IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 2678/2017

In the matter between:

SIPHO GILBERT MOLEKO	Applicant
and	
N.S. MAHLAFU	1st Respondent
MRS MAHLAFU	2nd Respondent
KOPANANG TAXI ASSOCIATION	3rd Respondent
FRANS MKUMBENI	4th Respondent

HEARD ON: 7 SEPTEMBER 2017

JUDGMENT BY: CHESIWE, AJ

DELIVERED ON: 21 DECEMBER 2017

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[1] This matter come before me by way of a notice of motion in which the applicant sought the following relief:

[1] This matter comes before me by way of a Notice of Motion in which the applicant sought the following relief:

1.1 That the written agreement between the applicant and the first respondent be declared valid and binding.

1.2 The first respondent be directed to give effect to the provisions of the written and/or oral agreement referred to in prayer 1 but not limited to signing any and all papers effecting transfer and giving ownership of the taxi operating license and/or permit number LFSLB 1264012 to the applicant.

1.3 Should the first respondent fail to give effect to the provisions of paragraph 2 within thirty days of this court order. The third respondent be authorised and directed to sign any and all transfer papers transferring ownership of the taxi operating license and/or permit number LFSLB1264012 to the applicant.

1.4 The first respondent is ordered to pay the cost of this application provided that if the second/third respondent opposes the matter, all those opposing be ordered to pay costs jointly and severally on an attorney and client scale.

[2] The first and second respondents opposed the application and filed their opposing affidavits on 7 September 2017.

[3] The matter was set down for hearing on 7 September 2017.

[4] I granted an order on the same date as follows:

> "1. In terms of Rule 6(5) of the Uniform Rules of court, the matter is referred to oral evidence.[1]
>
> 2. Costs reserved for adjudication."

[5] On the 21 September 2017 the first and second respondent filed a notice in terms of Rule 49(1)(1) of the Uniform Court Rules requesting reason pertaining to the three points *in limine* in this matter. These are my reasons.

BACKGROUND ON THIS MATTER

[6] The applicant and first respondent entered into a written contact on 20 February 2014, which contract was attached to the notice of motion as annexure "SGM1". The applicant and first respondent agreed that the Toyota Hiance belonging to the applicant will be transferred to the first respondent. In return the first respondent will transfer a taxi operating licence (permit) number LFSLB1264012 to the applicant. The parties further

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[1] Rule 6(5)(g) provides: Where an application cannot properly be decided on affidavits the court may dismiss the application or make such an order as to it deems with a view to ensuring a just and expeditions decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on special issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriated directions as to pleadings or definition of issues, or otherwise.

agreed that they will assist each other in so far as it was necessary to effect the transfers of both the motor vehicle and the permit respectively, including the signing of all and any documentation that is required by law to be signed by the parties.

[7] The applicant's founding affidavit indicates that the applicant fulfilled the end of his obligation by delivering the vehicle to the respondent, and around September 2014, the vehicle was officially transferred to the first respondent. The respondent has to yet meet his obligation of signing the papers to transfer the permit to the applicant.

[8] Before I deal with the background facts of this matter, I shall firstly deal with the issue of the application that the matter be referred to oral evidence, and as an essential part of the determination of this question what evidence must be considered to be the enforcement of the contract.

REFERRAL TO ORAL EVIDENCE

[9] Before I deal with the issue of referring this matter to oral evidence. The applicant in his founding affidavit submitted that a clear right to have the permit transferred into his names has been established. And when it came to making out the required case to substantiate the issues of the existence of a protected interests and the infringement thereof, the applicant has established harm of enduring long financial prejudice and he continued to suffer from the same. The balance of convenience clearly favours the

applicant and that the respondent in law cannot dishonour such an agreement.

[10] A party wishing to claim specific performance in terms of a contract must prove both the terms of the contract as well as compliance or the reciprocal obligation to perform fully.[2] According to the applicant, he alleges that he has performed in terms of their contract. The first and second respondent raised three points in limine. It is therefore clear at this stage there is material factual dispute between the parties.

