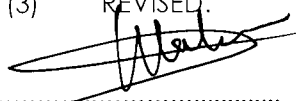


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:78213/14

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
SIGNATURE	DATE
	17/11/14

In the matter between:

AGATHA HILDA MASILELA
J.F MASINGA
ELIAS SIYO MAPHAKA
NORMAN W.MOKONI
MOSS MASANGO
WILLIAM T.MOLOTO
J.SEDIBE
JOBANA JAN SHABANGU
D.MABENA
J.B MTHOMBENI
SIPHO MNGOMEZULU
JABU MDHLULI

1st APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT
6TH APPLICANT
7TH APPLICANT
8TH APPLICANT
9TH APPLICANT
10TH APPLICANT
11TH APPLICANT
12TH APPLICANT

LOCAL TAXI ASSOCIATION

13TH APPLICANT

and

SOLLY VILANE (CHAIRMAN)	1 ST RESPONDENT
JEANETH THOKO SIWELA (DEPUTYCHAIRPERSON)	2 ND RESPONDENT
T.P GWALA (SECRETARY)	3 RD RESPONDENT
N.V.SIBIYA (DEPUTY SECRETARY)	4 TH RESPONDENT
WILLIES MOTSAMAYI MOLAPO (TREASURER)	5 TH RESPONDENT
SAM OUPA SKHOSANA	6 TH RESPONDENT
KENSLEY V. NKABINDE	7 TH RESPONDENT
CLEOPERS MOGAMEDI (TRAINING OFFICER)	8 TH RESPONDENT
DANTSHI MAHLANGU (GRIEVANCE CHAIRMAN)	9 TH RESPONDENT
SAM S. MAHLANGU (DISPLINARY COMMISSIONER	10 TH RESPONDENT
NEDBANK MANAGER (SAVEWAY COMPLEX)	11 TH RESPONDENT
FNB MANAGER (SAVEWAY COMPLEX)	12 TH RESPONDENT

JUDGMENT

MATOJANE J

[1] The applicants, are former members of Local Taxi Association ("LOTA"), who were removed from office because of financial mismanagement, they applied, as a matter of urgency and without serving the papers on the respondents, for relief that was aimed at regaining control of LOTA's affairs from the respondents. The respondents are members of the Executive Committee of LOTA.

[2] Before dealing with the merits, it is unfortunately necessary to raise my concern about the manner in which these proceedings were conducted. The matter first came before Molefe J *ex parte* on 24 October 2014. Applicants obtained an order in the following terms:-

1. *That the current entire Executive Committee Member's to wit: first to tenth respondents are no longer authorized to act as office bearers of the thirteenth applicant and their positions are declared null and void;*
2. *The chairman, Solly Vilane and the treasurer, William Motsamayi Molapo are no longer authorized to sign any documents and/or cheque or to withdraw and/or deposit any monies into the trust account: 1585332917 Nedbank and also FNB account number: 62237400669;*
3. *The Nedbank manager and FNB manager at Saveway Complex, Witbank are ordered to put a hold and freeze the following accounts: Nedbank account: 1585332917 and FNB account: 6223700669 with immediate effect;*
4. *It is ordered that no taxi driver or taxi owner of the thirteenth applicant should pay the R20,00 loading fee from any of the pick-up points or taxi ranks until an elective conference is held by the entire 263 members of the thirteenth applicant*
5. *It is ordered that an interim executive committee be appointed by the entire 263 members of the thirteenth applicant and the latter should facilitate and convene an elective conference to elect a new executive committee.*
6. *That this order should operate as an interim order and that the first to tenth respondents are called upon to show cause as to why the rule nisi should not be made a final order on the return day, Tuesday, 4 November 2014.*

[3] On 27 October 2014 the applicants forcefully took occupation of LOTA's offices and evicted the respondents. Applicants, together with their counsel, Mr. Masango went to the bank and withdrew a sum of R250 000.00 from LOTA's bank account and counsel deposited the money into his

personal bank account, Mr. Masango stated from the bar that he subsequently paid the money over to his instructing attorney.

[4] On 30 October 2014, in anticipating the return day of the *rule nisi* the respondents delivered an opposing affidavit and advanced their reasons why the ex parte order granted on 24 October 2014 should be set aside and the rule nisi should be discharged. The respondents also delivered a counter application for restoration of their possession of LOTA's offices.

