

SOUTH AFRICA / JUDGMENT

Legau and Others v Mokhasi (6749/2007) [2008] ZAFSHC 74 (19 June 2008)

[2008] ZAFSHC 74

COURT

Free State High Court, Bloemfontein

BEFORE

M B Molemela

CASE / FILE NUMBER

6749/2007

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IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 6749/2007

In the case between:

DALTON THULANE LEGAU First Applicant

TUBATSI SHADRACK MOLOI Second Applicant

MHO JOHANNES MOTHIOA Third Applicant

RAMAELE JOHANNES MOTAUNG Fourth Applicant

MOLAHLEHI AUGUSTUS THOABALA Fifth Applicant

SEPUTSWE DANIEL MOFOKENG Sixth Applicant

THABO JOSIAS MOKOENA Seventh Applicant

PAULUS SEMOLA MOLOI Eight Applicant

PETROS MATJALE NTOMBELA Ninth Applicant

POKANE ELIAS TSHABALALA Tenth Applicant

MIKE MOSIUWA MOFOKENG Eleventh Applicant

and

THABISO MOSES MOKHASI, THE Respondent

CHAIRPERSON OF THE EXECUTIVE

COMMITTEE OF QWAQWA UNITED

TAXI ASSOCIATION

JUDGEMENT:

MOLEMELA, AJ

HEARD ON: 22 MAY 2008

DELIVERED ON: 19 JUNE 2008

- [1] This is an application launched by 11 applicants against THABISO MOSES MOKHASI in his capacity as a chairperson of a taxi association of which the applicants are members. The application is for an order in the following terms:

“1. That the Respondent be ordered to set a date for the holding of an annual general meeting by the Qwaqwa United Taxi Association (“the Association”), and to give notice thereof within seven days of the date of this order in accordance with the provisions of clause 6.2.2. of the Standard Constitution being Annexure “C” to the Free State Interim Passenger Transport Regulations published in Provincial Gazette (FS) No 104 of 27 November 1998 (“the Standard Constitution”), alternatively, to set a date for the holding of a Special General Meeting by the Association, and to give notice thereof within seven days of the date of this order in accordance with the provisions of clause 7.2 of the Standard Constitution.

2. That, should the Respondent fail to comply with the provisions of paragraph 1 of this order the Free State Transport Registrar (“the Registrar”) is ordered to call a Special General Meeting of the Association in accordance with his powers in terms of clause 7.1.1(c) of the Standard Constitution.
 3. That the Respondent, in consultation with the Registrar, comply with the provisions of clauses 4.2(b) and (c) of the Standard Constitution prior to the date of the meeting referring (sic) to in paragraphs 1 and 2 of this order (“the meeting”).
 4. That the Respondent, alternatively, the Registrar be ordered to ensure that the election of the Executive Committee of the Association is an item on the agenda of the meeting.
 5. That the Respondent, in his personal capacity, be ordered to pay the costs of this application.
 6. That further and/or alternative relief be granted to the Applicants.”
- [2] For background purposes, it must be mentioned that on the 2nd February 2007 the association had approached the High Court and applied for an interdict against 9 (nine) of the present 11 (eleven)

applicants. By agreement between the parties, the following order was granted by the court on the 19th April 2007:

“1. The first to Eighth respondent be interdicted and restrained from, directly or indirectly:

- 1.1 Organising and/or participating in any subversive activity against the Applicant;
- 1.2 Calling, holding or attending protest meetings or arranging any other form of protest against the Applicant in a manner which is contrary to the provisions of the Standard Constitution and/or the grievance procedure;
- 1.3 Threatening and/or intimidating any members of the Applicant;
- 1.4 Participating in activities that could in any way induce violence;
- 1.5 Inciting members of Applicant not to adhere to the rules of the organization;
- 1.6 Purposefully disrupting the activities of the Applicant;
- 1.7 Inciting members not to pay the obligatory and/or membership fees and other levies.
2. The First to Eighth Respondent are only allowed to operate their taxi's, of which they have a legal permit, issued by the Free State permit board, to such an extent, and only to such an extent to which their permits allow them to operate, specifically referring to the routes allocated and stated in their permits.
3. That the First to Eighth Respondent, with a legal permit which permits them to operate on the long distance routes between Qwa-Qwa and Frankfort as well as Qwa-Qwa and Ladysmith, must make use of Phase 1 of their departure in Mampol Street, Qwa-Qwa.
4. That the First to Eight Respondent, with a legal permit which permits them to operate the routes between Qwa-Qwa and Bethlehem as well as Qwa-Qwa and Harrismith, must make use of Phase 2 for their departure in Mampoi Street, Qwa-Qwa.
5. The parties will adhere to the provisions of the Standard Constitution and must comply with the provisions thereof.
6. The Applicant will insure that a copy of the Standard Constitution will be available for perusal at every meeting convened by the Applicant.
7. The Applicant will insure that a copy of the Standard Constitution is available for perusal by any member of the Applicant at the Applicant's offices situated at Office no 2, Century Building, Setsing, Phuthaditjhaba, from 08:00 to 17:00 Monday to Friday.
8. The First to Eighth Respondent pay their arrears regarding the annual membership fees and levies within six (6) months, of this Order, regardless of the number of permits being held by each Respondent.
9. Each party to pay his own legal costs.”

