

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE: 4744/2022

In matter between:

NOMNTU MDITSHWA

APPLICANT

And

JACKSON NKOSIPHENDULE SABONA

1ST RESPONDENT

MTWENI ROYAL FAMILY

2ND RESPONDENT

**STATION COMMISSIONER: SOUTH AFRICA
POLICE STATION: LUSIKISIKI**

3RD RESPONDENT

JUDGEMENT

NQUMSE AJ

[1] Following an urgent application instituted by the respondents. On 15th September 2022 Nhlangulela DJP gave the following relief:

1. “That a Rule Nisi be issued calling upon the respondent’s to show cause, if any, to this Honorable Court on a date to be arranged with the Registrar, why the following order cannot be made final. Reviewing and setting aside any decision that appointed Jackson Nkosiphendule Sabona as the iNkosi /Senior Traditional Council, Lusikisiki.

- 1.1. Reviewing and setting aside any decision that appointed Jackson Nkosiphendule Sabona as the iNkosi/Senior Traditional and Head of Mtweni Traditional Council Lusikisiki.

- 1.2. Reviewing and setting aside any decision of Mtweni Royal Family awarding Jackson Nkosiphendule Sabona any leadership position and robing him with leopard skin or any traditional leadership attire within the area of jurisdiction of Mtweni Traditional Council,
- 1.3. Interdicting and restraining Jackson Nkosiphendule Sabona to proclaim himself as the iNkosi/ Senior Traditional Leader and Head of Mtweni Traditional Council, Lusikisiki and addressing any gathering and or any funeral professing to be an iNkosi and Head of Mtweni Traditional Council, Lusikisiki,
- 1.4. Interdicting and restraining Jackson Nkosiphendule Sabona and Mntweni Royal Family from hosting his installation as the iNkosana/ Senior Traditional Leader and Head of Mtweni Traditional Council and on 16th September 2022 and/ or any ceremony anywhere within the area of jurisdiction of Mtweni Traditional Council without the consent of the applicant.
- 1.5. Authorising and directing the Station Commissioner of the South African Police Service in Lusikisiki to deploy members of South African Police Service to disperse any gathering of people at the so called Mphopomeni Great Place (Sandlulube locality) within the area of jurisdiction of Mtweni Traditional Council, Lusikisiki,
- 1.6. That paragraphs 1.3, 1.4 and 1.5 above shall operate as an interim interdict and mandamus pending finalization of the application”.

- [2] On 4th October 2022 the matter came before me in essence for contempt of court against the 1st and 2nd respondents and for the enforcement of the Order of Nhlangulela DJP.
- [3] It is necessary to sketch the background of this matter which can be briefly stated.
- [4] The applicant, a Senior Traditional Leader and Head of Mtweni Traditional Council who resides at Nzimankulu Great Place (Komkhulu) in Lower Ntafufu Administrative Area Lusikisiki, instituted an application on an urgent basis that resulted in the Order of Court referred to in paragraph 1 above. ("the Order")
- [5] On the same date of the issuing of the Rule Nisi, the 1st and 2nd respondents served an application for leave appeal the order of 15th September 2022. The application for leave to appeal is premised on a number of grounds which I do not intend to deal with nor are they relevant in there proceedings, save the first ground which I find central to the opposition of the respondents and a significant factor in determining the allegation of contempt by the respondents. I shall deal later in the judgement with this aspect.
- [6] According to the applicant's founding affidavit, on 16 September 2022 the 1st and 2nd respondent hosted the ceremony to install the 1st respondent as the iNkosi and Senior Traditional Leader of Mtweni Traditional Council. In support of the allegation.annexed to the founding affidavit is the picture marked "NM8" which depicts a young girl wearing a T Shirt with the words," **Mtweni Royal Family Coronation of chief Sabona on 16 September 2022**". The applicant further annexed a copy of a picture marked "NM9" which depicts the 1st respondent wearing a leopard skin sitting along people from a faction of the Sigcau Royal Family who are according to the applicant included Nkosi Ndabankulu from Flagstaff, Mr. Dumelani Sigcau who presided over the "Coronation", Nkosi Mdutshane and Mr. Cetywayo. In a picture marked "NM10" depicted therein are people who attended the ceremony.

