

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date 18 May 2006

CASE NO : 7215/06

In the matter between :-

FULLIMPOT 221 CC t/a HAWK

Applicant

MOLABA LUXURY TOURS

and

GODFREY AMIGO SONO

First Respondent

JABULANI MASULUKE

Second Respondent

In Combination with

Case 11712/06

FULLIMPOT 221 CC t/a HAWK MOLABALUXURYTOURS

Applicant

and

MINISTER OF SAFETY AND SECURITY

First Respondent

NATIONAL COMMISSIONER SAPS

Second Respondent

PROVINCIAL COMMISSIONER SAPS

Third Respondent

AREA COMMISSIONER, MOPANI REGION

Fourth Respondent

STATION COMMISSIONER

Fifth Respondent

GODFREY AMIGO SONO

Sixth Respondent

JABULANI MASULUKE

Seventh Respondent

Van Rooyen AJ

[1] This is the return day of a *rule nisi* calling upon the respondents to show cause why they should not be permanently interdicted from interfering with the bus service of the applicant at Giyani in the Limpopo Province. The temporary interdict, *inter alia*, prohibited the respondents from assaulting or threatening to assault the applicant's employees and/or drivers and or cabin crew and/or passengers. The respondents were also restrained from interfering with the applicant's bus operations as authorized by the relevant permits.

[2] The dispute on the papers revolved around the order of departure of the applicant and the respondent's busses from Giyani. When, on the 12th February 2006 the applicant's bus driver arrived at Giyani he found the first respondent's busses parked where the busses of the applicant usually parked. He then drove to a different spot and commenced loading passengers. While still loading passengers, one of first respondent's busses drove in their direction and obstructed them by parking in front of the bus of respondent. This was followed by a loud noise from the back of the bus. It appeared upon inspection by the driver that the second respondent, the free lance queue marshal for the loading area, was banging the sides of the bus with a knobkerrie and shouting at the passengers to alight from the bus. When the passengers refused, he told them that if they did not get out and travel by way of the first respondent's busses, they were going to be shot, once out of Giyani. The second respondent was joined by a group of other marshals, some of whom earlier worked for the applicant, and they kept on banging the busses with sticks and yelling to the passengers to alight. The passengers panicked and ran out in a stampede. The sole member of the cc (hereinafter called the applicant) was then called by the driver. The applicant instructed the driver to call the Police and applicant then also called his attorney. The Police drove to the spot while the driver proceeded on foot. When the driver arrived he found the Police interrogating the applicant's other driver. The Police accused the drivers of operating on the route without the necessary permit and one of the applicant's drivers was fined R1000.

[3] On the 27th February 2006 the first and second respondents, assisted by a group of other queue marshals/porters, ordered passengers out of the applicant's

busses and removed the passengers' luggage out of the luggage compartment. The passengers were ordered to board the first respondent's busses and the first respondent's drivers warned that if they continued loading passengers at the Giyani bus terminal, they would be killed. The first respondent then instructed that from that day, only one of the applicant's busses would be permitted to load passengers and then only, after his busses had departed. As a result of these threats the applicant's drivers and cabin crew were scared to load passengers at the Giyani bus terminal. Applicant expressed his fear for the lives of his employees and passengers since, according to him, the Police had refused or were unwilling to assist. Applicant's attorney explained that the policeman whom he contacted told him that he could not assist, since he was a detective. As a result of these actions the applicant faces imminent closure and financial ruin, because he will not be able to pay his monthly installments of more or less R153000.

[4] The respondent's answer, which was filed after the interim interdict was granted *ex parte*, amounted to bald denials and simply stated that he was not there. He also pointed out that the permit of the applicant was only valid as from 20 February 2006 and that the applicant was, accordingly, not permitted to have loaded passengers at Giyani on the 12th February. In his reply, the applicant pointed out that he was in possession of a temporary permit on the 12th and attached a copy thereof.

[5] From the permits of the two parties it appears that applicant must depart from Malamulela to Giyani at 06:30 and leave Giyani at 08:00. First respondent's busses must leave Giyani at 06:00 for Dzingidzingi. In theory the two sets of busses should, accordingly, not clash as to parking and passengers at Giyani. On the reverse trip from Tembisa, the respondent's busses should, according to the prescribed schedule, arrive at Giyani at 15:00. The applicant's permit mentions that the stopping point is Malamulela when arriving from Johannesburg. Only the next morning the busses would leave for Giyani, where they leave at 08:00. Although the specific times are not mentioned, it is clear that the problems between the applicant's drivers and the respondent's drivers arose early in the morning at Giyani.

