GAUTENG DIVISION, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 51536/14

DATE: 9/10/2014

In the matter between:

ROAD FREIGHT ASSOCIATION	Applicant
and	
DE KLERK AND MARAIS INC	First Respondent
VIVIAN DE KLERK	Second Respondent
EMAKHAZENI MUNICIPAL FIRE AND EMERGENCY SERVICES (PTY) LTD	Third Respondent

EMAKHAZENI LOCAL MUNICIPALITY	Fourth Respondent
STANDARD BANK OF SOUTH AFRICA	Fifth Respondent
FIRST NATIONAL BANK	Sixth Respondent
LAW SOCIETY OF THE NORTHERN PROVINCES	Seventh Respondent

J U D G M E N T

Ismail J:

[1] This application is sought in response to an application which was brought ex parte in the urgent court before Louw J. The order granted was as follows:

(1) Condoning the non compliance with the Rules of court and directing that the applicant be heard *in camera* as a matter of urgency in terms of uniform rule of court 6 (12);

(2) A *rule nisi* is issued calling upon the respondents to show cause on 29 August 2014 at 10h00 or so soon thereafter as the matter may

be heard why an order should not be made in the following terms:

2.1 The funds held in the following bank accounts are preserved pending the outcome of an action to be instituted by the applicant against *inter alia* the first, second and third respondents:-

2.1.1 Bank account held in the name of De Klerk Marais Inc,
Standard Bank (Menlyn Square)
Brach code: 01-23-45-00
Account number: 4[…]

2.1.2 Bank accounts held in the name of Emakhanzeni Municipal Fire Emergency Services:-

2.1.2.1 First National Bank (Belfast)
Branch code: 270-351
Account number: 6[…];

2.1.2.2 First National Bank (Belfast)
Branch code: 270-351
Account number: 62[…];

2.1.2.3 Standard Bank (Menlyn Square)
Branch code: 01-23-45-00
Account number: 0[…].

2.2 In respect of 2.1.1 above-

2.2.1 The first and second respondents are prohibited and restrained from operating in any way, whether directly or indirectly, the trust account of De Klerk and Marais Inc.;

2.2.2 The seventh respondent is directed to:-

2.2.2.1 supervise the trust account of the first respondent, referred to in para 2.1.1, such supervision to include the appointment of a *curator bonis;*

2.2.2.2 inspect the accounting record of the first respondent, such to include causing an audit of Trust Account referred to in para 2.1.1 and causing a report to be compiled for the benefit of the court within 30 (thirty) calendar days from date of this order.

(3) Pending the return day:-

3.1 The funds held in The bank account listed in 2.1 are preserved; and

3.2 The first and second respondents are prohibited and

restrained from operating in any way directly or indirectly, the trust account mentioned in 2.1.1 above.

(4) The cost of this application are reserved for determination in the action proceeding to be instituted by the applicant.

By order of the Court

11 July 2014.

[2] The first and second respondents were prohibited and restrained from operating either directly or indirectly the trust account of the First respondent.

[3] The first and second respondent seek to have the interim order, granted on the 11 July 2014, be discharged.

[4] The main application wherein the applicant seeks a declarator has been set down for hearing on the 2 December 2014.

[5] The third respondent would be referred to as such or by the acronym

EMFES, in the course of this judgment. EMFES has not opposed these proceedings.

Background

[6] The applicant avers that the third respondent has been masquerading that it was an emergency service of the Emakhazeni Municipality and that they were the Municipality Fire Brigade Services. In so doing they perpetrated a fraud on the unsuspecting public into believing that they were the Municipal Fire Brigade, whereas in truth the third respondent was a private company.

[7] A whistle blower, who was a director of the third respondent, one Mr Baker, turned against the second respondent who was a co- director of the third respondent. This whistle blower deposed to an affidavit on behalf of the applicant wherein he stated that the second respondent of his own steam brought the application to have the interim order discharged, without notifying him as a director. More importantly he alluded to the improper behavior of the third respondent in devising a scheme to perform so called emergency services which were not warranted. The monies collected went into the account of the third respondent and not into the account of the municipality.

[8] The applicant furthermore contended that the person behind the scheme was none other than the second respondent , who is an attorney and a director of the first respondent.

[9] During argument before me Mr Arnoldi SC, submitted that the Applicant's founding affidavits contained diverse allegations of a hearsay nature. Furthermore the allegation of the alleged fraud were referred to in the main application [which contains 1500 pages] which is set down for December, this year. He submitted that the applicant relied in its founding papers to the main application and it therefore made it impossible for the first and second respondents to respond thereto. He referred to the well known decision of *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324 where Joffe J stated:

" Regard being had had to the function of affidavits , it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met. See Lipschitz and Swartz NNO v Markowitz 1976 (3) SA 772 (W) at 775 and Port Nolloth Municipality v Xahalisa and Others; Luwalala and others v Port Nolloth Municipality 1991 (3) SA 98 (C) AT 111 B-C.."

