



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 5727/2016

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE OTHER JUDGES: YES/NO
(3) REVISED. 17/05/2017
DATE: 17/5/2017 SIGNATURE: <i>M/s P. M. M.</i>

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL
RESPONSIBLE FOR THE DEPARTMENT
OF HEALTH, LIMPOPO**

APPLICANT

and

**LETHEBO RABALAGO
MOUNT ZION GENERAL ASSEMBLY**

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

Summary: Freedom of conscience, religion, thought belief and opinion - whether freedom of religion thought and belief in sections 15 (1) and 31 (1) Bill of Rights, even when exercised in an unorthodox manner unlimited- or not.

Principle: Sections 15 (1) and 31 (1) of Bill of Rights guarantee freedom of conscience, religion, thought, belief and opinion, and such right not to be unreasonably denied - unless performance or practices offend Government - or public interest and the Constitution - Sections 15 (1) and 31 (1) are subject to limitations found in section 36 of Bill of Rights-Section 31 (2) also places limitation to freedom of cultural, religions - or linguistic communities - manner of worship and exercise of freedom of religion *in casu* poses considerable health risks and danger to the general public - such practices to be curbed in Government and public interest by law of general application in place, and Section 36 proportionality analysis - the majority reasoning - of Concourt in Prince v The President of the Law Society of Cape of Good Hope and Others, applied and followed - an injunction, therefore, required to prohibit all unconventional religious practices under the cloak of spiritual faith healing - state intervention necessary to protect life and limb-

Held: *In casu* - freedom of worship or religion to be practiced and exercised reasonably within the confines of the law and the constitution.

M.G PHATUDI: J

[1] On 20 March 2017, I made an Order couched as follows:

- 1.1. "The Rule *nisi* granted by the Court on 20 November 2016 and extended to 30 January 2017, is confirmed.
- 1.2. The Respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved,

1.3. The full text of my judgment with reasons for which the judgment is reserved will be delivered in due course”.

[2] The Rule *nisi* granted by the Court on 20 November 2016 had the effect of interdicting and restraining the Respondents herein from:-

2.1. *“employing and/or spraying and/or directly or indirectly “Doom”*

incedicide on any member of the public, or congregant or visitor of the Mount Zion General Assembly,

2.2. *employing and/or applying directly or indirectly any form of harmful substance on any member of the public, or congregant or visitor of the Mount Zion General Assembly,*

2.3. *Feeding and/or administering orally directly or indirectly, any form of non-consumable item or liquid on any member of the public, or congregant or visitor of the Mount Zion General Assembly,*

2.4. *Inciting any member or ministering instructions or directives to any member of the public or congregant or visitor of the Mount Zion General Assembly to perform any of the acts prohibited and stated in paragraphs 2.1.1. to 2.1.3.”*

[3] The aforementioned restraint measures, were in fact, the hardcore of the interdict .

- [4] On the Return Day of the Rule nisi, (30.01.2017) the matter became opposed and was argued before me.
- [5] The facts giving rise to this application which are res nova are not only posing intriguing constitutional issues enshrined in Section 15(1) and 15(2), of Act 108 of 1996,¹ but also raises jurisprudential conundrum in our current democratic legal dispensation of which the Bill of Rights is a cornerstone. I propose to revert to the provisions of Section 15(1) and 15(2) referred to in the course of this judgment.
- [6] The Applicant, a Member of the Executive Council ("MEC") responsible for the department of Health and Social development in Limpopo Province, launched an urgent application in this court against the Respondents for an interim interdict in terms of which a Rule nisi was granted, the return day set on 30 January 2017. The effect of the provisional order granted is as set out in paragraph 2, above.
- [7] The Department of Health and Social Development of which the Applicant is the MEC in Limpopo, is as an organ of State, mainly responsible for administration and control of health care services within the province. This authority flows from Part A of Schedule 4 of the RSA Constitution Act (Act 108 of 1996) which provides health

¹ Chapter 2, Bill of Rights, Act 108 of 1996.

services as one of the functional areas of concurrent national and provincial legislative competence. See, The National Health Act.²

- [8] The First Respondent describes himself as a "prophet" and Chairperson of the Second Respondent, a religious organization or church known as Mount Zion General Assembly.

