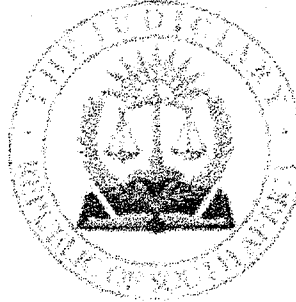


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: EQ2/2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ☒
13.9.2019	
DATE	SIGNATURE

In the matter between:

NELSON MANDELA FOUNDATION TRUST

APPLICANT

And

AFRIFORUM NPC

FIRST RESPONDENT

ERNEST ALEX ROETS

SECOND RESPONDENT

J U D G M E N T

LAMONT, J:

[1] This is an application brought by the applicant as a matter of urgency (on one day's notice to the respondents) seeking a *rule nisi* requiring the two

respondents to show cause why an order should not be made declaring them to be in contempt of this court's order.

[2] The relief sought is in the following terms:-

- 2.1 declaring that the first respondent and the second respondent are in contempt of paragraph (2) of this court's order dated 21 August 2019 and under Case No EQ 2/2018;
- 2.2 imposing a fine, such as is deemed appropriate by this court on the first and second respondents, jointly and severally;
- 2.3 imposing a period of imprisonment, such as is deemed appropriate by this court, on the second respondent suspended on conditions deemed appropriate by this Court;
- 2.4 directing the first and second respondents to bear the costs of this application jointly and severally, on the attorney and client scale'.

[3] The Court order referred to in paragraph 2.1 of the Notice of Motion is in the following terms:-

'(1) In terms of section 21 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act for of 2000 ("the Equality Act"), it is determined that the display of the old national flag of South Africa introduced from 31 May 1928, and used throughout apartheid until it was abolished on 27 April 1994 ("the Old Flag"), at the "Black Monday" demonstrations on 30 October 2017 constituted:

- a. hate speech, in terms of section 10 (1) of the Equality Act;
- b. unfair discrimination on the basis of race, in terms of section 7 of the Equality Act;
- c. harassment in terms of section 11 of the Equality Act.

(2) In terms of section 21 (2) of the Equality Act, it is declared that subject to the proviso in section 12 of the Equality Act any display of the Old Flag constitutes:

- a. hate speech, in terms of section 10 (1) of the Equality Act;
- b. unfair discrimination on the basis of race, in terms of section 7 of the Equality Act;
- c. harassment in terms of section 11 of the Equality Act.'

[4] The law on contempt of court was discussed in *Matjhabeng Local v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) particularly at para 50 and following; also in *Fakie NO v CCII Systems Pty Ltd* 2006 (4) SA 326 (SCA) at para 6 and following. There must be a court order in existence requiring the alleged contemnor to do or not do something (*ad factum praestandum*).

[5] The nature of the order in the present matter is that it is a declarator, which on the face of it does not require the alleged contemnor to do or not do something but rather states what certain conduct constitutes.

[6] The first respondent is a litigant in the application in which the order was made. The second respondent representing the first respondent was present at the time the judgment was delivered and the order made. On this basis, the applicant alleges that both the first and second respondents had knowledge of the terms of the order from the time it was made.

[7] Some hours after the order was made the second respondent published a tweet on his personal Twitter account. Contained within the tweet was the image of the Old Flag and the words '*Did I just commit hate speech?*'

[8] The next day the second respondent published a tweet on his Twitter account containing the first tweet in full underneath the words:

'The reaction to the tweet is as expected. The judgment said the flag may be used for academic purposes. I am a scholar of Constitutional Law, currently doing my doctorate. This is an academic question. It seems to the NMF's quest for apartheid style censorship and banning continues'.

[9] Later the same day, the second respondent was interviewed on radio. He inter alia made the following statements:-

- '1. In response to a question about whether he was trying to disrespect the ruling of the court "Well that's a very legal positivistic argument – to say, because the law says so it has to be right – we must remember that Nelson Mandela was illegal according to the laws of the time, that the apartheid system was illegal according to the laws of the time and according to the courts of the time. So we shouldn't simply say, because the court says so therefore it's the right thing to do."
- 2 "You seem to suggest that courts are always right. Courts are not always right. Courts are judged by humans, judges are also human, judges can also be wrong. And yes, we do respect the rule of law, we believe the rule of law should be respected, but some of the greatest – not some of the greatest – the greatest –atrocities of the last century were all committed with government consent and with the consent of the courts."

[10] The statements referred to were all made by the second respondent; the tweets were published on the second respondent's Twitter account. The submission was made that notwithstanding that he acted alone using his own Twitter account that the first respondent was party to his actions. The second respondent denied that he had been authorized to act on behalf of the first respondent in making the statements and publishing the tweets refers to. He also denied he had been acting on the first respondent's behalf. It was submitted that I should draw the inference that he was acting on behalf of the first respondent, notwithstanding his denial, on the basis that the first respondent never distanced itself from the tweets.

