IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO's: 4858/2017 & 4700/2017

In the matter between:

ABSA BANK LIMITED	APPLICANT
AND	
REFORMED PRESBYTERIAN CHURCH IN SOUTHERN AFRICA	1ST RESPONDENT
PANGWA ATTORNEYS	2ND RESPONDENT

JUDGMENT

DAWOOD, J:

1. The facts and law pertaining to both case numbers 4700/2017 and 4858/2017 are such that it is convenient to detail with both matters contemporaneously in this judgment.

2. Case number **4700/2017** is:

    a) An application brought by Pangwa Attorney's against the Reformed Presbyterian Church in Southern Africa (herein after referred to as the Church) and ABSA Bank for the freezing of two of the Church's accounts held at the bank.

    b) In this application Pangwa Attorneys only sought costs in the event of the application being opposed.

    c) An interim order was granted to freeze the aforesaid accounts.
    d) The Bank accordingly froze the Church's accounts in terms of the court's order which appears to have initially been served informally by an individual and the formal service via the Sheriff only followed on the 12th October 2017. The bank froze the account from the date of the informal service.
    e) The Church initially brought a separate application against the bank for the unfreezing of the accounts, under case numbers 4858/2017.
    f) The Church thereafter brought an application for the re-consideration of the order granted herein and in the reconsideration application costs was sought against the Bank.
    g) The matter was eventually heard on the 8th November 2017 and the following order was made:

        "
        i) The reconsideration application is granted with costs.
        ii) The rule nisi discharged and set aside.
        iii) The main application is hereby withdrawn with no order as to costs."

    h) This matter had come before Jolwana J and a Mr Matanda was erroneously reflected as having appeared for both respondents' whereas it is common cause that he was only representing Pangwa Attorneys.

i) The very nature of a reconsideration application is that it reconsiders the granting of an order in favour of one party as against another party or other parties, in this case being the order granted by the court in favour of Pangwa Attorneys against the church and against the bank.

j) Even on a consideration of the nature of the relief sought therein it would have been that the order that was granted in Pangwa's favour against both Respondents that had to be set aside on reconsideration and was indeed set aside. It was not an order that was sought by the Bank but one that was granted against the Bank requiring it to freeze the account. It was simply a party that was obliged to comply with the court order. The cost order accordingly ought to have been sought against Pangwa in the circumstances.

k) The order was silent with regard to against which respondents or parties costs were granted. It merely states *"the reconsideration application is granted with costs."*

l) There was further an error in that Mr Matenda was reflected as appearing for both the Respondents and despite the order not saying so it would appear that the draft was handed up by consent creating the impression that both Respondents had consented to the same.

m) This clearly was an error as it is readily conceded by Mr Zono that the Bank was not represented and the order was not consented to by it.

3. In case number **4858/2017**:

a) The Church had instituted the application against ABSA Bank and Pangwa attorneys had intervened as second respondent and opposed, the application.
b) The Church had sought an order declaring the freezing of the accounts unlawful and an order for the immediate unfreezing of the account.

c) They further sought an order that the respondent (being ABSA Bank at that time) pay costs of the application only in the event of it opposing the application.

d) It is common cause that the Bank did **not** oppose the application and accordingly the Applicant was **not** entitled to any costs order against it.

e) However on the 9 November 2017 the following order was taken **by consent** before Notununu AJ:

> *(i)* *The First Respondent is directed to forthwith unfreeze applicant's accounts held under case numbers 9127508403 and 9170069874.*
>
> *(ii)* *The Respondents' are ordered to pay costs of the application."*

f) Mr Matanda was erroneously reflected as appearing for both the Respondents whereas it is common cause that he only acted for Pangwa Attorneys and not the Bank.

g) It is accordingly common cause that there was no appearance for the Bank and indeed no opposition by the Bank and no consent to the orders sought against the Bank.

h) The order granted in any event was erroneous in that the applicant could not have sought a costs order against the Bank in circumstances where its entitlement to costs against the Bank was dependant on the Bank opposing the relief.

i) There was no opposition by the Bank and indeed no appearance.

j) This costs order against the Bank was clearly wrongly sought and wrongly granted in the circumstances and falls to be set aside or varied to reflect costs against the party that had consented thereto being Pangwa Attorneys.

4. The issues raised in this matter are the same in respect of both applications.
5. I do not intend to delve into the issue of urgency as the court granting the interim order clearly found that there was urgency.
6. I am in any event satisfied that urgency was established particularly having regard to the contents of the letter dated 4th April 2018 wherein it is stated *inter alia*:

"In view of the fact that we have neither application nor court order in our possession stopping it from executing, we are instructing the sheriff to urgently attach and remove your client's assets."

