

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

CASE NO. 4481/2016

APPEAL CASE NO. CA 47/2018

[Not reportable]

In the matter between:

AYANDA MATISO	First Appellant
LOYISO MDINGI	Second Appellant
MINIYAKHE NKEBE	Third Appellant
MANELI NKEBE	Fourth Appellant
GCOBANI KHOLWANE	Fifth Appellant
SANDI MFEYA	Sixth Appellant
MASIBULELE MANCOTYWA	Seventh Appellant
SIVE MANCOTYWA	Eighth Appellant

and

UNITING PRESBYTERIAN CHURCH IN SOUTHERN AFRICA	Respondent
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JUDGMENT

MBENENGE JP:

[1] On 08 June 2017 the court *a quo*¹ confirmed a *rule nisi* which called upon the respondents (the appellants in the instant appeal) to show cause why an order in the following terms should not be made final:

“[1.1] [That] [t]he respondents and any other person/s acting in concert or in *cahoots* with the respondents under the name of the **Reformed Presbyterian Church in Southern Africa** be and are hereby interdicted and restrained from holding a church service on **11th December 2016** or on any date thereafter at **Ross Mission** or at any of the **28 preaching stations** [belonging] to **Ross Congregation** of the applicant;

[1.2] **That** the respondents and any other person/s acting in concert or in *cahoots* with the respondents under the name of the **Reformed Presbyterian Church in Southern Africa** be and are hereby *interdicted and restrained* from *threatening, harassing, intimidating* and interfering in any way whatsoever with the applicant’s congregants, church officials or followers in their worship or other Church activities in any of the applicant’s properties and its **28 outstations** [belonging] to **Ross Congregation**;

[1.3] **That** the respondents and any other person acting in concert or in *cahoots* with the respondents under the name of the **Reformed Presbyterian Church in Southern Africa** be and are hereby interdicted and restrained from disrupting the church service to be held on **11th December 2016** or on any date thereafter at **Ross Mission** or at any church hall of the **28 preaching stations** belonging to **Ross Congregation** of the applicant.”

[2] The applicant before the court *a quo* had been cited as “*the Uniting Presbyterian Church in Southern Africa, a voluntary association of Presbyteries... [with] perpetual succession*” empowered “*to sue and be sued in its own name*” (the respondent in these appeal proceedings, otherwise referred to as “*the UPCSA*”).

[3] The affidavit in support of the application was deposed to by “*Phindile Nqakwana*” (Rev Nqakwana), who claimed to have been authorised “*to depose to [the] affidavit on [the UPCSA’s] behalf*” in his capacity as “*the Moderator of the Mthatha Presbytry*” of the UPCSA.

[4] It was alleged, in support of the relief sought, that the appellants, all of whom are members of the Reformed Presbyterian Church of Southern Africa (the RPCSA), an entity which did not have any rights to the property which formed the subject of the application, had behaved in a disruptive manner towards the UPCSA and the Ross Mission congregants; had threatened and planned to disrupt services conducted at the

¹ Per Alkema J

Ross Mission Church hall of the UPCSA that was to be conducted on 11 December 2016; a week before that date the appellants and “*their small group*” had forcefully broken the main gate into the church premises, threw it away and broke the door locks with a view to gaining entrance into the church hall. The UPCSA, so it was alleged, had brought the application *qua* owner of the Ross Mission Church building.

[5] The affidavit filed in pursuit of the opposition to the application was deposed to by “*Ayanda Matiso*” (Mr Matiso), cited in the proceedings before the court *a quo* as the first respondent. He identified himself as being “*a member of a church commonly known as Reformed Presbyterian Church in Southern Africa*”, adding that he had been “*authorised by the rest of the respondents² to oppose [the] application on their behalf as well.*”

[6] Besides stating that there had been a non-joinder of the RPCSA, the appellants contended that the application had been predicated on the fallacious basis that the subject property belonged to the respondent, yet it was not “*owned by the respondent,*” but “*by the community*”. He also said:

“Since we have always been in control and possession of our church when we found locks locked and we broke the locks that were put up by a person we did not know and replaced it with ours.”

[7] In its *ex tempore* judgement the court *a quo* traced the long history of the dispute between the former members of the RPCSA and the UPCSA, and became satisfied that the subject property was owned by the UPCSA. In the final analysis the court *a quo* was satisfied that the requisites for the grant of a final interdict had been fulfilled, hence it confirmed the *rule nisi*.

[8] The appellants thereupon sought leave of the court *a quo* to appeal against the order confirming the *rule nisi*. In the notice of application for leave to appeal no contention was raised that Rev Nqakwana lacked the authority to institute the proceedings and to prosecute same on behalf of the UPCSA.

² All of whom were cited in their individual capacities

[9] The matter now serves before this court with the leave of the court *a quo*³, that court having permitted the appellants to amplify the application so as to address a further issue “*relating to the lack of authorisation, by the applicant, to bring the application proceedings*”. The court went on to say:

“Whilst there is reference in the founding affidavit to the authority of the deponent, to depose to the founding affidavit, there is no reference to the authorisation, to bring the proceedings.

