



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION-MTHATHA)**

CASE NO: 2021/ 2024

In the matter between:

PORT ST JOHNS TAXI OWNERS ASSOCIATION

APPLICANT

And

**MEC FOR TRANSPORT, SAFETY AND
LIAISON EASTERN CAPE**

1ST RESPONDENT

THE MINISTER OF POLICE

2ND RESPONDENT

**THE PROVINCIAL COMMISSIONER
SOUTH AFRICAN POLICE SERVICES,
EASTERN CAPE**

3RD RESPONDENT

**THE MUNICIPAL MANAGER PORT ST
JOHNS MUNICIPALITY**

4TH RESPONDENT

UNCEDO TAXI ASSOCIATION LUSIKISIKI

5TH RESPONDENT

**THE STATION COMMANDER PORT ST
JOHNS POLICE STATION**

6TH RESPONDENT

JUDGMENT

NKELE A.J

INTRODUCTION

1. The applicant seeks an order to interdict, prohibit and restrain the fifth respondent from picking up and dropping passengers along the R61 National Road from Lusikisiki to Port St Johns. The applicant also seeks an order directing the first, second, third, fourth and sixth respondents to ensure that the fifth Respondent is restrained and prohibited from picking up and dropping off passengers along the R61 National Road en route from Lusikisiki to Port St Johns.

APPLICANT'S CASE

2. The applicant premises its case on the argument that it is in possession of a permit to pick up and drop off passengers from Lusikisiki to Port St Johns in the National Route R61. In substantiation thereof, the applicant further states that it has an exclusive right to so pick up and drop off passengers on the R61 Route from Lusikisiki to Port St Johns. The applicant also further submits that the fifth respondent's conduct encroaches upon its exclusive right to pick up and drop off passengers in that Route and for that reason it should be prohibited and restrained from dropping off and picking up passengers.

3. In the Founding Affidavit the applicant submits that the fifth respondent's conduct prejudices it economically in that it is not able to make profit and that all attempts have been made to solve the problem such that negotiations between the applicant and the fifth respondent to solve the problem failed.

4. Furthermore, the applicant seeks an order interdicting the fifth respondent from dropping off and picking up passengers along the R61 Route from Lusikisiki to

Port St Johns. It further seeks an order declaring the first, second, third, fourth and sixth respondent's conduct of refusing to interdict and restrain the fifth respondent's conduct of dropping off and picking up passengers, en route from Lusikisiki to Port St Johns via R61, unlawful.

5. A further order is being sought authorising the first, second, third, fourth and sixth respondents to ensure that the interdict against the fifth respondent is implemented against the fifth respondent.

6. The applicant further submits that it is necessary for the law enforcement agencies and the Local Municipality to intervene so as to save them from the prejudice they continue to suffer on a daily basis. The prejudice that they continue to suffer is of a financial nature and manifests itself in that they owe money for their vehicles to the Banks and other financial institutions. So, their livelihoods have been placed in jeopardy and for that reason the intervention of the other respondents to enforce the law is necessary.

FIFTH RESPONDENT'S CASE

7. In its Answering Affidavit, the fifth Respondent disputes the applicant's Locus Standi on the basis that the permit attached as **PSJ2** to the founding papers, to prove that it has an exclusive right to pick up and drop off passengers from Port St Johns to Lusikisiki, was issued by the Department of Transport to Mr Caleni. That licence, the 5th Respondent submits, does not mean that the applicant has an exclusive right and that other people who are members of other associations do not have a right to pick up and drop off passengers in the same route.

8. The fifth respondent further disputes that the deponent to the Founding Affidavit, Mr Velaphi Fanele, has the necessary Locus Standi to bring this application. To substantiate this defence the applicant submits that annexure **PSJ1** does not give the deponent authority to depose to the Founding Affidavit in that it was signed by him only and therefore he cannot give authority to himself.

9. On the merits, the fifth respondent disputes that the Applicant has an exclusive right to pick up and drop off passengers enroute from Lusikisiki to Port St Johns. For that reason, the fifth respondent submits that its members have an equal right to pick up and drop off passengers at the disputed route and they have been issued with operating licences for that purpose. In support of this assertion the fifth respondent attaches copies of operating licences of **Messrs Tholakele Zenzile, Simlindile Nkqayi, Mlungisi Mazaleni and Siphon Mnyameni** to the Answering Affidavit.