7. The first respondent's Practice Note, in terms of rule 15*A* stated that the issues for determination were:

   (i) Whether or not the proceedings have been duly or properly authorised regard being had to the fact that the applicant is a juristic person.

   (ii) Whether or not reconsideration application is justified in circumstances where the order was granted not on an urgent basis – rule 6 (12) *(c)*

   (iii) Whether or not the **acquiescence** to the execution of the court order or delay in bringing these proceedings amounted to the acquiescence to the granting of the order.

   (iv) Whether or not the applicant's cause of action is founded on the rules, or common law and whether requirements of the dispensation had been met by the applicant.

8. I shall briefly deal with the relevant issues raised by the first respondent as it raises points *in limine* that needs to be disposed of prior to dealing with the merits.

(A) **Authority**.

a) The first respondent raised a point in *limine* that the deponent to the applicant's affidavit has failed to allege that he is duly authorised to launch the application and instead has merely alleged, *"I am duly authorised to depose* hereto."

b) Mr Zono stated that this was pertinently challenged in the answering affidavit using the following words:
"There proceedings are not authorised".

c) Mr Zono accordingly alleged that the application falls to be dismissed as there is no evidence that the deponent was duly authorised despite this being specifically challenged in the answering affidavit.

d) Mr Zono referred to the case of ***Ganes and Another v Telecom Namibia Ltd***.[1] at paragraph 19 as support for his proposition:

> *"There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit.*
> *In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit.* ***The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised****. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, [****r]ule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant****.*
> *The appellants did not avail themselves of the procedure so provided. (See Eskom v Soweto City Council 1992 (2) SA 703(W) at 705C-J.)"*
> *(My Emphasis)*

e) He further referred to the full bench decision in this Division in the matter of ***Reformed Presbyterian Church in Southern Africa v Minister of Police and Two Others***[2]. However, in that case it is noted that was contended by the respondent was that the Church has so disintegrated that there are groupings who all claimed to have authority over it. *"Since the deponent has not attached any constitution of the church, the court has not been put in a proper*

[1] 2004 (3) SA 615 (SCA)
[2] (ECM) unreported case number CA 77/2017 of 13 February 2018.

position to know as to who has authority to institute the proceedings on behalf of the church or whether there was any resolution by the church to institute these proceedings[3]*."* (See paragraph 12).

f) The court accordingly having regard to the facts of that case found at paragraph 17:

> *"Consequently there is no need for the deponent to be authorised to depose to an affidavit in motion proceedings.*
> *However, the institution thereof must be authorised by the legal entity purporting to sue. The deponent in casu does not appear to have been authorised by the Applicant."*

g) There were further basis upon which the application was dismissed.

h) In that case it could not be said that the attorney was duly authorised to institute the application proceedings as it was not known as to which faction of the church was actually entitled to institute proceedings on behalf of the church in light of the in-fighting and disputes. It was in the context of that factual background that that finding was made by the full bench in this Division with regard to the issue of authority.

i) There are various cases dealing with the issue of authority. I shall simply highlight a few relevant ones for purposes of determining the issue in casu.

(i) In *Eskom v Soweto City Council* [4] the court held:

> *"The care displayed in the past about proof of authority to bring legal proceedings appeared to have been inspired by the fear that a person might deny that he was a party to the litigation carried on in his name. The later view, reflected in Rule 7(1) of the Uniform Rules of Court, is that,* ***if the attorney concerned is authorised to bring an application on behalf of the applicant,*** *the* ***application necessarily is that of the applicant. There is no need for any other person, whether (s)he is a witness or someone who becomes involved especially in the context of authority, to be additionally authorised. It is thus sufficient to know whether or not the attorney acts with authority.*** *Apart from more informal requests or*

[3] Ibid para 12
[4] 1992 (2) SA 703 (W) at pp 703-4

enquiries, Rule 7(1) provides the machinery for challenging an attorney's authority to act. ***Use should not be made of heads of argument, textual analysis and submissions about the adequacy of the words used by a deponent about his own authority.***

