IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 22985/2018

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

02-May-2018 .....

DATE SIGNATURE

In the matter between:

DITHEJANE, SIMON MODISAEMANG	First Applicant
BOTHOMANE, POGISO	Second Applicant
LUCAS MARUPING	Third Applicant
LEDWABA, BOSA	Fourth Applicant
BOTMAN, THAMBO	Fifth Applicant
MARUPING, GONTSE	Sixth Applicant
MMOPELWA, BENJAMIN	Seventh Applicant
MOLOKO, LETLHOGONOLO	Eighth Applicant
MONTWEDI, MOTHUSI KENNETH	Ninth Applicant
MOSELANG, MODISAOTSILE JACOB	Tenth Applicant
MODISE PAKISO GODFREY	Eleventh Applicant
MBANA, KGOMOTSO	Twelfth Applicant
DIGOPO, THABO	Thirteenth Applicant
FOLENI, CORNELIUS GASETLOLWE	Fourteenth Applicant

and

FORUM 4 SERVICE DELIVERY	First Respondent
FORUM 4 SERVICE DELIVERY (NFEC)	Second Respondent
KEKANA, MBAHARE	Third Respondent
MOTLAGODISA, KATLEGO	Fourth Respondent
KODISANG, MASEGO DORCAS	Fifth Respondent
MOGORU, ELIAS	Sixth Respondent
RANKAPOLE, MOTSWALEDI	Seventh Respondent

Date of Hearing and Order	:	07 April 2018
Date of Reasons for Order	:	02 May 2018

JUDGMENT (REASONS FOR THE ORDER GRANTED)

MANAMELA, AJ

Introduction

[1] This matter concerns an interdict of a national conference or "imbizo" of the first respondent which was scheduled for 07 and 08 April 2018, pending the finalisation of another application (between the applicants, and first and second respondents) issued in this Division under case number 56517/2017 (the pending application). The applicants, who are members of the first respondent, contend that the national imbizo was convened to circumvent the outcome of the pending application and in contravention of the provisions of the first respondent's constitution, and, therefore, improperly constituted.

[2] The first to seventh respondents (the respondents), on the other hand, contended, in opposition to the relief sought by the applicants, that the applicants lack the necessary legal standing to bring the application and the applicants failed to establish the harm apprehended, as they did not state the business of the meeting or conference or issues to be discussed at the meeting. This was apart from a challenge that the matter was not urgent.

[3] This matter came before me in the urgent court on Saturday, 07 April 2018. After listening to oral argument by Mr C Muza, appearing for all fourteen applicants; Mr H Kriel, appearing for the first and second respondents, and Mr DT Molea, appearing for third to seventh respondents, I extemporaneously handed down an order granting relief sought by the applicants, with costs.[1] I mentioned, at the time, that these reasons for the order will follow in due course.

[4] Apart from the main issues, indicated above, and urgency, the argument I this matter included preliminary objections relating to the form of the application and the standing (or *locus standi*) of the applicants. I will discuss these issues under separate or joint subheadings below, after a brief discussion of the relevant background to this matter.

Brief background

[5] The material background to this matter, which is common cause between the parties or is not effectively challenged, is as follows. I will accordingly indicate wherever there is no consensus on the specific issue between the parties.

[6] Most of the events in the background of this matter relate to the pending application between the applicants and first and second respondents issued in this Division. The terms of the relief sought in the pending application are material to the merits of this matter. I will discuss the pending application under a separate subheading, below. Suffice for now to state that the applicants contended that the respondents reacted to the launch of the pending

[1] See par 34 below.

application by purging the applicants from around August 2017. In reaction to the alleged purge, the applicants brought three different urgent applications, in this and another Divisions of the High Court.

[7] During or about February 2018, the tenth and eleventh applicants were expelled and had their membership of the first respondent terminated, due to conducting a press briefing on or about September 2017. In response, the applicants brought another urgent application, in which they apparently succeeded, with costs.

[8] Between January and early March 2018, the respondents uniformly charged the applicants on various charges. Again, the applicants reacted to the respondents' charges by launching an urgent application in the Mahikeng Division of the High Court. The application was struck from the roll for want of urgency on 04 April 2018. The applicants have since re-enrolled the application for hearing in the normal course.

[9] On 04 April 2018, whilst at the Mahikeng High Court, the first applicant was informed of invitations to a national imbizo sent out to members by the second respondent. The national imbizo was to be held on 07 and 08 April 2018 at Roodeplaat, Kameeldrift, Pretoria. He notified the other applicants, some of whom were with him at Court and they confirmed details of the meeting by logging onto the Facebook page of the first respondent.

