be allowed a fair and equal opportunity to state their respective cases. It sets out the rules of natural justice that shall be applied to disciplinary proceedings as well as the sanctions that may be imposed

(refusal to assist administratively is not one of the prescribed sanctions). It also contains an appeal procedure to the Regional Taxis Association.

[30] It is clear that the disciplinary procedure is a self-contained procedure which culminates in its own appeal procedure after conviction and sentence. Clause 10.2.4 was therefore created in order to make it clear that an accused person who has been properly tried and convicted must use the appeal procedure contained in Annexure B and not use the grievance procedure in Annexure C.

[31] Even if the decision of the first respondent can be construed as a sanction it is still not a sanction imposed in terms of the disciplinary procedure for the simple reason that the disciplinary procedure was not followed at all. The applicants should have invoked the grievance procedure in order to challenge the impugned decision. Moreover, it is common cause that the disciplinary hearing must still unfold.

[32] Even if I find that the first respondent could not constitutionally take the decision that it did, the applicants

were constitutionally enjoined to utilise the grievance procedures first.

[33] There is, as I have said above, no reason given as to why the grievance procedures were not followed. Although the first respondent's decision is *prima facie* contrary to its constitutional terms no exceptional circumstances for interference by this court have been shown.

[34] The application ought to be dismissed.

[35] There is no reason why the costs should not follow the success. Members of voluntary associations should be discouraged from approaching the courts before complying with their contractual rights and duties.

[36] I therefore make the following order:

- a) The application is dismissed.
- b) The applicants are ordered to pay the first respondent's costs jointly and severally, the one paying the other to be absolved.

C.J. MUSI, J

I agree

LEKALE, J

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