In casu, where an interlocutory application had been delivered under the name and signature of the respondent's (a local authority) attorney, the Court held that, ***if the attorney had been authorised to bring the application on the respondent's behalf, then the application was that of the respondent, irrespective of whether the deponent to the supporting affidavit had also been authorised 'to bring this application'****. The Court held, further, that the deponent's evidence could not be ignored because he had not been* ***'authorised': if the attorney had authority to act on the respondent's behalf, then the attorney was entitled to use any witness who, in his opinion, would advance the respondent's case - a witness may testify even if (s)he has no authority to bring, withdraw or otherwise deal with the application itself."(My Emphasis)***

(ii) In ***Unlawful Occupiers of the School Site v City of Johannesburg***[5] **it was held that**:

"[11] The three grounds raised in the notice of appeal were all of a technical or procedural nature, namely that:

(a) The municipality had failed to prove that the deponent to its founding affidavit, Mr B M Lefatola, had the requisite authority to institute the application on its behalf.

(b) …

(c) …

4At the hearing of the appeal, counsel for the appellants conceded that she could not support this ground of appeal. I think the concession was fairly made. ***The issue raised had been decided conclusively in the judgment of Flemming DJP in Eskom v Soweto City Council*** *1992 (2) SA 703 (W), which was referred to with approval by this Court in Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624I-625A. The import of the judgment in Eskom is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in [r]ule 7(1)of the Uniform Rules of Court. The ratio decidendi appears from the following dicta (at 705D-H):*

[5] 2005 (4) SA 199 (SCA); (036/2004) [2005] ZASCA 7; [2005] 2 All SA 108 (SCA) (17 March 2005) at paragraphs 11 (a), 14, 15 and 16.

'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 I would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. …

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 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).'
And (at 706B-D):

> 'If **then applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment.** Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and **make submissions about the adequacy of the words used by a deponent about his own authority.'**

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*'If **the applicant had qualms about whether the "interlocutory application" is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment.** Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and **make submissions about the adequacy of the words used by a deponent about his own authority.'***

*These remarks by Flemming DJP must be understood against the background that [r]ule 7(1) in its present form was only introduced by way of an amendment only in 1987. **Prior to the amendment an attorney was obliged to file** a power of attorney whenever a summons was issued in an action, **but not in motion proceedings**. The underlying reason for the distinction, so it was said, was that **in motion proceedings there is always an affidavit signed by the applicant personally or by someone whose authority appears from the papers** (see eg Ex Parte De Villiers 1973 (2) SA 396 (NC)). On the basis of this reasoning it is **readily understandable why, before 1987**, the **challenge to authority could only be directed only at the adequacy of the averments in the applicant's papers and pre-1987 decisions regarding proof of authority should be read in that light**.*

*However, as Flemming DJP has said, now that the new [r]ule 7(1)remedy is available, **a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority.** This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is **rarely any motivation for deliberately launching an unauthorised application**. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: **Is it conceivable that an application of this***

magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? *That question can, in my view, be answered only in the negative." (My emphasis.)*

j) In ***North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme***[6] **it was held**:

[5] Turning to the applicant's opposition to the Rule 30 application, rule 7(1) is the procedure a party may follow if it disputes the authority of anyone to act on behalf of a party. In the event of such a challenge the person may no longer act unless he satisfies the court that he is authorised to act. ***Case law confirms that rule 7 is the prescribed procedure for challenging the authority of a party to act****. In the unanimous decision of this division in ANC Umvoti Council the full bench observed*

> *'that the* ***legislature intended the authority of "anyone" who claimed to be acting on behalf of another in initiating proceedings, and not only attorneys, to be dealt with under rule 7(1)*** *. . .'*

[6] I agree with the ***full bench that rule 7(1) requires a broad interpretation having regard to the purpose of the rule****. The purpose of the rule is, on the one hand, to avoid cluttering the pleadings unnecessarily with resolutions and powers of attorneys. On the other hand,* ***it provides a safeguard to prevent a person who is cited from repudiating the process and denying his or her authority for issuing the process.*** *Rule 7 can be invoked anytime before judgment. It is a practical rule which mostly turns out to be compliance with a procedural formality. In this case it is not merely a procedural formality. It impacts substantively on the pockets of all the members of the Body Corporate, including the opposition Northglobal.*

…

[8] Rule 7(1) requires the court to be satisfied that the party whose authority is disputed is authorised to act. In this case Northglobal has disputed the competence of two Trustees namely, Mr and Mrs Ashworth, to represent the Body Corporate. I appointed an Administrator for the Governing Body because I found that the Trustees, in particular the Ashworths, were unsuitable to represent the Body Corporate. Consequently, ***I need to be satisfied that the attorneys are properly authorised to act on behalf of the applicants and that the latter are properly mandated to represent and bind the members to the consequences of this***

[6] (KZD) unreported case no 12465/2011 of 17 August 2012 at paras 5, 6, 8, 9 and 16.

