

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

Case No: 4706/2013

In the matter between:-

CONGRESS OF THE PEOPLE

Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT BY: POHL, AJ

HEARD ON: 28 NOVEMBER 2013 and 2 DECEMBER 2013

DELIVERED ON: 6 December 2013

INTRODUCTION

- [1] In this matter, the applicant, a political party known as The Congress of the People (“COPE”) brought an urgent application to court in which it seeks an order from the court, ordering the respondent, the Mangaung Metropolitan Municipality to make available to the applicant the Kaizer Sebothelo Stadium, Botshabello, on 16 December 2013 in accordance with an agreement between the parties.

BACKGROUND

- [2] According to the applicant, it annually hosts a rally for its members at which rally it commemorates the “birthday celebrations” of the

applicant. This year's annual rally is to be held on 16 December 2013, on the Public Holiday known as Reconciliation Day.

- [3] Initially however, during the month of February 2013, the applicant and the defendant entered into an oral agreement in terms of which the respondent would make available to the applicant, the Free State Rugby Stadium, as venue for this purpose.
- [4] On 26 July 2013, the respondent informed the applicant that the Free State Rugby Stadium was no longer available as a consequence of a prior booking of the venue by FIFA (The International Football Association). When the respondent informed the applicant of this prior booking of the Free State Stadium, it offered the applicant the stadium known and described as the Kaizer Sebothelo Stadium, Botshabello, for the purpose of holding its annual rally on 16 December 2013. The applicant then accepted this offer.
- [5] The undisputed evidence of the applicant on the papers is that:
 - (1) The respondent would prepare a quotation for the use of the facilities at the Kaizer Sebothelo Stadium situated in Botshabello for the use on 16 December 2013.
 - (2) The applicant would, if it accepted the quotation, pay the quoted amount.
 - (3) With payment an agreement was entered and concluded between the parties in terms whereof the applicant is entitled to the use of the facilities known as the Kaizer Sebothelo

Stadium situated in Botshabello on 16 December 2013 for its annual celebrations.

- (4) It was an implied term of the agreement that the respondent would take such reasonable steps to assist the applicant where necessary with the peremptory provisions of The Safety at Sports and Recreational Events Act, Act 2 of 2010, in so far as more than the threshold of 2 000 people will attend the rally.
- [6] On or about 19 August 2013 the respondent then furnished the applicant with a quotation in the amount of R10 692,00. As part and parcel of this quotation the respondent furnished its bank details, to wit Absa Bank as well the relevant account number, reference number and branch code for payment of the quotation, if accepted.
- [7] The applicant accepted the quote and on 29 August 2013 the applicant then duly paid the amount into the bank account of the respondent.
- [8] It needs to be emphasized that in its opposing papers, the respondent did not dispute any of the above-mentioned terms of the contract between the parties, as alleged by the applicant.
- [9] After the payment of the quoted amount, and in order to attend to the hosting of a safe and secure rally which are, *inter alia*, prescribed by the Safety at Sports and Recreational Events Act, Act 2 of 2010, two meetings were held with, *inter alia*, with

representatives of the respondent and other relevant parties on 18 September 2013 and 30 October 2013.

- [10] The applicant also completed a comprehensive application form which was presented to the National Commissioner of The South African Police Services. This was a requirement the applicant had to comply with in terms of the Safety at Sports and Recreational Events Act, Act 2 of 2010.
- [11] It was also agreed that a further meeting would be held between all relevant parties on the 27 November 2013 so as to finalise the last outstanding issues. The applicant also contracted with a security firm for the provision of security services at the venue in order to comply with Act 2 of 2010.
- [12] On **4 November 2013** the applicant received a letter of cancellation of the contract from the respondent. This letter which was written on a letterhead of the respondent and signed by a Mr Teboho Maine, the regional manager, Botshabello, was addressed to the Provincial Secretary, Congress of the People (COPE), Mr Hleko. It has the heading: "CANCELLATION OF THE BOOKING OF COPE CELEBRATION EVENT AT KAIZER SEBOTHELO STADIUM, BOTSHABELLO". For purposes of this judgement it is extremely important to have regard to what is said in this letter of cancellation, or rather what is not said in this letter. The body of the letter reads as follows:

“This letter is to regretfully inform you that the booking COPE celebration event at Kaizer Sebothelo Stadium, Botshabello is being cancelled. We were very much on track regarding the preparations but unfortunately **due to unavoidable circumstances** we had to cancel the booking of this event. (My emphasis)

Please accept our sincere apologies for the inconvenience you may have experienced.

We hope that you will understand and co-operate.”