[6] The applicant has a clear right to provide a passenger service and his permit delineates how that right must be exercised in detail. The same principle applies to the first respondent. The life and limb of passengers and employees of applicant are also threatened. Once again these rights are clear rights, which are also protected by the Constitution of the Republic of South Africa. Of course, passengers have the right to choose which service to use, even if

they arrive at Giyani before 06:00, when the first respondent's bus leaves Giyani. The first respondent is not entitled to leave after 06:00. Applicant may also not leave Malamulele for Giyani before 06:30. One would expect that there should never be a clash. However, unlawful forces are at work at the bus terminal at Giyani.

[7] Even if first respondent's argument that applicant's busses were there without a permit were to have been correct, it does not give the first respondent and his employees the right to threaten them physically or to make them use the bus service of the first respondent.

[8] The second respondent did not file an answering affidavit in spite of the fact that the preliminary order was served on him. There is no reason to disbelieve the applicant and his drivers that the second respondent, as a queue master, was also involved in making the threats.

The following order is, accordingly, made:

1. That the respondents or any person acting under their command, instructions or authority, be interdicted and restrained forthwith from assaulting, committing any act of violence, invading or threatening to invade the right to physical integrity of the applicant's employees and/or drivers and or cabin crew and/or passengers.
2. That the respondents or any person acting under their command, instructions or authority be interdicted and restrained forthwith from having any contact whatsoever, directly or indirectly, with the applicant's property or destroying or threatening to destroy the applicant's property.
3. That the respondents be interdicted and restrained from interfering with, prohibiting and/or inhibiting the applicant's bus operations as authorized by its permits as in annexures TLM1, TLM2, TLM3, TLM4 and TLM5, from operating from Chiawelo Station, Soweto, Gauteng to Malamulela Rank, Limpopo and back.
4. That first respondent's busses be interdicted from leaving the Giyani terminal after 06:00.
5. The first and second respondents are ordered to pay, jointly and severally, all the costs of this matter on an attorney and client scale.

The **Applicant** is ordered to ensure that his busses do not reach the Giyani terminal before 07:00 and leave at 08:00.

SECOND MATTER: CONTEMPT AND MANDAMUS

[9] In this second application the applicant, who was also the applicant in the above matter, approached this Court to hold the sixth and seventh respondents, who were the first and second respondents in the above matter, in contempt of the preliminary order which Rabie J had made. The applicant also intends to obtain an order against the Minister of Police and several high ranking police officers, as set out above, to inquire why the SA Police Service stationed at Giyani has not investigated, arrested and opened proceedings against the sixth and seventh respondents and members of the eight respondent and to submit a report on the matter to this Court. The office bearers of the eight respondent, a taxi association, are also called upon to show cause why they should not be held in contempt of orders made by Legodi J and later on, the 1st March 2005, by Ismail AJ. On the 9th March 2006 Rabie J issued a *rule nisi*, which is the subject of the first matter dealt with above in paragraphs [1]-[8] and which I confirmed. The preliminary order was served on the sixth and seventh respondents, who were the first and second respondents in the first matter dealt with above.

[10] This application was only served on the Minister (via the State Attorney, Pretoria), the National Commissioner and the sixth and seventh respondents. Only the sixth respondent answered. It is alleged by applicant that despite the Court orders, the sixth and seventh respondents as well as members of the Taxi Association continue to intimidate and threaten to assault the applicant's employees and passengers. On 2 and 3 April, according to the applicant, his drivers called him and told him that the seventh respondent, assisted by members of the Taxi Association, had again forced passengers off the applicant's busses and threatened the drivers with violence. The drivers had to drive to Johannesburg without their load of passengers from the Giyani bus terminal. The applicant and his attorney then went to Giyani and on the morning of 4 April witnessed the seventh respondent and members of the taxi association preventing the applicant's busses from loading passengers.

[11] Applicant called the Giyani Police Station and requested the intervention of the SAPS. A group of officers arrived at the bus terminal. However, according to the applicant, they refused to be of any assistance and were mere spectators. The Police advised that the applicant should negotiate with the perpetrators in order to reach some form of settlement. There was a promise that a video of what occurred would be handed to the Court. No video was, however, handed in. Some scenes, which are said to prove the intimidation, are said to be part of the video.