- [7] In addition to the pictures indicated above are Facebook screenshots which described the event with posters which indicate the excitement to what was taking place. The first screenshot marked “NM9 “is written in the vernacular language with no interpretation thereof. Whilst the other screenshot reflects the words” **Angel C. More is with Amanda, Rubuluza Amanda and 6 others**”. It continues **“My father the King of uMthwa Royal family the Founder, the vision bearer and Apostle of Peculiar Christian Centre now when we see him we all say “ahh Zanoxolo”**
- [8] In his answering affidavit, the 1st respondent opposed the application on the grounds that:
- a) the application is lis pendens, pending before this court under case number 4442/2022.
 - b) lack of urgency in the application, if any, it is self-created.
 - c) the relief sought is incompetent and not capable of being granted:
 - d) the applicant failed to meet the requirements for contempt of court proceedings.
 - e) the applicant failed to establish a proper cause of action, and
 - f) the application is bad n law.
- [9] According to the 1st respondent, the applicant instituted on 7 September 2022 an application against him and other respondents under case number 4744/2022. The 1st respondent contends that since the previous application was not withdrawn and since the relief sought in the present application is identical to the previous one, the present application is therefore lis pendens. It is further contended by the 1st respondent that the applicant seeks to have this court determine issues which are similar to those pending before this court.
- [10] The 1st respondent further contends that the Order of 15 September 2022 by Nhlangulela DJP has no effect nor capable of being executed, since there is an

application pending for leave to appeal of the said order. As a result, so it is contended, the relief for contempt of the court order cannot be granted.

- [11] He denies that he defied the Order of the court nor causing any division or destabilising the area, but instead as the leader of the Mtweni Royal Family, is duty bound to ensure the unity peace and stability in his family. He also stated that the royal family had taken a resolution to remove the applicant as the acting Senior Traditional Leader on account of her marriage to Chief Nonkonyane. The process of her removal is still a subject of administrative process.
- [12] He avers that the event of 16 September 2022 which he was part of, was a ritual ceremony hosted by the Mtweni family to appease their ancestors and it had nothing to do with his installation or appointment as a Traditional Leader. His robing with a leopard skin which was accompanied by gifts, was an acceptable practise and was not intended to harm or injure anyone.
- [13] He further contends that he was never served with the court order, a necessary requirement for court of court proceedings. He alleges that the returns of service annexed in the founding affidavit as “NM3” and “NM4” were served upon the 2nd and 3rd respondents. He however, admits being advised by his attorney of the existence of the court order of 15 September 2022 for which he launched an application for leave to appeal. He further contends that whilst the said order is final in its nature, the filing of the leave to appeal, suspended its force and its effect was suspended.
- [14] Regarding the issue of costs, it is contended by the 1st respondent that the applicant is abusing the court process for launching this application despite having launched previously a similar application which was struck off the roll with costs. Furthermore, the applicant has despite knowledge that there is a pending appeal against the order of 15 September 2022 went ahead and launched this application, a conduct, so it was contended, which amounts to mendaciousness and frivolity

which warrants the court to show its disapproval by awarding a punitive costs order against the applicant.

[15] In his reply, the applicant contends that, whilst the present application bears the same case number 4442/2022 as the previous application, the former application is no longer on the roll since it was struck off. Therefore, it is not pending before this court and it was not necessary for its withdrawal. The applicant further disputes that the matter is not urgent, since contempt of court proceedings are urgent in their nature. It is further contended that the 1st respondent was aware of the Order since he was present in court when the Order was made and he consulted with his legal representative, Mr. Notyesi. Their consultation resulted in the notice for application for leave to appeal the Order which is not appealable, so it was contended.

[16] The applicant alleges further that the gathering of men in mountains with some members of the community who have fled their homes and the need that has caused her to engage private security for protection and that of the iKomkhulu (Great Place) has rendered the matter very urgent. The applicant also stated that as iNkosi and Head of Mtweni Traditional Council and as the extended family member of Sabona family she would have been advised of the ceremony that allegedly took place on 25th August 2022, to visit, the graves of the ancestors and their appeasement ceremony which culminated in the ceremony of 16 September 2022.

[17] This matter has brought to bear a number of issues namely,

17.1 The validity or competence of the Order of 15 September 2022 by Nhlangulela DJP, more specifically whether the Rule” Nisi’ that was made is final in effect since it has no “specific “return date,

17.2 Whether the filling of the leave to appeal the said Order suspends it in terms of section 18 of the Supreme Courts Act¹.

17.3 Whether the matter is *lis pendens* and

17.4 Whether the applicant has met the requirements for contempt of court.

[18] The other ancillary questions such as urgency of the application and the dispute of facts that may have arisen will in my view be properly addressed depending on the answers to the five main issues in paragraph 17 above. It is also worthy to note that each of the four main issues above may be dispositive of the application. I shall deal with the issues not in any order of preference but only on the basis of convenience and practicality.