10. The fifth respondent submits that those operating licences give its members all the right also to pick up and drop off passengers from Lusikisiki to Port St Johns, along the R61 National Road. Therefore, the fifth respondent submits, the applicant does not have an exclusive right to use the route from Lusikisiki to Port St Johns. The applicants, for that reason, have failed to prove a clear right to the interdict and, consequently, are not entitled to the relief sought in the papers. If the duly issued operating licences of the fifth respondents' members were to be suspended, that would be equivalent to suspending them unlawfully to their prejudice. On this basis the fifth respondent disputes that there is any need for the intervention of the law enforcement agencies, as well as the Local Municipality, as no prejudice has been suffered or contravention of the law has been committed by the members of the fifth respondent.

THE GOVERNING LEGAL PRINCIPLES. REQUIREMENTS FOR AN INTERDICT

11. It is trite that for a party to be granted an interdict, he or she must establish a clear right and, in this regard, must prove that on a balance of probabilities the right relied upon.¹ The concept of clear right means that an undisputed right has to be established in favour of the applicant. The word '**clear**' right relates to the degree of proof required to establish the right and should strictly not be used to qualify '**right**' at all.² The right must be a definite one and in order for the applicant to establish such a right, he or she has to prove on a balance of probabilities the right which he

¹ LAWSA Vol 4 para 50 page 49.

² Edrei Investments 9 Ltd

seeks to protect.³ In an instance where the proceedings are brought by way of an application and there is a material dispute of fact, a clear right cannot be established and a final interdict will not be granted.⁴

12. The second requirement for an interdict is an injury actually committed or reasonably apprehended and that means an infringement of a right which has been established and the prejudice that ensues therefrom.⁵ Prejudice is not equated with or synonymous with damages and it is sufficient to establish potential prejudice⁶. The injury must be the one that a reasonable man might entertain on being faced with the facts and the test is objective.⁷ The facts grounding an apprehension must be set out in the application to enable the Court to judge for itself whether the fears are indeed well founded.⁸ That means the applicant need not establish on a balance of probabilities that the injury will follow.⁹

13. The third requirement for an interdict is the absence of another adequate or alternative remedy.¹⁰ The alternative remedy must:

- (a) be adequate in the circumstances;
- (b) be ordinary and reasonable;
- (c) be a legal remedy; and
- (d) grant similar protection.

14. As a general rule, the applicant must first exhaust other remedies at his or her disposal before approaching the Court for an interdict.¹¹ The question whether or not an alternative remedy exists and is suitable will require the court to exercise its discretion.¹² It is settled law that the Courts will not, in general, grant an interdict

³Johannesburg City Council v National Transport Commission 1990 (SA199 (WLD) at 202F-203H

⁴ Peter Van Blerk Precedents for Applications in Civil Proceedings Juta 2018 page 23.

⁵ LAWSA Vol 4 para 51 page 49

⁶ ibid LAWSA para 51 page 49

⁷ Erasmus Superior Court Practice D6-16A.

⁸ Erasmus Superior Court Practice page D6-16A.

⁹ Ibid LAWSA Vol 4 para 49, Antares International Ltd v Louw Coetzee & Malan Inc 2014 (1) SA 172 (WCC) para31

¹⁰ LAWSA Vol 4 para 52 page 50

¹¹ LAWSA Vol 4 para 52 page 50.

¹² P. Van Blerk ibid para 4.9 page 24, Wynne & Godlonton v Mitchell, Wynne & Cornish v Mitchell 1973 (1) S.A 283 (E) at 294 and 296.

when the applicant can obtain adequate redress by an award of damages.¹³ For an applicant for a final interdict to succeed he or she must allege that there is no alternative legal remedy¹⁴.