[12] On the 7th April the drivers called applicant and informed him that his busses were allowed to load passengers at the Giyani terminal. However, members of the taxi association followed the busses and at the next stop, they forced the passengers off the busses. During the week of 3-7 April the applicant received telephone calls from people who refused to identify themselves. They informed applicant that he should attend a meeting with sixth and seventh respondents on the 16th April 2006. He was informed that if he did not attend that meeting, the applicant's busses would not be permitted to operate on that route again. The applicant states that when the above events took place, the sixth respondent was not present at the terminal. However, the anonymous callers gave applicant the impression that sixth respondent was the mastermind behind the "whole thing". Applicant did not attend the meeting, out of fear for his life. On the 10th April the drivers again called applicant and informed him that the respondents had carried out their threats and that the busses were not permitted to load passengers.

[13] The applicant requested the Court to issue a mandamus against the Police to take action against the sixth and seventh respondents. The problem is not of recent origin. The Fifth Respondent, the Giyani Station Commissioner, undertook under his signature on the 20th January 2005 to immediately investigate and solve a complaint against the Gimajoldta Taxi Association, after a letter of complaint was sent to him by the applicant's attorney, Mr Mokoena, on the 12th January 2005. The complaint was that despite a Court order, the busses of applicant were stopped by one Jas Baloyi of the said association and that the said Baloyi threatened to shoot one of the applicant's drivers. The National Evaluation Service Complaints Division conveyed to attorney Mokoena that the Provincial Commissioner of the Limpopo Province would attend to the matter, in liaison with that office, in a letter dated 7 January 2005. Attorney Mokoena received a letter, dated 10 March 2005, from the Provincial Police Commissioner that the matter had been "properly, objectively and meticulously investigated. The investigation revealed a number of anomalies on the part of the Police in Giyani and as such, departmental steps are being taken against the Station Commissioner and the Crime Prevention Head." The applicant is presently of the view that although some form of "departmental steps" might have been taken, he has reason to believe that no action was taken, since the Police still refuse to assist. Consequently the applicant cannot continue with its bus operations. Then there is a letter from the Deputy Area Commissioner dated 31 March 2005. It reads as follows:

" Your complaint was investigated and it was found that the members of SAPS Giyani

received the court interdict served to the Gimajoldta Taxi Association members. Members of Giyani SAPS failed to produce records as proof that the driver was protected as indicated in the court interdict. Disciplinary steps has (*sic*) been instituted against Giyani SAPS members.”

[14] In April 2006 attorney Mokoena addressed a letter to the Minister of Safety and Security. He complained about the intimidating conduct of the sixth respondent, Mr Sono, and the seventh respondent, Mr Masuluke. The attorney also complained that the Police officers at the Giyani Police station “constructively refused to open charges as requested. They informed us that the matter is dealt with by some officers who had already left and we must wait for them.” The letter included a complaint about the applicant’s busses, which were, once again, stopped from operating. The drivers and passengers were also intimidated by a group of taxi operators. “The matter was reported to the Giyani Police Station and the Police are refusing to attend to the complaint.”

[15] After this letter the conduct of the sixth and seventh respondents was brought to my attention in the application for the confirmation of a final interdict. The present application for contempt and a mandamus against the Police was also brought before this Court.

[16] In his answering affidavit the sixth respondent denied that he was at the Giyani Bus terminal on any of the days mentioned by the applicant. He was not involved in the case against the Gimajoldta Taxi Association and, accordingly, what happened there was irrelevant to the present matter. He was contesting the confirmation of the *rule nisi* which was to be heard on the 19th April 2006. He referred to the fact that the applicant stated in his founding affidavit that he was not present at the bus terminal on the relevant date. Applicant only gained an impression that he was the mastermind behind the

problems. He also denied that seventh respondent took instructions from him. He then states the following: “they are confirmed by the permits which the seventh respondent herein, as a queue marshal, must follow, more specifically that applicant’s busses must load passengers after my busses have finished loading.”

[17] Mr *Ndleve*, for the sixth respondent, argued that it was not sufficient for the applicant to base his case merely on the impression that the sixth respondent was involved. However, from the answering affidavit of the sixth respondent it clearly appears that the sixth respondent is under the impression that he is entitled to load passengers before the applicant and that if the applicant loads passengers before him *he and sixth respondent* are entitled to interfere. This supposed right for them to interfere does not exist. No person is entitled to interfere personally when the applicant is loading passengers even if he is at the Giyani terminal before his permit allows him to be there. Taking the law into one’s own hands is only permitted in exceptional circumstances and the circumstances sketched by the sixth respondent do not entitle him or his employees (or for that matter, any one else) or the seventh respondent to intervene personally. The respondent has only one effective remedy: to obtain a Court order against the applicant.

