IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-103348

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

7/11/2023
DATE

[redacted]
SIGNATURE

In the application by

TPN TRANSPORT AND DISTRIBUTION (PTY) LTD
(REGISTRATION NUMBER: 2015/025790/07) Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL (MEC)
FOR ROADS AND TRANSPORT GAUTENG PROVINCE Second Respondent

THE MINISTER OF TRANSPORT Third Respondent

EZIBELENI LONG DISTANCE TAXI ASSOCIATION
(REGISTRATION NUMBER: 2014/230557/07) Fourth Respondent

ETHEMBENI LONG DISTANCE TAXI ASSOCIATION
(REGISTRATION NUMBER: 2019171461) Fifth Respondent

EZBELENI BUS TOURS (PTY) LTD
(REGISTRATION NUMBER: 2015/021198/07 Sixth Respondent

EASTERN CAPE PROVINCIAL REGULATORY ENTITY Seventh Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Urgency – application does not comply with Directives and rules of practice in the Gauteng Division, Johannesburg

Mandament van spolie – requirements – unlawful deprivation of undisturbed and peaceful possession – applicant not unlawfully dispossessed

Contempt of court – court order not binding on parties not subject to order – not in contempt of court

Order

[1] In this matter I made the following order in the Urgent Court on 20 October 2023:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs of the application on the scale as between attorney and own client.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant sought an order[1] that the respondents were in contempt of court of a could order granted on 4 November 2022 and that the municipal manager of the first respondent, *"the second and third respondents in their official capacities as such, including (sic) the chairman of the fourth and fifth respondents"* be committed to prison for a period of three months.

[4] The other relief was far-ranging and was described by the applicant as a spoliation order.[2] The applicant also sought to interdict the seventh respondent from reconsidering a ruling by the Transport Appeal Tribunal[3] or to remove Germiston Railway Station from the applicant's operating licence pending a review of the ruling by the Tribunal.

There is no proof that the application was properly served on the seventh respondent and this prayer was stillborn.

[5] I refer to the -

5.1 first respondent as "EMM";

5.2 second respondent as "the MEC";

5.3 third respondent as "the Minister";

5.4 fourth respondent as "Ezibeleni";

5.5 fifth respondent as "Ethembeni";

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1 Prayer 1.1.
2 Prayer 1.2.
3 Established in terms of the Transport Appeal Tribunal Act, 39 of 1998

5.6 sixth respondent as “Ezbeleni”’

5.7 seventh respondent as "ECPRE”. The seventh respondent is actually the Eastern Cape Provincial Regulatory *Authority* and I confirm that this is the entity entitled to its costs (if any) in terms of the cost order made in this application.

Urgency

[6] The Deputy Judge President dealt with urgent applications and the need to comply with the principles and the procedures adopted in this Division in his Notice To Legal Practitioners About The Urgent Motion Court, Johannesburg, dated 4 October 2021.[4] The whole Notice is available to practitioners and I quote from it only selectively:

[7] The Deputy Judge President wrote:

> *“3. A much more disciplined approach must be adopted by practitioners as to whether or not a matter truly is urgent to justify its enrolment in a particular week. Non-urgent matters clutter up the roll and waste time that could be devoted to truly urgent matters. Practitioners must not be timid in the face of anxious and bullying clients who demand gratification of their subjectively perceived needs. To curb this abuse, judges shall consider the award of punitive costs de bonis propriius where non-urgent matters are enrolled. Also, an order forbidding attorneys and counsel to charge their own client a fee may be considered.*
>
> *5. The ultimate practical test as to whether to set down a matter as urgent is whether an irreparable harm is apparent if an order is not granted in that week; if there is none, it ought not to appear on the roll. The era of ‘lets see what the judge might think’ is now officially over.*
>
> *……*

[4] See also *In re: Several matters on the urgent court roll 18 September 2012* [2012] 4 All SA 570 (GSJ), a judgment by Wepener J.

10. Frequently unrealistic times are set by an applicant for the opponent to file opposing papers. Moreover, where opposing papers are required to be filed only after the Thursday before the set down, they do not reach the judge at a time when the judge has the opportunity to read them. One outcome is that the matter is by agreement removed for a later set down, but not before the judge has squandered valuable time reading the papers. Another outcome is that the judge cannot properly prepare.

11. The basic approach should be that a full set of papers is available to the judge on the previous Thursday so that the judge can organise a programme of preparation and prepare effectively. Counsel shall be required to justify what extreme exigency warrants a deviation from this approach.

Preparation of the papers in a manner suitable to be adjudicated urgently

12. There is seldom an appreciation of the forensic dynamics of an urgent application. There is no time for a judge to study affidavits that are composed in the style of a stream of consciousness. Competent practitioners who understand their briefs will put into an affidavit only what is really important and eliminate the fluff. Often the waffling affidavit is evidence of a failure to properly diagnose what is necessary to say in support the exact relief sought – ie a failure to think through the matter properly. A proper analysis of the prayers sought and the articulation of facts relevant to those prayers only is vital. The urgent court is not a suitable venue for a judge to engage in advocacy training.

13. A similar abuse occurs in the annexing of a plethora of documents, most of which are never referred to and are often of little or peripheral value in the deciding of the case. Care must be taken to trim the bulk of the papers. This can only occur if a practitioner understands the case sought to be presented. Sloppy thinking bedevils all matters but especially those in the urgent court."

[8] The Deputy Judge President's Directive was ignored in this application. The applicant cursorily deals with urgency in paragraphs 93 to 95 of the founding affidavit and makes the allegation that the *"the application is urgent since in the main, it seeks relief to*

hold the respondents to be in contempt of this court's order." The contempt of court is dealt with under a separate heading and no case is made out. The application is devoid of merit.

