



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 13850/2022

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|-----------------------|--|
| (1) | REPORTABLE: YES / NO ✓ |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO ✓ |
| (3) | REVISED. ✓ |
| <u>31 August 2023</u> | |
| DATE |  SIGNATURE |

In the matter between:

GAS GIANTS CC

First Applicant

WELL OF LIFE (PTY) LTD

Second Applicant

and

THE ECONOMIC FREEDOM FIGHTERS

First Respondent

KHUTSO SEGAGE

Second Respondent

AGREE MATHEBULA

Third Respondent

MATOME SOLOMON MASIPA

Fourth Respondent

JUDGEMENT

SARDIWALLA J:

[1] This is an application for a final interdict to restrain the respondents from interrupting or calling for the operations of the applicants operations at No 8 and 10 Main Reef Road Boksburg and instigating others to perform such acts designed to disrupt the operations of the applicants.

[2] The *ex parte* urgent application was launched by the applicants on 8 March 2022 and the applicants sought the following relief:

“1. That this matter be heard as an *ex parte* application and that the non-compliance with the prescribed time limits, forms and services and the like, be condoned that the Court dispenses with the formalities provided for in the rules of the above Honourable Court and in terms of Rule 6(12).

2. A Rule Nisi is issued calling upon the First to Fourth Respondents to show cause if any, on the return date to be fixed by the court, why an order should not be granted in the following terms:

2.1 That the First to Fourth Respondents are interdicted and restrained from *inter alia*:

2.1.1 Disrupting or calling for the operations to be disrupted at the Applicant’s operation at No 8 and 10 Main Reef Road Boksburg;

2.1.2 Instigating others to perform such acts designed to disrupt the operations of the Applicant’s on the sites and in particular performing any such act/s making of any such threat designed to cause disruption to the operations of the Applicants at the sites;

2.1.3 Assaulting or threatening to assault, intimidating, by way of violence or violent demonstrations. Or otherwise instigating others to assault, threaten or intimidate the workers and/or staff and/or the clients and customers of the Applicants;

2.1.4 Damaging any property or instigating others to damage property of the Applicant's;

2.1.5 Being within 500M of the sites alternatively from entering the sites without permission;

2.1.6 Blocking any entrance of the Applicant's properties alternatively inciting any other person to block the entrances to the Applicant's properties;

2.1.7 Taking any action and/or instigating any other person into taking action which is designed to prevent any movement or service of the of the vehicles of the Applicant's and/or the Applicant's staff and/or the Applicant's customers and clients.

2.2 That the Sheriff is further authorized to utilise the services of the South African Police Service and/or any private security firm to give effect to the orders in prayer 2.1 above;

3. That the relief sought above operate as an interim interdict with immediate effect, pending the final determination of the relief sought on the return date;

4. Costs on the attorney and client scale to be paid by the First to Fourth Respondents jointly and severally, the one paying and the other to be absolved;

5. The Applicant is ordered to serve this order on the Respondent's

6. Further and/or alternative relief."

[3] The matter was heard before Justice Tlhaphi on 8 March 2022 in which the following order was granted:

"1. That this matter is heard as an ex parte application and that the non-compliance with the prescribed time limits, forms and services and the

like, be condoned that the Court dispenses with the formalities provided for in the rules of the above Honourable Court and in terms of Rule 6(12).

2. A Rule Nisi is issued calling upon the First to Fourth Respondents to show cause if any, on 24 March 2022 on the unopposed motion roll, why an order should not be granted in the following terms:

2.1 That the First to Fourth Respondents (inclusive of all members and representatives of the First Respondent) are interdicted and restrained from *inter alia*:

2.1.1 Disrupting or calling for the operations to be disrupted at the Applicant's operation at No 8 and 10 Main Reef Road Boksburg;

2.1.2 Instigating others to perform such acts designed to disrupt the operations of the Applicant's on the sites and in particular performing any such act/s making of any such threat designed to cause disruption to the operations of the Applicants at the sites;

2.1.3 Assaulting or threatening to assault, intimidating, by way of violence or violent demonstrations. Or otherwise instigating others to assault, threaten or intimidate the workers and/or staff and/or the clients and customers of the Applicants;

2.1.4 Damaging any property or instigating others to damage property of the Applicant's;

2.1.5 Being within 500M of the sites alternatively from entering the sites without permission;

2.1.6 Blocking any entrance of the Applicant's properties alternatively inciting any other person to block the entrances to the Applicant's properties;

2.1.7 Taking any action and/or instigating any other person into taking action which is designed to prevent any movement or

service of the of the vehicles of the Applicant's and/or the Applicant's staff and/or the Applicant's customers and clients.

