Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **1443/2022**
Heard on: **18-19/07; 18/08/2022**
Supplementary Heads: **29/08/2022**
Delivered on: **18/11/2022**

In the matter between:

BATHO PELE MINING PRIMARY
CO-OPERATIVE LIMITED Applicant

and

ERNEST TSHEPISO SEEKOEI First Respondent

UNIDENTIFIED ASSOCIATES OF THE
FIRST RESPONDENT Second Respondent

JUDGMENT

MAMOSEBO J:

[1] On 18 July 2022 Ms LL Bezuidt, appearing for the applicant, and Mr A Jacobs for the first respondent, attended my chambers with an urgent application for an interdict. There is no opposition by the second respondent(s). The matter stood down until the following day, 19 July 2022 at 10:00, for the applicant to file its replying affidavit and the parties to serve and file written submissions. The parties argued on 19 July 2022 whereupon interim relief was granted on the same day. The parties filed supplementary heads to address certain aspects raised by the Court, more particularly relevant sections in the Co-operatives Act 14 of 2005 (the Act) as well as the cooperative's constitution. The applicant filed its supplementary heads on 24 August 2022 while the first respondent filed his on 29 August 2022. The parties agreed that the matter may be finalised on the papers.

[2] The relief sought by the applicant in the Notice of Motion is as follows:

"*1. That this application be deemed urgent. That due to the urgency of the application the form and services provided for in the Rules be dispensed with in terms of Rule 6(12)(a);*

2. That a rule nisi be issued, directing that the respondents be called upon to appear and show cause, if any, on the 18th of August 2022 at 09:30 or so soon thereafter as the matter may be heard, why an order in the following terms should not be made final, that:

2.1 the first respondent [Mr Seekoei] be interdicted and restrained from presenting himself to be an employee, director, representative or a member of the applicant and/or associated with the applicant in any capacity. Thus unlawfully misrepresenting his status to members of the applicant, third parties and, stakeholders;

2.2 the first and second respondents be interdicted and restrained from entering any of the premises of the applicant, inclusive of its registered office, any mine, place or building, from which the applicant conducts its business;

2.3 the first and second respondents be interdicted and restrained from interfering with, threatening, harassing, intimidating or in any way interacting with employees, representatives, members and stakeholders of the applicant;

2.4 the first and second respondents be interdicted and restrained from committing any act which is prejudicial to the good name, administration, discipline or efficiency of the applicant, its employees, representatives, members and stakeholders;

2.5 the first and second respondents be interdicted and restrained from acting in any way to hamper the normal functioning of the applicant;

2.6 the first and second respondents be interdicted and restrained from physically damaging, interfering with or in any way physically coming into contact with the applicant's property, equipment or assets at any of its premises;

2.7 the first and second respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved;

2.8 that prayers 2.1 to 2.7 shall serve as an interim interdict against the respondents until the return date.

3. That service of the application and court order on the first respondent be accepted as proper service on the second respondents."

[3] The applicant is Batho Pele Mining Primary Co-operative Limited with Registration Number 2017/000699/24. It was established as a juristic person in terms of the Act. The first respondent is Mr Ernest Tshepiso Seekoei whose full and further particulars were unknown to the applicant and the second respondent(s)'particulars are unknown.

[4] The historical background is thus. Mr Seekoei was the applicant's supervisory committee chairperson and was removed from the position consequent to failing to attend several meetings convened by the co-

operative's board to discuss its financial position including the demand that Mr Seekoei explain transactions which seemed to have been for his personal use.

[5] On 12 December 2019 the directors, having established a quorum, in a motion of no confidence resolved and removed Mr Seekoei with immediate effect from the position of chairperson. It was recorded in the minutes that he was not acting in the best interests of the co-operative. The deputy chairperson, who is also the deponent to the founding affidavit, Mr Taku, was elected as the interim acting chairperson and Ms Michelle Goliath was added as a member. The minutes which were annexed as "TVT 3" to the papers were ratified on 17 December 2019. Ms Anna Catharina Erasmus, in her capacity as the consultant to the company and mandated to submit the relevant COR documents to the Companies and Intellectual Properties Commission on behalf of the company, gave her imprimatur to the minutes of the meeting on 16 January 2020.

