

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

Appeal No.: A77/11

In the appeal between:-

**THE MEC: DEPARTMENT OF POLICE,  
ROADS AND TRANSPORT, FREE STATE  
PROVINCE**

First Appellant

**THE PROVINCIAL REGISTRAR, TRANSPORT:  
FREE STATE PROVINCE**

Second Appellant

**M NTHUPING**

Third Appellant

**W MDHLULI**

Fourth Appellant

and

**MOHOKARE LONG DISTANCE TAXI  
ASSOCIATION**

Respondent

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**CORAM:** VAN DER MERWE, J *et* MOCUMIE, J *et* LEKALE, J

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**HEARD ON:** 5 MARCH 2012

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**JUDGMENT BY:** VAN DER MERWE, J

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**DELIVERED ON:** 26 APRIL 2012

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[1] This is an appeal to the Full Court against orders made by Moloi J in three applications, namely applications 2968/09, 3357/09 and 3389/09. The appeal is with the leave of the court *a quo*.

[2] Application 2968/09 was launched by the respondent, as the

first applicant, and by Morning Star Taxi Association, as the second applicant. The first appellant (the MEC) was the first respondent. The second appellant (the provincial transport registrar) was the second respondent. The provincial transport registrar is appointed by the MEC in terms of section 68 of the Free State Public Transport Act 4 of 2005 (the Act). The main function of the provincial transport registrar is the registration of associations formed in relation to public transport such as minibus taxis, the members thereof, as well as non-members. The third and fourth respondents in this application were officials of the Free State Department of Police, Roads and Transport (the department).

- [3] Application 2968/09 was based exclusively on spoliation. The respondent alleged that it, Morning Star Taxi Association and their members had been in peaceful and undisturbed possession of the taxi rank known as the Border Box, Maseru Bridge, district Ladybrand for more than 20 years. It was further alleged that the respondents disturbed this possession on 10 June 2009 by causing the offices of the respondent at the Border Box to be locked and by, on that

date and thereafter, prohibiting and hindering the members of the respondent to make use of the Border Box as taxi rank.

- [4] On 12 June 2009 C.J. Musi J issued a rule *nisi* in application 2968/09 in the following terms:

**“WORD DIT GELAS DAT:**

1. ....
2. Die respondente opgeroep word om redes, indien enige, aan te voer op Donderdag, 25 Junie 2009 om 09h30 waarom 'n bevel met die volgende bepalinge nie verleen sal word nie:
  - (a) dat die respondente verbied word om die applikante of die lede van applikante te verhoed om hulle besigheid as taxi eienaar en/of bestuurders te bedryf.
  - (b) dat die respondente verbied word om die lede van die applikante te verhoed om hulle besigheid as taxi eienaars en/of bestuurders te bedryf vanaf die perseel bekend as Border Box, Maseru Brug, distrik Ladybrand, Vrystaat Provinsie.
  - (c) dat die respondente of enige van die respondente se amptenare verbied word om die lede van die applikante lastig te val, te intimideer of in te meng

met hulle bedrywigheide van taxi eienaars en/of taxi bestuurders.

- (d) dat die respondente, gesamentlik en afsonderlik, gelas word om die koste van hierdie aansoek te betaal.

- 3. Die bevel vervat in paragrawe 2 (a) tot (c) hierbo sal dien as tussentydse bevel met onmiddellike werking hangende die uitslag van hierdie aansoek.”

[5] The respondent was the only applicant in application 3357/09. The application was brought against the provincial transport registrar, as the first respondent, and the MEC, as the second respondent. The heart of the case of the respondent in this application was a decision taken by the provincial transport registrar to deregister the respondent as a taxi association in terms of the Act, which decision was conveyed to the respondent in a letter of the provincial transport registrar dated 23 June 2009. The case of the respondent was that the decision was both unlawful and a contravention of the order made in application 2968/09. Therefore an order for committal for contempt of court in respect of the provincial transport registrar was sought.