2.2 That the Sheriff is further authorized to utilise the services of the South African Police Service and/or any private security firm to give effect to the orders in prayer 2.1 above;

3. That the relief sought above operate as an interim interdict with immediate effect, pending the final determination of the relief sought on the return date;

4. Costs on the attorney and client scale, to be paid by the First to Fourth Respondents jointly and severally, the one paying and the other to be absolved;

5. The Applicant is ordered to serve this order on the Respondent's."

Background to the Application:

[4] The following is the material facts to the matter:

4.1 During November of 2021 the Second and Third Respondent's attended to the premises of the Applicants, purporting to act on behalf of the First Respondent.

4.2 Even though the EFF does not represent any of the employees of the Applicant's they decided to hear the Second and Third Respondents out with respect to their stance on labour issues.

4.3 The second and third respondents started to insist that the applicants must dismiss a foreign workers. The second and third respondents then started to demand protection money in order to protect employees of the applicants. The request for money is attached to the founding papers together with the proof of payment.

4.4 The Fourth Respondent was a staff member of the Applicants who

was fired on 3 March 2022 for misconduct and rude behaviour towards colleagues and other staff of the Applicant's.

4.5 The fourth respondent shared the result of his hearing with the First Respondent as represented by the Second Respondent, who sent a message relating thereto to the applicant's wherein he again indicated the First Respondent's involvement as follows:

".. maybe you undermine eff Labour desk'.

4.6 EFF arrived at the premises led by the second respondent at about 7:50 AM on 7 March 2022 and blocked the entrance. When the employees of the applicant arrived they were refused entry by the EFF.

4.7 The crowd of members of the First Respondent as ked by the Second Respondent, blocked the entrance to the property, refused to allow staff members and clients of the applicants on to site, and refused to allow for the moving of vehicles.

4.8 On 7 March 2022 the Second Respondent sent a threatening WhatsApp message wherein he states:

"if you are not willing to seat with us down then your business will remain like that, tomorrow its worse, so beef up your security. Eff cannot allow exploitation n victimization of our masses."

4.9 On 8 March 2022 the threat was made good on as the EFF returned with weapons as was testified before the Honourable Judge Tlhapi.

[5] The Rule Nisi issued on 8 March 2022 was extended on various occasion with the matter finally coming before me on 5 September 2022 for a determination of the final interdict.

[6] The matter was opposed by the first to fourth respondents.

Applicant's Argument

[7] The applicant's submission is that the respondents do not deny the protest actions by the crowds were unlawful only that they should escape liability for the actions as they did not order the protest action. That the allegation that the mob was not identified as EFF is unfounded as the second respondent led the protests who identified himself as an EFF member in all previous dealings and does so on his social media. The entire of the crowds clearly identified them as members of the first respondent. The applicants referred to multiple authorities regarding the relationship between a political party and its members where it has been held that a political party can be held vicariously liable for its members and supporters acts in terms of common law¹.

[8] That whilst the first respondent alleges that can only alert its members against unlawful conduct but cannot enforce lawful behaviour its Constitution empowers it to enforce provisions against members such as Sono and those that participated in the unlawful protest and that the first respondent has failed to hold its members accountable. Therefore the first respondent could not contend that it existed separately from its members. Admit that the posts emanated from them. That based on the evidence submitted before this Court it must be found that the second respondent is in fact a member of the first respondent and that he took a leadership role in the unlawful protest action. That the fourth respondent by his actions made his affiliation with the first respondent known.

¹ National Party v Jaime N.O and another 1994 3 SA 483 (EWC) at 485 D to E

[9] The applicants submit that they have made out a case for a clear right to safety of their employees as well as the financial interests of their business which has suffered great losses when it was forced to close. This constitutes an injury to the applicants. That the brandishing of weapons on the premises is sufficient to show the apprehension of future harm. That the applicants have no similar protection by any other ordinary remedy as the South African Police Service has already displayed a failure to act without a court order. That the respondents' version that they should not be held liable should be dismissed. A case has been made out that the second respondent led the protest action and that he is a member of the first respondent. That in terms of the case law the first respondent can be found liable for the conduct of its members and that the final order must include the first respondent. That the first respondent opted to oppose the matter with the other respondents as a collective rather than distance themselves from the wrongdoers.