15. If there is an existing remedy with almost the same result for the protection of the applicant's right, an interdict will not be granted.¹⁵ **Wallis J.A** as he then was, gave a clear explanation of the requirement of an absence of an adequate remedy in the matter of **Hotz v University of Cape Town** when he said: -

[36] *"firstly, the purpose of an interdict is to put an end to the conduct in breach of the applicant's rights. The applicant invokes the aid of the Court to order the respondent to desist from such conduct and, if the respondent does not comply, to enforce its order by way of the sanctions for contempt of court. Secondly, the existence of another remedy will not preclude the granting of an interdict where the proposed alternative remedy will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or apprehended. That is why in many cases a court will weigh up whether an award of damages will be adequate to compensate the injured party for any harm they may suffer. There may also be instances where, in the case of statutory breach, a criminal prosecution, in appropriate circumstances, will provide an adequate remedy, but there are likely to be few instances where that will be the case. Thirdly, the alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of Court. The fact that one of the parties, or even the judge, may think that the problem would be better solved, or can ultimately only be solved, by extra-curial means, is not a justification for refusing to grant an interdict.*

¹³ Erasmus Superior Court Practice D6-16A.

¹⁴ Francis v Roberts 1973 (1) SA 507 (RAD) at 512D-E remedy Chapmans Peak Hotel (Pty) Ltd v Jab and Annalene Restaurants CC T/A O'Hagan's [2001] 1 SA 415 (C) at 420g, Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newark Mining JV (Pty) Ltd (unreported, SCA CASE NO. 169/2021 DATED 27 May 2022) at para 15.

¹⁵ Francis v Roberts 1973 (1) SA 507 (RAD) at 512D-E remedy See Chapmans Peak Hotel (Pty) Ltd v Jab and Annalene Restaurants CC T/A O'Hagan's [2001] 1 SA 415 (C) at 420g, Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newark Mining JV (Pty) Ltd (unreported, SCA CASE NO. 169/2021 DATED 27 May 2022) at para 15.

[39] This understanding of the nature and purpose of an interdict is rooted in constitutional principles. Section 34 of the Constitution guarantees access to courts, or, where appropriate, some other independent or impartial tribunal, for the resolution of all disputes capable of being resolved by application of law. The Constitutional Court has described the right as being of cardinal importance and “foundational to the stability of an orderly society” as it “ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help”. It is a “bulwark against vigilantism, and ...chaos and anarchy”. Not only is the Constitution the source of the university’s right to approach the Court for assistance; in doing so it is exercising a right that the Constitution guarantees. In granting an interdict the court is enforcing the principle of legality that obliges the Courts to give effect to legally recognised rights. In the same way the principle of legality precludes a court from granting legal recognition and enforcement to unlawful conduct. To do so “is the very antithesis of the rule of law”.¹⁶

16. It is a trite principle that once the requirements for a final interdict have been established, the scope for exercising the Court’s discretion against the granting of an interdict is limited¹⁷. The Court will not exercise its discretion in favour of granting an interdict where to do so will would serve no purpose.¹⁸ The ultimate objective of an interdict is the prohibition of illegitimate activities and for that reason, the court will be slow in restraining a person from exercising his rights and carrying on his activities applies only in respect of legitimate activities.¹⁹

17. The ultimate objective of an interdict is to prohibition of illegitimate activities and for that reason, the Court will be slow in restraining a person from exercising his rights and carrying on his lawful activities because an interdict only applies in respect of illegitimate activities.²⁰

¹⁶ 2016 ZSCZ159 (20 October 2016).

¹⁷ P. Van Blerk *ibid* para 4.10 page 24, United Technical Equipment Company (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T).

¹⁸ LAWSA Vol 4 para 52 page 50, Gugu v Zongwana [2014] 1 All SA 203 (ECM) para 35

¹⁹ Erasmus Superior Court Practice D6-1.

²⁰ Para 40 page 21

THE LEGAL PRINCIPLES REGULATING SERVICE OF PROCESS UPON AN ORGAN OF STATE.

18. In terms of Section 5(1) of the Institution of Legal Proceedings Against Certain Orders of the State Act any process by which any legal proceedings contemplated in Section 3(1) are instituted must be served in accordance with the provisions of Section 2 of the State Liability Act No. 20 of 1952. Where the defendant or respondent is the Minister of Police, service of process must be effected upon the National Commissioner as defined in the South African Police Service Act no. 68 of 1995, at the Head Office of the department²¹.

19. Section 2(2)(a) provides that the plaintiff or applicant, as the case may be, or his or her legal representatives must, after any Court process instituting proceedings and in which the executive authority of a Department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the Head of Department concerned at the Head Office of the Department.

