



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2308/2016

In the matter between:

AFRICAN NATIONAL CHURCH

Applicant

(Registration number: 2009/000473/08)

(Association incorporated under Section 21 of the
Companies Act)

and

TB TSATSA

1st Respondent

MM KOLOLO

2nd Respondent

RM KOLOLO

3rd Respondent

TJ TSATSA

4th Respondent

ZM TSATSA

5th Respondent

K MPEMVANA

6th Respondent

M MOSOEU

7th Respondent

N QAI

8th Respondent

ELIAS SENOGÉ

9th Respondent

HILLARY NDAYI

10th Respondent

HEARD ON: 16 MARCH 2017

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 15 JUNE 2017

[1] These are motion proceedings. The applicant seeks an order for the incarceration of six of the 10 respondents for contempt of court. The alternative relief sought by the applicant is the imposition of a monetary punitive fine on each of the respondents. Moreover, the applicant seeks restraint orders against the four remaining respondents. It is the applicant's case that some of the respondents disobeyed certain court orders and that others have infringed its rights and thereafter to continue with their chaotic acts of interference, and victimization, disruption and disorderliness. The application is opposed by some of the respondents.

[2] Before me were four applications, viz: the condonation application, the application to strike out, the application to incarcerate and the application to restrain. The third was obviously the main application. I shall deal with these proceedings in the same order.

*[3] **In the first place the condonation application.** It was brought by the fourth respondent, Tebello Johannes Tsatsa and the fifth

respondent, Zililele Martin Tsatsa. Briefly stated their version was that the sheriff served the main application on them; that they decided to oppose it; that they accordingly instructed Attorney Harrington Jr, an attorney of Bethlehem; that he appointed Attorney JP Smith of Phatshoane Henney in Bloemfontein as his city correspondents; that notice of their intention to oppose was filed on 5 July 2016; that their attorneys withdrew on 19 September 2016 because they were not placed in sufficient funds; that they struggled to raise the funds; that the fourth respondent applied to Capfin Bank; that the R17 000 loan he received was not enough to cover the required legal bill; that the fifth respondent's loan application to Capitec Bank was unsuccessful; that his loan application to Absa Bank was similarly fruitless; that on 7 October 2016 Dr Kolobe paid R40 000 on their behalf to their attorneys; that the contemplated relief of incarceration sought by the applicant posed a serious threat to their civil liberty; and that excellent were their prospects of success on the substantive merits of the main application.

- [4] The applicant attacked the version of the two brothers as narrated by the fifth respondent. The grounds of the attack were that they had failed to show good cause for their neglect to file their answering affidavit; that the relief of condonation was not there for the mere asking; that they had disobeyed the court order; that they had no good prospects of success on the merits of the main application; that they deserved to be sanctioned and that their alleged unfortunate situation occasioned by their financial difficulties by itself constituted no sufficient cause to justify their considerable delay.

- [5] The financial plight of the respondent was a material consideration in my view. The fifth respondent explained the adverse impact of their financial predicament. He said:

“The sole reason why we would not file opposing papers timeously was a lack of funds. My brother obtained a loan from **Captin**, gathered a meagre sum from what was left of my and my brother’s salary and also borrowed funds from **Dr Kolobe**. We have to repay all these amounts.”

- [6] To compound their financial predicament, the fourth respondent was still indebted to Harringtons Attorneys in an amount of approximately R135 000 in respect legal services rendered under case number 1581/2015. He was one of the respondents in that case. He successfully opposed the application which had been filed by the same applicant church. Notwithstanding his success, the applicant had failed to pay his taxed bill of costs and disbursement in the sum of R165 550.96. That bill was still unpaid when the applicant launched the current main application to have them committed, and incarcerated or fined.

- [7] The applicant denied those facts but admitted that the *rule nisi* it had obtained in 2015 against the fourth respondent and others was finally discharged. However, he averred that the *rule nisi* in question was discharged because the applicant did not have sufficient funds to prosecute its application to its logical conclusion. The applicant’s contention in effect supported the contention of the respondents. Lack of funds may have an adverse impact on a litigant’s to intention safeguard his or her

interests. This is precisely the argument advanced by the respondents. Lack of financial resources is, therefore, a material consideration in this condonation application.

[8] But it did not all end there. It was undisputed that the 2015 provisional order against the fourth respondent was discharged; that the applicant was obliged to pay the fourth respondent's costs and that it was not the applicant's case that it had since settled the fourth respondent's bill. In view of all these, the applicant's denial was not made in good faith. Its failure to pay such costs adversely inhibited the fourth respondent's financial ability to subsequently defend himself in respect of the 2016 application launched against him by the same defaulting applicant.

[9] In my view both of these respondent's went to great lengths to raise funds in order to oppose the current application. They demonstrate, without any shadow of doubt, their serious and honest intentions to resist, at all costs, the relief sought against them. On the facts, the interests of justice strongly militated against shutting the door in the face of any of them.