Respondent's Argument

[10] The respondents submitted that the applicant has failed to establish any rational or factual link between the respondents and the conduct complained of. That it is not for this court to determine whether unlawful conduct took place on 7 and 8 March 2022 nor is it disputed. That the court must determine whether the conduct complained of is attributable to the respondents. In the absence of a rational connection between the respondents and the unlawful conduct that the applicants have failed to make out a case for final relief. In referring to the Plascon-Evans² Rule that a final order can only be granted where the facts averred on affidavits are admitted to justify an order.

² Plascon-Evans Paint Ltd v van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635

[11] The respondents submit that despite the applicants being in a position to obtain photographs they have failed to identify the second to fourth respondent or any other individuals as participating in the conduct on 7 March 2022. The respondents deny that the wearing of the first respondent's red regalia is indicative of the first respondents involvement and that the applicant's lose sight of the fact that any member of the public may purchase their merchandise. The fact that persons where wearing the first respondents shirts does not mean that they were acting with authority of the first respondent.

[12] It is the respondents' position that the applicants have failed to directly or indirectly establish that the respondents were responsible for the conduct complained of and that the protestors were acting on any mandate by the first or third respondents. That it is insufficient to simply allege that the second ad forth respondents were present at the protest on 7 March 2022 to justify the relief. The applicants have failed to establish the commission of an injury and to make a case for final relief against any of the respondents.

LAW AND ANALYSIS

[13] Before determining whether the applicants are entitled to the relief sought it is important for this court to determine whether in terms of the respondents averments above if there is a material dispute of fact that would require this court then to refer the matter to oral evidence.

[14] The general principle with regard to applications to refer motion proceedings to oral evidence was set out in **Kalil v Decofex (Pty) Ltd and Another**³ where the court said:

"The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to establish a balance of probabilities in his favour. It seems to me that in these circumstances, the court should have a discretion to allow the hearing of oral evidence in an appropriate case....."

Naturally, in exercising this discretion the court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the court would be more inclined to allow the hearing of oral evidence (my emphasis) than if the balance were against the applicant and the more the scales are depressed against the applicant the less likely the court would be to exercise this discretion in his favour. Indeed, I think that only in rare cases would the court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favour the respondent's."

[15] Motion proceedings are decided on the papers filed by the parties. In case if there is a factual dispute which can only be resolved through oral evidence, it is appropriate that action proceedings should be used unless the factual dispute is not real and genuine. In **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd**⁴, the court held that where there is a

³ (158/87) [1987] ZASCA 156 {1988} 2 ALL SA 159 (A) (3 December 1987)

⁴ 1957 (4) SA 234 (C) at 235 E-G. See also Joh-Air (Pty) Ltd v Rudman 1980 (2) SA 420 (T) at 428-429.

dispute of facts final relief should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the facts in the applicant's affidavit justify an order.

[16] This rule applies irrespective of the onus and whether a factual dispute existed or arises before the hearing of an application. The court still has the discretion to either dismiss the application or direct that oral evidence be heard or the matter goes to trial.

[17] Based on the above, it is clear that as a general principle, the court has discretion to decide whether to refer motion proceedings to oral evidence where there is a dispute of fact that needs to be resolved. In exercising this discretion, a litigant should at least set out the evidence presented by the other party in their affidavits. The court should also consider to what extent this referral to oral evidence could tip the scales in the support of the litigant seeking the referral. The final issue would be to consider is convenience of the court.

Interdicts

[18] A request for an interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In this regard the Constitutional Court said the following:⁵

“An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim

⁵ In *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC

interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo.”⁶

[19] The law in regard to the grant of a final interdict is settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.⁷ Once the applicant has established the three requisite elements for the grant of an interdict the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief.⁸ That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to withhold an interdict that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts

⁶ At 730 - 731[49]

⁷ Setlogelo v Setlogelo 1914 AD 221 at 227. These requisites have been restated countless times by this court, most recently in Van Deventer v Ivory Sun Trading 77 (Pty) Ltd 2015 (3) SA 532 (SCA) [2014] ZASCA 169 para 26, and Red Dunes of Africa v Masingita Property Investment Holdings [2015] ZASCA 99 para 19. They were affirmed by the Constitutional Court. Pilane and Another v Pilane and Another [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (Pilane) para 38.

