

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

CASE NO. 468/2013

Date heard: 24 October 2017

Date delivered: 23 January 2018

In the matter between:

**THE MASTER OF THE HIGH COURT,
EASTERN CAPE DIVISION, MTHATHA**

Applicant

and

BUBELE LINYANA N.O.

First Respondent

LINYANA AND SOMACALA INC

Second Respondent

JUDGMENT

LAING AJ:

[1.] The Applicant has brought an application for an order in terms of which the First Respondent be held to be in contempt of two previous orders, brought under the same case number. In addition, the Applicant has applied for the First Respondent to be committed to imprisonment for a total sum of 12 months, that the matter be referred to the Law Society of South Africa for consideration, and associated relief.

[2.] On 6 March 2008, the Applicant granted letters of executorship to the First Respondent in respect of the estate of the late Mr Thanduxolo Ngqobe. After some delay and several requests, the First Respondent furnished the Applicant with a first and final liquidation and distribution account. The Applicant was not satisfied with the account and issued a query sheet, listing all the shortcomings thereof. The matter lay dormant for a considerable period of time, despite the Applicant's sending a number of reminders. On 7 November 2011, the First Respondent submitted a further account to the Applicant, but replete with the same shortcomings as the previous document. In the meanwhile, the family of the late Mr Ngqobe had become increasingly concerned about the lack of progress and conveyed this to the Applicant.

[3.] Consequently, the Applicant instructed the State Attorney to take steps against the First Respondent. This decision culminated in the Applicant's obtaining an order against the First Respondent on 27 June 2013 to the effect that the account submitted on 7 November 2011 was declared to be non-compliant with the provisions of the Administration of Estates Act 66 of 1965. Furthermore, the order directed the First Respondent to ensure compliance within a period of 14 days of service thereof and granted leave to the Applicant to approach the court on the same papers for an order to remove the First Respondent from the position of executor and to recover any losses suffered. It is alleged that the order was served on the First Respondent on 4 October 2013.

[4.] The First Respondent failed to comply with the order. The Applicant returned to court and obtained a further order on 6 March 2014, removing the First Respondent as executor and directing him to return the letters of executorship and to provide a statement of account in respect of all transactions conducted in relation to the estate within a period of 14 days of service of the order. The order was allegedly served on the First Respondent on 17 March 2014.

[5.] The First Respondent failed to comply with that order, too. As a result, the Applicant has brought the present application.

[6.] Both the First and the Second Respondents have opposed the application. The First Respondent concedes that there were some shortcomings in the first and final liquidation and distribution account. However, he avers that he was not aware of any proceedings brought against him by the State Attorney. He disputes that he ever accepted personal service of the order, 27 June 2013. The First Respondent draws attention to the sheriff's return of service,

attached to the papers as 'SJ2', and points out that it records service of the order upon a certain Thandile but lacks an indication that anyone actually accepted service of the order on his behalf. The return carries no signature and no office stamp.

[7.] Similarly, the First Respondent disputes that he ever accepted personal service of the order, 6 March 2014. The sheriff's return of service, attached to the papers as 'SJ3', indicates that the order was served on a certain Malibongwe. However, like the earlier order, the later one is unsigned and has no office stamp.

[8.] Accordingly, the First Respondent denies that the orders were ever served on him. He had been unaware of them. He states that if he had been aware of the orders then he would have given them his attention.¹

[9.] The First Respondent's contentions are supported by the affidavit of a Mr Thandile Vokwana, who does not dispute that he was the person who accepted service of the first order. Nevertheless, he states that he would normally have signed the document itself, recorded the date, and then placed it on a particular filing cabinet for the attention of the First Respondent. In an urgent matter, he would have phoned the First Respondent directly who would have arranged for the collection of the document from the Second Respondent's Mthatha office and its delivery to the Flagstaff office, which is where the First Respondent operates. If the sheriff ever pointed out the urgency of a matter to Mr Vokwana, then he would mark the document as extremely urgent and stipulate the date upon which it was received. He cannot recall whether the sheriff ever explained that the matter in question was urgent.

[10.] A Mr Malibongwe Mfokazi also deposed to an affidavit in support of the First Respondent's case. He neither admits nor denies that he accepted service of the second order. If the matter was urgent, as explained to him by the sheriff, then he would have indicated as much on a piece of paper and attached this to the document. He would have phoned the Second Respondent's main office to arrange for collection. Moreover, in the event that Mr Mfokazi had indeed received the document, he would have signed and dated it.

[11.] The issue to be determined is straight-forward: whether the First Respondent was ever aware of the orders and the contents thereof. Only in the event that this was so would it be

¹ The First Respondent goes so far as to allege that 'I was genuinely unaware of their existence and service upon me and I have always been acting in good faith in this regard.' See p 42 of the record.

necessary to decide whether the Applicant has met the remaining requirements for a contempt of court -application.