[6] Van Zyl J on 9 July 2009 issued a rule *nisi* in application 3357/09 in the following terms:

**“WORD DIT GELAS DAT: (By ooreenkoms)**

1. Die eerste respondent word opgeroep om redes aan te toon waarom die volgende bevel nie verleen moet word nie:
  - 1.1 dat die eerste respondent skuldig bevind word aan minagting van die Hof deurdat hy die bevel, uitgereik deur Sy Edele Regter C J Musi, op 12 Junie 2009 onder saaknommer 2968/2009, aangeheg by die applikant se funderende eedsverklaring en gemerk aanhangsel ‘JM1’ verontagsaam.
  - 1.2 dat die eerste respondent gelas word om te voldoen aan die bepalings van voormelde Hofbevel.
  - 1.3 die eerste respondent word gelas om sy besluit, gedateer 23 Junie 2009, en waarvan ‘n afskrif aangeheg is by die applikant se funderende eedsverklaring, gemerk aanhangsel ‘JM5’, te herroep.
  - 1.4 dat die eerste respondent ‘n vonnis opgelê word wat die Agbare Hof onder die omstandighede billik mag ag.
  - 1.5 dat die eerste respondent gelas word om die koste

van die aansoek te betaal.

2. Bede 1.3 hierbo sal dien as 'n tussentydse bevel met onmiddellike werking hangende die uitslag van hierdie aansoek.
3. ....”

[7] The applicants in application 3389/09 were the respondent, Morning Star Taxi Association, Mr. Moses, Mr. Chivase, Mr. Ntlema, Mr. Khotso and Mr. Selane. These persons are owners or drivers associated with the respondent and Morning Star Taxi Association, whose taxis were impounded. The respondents were the MEC, as first respondent, the provincial transport registrar, as second respondent, Mr. Nthuping, who was then the acting provincial transport registrar, as the third respondent and Mr. Mdhluli, an official of the department, as the fourth respondent. The applicants in this application sought a rule *nisi* calling on the respondents to show cause why the following orders should not be made:

- “(a) Dat die Respondente gelas word om die voertuie, met registrasienommers **DBN 963 FS; FWN 396 NW; NKR 223 GP; DPD 509 FS** en **WDN 623 GP**, asook enige

ander voertuie waarop die Respondente beslag gelê het en geskut het na aanleiding van optredes op **5 en 6 Julie 2009** en te Border Box Maserubrug, distrik Ladybrand, Vrystaat Provinsie, en welke voertuie voor of op **5 Julie 2009** in die regmatige besit van die lede van die Eerste en Tweede Applikante was, onverwyld aan die regmatige eienaars en/of bestuurders terug te handig;

- (b) Dat die respondente gelas word om alle dokumente, welke insluit maar nie beperk is nie tot bedryfslisensies en bestuurderslisensies, welke deur die respondente op beslag gelê is gedurende optredes deur die Respondente op **5 en 6 Julie 2009** soos vermeld in paragraaf 2(a) hierbo onverwyld aan die betrokke lisensiehouers en/of regmatige besitters daarvan, terug te oorhandig;
- (c) Waarom die Respondente nie skuldig bevind sal word aan minagting van die Hof nie, deurdat die respondente die bevel, uitgereik deur Sy Edele Regter CJ Musi op **12 Junie 2009** onder **saaknommer 2968/2009**, aangeheg by die Applikante se funderende eedsverklaring en gemerk Aanhangsel **JM1**, verontagsaam;
- (d) Dat die Respondente gelas word om te voldoen aan die bepalinge van voormelde hofbevel;
- (e) Dat die Respondente 'n vonnis opgelê word wat die Agbare Hof onder die omstandighede billik mag ag;
- (f) Dat die Respondente, gesamentlik en afsonderlik, gelas

word om die koste van hierdie aansoek te betaal op 'n skaal soos tussen prokureur en kliënt, of sodanige skaal as wat die Agbare Hof onder die omstandighede mag billik ag.”

[8] The basis of this application was an operation carried out on 5 July 2009 by officials of the department headed by Mr. Mdhluli. The applicants in this application alleged that this operation was launched and carried out in order to prevent the members of the respondent and Morning Star Taxi Association from using the Border Box as a taxi rank and that in the process the vehicles mentioned were impounded.

[9] On the extended return dates of applications 2968/09 and 3357/09 both served before Moloi J, who heard both simultaneously with application 3389/09. Moloi J confirmed both rules *nisi* with costs, including the costs of two counsel and made the following order in respect of application 3389/09:

“The prayers as per notice of motion in case number 3389/09 are granted with costs including the costs of two counsel.”