[10] The determinant factor was whether the respondents had shown good cause for the delay in filing their answering affidavit on 13 October 2016, some 100 days after they had filed notice of their intention to oppose. I am satisfied that they have discharged the onus. The applicant's main argument was that, in their condonation application, the respondents did not deal with the

prospects of success. The argument did not impress me. The omission was neither here nor there.

- [11] The plain truth was that the respondents thoroughly dealt with substantive merits of their case in their answering affidavit which also embodied their condonation application. Their answering affidavit was a 21 page document excluding annexures. It consisted of 95 paragraphs of which the first 25 were devoted to the condonation application and the rest to the main application. At para 22 the fifth respondent had this to say:

“We have excellent prospects of success.”

- [12] From para 26 of the answering affidavit the fifth respondent highlighted the substantive strength of their defence and the substantive weaknesses of the applicant's case. In those circumstances, where the condonation and the main application were structurally intertwined, it was perfectly in order to deal with the prospects of success only in the main compartment of the answering affidavit. In my view it would have served no practically useful purpose for the respondents to have also fully addressed the merits in the condonation compartment of the answering affidavit. Burdening the court record with unnecessary repetition is generally frowned upon.

- [13] In view of the above considerations, I am persuaded that good cause has been shown why the lateness of the respondents in filing their answering affidavit should be condoned. Given the peculiar circumstances of this particular cases, if I were to refuse

condoning, my decision would not have been compatible with proper exercise of the judicial discretion entrusted to me. I would, therefore, grant the condonation application of the fourth and fifth respondents. **Melane v Santam Insurance Co Ltd** 1962 (4) SA 532 (A).

*[14] **In the second place, the application to strike out.** It too was brought by the same respondents, namely: the fourth and the fifth respondents. The common ground of their objections was that certain paragraphs of the founding affidavit contained inadmissible hearsay.

[15] The relief sought by respondents was that the following paragraphs be entirely struck out:

7.3, 19.3, 19.5, 20.2, 20.4.1, 20.5, 21.1, 22, 14.7, 18.1 and 19.1

[16] As regards par 7.3, the applicant stated, through its founding deponent, Thabo Hendrik Jiya, as follows:

“7.3 As is evident from **Part** hereof, the orders were disregarded and the **1st – 5th Respondents in acting through the 7th & 8th Respondents** disrupted the Applicant in preventing it from holding church services or the like at its chapter in Brandfort.” (my emphasis line)

[17] As regards par 19.3, the applicant stated:

“19.3.5 This is important because the **1st – 5th Respondents in acting through the 7th & 8th Respondents** ‘magically’ appeared at the property of the Applicant’s chapter’s same day they decide to hold church there to revive

the said chapter, claiming that they (The Respondents or the Association rather) hold church there and for the Applicant's chapter not to continue with its church services or the like on its own property."

[18] As regards par 20.2, the applicant stated:

"20.2 Upon arrival at the property same day it was evident that the members of the Respondent was (sic) all of a sudden there to 'hold church' under the leadership of a certain Mzunjani Mosoeu, the **7th Respondent**, who was unbeknown to me at the time."

[19] As regards par 20.4, the applicant stated:

"20.4 I was further informed that upon (sic) a meeting that was held on 2 April 2016 where the **7th Respondent** was present, held under the name of the '**African National Church**', whichever name it declares to have in terms of it being an 'Association', and that he wasn't told therein of the Applicant church service or the like to be held the day of the incident. (my emphasis line)

20.4.1 The question however arises how the **7th Respondent** knew that the Applicant would be there, especially following the fact that he was present at a meeting along with the **1st to 6th Respondents**, who has or reasonably had to have had knowledge of such a possibility- due to the letters sent to them."

[20] As regards par 20.5, the applicant stated:

"20.5 According to the **7th Respondent** the following members were at such a meeting:

- **TP TSATSA** (First Respondent)
- **M MKOLOLO** (Second Respondent)
- **R MKOLOLO** (Third Respondent)
- **TJ TSATSA** (Fourth Respondent)

- **ZM TSATSA** (Fifth Respondent)
 - **K MPEMVANA** (Sixth Respondent)
 - **MZUNJANI** (Seventh Respondent)
 - **N QAI** (Eight Respondent)”
- (my emphasis line)

[21] As regards par 21 the applicant stated:

“21.1 The **1st – 5th Respondents disobeyed said orders** to (sic) acting contrary thereto in preventing the Applicant from being able to hold Church at its chapter in Brandfort on the property known as Stand 1809, Majwemasweu, Brandort, **through the 7th & 8th Respondents.**

21.2 I submit that it is clear from the averments contained herein that the **1st – 5th Respondents acted through the 7th & 8th Respondents.**”

(my emphasis line)

[22] As regards par 22, the applicant stated:

“Wherefore the Applicant applies for the above Honourable Court to find the **1st – 5th Respondents in contempt of Court** and grant **Part A** of the Notice of Motion **as they clearly disregarded the Court’s order of 22 September 2011** as well as that of **01 August 2013** respectively.”