[12.] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court other than a money judgment.² To elaborate, the requirements for contempt are: (a.) the order; (b.) service or notice; (c.) non-compliance; and (d.) wilfulness and *mala fides*. It is necessary for an applicant to demonstrate the existence of such requirements beyond reasonable doubt.³ Once the applicant has proved the order, service or notice, and non-compliance, the respondent carries an evidentiary burden with regard to wilfulness and *mala fides*. If the respondent fails to provide evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, then the requirements for contempt will have been met.⁴

[13.] In the present matter, the First Respondent has pleaded that there was no personal service of the orders. Accordingly, he had not been made aware of them. Knowledge of the orders has long been recognised in South African law as a fundamental prerequisite for a contempt application.⁵ Importantly, the lack of actual service of the order directly on the respondent is not fatal to the applicant's case, provided that the applicant can demonstrate that the respondent knew about the order.⁶

[14.] Here, the Applicant has alleged that the sheriff served both orders on the First Respondent, as demonstrated by the returns of service attached to the papers as 'SJ2' and 'SJ3', respectively. The First Respondent points out, however, that the returns of service do not, *ex facie*, show that the sheriff effected personal service. The affidavits of Mr Vokwana and Mr Mfokazi do not dispute that they may have accepted service on behalf of the First Respondent but neither can take the matter much further. They aver that they would usually have signed and dated the orders and followed the usual procedures to arrange for collection

² See Harms DR 'Civil Procedure: Superior Courts' in *LAWSA* (Volume 4, third edition) para 19.

³ See *Fakie NO v CCII Systems (Pty) Ltd* [2006] JOL 17080 (SCA), at [42].

⁴ *Ibid.* See, too, *Tasima (Pty) Ltd v Department of Transport and Others* [2016] 1 All SA 465 (SCA), at [18].

⁵ See *Godefroy v The State* (1890) 3 SAR 113. The principle that prior knowledge of the order is required has been followed consistently in the case law that has followed. See *Eaton, Robins & Co v Voges* (1909) 19 CTR 140, *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 (2) SA 517 (C), and most recently *Fakie NO* [2006] (n 3 above).

⁶ See *Botha v Dreyer* (1880) 1 EDC 74, *Frank v Van Zyl* 1957 (2) SA 207 (C), *Consolidated Fish Distributors* 1968 (n 5 above), and *Townsend-Turner v Morrow* 2004 (2) SA 32 (C).

so that the orders could be taken to the Second Respondent's main office for further attention. Interestingly, each order bears the signature of either Mr Vokwana or Mr Mfokazi; both orders bear date stamps. Quite why these particular orders never reached the attention of the First Respondent remains a mystery.

[15.] Generally, in proceedings on notice of motion, where disputes of fact have arisen in the affidavits, a final order may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.⁷ As this matter stands, the Applicant has not made any express averment to the effect that the First Respondent knew about the orders. Rather, the Applicant has relied on the sheriff's service of the orders on staff employed or acting as agents for the Second Respondent to draw the inference that the orders would consequently have come to the knowledge of the First Respondent. In response, the First Respondent explains what would usually have happened upon receipt of the orders but is adamant that he remained unaware thereof. He does not admit the inference sought to be drawn by the Applicant.

[16.] It may happen that the respondent's denial of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. To the extent that a court is satisfied with the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he or she seeks.⁸ However, it cannot be said that this situation presents itself in the present matter. The First Respondent's denial of any knowledge of the orders is in direct conflict with the Applicant's inference that the service thereof on Mr Vokwana and Mr Mfokazi would have brought the orders to the attention of the First Respondent, whose non-compliance would give rise to an evidentiary burden in relation to wilfulness and *mala fides*. This creates a dispute of fact, which must be resolved in accordance with the established principles.⁹

⁷ See *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), at 368.

⁸ Ibid.

⁹ In other words, to paraphrase the case law, the court may grant a final order only in the event that those facts averred by the applicant and admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[17.] As it has been observed, there are exceptions to the above. These include the situation where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in merely rejecting them on the papers.¹⁰ As much as the First Respondent's assertions raise serious questions about the management of his practice and the adequacy of the Second Respondent's arrangements in relation to how process is treated, it cannot be denied that matters are sometimes overlooked by staff or simply not accorded the priority that they deserve. Mistakes do occur. Without in any way suggesting that either the First or Second Respondent can be condoned for allowing the situation to have arisen, the operation of more than one office can sometimes lead to misunderstandings between employers and employees. The point to be made is that the First Respondent's denial of any knowledge of the orders is not so far-fetched or clearly untenable as to be rejected out of hand. Whereas his assertions may be tenuous and may test the limits of plausibility, they are nevertheless sufficient to prevent the court from being persuaded that the Applicant has proved that the prerequisites for contempt have been met. The Applicant has not demonstrated, beyond reasonable doubt, that the First Respondent had knowledge of the orders.

[18.] However, the matter cannot be permitted to rest there. The Applicant has sought an order in terms of which not only is the First Respondent held to be in contempt but also that the matter be referred to the Law Society of South Africa for consideration. This deserves closer attention.