I will return later to the aforesaid order (hereafter referred to as “the court-order”).

[3] The importance of mentioning the dates of the filing of the respective affidavits in the current application will emerge later on in the judgment. The notice of motion was issued by the applicants on the 13th December 2007. The respondent filed an answering affidavit on the 8th February 2008 in which he inter alia averred that the applicants had, in light of the problems that led to the association obtaining the interdict referred to in paragraph 7 above, launched this application prematurely as the first possible compliance with the Standard Constitution of the pertaining to the holding of an annual general meeting could only have been in the months of February 2008, March 2008 or April 2008. It was further averred that the respondent’s attorney had, subsequent to receiving the notice of motion, requested the applicants in writing on the 21st January 2008 to withdraw their application on the basis of the assurance given by the respondent by virtue of the same letter, that the respondent intended holding the annual general meeting during March 2008.

[4] In their replying affidavit filed on the 2nd April 2008, the applicants admitted having received the letter of the 21st January 2008 from the respondent’s attorneys and also admitted their refusal to withdraw the application. The reason for their refusal was expressed as follows on p.188 of the papers: “It is an unfortunate truth that if this application is withdrawn, the very real possibility exists that Mokhasi may simply continue to find reasons to postpone the holding of the annual general meeting indefinitely. The only reliable way to obtain finality is to seek the assistance of the Honourable court”.

[5] Adv. Knoetze SC argued on behalf of the applicants that their main complaint was that despite the provisions of paragraph 6.2.1 of the Standard Constitution, no annual general meeting was held by the Association either during 2006 or 2007. It is apposite to, at this stage, quote the provisions of the relevant clause which provides as follows:-

“6.2.1 The AGM must take place in the month of February, March or April (each association should choose a specific month (month to be filled in by Association) of each year at a time and place determined by the Executive Committee.”

(“AGM” is the acronym in the Regulations for “annual general meeting”). (my underlining.)

[6] Adv. Knoetze SC submitted further that there can be no doubt about the fact that the annual general meeting must be held every year strictly during one of the months referred to in clause 6.2.1. He submitted that the usage of the word “must” was indicative that those provisions were peremptory. He argued that it was not in

dispute that up to the time of the launching of the application by the applicant's no annual general meeting had been held. He submitted that the reasons advanced by the respondent for its failure to hold the annual general meeting did not hold any water.

[7] My view is that the whole content of the order of court dated the 19th April 2007 cannot be disregarded. In any event counsel for the applicant does in fact place reliance on it with regards to the terms of office of the executive committee insofar as he submits that "whatever may or may not have been decided at the meeting of the 25th August 2005 in respect of the term of office of the Executive Committee was subsequently superseded by paragraph 5 of the order of the above Honourable Court...". The application is basically premised on the respondent's non-compliance with the provisions of that paragraph.

[8] Reliance having placed by the applicants on paragraph 5 of that court-order it would, with respect, not make sense for anyone to seek to consider that particular paragraph of the order in isolation. Other clauses of the same order are relevant to this application. Having accepted that the whole order is of relevance in casu, it can therefore safely be accepted that there had in fact been some obtrusiveness in as far as the operations of the association were concerned, necessitating an application and the granting of an order as set out in paragraphs 1.1 – 1.7 of that court-order. I am therefore inclined to agree with adv Snellenburg's submission that valid reasons have been advanced as to why the annual general meeting had not been held during 2007.

[9] Considering that the court order of the 19th April 2007 was obtained by consent of the parties, it would not amount to stretching it too far to accept that the effect of the

order was to amicably resolve past issues, including previous non-compliances and to agree to act in accordance with clause 5 from

the date of the court-order. This would equally mean that the failure to hold the annual general meeting in 2006 had effectively been condoned by virtue of that court-order.