[18] Before this Court may find sixth or seventh respondent to have been in contempt of the order of Rabie J, it must be satisfied that the applicant has proved beyond a reasonable doubt¹ that the respondents knew about the order and intentionally did not abide by it. Of course, once the applicant has shown that the Court order was served on

¹ See *Fakie NO v CC11 System Pty Ltd* [2006] JOL 17080 (SCA); *Deyzel v Deyzel(2)* [2006] JOL 17111(T).

the sixth and seventh respondents personally or that it had otherwise been brought to their attention, an evidentiary onus rests on the respondents to show that they did not intend to contravene the order. Although contempt can also be committed by an omission, I am not convinced that the applicant has proved that the sixth respondent knew that the order was being disobeyed by his employees. The mere impression of applicant that sixth respondent was involved is not sufficient to base a finding of contempt on. The fact that the sixth respondent believes that he may interfere when applicant loads passengers before him, is a misconception which he has as to what the law permits him and his employees to do. The fact that he concedes this does not mean that he has interfered. In future, he would be in contempt if any interference takes place and I would not be surprised if upon proof of contempt, a Court would seriously consider a prison sentence for such contempt after this judgment.

[19] The seventh respondent has not taken the trouble to file an answering affidavit and deny responsibility. I believe that the applicant has proved his involvement in continuing with the threatening conduct in conflict with the order of Rabie J. I accordingly find that his conduct was in contempt of the court order. He is sentenced to ninety days in prison. The imprisonment is suspended for a term of five years subject to the condition that he does not intentionally contravene the order, which I have issued above, during the said period according to a decision by a court of law.

[20] In so far as the Taxi Association is concerned, there is insufficient evidence on the papers that it or its members have disobeyed the order made by Ismail AJ. I will, however, order the Police Commissioner for Limpopo to ensure that the previous order

and this order are, once again, brought to the attention of the Taxi Association.

[21] The next and final question is whether there are sufficient grounds to order the Police Commissioner for Limpopo to ensure that the Court order be abided by and that the culprits, if any, be brought before a court.

Section 205(3) of the Constitution of the Republic of South Africa provides that:

“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

That other organs of state could have similar duties, appears from what O’Regan J said in *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others*.² Furthermore, it is also clear that these duties are not unlimited. In *Minister of Safety and Security v Rudman & Another*³ van Heerden AJA, after referring to section 205(3), said:

“So too, under the South African Police Service Act 68 of 1995, 14 the functions of the police are in the main the maintenance of law and order and the prevention of crime. Unlike the situation in *Van Duivenboden* and in *Minister of Safety and Security v Hamilton*, the recognition of a legal duty on the police to save people from drowning or to attempt to resuscitate near-drowning victims would indeed, to my mind, have the potential to disrupt the effective functioning of the police and would require the provision of substantial additional training and resources. In my view, while the imposition of such a duty upon policemen in the position of Becker and Sergeant Pienaar might possibly be in accordance with the moral convictions of the community (upon which question I express no opinion one way or the other), the legal convictions of the community do not demand that Becker's failure to attempt to perform CPR on Roald ought to be regarded as unlawful.”

[22] That the duties imposed by the Constitution must be interpreted in such a fashion that they find their limits in what is reasonable and that the bearers of such duties must be given leeway to decide how best to fulfil those duties is, with respect, well stated by O’Regan J in the said *Rail Commuters* matter at paras [87] and [88]:

“[87] In adopting this standard the Court requires the bearer of constitutional obligations to perform them in a manner which is reasonable. This standard strikes an appropriate balance between the need to ensure

² 2005(2) SA 359(CC)

³ 2005(2) SA 16(SCA) at 39.

that constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances. As this Court reasoned in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*:

'Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.'

[88] What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer - the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. *Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of State in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints.* Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities." (some footnotes omitted; emphasis added)

[23] In the circumstances of the present application, the applicant relies on ss 10, 11 and 12 of the Bill of Rights. Section 10 provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected." Section 11 provides that: "Everyone has the right to life." Section 12 provides that: "(1) Everyone has the right to freedom and security of the person, which includes the right - . . . (c) to be free from all forms of violence from either public or private sources."