[11] I accept that there is a material factual dispute between the parties on the issue of a protectable interests and whether such interests existed and has been infringed. The question is whether it is appropriate and proper to resolve this factual dispute by referral to oral evidence, considering the normal principles applicable to factual disputes in motion proceedings.

[12] The general principle with regard applications to refer motion proceedings to oral evidence was set out in **Kalil v Decofex (Pty) Ltd and Another**[3] where the court said:

> "The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to establish a balance of probabilities in his favour. It seems to me that in these circumstances, the court should have a discretion to allow the hearing of oral evidence in an appropriate case.... ...

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[2] Nkengana and Another v Schnetler and Another [2010] ZASCA 64; RM Van de Ghinste & Co (Pty) Ltd v Van de Ghinste [1980] (10 SA 250 (C)

[3] Kalil v Decotex (Pty) Ltd. And Another (158/87) [1987] ZASCA 156 [1988] 2 ALL SA 159 (A) (3 December 1987)

Naturally, in exercising this discretion the court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balance, the court would be more inclined to allow the hearing of oral evidence (my emphasis) than if the balance were against the applicant and the more the scales are depressed against the applicant the less likely the court would be to exercise this discretion is his favour. Indeed, I think that only in rare cases would the court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favour the respondent's."

[13] In Minister of Environmental Affairs and Tourism and Another court said the following:

(a) as a matter of interpretation there is nothing in the language of Rule 6(5)(g) which restricts the discretionary power of the court to order the cross examination of a deponent to cases in which a dispute of fact is shown to exist;

(b) ...

(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this rule. In my view oral evidence in one or other form envisaged by the Rule should be allowed if there is a reasonable grounds for doubting the correctness of the allegations concerned.

(d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant which for that reason cannot be directly contradicted or refiled by the opposite party, are to be carefully scrutinised.

[14] Motion proceedings are decided on the papers filed by the parties. In case there is a factual dispute which can only be resolved through oral evidence, it is appropriated that action proceedings should be used unless the factual dispute is not real

and genuine. In **Stellenbosch Farmers' Winery Ltd v Stellenvale** Winery (Pty) Ltd,[4] the court held that where there is a dispute of facts final relief should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the facts in the applicant's affidavit justify an order.

[15] This rule applies irrespective of where the onus where a factual dispute exist or arises before the hearing of an application. The court still has the discretion to either dismiss the application or direct that oral evidence be heard or the matter goes to trial.

[16] Based on the above, it is clear that as a general principle, the court has discretion to decide whether to refer motion proceedings to oral evidence where there is a dispute of fact that needs to be resolved. In exercising this discretion a litigant should at least set out the evidence presented by the other party in their affidavits. The court should also consider to what extent this referral to oral evidence could tip the scales in the support of the litigant seeking the referral. The final issue to consider is convenience of the court.

The Three Points in Limine

[17] The first and second respondent raised three points *in limine*. First point *in limine* is that the claim of the applicant has prescribed. The applicant in the heads of argument submitted that the breach of agreement only occurred upon June 2016 and the duty to perform only realised at the earliest during September

[4] 1957 (4) SA 234 (C) at 235 E-G. See also Joh-Air (Pty) Ltd v Rudman 1980 (2) SA 420 (T) at 428 -429.

2014. The respondents in their heads of argument that prescription started to run when the creditor had knowledge of the identity of the debtor and the facts from which the debt arises.

It is true that the prescription act does not define the term "debt". In terms of section 10(1) it has a wide meaning and includes the obligation to do something or refrain from doing something. See **Electricity Supply Commission v Stewarts and Llyods of SA (Pty) Ltd** 1981 (3) SA 340 at 344f-g, **De Sai NO v Desai and Others** 1996 (1) 141 at 146I-J.

