

SOUTH AFRICA / JUDGMENT

Moqhaka Taxi Association v Moqhaka Municipality and Others (3706/2012) [2013] ZAFSHC 24 (7 March 2013)

[2013] ZAFSHC 24**COURT**

Free State High Court, Bloemfontein

BEFORE

A. Kruger

CASE / FILE NUMBER

3706/2012

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 3706/2012

In the matter between:-

MOQHAKA TAXI ASSOCIATIONApplicant

and

MOQHAKA MUNICIPALITYFirst Respondent

FREE STATE TRANSPORT OPERATING

LICENSING BOARDSecond Respondent

THE REGISTRAR OF TRANSPORTThird Respondent

MEC FOR THE FREE STATE PROVINCE

RESPONDENT FOR TRANSPORTFourth Respondent

HEARD ON: 28 FEBRUARY 2013

JUDGMENT BY: KRUGER, J

DELIVERED ON: 7 MARCH 2013

[1] The applicant taxi association is disgruntled because –

(i) members of registered taxi associations,
(ii) licensed metered taxi operators,
unlicensed operators of taxi type vehicles (“pirate taxis”), and
vehicles used to convey people for remuneration
use unlawful loading and drop-off zones other than the official Station Street Taxi Rank
(Kroonstad) and specifically –

- (a) in front of the Shoprite Centre in Reitz Street, Kroonstad,
- (b) across from the Ou Hotel Emilio, Sarel Cilliers Bridge, and
- (c) in Louw Street, Kroonstad.

[2] Prayer 1 of the Notice of Motion seeks to order the four respondents to take all steps reasonably necessary to stop these activities at those places.

The respondents are:

Moqhaka Municipality;

Free State Transport Operating Licensing Board;

The Registrar of Transport;

MEC for the Free State Province Responsible for Transport.

Prayer 2 reads as follows:

“2. That the Respondents be ordered to perform their functions and duties to enforce the National, Provincial and Municipal legislation and regulations pertaining to regulating the metered taxi industry; road transportation of passengers and enforcement of road traffic rules and regulations regarding the metered taxi industry in Kroonstad, Free State Province including, but not necessarily limited to:

2.1 regulating conduct of owners and drivers of taxi type vehicles in accordance with conditions of registration and the operating licences and/or permits;

2.2 regulating registered taxi associations’ compliance with their registration and conditions of registration;

2.3 regulating conduct of registered non-members in accordance with their conditions of registration and the operating license and/or permits;

2.4 policing the industry to stop and prevent people from conducting taxi type business without complying the National, Provincial and/or Municipal Legislation pertaining to Road Traffic rules and regulations and the Public Transportation of passengers.”

In argument Mr Snellenburg conceded that prayer 2 of the Notice of Motion possibly is too vague and he did not press for an order under prayer 2, although he did not abandon it.

- [3] Mr Snellenburg says that the applicant was forced to come to court. Annexures R1 – R50 attached to the replying affidavit show that in order to address the applicants' problems, various suggestions were made over a three month period. The point is that nothing happened. The applicant has a right that the law be enforced. The four respondents must sort out amongst themselves who does what in order to enforce the law to applicant's advantage.
- [4] The respondents oppose the relief sought. The first respondent filed an answering affidavit and was represented by Mr Wessels, assisted by Mr Roux at the hearing. An answering affidavit, and a duplicating affidavit, were filed by the second, third and fourth respondents, who were represented by Mr Claasen at the hearing.
- [5] There is no dispute that the application must be decided on the facts as set out in the opposing affidavits – *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634. These allegations show that the inspectors of the respondents frequently visit taxi operations and investigations take place regularly. There are 34 taxi associations in the Free State and in excess of 14 000 operators. More than 500 busses pass through the Free State.
- [6] Mr Wessels submitted rather diffidently that the first respondent is a local municipality and in terms of sections 83 and 84 of the Local Government: Municipal Structures Act 117 of 1998 and as a local municipality it does not have powers and functions to regulate the passenger transport system, because those powers vest in the district municipality, with reference to the unreported judgment of *Amatole District Municipality and Others v King William's Town Taxi Management and Others*, Eastern Cape Case No 011/2004 12 August 2004. Mr Snellenburg raised two points to counter this argument:
 - (i) This is not an issue on the papers.
 - (ii) It is not in dispute on the papers that the first respondent is legally obliged to and in fact controls traffic in Kroonstad and enforces its bylaws and the regulation of traffic in Kroonstad.