⁸ Lester v Ndlambe Municipality and Another 2015 (6) SA 283 (SCA) paras 23-24; United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T) at 347F-H. The more general statement regarding discretion in Wynberg Municipality v Dreyer 1920 AD 439 at 447 does not reflect the approach adopted by our courts. It is different when dealing with an interim interdict, where the remedy is clearly discretionary because of the need to consider the balance of convenience. National Treasury and Others v Opposition to Urban Tolling Alliance and Others [2012] ZACC 18; 2012 (6) SA 223 (CC) para 41-47.

for the resolution of disputes and potentially infringe the rights of security of the applicants.

[20] In this case the applicant seeks an interdict and restrain the respondents from interrupting or calling for the operations of the applicants operations at No 8 and 10 Main Reef Road Boksburg and instigating others to perform such acts designed to disrupt the operations of the applicants. The question therefore is whether it has established a *prima facie* right. The approach to be adopted in considering whether an applicant has established a *prima facie* right has been stated to be the following:⁹

“The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.”¹⁰

The current application

[21] In the present case there is no request to refer the matter to oral evidence. The respondents however state that where there is a dispute of material facts and that this Court should not grant final relief. The facts in issue are, of course, in this case presented by way of photographic evidence and

⁹ In *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA).

¹⁰ At 228; See also *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, *Manong & Associates (Pty) LTD v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) at 180.

WhatsApp chats. In the absence of any other reason or evidence and where none has been advanced, what would have to be established is the existence of reasonable grounds for doubting the correctness of the allegations concerned before a referral for oral evidence would be justified.

[22] The applicant's argument is founded on several photographs, WhatsApp chats posted and payments made to the second and third respondents. The second respondent sent a WhatsApp message to the applicants informing them that the protests would continue the next day on 8 March 2022. This is not denied by the second respondent or by any of the other respondents. They do not deny that the second respondent was in attendance save for the fact that they state that the applicants failed to identify any unlawful conduct on part of the second respondent at the protest. They accepted his attendance and stated that it was necessitated by the receipt of several complaints and that he is a community leader of EKurhuleni.

[23] In respect of the third respondent they do not deny that the third respondent works at the labour desk for the first respondent but allege that the third respondent was not a participant to the unlawful protest of 7 and 8 March 2022 as he was in Bloemfontein and at the first respondent's head office on those respective days. They attached a confirmatory affidavit in this regard. It is their allegation that the applicants joined the third respondent by virtue of his prior meetings with the applicants. However, notably that the third respondent is alleged to have been in two provinces over two days the respondent have failed to put up any other evidence that speaks to his travels to confirm he was not at the applicants premises.

[24] In respect of the fourth respondent the first respondent does not deny that he is a member and set out the factual issues that transpired between the fourth respondent and the applicants.

[25] In respect of the monetary payments the respondents allege that it was demand or protection money payments but rather that by virtue of the meetings held between the parties in November 2021 that it was an agreement that the applicants would contribute towards the community soccer club and it is their averment that it was agreed that this donation would be paid over to the second respondent who would in turn pay it over to the necessary individuals.

[26] The annexures provided by the respondents provide no evidence to disprove the averments in the applicants' founding affidavit nor do the respondents produce any evidence at the hearing of the matter to contradict the averments of the applicants. Most importantly however is, that despite its allegation that there are several material disputes of facts the respondents have not brought an application to refer the matter to oral evidence. The Court therefore has to exercise its discretion whether on the papers there is a material dispute of fact that favours the granting of a referral to oral evidence or if the facts established by the applicants justify the final relief being granted.

[27] An injury actually committed or apprehended would justify the grant of the relief sought by the applicants. Without any proof to the contrary to dispute the allegations I am in any event not satisfied that the probabilities are evenly balanced or favour the respondents.

[28] It is common cause that the unlawful protest took place on 7 and 8 March 2022 and that there were a number of members that were wearing the first

respondents' regalia. The respondents have not disputed the allegations that the unlawful protest occurred or that persons in attendance were brandishing weapons. I am also cognisant of the fact that the applicants premises and operations related to highly flammable gases and liquids which in the event a final interdict is not granted could lead to serious bodily injuries not only to the applicants and its staff but the respondents or any other public member. The applicants therefore have a reasonable apprehension of injury and have a right to protect its own safety and its staff members, therefore the first two elements have been established.