In addition the following formed part of Moloi J's order:

“2. The registrar of Transport and Wally Mdhudi are found guilty of contempt of court as set out in the judgment. The contempt of court findings are taken as one for purposes of sentence. Each one of them is sentenced to three (3) months imprisonment wholly suspended for a period of three (3) years on condition that they are not found guilty of contempt of court relating to their employment situation as public servants and committed during the period of suspension.”

[10] In context it must be accepted that the provincial transport registrar was convicted of contempt of court in respect of the conduct relied upon in both applications 3357/09 and 3389/09. It must also be accepted that final orders were made in terms of prayers 2(a) and 2(b) of the notice of motion in application 3389/09.

[11] The only parties to the appeal are the parties mentioned in the heading above. I propose to deal separately with the grounds of appeal of the appellants in respect of each of the applications.

**APPLICATION 2968/09**

[12] Only two points were argued in respect of the orders made in this application, namely first, that interference with the peaceful and undisturbed possession of the Border Box was not established and second, that the orders were made in too wide terms.

[13] I cannot agree with the first contention on behalf of the appellants. It is trite that spoliation is committed when peaceful and undisturbed possession is disturbed or interfered with without due and lawful process. The evidence that the respondent and its members were in peaceful and undisturbed possession of the Border Box taxi rank, was not disputed at all. Not only was the specific evidence of the respondent of interference with this peaceful and undisturbed possession met only with a bare denial on the part of the appellants, but on their showing the appellants spoliated the respondent and its members. It appears from the evidence that officials of the department took a decision that taxi operations at the Border Box will cease as a matter of urgency as of 10 June 2009 and that that decision was executed. One of the officials of the department in his

affidavit before us in so many words confirmed that he stopped taxis driven by members of the respondent and informed them not to operate from the Border Box, but to use different premises.

- [14] I do agree, however, that par. 2(a) of the order of 12 June 2009 is couched in too wide terms, in that lawful actions and conduct on behalf of the appellants also appears to be prohibited thereby. The order should be amended so as to make it clear that only unlawful actions and conduct by or on behalf of the appellants are prohibited.

### **APPLICATION 3357/09**

- [15] The appellants did not attack the necessarily implicit finding that the decision to deregister the respondent as a taxi association cannot stand, but confined their argument to the finding of contempt of court. This was done for good reason, which, I think, should be briefly stated in the interest of the parties.

- [16] The date of commencement of the Act is 23 March 2007. The Act repealed the Free State Interim Passenger

Transport Act 16 of 1998. In terms of section 80 of the Act the provincial transport registrar is obliged to register a minibus taxi association, if satisfied in respect of the requirements tabulated in that section. Section 80(b) provides that the provincial transport registrar must be satisfied that the number of members of the particular association meets the prescribed minimum. It appears from the aforesaid letter that the respondent was purportedly deregistered for failure to maintain the minimum prescribed number of members. Section 84 of the Act provides that the provincial transport registrar may suspend or withdraw the registration of an association for failure to comply with the Act or for other conduct that has been prescribed as improper conduct. This section provides that on receipt of a complaint, accusation or allegation, the provincial transport registrar may conduct an enquiry in the manner prescribed, but before conducting an enquiry, the provincial transport registrar must address a written warning to the association requiring it to remedy its failure within the time stated, which may not be less than 21 days. It is common cause that no such warning was addressed to the respondent.

[17] However, the respondent was never registered or deemed to be registered as an association in terms of the Act. The respondent was only conditionally registered in terms of the repealed Act 16 of 1998. Its certificate of registration issued by the provincial transport registrar on 20 September 2004 stated that the respondent had been conditionally registered under section 18(2) of the Free State Interim Passenger Transport Act 16 of 1998 and that full registration will be effected under section 18(3) of that Act on compliance with all requirements set out in that Act. Section 78(1) of the Act provides that an association which has been fully registered in terms of section 18 of the Free State Interim Passenger Transport Act 16 of 1998, will be deemed to have been registered under the Act. The Act does not provide for or recognise conditional registration of an association. It follows that at best the respondent's application for full registration was not disposed of at the time of the commencement of the Act. In this regard section 112(5) of the Act provides that any application for registration as an association in terms of Act 16 of 1998 which was not disposed of at the commencement of the Act, is deemed to be an application under the Act. There was therefore no

basis for “deregistration” of the respondent or for steps in terms of section 84 of the Act and non-compliance with section 80(b) should have led to refusal of registration for the time being.