20. In interpreting the provisions of Section 2(2) of the State Liability Act, the **Supreme Court of Appeal in Minister of Police v Miya** remarked as follows: -

“as already stated above, it is common cause the main issue in this appeal concerns the interpretation of section 2(2) of the State Liability Act. It is by now trite that when a legislative provision is to be interpreted, consideration should be given to the language used in the light of the ordinary rules of grammar and syntax; the process of interpretation is objective, not subjective; and a sensible meaning should be preferred than insensible one. Furthermore, the Constitutional Court has made it clear that when interpreting legislation, the purpose of the impugned section must be fulfilled, and if it is fulfilled, a mechanical approach is to be deprecated”²². At para 14 the Supreme Court of Appeal further stated that “...the right implicated in this Section is that of access to Courts, enshrined in Section 34 of the Constitution. Consistent with this injunction, the interpretation of Section 2(2)

²¹ Section 5(1)(a), (b)(ii) of Act no. 40 of 2002).

²² (1250/2022) [2024] ZASCA 71 (6 May 2024) para 12

of the State Liability Act must be one which promotes this right, by considering the underlying purpose of the section, rather than merely its text. This purposive approach is far more consistent with our constitutional values, than reading the section narrowly and strictly...”

21. The Supreme Court of Appeal in **Minister of Police v Molokwane** made the following remarks *“this approach received the imprimatur of the **Constitutional Court in African Christian Democratic Party v Electoral Commission and Others** ...para 25. There, it was held that the adoption of the purposive approach in our law has rendered obsolete all the previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision. The question was thus ‘**whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose**’. A narrow textual approach is to be avoided”*.²³

22. In a most recent case, the central issue for determination before the Supreme Court of Appeal was whether non-compliance with the provisions of section 2(2)(a) of the State Liability Act renders a Summons a nullity. In **Minister of Police v Miya**, the issue arose as a result of a failure to serve summons on the Minister of Police in terms of Section 2(2)(a), although the summons was served upon the State Attorney representing the Minister. As result of that the Minister raised a special plea of prescription due to non-service of the summons on him. The High Court dismissed the special plea on the basis that the Minister was made aware of the Summons and even filed an appearance to defend. For that reason, the High Court concluded that, non-compliance with Section 2(2)(a) did not render the summons void, as the purpose of Section 2(2)(a) was achieved. In that matter it would appear that the Minister received the statutory notice and he gave instructions to the State Attorney to defend the matter. The Supreme Court of Appeal took into account that the Minister fully participated in all stages of the proceedings until trial and that showed that he was fully aware of the proceedings instituted against him. The Supreme Court of Appeal endorsed the purposive interpretation of Section 2(2) adopted in

²³ (1250/2022) [2024] ZASCA 71 (6 May 2024) para 12

Minister of Police v Molokwane.²⁴ The end result was that, on the facts of that matter, the Court concluded that the failure to serve summons, in terms of the provisions of Section 2(2) of the State Liability Act, was not fatal.

LEGAL PRINCIPLES GOVERNING THE RESOLUTION OF A DISPUTE OF FACT.

23. Rule 6(5)(g) of the Uniform Rules of Court provides that *“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact...”*

24. The Court has a discretion to dismiss an application where a serious dispute of fact has arisen and which is not resolvable in the papers especially where it is of the view that the applicant should have realised that a serious dispute of fact was bound to develop.²⁵

25. Murray AJP in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* indicated different instances where a material dispute of fact may arise, namely;

(a) *“When the respondent denies all the material allegations made by the various deponents on the applicant’s behalf and produces or will produce positive evidence by deponents or witnesses to the contrary;*

(b) *The respondent may admit the applicant’s affidavit evidence but allege other facts which throw a different light on the applicant’s allegations, which fact the applicant disputes”.*

26. *The respondent may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting the applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his*

²⁴ (730/2021) [2022] ZASCA 111 (15 July 2022).

²⁵ *Food & Nutritional Products (Pty) Ltd* 1986 (3) SA 464 at 470A-C.