FACTUAL MATRIX:-

- [9] The factual background that triggered the present application are in short, the following:-

9.1. On or about Monday 21 November 2016, the Daily Sun newspaper reported an article about a Pastor, the First Respondent herein, who it was alleged uses Tiger brand's Doom insecticide to spray his congregants in order to heal members of his church assembly. Doom is an insecticide held and registered by Tiger Consumer brand as its trade mark. It is generally freely sold to the consumers in open markets, shops, supermarkets and even larger hypermarkets and stores, for use in households. It is a multi-insects killer also registered as a pesticide under Registration No: L7317 in terms of Act 30 of 1947 to poison and kill insects.

² Act 61 of 2003 – It is aimed at providing "a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws on the national, provincial and local governments sphere with regard to health services"

- 9.2. On the same day (21.11.2016) and ensuing days, You Tube and other social media circulated images of the pontiff spraying Doom on some of his congregants, a situation that went viral on social network. Most newspaper articles and social media captured the First Respondent spraying Doom directly on the face and eyes of a woman in the tent used for prayer and performance of other religious rituals.
- 9.3. Other media houses, the Sowetan newspaper, and Pretoria News, e-TV channel, SABC TV and radio stations, all ran stories about the man of cloth who used Doom insecticide during church service to inspire divine power to heal his congregants. The First Respondent in doing so, claimed to be spiritually inspired and as a prognosticator was competent to heal and expel all disease from his followers.
- [10]. The Applicant proffered as inherent health risks the dangers Doom can expose the general public to if applied to humans as the Pastor did as shown in the print, electronic and social media. The practice by the pastor poses immense health risks when used against the express caution labeled on each can. I consider it apposite to refer to the relevant "warning" issued to the consumer when administering the pesticide.
- [11] The "Warning" requires of the consumer or the public to "handle with care" as it may cause irritation of the skin, eyes, mucous, membranes and skin sensitization"... As to "precautions", the consumer or the public using it must "avoid excessive

inhalation", and not to be used in the presence of persons with known sensitivity to Pyrethroids," and "avoid contact with skin, eyes and clothing ..." and do not spray onto food utensils of food, preparation surfaces." These "warnings" are inscribed or labeled on each can.

- [12] Against the backdrop of the aforementioned health risks and the dangers associated with it, the Applicant submitted in its founding papers before court no less than four separate incidents in which the First Respondent's conduct allegedly breached Tiger Consumer brand Product Protocols ("Tiger Brand") and warning signs as exhibited on each Doom can. These incidents were published in the general media where the Second Respondent was seen spraying Doom product on the faces, eyes, legs, and abdomen of some of the congregants of his tent crusade.
- [13] The issue is whether for considerations of health services rendered by the Applicant to the public, is the use by the First Respondent to spray Doom as alleged, poses health risks and dangers alleged by Tiger Brands' spokesperson in a Media statement. This then makes it imperative to investigate although superficially, the toxicology of the Doom spray when used or applied and administered as a spray to humans.
- [14] It is common cause that the Doom product Complaint of contains an active ingredient termed in science **Metofluthrin**. This is a synthetic derivative of **Pyrethroid**. Other ingredients labeled are prallethrin (EtoC), and Imiprothrin. The non-synthetic compound similar to pyrethroids elements, is extracted from a flower

(chrysanthemum) which contain insecticidal ingredient known in science parlance as pyrethrin. Pyrethroid element is akin to natural pyrethrins.

