

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1665/2010

In the case between:

GABRIEL TUMELO SEHANKA

Applicant

and

L J LEBATLA

1st Respondent

DIE LUR: DEPARTEMENT POLISIE,

PAAIE & VERVOER

2nd Respondent

DIE VOORSITTER: PLAASLIKE PADVERVOER-

RAAD, BLOEMFONTEIN

3rd Respondent

DIE PROVINSIALE REGISTRATEUR VERVOER,

VRYSTAAT PROVINSIE

4th Respondent

GREATER BLOEMFONTEIN TAXI ASSOCIAION

5th Respondent

JUDGMENT:

RAMPAI, J

HEARD ON:

25 NOVEMBER 2010

DELIVERED ON:

20 JANUARY 2011

- [1] The matter came to court by way of motion proceedings.
- The applicant applied for an order whereby the 1st respondent is prohibited and restrained from operating as a taxi service provider on a specified route in Bloemfontein pending the outcome of the 1st respondent's proper application for a taxi permit – alternative pending the outcome of the applicant's appeal for the review of the 3rd

respondent's decision to grant temporary taxi permit to the 1st respondent.

[2] The application was opposed by the 1st respondent who was aided and abetted by the 5th respondent. The 2nd, 3rd and 4th respondents decided to abide the decision of the court. None of them disputed or admitted the averments contained in the applicant's founding affidavit.

[3] In his founding affidavit the applicant alleged that he was a member of the 5th respondent and the secretary of its sub-structure called Jacaranda Route 16 Committee. He was a taxi service provider. He rendered such services from Jacaranda Taxi Rank in Dr Belcher Road to Universitas, Wilgehof, Bayswater via Noordhoek, Dan Pienaar and back to Jacaranda Taxi Rank where his taxi had to be stationed. All those areas were neighbourhoods in Bloemfontein. That route-network on which he operated was known as Route 16 among the taxi service providers.

[4] The applicant also alleged that the 1st respondent was also a member of the 5th respondent. The 1st respondent had valid permits in terms of which he was authorised to render

minibus-type of services as a taxi service provider from Bloemfontein to Botshabelo and back along the same route.

[5] During the course of 2009 he received complaints, from certain taxi service providers who were lawful holders of valid permits which authorised them to operate on Jacaranda Route 16, that the 1st respondent was conducting business on the same route but without any valid payment authorising him to do so. He investigated the complains. The grievance was reported to the 5th respondent who convened a meeting which was scheduled for the 15th May 2009. The executive committee of the 5th respondent, the route committee and the 1st respondent attended the urgent meeting.

[6] The written investigation report of the route committee was then tabled at the meeting. The 5th respondent heard that the 1st respondent unlawfully operated on the local route in question and that he threatened rank marshals whenever they confronted him about his unlawfully operations on the route. The 1st respondent's response was that he possessed a valid permit but failed to produce it. He relied

on an invalid permit as well as his alleged undisturbed rendering of taxi services on the route since 2006.

[7] The 5th respondent found against the 1st respondent after hearing the dispute. It was recommended that the 1st respondent should cease operating on the route without a valid permit. On the 18th May 2009 the 5th respondent informed the 4th respondent about the outcome of the grievance lodged by the route committee on behalf of its authorised but aggrieved operators. Notwithstanding the outcome of the grievance hearing the 1st respondent continued to conduct business operations on the route without a valid permit.

[8] The 3rd respondent advised the attorneys of the route committee on the 29th July 2009 that the 1st respondent had applied for a permit, that his application was gazetted on the 12 June 2009; that the application was still open for written objections and that no date had as yet been fixed for the hearing thereof – annexure “E”.

[9] On the 12th August 2009 the 5th respondent, through its attorneys sent its written objection to the 3rd respondent

against the 1st respondent's application – annexure "F". The applicant alleged that the 1st respondent's application was highly irregular on the grounds that the 1st respondent did not first seek and obtain the consent of the route committee and the recommendation of the 5th respondent. The 5th respondent was not even furnished with a copy of such an application for consideration. The gazetting of the application was, for various reasons, procedurally flawed.