[6] Subsequent to the ratification of the minutes and on 24 January 2020, the following notice ("TVT4") was issued:

"TO WHOM IT MAY CONCERN
NOTICE TO MR SEEKOEI ON REMOVAL FROM COOPERATIVE
Kindly be advised that the above director was notified in writing on 3 December 2019 of his removal from the cooperative. He was personally handed the notification at the office and it was explained to him. He rejected the receipt of the notice.
We trust you find this in order
Signed VICTOR TUKU CHAIRPERSON"

[7] Notwithstanding severance of Mr Seekoei's association with the cooperative he continued to use his defunct status and interacted with the cooperative's employees, representatives, members and stakeholders

to the detriment of the association. Despite efforts to restrain him from such conduct he has proceeded undeterred. He also continued to access the applicant's premises without permission.

[8] On 20 April 2022 Mr Seekoei was in the company of 400 non-members who marched to the applicant's premises to hand over a memorandum (Annexure "TVT 5") setting out grievances purportedly by "Batho Pele Artisanal Miners". Mr Taku intimated that the 400 protestors were unknown and had no relation to the applicant. After handing over the memorandum Mr Seekoei used that opportunity to address the protestors and informed them that he was acquitted on a charge of theft of R800,000.00 and that he will be resuming his duties with the applicant. The applicant's attorneys of record addressed several letters to Mr Seekoei warning him not to enter the applicant's businesses but to no avail.

[9] On 12 July 2022 Kenneth Juries & Associates, the first respondent's legal representatives, addressed a letter to the applicant which states in relevant part and triggered this application:

> *"Please note that our client has never been removed from his duties as the chairperson of the organisation, neither in terms of the constitution, a vote of no confidence or through a court order. As a result, our client will be reporting for duty on the 19 July 2022."*

[10] The first respondent raised two points *in limine*: First, that the application lacked urgency and secondly, disputed the authority of both the deponent to the founding affidavit and acting chairperson, Mr Taku, and Ms LL Bezuidt the applicant's legal representative, to act.

Lack of authority

[11] It was contended on behalf of Mr Seekoei that the deponent to the founding affidavit lacked the necessary *locus standi* to bring the application, as his appointment is invalid. Clause 27(1)(c) of the co-operative's constitution stipulates:

"The directors have the power to suspend by resolution a member for a period to be determined by the Board but which shall not be longer than the date of the next annual general meeting."

[12] At paras 5 and 6 (above) I dealt with the meeting of the directors held on 12 December 2019 and the resolution taken to remove Mr Seekoei. It is contended by the respondent that the directors needed a resolution that authorised them to institute legal proceedings which is lacking. This attack is incomprehensible considering that the first respondent attached the co-operative's constitution as part of his papers. What is unclear is whether or not there was any annual general meeting following this decision to suspend him. That aspect, however, need not be determined for present purposes.

[13] There was also an attack levelled on the authority of Ms Bezuidt to appear as the applicant's legal representative. In *Eskom v Soweto City Council*[1] Flemming DJP, referring to rule 7(1) held:

"The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. (Compare Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 752D–F and the authorities there quoted.)

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to

[1] 1992 (2) SA 703 (W)

bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach."

The correct procedure to follow by the respondent would have been to invoke Rule 7(1) of the Uniform Rules of Court. When pressed on this aspect Mr Jacobs, for the respondent, correctly in my view, retracted the challenge. It therefore follows that the challenges have no merit and stand to be dismissed.