[10] Mr Hopkin's in reply submitted that the argument advanced by his esteemed opponent, that 1500 pages were annexed, and that he could not respond thereto was misplaced as the applicant specifically summarized the evidence in its founding papers. It referred to the passage in the main application by means of page references. In addition the applicant stipulated whether it was in the founding papers or answering papers or replying papers. The applicant also summarized the relevant portions which it relied upon. He also contended that the practice manual of this division specifically directed that the papers could be annexed in applications such as Anton Pillar applications. The applicant strictly complied with the practice directive.

[11] The respondents submitted that the applicant stubbornly refused to provide the names of its members, despite them having requested the same. They were therefore not in a position to respond to queries in general as some of the parties who received statements may or may not be members of the applicant. This point might have had some gravitas, however, it was submitted that this was a constitutional challenge and that any person could challenge the decision of an government functionary such as the Municipality if it acted beyond the powers it was given, in other words, if it acted *ultra virus* the enabling statute. See *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of Republic of South Africa* 2000 (2) SA 674 (CC) where Chaskalson CJ stated:

" [85] It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive or other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standard demanded by our Constitutional principle"

[12] Section 8 of the Fire Brigade Services Act 99 of 1987 is headed " 8 powers of members of service" it reads as follows:-

(1) A member of a service of a controlling authority, including the chief fire officer, may, whenever he regards it necessary or expedient in order to perform his functions, perform any act, and may also-

(a) close any road or street;

(b) enter or break and enter any premises;

(c) damage, destroy or pull down any property;

(d) forcibly remove or cause to be removed from the scene any person who is in danger or who obstructs that member in the performance of his duties; and

(e) take material or any object from any person: provided that the owner of the material or object so taken shall be compensated therefor by the controlling authority and the owner, or in the absence of such agreement,

an amount determined by arbitration in accordance with provisions of the Arbitration Act (act 42 of 1965).

(2) A member of a service of a controlling authority, including a chief fire officer, may whenever he regards it necessary in order to perform his functions, order any inhabitant of the Republic who is not younger than 16 years and not older than 60 years to assist him in the performance of his functions on any particular occasion.

[13] In my view the provisions of the aforementioned provisions should be interpreted literally and restrictively.

[14] It therefore follows that the municipality could not enter into a contract with a third party whereby it sub contracts what it ought to be doing itself in terms of the enabling Act.

[15] Mr Hopkins relied upon the fact that EMFES, the third respondent, acted in a fraudulent manner and throughout the papers words such as masquerading, deceiving the public, misled were used. It is not necessary for my to find this as a fact. I need not make a finding that the third respondent or the first and/or second respondents acted as such. Such a finding would be for the determination of the court which hears the Main

application in two months' time. All I need to find is that there is a *prima facie* case to that effect for the rule to be confirmed.

[16] In this regard counsel for the first and respondents during his address conceded that it was established that there was a *prima facie* case, however he submitted that more than two years had passed before this application was lunched. Notwithstanding the lapse of that period the applicant suddenly labour under the belief that the monies would be dissipated from the trust account. He submitted that the seventh respondent is aware of this application and has not seized the first respondent books of account or for that matter investigated the alleged impropriety. The seventh respondent has merely indicated that it would abide the court's decision.

[17] The applicant's counsel submitted that the court cannot rely upon the word of the second respondent, who they allege had displayed the 'hallmarks of dishonesty' by his inconsistencies and changing of versions. An example of this being that he continuously stated that there was no tender process which applied in this matter. When they, the applicant informed him that if that were the case the agreement would be void. He hereafter changed directions to suit the wind by altering his version by stating there was a tender process.
Another example being that he claimed there was only one agreement.

This changed and it appears that there were several agreements.

[18] The letterhead of the third respondent does not contain the words (Pty) Ltd. This it was submitted was done to mislead the public to believe that they were dealing with the municipality. This is compounded by the fact that the first respondent on its own letterhead also left out the words (Pty) Ltd when it demanded payment from third parties. See page 72 of the papers in this application. In the letter of demand the following appears:

" RE : EMAKHAZENI LOCAL MUNICIPALITY / YOURSELF"

It was contended that this was not an unwitting error as the second respondent is a director of the third respondent and he was aware that it was a private company.

[19] The applicant submitted that the respondents, (first, second and third Respondents) on their own concede that they acted unlawfully in that they referred to a period pre January 2012 and post January 2012. They contended that they acted mistakenly prior to January 2012 , although their intentions were bona fide. As soon as they realized their error they rectified the situation. This concession was ultimately made by counsel in his address to the court, namely that there was a prima facie case of unlawfulness made out.

[20] Section 8 of the Fire Brigade Services Act (see para [12], supra) permits the fire chief on certain occasions to do certain things. This section does not permit him to employ people belonging to another company as reserve fireman to do it's task. As counsel for the applicant pointed out no one knows what training and instructions these 'reservist' received. More importantly the municipality cannot conclude a contract with a company without following the proper procedure which should be transparent , fair and equitable. Mr De Klerk initially stated that there was no tender process. When he was challenged that the absence of such a process would render the agreement *ultra vires* he then changed that view and suggested that there was a tender process which was followed. Clearly the issue of whether a tender process was followed or not is a factual one and Mr De Klerk is not being completely honest on this score.