I find it convenient to first deal with the issue of *lis pendens*. The close relationship between a plea of *res judicata* and the *lis pendens* is best described in Voet 44.2.7 as follows:

“Exception of *lis pendens* also requires same persons, thing and cause, the exception that suit is already pending is quite akin to the exception of the *res judicata* in as much as when the suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is no room for the exception of *res judicata* in terms of what has already been said. Thus, the suit must have started to the mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceedings has once been taken up is also the place where it ought to be given its ending”² **In Nestle (South Africa) Pty Ltd v Mars. Incorporated**³,

¹ See sections 18(2) and (3) of the Superior Courts Act, 10 of 2013

² *Sacratous v Grindstone Investment* 2011 (6) SA 325 (SCA) para 13.

³ (333/99) [2001] ZASCA 76, [2001] 4 ALL SA 315 (A) (31May 2001)

Nugent, AJA (as he then was), observed. “The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties should be brought only once and finally”⁴.

[19] It is trite therefore that the three elements for a successful reliance on the plea of *lis pendens* are:

- 1) The litigation is between the same parties,
- 2.) That the cause of action is the same, and
- 3.) That the same relief is sought in both sets of proceedings.

[20] In the present matter the circumstances are slightly different in that the present application was brought previously on a different case number namely, 4442/2022, seeking the same relief but was struck off due to lack of urgency. It was submitted by Mr. Nomlala for the 1st respondent that since the previous application had not been withdrawn but struck off the roll, it was still pending before this court. In support of his contention he relied on the case of **Jojuwana v Regional Court Magistrate and Another**⁵ by Tokota J. In that matter the court dealt with a situation where the magistrate had struck off the roll the matter due to the absence of the respondents. In an application launched by the respondent for the review of the magistrate’s decision placed reliance therefore on the case of **Zuma v**

⁴ I bid at para 16

⁵ 2019 (6) (SA 524 ECM

Democratic Alliance and others 2018 (1) SA 200 (SCA) and Thring Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions, Zuma v NDPP [2008] ZACC 14, 2009 (1) SA 141 (CC), the learned Tokota J had this to say:

“[10] In my view the above cases do not lay down a general rule that if a matter is struck from the roll it is thereby terminated and may not be re- enrolled. The striking of the matter from the roll has nothing to do with the merits of the case. In civil matters it often happens that if a party has either failed to comply with practice directives such as pagination, filing of heads of arguments etc. or that the applicant or plaintiff failed to appear when the matter was called, the matter is struck from the roll. In practice, where the matter has been struck from the roll under those circumstances it may be re- enrolled upon the delivery of an affidavit explaining the reasons for the failure to comply with the practice directive and /or failure to appear when the matter was called. In this context therefore striking of the matter from the roll is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for re-instatement. The learned judge continued and said “the word “terminate” was not used in the context of its general meaning, namely to bring to an end, to close, or to ‘discontinue’. In my view when the courts said the proceedings were ‘terminated’ they meant suspension thereof pending any decision to reinstate them.”

[21] The issue that falls to be determined therefore in the matter at hand is whether it was permissible for the applicant to bring the subsequent application in the manner he did.

[22] Whilst it may be so that the initial application has not run its full course and thereby not come to a close, it is however, not ‘technically “pending for any consideration until it is reinstated. The matter referred to of Jojwana is distinguishable from the circumstances of this matter. It therefore does not follow that in circumstances

such as the present, lis pendens should serve as a bar to hearing the latter application simply because the requirements of lis pendens have been met. My view is further bolstered by what was said in **Loader v Dursot Bros (Pty) Ltd**⁶ where the court held:

'It is clear on the authorities that a plea of lis alibi pendens does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings, because it is prima facie vexatious to bring two actions in respect of the same subject-matter. The Court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case which a lis alibi pendens is proved to exist.....'

[23] In **Eksteen v Road Accident Fund**⁷, Petse AD, as he then was, held:

" [53]....when a court upholds a plea of lis alibi pendens it has the discretion to stay one or other of the two actions. A court is vested with such discretion because it is prima facie vexatious to bring two actions in respect of the same subject matter.

[54] The high court before which the second action was pending undoubtedly enjoyed a wide discretion to determine whether the interest of justice dictated that the second action should be allowed to proceed. The high court did not take in to account this aspect in its judgement".