- [10] On the 30th November 2009 the 5th respondent heard, through its attorneys, that the 1st respondent had been granted a temporary permit in the meantime. The 4th respondent's decision to grant a temporary permit to the 1st respondent would be reviewable on the grounds that the person or authority that took such a decision would not have been authorised by the empowering legislation. The action or decision was influenced by an error of law and thus procedurally unfair – section 6(b) Promotion of Administrative Justice Act, 3 of 2000. The action taken by the 4th respondent instead of the 3rd respondent was a breach of a material procedure. So alleged the applicant. The applicant was frustrated by the reluctance or failure of the 5th respondent to take decisive action against the 1st

respondent. As a result of such reluctance the applicant decided to bring this application in his personal capacity.

[11] The applicant alleged that he had a clear right; that he stood to suffer harm unless the 1st respondent was interdicted; that he had no other suitable alternative remedy available and that the balance of convenience favoured the applicant more than the 1st respondent.

[12] In his answering affidavit the 1st respondent alleged that he first applied to the Jacaranda Platform Committee, a sub-committee of the 5th respondent for consent to operate on Jacaranda Route 16 and related network of routes. The required consent, was given on 30 December 2004 – annexure “LL15”.

[13] Subsequently he applied to the 5th respondent for the required recommendation in support of his application to the permit board for the official conversion of his taxi permits from the external provincial route known as Botshabelo (FS095) to the internal or local route known as Jacaranda Route 16. Between the 8th July 2007 and 1 November 2007 he addressed three letters – annexures

“LL18”, “LL19” , “LL20”) to the 5th respondent and its route committee. He received no response from the 5th respondent. However, the Jacaranda Route Committee gave him written consent – annexure “LL16” on the 17th Augusts 2007 to operate on the four local routes, namely, routes 16, 17, 18 and 19.

[14] He was frustrated by the uncaring attitude of the 5th respondent. On the 6 December 2007 he complained to the 3rd respondent about the apparent lack of co-operation by the 5th respondent (annexure “LL17”). The 5th respondent acknowledge receipt of his letter for the first time on the 12 December 2007.

[15] On the same day, 12 December 2007, the 3rd respondent enquired from the 5th respondent whether the 5th respondent recommended or opposed his application for the proposed amendment of his permit (annexure “LL22”). By the 11th February 2008 the 5th respondent had still not advised the 3rd respondent of his decision concerning his proposed migration from the provincial route to the local route taxi operations (annexure “LL22”).

- [16] The 1st respondent alleged further that on the 7th May 2009 he enquired from the 3rd respondent about the progress made in its dealings with the 5th respondent (annexure “LL23”). The 3rd respondent then convened a meeting which was held on 13 May 2009. The meeting was attended by certain members of the Jacaranda Route 16 committee. At the meeting it emerged that the Jacaranda Route 16 Committee was no longer supporting his application (vide 2 annexure “LL1”) as it had earlier done per annexure “LL16”).
- [17] On the 15th May 2009 he attended a meeting convened by the 5th respondent. After that meeting the 5th respondent wrote a letter, annexure “C” to the 3rd respondent in which it objected to the amendment or transfer of his permits. On the 20 May 2009 the 3rd respondent informed the 5th respondent that his objection contained no reasons and that he would be issued with temporary permits, if he applied for them pending the finalisation of his main application (9 annexure “LL1”). He was then issued with the first temporary permit valid from the 30th May 2009 (annexure “LL2”). The 3rd respondent issued further permits to him from time to time (annexure “LL3” –

annexure “LL9”).

[18] On the 5th February 2010 the 5th respondent, as the applicant, under case number 91 of 2010 launched an application against him and the 3rd respondent among others. The 5th respondent’s application was withdrawn on the 11th February 2010. Notwithstanding its withdrawal, the 3rd respondent declined to issue any further temporary permits in his favour from the 7 March 2010 after the expiry of his 7th temporary permit - annexure “LL9”.

[19] The 1st respondent further alleged that he was still busy trying to negotiate with the 3rd respondent for the issue of a further temporary permit when the current proceedings were brought. He solicited the health of his attorneys. They took the matter up with the 3rd respondent, (annexure “LL10” and annexure “LL12”). The 3rd respondent indicated to his attorneys that it was not keen to re-issue any more temporary permits to him pending the finalisation of the litigation between the parties (annexure “LL11” and annexure “LL13”).