[19.] The First Respondent has not attempted to deny that the sheriff served the orders on employees of the Second Respondent. Similarly, neither Mr Vokwana nor Mr Mfokazi has attempted to deny that he accepted service. At best, the employees in question have disclosed an ambivalence towards the matter; they do not dispute service but they cannot recall the circumstances at the time. In light of the signatures and date stamps that appear on both the returns of service and the orders themselves, it must be accepted that the First Respondent cannot but admit that service was carried out on the Second Respondent's employees. If that is so, then for the First Respondent's attention not to have been drawn to the first court order would have been a major shortcoming. For his attention not to have been drawn to the second court order would have been not only an odd coincidence but also an issue that pointed to a significant flaw in the Second Respondent's operational arrangements.

¹⁰ See *Plascon-Evans* [1984] (n 7 above), at 368.

[20.] As a director of the Second Respondent and as an attorney, the First Respondent has certain responsibilities. As a director, he must ensure that the Second Respondent's staff are sufficiently trained or instructed to deal effectively with any process that is served by the sheriff. As an attorney, the First Respondent owes a duty to his clients and the public to ensure that proper legal services are provided; he owes a duty to his colleagues to ensure that the reputation of the profession is upheld; and, by no means least, he owes a duty to the courts to ensure that orders are treated with the respect and compliance that they demand and that the administration of justice is in no way compromised. The service of a court order should have led to an immediate and appropriate response by the First Respondent. This never happened.

[21.] In relation to the subject matter of the first and second orders, the First Respondent appears to concede, grudgingly, that the first and final liquidation and distribution account may have contained shortcomings. However, he professes ignorance with regard to the actual cause of the Applicant's complaint,¹¹ despite the latter's having indicated that the background facts to the application are contained in the record of Case No. 468/2013.¹² There is no explanation for why the First Respondent could not have requested the Applicant to have furnished him with a copy of the above record should he indeed not have been in possession thereof.

[22.] There is no indication that the First Respondent has appealed against the orders that form the subject of the present matter. Of considerable concern is the total absence of any suggestion that the First Respondent still intends to address the findings made and the directions given by the court in terms of the orders in question. If there is insufficient proof of contempt displayed by the First Respondent then there is certainly a troubling air of indifference.

[23.] The proper conduct of attorneys is regulated by the provincial law society with jurisdiction in a matter. To the extent that an attorney fails or refuses to conduct him- or

¹¹ The Second Respondent states 'that there may be some omissions and/or failures in it, such may never have been intended by me at all', at p 36 of the record. He goes on to say 'that there may be some inaccuracies and an inconsistency in the said report does not necessarily mean that it was an indication of lack of care and diligence on my part in dealing with the deceased estate'. Furthermore, he alleges that 'I am still in darkness as to what the actual cause of complaint as such is not stated in this affidavit [sic].' *Op cit*.

¹² See pp 12-13 of the record.

herself properly, various sanctions may be applied.¹³ The Applicant has sought an order in terms of which the matter is referred to the Law Society of South Africa but it would be more appropriate for the matter to be considered by the Cape Law Society in view of the jurisdiction that it enjoys in relation to the First Respondent. His role as executor with regard to the estate of the late Mr Ngqobe and the apparent failure of the Second Respondent's operational arrangements indicate the need for the Cape Law Society to investigate the matter further. The possibility of professional misconduct on the part of the First Respondent cannot be excluded.

[24.] The court in the present matter is not convinced that the Applicant has demonstrated that the requirements for contempt exist. There is no proof, beyond reasonable doubt, that the First Respondent was aware of the orders. Nevertheless, the Applicant has made out a case for the referral of the matter to the relevant law society for consideration.

[25.] Ordinarily, costs follow the event but there may be a departure from this rule where there are good grounds for doing so.¹⁴ Here, save for the referral of the matter to the law society, the Applicant has been unsuccessful. It would not, however, be appropriate for the court to order the Applicant to pay costs. If the First Respondent had conducted himself properly with regard to the administration of the estate of the late Mr Ngqobe and if he had made proper arrangements for his employees to have dealt effectively with the orders that form the subject of this matter, then the application would not have been necessary at all. Moreover, the First Respondent's failure or refusal to disclose any intention to address the findings made or directions given under the orders reveal an unhealthy disdain that should not be rewarded with a favourable costs order. The court is satisfied that there are good grounds upon which to depart from the usual rule.

[26.] In the circumstances, the following order is made:

(a.) the application is dismissed, subject to the sub-paragraphs that follow;

¹³ See, for example, *Incorporated Law Society, Transvaal v Bothma* [1962] 4 All SA 282 (T), where the law society in question brought an application against the respondent for his removal from the roll of attorneys by reason of the gross neglect of his practice.

¹⁴ See the general discussion about costs in Ellis I 'Costs' in *LAWSA* (Volume 3(2), Second Edition Volume), at 392.

(b.)the Registrar is directed to make a copy of the contents of the record in respect of the proceedings under Case No. 468/2013, including the present matter, and to provide same to the Cape Law Society for consideration and further action; and

(c.) there is no order as to costs.

JGA Laing

Acting Judge of the High Court

Appearances:

For the Applicant: Adv Lwazi Kubukeli, instructed by the State Attorney, Broadcast House, 94 Sisson Street, Fort Gale, Mthatha

For the Respondents: Adv Johan Bothma, instructed by Linyana & Somacala Inc, 23 Sprigg Street, Mthatha