This point was raised in the Heads of Argument which were placed before Alkema J but has not received his consideration in the judgment which he gave after hearing argument. In my view this would appear to be another area in which there is a reasonable prospect another court may come to a different conclusion and accordingly that it would be an issue properly raised before a court of appeal.”

[10] At the hearing of the appeal Mr *Zilwa* who, together with Mr *Matanda*, appeared for the respondent, correctly in my view, conceded that the issue of lack or otherwise of Rev Nqakwana’s authority to represent the respondent is one of law, sufficiently covered in the papers and worthy of being considered by this court.⁴ In any event, even if this court had been of the view that in a ground of appeal not covered by the terms of the leave granted there was sufficient merit to warrant the consideration thereof, it would, upon leave therefor having been sought, permit such a ground to be argued.⁵

[11] The issues central to this appeal are two-pronged: first, the authority of Rev Nqakwana to champion the cause of and represent the respondent in the proceedings before the court *a quo* and, second, the correctness or otherwise of the court *a quo*’s finding that the requisites for the grant of a final interdict had been met. These are dealt with *seriatim*.

³ *Per* Brooks J, Alkema J having been no longer available.

⁴ See *Minister of Justice and Correctional Services v Walus* (777/2016) [2017] ZASCA 99; [2017] 4 All SA 1 (SCA); 2017 (2) SACR 473 (SCA) (18 August 2017), where it was held that:

“[23] The duty of an appellate court is to ascertain whether the court *a quo* came to a correct conclusion on the case before it. Its role is generally limited to deciding issues that are raised in the appeal proceedings and it may not, on its own, raise issues which were not raised by the appellant. However, where a point of law is apparent on the papers (even where it has been expressly abandoned) but the common approach of the parties proceeds on a wrong perception of the law, and its consideration on appeal would involve no unfairness to the party against whom it is directed, the court is not only entitled, but is also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise it would be bound to make a decision that is premised on an incorrect application of the law, despite the accepted facts, merely because a party failed to raise the legal point, as a result of an error of law on his part. That would infringe the principle of legality.”

⁵ *S v Sefatsa and Others* 1988 (1) SA 868 (A) at 877 c-f

[12] The contention raised on behalf of the appellants that the respondent had not established the requisite *locus standi* has no merit.

[13] It is trite law that in motion proceedings any person who can attest positively to the facts is entitled to depose to an affidavit, whether it is the founding or any ancillary affidavit, and no specific authority therefor is required.⁶

[14] A line should be drawn between authorisation to launch and prosecute proceedings on behalf of a juristic person and the authority to depose to an affidavit in support of the relief sought in the relevant proceedings. The notice of motion commencing the proceedings points to the attorney mandated to represent the applicant in the proceedings as does the notice to oppose in the case of any person or entity opposing the proceedings. Should the adversary wish to challenge the authority of the attorney to launch (and prosecute) the proceedings on behalf of the juristic person, rule 7 of the Uniform Rules must be resorted to.

[15] In *Eskom v Soweto City Council*⁷, Flemming DJP crystalized this issue in the following apt terms:

“It was argued that the respondent's claim that the matter be referred to arbitration depends upon a litigious step (the present interlocutory application) taken by the deponent, Rossouw, whose authority to institute the legal proceedings is not proved. Rossouw states that he was duly authorised '*to make this affidavit*'. Counsel argued that that is different from authority '*to bring this application*'. Furthermore, there is no resolution in proof of his authority.

I find the regularity of arguments about the authority of a deponent unnecessary and wasteful.

...

... 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). Courts should honour that approach...

⁶ *Ganes and Another v Telecom Namibia Ltd* 2005 (3) SA 615 (SCA) at 624 G-I

⁷ 1992 (2) SA 703

In the present case the '*interlocutory application*' was delivered under the name and signature of Mr Attorney Bennett. He purportedly did so on behalf of respondent. If he was authorised to do that, respondent is bound to accept the application as his application. That remains so irrespective of whether deponent Rossouw was also authorised '*to bring this application*'. There is no logical need to insist on proof that someone other than Bennett was also authorised.

There is a second aspect to the situation. The evidence of Rossouw cannot be ignored because he is not '*authorised*'. If Attorney Bennett has authority to act on respondent's behalf, he may use any witness who in his opinion advances respondent's application. A witness, also when a deponent, may testify even if he has no authority to bring, withdraw or otherwise deal with the application itself. *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515C-E and 515F-G.

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 Attorney Bennett 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."

[16] The principle enunciated in the *Eskom* and *Ganes* cases⁸ was followed in *ANC Umvoti Council Caucus and Others v Umvoti Municipality*,⁹ where it was held:

"[28] ... The position now is that, absent a specific challenge by way of rule 7(1), '*the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant*' is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used...

[29] There was no challenge in terms of rule 7(1) in the application which is the subject of this appeal. The appropriate procedure was therefore not used by the appellants. It was accordingly not necessary for the applicant to prove the authority to initiate the application, nor appropriate to attempt to do so on the papers. It was also not necessary for the court *a quo* to make a finding relating to authority on the affidavits delivered in the matter. Since there was no challenge in the required manner to the authority of the respondent's attorney who signed the notice of motion and initiated the application in the accepted way, this court does not have to deal with the question of authority. I am therefore of the view that the appeal on this issue must fall."