[18] It is settled law that in civil contempt proceedings the applicant has to prove the requisites of contempt, that is the order, service or notice thereof, non-compliance therewith and wilfulness and *mala fides*, beyond a reasonable doubt, but that once the applicant has proved the order, service or notice and non-compliance, the respondent bears an evidentiary burden to raise a reasonable doubt in respect of wilfulness and *mala fides*. See **FAKIE NO v CCII SYSTEMS (PTY) LTD** 2006 (4) SA 326 (SCA). It is also clear that a public official who is ordered by a court to do or to refrain from doing a particular act and fails to do so, is liable to be committed for contempt. See **MEC, DEPARTMENT OF WELFARE, EASTERN CAPE v KATE** 2006 (4) SA 478 (SCA) at 492 G – H.

[19] In this regard it was argued by the appellants that the finding of contempt of court in respect of the provincial transport

registrar is bad in law as he or she was not identified “as a particular human being”. It was also argued that the provincial transport registrar only exercised his official duties when taking the decision to deregister the respondent as a taxi association and that he was therefore not *mala fide*.

[20] I do not agree with the contention that a court order made against a public official can only be enforced by civil contempt proceedings if a particular human being is identified as the holder of the particular public office. Section 34 of the General Law Amendment Act 62 of 1955 in fact prohibits the citing of a public official by name. It provides that whenever any minister of state or a public official is cited in official capacity in any legal proceedings in any court, he or she shall be cited by his or her official title and not by name. A court order made against a public official must therefore ordinarily be interpreted as an order against the holder of the particular office for the time being. A contrary interpretation could result therein that the execution of a court order and the enforcement of the rights of any person in terms thereof may be frustrated by simply changing the personnel involved. On the other hand, this interpretation

should not lead to any prejudice to a public official or the state.

[21] I do not find it necessary to deal with the contention that the provincial transport registrar was not *mala fide*. In my view the conduct relied upon in this regard, namely the decision to deregister the respondent as a minibus taxi association, objectively did not constitute non-compliance with the court order of 12 June 2009 in application 2968/09. Upon a proper construction of this order, its import is to prevent interference with the operation of taxis. The respondent does not operate taxis, its members and their drivers operate the taxis.

[22] Section 4(3) of the Act provides as follows:

- “(3) A person undertaking a public transport service must –
- (a) have the necessary permit, operating licence or ad hoc authorisation; and
  - (b) be registered in terms of this Act in the case of minibus taxi-type, metered taxi, bus-type and coach services, four plus one taxi-type and education services subject to section 77, 83, 86, 87, 89, 90, 92, 93, 94, 95 and 96 of this Act.”

A permit is a public road carrier permit or similar authorisation issued under a previous law. An operating licence is issued by the Free State Transport Operating Licensing Board in terms of the Act. Section 65 of the Act provides for *ad hoc* authorisation by the Board to undertake public transport services in connection with a particular occurrence, such as a sports event, funeral or wedding.

[23] As stated above, section 80 of the Act provides for registration of minibus taxi associations. Section 81 provides that where an association has been so registered, the provincial transport registrar must register every member thereof who holds a valid and appropriate permit or operating licence. Section 83 deals with the registration of non-members of minibus taxi associations. Sections 86 to 96 are not relevant to the present matter.

[24] As stated, section 4(3)(b) of the Act is expressly subject to section 77 thereof. Section 77(1) of the Act provides that after a date determined by the MEC by notice in the provincial gazette, no operator may undertake minibus taxi-

type services and no association may conduct business as such, without being registered under the Act. The aim of this provision is no doubt to allow existing associations and operators with permits or operating licences to continue to operate taxis during the process of obtaining registration in terms of the Act. After having been given an opportunity to research the matter, the appellants confirmed that to this day the MEC has not determined a date in terms of section 77(1) of the Act. It follows that at all times relevant hereto a minibus taxi could have been validly operated without registration in terms of the Act, if the necessary permit or operating licence had been issued. It also follows that before the date determined in terms of section 77, the deregistration or cancellation of registration of an association such as the respondent, has no impact on the operation of the taxis by the members of the association.

[25] In my view therefore, the finding that the provincial transport registrar was guilty of contempt of court as alleged in this application, is wrong and must be set aside.