[13] On 11 November 2013 the respondent’s attorneys, Messrs Moroka Attorneys, wrote a letter to the applicant’s attorneys Messrs Blair Attorneys. It once again important to have regard to the contents of this letter, in comparison with the cancellation letter referred to in paragraph 12, *supra*. It reads as follows:

“2. We confirm that we have consulted with our client and have been advised as follows:

2.1 Your client was furnished with the necessary forms to complete for purposes of complying with the provisions of Safety at Sports and Recreation Events Act which forms were to be submitted to the SAPS;

2.2 There were no further forms submitted by your client confirming the venue;

2.3 Further thereto, we are advised that your client has, up to date, not made any payments regarding the venue and therefore since no payment has been received by our client, nor any prove thereon, the booking had to be cancelled;

2.4 Should your client have conflicting view in respect herein, kindly furnish us with prove of payment if same was made.

3. Be advised that, the meetings allegedly held by your client and the SAPS do not guarantee nor serves as security for the venue and confirmation of same can only be made when payment is received and a lease agreement is signed.
4. Your client was advised of the above timeously.”

[14] What is of extreme importance in this matter is the conspicuous absence of any of these allegations contained in the letter of Mr Moroka Attorneys dated 11 November 2013, in the letter of cancellation by the respondent dated 4 November 2013, quoted above. It is also important to have regard to the fact that when the letter of Messrs Moroka Attorneys was written on 11 November 2013, the money paid in lieu of the respondent's quotation had been sitting in the account of the respondent since 29 August 2013, drawing interest.

[15] It is furthermore important to have regard to the fact that in the opposing affidavit filed by the respondent on 26 November 2013, it does not in any way attempt to deal *ad seriatim* with the allegations made by the applicant in its founding affidavit, paragraph per paragraph. It chose to attack the applicant's papers based on alleged lack of urgency, lack of authority, it then briefly dealt with the merits and the sequence of events as it saw it and lastly it dealt with the questions of balance of convenience and prejudice.

[16] With regards to the alleged **lack of authority**, the respondent's deponent said the following in the opposing affidavit in paragraphs 9, 11, 12 and 14 thereof:

“9. Mr Mzwandile indicates at paragraph 1.2 of the founding affidavit that he is duly authorised to depose to the affidavit.

...

11. However, Mr Mzwandile fails to attach a resolution authorising him to prosecute the application on behalf of the applicant. He does not indicate which faction he comes from within the applicant and he does not attach a resolution authorising him to act in the manner that he purports to.

12. In fact, the application is brought not by a branch of the Congress of the People but it is brought by the Congress of the People. My understanding is that this is a national body and that the applicant and more particularly Mr Mzwandile would have to get the necessary resolution from the national body.

...

14. The fact that the application is not brought by a provincial body but by the national body means that there has to be a national resolution for the applicant to have brought this application.”

[17] It is furthermore important to have regard to the fact that it is common cause that the respondent, in its challenge of the authority, did not make use of the procedures as contemplated by rule 7(1) of the Uniform Rules of Court. The only way it chose to challenge the authority of the applicant and/or the deponent of the applicant was by the allegations alluded to above in its opposing affidavit.

[18] With regards to the aspect of **urgency** the respondent alleged in its opposing affidavit that the urgency was self-created by the applicant. The crux of these allegations amount to the allegation

that the applicant knew of the cancellation of the booking from the 4th of November. The respondent then alleges that on the 11 November 2013 further correspondence was exchanged and only a further week later, on the 18th November 2013 the founding affidavit was signed and the application brought. The respondent alleges that the application could have been brought as far back as the period between 4 and 11 November 2013.

[19] With regards to the merits, the respondent in his opposing affidavit says the following:

“THE MERITS

18. The hiring out of venues by the respondent is a function that is undertaken by the respondent in order to manage and facilitate the use of the venues within the jurisdiction of the Mangaung Metropolitan Municipality.
19. The venue that is currently the subject-matter of the application is the Kaiser Sebothelo Stadium which is situated in Botshabelo.
20. This is one of the venues that will be used as a training ground for the 2014 CHAN Tournament. The countries that will be hosted by the Respondent are the following, Ghana, Ethiopia, Libya and Congo Brazzaville. The stadium will be used by one of the above mentioned four countries.
21. The use of the venue by 22 000 members of the applicant will cause damage to the pitch to such an extent that it will become unusable. This will mean that one of the countries that is to take part in the CHAN soccer tournament will not be able to train. Apart from the fact that this will affect the finances and the reputation of Mangaung as a city, it will also have national and international repercussions as far as South Africa is concerned. With 22 000 people attending the event it is therefore reasonably anticipated

that there will be a use of the pitch or evading of same. In the September meeting it was also noted and discussed that the pitch was going to be used.”