- [15] According to the Applicant, the external application of Doom on humans would naturally have a toxic effect, and at times may be fatal. Exposure to pyrethroids predisposes one to the possibility of death with pre-natal exposure, or when repeated dosing in adults has been excessive. When applied, the potential ability of the foetus (which incidentally is regarded as a persona iuris with rights as per nasciturus fiction) to metabolize these agents, could result in higher concentration levels in the developing brain with resulting neurotoxicity.³
- [16] Furthermore, the spray of Doom on humans also has serious dermal effects e.g. paraesthesia probably due to hyperactivity of cutaneous sensory nerve fibres, and the face is often affected. Pyrethroid ingestion also gives rise to a sore throat, nausea, vomiting, mouth ulceration and/or dysphagia. In addition, coma and convulsions are the principal life-threatening features. The Applicant, for the dangers alluded to herein, and the medical discourse outlined, contended that organophosphate and pyrethrin, are catalysts to predisposal or paraesthesia which may trigger a few life and limb threatening adverse consequences. These are the medical facts and the undesired consequences which the Applicant is resolute to curb, particularly the adverse effects of which the congregants of the Second Respondent may be oblivious of the more so that the majority are not well lettered

³ P17, Para:17.6, "FA" – Paginated index.

and bear no scientific knowledge of the risks associated with the application of such product to human body, regardless of their religious belief and practices.

LEGAL FRAMEWORK

[17] As indicated in paragraph 5 above, I now proceed to deal with the legal framework in matters where it has been contended that the court is required to deal with novel situations around issues of faith and religious beliefs of the Respondents and other cases analogous to the present in the country recently.

[18] Section 15(1) and 15(2)(a) of the Constitution of the Republic of South Africa 1996.⁴ ("the Constitution") provides that:-

Section 15(1):-

"Everyone has the right to freedom of conscience, religion, thought, belief and opinion"

Section 15(2) provides further that:-

" Religious observances may be conducted at State or State-aided institutions, provided that-

(a) "those observances follow rules made by appropriate public authorities."

⁴ Act 108 of 1996

- [19] In casu one is confronted with the question whether the Respondents in exercising their "religious observances" in their religion and beliefs, do so within the confines of Section 15 (2)(a) of the Constitution Act.

I was not called upon to decide on this aspect, but it is a matter which, in my view, is not quiet remote from the defence raised that the Respondents have a right to freedom of religion, belief and opinion which covers methods of worship, praying and conducting faith healing.

- [20] In an attempt to fortify its stance on the matter, counsel for the Respondents referred to the provisions of Section 31(1)(a) of the Constitution which stipulate that :-

Section 31(1)-

" Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

(a).to enjoy their culture, practice their religion, and use their language,

and,

(b). to form, join and maintain cultural, religious and linguistic associations and other organs of civil society".

- [21] But, the matter does not end there. Section 31(2) thereof clearly stipulates that the right in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Apart from the restriction espoused in subsection 1 of Section 31, there we have a limitation clause in section 36 of the constitution that

curtails or limits the rights in the Bill of Rights in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

[22] It was further submitted on behalf of the Respondents during argument that, apart from the fact that Doom was indeed applied or employed on specific congregants during the "faith healing ministration," religious beliefs and faith healing, are reasons for spraying Doom to "pray for people as per "instruction from God by the spirit". "God spoke to the First Respondent on the 18 November 2016 while in the church crusade at Mookgopong⁵ to conduct faith healing ministration to the people." It was further submitted by the Respondents that the congregants who submitted themselves to the spraying of Doom on them, their testimonies revealed that they were healed and delivered from sickness and various ailments that beset them. This spiritual intervention with healing powers from Doom or spray or other medium, descends as and when the Spirit of God instructs the pontiff in his church assembly, crusades and other terbanacles of worship to heal ailing members.

[23] A closer reading and subjunctive interpretation of the allegations made by the First Respondent in his Answering Affidavit ("FA"),⁶ gives an illustration of clear admissions of fact about the application or use of Doom spray to heal willing congregants, and the reasons proffered by the Respondents for such application or use thereof.

⁵ Index, P57, Para: 8.1, "AA".

⁶ Index P57, Para: 8.1 to 8.5, "FA".

