

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

Case No.: 4670/2013

In the matter between:

THAHAMESO NTSWANATSATSI THUSANANG
TAXI ASSOCIATION

Applicant

and

QWAQWA UNITED TAXI ASSOCIATION

First Respondent

LIST OF MEMBERS
("ANNEXURE FA1")

2nd to further Respondents

CORAM:

L. Le R. POHL, AJ

HEARD ON:

29 NOVEMBER 2013

DELIVERED ON:

12 DECEMBER 2013

INTRODUCTION

- [1] In this matter, the applicant, being a Taxi Association from Germiston, Gauteng, applies for an urgent final interdict against the first respondent and its members, being a Taxi Association from Phuthaditjhaba, Free State Province, in the following terms:

“4. That the first respondent and its members be interdicted and restrained from unlawfully operating as taxi operators on the Germiston-Setsing taxi route.”

BACKGROUND

[2] Besides the abovementioned prayer for an interdict, the notice of motion also contains a prayer in respect urgency. This matter first came before this court on 21 November 2013. It was then, by agreement, postponed to 21 November 2013. Supporting, opposing and replying affidavits were filed. All the issues have been ventilated. In all the circumstances I consider the application to be urgent and will thus take it onto the roll accordingly.

The notice of motion also contains the following two prayers with regards to the alleged contempt of court:

- “2. That the second to thirteenth respondents be found in contempt of the court order issued out of this Honourable Court on 12 April 2012;
- 3. That the second to thirteenth respondents who are in contempt of the court order referred to in paragraph 2 above, be committed to imprisonment for contempt of court for a period of 30 days, or such period as this Honourable Court deems just and equitable.”

[3] The relevant court order of 12 April 2012, referred to above, was in the form of a rule *nisi* which was confirmed and which reads as follows:

“2. A rule *nisi* is issued calling upon the respondent to furnish reasons, if any, on Thursday 12 April 2012, as to why the following order should not be made:

- 2.1 That the respondent and its members be interdicted and restrained from preventing the applicant and/or its members in any way to make use of the Setsing Taxi Rank, Phuthaditjhaba, Free State Province;
- 2.2 That the respondent and its members be ordered to allow the applicant and/or its members to make use of the Setsing Taxi Rank, Phuthaditjhaba, Free State Province;
- 2.3 That the respondent and its members be interdicted and restrained from threatening, intimidating, harassing or assaulting the applicant's members and/or its employees;
- 2.4 That the respondent and its members be interdicted and restrained from interfering with the applicant's use of the Setsing Taxi Rank, Phuthaditjhaba, Free State Province;
- 2.5 That the respondent be ordered to pay the costs of the application.”

[4] Mr Maritz, who appeared for the applicant in this matter before me, requested the court to postpone the prayers that deal with the alleged contempt of court to the normal opposed motion roll of this court. He also requested that the costs in respect of same should stand over to be determined with the said contempt of court application. It is not necessary for me for purposes of this judgment to deal with the reasons for the postponement of the application for contempt of court. Suffice it to say though that I think Mr

Maritz's request was a fair request and the correct request in the circumstances of this case.

- [5] Mr Maritz, however indicated that the applicant still moves for the abovementioned urgent, final interdict, together with costs.
- [6] As indicated above, the crux of this application is that the applicant seeks to obtain a final interdict against the respondent from unlawfully operating and conducting the business of conveyance of passengers in the Free State Province along the Germiston-Setsing taxi route, without being registered and/or holding the necessary operating licences to do so.
- [7] The applicant alleges that on a continuous basis, the respondent and its members prevented the applicant and its members access to the Setsing Taxi Rank to load and offload passengers and furthermore alleged that they are using this particular route without being registered and/or holding the necessary operating licences to do so.
- [8] The uncontroverted evidence of the applicant is that as a taxi association, it is lawfully registered to operate along the Germiston-Setsing taxi route which runs between QwaQwa in the Free State and Germiston in Gauteng. As proof of this, it attached to the papers a copy of the operating licence issued to the applicant in terms of the National Land

Transport Act, Act 5 of 2009, which clearly indicates that the applicant is lawfully registered to operate along this route.