[26] In respect of this application only the findings that the provincial transport registrar and the fourth appellant (Mr. Mdhluli) were guilty of contempt of court and the sentences imposed, were challenged before us.

[27] The finding that the provincial transport registrar made himself guilty of contempt of court in respect of the operation of 5 July 2009 can be briefly disposed of. This application simply contains no evidence of failure to comply with or contravention of the relevant court order on the part of the provincial transport registrar.

[28] In the answering affidavits in this application, the allegations made against Mr. Mdhluli were responded to in particularity. It was stated that the operation of 5 July 2009 was a scheduled normal law enforcement operation that was carried out on a public road far from the Border Box, during which many vehicles were stopped and inspected. Some 15 vehicles were impounded and not only the vehicles belonging to members of the respondent and Morning Star Taxi Association. The evidence is that these vehicles were impounded because they were operated as taxis without

valid operating licences. It was therefor also denied that any operating licences were confiscated. It was specifically denied that the operation was aimed at preventing the use of the Border Box or that anyone was informed accordingly. Mr. Mdhuli also specifically denied that he used the vulgar words of disregard in respect of the court order ascribed to him.

[29] The evidence referred to can in my view not be described as far-fetched or clearly untenable and must therefore have been accepted for purposes of decision of the application. On this evidence there was no contempt of court. In my judgment the court *a quo* therefore erred in finding that Mr. Mdhuli was in contempt of court as alleged.

### **COSTS**

[30] This appeal was initially enrolled for hearing on 24 October 2011. The attorneys for the respondent were notified thereof on 18 July 2011. However, on 21 October 2011 the respondent launched an application to have the appeal

postponed *sine die* in order for the respondent to file heads of argument as required by the Rules of Court. This application was successful, but on 24 October 2011 it was specifically ordered that the respondent must file its heads of argument on or before 30 November 2011. The appeal was enrolled on 25 October 2011 for hearing on 23 January 2012. Only on 18 January 2012 did the respondent file heads of argument in respect of the appeal, accompanied by an application for condonation for late filing of the heads of argument. The appellants on 23 January 2012 requested and were granted opportunity to consider the application for condonation and to file answering affidavits thereto and the matter was postponed to 5 March 2012. Costs occasioned by the postponement were reserved. On 5 March 2012 the required condonation was granted, but costs reserved. It is clear in my view that the respondent should be ordered to pay the costs of the application for condonation including the costs of opposition thereto, as well as the costs occasioned by the postponement on 23 January 2012. Counsel for the appellants, however, argued that these costs should be awarded on the scale of attorney and client. I seriously considered this request, but have come to the conclusion

that it is clear that the respondent at all times intended to resist the appeal and that lack of sufficient funds must have been the major cause of the delay. In the circumstances these costs should be awarded on the normal party-and-party scale.

[31] Costs of the appeal should follow the result, including the costs of two counsel. The record of the appeal however includes three volumes containing transcription of oral argument delivered at various stages of hearing of the matters up to and including the application for leave to appeal. There is no justification for including the costs of these volumes in the costs of appeal and this was correctly conceded by counsel for the appellants. There is no reason to disturb the costs orders made by the court *a quo*.

[32] In the result the following orders are issued:

1. The appeal succeeds to the following extent:

- 1.1 Paragraph 2(a) of the order in application 2968/09 is amended to read as follows:

- “(a) dat die respondente verbied word om die

applikante of die lede van applikante op onregmatige wyse te verhoed om hulle besigheid as taxi eienaar en/of bestuurders te bedryf.”

1.2 The findings that the second and fourth appellants are guilty of contempt of court and the sentences imposed in respect thereof are set aside.

2. The respondent is ordered to pay the costs of the appeal, excluding the costs pertaining to the three volumes containing transcription of oral argument but including the costs occasioned by the postponement thereof on 23 January 2012 and the costs of two counsel, as well as the costs of its application for condonation dated 18 January 2012 and the costs of opposition thereto.

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**C.H.G. VAN DER MERWE, J**

I concur.

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**B.C. MOCUMIE, J**

I concur.

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**L.J. LEKALE, J**

On behalf of appellants: Adv. M.T. K. Moerane SC  
With him:  
Adv. T.L. Manye  
Instructed by:  
The State Attorney  
BLOEMFONTEIN

On behalf of respondent: Adv. A.J.R. van Rhyn SC  
With him:  
Adv. P. du P. Greyling  
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