[11] In my view there is insufficient evidence to establish that the first respondent authorized the second respondent to act on its behalf. There is no evidence that he in fact acted on its behalf. At best for the applicant, the evidence of the second respondent has been disputed. The submission that I should simply reject the second respondent's evidence as it is patently improbable, is also rejected. See: *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H where Price JP held:

'It is necessary to make a robust, common-sense approach to a dispute on motions as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'

[12] In my view for this reason alone, no case has been made out against the first respondent.

[13] The submission was made on behalf of the applicant that I should interpret the order made as containing an order directing that no person display the Old Flag i.e. as containing a prohibition, which would be punishable by contempt proceedings if it was not complied with.

[14] The submission was that if I applied a proper approach to the order and its interpretation it would be apparent that that was what the order meant. The question of interpretation of orders of court has frequently been considered in our courts. For the sake of convenience, it is necessary to set out some of the authority on the matter. It is *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304 where it was held:-

'First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See *Garlick v Smatt and Another* 1928 AD 82 at p. 87; *Rand Estates Ltd. v New Zealand Insurance Co. Ltd.*, 1926 AD 173 at p.188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the

judgment or order can be asked to state what is subjective intention was in giving it (cf. *Postmasburg Motors (Edms.) Bpk. v Peens en Andere*, 1970 (2) SA 35 (NC) at p. 39F - H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty persists, other relevant extrinsic facts or evidence are admissible to resolve it. See Garlick's case, *supra*, 1928 AD at p. 87, read with *Delmas Milling Co. Ltd. v Du Plessis*, 1955 (3) SA 447 (AD) at pp. 454F - 455A; *Thomson v Belco (Pvt.) Ltd. and Another*, 1960 (3) SA 809 (D).'

See also: *Eke v Parsons* 2016 (3) SA 37 (CC) where it was held:

'[29] Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."

[30] This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:

"The court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the genesis of the transaction or its factual matrix. Its aim is to put the court in the armchair of the author(s) of the document. Evidence of surrounding circumstances is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide sufficient certainty."

See also: *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) where it was held that:

'[13] As indicated earlier in the judgment, the determination of this appeal depends on the proper interpretation of the Preller J order. The starting point is to determine the manifest purpose

of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

[14] It is necessary to place the Preller J order in proper perspective and to examine its terms and purpose in order to determine the intention of the learned judge when he used the word 'initiate'. In so doing one has to consider the context in which the order was made. It is not in dispute that there were two competing rights that required to be settled without delay, viz BHP's entitlement to a prospecting permit on the one hand, and Finishing Touch's prospecting rights granted on 19 and 22 September 2006 on the other. It was imperative that the dispute be resolved. The question to be answered therefore is: What did Preller J mean when he ordered BHP to initiate the review proceedings by 25 January 2006?

[15] I have to have regard to the order of court as well as the judgment when I interpret the order of court. I must determine the manifest purpose of the order and the language of the order. It is apparent from the language of the order as well as the content of judgment that the judge's intention was to issue a declarator. In paragraph 2.1, a declarator was

issued in regard to the historic conduct of displaying the Old Flag. In paragraph 2.2, a declarator was issued in regard to future conduct.

[16] The prohibitions are contained within the relevant sections of the Equality Act (s 7, 10, and 11), not within the court's order. The order containing the declarator deals with issues, which will arise if an Equality Court enquires into whether or not those sections have been breached.

[17] It appears to me that the judge who made the order intended to do no more than issue the declarator relating to those issues. The order sets the standard of morality expected to be adhered to by society.

[18] The judgment at paragraph 162 gives insight into the purpose of the declaratory order which was made. The declaratory order firstly resolves the issue of whether displaying a symbol falls within the purview of section 10 of the Equality Act by holding that it does. See paragraph 162:-

[162] In interpreting and applying section 10 of the Equality Act, a court having regard to this context should not limit the scope of the prohibition of hate speech in section 10(1) to literally only "words", thereby allowing expressions of hatred in non-verbal forms to escape prohibition.'

[19] The court was fully aware of the fact that the prohibition against hate speech is to be found in section 10 of the Equality Act and dealt with the issue concerning by giving direction to the Equality Court in paragraph 163 as follows:-

'[163] To sum up and conclude: Section 10 of the Equality Act should be interpreted in a manner that prohibits all expressions of ideas, verbal and otherwise (including the displaying of a flag), that amount to hate speech. Accordingly, "words" in section 10(1) must not be read literally. It must be interpreted to be wide enough to include expression of ideas such as the waving of a flag. Such an interpretation is not unreasonable. Instead, it ascribes a meaning to section 10(1) and "words" which is reasonably capable of being borne. It accords with the objects of the Equality Act. It is consistent with international law. It is not out of kilter with comparative foreign law. It takes into account the context of the dispute. And, most importantly, it gives effect to the spirit, purport and objects of the Bill of Rights and ensures that section 10(1) is generally consonant with the Constitution. Accordingly, the prohibition against hate speech in section 10 (1) applies to and regulates the waving of the Old Flag.'