Urgency: Why the interim interdict was granted

[14] The main point taken by counsel for the respondent in relation to urgency is that the applicant delayed in launching its application as it dates back to the year 2020 when it addressed various letters to the respondent but yet the application is only brought now. The first respondent contended that in 2020 the applicant brought a similar application under Case No H150/2020 against him which prohibited him from entering the applicant's premises but the case was subsequently removed from the court roll. He contended that the applicant has again in this application failed to set out explicitly the circumstances which render the application urgent and the reasons why it would not be afforded substantial redress at a hearing in due course. The applicant launched this application belatedly on 15 July 2022 to be heard on 18

July 2022 making it a self-created urgency and urged a dismissal with costs, so the argument went.

[15] In countering this submission the following were raised: The first respondent is not a director, member or employee of the applicant and has no association whatsoever with the applicant since he was voted out of his chairpersonship in a properly quorate meeting of the board. The threat of pressing to report for work as chairperson of the cooperative on 19 July 2022, the day after the application, set the wheels in motion. The applicant has a right to protect its business operations. The relationship between him and the applicant is non-existent. Should he be permitted to enter the premises he would have access to private and confidential documents that are privy only to the applicant and those authorised.

[16] As the former chairperson, Mr Seekoei had electronic access to the bank account and there was a fear that if not restrained from accessing the premises he would cause irreparable harm. There is a further need to restrain him from interfering with the employees, members, directors and stakeholders of the applicant.

[17] In the ratification of the board meeting minutes dated 17 December 2019, the following appears:

> *"The board has serious concerns on the mismanagement of funding and the banking access via electronic means, which it aims to address by removing all access to Mr Seekoei. All linked accounts to the main cooperative account need to be unlinked and new arrangements be made for internet banking access. We the undersigned members confirm that the information is true and correct."*

[18] Rule 6(12)(a) and (b) of the Uniform Rules of Court provides:

> *"(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.*
>
> *(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."*

[19] The principles relating to urgent applications are trite. Coetzee J in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*[2] deals with the question of how and when an urgent application may be brought. See also *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others*[3].

[20] In *Safcor Forwarding (Johannesburg) Pty Ltd v National Transport Commission*[4] Corbett JA made these instructive remarks:

> *"The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law (see, generally, Van Zyl The Judicial Practice in South Africa 2nd ed at 355ff, 370-1; Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 89-90). This is recognised by implication in the Rules (see, eg, Rule 6(8) and Rule 6(13)). The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order to adequately protect*

[2] 1977 (4) SA 135 (W)
[3] (35248/14) [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP) (19 June 2014) para 64.
[4] 1982 (3) SA 654 (A) at 674G – 675A

his immediate interests. It is a useful procedure and one to be encouraged rather than to be disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to court by way of notice of motion or summons. The rule nisi procedure must be considered in conjunction with the provisions of Rule 6(12) which, in the case of urgent applications, permits the Court to:

'dispense with the forms and service provided for in these Rules and (to) dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet'.

(And see in this connection Republikeinse Publikasies (Edms) Bpk Republikeinse v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 781H – 782G). In fact, the rule nisi procedure does make it possible for the application to come before the Court for adjudication more speedily than the usual procedures for the set down of applications or trials, and it does, in a proper case, permit of the granting of interim relief."

Since the first respondent and his attorneys were adamant that he must report for duty on 19 July 2022 I was satisfied that the applicant could not be afforded substantial redress at a hearing in due course and therefore granted the interim relief.

Final Interdict

[21] The applicant has to meet the test for final relief, namely, the well-known requirements for the granting of an interdict as set out in *Setlogelo v Setlogelo.*[5] The test requires that an applicant that claims a final interdict must establish:

(a) clear right;

[5]1914 AD 221 at 227

(b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;

(c) the balance of convenience favours the granting of the interdict; and

(d) that the applicant has no other remedy.

Clear right

[22] The applicant operates under a licence issued by the Department of Minerals and Energy for its and its members' benefit. It has a duty to protect its own interests and provide a safe environment for its employees. The first respondents posed not only a physical but also financial threat to them because the respondent receives illegal diamonds from the applicant's members which must be processed through the applicant resulting in financial losses by the applicant. The employees and/or members comprise members of the community who were previously unemployed. When the members discover the diamonds, they must rightfully deliver them to the applicant as the licence holder. The applicant must therefore control and manage access to its property including the regulation of access to its registered office, any mine, workplace or building where it conducts its business.