> ***application. Therefore properly mandated powers of attorney are required in this application for leave to appeal.***
>
> *[9] Any party to* ***legal proceedings bears the onus of proving that its legal representative is properly authorised and that it has the authority to instruct its legal representatives.*** *In this case meeting this onus is not accomplished by simply filing powers of attorney and resolutions on behalf of the applicants. The applicants have to comply with a substantive requirement of the Body Corporate Rules namely, that in instructing legal representatives, they will not exceed their mandate by incurring costs in excess of R50 000.00.*
>
> *…*
>
> *[15] As to the remedy,* ***rule 7 challenge would usually result in the hearing of an application being postponed****. However, Northglobal gave the applicants notice to prove their authority by way of delivering a power of attorney supported by a resolution by the members. Rule 30 prescribes that an application to set aside an irregular step may be made only if an applicant has by written notice afforded its opponent an opportunity to remove the cause of complaint within 10 days and thereafter delivers an application after the expiry of those 10 days. The notice in terms of rule 7(1) was delivered about 9 March 2012 and the application in terms of rule 30(2)(b) was filed on 12 March 2012. The application in terms of rule 30(2)(c) was filed on 19 April 2012. It is not the applicants' case that they did not have an opportunity to the remove the cause of complaint. It is simply that there is no basis for a complaint." (My Emphasis)*

k) It is evident from the aforegoing authorities as conclusively determined the Supreme Court of Appeal that it is no longer a requirement for a deponent to state that he is duly authorised to institute the proceedings and that the procedure to challenge authority is the one set out in rule 7.

l) In this matter the first respondent did not utilise the procedure set out in rule 7 to challenge the authority.

m) There is furthermore no challenge with regard to the authority of the attorney as was conceded by the first respondent in argument.

n) It is accordingly taken that the attorneys were duly authorised to institute the application proceedings.

o) This has been held in the cases cited above to be sufficient to satisfy the requirement of authority and there was no necessity for the deponent to additionally satisfy that requirement.

p) The first respondent's point in *limine* in respect of lack of authority is accordingly dismissed.

q) I shall deal with the issue of costs at the end of the application.

(B) Acquiescence/Peremption to the grant of the order.

(i) The first respondent has alleged that the fact that the applicant participated in the taxation process and thereafter requested the first respondent's attorneys banking details for purposes of paying the costs meant that the bank had acquiesced to the payment of costs as set out in the court order.

(ii) The Bank as correctly stated by the first respondent had willingly participated in the taxation of the relevant bills of costs orders and had expressed a willingness to satisfy the cost order.

(iii) The issue is whether this amounts to acquiescence or peremption in terms of the law.

(iv) Mr Hobbs sited the authorities that deal with peremption and the legal requirement thereof:

(v) In of Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others[7] at paragraph 10 Cameron JA states as follows:

"Peremption of the right to challenge a judicial decision occurs when the ***losing litigant acquiesces in an adverse judgment****. But before this can happen, the Court must be satisfied that the* ***loser has acquiesced unequivocally in the judgment.*** *The losing party's conduct* ***must 'point indutably and necessarily to the conclusion that he does not intend to attack the judgment'****: so the conduct relied on* ***must be 'unequivocal and must be inconsistent with any intention to appeal'*** *(Dabner v South African Railways and Harbours 1920 AD 583 at 594, per Innes CJ)."*

(vi) The party claiming **peremption bears the onus of showing conduct on the part of the other party which points indubitably and necessarily to the conclusion that is inconsistent with an intention to attack the judgment of the Court below**. [See: Natal Rugby Union v Gould 1999 (1) SA 432 (SCA)].

[7] *2007 (6) SA 511 (SCA)*

(vii) Mr Hobbs argued that as far back as **21 December 2017 ABSA's attorneys wrote to those of the Church recording the reservation as to ABSA's liability for costs in the matters.** It is so that thereafter ABSA **made overtures** towards settlement of the relevant cost orders but ABSA contends **that it did so acting on the belief that it was under a legal obligation to do so as the costs orders had not been set aside**. He submitted that the obligation to pay remained in the face of **the relevant cost orders and that ABSA's belief was well-grounded**.