[20] The respondent also alleges that the CHAN tournament, being an international football tournament, will take place on 13 January 2014. It is thus almost a month after 16 December 2013. The respondent does not say which of the countries will use the relevant facility. The respondent also does not say from when and for what length of time the football team will make use of this particular facility.

[21] On 27 November 2013 the applicant filed a replying affidavit. With regards to the alleged lack of urgency the applicant’s deponent declared as follows in paragraphs 25.2 to 25.5 thereof:

“25.2 On 5 November 2013 Annexure “FA6” was sent recording the salient facts, the confirmation that the Applicant can proceed with its arrangements as the Respondent’s conduct was and is unlawful and constituting a *bona fide* attempt to aver to this matter and to resolve it *extra curiae*.

25.3 On the 11th November 2013 Annexure “FA7” was received stating that the Respondent would have a consultation on that day and would reply to the content of the letter dated the 5th of November 2013 in due course. Then followed Annexure “FA5” with an invitation if there is a conflicting view to furnish proof of payment if it was made.

25.4 The Applicant did not simply rush to Court, but also gave abridged time frames to enable the Respondent to file answering affidavits which they have now done, and even though not complying with the prescribed time periods.

25.5 There can be absolutely no question of self created urgency.”

[22] There was also a supporting affidavit annexed to the replying affidavit by Mr Diratsagae “Papi” Kganare. In this affidavit he declares *inter alia* as follows:

- “1. I am the chairperson of the Applicant in the Free State.
- 2. I confirm that the acting provincial secretary of the Applicant, Mr Hleko Mzwandile, has been mandated to sign all legal documents with regards to the action the Applicant had resolved to take against the Mangaung Metropolitan Municipality relating to the hiring of and use of the Kaizer Sebothelo Stadium in Botshabelo.
- ...
- 4. With regards to the respondent’s contentions that this application must be authorised by the National Executive of the Applicant, the same is nonsensical and devoid of any merit. The Provincial Executive Committee has resolved as it is duly authorised to institute this said application.”

[23] Another annexure, annexed to the replying affidavit is a letter, which on the face of it appears to be signed by Mr Kganare and dated 11 November 2013 and which reads as follows:

“DECEMBER 16 RALLY

COPE received a letter from Mangaung Municipality on 4 November 2013 stating that the booking of the Kaizer Sebothelo Stadium has been cancelled due to unavoidable circumstances. The stadium was paid in full.

On 5 November 2013, COPE approached Blair Attorneys to act on behalf of the Party in writing to the Mangaung Metro Municipality. The Mangaung Metro Municipality was to respond within three (3) days.

The PEC, of 11 November 2013, resolved that:

Instruction is to be given to Blair Attorneys to continue to represent COPE in the matter and that the matter be referred to the High Court with costs against the Mangaung Metro Municipality. The PEC hereby mandates Mr. I.M. Hleko, Acting Provincial Secretary to act on behalf of the Party in the matter."

- [24] A portion, containing 5 pages of the Constitution of the applicant was also annexed to the replying affidavit.

- [25] When the matter first came before me as an urgent application on Thursday, 28 November 2013, the applicant was represented by Mr Coetzer and the respondent by Mr Bava. During the course of argument the complete constitution of the applicant, as opposed to the mere 5 pages annexed to the replying affidavit, became an issue. I then made a ruling that in the interest of justice I should be furnished with the complete constitution if the parties want me to rely on same in determining the issues. The application was then by agreement postponed to Monday 2 December 2013.

- [26] When the matter was called on Monday, 2 December 2013 Mr Fischer appeared for the applicant with Mr Snellenburg and the respondent was once again represented by Mr Bava. In was then furnished with the complete constitution and the matter was duly argued.

THE LEGAL POSITION WITH REGARDS TO MOTION PROCEEDINGS

[27] It is trite law that in motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues, because they are not designed to determine probabilities. It is well established under the **Plascon-Evens** rule that where in motion proceedings, disputes of fact arise on affidavits, a final order can be granted only if the facts averred by the applicant have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raised fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers (compare **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A); and **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA)).

URGENCY

[28] The first important factor to have regards to is the fact that it was the respondent who cancelled the agreement on 4 November 2013, i.e. a mere month and 12 days prior to the event of 16 December 2013. It was thus the respondents conduct that necessitated these proceedings.