[20] He added that after a long struggle he eventually received

the support or required recommendation from the 5th respondent (“annexure “LL24”) on the 26 April 2010 as well as the required consent from the Jacaranda Route Committee (annexure “LL25”) dated the 29th April 2010. Over and above that, on 1 July 2010, he also received two affidavits in support of his application from the chair of the 5th respondent and the chair of the Jacaranda Route Committee (annexure “LL26” and annexure “LL27”) respectively.

[21] Through the persistent intervention of his attorneys, (annexure “LL14”) the 5th respondent relented and issued a further temporary permit to him. His operations on the route were validated or authorised by the 3rd respondent from the 2nd July 2010 to the 1st October 2010 (annexure “AO1”). The 9th temporary permit was attached to the 1st respondent supplementary affidavit dated the 29th July 2010. These then were the positive allegations contained in the answering affidavit.

[22] There were also negative allegations in the answering affidavit. The 1st respondent denied the applicants allegations that he was the secretary or the chair of the

Jacaranda Route 16 Committee but rather the vice chair; that any operator of the route ever complained to the applicant about him conducting business on the route; that he was operating on the route without a valid permit; that he did not procedurally lodge a proper application with the permit board; that he made use of invalid permits to conduct his business; that he threatened to harm the marshals; that he was aggressive towards the lawful operators of the route; that he never had the consent of the Jacaranda Route 16 Committee to operate on the route or that the permit board acted unprocedurally in publishing his application in the government gazette.

- [23] In his replying affidavit the applicant denied the 1st respondent's allegations: that he did not have the support of any operator of the route; that he had any valid permit as on the 18th May 2009; that the 5th respondent and its route committee now supported him; that the 1st respondent ever lodged a proper application for the conversion or amendment of his permit; that annexure "AO1" was a valid permit seeing that it was issued on the 2nd July 2010 whereas the 1st respondent's motor vehicle DKJ346FS in respect of which such permit was issued was repossessed

on 24th June 2010; that annexure “LL15” was not a regular consent because it was not made in support of a proper application; that annexure “LL16” also was not a regular document for the same reason in addition to the defect that it was signed by the secretary only; that the objections of the 5th respondent (annexure “C”) were not taking into account by the 3rd respondent as evidenced by annexure “LL1”; that annexure “LL23” served to prove that the 1st respondent did not have a permit to operate on the route as on 7th May 2009 and that the 1st respondent was, at present or in the past, ever entitled to conduct taxi business on the specific route.

- [25] The undisputed facts are: that the applicant has a valid permit which entitles him to run a taxi services on the specified local routes; that the 1st respondent started rendering the same sort of services on the same route from the year 2004; that until 30 May 2009 the 1st respondent was rendering taxi services on the same route without a valid permit; that the 3rd respondent issued 7 temporary permits to the 1st respondent to operate as a taxi service provider on the specific routes between the 29th May 2009 and the 7th March 2010; that the 1st respondent did not

have a valid permit applicable to the specified route at the time these proceedings were initiated on the 31st March 2010; that for the period commencing on the 7th March 2010 and ending on the 1 July 2010 the 1st respondent did not have any temporary permit to continue with his business operation on the specified route; that the 1st respondent nonetheless continued with his unauthorised operations on that route; that on 2nd July 2010 the 3rd respondent again issued the 1st respondent with the eight temporary permit which lapsed on 1st October 2010 and that from then on until the hearing of the application the 1st respondent was not issued with any further temporary permit.

[26] The issue in the case was whether, on these undisputed facts, the applicant was entitled to the relief sought, be it final or interim.

[27] Mr. Snellenburg, counsel for the applicant, submitted that the applicant had made out a case for the grant of a final interdict or alternatively an interim interdict. However, Mr Greyling differed. He submitted that, save for a specified period of four months, the 1st respondent was entitled to

operate on this specified route by virtue of the various permits issued to him by the 3rd respondent, the permit board.

[28] The requirements for the grant of a final interdict are trite. To obtain a final interdict the applicant has to allege and prove a clear right; an injury to such a right actually committed or reasonably apprehended; absence of any other alternative ordinary remedy that can adequately afford him a similar or satisfactory protection – **SETLOGELO v SETLOGELO** 1914 AD 221 on 227.