[29] In my view the respondents have failed to discharge that there is a real or genuine dispute of fact. The first respondent cannot separate itself from the actions of its members on the simple averment that any public member can purchase their regalia and allege to be a member of the first respondent and therefore the first respondent cannot be held liable. I find this argument to be concerning on without merit for two reasons namely; the first respondent reputation can be tarnished if any public member is permitted to purchase and wear their regalia, commit unlawful acts without their authorizations, which could lead the first respondent to be blamed in instances where it may not be linked. The first respondent should therefore take action to guard against this risk. Alternatively the first respondent by virtue of the same argument can incite unlawful protests with potential to harm innocent civilians without facing any repercussions or accountability. I agree with the applicants that the first respondent is able to investigate the acts committed and hold persons accountable, the first respondent failure to do so either against the respondents cited in this application or to investigate and determine by the photographic evidence supplied by the applicants if those featured in the photographs are

indeed members of the first respondent or not and to take action against those members if they are found to be tarnishing the first respondent's reputation. The lack of action and the reasons in this regard by the first respondent are therefore wholly inadequate.

[30] The final question then is whether there are any alternative means through which the applicant can protect its rights. I am of the view that an interdict would have the desired result of protecting the applicants' operations as well as the safety of the applicants and its staff members, clients and customers and prevent further harm or damages to property and persons. I am satisfied that the balance of convenience favours the applicants and that a failure to grant the interdict would result in reasonable apprehension of irreparable harm and/or injury being done to the applicants, staff, customers, clients and members of the public to which there is no alternate remedy. Neither have the respondents alleged what alternative remedy is available to the applicants.

[31] The respondents are being interdicted and restrained from interrupting or calling for the operations of the applicants operations at No 8 and 10 Main Reef Road Boksburg and instigating others to perform such acts designed to disrupt the operations of the applicants. I am of the view the granting of the final interdict will not infringe on any of the respondents' constitutional rights and neither have the respondents alleged that there would be an infringement other than it would be restrained from committing acts which it was not linked to in the first place if the relief is granted. This in my opinion is not a real or genuine dispute of fact. In any event the respondents have the right to approach this Court for relief which it has not done. I am satisfied that whilst this court

has the discretion to refer the matter to oral evidence, I find that there are no grounds to do so in that I am doubtful that any *vive vice* evidence would tip the scales in favour of the respondents. I am satisfied that the balance of convenience favours the applicants.

[32] Accordingly, the following order is made:

- 1. The final interdict against the first to fourth respondents is granted with immediate effect;**
- 2. That the first to fourth Respondents (inclusive of all members and representatives of the first respondent) are interdicted and restrained from *inter alia*:**
 - 2.1 Disrupting or calling for the operations to be disrupted at the Applicant's operation at No 8 and 10 Main Reef Road Boksburg;**
 - 2.2 Instigating others to perform such acts designed to disrupt the operations of the Applicant's on the sites and in particular performing any such act/s making of any such threat designed to cause disruption to the operations of the Applicants at the sites;**
 - 2.3 Assaulting or threatening to assault, intimidating, by way of violence or violent demonstrations. Or otherwise instigating others to assault, threaten or intimidate the workers and/or staff and/or the clients and customers of the Applicants;**
 - 2.4 Damaging any property or instigating others to damage property of the Applicant's;**
 - 2.5 Being within 500M of the sites alternatively from entering the sites without permission;**

2.6 Blocking any entrance of the Applicant's properties alternatively inciting any other person to block the entrances to the Applicant's properties;

2.7 Taking any action and/or instigating any other person into taking action which is designed to prevent any movement or service of the of the vehicles of the Applicant's and/or the Applicant's staff and/or the Applicant's customers and clients.

3. That the Sheriff is further authorized to utilise the services of the South African Police Service and/or any private security firm to give effect to the orders in prayer 2 above;

4. Costs on the attorney and client scale, to be paid by the first to fourth Respondents jointly and severally, the one paying and the other to be absolved;

5. The Applicants are ordered to serve this order on the respondent's.



SARDIWALLA J

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv J Mouton

Instructed by: De Jager Inc

For the Respondents: N Kakaza

Instructed by: Ian Levitt attorneys