These contentions by Mr Snellenburg are correct.

- [7] One of the main objections of the respondents is that the relief sought is too widely couched and too vague. Mr Wessels says that the applicants have failed to tell the court what the status of an official taxi rank is. He could not find a description of an "official" taxi rank anywhere. The court is not told what the permits of the persons or entities, who allegedly service passengers at the "unofficial" points, at Shoprite, the Ou Hotel and in Louw Street, state. Which bylaw says they are not allowed to pick up passengers at these points? There is no allegation that there is a sign prohibiting the loading or off-loading of passengers at those points.

- [8] The ambit of the relief sought by the applicant is, as set out by Mr Claasen on behalf of the second, third and fourth respondents in his heads of argument, vague:

“(a) Exactly what will the Court order entail in regard to ‘all such steps as are reasonably necessary to stop’ the four kinds of ‘operators’ from ‘utilising unlawful loading and drop-off zones...’ Exactly what and where are these unlawful loading and drop-off zones? It is common cause that any taxi can load and drop-off passengers en-route. Will that now be contravening the Court order?”

- (b) Exactly from where to where is the ‘in front of or next to the Shoprite Checkers Centre in Reitz Street, Kroonstad’?
- (c) Exactly what is the exact area of ‘across from the old Hotel Emelio, Sarel Cilliers Bridge’?”

- [9] Mr Claasen contends that the application transgresses the constitutional principle of the separation of powers. To answer this contention Mr Snellenburg relied on *Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality and Others* [2008] ZAGPHC 101; 2008 (5) SA 387 (T). The Chieftain case was an opposed application to join the Government of the Republic of South Africa and the MEC for Housing as second and third respondents. The court stated that the judgment does not concern the merits of the case, but deals with an application for joinder (par [26]). In that case the municipality had made an undertaking to evict the 20 000 occupiers of property, but did not perform in terms of its undertaking. On that basis the court in the Chieftain case ordered that the Government and MEC be joined. The case is not authority for the proposition that a court has the power to order a municipality in general terms to enforce the law. It says that organs of state must assist each other.

- [10] Mr Claasen has referred to a number of cases where the Constitutional Court has dealt with the issue of separation of powers. The judiciary has a crucial and sensitive role to play in controlling the exercise of power and upholding the Bill of Rights. A judge should not intrude into the executive domain. See *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) BCLR 77 (CC) par [46]. The basic structures of the Constitution are set out in *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) par [45]. The separation of powers emanates from the wording and structure of the Constitution - *Justice Alliance of SA v President of the RSA and Others and Two Similar Applications* 2011 (10) BCLR 1017 (CC) par [32]. In *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (2) BCLR 136 (CC) at par [29] it was stated that it is now axiomatic that the separation of powers is part of our constitutional design. As Mr Claasen puts it, the underlying idea is that certain institutions are particularly well equipped to perform a particular function. Laws are made by legislatures and executed by officials. It is the duty of the courts to ensure that the powers are performed in line with constitutional

rights. See *Prince v President, Cape Law Society, and Others*

[2002] ZACC 1; 2002 (2) SA 794 (CC) par [155]. Courts have to be sensitive to considerations of institutional competence. Courts must guard against being timid or over-valiant (par [156]).

[11] A case in which the relief sought is similar to the relief asked for in this case, is *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998

(1) SA 765 (CC). The respondent Health Department was unable to provide the applicant with the kidney treatment he requested. The court held (at par [29]) that the provincial administration which is responsible for health services has to make decisions about funding that should be made available for health care and how such funds should be spent. A court will be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it is to deal with these matters (par [29]). A similar line was taken by the court in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*

[2002] ZACC 15; 2002 (5) SA 721 (CC) at par [38]:

“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. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.”