[24] Regard being had to the authorities above, it seems to me, it would be unjust to stay the proceedings in the present matter, or to uphold the respondents' defence even if it was to be accepted that the cause of action in both applications are the same. I therefore find that the defence on lis alibi pendens ought to be dismissed

⁶ 1948(3)SA 136 (T) at 138

⁷ (873/2019) [2021] ZASCA 48

[25] Central to the application by the applicant is contempt of court by the respondents. I now turn to deal with the question whether the applicant has succeeded in establishing contempt against the respondents.

[26] In **Fakie NO v CC 11 Systems (Pty) Ltd**⁸ the requirements for contempt of court are stated as the following:

- a) the existence of the order,
- b) the order must be duly served on, or brought to the notice of the alleged offender,
- c) there must be non-compliance with the order and
- d) the non – compliance must be wilful and *mala fide*. Once these elements have been established, wilful and *mala fide* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established (See **Secretary, Judicial Commission of Inquiry with allegations of State Capture v Zuma and Others** [2021] ZA CC 18, 2021 (5) SA 327 (CC) para 37).

[27] In *Fakie*⁹ the requirements for willful and mala fides were stated thus:

“[9] the test for when disobedience of a civil order constitutes contempt has come to be stated as whether, the breach was committed deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely albeit mistakenly believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a

⁸ [2006] ZASCA 52; 2006 (4) SA 326 (SCA)

⁹ *id*

refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith”,

[10] “These requirements- that the refusal to obey should be both *willful* and *mala fide*, and that unreasonable non- compliance, provided it is bona fide, does not constitute contempt- accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent”.

It should follow therefore that before an enquiry is made whether the respondents’ alleged non-compliance was *wilful* and *male fide*, it has to be determined whether the first three requirements for contempt as propounded in *Fakie* have been met.

[28] It is not dispute that on 15 September 2021 an order by way of a Rule Nisi was granted against the respondents. The 1st respondent does not dispute that he was present in court when the judgment was pronounced, however, disputes hearing it being pronounced¹⁰. His emphasis is on the lack of personal service of the order and as a result, so it was contended, the applicant has failed to meet the requirements to support the allegation for contempt of court. The problem with the 1st respondent’s submission is that he limits the interpretation of the requirement only to the order being duly served on the contemnor and ignores the alternative option that the order should be brought to the notice of the alleged offender. In paragraph 42 of the answering affidavit, he admits that he was advised by his attorneys of the existence of the court order and filed an application for leave to appeal the very order on the very same day it was issued. Undoubtedly, on his own version the 1st respondent admits that he did gain knowledge of the court order. He can therefore not hide behind the fact that it was not served on him

¹⁰ See Answering Affidavit paragraph 25

personally. I am therefore satisfied that the 1st respondent was made aware of the existence of the court order made against him and had acquired the full knowledge thereof. His contention of lack of knowledge has no merit and is dismissed

[29] The next element that has to be satisfied is whether the 1st respondent failed to comply with the order. This aspect has raised a lot of dispute between the parties. In response, the 1st respondent's approach is multi – pronged. He attacks the validity of the court order for its lack of a return date. Therefore, the Rule Nisi has no life and of no force and affect, so the argument went. Second, the application for leave to appeal the order has suspended its effect. Thirdly, it is contended by the 1st respondent that the order was not defied since there has been no event hosted by the 1st respondent for his installation as Inkosi (Senior Traditional Leader). Whilst the three points referred to above have not been submitted as alternatives to each other but are raised as individual defences. I shall approach them as if they are pleaded in the alternative to each other in the following manner. That in the event, I hold that order is valid, I must in the alternative, find that as a result of the leave to appeal, its effect was suspended. Alternatively, if I hold that it is not suspended by the application for leave to appeal, I should find that the 1st respondent has not disobeyed the said order

[30] In the heads of argument for the applicant as well as in oral argument before me, Mr. Nonkonyane argued that the order of 15 September is not appealable due to its interim nature. He however, did not make any submission on the effect of the order due to its lack of a return date. He also submitted that based on the pictorial material and, the social media posts, they are sufficient to show that the 1st and 2nd respondents are guilty for non- compliance with the court order.

[31] The 1st respondent does not deny the hosting of a ceremony by the Mtweni Royal Family albeit a Traditional ceremony to appease their ancestors¹¹. At this point I find it necessary to pay a closer look at the order of the court more particularly

¹¹ Answering affidavit, paragraphs 31 and 32

paragraph 2.4 thereof. The interdict and restraint in this paragraph of the order appears to me to be wide so as to interdict the respondents from hosting a coronation ceremony and/or any ceremony within the area of jurisdiction of the Mntweni Traditional Council unless with the consent of the applicant. I however, did not have the benefit of being addressed by either counsel on this point. That notwithstanding I find it necessary to deal with this aspect albeit in a brief manner.