[10] On 05 April 2018, the applicants convened a meeting of their own to urgently discuss the invitation to the imbizo. They decided to raise funds in order to urgently instruct an attorney to engage the first respondent and possibly to bring an urgent application. A consultation took place on 06 April 2018 with their legal representatives and, later on that day, a letter was sent out by their attorney seeking an undertaking from the respondent that the meeting will not go ahead, but in vain. This application was subsequently launched.

Urgency and other preliminary objections

Urgency

[11] A vast amount of time was spent on argument of the issues relating to urgency. The application was issued on 06 April 2018 and scheduled for hearing at 07h00, the next day, on Saturday, 07 April 2018. As indicated above, the hearing did, in fact, take place in the morning of 07 April 2018.

[12] Mr C Muza, appearing for the applicants argued that the matter was urgent for, mainly, the following reasons. The meeting had to be interdicted, as the parties had a long-standing dispute, from as far back as 2016, which is yet to be decided. Allowing the meeting to continue will constitute allowing continuation or countenance of illegality. He also submitted that, as the pending application is challenging the very legitimacy of the second respondent, the imbizo or conference which was to be presided upon by councillors constituting the second respondent, ought not to be allowed to continue. Therefore, the hearing of this application at any time in the future will be rendered moot by any newly elected structure.

[13] Mr H Kriel, appearing for the first and second respondents, argued the matter from the papers filed by the applicants and third to seventh respondents. His clients had not filed any papers and did not seek an opportunity to do so, probably given the nature and extent of the merits of this application. Mr Kriel argued as follows with regard to urgency. The first respondent only received notice of the application at 02h30 in the morning of 07 April 2018. His clients were not afforded ample opportunity, as required by the practice manual and the rules of this Court, for preparation and appearance at Court. Also, his clients had concerns regarding the form of the application and the scheduling of its hearing. The respondent has over 600 members and therefore the absence of notice of the meeting to the applicants should not impede the holding of the meeting. Besides, the proverbial horse may have already bolted as the meeting was scheduled to start at 06h00 that morning and therefore by the time this Court grants any order some activities may have already taken place, including resolutions on the relevant issues. Further, in terms of the notice or his understanding of arrangements for the meeting, members were scheduled to arrive at 18h00, the day before the meeting, on 06 April 2018. And the notice for the meeting was sent out as far back as 09 January 2018.

[14] Mr DT Molea, appearing for the third to seventh respondents, lamented the fact that the application was only served on his clients at around 21h38, the day before it was heard and, more so, since his clients only received an unsigned affidavit. The actual service of the application was only around 00h48 on 07 April 2018.

[15] After consideration of the submissions, I ruled that the matter was urgent and directed counsel to address the Court on the merits of the matter. In my view the applicants were not notified of the meeting and only became aware of same through the grapevine, only a few days,

before they brought the urgent application. They acted timeously and to the best of their abilities, as permitted by the prevailing circumstances. There were other preliminary issues, besides urgency, that were dealt with at the hearing. I briefly discuss these, next.

Locus standi of the applicants

[16] Mr Molea argued, on behalf of third to seventh respondents, as follows regarding his clients' assertion that the applicants lack the necessary legal standing to bring this application. Nowhere in the papers it is suggested that that the applicants are members in good standing. When, I referred him to a paragraph in the founding affidavit which indicated that the applicants had indeed averred that they are members of the first respondent, he retorted that they are not members in good standing. Mr Kriel also argued in support of this contention on behalf of his clients. The argument further extended to the fact that some of the applicants' membership had been terminated or suspended. However, it was common cause that the notice for the meeting had been sent out long before the expulsion or termination of membership of some of the applicants.

[17] Mr Muza appearing for the applicants, submitted that, in terms of the constitution given to the applicants by the third and fourth respondents, the applicants became members of the first respondent when they joined and they were indeed still members or members in good standing of the first respondent. He further argued that, although some members have been expelled, others were only on suspension and, therefore, those on suspension were also not notified of the impugned meeting. He pointed out that the first, second and tenth applicants have not been expelled by the respondents.

[18] I dismissed this preliminary objection. In my view, the applicant had adequately stated that they are members of the first respondent. The respondents, being the parties raising the very specific issue of lack of membership "in good standing", bore the onus to establish this aspect and to bring the necessary proof in support of this contention. Not the other way around. The respondents had failed to establish their allegations.

Pending application

[19] Mr Muza for the applicants approached the issue of the pending application from an angle of a *lis alibi pendens* defence. He argued that the pending application is still to be determined and therefore the respondents were not supposed to convene and hold the impugned meeting.