[29] As regards the first requirements, it was clear and obvious, on the papers and during argument, that the applicant was a holder of a valid permit. The permit entitled him to operate on the route concerned. Therefore he had a clear right.

[30] As regards the second requirements, it was common cause that the 1st temporary permit held by the 1st respondent entitled him to render taxi services on the specified route as from 30 May 2009 – annexure “LL2”. It stands to reason therefore that prior to the issue of the first temporary permit

the 1st respondent was not authorised to provide taxi services on the route in question.

[31] The seventh temporary permit, annexure “LL9” expired on the 6 of March 2010. When this application was launched on the 31 March 2010 the 1st respondent did not have any valid temporary permit to operate on this specific route. The 8th temporary permit, annexure “AO1” again authorised him to operate on the route as from the 2nd July 2010. It follows therefore that the 1st respondent’s operations from the 7th March 2010 to the 1st July 2010 were unauthorised.

[32] Similarly, the 1st respondent’s continued operations from the 2nd October 2010 after the expiry of his 8th temporary permit until the hearing on the 25 November 2010 were also unauthorised by the permit board, the 3rd respondent.

[33] Whereas the applicant was legally providing minibuss taxi services on the route concerned at all time material to this dispute, the 1st respondent was not. In the three preceding paragraphs, I have highlighted the three periods during which he conducted passenger transport business on the route while he was not in possession of any valid permits

issued by the 3rd respondent. To the extent that he did so, his operations were certainly illegal. BY conducting such an unlawful trade competition against the applicant, he actually infringed the applicant's clear right. Such an infringement constituted an injury to another's protected right. I would, therefore, find that the second requisite of harm to a clear right has been established.

[34] It may well be so that the 3rd respondent would, but for this application, have continued to issue further temporary permits to the 1st respondent. The contention holds true in respect of the second and third periods only of the 1st respondent's permitless operations. Certainly the contention hold no water in respect of the first period. He described himself as a member of the operators of the Jacaranda Route 16. He has been operating on the route for years, (annexure "LL1") before the current application was launched on 31 March 2010. His illegal operations started way back in 2004, annexure "LL12".

[35] Notwithstanding the belated application and the incorrect perception that it prohibited or froze any issue of further permits by the 3rd respondent to the 1st respondent and the

perceived impact it had on the minds of the functionaries of the 3rd respondent, the bottom line is that the 1st respondent had virtually no valid permit at the time the interdictory application was launched. The first temporary permit was issued two months later.

[38] As regards the third requisite of alternative remedy it was argued, *in limine* in fact, on behalf of the 1st respondent that the applicant did not follow the internal grievance procedure as laid down in the 5th respondent's constitution. The applicant and the 1st respondent were members of the 5th respondent at all times relevant to the dispute. The constitution provided that a member who was aggrieved by the decision of the domestic grievance committee had a right to take the matter up, on appeal, to the regional grievance committee. On the ground that the applicant had not exhausted internal remedies I was urged to dismiss this application.

[39] On behalf of the applicant it was argued that such internal remedies were not meaningfully satisfactory in this particular case. Mr Snellenburg contended that it was the case of the applicant that his vested interests in a lawful

trade competition were not properly protected by the 5th respondent. He argued that the fact that the 5th respondent had so far done nothing meaningful or effective to restrain the 1st respondent's unlawful operations was detrimental to the applicant's pursuit of lawful trade demonstrated the inefficacy of such home based grievance remedies.

[40] I am persuaded by Mr Snellenburg's submission. I may add two things to that submission. Firstly, the 1st respondent himself has been struggling for years to get the 5th respondent to recommend or to decline recommending his application for the transfer from a provincial to a local route. This demonstrated how poorly the affairs of the 5th respondent we managed. Obviously its members were not receiving meaningful and good service. Secondly, the 5th respondent recently decided backing up the 1st respondent. This was a strange twist in the tail. Hardly two months before these proceedings were instituted by the applicant, the 5th respondent itself came rushing to court with guns blazing to stop the 1st respondent. They withdrew the case, went away, never came back and never looked back. Can any objective member of the 5th respondent be optimistic about the fair workings of the local grievance committee of

the 5th respondent in the light of such dismal and pathetic ineptitude and disarray of the 5th respondent's executive committee?