[18] The court takes cognisance of the applicant's averment that the breach of the agreement only occurred on June 2016 and that the duty to perform only realised during September 2014. I am of the view that the parties are in dispute with regard to the date as to when prescription started to run. The parties are in a factual dispute as to the date of the agreement as well as the date of the breach. Faced with a dispute of facts which cannot be resolved on the papers before me, it is difficult to deal with the issue of prescription. I am of the view that this dispute should be resolved when the matter is referred for oral evidence.

[19] Second point *in limine* – Impossibility of Performance. The applicant in the heads of argument argues that the respondent cannot rely on a supervening impossibility of performance that arose after the respondent himself fell in mora. Furthermore the person relying on impossibility of performance presumably bears the onus of alleging and proving that the impossibility is not their fault.

According to the respondents, the permit was issued by the greater Bloemfontein Taxi Association and not by Kopanang Taxi Association. Therefore Greater Bloemfontein Taxi Association cannot perform. The respondents on their own version for all purposes stated in the heads of argument the Third Respondent, Kopanang Taxi Association is the correct association and it did in fact issue the permit. However, the agreement between the parties is silent; hence the issue of impossibility was raised by the respondents. The body or person relying on impossibility of performance presumably bears the onus of alleging and proving that the impossibility is not their fault. [5] With regard to the Greater Bloemfontein Taxi Association, according the parties the agreement was made in respect of their rules and regulations to be followed. It cannot be therefore said the contract between the parties is null and void in terms of the impossibility to perform under the prevailing circumstances. On the papers before me and faced with this dispute between the parties, it therefore makes it necessary to refer the matter for oral evidence in order to resolve the dispute.

[20] The third point *in limine* – the respondents alleged that applicant has not met the requirements of a final interdict. The respondents further indicated that the applicant allegedly stated in his founding affidavit that a criminal offence was committed by the respondents that they broke in his vehicle and stole the permit. These are some of the allegations that needs to be addressed by

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[5] See Algoa Milling Co Ltd v Arkell & Douglas 1918 AD 145; Grobbelaar NO v Bosch 1964 (3) SA 687 (E).

both parties. In order to succeed, the applicant has to satisfy the three essential of requisites of an interdict namely;

(a) a clear right

(b) an injury actually committed or reasonably apprehended, and

(c) the absence of similar protection or any other satisfactory remedy.

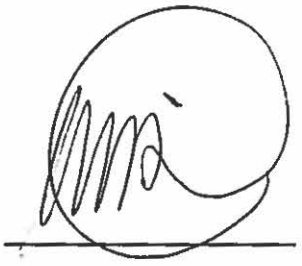
[21] The first question is thus whether the applicant has demonstrated a clear right. This means whether the applicant has a protectable right. In my view the applicant has demonstrated clear right in the form of protectable interest. The applicant has simply made out a case on the founding affidavit as required. The respondents submitted that any alleged ham was solely due to the applicants own conduct and self-inflicted. The applicant indicated in the founding affidavit the first respondent has been giving him the run around for three years. In my view the applicant has clearly demonstrated a clear harm. The applicant has a protectable interest. The applicant delivered the vehicle as agreed by the parties, but the permit transfer did not happen. Clearly the evidence of the parties would be satisfactorily resolved with the aid of oral evidence.

[22] It is therefore clear from the papers that the Applicant suffered injury whist fully performing in terms of the agreement concluded between the parties, which harm the applicant continues to suffer. The applicant submitted that he has exhausted all internal procedures available to him and for three years he struggled to get any cooperation from the first and second respondents. In my view the applicant has demonstrated a clear right in this matter

and that he has a protectable interests. It is for these reasons that the matter be referred for oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court.

ORDER

1. In terms of Rule 6(5)(g) of the Uniform Rules of court the matter is referred to oral evidence.
2. Costs reserved for adjudication.



S CHESIWE, AJ

On behalf of applicant:	Adv. Lubbe
Instructed by:	Modise Modise Attorneys Bloemfontein
On behalf of 1st & 2nd respondents:	Mr. H. J. Stander
Instructed by:	Stander and Partners Bloemfontein