*deponents are biased and untruthful or otherwise unreliable and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue.”*²⁶

27. It is trite that where a dispute of fact becomes apparent on the Affidavits a final order may only be granted if the allegations in the Applicant’s Affidavit, which have been admitted by the respondent, considered together with the allegations made by the respondent, justify the granting of such an order.²⁷

28. Watermeyer CJ enunciated the test to determine whether there is a real dispute of fact as follows “*In every case the Court must...examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence*”²⁸ The Court should dismiss the application where there are fundamental disputes of fact on the papers and the applicant failed to make out a case for the relief sought.²⁹ The test to determine whether there is a real and genuine dispute of fact on the papers is stringent one that is not easily satisfied.³⁰

APPLICATION OF LAW TO THE FACTS

29. Section 2(2)(a) and (b) of the State Liability Act mandates the applicant or plaintiff, as the case may be, to serve the process instituting proceedings upon the head office of the department and, thereafter, within five days after such service, serve a copy on the office of the State Attorney.

30. In terms of section 2(3) of the State Liability Act, once the State Attorney is in receipt of a copy of the process served on its office, it is mandated to, without undue delay, send a written request to the Head of Department concerned to provide the State Attorney with written instructions regarding the proceedings in question.

²⁶ 1949 (3) SA 1155 (T) at 1163.

²⁷ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Ltd) Ltd 1984 (3) SA 620 (A) at 634E-635C, Pete & Hulme’s Civil Procedure a Practical Guide Oxford 4th Ed page 175.

²⁸ Peterson v Cuthbert & Co Ltd 1945 AD 420 at 428, Nampesca (SA) Products (Pty) Ltd v Zaderer and Others 1999 (1) SA 866 (CPD) at 892H, Townsend Productions (Pty) Ltd v Leech and Others 2001 (4) SA 33 (CPD) at 4040E-H.

²⁹ Erasmus Superior Court Practice Vol 2 D1. Rule 6-41, Transnet Ltd t/a Metrorail v Rail Commuters 2003 (6) SA 349 (A) at 368C-D and 368G-H.

³⁰ National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd 2012 (5) SA 300 (SCA)

Moreover, the State Attorney is required to, within 10 days of receipt of the process, provide the Head of Department with legal advice on the merits of the matter.

31. In the factual circumstances of this matter, it is not in dispute that the application papers were not served at the Head Office of the second Respondent, as contemplated in section 2(2)(a) of the Act. The inevitable conclusion is that the Minister is not aware of the present proceedings due to the fact that no service of the present application was not served at the offices of the Head of Department, as envisaged in the Act. In the same vein, it also indisputable that the provisions of section 2(3) of the Act have not been complied with in that no service of papers was effected upon the State Attorney, and therefore the second respondent is not aware of the present application proceedings. That office, as a result of non- service, could not perform the obligations imposed upon it in terms of section 2(3) of the Act. That in my view, explains why there was no notice to oppose as well as opposing papers filed and why the Minister did not participate in the whole proceedings.

32. Now, despite the fact that no proof of service upon the head of department and the State Attorney, as contemplated in the Act, the applicant requires this court to issue orders, in particular against the 2nd respondent to;

(a) *“Prevent, prohibit and restrain forthwith the fifth respondent from his conduct of picking up passengers from R61 road which is from Lusikisiki district and drop them to Port St Johns district without any operating licence and to declare wrongful, unlawful and without legal cause their refusal to do so; and*

(b) *directing the second respondent, in particular, to implement law prohibiting the fifth respondent from using R61 road from Lusikisiki to Port St Johns on a daily basis and issue a costs order affecting the second respondent”.*

33. During argument the issue of lack of service of the papers was pertinently raised with Mr Mkhongozeli. In response, he was adamant that there has been proper service of the papers in the manner prescribed by the Act. The parties were even invited to file supplementary heads of argument to address this issue. Even

those heads did not change, as they could not, the fact that there was no proper service. I respectfully disagree that there was proper service of application papers herein for the simple reason that no service was effected upon Provincial Commissioner, as contemplated in the State Liability Act, as well as upon the State Attorney. The papers were only served upon the Provincial Commissioner and the State Attorney as required by the Act. The failure to serve the papers upon the 2nd Respondent is in my view, fatal to the applicant's case.