[20] There is a finding about what the effect of the display of the flag is:-

'[187] Accordingly, any gratuitous display of the Old Flag (that is, a display beyond the protection of the proviso in section 12 of the Equality Act), besides being racist and discriminatory, demonstrates a clear intention:

- (a) to be hurtful;
- (b) to be harmful and incites harm; and
- (c) it promotes and propagates hatred

against black people in contravention of section 10 (1) of the Equality Act. It constitutes hate speech. Such display is furthermore divisive, retrogressive and destructive of our nascent non-racial democracy, the constitutional values of human dignity and equality and the building of a society united in

its diversity. It is an affront to the spirit and values of ubuntu/botho, which has become a mark of civilised interaction in post-apartheid South Africa.'

[21] The judge then set out his express intention not to ban the Old Flag. He said:-

'[201] Contrary to the protestations of Afriforum, the relief sought by the applicants in this matter is not a banning order against the Old Flag. The Mandela Foundation seeks only an order that will declare to all South Africans (including potential offenders and complainants) that the display of the impugned flag must be confined to genuine artistic, academic or journalistic expression in the public interest (i.e., it must qualify for the proviso in section 12 of the Equality Court Act). Any display beyond that may be brought before the Equality Court for the displayer to prove that the display was defensible (under the proviso) or to prevail on the Court to make an appropriate remedy'

[22] It is apparent from the judgment that the court intended for the issue of display to be dealt with in the court, which deals with the enforcement of the prohibition, namely the Equality Court dealing with the matter. That court would hear the matter and make appropriate rulings. This in my view is precisely why the order does not contain a directive prohibiting the display of the flag. There is no order *ad factum praestandum*. The process of enforcement of the prohibition is contained in the Equality Act. The court hearing the matter has all the advantages the Equality Court provides. The judge hearing the matter would have been trained in the Equality Court. The court has the right to structure the proceedings to allow the parties the

opportunity to ventilate the issues fully (orally or otherwise). One of the major objectives of the Equality Court is the control of conduct in society by using the wide-ranging sanctions available to it. This enables the court to consider the wide-ranging options available to it to control conduct. The range of controls and punishments an Equality Court can impose after an enquiry are not available to a court punishing a contempt of its order.

[23] I am accordingly of the view that while the second respondent may in due course be held to have breached the provisions of the Equality Court Act he is not in contempt of the court order. The same reasoning applies in respect of the first respondent if I am wrong in my finding *supra* regarding it.

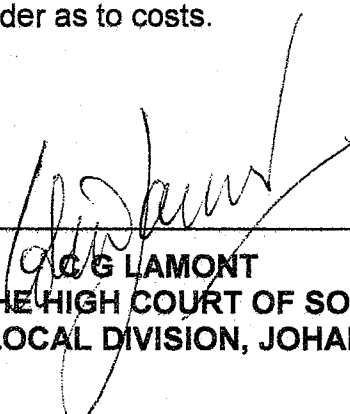
[24] This application was brought seeking a *rule nisi*. The terms of the rule proposed that the second respondent shows cause as to why he should not be committed for contempt. This may be understood by a lawyer to have a meaning allowing the decision made on a *prima facie* basis to be decided afresh on the return date. This is not how a lay person would read the order. It is undesirable in my view for an order to be made on a *prima facie* basis when the true onus is of a much higher standard (whether it be a balance of probabilities or proof beyond reasonable doubt). It is also undesirable to make an order which may well be misunderstood to mean that there has been a "conviction" of the respondents.

[25] The upshot of these proceedings is that even if an order is made nothing has moved forward in the current litigation, save that a date has been

determined in the form of a return date when the matter will be heard. This questions the entire process initiated by the applicant. I need however not deal with this aspect of the matter on account of my findings. I have deliberately avoided dealing with factual matters as my opinion is not relevant and may be perceived as impacting on another court dealing with the matter in due course.

[26] I propose to make no order as to costs. This is a matter concerning the Equality Court and the constitutionality of the conduct of members of society. I was not addressed on the costs issue and grant the parties seven days from date of this order being handed down to deliver written submissions on costs only.

[27] Application dismissed with no order as to costs.



C. G. LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING:

4 SEPTEMBER 2019

DATE OF JUDGMENT:

17 SEPTEMBER 2019