[12] A court will not make orders which cannot legally and practically be enforced – *Mansell v Mansell* 1953 (3) SA 716 (N) at 720F, 721E – F. An example of an order which the court was willing to make, is to be found in *Administrator, Cape and Another v Ntshwaqela and Others* 1990

(1) SA 705 (A), where the order made by the court was solely prohibitory. Neither the owners nor the second and third respondents were required to do anything. There was no room for an argument that the order is impossible of performance (at 721B – C).

[13] In *Aetiology Today CC t/a Somerset Schools v Van Aswegen and Another* 1992

(1) SA 807 (W) the court refused to make an order restraining the respondent from competing unlawfully with the applicant (at 816H –

J), because it was couched too widely and would cause difficulty in enforcement. A court cannot make an order if it cannot enforce

compliance with it – *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) par [36].

CONCLUSION

[14] In the present case the respondents have given details of what they can do and are doing to enforce the law. It would be inappropriate

for the court to give specific directions. The applicant seeks an order that the respondents enforce the law. Such order would be couched as widely as that in the Aetiology case and would cause difficulty in enforcement. The applicant has not referred to one case in which relief similar to the relief sought in this case has been granted. The Soobramoney case (*supra*), on medical care, comes the closest. There the court refused to tell the executive what to do.

[15] A striking aspect of this application is that no alleged transgressor has been cited as respondent. The alleged transgressors fall into four categories. As to the metered taxis, they are in any event as a general rule allowed to stop anywhere. Also, it is not known what the permits of the alleged transgressors, who use the “illegal” taxi ranks, state as to where they are allowed to operate from. The fact that the exact places where the alleged transgressors may stop, have not been identified, creates a deficiency in applicant’s

case and leads to difficulty in making an enforceable order. This is not an unlawful competition case, as was *Bophuthatswana Transport Holdings (Edms) Bpk v Matthysen Busvervoer (Edms) Bpk*

[1995] ZASCA 105; 1996 (2) SA 166 (A) at 173G – H. Without proof of injury there is no proof of interference with a person’s trade or of an infringement of his right – *Patz v Greene & CO*. 1907 TS 428 at 438, as quoted in the *Bophuthatswana* case at 174G – H.

[16] The applicant is not without a remedy. Mr Claasen gives three possible remedies:

(i) If a registered taxi makes use of unofficial taxi ranks or allows passengers to embark or disembark at illegal places, such operator can be reported to the Registrar in terms of section 84 of the Free State Public Transport Act 4 of 2005 and the Registrar can then after an inquiry suspend or cancel the permit of such operator.

(ii) The applicant can seek an interdict against persons contravening the law and if they disobey the court order, the applicant can bring an application for contempt of court.

(iii) The applicant can sue the illegal operators directly (for unlawful competition, as in the *Bophuthatswana* case).

[17] In summary, the relief sought by the applicant is too wide and too vague to justify an order.

[18] As to costs, Mr Wessels asked for the costs of two counsel in respect of the first respondent. Novel points of law are raised in this application and the first respondent was justified in employing two counsel. The second, third and fourth respondents were represented by senior counsel, although he had no junior. The costs of two counsel in respect of the first respondent are to be allowed.

ORDER

- [19] 1. The application is dismissed.
2. The applicant is to pay the costs of the first respondent, including the costs attendant upon the employment of two counsel.
3. The applicant is to pay the costs of the second, third and fourth respondents.

A. KRUGER, J

On behalf of applicant: Adv N. Snellenburg

Instructed by:

Naudes

BLOEMFONTEIN

On behalf of first respondent: Adv M.H. Wessels SC

With him:

Adv. L.A. Roux

Moroka Attorneys BLOEMFONTEIN

On behalf of second, third and

fourth respondents: Adv J.Y. Claasen SC

The State Attorney

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