[21] It is not necessary for me to make a finding in terms of the *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), principle. I do not intend to repeat the principle in this judgment as it is familiar to all concerned. All that needs be shown by the applicant in this application is that there is a *prima facie* case off harm or wrongdoing been made out. The test in this case is a lower test than in normal application proceedings. *Colin Prest –The Law of Practice of Interdicts at p.55* describes a " prima facie case" as follows:

" The correct meaning, it is submitted, is that an applicant is required to furnish proof which, if uncontradicted and believed at the trial, would establish his right. The use of the phrase "prima facie established though open to some doubt" indicates that more is required than merely to look at the allegations of the applicant but something short of weighing up of the probabilities of conflicting versions is required."

[22] In *Krog v Botes* 2014 (2) SA 596 (GJ) Weiner J dealt with anti dissipation interdict. At para [28] the learned judge stated:

" In my view the applicant does not need to go that far what he essentially seeks is an interim interdict to secure the proceeds of the sale pending the determination of the action, which directly involves the asset in question. It is not an interdict as envisaged in the *Knox D'Arcy* case

[23] It is clear that the third respondent did the work of the Fire Brigade services on behalf of the municipality. It was not empowered to do so. By its own admission it erred in doing so up to 3 January 2012. The applicant avers that the third respondent's conduct was also unlawful as discussed, supra.

[24] Furthermore EMFES received monies into its account which ought to have gone to the municipality. It created the impression to the general public that it was the municipality. It was submitted that EMFES was not generally concerned with the trucks that were parked off thereby causing a

danger to other road users, however it was predominantly concerned with making a profit and was motivated by self enrichment. According to Manabile approximately R26 million had been paid by trucking companies to EMFES.

[25] The applicant submitted that it made out a prima facie case of unlawfulness on the part of the first, second and third respondents and the order should be confirmed because the second respondent honesty was suspect and that he could not be trusted. In addition two of his close associates, namely Manabile and Baker turned against him and they deposed to affidavits wherein they set out his nefarious conduct, which they ascribed as dishonest to say the least.

[26] The other grounds of an interdict are that there is a reasonable apprehension of harm and prejudice. It was submitted that second respondent had changed his version on several important aspects and this is a clear indication of a dishonest person whose word cannot be relied upon. If the order is not confirmed it is suggested that the funds would be spirited away and the applicant and its members would suffer irreparable harm. The applicant contended that there was a reasonable apprehension that if the order was discharged the money would be dissipated.

On the other hand if the order were to be confirmed the prejudice to

the first and second respondents would not be insurmountable as the curator would control the account and the first respondent could still continue with its practice. Mr Arnoldi submitted that if the respondent wanted to remove funds it would have done so ages ago. That may be so, however, it appear that *prima facie* the tide had turned against the second respondent in that people close to him have blown the whistle against him.

[27] Mr Arnoldi also raised a point regarding *locus standi,* in that the applicant did not give a list of its members, notwithstanding the respondents asking for a list of such membership. Mr Hopkin's argued that this was a constitutional issue and that any person could bring the application as it was in the public interest.

[28] ***Costs:***

The applicant seeks a punitive costs order against the respondents whilst the first and second respondents seek a similar order against the applicant. The respondents submitted that the application was an abuse of the court and that the rule nisi should be discharged with costs. Such costs to include the costs of senior and junior counsel.

It is clear that the court would have to order costs in this matter. The question is whether this matter clamours for a punitive costs order .

The applicant submitted that the second respondent on his own admission was the author of most of the affidavits. It is not rocket science to infer that the version of the respondents seem to have changed as a chameleon would change its colour as it moves along. To aggravate the issue the second respondent is an officer of this court.

Over and above the contradictions regarding the issue of the tender process; whether there was one contract or three contract ; the affidavit of Mr Oscar Nkosi (pp 289 et seq) in this application is critical and damning of the second defendant's veracity. I am tempted to make an order that the second respondent pays the costs on an attorney and client scale, as one would expect greater candor from an officer of the court then what has been displayed here.

I would leave the issue of punitive costs order for the determination of the Court which would hear the main action. That court would be in a better position to determine all the issues as my task is simply to establish whether the applicant has made out a preima facie case of unlawful conduct.

[29] I am of the view that the applicant has established that: -

1 . It has made out a prima facie case of unlawful conduct on the part of the 1st to 3rd respondents;

2. the order given by Louw J should be confirmed pending the finalization of the main action.

3. the orders relating to the first respondents trust accounts are hereby confirmed pending the main application namely prayers 2 including its sub paragraphs and 3)

4. First and second respondents are to pay the costs of this application jointly and severally on a party and party scale. The one paying the other to be absolved.

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APPEARANCES :

For the Applicant :	Adv K Hopkins instructed by Glyn Marais Inc c/o Cilliers and Rynders Inv, Centurion
For the first and second Respondents:	Adv C Arnoldi SC assisted by Adv Du Plessis, instructed by- De Klerk and Marais Inc, Pretoria.
Date of hearing:	19 September 2014.
Judgment delivered on:	9 October 2014