34. In my respectful opinion, it is inconceivable of the applicant to expect this Court to grant such orders, in the present matter, against the second respondent when it has not been served with the application papers to enable it to decide whether to oppose it or not. That would be a grave injustice. Generally, the importance of service of court process upon a party, against whom an order is sought, cannot be over-emphasised, especially in the light of the fact the legislature has made it clear that it is necessary to do so. In the circumstances, this court does not have the power to, and therefore cannot, issue such orders against the second respondent when the requirements for service of the process prescribed by the State Liability Act have not been complied with.

35. The paramount rule regulating service is that the court must be satisfied that the defendant or respondent has been served with the court process or documents and is, therefore, aware that legal proceedings are being brought against him or her. Our Courts have been unwavering in the enforcement of the requirement that an opponent should be notified timeously of the legal proceedings instituted against him or her and he or she must be given a fair opportunity to present his or her side of the story. That is a basic common law principle expressed in the maxim, **audi alteram partem**.³¹ I am not persuaded that service of the application papers has been effected upon the Second Respondent.

36. In addition to the rules regulating how service of process initiating an action or application should be effected upon the Minister of Police, the State Liability Act prescribes how process should be served upon the Minister of Police. The applicant

³¹ First National Bank of SA Ltd v Schweizer Drank Winkel (Pty) Ltd 1998 (4) SA 565 (NCD) at 568C-D, Pete & Hulme ibid page 156

dismally failed to comply with that piece of legislation regarding service upon the Second Respondent in that there was no service of the application on both the National Commissioner and the State Attorney, as prescribed therein. There was, in my view, no way that the Minister was expected to know of these proceedings in the manner in which he was expected to be notified in terms of the governing legislation has not been complied with and there is not even proof of an attempt to do so.

37. This Court cannot, therefore, sanction a contravention of and/ or non-compliance with a legislative enactment. It is for that reason that I am of the view that no order of any kind can be issued by this court against the second respondent in the present factual circumstances. Clearly in this matter the Minister has not been served with the application papers in the manner contemplated in Section 2(2) of the State Liability Act or at all, and that means there has not been compliance with the governing legislation in this regard. Moreover, as the facts of this case are distinguishable from those that the court had to deal with in the decision of **Minister of Police v Miya**, I have come to the conclusion that the second respondent is not aware of the present proceedings as the application papers were not served upon the National Commissioner and the State Attorney, in terms of the Act.

38. As is apparent from the notice of motion, the applicant seeks, in the main, an order interdicting the fifth respondent from picking up passengers from Lusikisiki and dropping them off at Port St Johns district and on the way back. The applicant also seeks, as an ancillary relief, an order compelling the first, second, third, fourth and sixth respondent to prevent, prohibit and restrain the fifth respondent from picking up passengers from R61 road from Lusikisiki and dropping them at Port St Johns without an operating licence. Among the orders sought is a prayer to declare the last-mentioned respondents' conduct to be wrongful, unlawful and without any legal cause. For that reason, in my view, it was imperative that service of the application papers be effected upon all the respondents, in particular the second respondent in the manner prescribed by law, to enable them to respond to the averments made therein.

39. Even if I am wrong in coming to the conclusion that the application should be dismissed because the second respondent has not been served with the papers, I

am of the view that the dispute of fact raised in the papers is not capable of being resolved such that the application should be dismissed. The dispute of fact on the papers is of a kind that it is irresolvable in the papers and, in my considered view, the only appropriate order that should be granted is the dismissal of the application. This is so because the dispute of fact is genuine, material and it goes to the heart of the very issue that this court is called upon to resolve. Above all, the applicant should have well anticipated that even before this application was launched or, at least after the answering was filed, it should have re-considered its stance. Now that it has failed to do so, there is no going back.

40. The applicant's allegation that it has an exclusive right to drop off and pick up passengers from Lusikisiki to Port St Johns is seriously disputed by the fifth respondent which relies on the operating permit, marked as **PSJ 2**, in its endeavour to prove that it has an exclusive right to drop off and pick up passengers along the R61 route running between Lusikisiki and Port St Johns.³² The relevant part of the operator permit reads as follows *"From Port St Johns taxi rank join R61 turn right to Lusikisiki taxi rank (Drop off and pick up) return via the same route"*.