[20] As already indicated, the proceedings under the pending application were at such an advanced stage that, as at the date of hearing of this application, heads of argument were being exchanged, which would culminate with enrolment of the matter for hearing. The first and second respondents are taking part in the proceedings relating to the pending application. The relief sought in terms of the pending application is said to include the following orders:

> [20.1] declaring that the constitution of the first respondent was never adopted at a national imbizo or at the special national imbizo and therefore of no legal force or effect;
>
> [20.2] declaring the appointment of any structure, including the national forum executive council that existed before 30 June 2017 to be invalid and of no legal effect;

[20.3] declaring the annual general meeting of the first respondent held on 30 June 2017 at Tzaneen the to be invalid;

[20.4] declaring all resolutions taken at the annual general meeting of the first respondent held on 30 June 2017, including a resolution appointing the national forum executive council to be invalid and of no legal effect;

[20.5] that the first to twelfth applicants, and second, fourth and fifth respondents be appointed as an interim committee to oversee the administration of the first respondent pending the adoption of the constitution, alternatively, pending a properly convened annual general meeting;

[20.6] that first to twelfth applicants, and second, third and fourth respondents convene a meeting within 14 days of the court order to appoint an interim subcommittee to attend to the logistics of calling an imbizo, alternatively, an annual general meeting;

[20.7] that the appointed subcommittee shall convene a national imbizo within 60 days of such appointment;

[20.8] that the second to sixth respondents hand over the keys to the offices of the first respondent, financial records, books, membership registers, lease agreements, bank accounts and other properties belonging to the first respondent to the subcommittee within seven days of the appointment of the subcommittee.

[21] As indicated above, it is submitted by the applicants that the respondents reacted to the pending application by purging the applicants from around August 2017 and ultimately some other litigation ensued. I did not make any specific ruling on this aspect, but the issues raised in this regard are relevant to the determination of the main issue(s).

Applicants' case

[22] Mr Muza, for the applicants, argued that this application was brought, mainly, because the respondents seek to circumvent the pending application, which deals with all material issues that are probably to be discussed at the meeting which his clients sought to interdict. He referred to the relief sought in terms of the pending application reflected above. He pointed out that the respondents were *mala fide* in that they couldn't wait for the pending application, which is at an advanced stage, before they convened the impugned meeting.

[23] Further, Mr Muza argued that clause 10.2 of the constitution requires that a written notice of not less than 21 days be given for a meeting which seeks to bring changes to the constitution. The notice must indicate the proposed changes to be discussed at the meeting. The respondents did not comply with clause 10.2 of the constitution in that the notice given did not provide time commensurate with the prescribed period. The so-called expelled members, were still members of the organisation as at 09 February 2018, when notice was sent to other members. They ought to have received notice as their expulsion only occurred long after the notice for the meeting had already been sent out. He further argued that, although his clients did not have any idea as to what was to happen at the meeting, they could not just sit idle and wait for the outcome thereof, when they have a pending application. There is no prejudice in stopping the meeting, as it could be properly reconvened later. Besides, there was no hurry as the last imbizo only took place in 2015 and, therefore, there is currently no need to hold another imbizo in terms of the prescripts of the constitution.

Respondents' case

[24] Mr Kriel argued that the notice given by his clients for the meeting was proper and adequate. He pointed out that Facebook is one of the recognised methods of informing members of the first and second respondents. He further argued in this regard that, in any case, the method of sending the notice had not been dealt with in the applicants' papers. Also, that the applicants did not disclose any reason or evidence suggesting that the meeting will deal with resolutions concerning change of the constitution. Mr Molea, for the third to seventh respondents, supported the argument that there is no indication as to what was to happen at the meeting, but the applicants just dragged his clients to court. Mr Kriel also repeated in this regard his submission that membership of the organisation was at 600 and, therefore, the meeting cannot be stopped at the instance of the applicants constituting a handful of the affected members of the first respondent.

[25] In reply Mr Muza for the applicants pointed out that, the notice indicated that the meeting was to be a national imbizo which is defined in the constitution to mean "a representative body of the provinces that convenes grassroots policy and strategy at national level and formulates policy and strategy for action by the FEC". Therefore, changes to the constitution ought to be part of the business or agenda for the meeting. He disputed that membership of the organisation was at 600.

Analysis of the submissions

[26] As indicated above, the applicants sought prohibitory or final interdict against the respondents in respect of the conference or meeting that was to be held on 07 and 08 April 2018.