(viii) He further argued that on 28 March 2018 ABSA's attorneys dispatched a letter to those of the church, from this letter it is **quite clear that ABSA had taken full stock of the situation in which it found itself and was intent on resisting payment.**

(ix) Mr Hobbs accordingly argued that the Church had **failed to discharge the onus of showing conduct** on the **part of ABSA which points indubitably and necessarily to the conclusion that is inconsistent with an intention to attack the costs orders.**

(x) There was no unequivocal acceptance of liability by the Bank but rather an equivocal one, that was conveyed to the first respondent as pointed out on the 21st of December 2017.

(xi) It is evident however that the Bank did create an impression that they would pay. This did not amount to legal concepts of peremption/acquiescence as alleged by the first respondent, but clearly was a factor that influenced the stance that was taken by the first respondent in opposing this application and will have a bearing on the issue of costs.

(xii) The Bank's conduct did not point indutiably to the conclusion that it does not intend to attack the judgment but rather a reservation of rights and a protection of rights until they had all the facts if it was found that they were indeed liable.

(xiii) The first respondent has failed to prove peremption on the part of the Bank.

(xiv) The Bank is accordingly not precluded from pursuing this application as it has no acquiesced to the costs.

(xv) This point by the first respondent also fails.

(C) **Rule 6 (12) challenge and whether the application is founded on the Rules of court or common law and whether it has satisfied the requirements**.

(i) The first respondent alleges that the applications for reconsiderations are not justified in circumstances where the order was not granted on an urgent basis and does not fall under rule 6 (12) *(c).*

(ii) Rule 6 (12) *(c)* reads as follows:

"A person against whom an order was granted ***in his absence*** *in an* ***urgent application*** *may by notice set down the matter for reconsideration of the order."*

(iii) It is clear that these main applications were both brought on an urgent basis the fact that the orders were granted a few days later does not detract from the urgent nature and hearing of the matter. These applications fell within the ambit of the definition of an urgent application and it was orders granted in the absence of the applicant in any event.

(iv) The applicant has relied on various basis for its relief in the alternative and has not based it exclusively on rule 6 (12).

(v) The applicant in fact in its rule 15 *A* notice have stated that the nature of the dispute is the reconsideration of costs order granted against the Applicant alternatively a variation of the costs order granted by the court alternatively that the costs order be rescinded.

(vi) The Bank further argued at paragraph 10 of his heads that the costs was erroneously sought and/or granted as contemplated under Uniform Rule 42 (1) *(a)* or *(c)* and falls to be varied to reflect that only Pangwa is liable for those costs, in respect of 4700/2017.

(vii) The Bank has with sufficient clarity indicated the basis upon which it seeks relief. The arguments contrary to this by the First Respondent are accordingly without merit.

(viii) The order in respect of case number 4858/2017 reflects that:

a) It was by consent; and

b) That Mr Matanda represented both respondents.

(ix) This was most certainly on all the parties version not the correct position as the Bank did not consent to the order and nor did Mr Matanda represent the Bank. The bank was not represented and the order was taken in its absence.

(x) With regard to case number: 4858/2017 it is further evident that that order should not have been requested by the applicant, as against the Bank, since it as already stated did not oppose the application and that was the only basis upon which even an obligation to pay costs would have arisen. The first respondent would be disingenuous to suggest otherwise and this order most certainly should be reconsidered and thereafter varied.

12. This order needs to be varied to hold only Pangwa, the party that opposed it, liable to pay the costs.

13. Once the costs order is varied there would be no need to stay execution of the warrant as there will be no costs order against the applicant and the costs order against Pangwa appears to have been resolved between him and the First Respondent. He has not opposed this application and had consented to the order.

14. No purpose will be served in determining whether the applicant had specifically set out which rule it was relying upon for the grant of its relief in its papers. There was sufficient particularity furnished for its entitlement to the relief sought.

15. With regard to case number 4700/2017 the Bank has correctly argued that the order falls to be rescinded or varied as ABSA at no stage acted unlawfully and indeed acted in accordance with the court order under case number: 4700/2017 dated 6th October 2017.

16. The court order was served by the Sheriff on the 12th October 2017 whereas the application for reconsideration was launched subsequent thereto.