[17] I am also mindful of the pronouncement in *Cullinan Holdings Limited v Lezmin*¹⁰ wherein Ranchod J expressed the view that the *ANC Umvoti* case¹¹ was

⁸ *Supra*

⁹ 2010 (3) SA 31 (KZP)

¹⁰ 2768 CC 2016 JDR 1578 (GP)

¹¹ *Supra*

decided in the context of rule 7(1) which relates to the filing of a power of attorney to act on behalf of a party and in proceedings where the authority to institute legal proceedings on behalf of the applicant company had been disputed in the papers. The distinction sought to be made in the *Cullinan Holdings* case¹² does not find support from the *ANC Umvoti* case,¹³ which makes it clear that application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings.

[18] The appellants in *hoc casu* elected not to challenge the authority of the respondent's attorney to represent the respondent in the proceedings before the court *a quo* in accordance with rule 7. They contented themselves with challenging, by way of a bald denial, the authority of Rev Nqakwana to depose to the founding affidavit, which was unavailing. No facts were put up in support of such challenge. On the contrary, there is evidence *aliunde* to infer, in so far as it was argued that such authority was necessary,¹⁴ that Rev Nqakwana had the authority to depose to the affidavit in support of the relief that had been sought in the application that served before the court *a quo*. The respondent is, as will be demonstrated shortly herein under, the owner of the subject property. There is no reason in logic why a moderator would go on a frolic of his own and seek an interdict restraining dissident members from being disruptive during church worship services.

[19] On the merits, the parties locked horns at two fronts: the existence or otherwise of a clear right and whether there were facts establishing an injury or an act of interference actually committed or reasonably apprehended.

[20] The appellants resisted the application before the court *a quo* on the ill-begotten notion that the subject property was owned by the Ross community, and not the respondent. This flies in the face of the endorsement made on the relevant title

¹² *Supra*

¹³ *Supra*

¹⁴ Cf. *Plettenberg Bay Country Club v Bitou Municipality* [2006] 4 All SA 395 (C), para [8], where it was held that such authority is, strictly speaking, not necessary.

deed which makes it plain that on 14 July 2004 the subject property was transferred to the respondent.¹⁵

[21] Mr *Kunju* who, together with Ms *Nqabeni*, appeared for the appellants, was constrained to concede that the endorsement on the title deed served to dispel any notion that the subject property did not belong to the respondent. That concession put paid to the contention that the court *a quo* erred in finding that the respondent was the owner of the subject property and that, therefore, a clear right had been established.

[22] The appellants were, in my view, also proven as having interfered with the respondent's ownership of the subject property when, at the very least, they forcefully broke the locks on the doors to the church's premises and replaced the same with theirs. That conduct was, in and by itself, sufficient to ground the proceedings that are the subject of this appeal, as indeed there was a reasonable apprehension that the appellants might interfere with or disrupt church activities at Ross Mission. Schisms such as the instant one have sometimes led to bloodshed even in the house of worship.

[23] The court *a quo* was correct in granting the order it did, and there is no basis for tampering with the impugned order.

[24] Costs of the appeal should follow the result. Mr *Zilwa* and Mr *Kunju* were *ad idem* that the involvement of two counsel was, on both sides, justified. I disagree. The question to be posed and answered, as always, is whether it was reasonable for a party to brief two counsel, which is a matter of judicial discretion to be exercised with due regard to, *inter alia*, the amount involved, the nature of the issue in dispute, the length of the hearing and argument, the importance of any questions of principle or of law and the number of legal authorities quoted.¹⁶ I am quite mindful of the fact that normally where two counsel have been employed, the court will require cogent reasons why the fees of one of them should be disallowed.¹⁷ Despite the agreement reached by the parties on the aspect of costs, I am not persuaded that costs of two counsel should be allowed. The papers are not voluminous. The issues raised before

¹⁵ The endorsement points to 12 properties, including the subject property, as having been transferred to the respondent

¹⁶ *Janse van Rensburg NO and Others v van der Merwe* (14010/05) [2007] ZAGPHC 56 (17 May 2007)

¹⁷ *Grobelaar v Havenga* 1964 (3) SA 522 (NPD) at 530 B-G

the court *a quo* and in this court are not complex; they are governed by settled legal principles. If one has regard to the issues raised in the appeal, two counsel were, in my view, not even a reasonable precaution.

[25] In the result, **the appeal is dismissed with costs.**

S M MBENENGE
JUDGE PRESIDENT OF THE HIGH COURT

I agree

J E SMITH
JUDGE OF THE HIGH COURT

I agree

N R MTSHABE
ACTING JUDGE OF THE HIGH COURT

Counsel for the appellants : *V Kunju* (with him *V Nqabeni*)

Instructed by : Brauns Nyembezi Inc.
Mthatha

Counsel for the respondent : *PHS Zilwa SC* (with him *EM Matanda*)

Instructed by : Mantyi Attorneys
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Date heard : 19 November 2018

Date judgment delivered : 04 December 2018