[27] The decision of *Setlogelo v Setlogelo*[2] is considered a *locus classicus* regarding requirements for an interdict: a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. There is no need, for current purposes, to discuss each and every one of the requirements. Suffice to only highlight one or two issues relating to some of the requirements.

[28] It was argued that the applicants did not have a clear right and therefore fell short of meeting all of the requirements for an interdict. I have indicated above that, I ruled that the applicants are members of the first respondent and dismissed an objection that the applicants were not "members in good standing" of the first respondent. Their membership entitles them, like the rest of members of the first respondent, to be notified of meetings, attend and take part in the activities at meetings. They also have the right to have meetings lawfully convened and conducted. This is so, unless they are legally barred from those activities by a provision within the constitution of the respondent. It is common cause that not all the applicants have such an impediment and therefore ought to have been notified.

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[2] 1914 AD 221 at 227 whereat the court said: "the requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

[29] Further, it was argued that the applicants had failed to establish an injury actually committed or reasonably apprehended in that they did not state the activities or agenda of the meeting they sought to interdict. Counsel for the applicant argued, correctly in my view, that in terms of the constitution of the first respondent a national imbizo is convened for dealing with the formulation of policy and strategy of the first respondent. This relates to constitutional matters, including changes to the constitution. Also, the applicants were apprehensive that the impugned meeting was aimed at circumventing the pending application. I agreed with these submissions.

Conclusion and costs

[30] I was satisfied that the application met all the requirements for an interdict and that refusing the relief sought, would result in irreparable harm or tremendous amount of prejudice to the applicants. The applicants, in my view, appear to be steadfast in their commitment to the constitution of the first respondent and the rule of law. This is demonstrated, among others, by the fact that they brought the pending application in order to get a determination made on a number of issues relating to the constitution and administration of the affairs of the first respondent. Whilst the pending application was about to be enrolled for hearing, the respondents sought to undermine its outcome by convening the impugned meeting, without notice to the applicants. This was clearly aimed at rendering moot the outcome of the pending application. The respondents, particularly the second respondent, unlike the applicants do not appear to have any commitment to the constitution of the first respondent by whose provisions they are supposed to govern the affairs of the first respondent. The end justifies the means in their continuing and apparent purging of the applicants. This cannot be countenanced by this

Court. For, substantially, the above-mentioned reasons the applicants were granted relief in the terms which appear as an order, only for record purposes, below.

[31] The applicants prayed for a punitive costs order at the scale of attorney and own client against the respondents. Mr Muza for the applicants submitted that a punitive costs order was justified by the presence of malice on the part of the respondents, manifested by the fact that notice of the impugned meeting was sent out, as far back as January 2018, but yet his clients were not notified and the attempt to derail the pending application.

[32] Mr Molea, for the third to seventh respondents, argued that the applicants have failed to indicate why they cited these respondents in their personal capacity, as no relief was sought against them personally. He pointed out that it is not stated in the papers that, third to seventh respondents would only be liable for costs in the event of opposition, but a direct costs order was sought against them. He submitted that his clients are for that reason entitled to recover their costs at attorney and client scale from the applicants. Mr Muza conceded that there was an error in the framing of the costs orders as being personally against the third to seventh respondents.

[33] I granted a costs order on a party and party scale against all respondents, jointly and severally, the one paying the other to be absolved. I considered this form of costs order justified, including against the third to seventh respondents. These respondents did not only oppose the matter for purposes of avoiding a costs order being granted against them, but substantially participated in the proceedings in their own right, including by filing of opposing affidavit and

even seeking the dismissal of the application based on alleged lack of legal standing on the part of the applicants.

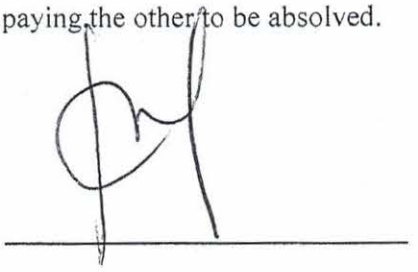
Order made

[34] For the abovementioned reasons, I granted an order in the following terms:

(1) that, the provisions of the Uniform Rules of Court pertaining to forms, time periods and service is abridged and that the application is heard on an urgent basis in terms of Rule 6(12)(a);

(2) that, the national imbizo scheduled for 07 and 08 April 2018 at Roodeplaat, Kameeldrift, Pretoria is interdicted pending the finalisation of the application under case number: 56517/2017 in this Division, and

(3) that, the first to seventh respondents are liable for payment of costs of the application on party and party scale, the one paying the other to be absolved.



K. La M. Manamela

Acting Judge of the High Court

02 May 2018