These provisions need to be read in the light of ss 7(2) and 8(1) of the Constitution. Section 7(2) provides that: "The State must respect, protect, promote and fulfil the rights in the Bill of Rights." Section 8(1) provides that: "The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State. An "organ of State" is defined in s 239 of the Constitution as meaning: "(a) (A)ny department of State or administration in the national, provincial or local sphere of government; or (b)

any other functionary or institution - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'

In *Van Eeden v Minister of Safety and Security*⁴ Vivier ADP said the following as to the manner in which the State should protect these rights:

[13] ...For present purposes it is not necessary to decide whether the right to be free from violence constitutes a separate entitlement or whether it is merely an explicit element of the right to freedom and security of the person. Freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms (*S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) para [13]). *Section 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the State to protect everyone from violent crime.* See *Baloyi* para [11], De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4th ed F (2001) at 258; Hélène Combrinck 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) 20 *Human Rights Quarterly* 666 at 683; Carpenter 'The Right to Physical Safety as a Constitutionally Protected Human Right' *Suprema Lex: Essays on the Constitution Presented to Marinus Wiechers* (1998) 139 at 144; Pieterse 'The Right to be Free from Public or Private Violence after Carmichele' (2002) 119 *SALJ* 27 at 29.

[14] Section 12 should be read with s 7(2) of the Constitution which imposes a duty on the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. As the Constitutional Court said in *Carmichele* (para [45]), the provisions of our Constitution point in the opposite direction to the due process clause of the United States Constitution, which was held in *De Shaney v Winnebago County Department of Social Services* 489 US 189 (1988) not to impose affirmative duties upon the State. In *Van Duivenboden* the majority of this Court concluded (para [20]) that, *while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights.*

[15] The Constitutional Court has held in both *Baloyi* (para [13]) and *Carmichele* (para [62]) that the State is, furthermore, obliged under international law to protect women against violent crime and against the gender discrimination inherent in violence against women. This obligation was imposed on the State by s 39(1)(b) of the Constitution, read with the preamble to the Universal Declaration of Human Rights; art 4(d) of the Declaration on the Elimination of Violence against Women and art 2 of the Convention on the Elimination of All Forms of Discrimination against Women (Hélène Combrink (op cit at 671 - 81)). (emphasis added)

[24] It is unfortunate that no answer was filed by a representative of the Minister of Police or the National Police Commissioner. One realizes that this department is extremely busy. However, it would have been in the interest of justice to have received

⁴ 2003(1) SA 389(SCA).

an answering affidavit from this source. In the absence of such information, I must depend on the reports from the applicant and the sixth respondent, which would not, necessarily be objective. According to the information at my disposal, the Giyani Police Commissioner has not addressed the problem complained about sufficiently. He has a duty to at least investigate the situation and to report to this Court and the Provincial Commissioner. The life and limb of passengers are at risk. To advise the applicant to negotiate with the sixth and seventh respondents is not good enough. The Police must maintain order and protect the bodies and lives of the applicant's employees and passengers. They may not simply sit back and ignore the taking of the law into their hands by the employees of sixth respondent and the seventh respondent. It is not unreasonable to expect the Police to act and monitor the situation. The Police must order the culprits to stop and if they do not obey, they must be arrested and charged. As Vivier ADP said in *Van Eeden (supra)*: "while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights."

[25] I accordingly order as follows:

1. The Commissioner of Police Limpopo is directed to investigate the complaints of the applicant and to file a report to this Court on or before 1 July. The Registrar is directed to inform him or her of this order and to copy the State attorney, Pretoria, with this judgment.
2. I hold Respondent 7 to have been in contempt of the Court order issued by Rabie J. He is sentenced to ninety days in prison. The imprisonment is suspended for a term of five years subject to the condition that he does not intentionally contravene the order which I have issued above during the said period according to a decision of a Court of Law.

3. In so far as the Taxi Association is concerned, there is not sufficient evidence on the papers that it or its members have disobeyed the order made by Ismail AJ. I will, however, order the Police Commissioner for Limpopo to ensure that the previous order and this order are, once again, brought to the attention of the Taxi Association. The Registrar is requested to add that order to this order.
4. No order as to costs is made.

JCW van Rooyen..... 16 May 2006
Acting Judge of the High Court