[32] A cursory reading of the words... “and /or any ceremony” can suggest or be interpreted to mean that, not only are the respondents interdicted from hosting a coronation ceremony but are also prohibited from hosting any kind of ceremony, be it a celebratory function, such as a wedding, a birthday party even a funeral service..

[33] A proper approach to interpretation of documents, legislation, statutory instruments including a judgment of court was formulated in **Natal Municipality Pension Fund v Endumeni Municipality**¹² thus:

“whatever the nature of the documents, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the documents”¹³. In **Fishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and Others**¹⁴ the court dealing with the interpretation of a court order said: “The starting point is to determine the manifest purpose of the order. In interpreting a judgement or order the court’s intention is to ascertain primarily from the language of the judgement or order in accordance with the usual, well-known

¹² 2012 (4) SA (SAC)

¹³ Id para 18

¹⁴ 2013 (2) SA 204 (SCA) para 13

rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reason for giving it must be read as a whole in order to ascertain its intention'. (See also **Firestone South Africa (Pty) Ltd v Genticuro AG 1977(4)SA 298(A)**)

[34] In my view, the use of the words "any ceremony" as indicated in the order could never have been intended to mean that ceremonies that have nothing to do with the coronation of the 1st respondent, such as the examples referred above, were also prohibited by the order. Such an interpretation will be absurd. I therefore interpret the order, paragraph 2.4 thereof to be concerned with restraining the respondents from hosting any ceremony wherein the 1st respondent is coronated as Inkosi/ Senior Traditional Leader or addressing any gathering where he introduces himself as such. As alluded earlier the 1st respondent admits the hosting of a ceremony a day after the order. However, the ceremony was not for his installation but for another purpose. In support of this contention is Annexure E which shows the program of the ceremony held. Notably the purpose of the program is indicated as **Robing Prince J N Sabona with Royal Blanket**". There are two items which are conspicuously absent from the program. The first item is the mention of robing the 1st respondent with a skin of a leopard and his coronation as Inkosi. The second item that is missing is reference to the appeasement of ancestors as contended by the 1st respondent. Nevertheless, the 1st respondent is adamant that he never advertised on social media his coronation or installation as Inkosi nor does he bear any knowledge of the WhatsApp posts.

[35] What is glaringly lacking in the applicant's case is evidence that the first respondent was first recognized by way of a certificate by the necessary authorities as Inkosi. an event that precedes his installation or coronation. In the absence thereof, the allegation that the event of 16 September was an installation of the 1st respondent is not supported by the necessary evidence. Therefor, it is apparent that there is a dispute on whether the event of 16 September 2022 was a coronation /installation

of 1st respondent as Inkosi or whether it was a traditional ceremony of the Mtweni Royal Family.

[36] In dealing with disputes of fact in motion proceedings, Conradie J in **Cullen v Haupt**¹⁵ said: “I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard is, of course, **Room Hire CO (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162**, where Murray ADJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, particularly when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop”. The next of better known case on this topic is that of **Conradie v Kleingeld 1950 (2) SA 594 (O) at 597**. Where Hurwitz J said that “a petition may be refused where the applicant at the commencement of the application should have realized that a serious dispute of fact would develop”.

[37] My view in this matter is that the applicant has not succeeded to show convincingly that the 1st and 2nd respondents disobeyed the order of the court. Thus, on this ground alone the allegations for contempt of court cannot be sustained and as a result the application cannot succeed

[38] In view of my findings above, I do not find it necessary to deal with the appealability of the court order or its force and affect pursuant the application for leave to appeal. Nor do I find it necessary to deal with the urgency or absence thereof in bringing the application by the applicant. Consequently, I find that the applicant ought to be dismissed with costs. I was invited by the respondents to order costs against the applicant on a prunitive scale, ostensibly on the grounds that the application is vexatious and lis pendens. I decline the invitation and instead, it is my view that an order of costs on a party and party scale will be appropriate in the circumstances.

¹⁵ 1988 (4) SA 39 (C) at p 40 F-H

[39] I therefore make the following order:

1. The application is dismissed with costs on a party and party scale.
- 2.

M.V NQUMSE
JUDGE OF THE HIGH COURT (ACTING)

APPEARANCE:

Mr. NONKONYANE	:	COUNSEL OF THE APPLICANT
Mr. NOMLALA	:	ATTORNEY FOR RESPONDENTS

DATE OF HEARD	:	04 OCTOBER 2022
DATE OF DELIVERY	:	08 DECEMBER 2022