[24] The nub of their defence may be encapsulated as follows:

24.1. The spray of Doom on the congregants during healing ministration was a divine instruction from God by the Spirit as and when it occurred;

24.2. The spray or application endured for only one week during healing ministrations in the tent crusades;

24.3. No complaints of post-spraying or side effects or toxins alleged by the Applicant were received from the congregants, and that;

24.4. The Respondents have freedom of religion, belief and opinion, and further that;

24.5. There exists no regulatory legal framework currently in our law that prohibits such religious practices.

[25] It appears to me that the watermark of the Respondent's opposition to the interdict application is predicated on Section 15(1) read with Section 31 of the Constitution Act, 1996 referred to above, (Para: 18 and 20) and the fact that according to them no statutory framework is at the moment in place in our law that impede their religious practices complaint of.

THE LEGAL ISSUES FOR DETERMINATION

[26] With the preceding issues considered, the questions calling for a determination are three-pronged, namely:

- (a) Whether or not the Respondent's alleged freedom of religion, belief, thought and opinion is unlimited, if not absolute, whether such right or freedom of religion and/healing or ministration should be curtailed as against other freedoms or rights in the Bill of Rights;
- (b) Whether or not the Applicant and/or the general members of the public will suffer any potential or actual harm if the Respondents' healing ministrations alleged were allowed to continue as in the manner complaint of, and that;
- (c) Whether or not would it be in the best interest of the administration of justice, the democratic values enshrined in the Bill of Rights, the Constitution and rule of law, that this court confirms an injunction against the religious practices performed by the Respondents.

[27] I now turn to consider seriatim each of the crisp questions raised. Before I attempt to provide an answer, I consider it apposite to scan the prevailing jurisprudential developments from case law on the matter.

[28] The issues around the right to freedom of religion, belief and opinion first surfaced before the Constitutional Court ("Concourt") during May 2001. The Concourt in one

of its seminal judgments⁷ had occasion to consider issues of faith, religion and belief vis-à-vis the freedom enshrined in Section 15 and 31 of the Constitution. The appellant (Mr. Garreth Prince) sought to be admitted as an Attorney of the Second Respondent in that matter, (Law Society Cape of Good Hope). In an application to register his contract of community service with the Second Respondent ("the Law Society"), the appellant not only disclosed that he had two previous convictions for unlawful possession of cannabis sativa (also known as "Marijuana", "hashish", or "dagga" or even better known as "ganja" or the "Holy herb" within the Rastafrian religious circles. He also declared his intention to continue the use of the herb.

[29] The appellant declared that the use of cannabis ("dagga") was inspired by Rastafari religion to which according to him was his constitutional right found in the Bill of Rights. For that reason the Law Society declined to register his contract of community service. It also took the view that the appellant with his criminal records was not a fit and proper person to be admitted as an attorney.

[30] The appeal in Prince's case concerned the constitutional validity of the prohibition on the use (smoking I venture to add) of cannabis when its use or possession is inspired by religion. The appellant did not dispute that the prohibition was in the legitimate government and/or public interest.

⁷ Prince v The President of the Law Society of the Cape of Good Hope & Others
2002(2) SA 794

- [31] Similarly, in the present instance, the First Respondent does not deny having used Doom spray in the course of or in connection with performance of his religious exercise and faith mission on his congregants. He sees the intended interdict encroaching upon his right to freedom of religion and cultural religious right. Sections 15(1) and 31(1) of the Constitution.
- [32] In the Princes's case, supra, Ngcobo J (as he then was) was of the view that Rastafarianism is a religion and that the disputed legislation prohibiting the use of cannabis trenches upon the religious practices of Rastafari.
- [33] The right of an individual to practice his or her religion is, in my view, part of the Section 15(1) right. The right to practice religion in conjunction with others, for instance, in a tent crusade or any religious terbanacle, is protected by section 31 of the Constitution, albeit subject to the limitation in sections 31(2) and 36 of the Constitution.
- [34] What, however, limits the right in sections 15(1) and 31(1) asserted by the First Respondent, is the application and use of a toxic substance as Doom spray on human body contrary to the warnings on each can of Doom spray. I therefore venture to suggest that the legislation that prohibits misuse of such insecticides or pesticides as Doom spray on humans limits the very religious rights claimed by the First Respondent under the Constitution. What then becomes paramount in this instance is whether the limitation is justifiable under section 36 of the constitution.