41. The fifth respondent corroborates its submission by attaching operating licences issued by the Department of Transport to members as **LV 3, LV 4 and LV 5**.³³ All those operating licences contain a description of the routes that each licence holder is permitted to use. Of particular importance for purposes of the present matter is that they contain a similar, if not the same description, of the Lusikisiki to Port St Johns route. The route description is as follows:

"From Lusikisiki uNcedo main Taxi Rank with passengers to location along the R61 to Port St Johns, dropping and picking up passengers and Lusikisiki Uncedo Taxi Rank with passengers along the R61 to Port St Johns and turn left to Egoso Location and straight to Msikaba Area, dropping off and picking up passengers on the way and return back to Lusikisiki main rank with passengers, dropping and picking up passengers on the way back".

³²Record pages 20 to 25

³³ pages 86-89,90-93, 94-97 and 98-103

42. A close scrutiny of the route description reveals that the members of the fifth respondent have been granted operating licences to drop off and pick up passengers from Lusikisiki to Port St Johns and on their way back, that is from Port St Johns to Lusikisiki. Therefore, in the light of the clear description of the route, which gives the members of the fifth respondent a right to drop off and pick up passengers from Lusikisiki to Port St Johns and on the way back, the applicant's case of an exclusive right is not supported by any documentary or other evidence on the papers.

43. In any event it is well established, in our jurisprudence, that a person seeking a remedy must have a legal right that is under some kind of a threat and that right may be a common law, statutory or constitutional one or a right created in terms of a contract or will.³⁴ It is unfathomable that the applicant could have conceived of a threat on the facts of this case, when other operators have also been issued with operator licences. The fact that the applicant wishes to have a monopoly of the route, when in reality it has none, does not translate into a legal right which can be enforced and protected by this Court.

44. A perusal of the legal authorities makes it plain that our Courts have only issued protection orders under the following circumstances:

- (i) to prohibit the commission of the crime³⁵;
- (ii) to prohibit the commission of a delict³⁶;
- (iii) to restrain interference with an owner's rights of enjoyment of his property and to prevent a breach of a statutory provision, among others³⁷.

45. From a reading of the authorities cited above, I am fortified in my view that the right that the applicant seeks to protect does not fall under the categories of legally enforceable rights for that reason it cannot be enforced by this court.

³⁴ Peter & Hulme's Civil Procedure page 520

³⁵ Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning 2013 (4) SA 519 (WCC)

³⁶ Regal V African Superslate (Pty) Ltd 1963 (1) SA 102, Nativa (Pty) Ltd v Austell Laboratories (Pty) Ltd 2020 (5) SA 452 (A),

³⁷ Pats v Greene & Co 1907 TS 427, Peter & Hulmes's page 520.

46. It is abundantly clear, in my view, that the fifth respondent's members have been granted operator permits to drop off and pick up passengers from Lusikisiki to Port St Johns as well. Those permits were issued to them by a competent authority which also issued the very same one that the applicant seeks to rely on to assert its right. The fifth respondent is not, and cannot be regarded by any stretch of imagination, to be engaged in an illegal activity. Instead, the members of the fifth respondent are exercising their rights in terms of the permits duly issued to them by a competent authority.³⁸ There can therefore be no reason, either in law or logic, to grant the interdict sought in these papers. In any event, the applicant has failed to make out a case for the relief sought.

47. It seems to me that the applicant takes issue with the fact that the members of the fifth respondent are operating in the same route as its members and if that is the case it should either challenge their operator permits in the proper manner or address its complaint to the responsible government functionary. On the face of them, the permits are valid and any activity performed by their holders by virtue thereof cannot be regarded as illegal and therefore susceptible to being interdicted, as the applicant would have it. The end result is that the applicant has failed dismally to establish a clear right that is worthy of protection by an order of Court. That being the case, it has failed to meet the requirements for an interdict and the consequence thereof is that the relief sought in the notice of motion cannot be granted.

48. In the result the following order is granted: -

- (a) The application is dismissed; and
- (b) The applicant is ordered to pay the fifth respondent's costs.

T.A NKELE
ACTING JUDGE OF THE HIGH COURT

³⁸ Erasmus Superior Court Practice D6-1.

APPEARANCES:

For the Applicant: Mr H.S Mkhongozeli
Instructed by: Mkhongozeli Attorneys

For the Fifth Respondent: Mr G. Madubela
Instructed by: Zimasa Speelman Incorporated

Date Heard 3 October 2024
Date Delivered 13 February 2025