
A Legal Remedy to Combat the Rise of the Construction Mafia

By Advocate Wayne Pocock

1. The construction industry in South Africa is under siege. Companies throughout Gauteng are engulfed in wave after wave of illegal protest action often marred by violence, physical harm and the destruction of property. One need look no further than the rise of the so-called “construction mafia” who, after many years of terrorising construction firms all over KZN, have now infiltrated Gauteng and laid siege on sites all over the province including mines in the surrounding areas. The financial impact of these protests is catastrophic: no business can sustain the continuous onslaught of work stoppages and delays, escalating costs not to mention the persistent threats and acts of harm to management and employees who live in constant fear of their lives.
2. The strategy of the “construction mafia” is very simple: a mob of protestors is deployed outside a construction site to remonstrate on concocted grievances accusing the construction firm of various made-up complaints, mostly along the lines of labour abuses such as employing foreigners without work permits. The mob representatives pass themselves off as the elected leaders of a so-called ‘business forum’ that purports to act on behalf of small, black-owned businesses from the local community. The ‘business forum’ set about demanding from the construction company that it spend 30% of its contract sum on the local community by employing members of the ‘business forum’. Their demands are usually accompanied with threats and acts of physical harm, violence, work stoppage, and destruction of property.
3. Naturally the risk and exposure to the construction firm is enormous: no enforceable contract, no tender process, no market related prices, no quality of goods and services, no contractual remedies or formal dispute resolution processes, and certainly no recourse for damages. It is what one would literally define as negotiations at gun-point.
4. In essence, the construction mafia is the ugly cousin of State capture. Behind the bluster and bullying lies the true stratagem of the “construction mafia” being to force the construction company to spend millions of Rands through the ‘business forum’ and not in the local community. In other words the ‘business forum’ does not represent the local community and does not seek to advance the interests of the local community. Instead the true motive is to capture 30% of the contract sum for itself in return for the supply of workers, sub-contractors, building materials and the like to the project. It is nothing more than extortion and racketeering in its most rudimentary form.
5. The mafia’s modus is based on the recently revised regulations to the Preferential Procurement Policy Framework Act, 5 of 2000 (“the PPPFA”). These revisions now require construction projects valued at R30 million or more to sub-contract at least 30% of the value of the contract to Exempted Micro Enterprises (EMEs) or Qualifying Small Business Enterprises (QSEs) or a small business as defined in the National Small Business Act, 1996. In other words, 30% of the project sum must be spent on small black-owned businesses in the local community where the project is located. In virtually all cases, the “construction mafia” demands are based on these revised PPPFA regulations as justification to capture 30% of the construction firm’s business.
6. However, the mafia’s stratagem is fundamentally flawed: the PPPFA and its regulations apply to construction projects in the public sector only, and not to construction projects in the private sector. As such there is simply no legal basis underpinning the mafia’s demands and private construction company is under no statutory (or any other) obligation to accept let alone entertain the extortionist demands. In truth the entire strategy is to capture and sacrifice private enterprise on the altar of greed and extortion by advancing a false and distorted narrative of the PPPFA under auspices and perverted mantra of radical economic transformation.

7. The overarching question is this: what steps can a private construction business take to combat the relentless onslaught of protest action in order to protect its commercial interests including the safety of its employees. The strongest, and possibly the only, legal remedy lies in approaching the High Court for urgent interdictory relief. However, there are a number of challenges in bringing such an application. The most obvious being satisfying the court that the matter is sufficiently urgent; citing numerous unidentified protestors as respondents to the urgent application; proving that the application was properly served on the protestors; satisfying the requirements of an interdict; and framing the appropriate legal relief.
8. It is a well-established principle in our law that a litigant is not entitled to an order against which no cause of action is being made and calling upon that person to desist from some “unlawful” action (see *ex parte Consolidated Fine Spinners and Weavers Ltd v Govender (1987) 8 ILJ 97 (D)*; *Durban University of Technology v Zulu and Others 1693/16 P 2016 ZAZPHC 58*). The inability of the construction firm to identify the particular perpetrators does not afford any justification for granting an order against a number of people, including persons against whom no cause of action has been established.
9. This article seeks to demystify the “construction mafia” and provide a step-by-step legal remedy in combating the rise of racketeering and extortion in the industry.
10. Firstly, the construction firm should immediately go on the offensive and engage with the protestors by requesting that they select a small number of representatives to participate in formal discussions. The meeting must be recorded by way of a minute. The minute not only serves to gather information for purposes of future legal processes (i.e. an urgent application) but also to bolster the legal rights of the construction firm and expose the ulterior motives of the protestors. It is imperative that the minute be accompanied by a signed attendance register recording *inter alia* the following:-
 - 10.1. The names of all the parties present including recording the personal contact details of the appointed leaders such as ID numbers, cell numbers, work or home addresses and email addresses.
 - 10.2. The name and details of the ‘business forum’ such as its registration number, place of business, address, directors, constitution, years of trading etc.;
 - 10.3. The identities of the members and/or local communities that are represented by the ‘business forum’ including details of the mandate given to the ‘forum’;
 - 10.4. The nature of the ‘business forum’s’ grievances along with details of its demands on the private construction firm;
 - 10.5. A recordal of all threats of intimidation, destruction of property, physical harm etc.;
 - 10.6. An undertaking that the ‘business forum’ will cease all unlawful conduct.
11. Secondly, the construction firm must obtain proof of the unlawful conduct on site. This would include evidence of the number of protestors gathered at the site, proof of vandalism, proof of physical harm or assault (medical records etc.), blockage of access to the site and the like. Colour photographs or video footage would suffice.
12. Thirdly, all threats or acts of violence must be immediately reported to a local police station. A case number should be obtained and the station commander must be requested to attend the site to take control over the protest action. It is important to record the names and ranks of all police officers engaged including their responses and actions.
13. Fourthly, the construction company must obtain statements and confirmatory affidavits from witnesses present at the protest including from any workers or contractors assaulted by the

protestors including copies of medical reports or treatment. The names of these individuals can be redacted from the papers in order to protect them from reprisal although an unredacted copy ought to be made available to the court at the hearing.