- [9] The applicant alleges in its papers that the first respondent and its members have violently threatened the applicant and its members to stay away from the Setsing Taxi Rank and are currently refusing the applicant and its members access to the taxi rank in order to load passengers. It furthermore alleges that the current position is that all operations from Setsing by the applicant and its members have stopped due to the threat or violence and fear of their lives. The applicant alleges that its members will suffer irreparable harm if the interdict is not granted. The applicant furthermore alleges that it has no other remedy at its disposal. This is so because the taxi rank at Setsing is the only taxi rank that the applicant can use and is in fact obliged to use in terms of the route as indicated in the operating licence.
- [10] The respondents vehemently deny the use of any violence against the applicant. The respondents also deny that they are preventing the applicant to use the Setsing Taxi Rank. It needs mentioning that the alleged violent attacks by the respondents form, to a large extent, the basis of the abovementioned application for contempt of court.
- [11] In its opposing affidavit, the respondents declared the following in paragraphs 6.2 and 6.3 thereof:

- “6.2 The respondent specifically denies the allegations of unlawfully operating and conveying passengers without holding the necessary permits.
- 6.3 Respondent and its members aver that they have the authority to legally convey passengers on the route between Setsing, Phuthaditjhaba, Free State Province and Germiston, Ekurhuleni Municipality, Gauteng. As proof thereof, the respondent hereby attaches *ad hoc* permits to convey passengers from Setsing Taxi Rank, Phuthaditjhaba, Free State to Germiston, Ekurhuleni Municipality, Gauteng issued by the Department of Police, Roads and Transport on a renewable period of 3 months. Copies of *ad hoc* permits are attached hereto and marked, annexure ‘TM1’.”

[12] These *ad hoc* permits annexed to the respondent’s opposing papers, are all virtually similar. *Ex facie* each *ad hoc* permit, it was typed and/or printed on the official letterhead of the Department of Police, Roads and Transport of the Free State Province. They all have a reference to a specific application number and a receipt number in respect of each and every one of them. They were all addressed to the specific applicants in question which, on the papers, appears to be members of the first respondent. They all have the heading: “*Ad hoc* authorisation (operating licence)”. They all have the following introductory paragraph:

“The abovementioned applicant has lodged an application with the Free State Operating Licencing Board for an operating licencing (sic), due to unforeseen circumstances and technical problems, which we experience, the applicant could not be issued with original operating licence.”

Each and every one of these *ad hoc* authorisations has a reference to a specific vehicle, its capacity, it has a reference to the operating licence reference number and a validity period of three to four months.

Each and every one of these *ad hoc* authorisations then has a description of the route that may be used.

Each and every one of these authorisations has the following concluding paragraph:

“This document is only valid when it bears the original signature of the secretary of the Free State Operating Licencing Board and the original stamp. Any queries should be referred to the Office of the Free State Operating Licencing Board.”

They were all then signed on behalf of the secretary by a senior admin clerk and each and every one of them bears the official stamp of the Free State Operating Licencing Board.

[13] It is common cause, that neither the applicant nor anybody else, has to date attempted to have these *ad hoc* authorisations set aside by way of an application for review or in any other way.

[14] In the applicant’s replying affidavit, it declares the following in paragraph 5.2 thereof:

- “5.2 The applicant denies that the *ad hoc* permits attached to the respondents’ answering affidavit as annexure ‘TM1’ are valid, legal and permits the respondents to convey passengers on the route between Setsing Phuthaditjhaba, Free State Province and Germiston, Ekurhuleni Municipality, Gauteng on a continual basis in terms of the Free State Public Transport Act, Act 102 of 2005 (the Act) read with the National Land Transport Act, Act 5 of 2009.
- 5.3 Even in the event that the *ad hoc* permits are valid (which is denied) the respondents failed to disclose the true nature of an *ad hoc* permit in terms of the Act.”