Irreparable harm

[23] There is a risk of losing diamonds from the applicant's members to the respondent without the required authorisation. The applicant stands to suffer financial loss. The first respondent is reportedly collecting diamonds from the applicant's members and selling them instead of having them processed through the applicant. The purpose of the cooperative is to benefit the applicant and the community in its entirety and if the first respondent receives the diamonds not for the benefit of the collective while he is not the license holder, the harm is irreparable.

Balance of convenience

[24] The mere fact that the first and second respondents are not associates, employees, members or stakeholders of the applicant makes it plain that the prejudice that the applicant stands to suffer if the interdict is not granted is greater than the prejudice to be suffered by the first and second respondents if the interdict is granted. It was submitted on behalf of Mr Seekoei that as an artisanal miner, he stands to suffer financial prejudice particularly because of his level of education he may not find any alternative employment. I am of the view that the prejudice the applicant stands to suffer is greater than his.

No other remedy

[25] It was submitted on behalf of Mr Seekoei that the application was not urgent but rather premature because the respondents have approached the office of the Premier of the Northern Cape Province for mediation as an alternative remedy. The Act and the constitution of the co-operative, however, do not make provision for mediation by the office of the premier. The applicant can therefore not be faulted for not having pursued that route. There is an option of referring the matter to a Tribunal but the fact that the first respondent's attorney's letter indicated that he was to report for duty on 19 July 2022, the day when this matter was argued, I am of the view that the applicant was within its rights to approach this Court for urgent interim relief. A Tribunal would not have granted the requisite relief and at that juncture.

[26] In conclusion it is prudent to make the following remarks:

26.1 It is crucial always to be mindful of the objectives and the values upon which the cooperatives are established. According to the Act, provision must be made for co-operative principles and for compliance therewith.

26.2 In its Preamble the Act recognises the need for the development of a viable, autonomous, self-reliant and self-sustaining co-operative movement to promote community development and entrepreneurship, create employment and successful enterprises, eradicate poverty and improve the socio-economic well-being of the members of co-operatives in accordance with the co-operative principles. Co-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity; **co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others; and co-operative principles are guidelines by which co-operatives put their values into practice, and all co-operatives are obligated to contribute towards community development in line with the co-operative principle of concern for community**.

26.3 The first respondent and some members approached the office of the Premier of the Northern Cape apparently under the guise of seeking that office to conduct mediation between the parties. The Cooperatives Act 14 of 2005 has its own dispute resolution processes or mechanism which must be followed or adhered to. This Court is not at liberty to order mediation that is not legislated for.

26.4 When counsel for the first respondent, Mr Jacobs, filed supplementary heads, he also attached affidavits and supporting documents to the heads. This is unprocedural and unacceptable. See Supreme Court of Appeal's case *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) at paras 37 and 38 where Harms JA remarked:

> *"[37] There also appears to be a misconception about the function and form of heads of argument. The Rules of this Court require the filing of the main heads of argument.* ***The operative words are 'main', 'heads' and 'argument'****. 'Main' refers to the most important part of the argument. 'Heads' means 'points', not a dissertation. Lastly, 'argument' involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument. …"*
>
> *[38] Practitioners should note that a failure to give proper attention to the requirements of the practice note and the heads might result in the disallowance of part of their fees."*

[27] I am satisfied that the applicant has made out a case for the interim relief to be confirmed. There is no reason why costs should not follow the result. There is no warrant to grant a punitive cost order prayed for.

[28] The following order is made:

1. The rule *nisi* issued out of this court on 19 July 2022 is confirmed.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

Appearance:

For the Applicant:	Ms LL Bezuidt
Instructed by:	Leonie Bezuidt Attorneys
For the Respondents:	Adv A Jacobs
Instructed by:	Kenneth Juries & Associates