[10] Accepting Adv Knoetze's submission that clause 6.1 is peremptory, in other words that the meeting could only have been held in the months of February, March or April, I am inclined to agree with Adv Snellenburg's submission that, given the date of the court-order, the first possible months during which the annual general meeting could be held would be during the months of February 2008, March 2008 or April 2008. When confronted with Adv Snellenburg's latter submission, Adv Knoetze argued that the annual general meeting could still have been held between the date of the court-order and the end of April 2007, i.e. between the 20th April and 30th April. I am not persuaded by that argument and am of the view that it would have simply been impractical to do so, given that the

respondent would first have to give members at least 7 (seven) days' notice of such meeting.

[11] In my view, the earliest annual general meeting to be convened after the order would be one convened for February 2008, March 2008 or April 2008. Given that the Standard Constitution provides that a mere 7 (seven) days' notice of the annual general meeting be given, the applicants quite clearly launched their application prematurely. Having done so, they ignored the respondent's attorney's notification of the respondent's intention to hold the meeting in March 2008 and refused to withdraw their application.

[12] The respondent then proceeded, correctly in my view, to file its opposing affidavit and attached the letter in question to their papers, thus repeating the respondent's intention to hold the meeting in March 2008. The applicants then filed a replying affidavit on the 2nd April 2008, which is obviously a date after the proposed date of the AGM. In their replying affidavit the applicants focussed on denying the averments set out in the opposing

affidavit. The one important denial they failed to make was that the annual meeting was not held as per the respondent's

undertaking. To the extent that this has not been denied by the applicants in their replying affidavit when they had an opportunity

to do so, I accept that the annual general meeting was in fact held during March 2008.

[13] In drawing this inference I rely on the well-known principle

enunciated in the case of *Plascon-Evans van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 at 634H* where it was stated as follows: "It is correct that, where in proceedings on notice of motion disputes of facts have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent,

justify such an order." On the application of the aforesaid principle alone I am entitled to accept that the annual general

meeting was held in March as per the respondent's written undertaking.

[14] Although the above finding in itself disposes of the matter, I will venture to state that I am fortified in my acceptance that the annual general meeting was held by the fact that it was evident, from the papers that were filed by the same parties in respect of an interlocutory application that I subsequently dismissed in an *ex tempore* judgment, that the annual general meeting was held even prior to the filing of the replying affidavit in the application under

consideration. I am referring specifically to the opposing affidavit of Thabiso Moses Mokhasi where he stated as follows: "the annual meeting was duly constituted and was held on the 6th March 2008."

- [15] In the absence of any replying affidavit stating to the contrary, I accept that the annual general meeting was indeed held on that date as per the averment made in the opposing affidavit. Adv Knoetze SC contended that I should not consider the content of that opposing affidavit as it was filed in a different application than the one under consideration. He could not provide me with any authorities in support of his contention. I am of the view that nothing in law precludes me from doing so. In fact, my view is that I would still not be precluded from doing so even if that interlocutory application had been heard by a different judge.
- [16] The annual general meeting that was held might perhaps not have been held or conducted to the applicants' satisfaction, but that is really beside the point in as far as this application is concerned, as it was not the case that was made out on the pleadings. The fact of the matter is that the respondent did convene an annual general meeting as per its undertaking in a letter addressed to the applicants' attorneys.
- [17] As stated before, the mere launching of the application by the applicants was premature. As it turns out, the applicants' persistence with the matter beyond the filing of the Notice of Motion was foolhardy as it has more negative cost implications for them. Perhaps the applicants could have saved themselves some of the costs if they could have heeded the advice to withdraw its application after receipt of the respondent's letter dated 21 January 2008. This they did not do. They could perhaps also have resorted to internal remedies. They have not substantiated their bald assertion of having taken steps to exhaust such internal remedies. Having considered all the circumstances of this case, I am not persuaded that there is no reason for me to deviate from the general rule that costs should follow the cause.

[18] I therefore make the following order:

The application is dismissed with costs.

M. B. MOLEMELA, AJ

On behalf of the Applicants: Adv. Knoetze SC

Instructed by:

Lovius - Block

BLOEMFONTEIN

On behalf of the Respondent: Adv. N Snellenburg

Instructed by: Honey and Partners

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Prepared on 13 October 2026 · Esheria