[9] The application was brought on very short notice on 10 October 2023 and the respondents were required to file answering affidavits within two days. The time allowed was completely unrealistic in light of the complexity of the facts and the wide ranging relief sought. The respondents were prejudiced by the haste in which answering affidavits had to be prepared. They briefed attorneys and counsel and were nevertheless able to appear to argue the application.

[10] The application was not served by the Sheriff but by email, and this resulted in a time delay between service of the application and in some instances the relevant officials only became aware of the application two days later. The papers have not been properly indexed and no service affidavits could be located on Caselines when the matter was called. All the respondents save for the ECPRE were however represented during argument.

[11] Replying affidavits were only uploaded on Tuesday the 17th and Wednesday the 18th of October 2023.

[12] Bringing the application on two days' notice without any substantial grounds for relief in terms of rule 6(12) amounts to an abuse of the process of court. For this reason a punitive cost order is justified. Counsel for the respondents submitted that the shortcomings in the applicant's affidavits are such that the application ought to be dismissed outright instead of just removed from the roll, and there is in my view merit in the submission. It was also submitted that a *de bonis proprius* cost order was justified. The submission was not without merit but I have decided to award punitive costs without a *de bonis proprius* cost order.

The contempt of court application

[13] The criminal standard of proof, namely proof beyond reasonable doubt, applies.

The applicant must show -

13.1 that the respondent was served with or otherwise informed

13.2 of an existing court order granted against him,

13.3 and has either ignored or disobeyed it.[5]

[14] To avoid being convicted the respondent must establish a reasonable doubt as to whether his failure to comply was wilful and *mala fide.* In *Fakie NO v CCII Systems (Pty) Ltd,*[6] Cameron J said:

> *"[23] It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt."*

[15] In the order of 4 November 2022 the Court granted interdictory relief against Ezibeleni and Ethembeni, now cited as the fourth and fifth respondents.. The EMM and the Gauteng Department of Transport were cited as respondents in the application in 2022 but no order was granted against them.

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5 *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 6 et seq. See also *Uncedo Taxi Service Association v Maninjwa* 1998 (3) SA 417 (ECD) 429 G – I, *Dezius v Dezius* 2006 (6) SA 395 (CPD), *Wilson v Wilson* [2009] ZAFSHC 2 para 10, and *AR v MN* [2020] ZAGPJHC 215.

6 *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 23.

The MEC, the Minister, Ezbeleni and the ECPRE were not parties to the application in 2022 though the Department of Transport was cited.

[16] The applicant now seeks an order however that parties against whom no order was made in 2022 nevertheless be found guilty of contempt of court and imprisoned. In the affidavits the applicant seeks to make out a case for the incarceration of the municipal manager of the EMM, even though he is also not cited in the contempt application and his employer was not subject to the order of 4 November 2023. Individuals employed by or involved with Ezibeleni and Ethembeni are likewise not cited by name.

[17] The applicant does not make out a case for wilful and *mala fide* conduct on behalf of any individual. The application must fail.

The spoliation application

[18] The requirements for a spoliation order are that the applicant must be unlawfully dispossessed of his or her peaceful and undisturbed possession.[7]

[19] The applicant was once in possession of operating licence granted by the ECPRE. An appeal against the granting of the licence was partially successful and the Transport Appeal Tribunal referred the matter back to the ECPRE. The applicant was to secure ranking facilities for loading of passengers from the EMM and in the event that the applicant failed to secure facilities, the ECPRE was directed to remove such area from the route stipulated in the operating licence.

This in fact happened – the EMM refused the application for facilities within the EMM's area of jurisdiction on 5 September 2023 and the geographical area under the jurisdiction of the EMM must be removed from the licence. The applicant was not spoliated – as

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7 *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA) para 5. See also *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) para 22; *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) paras 10 to 12, *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA) paras 6 to 8, and Van Loggerenberg *Erasmus: Superior Court Practice* RS20, 2022, D7-1. (Mandamenten van Spolie)

matters stand and subject to the outcome of any appeal or review proceedings it simply does not have facilities in Ekurhuleni.

[20] The respondents also point out that –

20.1 the relief sought impacts on the Transport Appeal Tribunal as an order is sought pending the review of a decision of the Tribunal, but the Tribunal was not cited.

20.2 The applicant failed to disclose the application made to the EMM for a loading bay in Germiston that was denied on 5 September 2023,[8] and therefore failed in its duty to make a full and frank disclosure of the relevant facts in the application.

20.3 The by-laws of the EMM prohibits the loading of passengers without a loading permit.

[21] It follows that the applicant was not in undisturbed possession of loading bays and was not spoliated. No case is made out for spoliation relief.

[22] For the reasons set out above I make the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

[8] Referred to in the previous paragraph.

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **7 NOVEMBER 2023**.

COUNSEL FOR THE APPLICANT:	V P NGUTSHANA J P MTHEMBU
INSTRUCTED BY:	STRAUSS DALY ATTORNEYS
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INSTRUCTED BY:	STATE ATTORNEY
COUNSEL FOR THE FOURTH, FIFTH AND SIXTH RESPONDENTS:	M J MASHAVHA
INSTRUCTED BY:	H R MUNYAI ATTORNEYS
DATE OF ARGUMENT:	20 OCTOBER 2023
DATE OF ORDER:	20 OCTOBER 2023
DATE OF JUDGMENT:	7 NOVEMBER 2023