17. Mr Hobbs correctly argued that at the relevant time when the application was lodged the bank was obliged to obey the court order and thus was not acting unlawfully.
18. There are instances where even contempt of court orders are granted where it is established that a person or entity had knowledge of the order but failed to comply with the same, even where there was no personal service or formal service via the Sheriff.
19. The bank here was informally served with a copy of the order on the 6th of October and accordingly had knowledge of the same from that date and was obliged to act in accordance with that order.
20. It cannot be said that because this was not formal service in terms of the rules that they could disregard an order that was properly granted by the court.
21. The Bank's conduct in obeying the court order most certainly by any stretch of the imagination cannot be said to be unlawful in the circumstances.
22. They only froze the account when they received the court order ordering them to do so, not prior thereto.
23. The bank was well aware of the application for reconsideration by the First Respondent and that the relief sought included a costs order against it.
24. Mr Hobbs argued that the bank's default in the reconsideration application is explained by its bona fide – yet misguided belief that the facts did not justify a costs order being granted against it and accordingly did not enter the fray.
25. The Bank did have a *bona fide* defence in that it was acting in accordance with tenor of the court order and not acting unlawfully.
26. I accept that that is the case and any court hearing the matter would accept the defence as being a valid one and would not in the circumstances have granted a costs order against the Bank.
27. The Bank certainly ought to have entered the fray but having regard to their defence it clearly is a good one and warrants the setting aside of the costs order made against it.
28. There clearly is a sufficient case made out for a rescission.

29. However it will be an extremely costly and unnecessary path to embark upon to set aside the order and remit it for the applicant to oppose the order of costs, file papers and have the issue of costs argued.
30. The order in any event states that the reconsideration application is granted with costs without stating against whom.
31. Pangwa has in fact accepted liability for these costs and accordingly no prejudice will be suffered by the first respondent if the order was varied at this stage to reflect this. The first respondent costs would be paid, whether it be by set off or an actual payment.
32. The most appropriate and expedient route in the interest and of all the parties would be to vary the order here and now and hold Pangwa Attorneys solely liable for the costs.
33. No prejudice will be suffered by Pangwa as he himself had accepted sole responsibility for the taxed costs in the main application which costs would be set off against monies owed by the church to Pangwa Attorneys.
34. There would also be no prejudice suffered by the Church as its costs have been or will be paid by Pangwa in circumstances where they would not in any event be entitled to payment of the same costs twice which is the practical result if the fees are set off and the same fees are claimed from the Bank.
35. I am accordingly in the circumstances disposed to reconsidering and varying the order granted under case number 4700/2017.
36. The Bank is:
    a) Seeking an indulgence from this court and did act at its peril particularly in 4700/2017 where costs were sought against it by not entering the fray, whatever its justification therefore was, it ought to have been present to protect its interest and not assume that no order would be granted against it in its absence.
    b) Delayed in launching this application.
    c) Made overtures to the church which created the impression that they would pay the costs that might well have created the impression that they accepted liability thereof as set out in the court order; rightly or wrongly and that accordingly that there was some

justification in the first respondent opposing this application believing, albeit erroneously that there was acquiescence by the Bank and despite the fact that it did not pass muster on the requirements of peremption.

d) I accordingly for these reasons despite finding in favour of the applicant am disposed to making no order as to costs in respect of both applications.

37. The following order is accordingly made:

ORDER:

(i) That the costs orders in respect of both case numbers **4700/2017 and 4858/2017** are reconsidered and varied to exclude the liability for the payment of costs by the applicant.

(ii) Paragraph 1 of the order granted under case number: **4700/2017** on 8th November 2017 is accordingly varied to read as follows:

"The reconsideration application is granted with the second respondent (Pangwa Attorneys) to pay the costs."

(iii) Paragraph 2 of the order granted under case numbers **4858/2017** on 9 November 2017 is varied to read as follows:

"The second respondent (Pangwa Attorneys) is ordered to pay the costs of this application."

(iv) Each party to pay their own costs.

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F. B. A. DAWOOD

JUDGE OF THE HIGH COURT

DATE HEARD: 25 OCTOBER 2018

DATE HANDED DOWN:	07 FEB 2019
FOR THE APPLICANT:	MR HOBBS
APPLICANTS ATTORNEYS:	J.A. LE ROUX ATTORNEYS 56 LEEDS ROAD MTHATHA 047 531 4223 REF: J.A. LE ROUX/Gloria/MM0452
FOR THE FIRST RESPONDENT:	MR ZONO
FIRST RESPONDENTS ATTORNEY:	A.S. ZONO & ASS SUITE 153, FIRST FLOOR ECDC BUILDING MTHATHA
FOR THE SECOND RESPONDENT:	MR PANGWA
SECOND RESPONDENTS ATTORNEYS:	MANTYI ATT 1ST FLOOR CLUBLINK BUILDING

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MTHATHA