[41] In my view the applicant was entitled to obviate the internal grievance procedures. Such noble procedures were not worth the paper they were written on. The 5th respondent has demonstrated that it cannot be trusted to implement such procedures to realise the objective of resolving grievances among its members.

[42] I am persuaded that such domestic remedies would not have provided the applicant with adequate and satisfactory protection similar to the protection which the prohibitory interdict can provide. It follows therefore that I am of the view that the applicant did not have any other alternative of an ordinary but satisfactory remedy available on the domestic front. This third requirement has also been established.

[43] In the circumstances I have reached the conclusion that the applicant has established all the requirements for the grant of a final interdict - **V & A WATERFRONT PROPERTIES**

(PTY) LTD AND ANOTHER v HELICOPTER & MARINE SERVICES (PTY) LTD AND OTHERS 2006 (1) SA 252

(SCA) at 257 G – H. On the premises I would grant the relief sought.

[44] Now I turn to the question of costs. I came to the foregoing conclusion with some measure of trepidation. To start with, the applicant's allegation that the first respondent has not applied to the third respondent for the amendment of his taxi permit has no substance. It is based on speculative conjecture and not proven facts. The first respondent's case was that he applied, in terms of section 51(1) Free State Interim Passenger Transport Act, No. 16 of 1988, to the Provincial Licensing Board, the third respondent, some six years ago, for permits to operate on the route(s). Since 2004 he has been struggling to get the fifth respondent to participate in the prescribed statutory processes.

[45] He averred that as a result of lack of cooperation or share neglect of its statutory obligation (sec 51(6)) the entire process leading towards the hearing of his application in terms of section 51(9) by the board has been inordinately retarded. He became frustrated. He realised that talking to

the 5th respondent was like talking to a stone. He turned to the 3rd respondent to do something about his desperate situation caused by the 5th respondent's dereliction of duty.

[46] The plight of the 1st respondent was seemingly brought to the attention of the 2nd respondent. On the 20th May 2009 the director of the 2nd respondent addressed a letter (annexure "LL1") to the 5th respondent. He referred to numerous facsimiles from his department to the 5th respondent and in particular to the facsimile dated December 12, 2007 – some 18 months earlier. He made references to some annexures in respect of which the 5th respondent's response was still outstanding. He remarked, with an obvious feeling of utter dismay, that various correspondences subsequently addressed to the 5th respondent elicited no constructive response.

[47] He pointed out that even that one letter (annexure "C") dated the 18th May 2005 did not give any substantive reasons as to why the 5th respondent, after all those many years, was only then expressing its vague objection. At paragraph 7, annexure "LL1", Mr Phoshodi, the director of the second respondent politely warned the 5th respondent:

“7. It is regrettable that the Department is left with no choice but assume that there are no valid reasons as to why Mr. Lebatla’s application for amendment of route is not recommended.”

[48] Upon proper reading of the 5th respondent’s letter (annexure “C”) it becomes quite apparent that the 5th respondent does not, in principle object to the grant of the 1st respondent’s application. The crux of the 5th respondent’s stance which the applicant obviously supported, was that the 1st respondent should seek a permit that, allowed him to operate (vide par 2 thereof); that the 1st respondent should refrain from operating without a valid permit (vide par 1) and that he should not rely on his existing taxi permit in respect of Botshabelo (FS095). The 5th respondent cannot eat its cake and still have it. They cannot fool anyone but itself by overtly saying the 1st respondent must seek a permit. He did that ages ago but they covertly frustrated him. Eventually after many years the 5th respondent has recently reconsidered its stance. Its decision is refreshing.

[49] The applicant does not claim to have ever been in the executive committee of the 5th respondent. His claims that the 1st respondent did not comply with certain statutory procedures; that the temporary permits were issued through irregular procedures; that the application of the 1st respondent was irregularly gazetted and that such permits were issued on the strength of the decision taken by a functionary which was not authorised or statutorily empowered to do so were all misplaced. What is more telling against the applicant is that he did not explain why he did not endeavour to have the 1st respondent interdicted in a long period of approximately six years.