[5] The main application and the counter application were set down for hearing on 31 October 2014 before Molopa J. The matter was removed from the roll with costs reserved.

[6] On the 4 November 2014, the application did not appear on any of the unopposed motion court rolls nor on the urgent court roll for the week of 4 November 2014. The attorney and counsel for the respondents phoned applicants attorney and enquired about the matter. The applicants' attorney promised to revert to the respondents' legal representative and has failed to do so. In the meantime, Counsel for the applicants, Mr. Masango, without notice to the respondents, and knowing that the matter is opposed and a replying affidavit in the main application has been filed before the 4 November 2014, moved the application in the urgent court before Louw J asking for the confirmation of the rule nisi and by stealth adding new relief appointing applicants as an interim executive committee and declaring unfrozen, accounts which were frozen by the interim order and authorising applicants to deal with the funds of LOTA.

[7] The Order taken by counsel for the applicants' reads:

1. *That the current Executive Committee Members to wit: First to tenth respondents are no longer authorized to act as office bearers of the thirteenth applicant and their positions are declared nul and void;*

2. *The chairman, Solly Vilane and the treasurer, William Motsamayi Molapo are no longer authorized to sign any documents and/or cheque or to withdraw and/or deposit any monies into the trust account: 1585332917 Nedbank and also FNB account number: 62237400669;*
3. *It is ordered that the following LOTA members are now the official appointed signatures namely: Elias Siyom Maphaka, William Tunkie Moloto, Johan Mahlangu, Sipho Elijah Mngomezulu and are hereby confirmed and authorized to sign cheques and/or withdraw, deposit monies from the interest of LOTA and LOTA members for account number: 1585332917 Nedbank, account: 6223700669 FNB account and account number: 032097778 Standard Bank with immediate effect.*
4. *The Nedbank, FNB and Standard Bank manager are authorized and ordered to uplift and/or unfreeze accounts number: 1585332917 Nedbank, account: 6223700669 FNB, account number 032097778 Standard Bank.*
5. *All taxi drivers and taxi owners of the thirteenth applicant are authorized and ordered to pay the binding fee and/or loading fee of R20,00 to the thirteenth applicant.*
6. *The following interim committee members are confirmed to be the interim executive committee of the thirteenth applicant (LOTA) with immediate effect namely:*
 - 6.1 AGATHA HILDA MASILELA;
 - 6.2 FANNIE J MASINGA;
 - 6.3 ELIAS SIYO MAPHAKA
 - 6.4 NORMAN W MOKONI
 - 6.5 NOSS MASANGO
 - 6.6 WILLIAM T MOLOTO
 - 6.7 J SEDIBE
 - 6.8 JOBANA JAN SHABANGU
 - 6.9 D MABENA
 - 6.10 JB MTHOMBENI
 - 6.11 SIPHO MNGOMEZULU
 - 6.12 JABU MDHULULI
7. *The interim order granted at Lady Justice Molefe on the 24th October 2014 in favour of the first to thirteenth applicants is hereby made a final order of court.*

[8] On Friday, 7 November 2014 pursuant to a fresh application by the respondents, De Vos J made an order rescinding and setting aside an order

of Mr. Justice Louw granted on 4 November 2014 and reinstating the rule nisi granted by Molefe J and extending the *rule nisi* to the urgent roll of the 11 November 2014.

[9] I was asked to adjudicate and decide upon the main application and counter application. Before the start of the proceedings, counsel for the applicants, Mr. Masango approached my registrar in chambers and filed with her a supplementary founding affidavit that he alleged was by agreement with opposing counsel. Mr. Masango had to concede in open court that it was not true that the respondents has agreed to him filing an additional affidavit without bringing the necessary application. Mr. Masango submitted in court that the interim relief granted by Molefe J is the same as that made final by Louw J, when it is obvious that a new relief was added when the *rule nisi* was confirmed.

[10] It is not possible for me, and it is not my task, to enquire whether Mr. Masango has misled Louw J into confirming the *rule nisi* in the same manner as he mislead me when he sought to filed a supplementary affidavit and denying that a new relief had been added when the *rule nisi* was confirmed. I cannot just turn a blind eye to the manner in which Mr. Masango has conducted himself and have decided, in the order that I make, to direct the Registrar to refer the matter to the Bar Council, for it, as the body charged with the discipline of advocates, to look into the matter.