14. Fifthly, an urgent application must be brought at the first available opportunity once the above steps have been completed. It is critical that the construction firm act without delay by bringing the urgent application with all due haste and expedition. Urgency usually entails a deviation from the forms, time-limits and procedures prescribed by the rules or a departure from the established sitting times of the court (see Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977(4) SA 135 (W) at 136 H). The factors that are usually taken into account by the court in the exercise of its discretion to grant urgent relief are a) any prejudice that an applicant might suffer if the application had to be dealt with in the ordinary course; b) any prejudice other parties awaiting the hearing of their matters might suffer if the particular application were to be given preference; and c) any prejudice that the respondent might suffer as a result of any deviation from the prescribed forms and procedures, the abridgement of any prescribed time-limits and an acceleration of the hearing (See: IL & B Marcow Caterers (Pty) Ltd v Greetermans SA Ltd and Another: Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981(4) SA 108 (C) at 112 H – 113 A and 114 A – B). Self-created urgency or litigation in luxury would be fatal in these circumstances.
15. Sixthly, the applicant must satisfy the requirement for interim relief (Joubert NO and others v Maranda Mining Company (Pty) Ltd and others [2010] 2 All SA 67 (GNP) at para 26; Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others 2005 (6) SA 273 at para 8) which usually includes the following:-
 - 15.1. The construction firm must establish its real alternatively *prima facie* right to the interdictory relief sought and that there has been an infringement of this right. The private construction company has the legal right to conduct its business affairs without interference or intimidation including without harm to its employees and contractors. It also has the legal right to use and enjoy the construction site.
 - 15.2. In contrast, the protestors' right are governed *inter alia* by the freedom of assembly, demonstration, picket and petition as provided for in section 17 of the Constitution. Any vandalism, intimidation, destruction of property or physical harm to employees will result in the immediate forfeiture of the protestors' constitutional right to protest (see South Africa Transport and Allied Workers Union and Another v Garvas and Others 2013 (1) SA 83 (CC) at para 68 & 84). In addition, the protestors' gathering must be sanctioned by local authority in terms of the Gatherings Act, 205 of 1993. Of course, there is also the overarching factor being that the protestors have no right to capture 30% of the construction firm's turnover on the basis their misconstrued and perverted interpretation of the PPPFA.
 - 15.3. Where the construction firm's real alternatively *prima facie* right is weak or open to doubt, the other requirements of an interdict become relevant consideration for the Court, such as whether the balance of convenience favours the granting of the interdict; whether the construction firm will suffer irreparable harm if the interdict is not granted; and whether the construction firm has any other satisfactory legal remedy available to it. Naturally, each case will be determined on the merits of its own case.
16. Seventh, it is important to frame a powerful notice of motion. There is nothing more frustrating than succeeding with a strong case but faltering in the execution because of a toothless court order. The notice of motion must identify the correct categories of respondents, comprehensibly define the unlawful conduct to be interdicted, provide for suitable means of service and, more importantly, empower the relevant law enforcement departments to give effect to the court order. Ideally the notice of motion is framed in such a manner that it caters for a number of scenarios in order to adequately restrain the protestors.

17. Eighth, the SAPS and the authorised security providers must be ordered and directed to intervene and take control of all eventualities on site. This relief should be extended to include the construction firm's own private security. Any contemptuous conduct in breach of the court order is deemed inherently urgent and the company would be entitled to re-approach the court (on an urgent basis) to enforce the original order and commit the wrongdoers to imprisonment for contempt of court (see *Uncedo Taxi Service Association v Maninjwa And Others 1998 (3) SA 417 (E)*).
18. Finally, the legal costs of bringing an urgent application are steep and is usually tricky to quantify or contain upfront. Generally the cost are dependent upon a number of factors such as whether the protestors oppose the urgent application, whether a rule *nisi* is granted, whether the applicant returns to court for contemptuous conduct, the seniority of counsel deployed, the sets of papers filed (usually 3 sets of affidavits, 2 sets of heads of argument, practice notes, bundle of authorities) and the number of court appearances required. The costs of an urgent application can range from approximately R100,000 to R300,000 or more depending on these factors. A portion of these costs can be recouped from the 'business forum', or its leaders, should they have realisable and executable assets to satisfy an adverse cost order.
19. We are living in tumultuous and uncertain times. There is a real danger that the construction industry in South Africa will face financial ruin due to the growing number of racketeers acting as a law unto their own and with little or no Government intervention. The battle against these racketeers and ruffians is best fought in a court of law, rather than on site, where the extortionist tactics of the 'construction mafia' can be exposed and brought to account. After all, and in the partially borrowed and altered words of the notorious mafia boss Al Capone: "*a smile can get you far, but a smile and a court order can get you farther*".

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