[50] In my view the applicant, by his own conduct, tacitly encouraged the 1st respondent to operate on the route over the years and welcome him as a member of Jacaranda Route 16 operators knowing very well, right from the outset in 2004, that he did not have a valid permit. The same Jacaranda Route 16 Committee consented, not once but twice, that 3rd respondent should allow or grant the 1st respondent permit (vide annexures “LL15” dated 30 December 2004 as well as annexure “LL16” dated the 17 August 2008). By the way the two written consents were

never withdrawn. On 13 May 2010 certain operators of the same route had a meeting with the functionaries of the 2nd respondents and seeming attempted to contradict or nullify those earlier decisions of their own committee. The 3rd respondent would have nothing of the sort.

[51] The applicant vaguely alleged in the founding affidavit that the 1st respondent had threatened the rank marshals. It is remarkable that the applicant attached no confirmatory affidavit by any such marshal. It is also interesting to note that his allegation that the 1st respondent acted aggressively towards the other operators on the route was equally vague. The allegations were denied by the 1st respondent in the answering affidavit. The applicant annexed six affidavits to the replying affidavit. The six deponents were members or rather operators of route 16 but none of them verified the particular allegation concerning the 1st respondent's aggression towards them.

[52] He urged me to ignore the support which the 1st respondent received from the 5th respondent and Jacaranda Route 16 Committee as evidenced by annexures "LL24" and annexure "LL25". He alleged that the deponents thereof,

Mr Baadjies and Mr Valashiya, were friends of the 1st respondent who were recently elected the respective chairs of the 5th respondent and its route committee. He made a bold and unsubstantiated claim that the two chairs were not authorised to make affidavits in support of the 1st respondent. However, he attached no confirmatory affidavit by the committee members of any of the two structures. He has apparently been voted out of office as the vice chairs.

[53] He relied on a letter (annexure “C”) dated 18 May 2010 and another letter dated the 14 May 2010 which was not attached (vide par 20, founding affidavit) which the route committee allegedly sent to the 5th respondent. Although he attached no copies of written resolutions he criticised the 1st respondent for relying on sworn statements instead of resolutions by the same entities on whose letters he relied. The inconsistencies of the argument are quite apparent.

[54] In these circumstances, my decision would not be compatible with proper exercise of judicial discretion if I were to award the costs hereof in favour of the applicant. I

am inclined to deprive him of the fruits of his success.

[55] The powers of the 3rd respondent are set out in section 44. Among others, the 3rd respondent can amend or transfer licences or permits. I hasten to add that where, as in this instant, a holder of a permit wishes to amend and transfer his permit but his application to migrate has been considerably delayed through no fault of his, the 3rd respondent may administratively exercise its discretionary power to alleviate hardships by the grant of a temporary permit. This was a proper case where such an interim relief was justified.

[56] The mere fact that there was a pending litigation did not in itself, prevent or prohibit the 3rd respondent from issuing further temporary permits to extenuate the prolonged hardship which the 1st respondent had already suffered. Of course the objection which the applicant has if any, will be considered at the hearing of the 1st respondent in due course. I am persuaded by Mr Greyling's submission that there is virtually no sound reason save this current application why there should be any impediment against the issue of further temporary permits by the 3rd respondent

in favour or the 1st respondent.

[57] Accordingly I make the following order:

57.1 The 1st respondent is interdicted and restrained from operating as a minibus taxi service provider without valid permit(s) from Jacaranda Taxi Rank in Dr Belcher route to Universitas, Wilgehof, Bayswater via Noordhoek, Dan Pienaar and back to Jacaranda Taxi Rank where the taxis of route 16 operators are stationed.

57.2 The 3rd respondent is urged to expedite the finalisation of the 1st respondent's application and in the meantime to reconsider his interim application for a further temporary permit pending the leasing of his main application.

M. H. RAMPAL, J

On behalf of the applicant:

Adv. N. Snelleburg
Instructed by:
Naudes

BLOEMFONTEIN

On behalf of the 1st respondent
in main application:

Adv. P. Greyling
Instructed by:
Goodrick & Franklin Inc.
BLOEMFONTEIN

On behalf of the 2nd – 5th
respondent in main application:

No appearance

/eb