[11] I turn now to the application before me. The applicants stated in their founding affidavit that the terms of office of the executive committee (the respondents) expired on 29 September 2013 and ever since that date no elective conference has ever been held and called by the respondents. They stated further that not a single meeting was ever held and members were not given bank statements and no expenditure records or income statements were ever obtained by members. The deponent to the founding affidavit claims to represent the entire membership of LOTA which has 263 members but provides not proof thereof especially as will be shown later, the

respondents had just been re-elected into office in a properly constituted annual general meeting.

[12] The above allegations are devoid of any truth and were used to deceive Molefe J to obtain an *ex parte* order on the strength of false allegations. On the applicants' own founding affidavit, applicants have attached bank statements made quarterly and the chairman's financial report. It seems strange to me that applicants should be in possession of these bank statements if indeed, members were not given bank statements.

[13] The applicants stated that the application is brought without notice because the applicants fear that the respondents might withdraw all cash in the bank accounts, should they receive notice of the application. This fear is devoid of any substance as the respondents produced annual financial statements of LOTA for September 2010, September 2011 and September 2013 which were submitted to a properly constituted annual general meeting and approved.

[14] The respondents also produced the minutes of LOTA Annual General meeting of the 14 February 2014 in which it is recorded that the treasurer introduced Mr. Eddie Le Grange, an accountant from Hugo and Venter Accountants who read the financial statements to members. According to the minutes the elections could not be proceeded with and were postponed to the 18th February 2014 due to the absence of a representative from the Independent Electoral Commission. The elections were duly held on the 18 February 2014 and the respondents were elected to office. The meeting was presided over by an employee of the Independent Electoral Commission.

[15] It is clear that the above material facts were deliberately not disclosed to Molefe J and the founding papers fail to support any relief on an *ex parte* basis and on these grounds alone, the *ex parte* application stands to be dismissed¹.

¹ Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348 E -350 B.

² Plascon Events Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[16] In the light of these factors and in the application of the Plascon-Evans² test, I conclude that it must be accepted for the purpose of this application that the application has to be decided on the version of the respondents. It follows from this finding that applicants has not established a cause of action for the removal of respondents from office and for them to be appointed as the new executive committee with the power to deal with the funds of LOTA.

[17] It is common cause that respondents were in peaceful possession of LOTA offices when applicants forcefully evicted them from the property against their consent on the 27 October 2014. In my view, Respondents have made out a case for the relief sought in the notice of counter application.

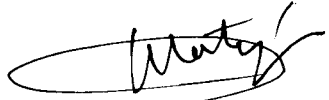
[18] Finally I gave consideration to the argument advanced on behalf of the respondents that applicants ought to be ordered to pay the respondents costs on an attorney and client scale. I agree with counsel for the respondents that applicants have gone above and beyond to deprive the respondents of an opportunity to place their version before court. The applicants and their legal representative misled the court and abused the process of court in their quest to regain control of the affairs of LOTA in a dishonest manner. Such conduct, in my view, justifies a punitive costs order.

[19] Accordingly the following order is made

1. The ex parte order of Molefe J granted on the 24 October 2014 is set aside and the *rule nisi* issued is discharged.
2. The applicants' main application is dismissed with costs, which includes the reserved costs on an attorney and client scale.
3. The respondents' counter application (as set out in the Notice of Anticipation of the return day) is granted in the following terms:

² Plascon Events Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

- (i) that the respondents' occupation of the premises known as Office 23 and 24, Rhodes street, Witbank, Mpumalanga is restored.
 - (ii) that the applicants are ordered to vacate and deliver to the respondents the premises known as Office 23 and 24, Rhodes street, Witbank, Mpumalanga.
 - (iii) the sheriff is authorised and directed to assist the respondents with restoring their possession of the premises known as Office 23 and 24, Rhodes street, Witbank, Mpumalanga by ejecting the applicants therefrom should it become necessary to do so.
 - (iv) The applicants are directed to account for all amounts collected on behalf of the LOTA and to pay the said amounts so collected into the bank account of LOTA.
 - (v) Applicants are interdicted and restrained from assaulting or exerting any form of physical or psychological pressure on any of the respondents.
 - (vi) The applicants, jointly and severally, the one paying the other to be absolved are ordered to pay the costs of the counter-application on an attorney and client scale.
4. The Registrar is directed to dispatch to the Bar Council a properly paginated and indexed copy of the papers in this matter (including the transcript of the proceedings on 14 November 2014, as well as a copy of this judgment for their consideration.



MATOJANE J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA