REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 86661/18

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

14.12.2018
Date: Signature:

In the matter between:

SOLIDARITY	APPLICANT
and	
THE NATIONAL COMMISSIONER, SOUTH AFRICAN POLICE SERVICE N.O.	FIRST RESPONDENT
THE MINISTER OF POLICE N.O.	SECOND RESPONDENT
THE SOUTH AFRICAN POLICE SERVICE	THIRD RESPONDENT

JUDGMENT

VAN DER SCHYFF, AJ

Introduction

[1] The applicant instituted an urgent application. The application was argued and both counsel submitted written heads of argument. When reference is made in this judgment to argument presented by the parties it refers to both *viva voce* argument as well as to the submissions set out in the written heads of argument.

[2] The applicant seeks interim relief pending the finalisation of a review application brought under case number 79041/2018. The respondents oppose the application on the grounds that the application is not urgent. They also dispute that the applicant made out a case for the relief sought in the founding affidavit. A point *in limine* of non-joinder is also raised. In addition to the aforesaid the respondents raised an issue in their answering affidavit and in argument before this court, which issue I shall refer to as a "procedural issue".

[3] I will first deal with the procedural issue and then with the question of urgency. If it is found that the matter is indeed urgent I will deal with the point *in limine*, and if the application is not dismissed due to a ruling in this regard I will deal with the merits of the application.

Procedural issue

[4] In the founding affidavit the applicant refers to the review application instituted under case number 79041/2018 and contends that 'the body of the affidavit filed in the review application should be read with the review application in so far as the Applicant's prospects of success are concerned (specifically referring to the *prima facie* (even clear) right that the Applicant has highlighted and in order to avoid prolixity.' The applicant also refers the court to the preceding litigation between the parties concerning the same subject matter and attached the judgment of Kubushi J and order granted by Potterill J. The respondents dispute that the applicant can incorporate the merits in the review application, as set out in the founding affidavit to that application, as a consideration for the determination of the current application or take cognisance of the preceding judgments. The applicant argues that the affidavit filed in the review application can be incorporated by reference since the same deponent deposed to the affidavits in the review application and the current

application. In addition, the applicant avers that the respondents' view that the founding affidavit of the review application finds no application and is of no relevance to the current application is premised on a misconception of the purpose and nature of the current application.

[5] It is trite that all applications that are to be adjudicated by the courts of this country, are to be adjudicated on the basis of their own unique and peculiar facts. No application, however, stands in a vacuum and the history preceding the litigation provides the context within which applications are to be considered. As a result, I am of the view that the court may take cognisance of the judgment of Kubushi J under case number 16572/2018 and must take cognisance of both the orders previously granted under that case number.

[6] The respondents surmised that the merits of the review application are not before this court and that there is no basis to make any remarks about the review application. I do not agree with this submission for two reasons. The first is that in order to determine whether the applicant has a *prima facie* right to bring this application, the substance of the review application becomes relevant, as is indicated in more detail below.[1] The second is that the applicant explicitly incorporated the founding affidavit to the review application by reference. Since the same deponent deposed to the founding affidavits in this application and the current application, and the applicant expressly incorporated the averments contained in the founding affidavit to the review application by reference in this application, I am of the view that the factual averments therein may be considered by this court and had to be addressed by the respondents in answer insofar as it is relevant to this application.

Urgency

[7] The applicant avers that the application must be heard on an urgent basis in light of the fact that the respondents refuse to provide an undertaking that they will not proceed with or implement any promotions or re-ranking in terms of the Non

[1] See *inter alia Searl v Mosselbay Municipality* (1237/09) [2009] ZAWCHC 9 (12 February 2009) para 6.

Statutory Forces re-ranking process, hereafter the "NSF" project, prior to the determination of the review application under case number 79041/2018.

[8] It is necessary to take cognisance of the fact that this is not the first litigation between the parties pertaining to promotions and / or re-rankings in terms of the NSF project. Kubushi J handed down a judgment under case number 16572/18 on 5 April 2018 ordering that certain information be made available to the applicant pertaining to the NSF project. On 3 August 2018 Potterill J ordered the National Access Manager of the South African Police Services to comply with the order handed down on 5 April 2018, and in addition ordered that 'the respondents and/or members and/or office bearers of the SAPS are interdicted or restrained from proceeding with and/or implementing any promotions/re-rankings and any further promotions/re-rankings in the so-called "NSF-project" until such time that they have fully complied with paragraphs 2, 3 and 4 above'.

[9] The applicant contends that the respondents are not in full compliance with the court order dated 3 August 2018. Although certain information was provided, they informed the state-attorney that they are of the view that some of the information is scant and fails to sufficiently discharge the applicant's requests as contained in the relevant notice of motion. However, the applicant avers that it has acquired sufficient information to proceed with the review application, hence the review application was instituted. The applicant states in its founding affidavit that the parties have agreed to address a consolidated letter to the Deputy Judge President requesting that a preferential date be allocated in March 2019 for the adjudication of the review application. The parties also agreed to a time line for the filing of papers in the review application. The respondents seem to dispute that such an arrangement has been made. It is explicitly stated in the respondents answering affidavit made with reference to the relevant paragraph in the applicant's founding affidavit, that they never gave an undertaking to the applicant regarding the NSF-project. However, annexures "FA9", "FA10" and "FA11" to the applicant's founding affidavit are correspondence between the parties' legal representatives and it is clearly indicated therein that the review application was served on the respondents, that the parties agreed to a timeline for the serving of affidavits in the review application and that the

parties agreed to approach the Deputy Judge President to have the matter case managed and to request a preferential date before a full bench of the court.

[10] From the applicant's perspective the urgency is found in the contention that a possibility exists that the respondents will proceed with promotions and re-rankings in terms of the NSF project in the time leading up to the review application. The urgency is created by the respondents' above mentioned refusal to provide an undertaking to stay the implementation of the NSF project pending the finalisation of the review application.

[11] The respondents disputed that the matter should be considered as urgent. They state that the applicant has known about the project for a long time and first sought an undertaking that the project will not be implemented in November 2017, and then again on 24 October 2018. They state that the applicant threatened the respondents with litigation more than a year before this application. The respondent argued with reference to an annexure attached to the applicant's replying affidavit, that it is evident that the state-attorney advised the applicants on 3 October 2018 that the NSF was not a draft, that the Minister of Police had approved the project and that recommendations had been made to the Minister about the re-ranking of personnel based on the NSF project.

[12] In formulating this argument, counsel for the respondents lost sight of the fact that a court order was granted on 3 August 2018 that stayed the implementation and further promotion and re-ranking of members in terms of the NSF-project in order to allow the applicant to obtain information pertaining to the NSF-project. It is evident from the judgment by Kubushi J handed down on 5 April 2018 under case number 16572/2018 that the respondents in that application refused to disclose the information and records sought mainly on the basis that the project has not been completed and was not about to be completed. Despite Kubushi J granting relief to the applicant, the applicant had to approach the court again for assistance in compelling the respondents to adhere to Kubushi J's order. This resulted in the order granted by Potterill J in August 2018 whereby the promotions and re-rankings in terms of the NSF project was stayed. It would thus be factually incorrect to accept

that the applicant did nothing since November 2017 and created the sense of urgency it is now relying on.

[13] The delay that concerns the court is the delay between 3 October 2018 and the institution of the current application. It is evident from correspondence between the parties' legal representatives that the applicant informed the respondents in a letter dated 13 October 2018 that it was of the view that the respondents did not comply fully with the court order dated 3 August 2018 and that the interdict contained in paragraph 5 of the order of 3 August 2018 is still in place. The respondents' replying letter dated 22 October 2018 was not included as an annexure but from the applicant's reply dated 24 October 2018 it is evident that the applicant has been informed that the respondents contended that they fully complied with the previous court orders. It is in this light that the applicant required an undertaking that the respondents would not proceed with the implementation of the NSF project pending finalisation of a judicial review. In a letter dated 26 October 2018 the respondents undertook not to proceed with the implementation or further implementation of the NSF project until Tuesday 30 October 2018. The respondents also indicated that they would convey their instructions pertaining to the stay of implementing the NSF project should the review application be served. From the correspondence it can be discerned that a review application was subsequently served on the respondents on 30 October 2018, via e-mail. and on 31 October 2018 by hand. The parties agreed to a timeline for the filing of affidavits and in a letter dated 13 November 2018 the applicant was informed that the respondents' attorneys are still awaiting instructions from their clients pertaining to the stay of the NSF project pending the review application. The applicant was informed in a letter dated 22 November 2018 that the respondents do not agree to provide an undertaking that the NSF project be stayed pending the review application. On 28 November 2018 the respondents' attorneys reiterated their clients' view and requested the applicant to enrol the application for 11 December 2018.

[14] It is trite that the question whether a matter should be enrolled and heard as an urgent application is governed by r 6(12) of the Uniform Rules of Court. This sub-rule allows a court in urgent applications to dispense with the forms and service

provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as it seems appropriate. Rule 6(12) is not there for the taking and an applicant has to set forth explicitly the circumstances which it avers render the matter urgent. The applicant must state the reasons why it claims that it cannot be afforded substantial redress at a hearing in due course. Whether an applicant will be able to obtain substantial redress in due course or not is determined by the facts of each case.

[15] The relief sought in the current matter speaks to the reason why the applicant won't be afforded substantial redress in due course if the latter was to enrol the application on the normal court roll. The applicant states that the application is urgent because the respondents' cumulative conduct demonstrated that they are intent on furthering, implementing and finalising the NSF project. The applicant launched the review application with the object of setting aside the NSF project in its entirety.

[16] In light of the nature of the relief sought in this application, and the fact that I am not of the view that the applicant created its own urgency, I find that the application meets the requirements to be heard on an urgent basis.

Non-joinder

[17] The respondents aver that the applicant failed to join parties with an interest in the relief sought in the application. It was argued by counsel acting for the respondents that since various officers in the South African Police Service, hereafter "SAPS" have been promoted and received benefits under the NSF project they have an interest in the litigation and ought to have been joined as parties.

[18] The relief sought in the current application is to interdict the respondents from proceeding with and / or implementing any promotions / re-rankings in terms of the NSF project pending the finalisation of the review application. Since the applicant is not currently seeking an order to stay the NSF project in its entirety, the rights of members who have been promoted or re-ranked will not be affected by any order that can be made in this application. Without belabouring this point, I accordingly dismiss the *point in limine.*

Merits

[19] The Constitutional Court, in *National Gambling Board v Premier, Kwa-Zulu Natal and Others*[2] confirmed that 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 and does not affect their final determination.'

[20] The legal requirements for the granting of an interim interdict are well known, and as Notshe AJ stated in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[3] the decisions are legion. The requirements for obtaining an interim interdict are:[4]

i. A prima facie right on behalf of the applicant;
ii. A well-grounded apprehension of irreparable harm if the interim interdict is not granted and the ultimate relief is eventually granted,
iii. That the balance of convenience favours the granting of an interim interdict; and
iv. That there is no satisfactory alternative relief.

[21] The respondents argued that the applicant did not make out a case in its founding papers and that it attempted to make out a case in the replying affidavit. Counsel correctly argued with reference to the well-known judgment in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[5] that the applicant must raise the issues upon which it would seek to rely in the founding affidavit. The court is to consider the content of the founding affidavit and determine whether the averments not only meet the required *facta probanda* for the relief sought but provides the necessary factual substantiation therefor, since in motion proceedings the affidavits serve a dual function as both the pleadings and the evidence.

---

[2] 2002 (2) SA 715 (CC) para 49.
[3] (11/33767) [2011] ZAGPJHC 196 (23 September 2011) para 14.
[4] *Setlogelo v Setlogelo* 1914 AD 221, *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973 (3) SA 685 (A).
[5] 1999 (2) SA 279 (T) 323H-324C.

[22] In considering whether the applicant met the requirements for the relief sought, I considered all the averments made by both parties in all the relevant affidavits. However, in this written judgment I only refer to the most substantial averments, or to the extent that it sufficiently substantiates the findings that I make.

Prima facie right

[23] The approach to be adopted in ascertaining whether an applicant has established a *prima facie* right has been explained in *Simon NO v Air Operations of Europe AB and Others*:[6]

> '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.'

[24] In its founding affidavit the applicant states that the evidence brought to the fore in the review application under case number 79041/2018 constitutes evidence that the NSF project is being implemented to the detriment of its members who are prevented from making representations and applying for promotions and other positions due to the fact that the promotions remain solely for NSF members to the exclusion of the applicant's members. The applicant avers that the NSF project is being rolled out and implemented in a manner 'where such implementation is (*inter alia*) procedurally unfair, and discriminates against its members on the ground that they are classified as non-NSF members despite a substantive number of them falling within the definition of 'military veterans' as contained in the Military Veterans Act, No 18 of 2011.' The applicant avers that it has acquired sufficient information to establish

---

[6] 1999 (1) SA 217 (SCA) 228G-H. See also *Camps Bay Residents Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) at [10].

what it contends is the illegality of the NSF project which 'tramples on' the constitutionally and statutorily enshrined rights of the applicant's members who are not considered NSF members. The applicant refers the court, and the respondents to the averments contained in the founding affidavit to the review application in this regard.

[25] The applicant indicates in its founding affidavit that it also acts in the public interest. It is contended that all South Africans have an interest in the rule of law, the requirements of a properly functioning constitutional democracy and the rooting out of unfair discrimination and unlawfulness. An argument was presented from the bar by the applicant's counsel to the effect that it is in the public interest that any policy implemented by the respondents must be open and transparent and benefit society at large.

[26] In answer to the allegations above the following are contended by the respondents:

i. The respondents deny that the members of the applicant are discriminated against. In the same paragraph, however, they state that the law does not prohibit unfair discrimination and state that there is no unfair discrimination against members of the applicant. The denial of discrimination is not absolute but qualified. If the possibility exists that the NSF project does discriminate against members of the applicant, I am of the view the factual dispute whether any discrimination imbedded in the NSF project, to the extent that it is present, is unfair must be decided on by an independent court in the review application;

ii. The respondents deny the allegation of procedural unfairness pertaining to the implementation of the NSF project and contend that the applicant does not state in what respect the project is said to be procedurally unfair. The applicant avers in the founding affidavit that the project is implemented 'behind a veil of secrecy'. The preceding urgent applications are evidence to the fact that the applicants had to revert to legal proceedings in order to obtain sufficient information pertaining to the NSF project to determine the

parameters of the project that ultimately led to the review application. The founding affidavit to the review application that was incorporated by reference deals with aspects of procedural unfairness. The respondents neglect to deal with these averments, specifically in light of the fact that the applicant explicitly stated in its founding affidavit that the 'body of this affidavit should be read with the review application in so far as the applicant's prospects of success are concerned specifically referring to the *prima facie* ... right', causes the allegations made therein relating to procedural unfairness, and other grounds on which the review application is brought, to a substantial degree to stand uncontested. The consequence thereof for the purpose of this application is that 'having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial'.

iii. The respondents dispute that the applicant has substantiated the rights of its members that the applicant claims are being 'trampled' upon and does not give evidence in support of which members have had their rights trampled. The respondents then make a very important remark. They state that the applicant cannot seek to review the NSF project when the applicant avers that it is "still not in possession of all the information" and that the intended review is thus based on speculation. It would have been expected that the respondents would be able to provide the court with a policy document wherein the NSF project is defined in detail to refute the applicant's contention that the NSF is a project veiled in secrecy, not for its existence but for its detailed provisions, - the respondents however react by stating that the applicant's review is based on speculation. One of the underlying reasons for bringing the review application as is evinced from the previous litigation between the parties, the correspondence between the parties and the founding affidavits to the review application and this application is the fact that it is necessary for the applicant to revert to speculation.

[27] The respondents disputed that the applicant is acting in the public interest and stated that the applicant acted out of self-interest. However, as is evident from the judgment of Kubushi J, the NSF project is a project of national importance. It is in the public

interest that the policy and plan implemented to serve the interests of members of the South African Police Force and specifically the interests of those who contributed to bring about democracy and change in this country, adhere to the constitutional values and imperatives brought about by their sacrifices, and is beyond reproach.

[28] Although the applicant's founding affidavit does contain some unsubstantiated broad statements, like: 'Thus, new positions are merely and willy-nilly created exclusively for NSF members' I am of the view that there are a substantial number of properly substantiated averments that indicate the existence of a *prima* facie right to the relief sought in this application in accordance with the principles laid down in case law. As stated, no final rights are being determined in this application and in light of the aforesaid I am of the view that the applicant succeeded in establishing the required *prima facie* right.

A well-grounded apprehension of irreparable harm if the interim interdict is not granted and the ultimate relief is eventually granted

[29] The applicant contends in its founding affidavit that if this application is not granted, and it is successful in the ultimate relief and the NSF project in its current form is set-aside, it will be very difficult to reverse the promotions and deprive the affected appointees of their newly acquired positions and benefits. This will result in material prejudice to the applicant's members.

[30] Once again, it is imperative to note that the court does not in this application make any final finding as to the validity of the applicant's claims. The court is, however, obliged to consider the consequences that may ensue if the respondents are allowed to implement the NSF project and it is then later set aside on review. I am accordingly of the view that this criteria has been met.

The balance of convenience favours the granting of an interim interdict

[31] Although both parties contend that certain promotions and re-rankings in terms of the NSF project have already occurred, it is common cause that a court order granted on 3 August 2018 stayed any further promotions and re-rankings in terms

of the NSF project. It is evident from the judgment handed down by Kubushi J in April 2018 that the respondents contended at that stage that although the NSF project has been launched the promotion and re-ranking of NSF members were still in the planning and developmental phase. After 3 October 2018 the respondents agreed that promotions and re-rankings in terms of the NSF project be stayed until 30 October 2018 and the applicant was informed in a letter dated 22 November 2018 that the respondents do not agree to a further stay of promotions and re-ranking in terms of the NSF project.

[32] The parties agreed that the Deputy Judge President would be approached with a request to allocate a preferential date for the hearing of the review application.

[33] It is difficult to fathom the prejudice that will be suffered by the respondents and any affected members of the SAPS if the promotion and / or re-ranking in terms of the NSF is stayed until the review application has been heard, particularly if a preferential trial date is requested. The project has been in existence for a very long time and members who have not yet been promoted or re-ranked will still be promoted and re-ranked if the applicant's review application is dismissed. I take cognisance of the fact that the parties are embroiled in a litigation- battle and that either may, depending on the circumstances and for different reasons, endeavour to protract the process leading up to the review application. I intend to address this to an extent in the order that I will make by ordering the applicant to schedule a meeting with the Deputy Judge President of this division. The meeting must be arranged within the time period stipulated in the order, but it may be scheduled for a later date. However, I am of the view that the balance of convenience favours the applicant.

[34] There is no alternative relief available to the applicant.

ORDER

In light of the aforesaid the following order is granted:

[1] The time periods and form of service provided for in terms of rule 6(12) are disposed of and the application is heard as an urgent application;

[2] The respondents and members of the South African Police Service are interdicted from proceeding with any promotions and / or re-rankings in terms of the Non Statutory Forces re-ranking process pending the adjudication of the review application instituted by the applicant under case number 79041/2018;

[3] The applicant is to arrange a meeting, the date to be convenient for all parties, to be attended by all parties, with the Honourable Deputy Judge President of this Division in order to discuss the case management of the review application and to request the allocation of a preferential date for the hearing of the review application under case number 79041/2018 within 15 days from 29 January 2019, by default of which this order will lapse;

[4] The respondents are ordered to cooperate in determining an appropriate date for the meeting to be arranged with the Honourable Deputy Judge President;

[35] This order will be effective until the court deciding the review application has made its order;

[36] The cost of this application will follow the cost order issued in the review application.

E VAN DER SCHYFF
Acting Judge of the Gauteng Division, Pretoria

Heard on:	12 December 2018
For the Applicant:	Adv C Goosen
Instructed by:	Serfontein, Viljoen & Swart
For the Respondents:	Adv O Mooki SC
Instructed by:	The State-Attorney Pretoria
Date of Judgment:	20 December 2018