[35] I am inclined to think that the use of Doom spray for alleged ceremonial or spiritual healing under the cloak of freedom of religion and worship cannot in my view, be left unlimited by section 36 proportionality analysis.

[36] The foregoing proposition is fortified by the fact that there are no watertight mechanisms in our law in which a law enforcement agent could distinguish between the use of harmful substance as Doom spray on humans, or the forceful eating of live reptiles like snakes, rats, lizards, or even consumptions of dangerous liquids like fuel/petrol, or any other unorthodox ways of religious worship which otherwise has a propensity of danger or harm when applied to humans or consumed, and the unconventional methods use for non-religious purposes.

If I were to err, I would rather err on the side of conservatism and carve a wide chasm limiting the scope and type of freedom of religion and belief entertained by the First Respondent and his church assembly, and the section 15(1) and 31(1) rights.

[37] Counsel for the Respondents was at pains to call for national legislation regulating such unconventional religious methods as practised by the Respondents. He contended that currently South Africa has no legislation that prohibits the freedom of worship and religion. However counsel for the Respondents lost sight of the principle that the right to freedom is not absolute. Its scope may be limited by other rights or by law of general application in pursuit of a genuine state's purpose and for good

governance. Legislation and a permit system regulated by law would, in my view, be too cumbersome to monitor and supervise. It will certainly put law enforcement agencies and the state in a strait jacket.

[38] I now turn to the three cardinal issues I was called to address in this matter. They are set out in Paragraph 26, *supra*.

38.1. Given the foregoing considerations and bearing in mind the authority of Concourt in Prince's case, above, it follows that the Respondent's rights of freedom of religion, belief and opinion is no doubt, subject to the limitation clause. I do not visualize a situation where religious leaders of various denominations in our country would be permitted to perform unorthodox dangerous and risky religious practices under the cloak of the freedom of religion envisaged in the Bill of Rights.

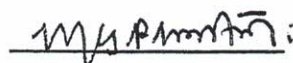
An attempt to regulate their religious faith and believe in order to allow them exemption to apply and administer toxic substances or feed their members with all sorts of live reptiles like snakes, rats, mice, etc. would be absurd if not untenable.

38.2. For the reasons given in 38.1 above, it would also not be in the best interests of members of the Second Respondents in particular and the fabric of society in general, to allow such unconventional and harmful methods of religious practices without State intervention.

It is not the Applicant's case to deny the First Respondent, the freedom of his religion. It is the harmful and unorthodox methods practiced by the First Respondent that offends the public interest and the protection accorded to it by the constitution, the rule of law and law of general application.

38.3. In addition, the freedom of worship whether actuated by spirituality or not, has to be exercised reasonably within the confines of the law and the Constitutional framework. Any conduct that offends the constitution which is the apex legal instrument to protect and defend human rights as enshrined in it, is liable to be met with a stern injunction.

[39] It was on a semblance of the facts in this application that the Rule nisi granted on 20 November 2016 was confirmed.



M.G PHATUDI J
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

REPRESENTATIONS

- | | | |
|-------------------------|---|---------------------------|
| 1. Applicant's Counsel | : | Adv M.H. Masilo |
| Instructed by | : | State Attorney |
| | | Polokwane |
| | | |
| 2. Respondents' Counsel | : | Mr. T.E. Lubisi |
| Instructed by | : | c/o Lubisi Attorneys Inc. |
| | | Malamulele |
| | | |
| 3. Date heard | : | 20 March 2017 |
| 4. Date Order delivered | : | 20 March 2017 |