- [29] It is furthermore clear from the papers and common cause that there were attempts after 4 November 2013 to try and resolve this matter without going to court. In this regard important to have regard to the decision of **Transnet Limited v Rubenstein** 2006 (1) SA 591 (SCA) at 599, para [21]:

“The judgment deals with the fact that Rubenstein, in his replying affidavit, explained the reasons for delay, which related largely to attempts to settle the matter and to enter into a new contract. It was not essential for Rubenstein to deal fully with the question of delay in the founding affidavit given that much of it was attributable to on going discussions with Transnet about the conclusion of a new contract.”

- [30] It is furthermore clear from the papers that the applicant could not, even on respondent's version, follow the prescribed periods set out in rule 6. The matter could not have been right for hearing; much less would it have been heard before the 16th of December 2013.

- [31] The respondent was also afforded sufficient time to answer to the applicant's averments in its founding affidavit, which it did by way of the opposing affidavit. The applicant also filed a replying affidavit before the matter came before me the first time. It is therefore abundantly clear that all the issues have been ventilated and I cannot find that in all the circumstances, the applicant is to blame in the sense it created the urgency itself.

- [32] In the premises I take the matter onto the roll as an urgent application in accordance with the provisions of Uniform Rule of

Court 6(12) and thus grant the applicant the relief sought in the first two prayers of the notice of motion.

AUTHORITY

[33] Before dealing with the facts of this matter with regards to the alleged lack of authority, it is apposite to refer to the decision of **ANC Umvoti Council v Umvoti Municipality** 2010 (3) SA 31 (KZP), and more in particular to paragraphs [22], [27] and [28] thereof at pages 41-43, where the court *inter alia* found as follows:

“[22] ...It seems to me, therefore, that the legislature intended the authority of 'anyone' who claimed to be acting on behalf of another in initiating proceedings, and not only attorneys, to be dealt with under rule 7(1), and not by way of the application papers. However, since this appeal deals with the authority to represent an artificial person, I refrain from further comment on the situation applying where one litigant purports to represent another in applications.

...

[27] ... Whether or not the litigation has been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained by means of rule 7(1), since this is a procedure which safeguards the interests of both parties. It frees the applicant from having to produce proof of what may not be in issue, thus saving an inordinate waste of time and expense in 'the many resolutions, delegations and substitutions still attached to applications'. It protects a respondent in that, once the challenge is made in terms of rule 7(1), no further steps may be taken by the applicant unless the attorney satisfies the court that he or she is so authorised. ...

[28] It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial

person has authorised the initiation of application proceedings. Rule 7(1) must be used. This means that I disagree with Mr Gajoo's submission that rule 7(1) provides only one possible procedure and that, if a respondent elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.”

(Compare also **Eskom v Soweto City Council** 1992 (2) SA 703 (W); and **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA); and **Unlawful Occupiers, School Site v City of Johannesburg** 2005 (4) SA 199 (SCA).)

- [34] As mentioned earlier, in this case before me, the respondent also did not use the procedures of rule 7(1) of the Uniform Rules of Court. I am in respectful agreement with the full bench decision of **ANC Umvoti Council Council**, *supra* and thus find that the respondent's attack on the applicant's lack of authority in this way is not the way to do it and without merit. The absence of use of Rule 7(1), makes it unnecessary for me to deal with the different provisions of the applicant's constitution. I thus find that the application and the prosecution thereof and the applicant's deponent was duly authorised by the applicant.

THE MERITS

- [35] Mr Bava submitted the applicant is not entitled to the main relief sought as contained in the paragraph 3 of the notice of motion, which reads as follows:

“That the respondent be ordered to make available to the applicant the Kaizer Sebothelo Stadium, Botshabelo, Free State Province on 16 December 2013 in accordance with the agreement between the parties.”

His submission was that the essence of the relief thus sought by the applicant is in the nature of a specific performance. Because of the fact that there are outstanding issues, even on the applicant's own papers, with regards to further meetings etc., meant that the court could not order specific performance. Mr Fischer however submitted that these further meetings had to do with the compliance with the Safety at Sports and Recreational Events Act, Act 2 of 2010 and thus had nothing to do with the contract between the applicant and the respondent. It would thus not preclude the applicant from obtaining an order for specific performance as prayed for.

The problem with Mr Bava's submission is that the respondent chose not to attack the terms of the contract as alleged by the applicant in its founding papers. I must therefore apply the **Plascon-Evans** principle to which I have alluded above. This means that I must accept the terms of the contract as alleged by the applicant in this case before me, as it stands uncontroverted. In principal, the applicant might therefore be entitled to the relief sought.