THE LEGISLATION

[15] Section 65 of the Free State Public Transport Act, Act 4 of 2005, that deals with *ad hoc* authorisations, has *inter alia* the following provisions:

“65 *Ad hoc* authorisations

- (1) No one may undertake public transport services in connection with a particular occurrence, such as a sports event, funeral or wedding, except under the authority of an *ad hoc* authorisation issued and completed under this section.
- (7) The Board may disqualify a holder who habitually undertakes temporary transport services without completing the necessary authorisation, or who habitually abuses *ad hoc* authorisations.
- (8) *Ad hoc* authorisations must be in the prescribed form.
- (9) *Ad hoc* authorisations may only be used to transport passengers for once-off events and, while they are being used-

passengers may not be picked up or dropped off en route;
the holder must return from the *ad hoc* journey with the same passengers;
the holder may not undertake minibus taxi-type services locally while waiting for passengers.”

THE LEGAL POSITION

[16] It would appear, that on the face of these *ad hoc* authorisations annexed to the respondents’ opposing papers, that they do not strictly comply with the provisions of section 65 of the Free State Public Transport Act, Act 4 of 2005 and more in particular, with the provisions of subsection 1 and/or subsection 9. If one has regard to the abovementioned introductory paragraph of these authorisations, it would appear that they were issued, almost as a substitute for a proper operating licence. They do not appear to be issued for “a specific event, funeral or wedding”, for instance. They were issued for a validity period of three to four months, indicating that they were not issued for a specific event. They were also not signed by the secretary himself, but by the senior admin clerk. Whether or not this clerk had the necessary authority and/or delegation to sign these authorisations, is unclear on the papers before me.

[17] In the premises there is a strong possibility that these *ad hoc* authorisations could be set aside by the proper forum if taken on review. As indicated above, this had not been done to date.

[18] Mr Maritz submitted that the court need not declare the specific permits invalid. The applicant is not asking for a declaratory order. He submitted that it would suffice if I find that on the face of it, it appears to be invalid. Such a finding would then entitle the court to find that the respondents are in fact unlawfully operating as taxi operators on the Germiston-Setsing taxi route. It would thus entitle the applicant to the interdict.

[19] In this regard it is apposite to refer to the decision of **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) at p 241 par [26]:

“[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the

subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

I respectfully agree with the **Oudekraal Estates** decision, *supra*. This means that even if the *ad hoc* authorisations are susceptible to be set aside by a court of law, it has not been done to date. It thus has legally valid consequences for as long as the authorisations are not set aside. The consequences that follow from these *ad hoc* authorisations are that the respondents, who are in possession of these *ad hoc* authorisations, may operate with them, as if they are valid, at least until they are set aside. In the premises, I disagree with Mr Maritz’s submissions referred to in paragraph 18, *supra*.

- [20] 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-Evans** 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 respondents’ version consists of a bald or uncreditworthy denials, raises 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); **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA).)

In the premises, and when I apply the **Plascon-Evans** rule in motion proceedings to the totality of the facts placed before me and I apply the **Oudekraal Estates** decision, *supra*, to these facts, as I am obliged to do, I cannot find that the applicant has proved that the respondents are unlawfully operating and conducting business of conveyance of passengers on the relevant route without the necessary authorisation to do so. This finding of course precludes the applicant of obtaining the final interdict contained in prayer 4 of the notice of motion.

ORDERS

[21] In the premises I make the following orders:

1. **Prayers 2 and 3 of the notice of motion (i.e. the contempt of court) are postponed *sine die*, to be heard on the normal opposed roll of this court;**

2. The costs in respect of prayers 2 and 3 will stand over to be determined by the court hearing the opposed motion in respect of prayers 2 and 3;
3. This matter is taken on to the roll as an urgent application in terms of prayer 1 of the notice of motion, with reference to prayer 4 of the notice of motion. (the interdict)
4. The application for a final interdict in terms of prayer 4 of the notice of motion is dismissed with costs.

L. le R. POHL, AJ

On behalf of applicant:

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Instructed by:
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NIEUW MUCKLENEUK
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