- [36] If one has regard to the letter of cancellation of the agreement of 4 November 2013, it merely states that due to unavoidable circumstances respondent had to cancel the booking of the event.

If one compares this letter of cancellation which came directly from the respondent, and compares it to the letter of Mr Moroka attorneys dated 11 November 2013, it clearly does not say that the contract is being cancelled because of non-payment. It clearly does not say that there were further conditions attached to the agreement which were not fulfilled, hence the cancellation. It clearly does not say that there was a lease agreement that had to be signed which was not done and therefore the contract is cancelled. To my mind the letter of 4 November 2013 amounts to a clear repudiation of the contract without just cause, which entitled the applicant to approach the court for a specific performance.

- [37] The respondent's allegation that the pitch of the stadium would be damaged by the attendance of 22 000 people, is not substantiated by any proof. The fallacy in this argument, to my mind, is that by the very nature of sports stadiums, the visitors to these stadiums sit on the stands made available for such visitors. There is thus no evidence before me that the visitors to the stadium on the 16th of December 2013 would damage **the pitch**. Even if the pitch is so damaged, there is also no evidence before me as to what time it would take to repair the pitch. There is also no evidence placed before me by the respondent as to what team would use the pitch, from when and for what duration. It is thus conceivable that, if the pitch was damaged, it could have been repaired by the time the team starts to train on it.

[38] The essence of the relief sought by the applicant in this matter before me is for specific performance in the form of a final interdict. It is trite law that an interdict is an order of court enjoining a respondent to refrain from doing something or ordering a respondent to do something. (Compare **CF Jafta v Minister of Law and Order** 1991 (2) SA 286 (A) at 295.)

[39] In the premises I find that the applicant has established that it has a clear right stemming from the contract to be afforded the use of the venue. The second requisite for a final interdict is an injury actually committed or reasonably apprehended. A reasonable apprehension of injury is one that a reasonable man might entertain on being faced with the facts; the test is thus objective and the applicant need not establish on a balance of probabilities that injury will follow.

To my mind the applicant, on the facts of this case before me, also succeeded in proving that there is at the very least a reasonable apprehension of injury if it is not afforded the use of the venue in question. (See paragraph 40, *infra*)

The third requisite for a final interdict is the absence of another adequate remedy. The alternative remedy must be adequate in the circumstances, be ordinary and reasonable, be a legal remedy and grant similar protection. Once again, if one has regard to the totality of the facts before me I find that the applicant has succeeded in proving this final requisite for an interdict.

[40] To my mind the applicant will suffer irreparable harm if the relief sought by the applicant is not granted by the court. It must be borne in mind that the applicant in its papers clearly states that, *inter alia*, it is an annual event that usually takes place on the 16th of December of each year, being a Public Holiday. This annual rally is attended by leaders of the applicant, its members and invited delegates from all over the country, which includes dignitaries. The rally is attended by thousands of people. (22 thousand is expected) In accordance with its established practise the applicant timeously sought to secure a venue for this year's rally which it intends to hold on the 16th of December 2013. Bloemfontein is centrally situated in the Republic of South Africa and is most often used as a venue as a consequence of its conveniently centralised location. There appears to be no other suitable venues which are available in the district of Bloemfontein which can host more than 20 000 people. The applicant also declared in its founding affidavit that with the upcoming national election to be held next year, the importance of such rallies requires no further elaboration. The applicant and its voters stand to suffer irreparable harm if the venue is not made available to the applicant. Furthermore all invitations to the rally have already been sent out since August 2013.

COSTS

[41] The notice of motion does not have a prayer for costs. It does however have a prayer for further and/or alternative relief. Mr Fischer requested the court to make an order as to costs in favour of the applicant, including the costs of two counsel, where

employed, should the applicant be successful. Mr Bava did not make any submission to the contrary.

CONCLUSION AND ORDER

[42] In the premises and in all the circumstances of this case I am satisfied that the applicant has made out a proper case for the relief sought in prayer 3 of the notice of motion.

[42] I thus make the following orders:

- 1. The respondent is ordered to make available to the applicant the Kaizer Sebothelo Stadium, Botshabelo, Free State Province on the 16 December 2013 in accordance with the agreement between the parties.**
- 2. The respondent is ordered to pay the applicant's costs, which costs will include the costs of two counsel, where employed.**

L. le R. POHL, AJ

On behalf of the applicant: Adv. P. U. Fischer SC
With Adv. N. Snellenburg
Instructed by:
Blair Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. Bava SC
Instructed by:
Moroka Attorneys
BLOEMFONTEIN

/ebeket