(my emphasis line)

[23] It has been held that a person may acquire knowledge of the occurrence of an event in three possible ways:

“Knowledge of the occurrence of an event might come to a person in one of three ways. It might come to him or her through directly experiencing the occurrence of the event. Or the occurrence might be reported to him or her by someone else. Or he or she might deduce that the event has occurred by

inference from other facts. If knowledge of the occurrence of the event has come to a witness from direct observation then his or her evidence is admissible to prove that it occurred. If that knowledge was acquired from someone else then a proper basis must be laid for admitting it as hearsay and enabling its weight to be evaluated. And if the knowledge was acquired only by inference then that is not evidential material at all: it is for a court to draw the inference itself upon proof of primary facts.”

President of RSA & Others v M & G Media Ltd [2011] ALL SA 56 (SCA) par [37].

[24] In the instant matter, the applicant did not have personal knowledge of the facts alleged in the paragraphs specified above. I randomly extracted only seven out of many passages complained of. The golden thread which ran through all of them was hearsay. The hearsay relied upon was inadmissible evidence. Indeed the applicant’s founding deponent, Jiya, acknowledged the offensive nature of his factual allegations. At par 1.4 of the founding affidavit he said:

“1.4 submit to this Honourable Court that where I refer to the facts in this Affidavit which does not fall within my personal knowledge, I have no reason to doubt the correctness thereof and I request the Honourable Court to accept the abovementioned facts as evidence in accordance with the provisions of the **Law of Evidence Amendment Act, 45 of 1988;**”

Section 3 thereof specifies circumstances in which hearsay can be received as admissible evidence in legal proceedings. In this matter, however, the applicant failed to establish any of those permissible statutory exceptions.

- [25] Consequently, it was common cause that Jiya had no personal knowledge of the factual allegations he attributed to the fourth and fifth respondents. His second hand knowledge was, to a great extent, allegedly derived from the seventh respondent, Mzunjani Mosoeu and, to a less extent, from the eight respondent, Nomsa Qai. However, no confirmatory affidavit by either the seventh respondent or the eight respondent was attached to the founding affidavit. To make matters worse, Jiya proffered no explanation for such material omissions. In these circumstances section 3 cannot be invoked.
- [26] Obviously Mosoeu and Qai were, according to Jiya, the primary sources of the facts set out in the founding affidavit. The probative value of his evidence entirely depended on their first hand knowledge and account of the incident(s) which precipitated the main application. Absent their confirmatory affidavit, no evidential foundation exists to sustain his version premised on in admissible hearsay. It would also appear that Jiya knew very little about his two primary informants. He knew neither's residential address.
- [27] During the hearing of this application the seventh and the eighth respondents were in attendance. None of them had filed an answering affidavit. I gained the impression that they associated themselves with the cause of the fourth and fifth respondents and not the applicant's.

[28] The further relief sought by the respondents was that the following paragraphs of the founding affidavit be partially struck out:

10.5 and 20.5

[29] At par 10.5 the applicant stated:

“10.5 All the members of the Applicant, me obviously included, love the African National Church and consider it is our only spiritual home. Contributory thereto we only serve the best interest of the Applicant and its members and I for one will not desert the notwithstanding the uncalled for onslaught to which the Applicant is subjected to at the moment. It is not my intention to drag the church to the earthly Courts once again and the decision to initiate this further Application was not taken lightly. Unfortunately the various Respondents *inter alia* those cited herein along with their various followers act as a frolic of their own which causes irreparable harm and they’re simply not interested to act in the best interest of the church. As such I have virtually no other option than to approach the Honourable Court in order to obtain the necessary relief.”

[30] In the preceding par I have highlighted the portion which the respondent complained about. The alleged harmful act, described as “a frolic of their own”, is not sufficiently particularized to enable the respondents know precisely what it is they are alleged to have done which had caused the applicant irreparable harm. The alleged followers were not identified. Exactly where and when the alleged incident occurred remained a puzzle. The passage is riddled by vagueness. The objection is sustained.

[31] I have quoted par 20.5 earlier. At that par the applicant's founding deponent mentioned the names of eight persons described as members of a nameless association. The eight were the 1st to the 8th respondent, according to the allegation attributed to the 7th respondent, Mzunjani Mosoeu. The insinuation was that those respondents had attended a meeting somewhere on 2 April 2017. Since I have already struck the whole par out, complaint requires no further attention. It follows, as a matter of logic, that there can be no names to be deleted. The entire par no longer exists.

[32] Although I have not critically commented on all the paragraphs under attack, I have nonetheless considered all of them. Indeed all of them, without any exception, were offensive. Accordingly, I am inclined to strike all of them out seeing that they were all premised on inadmissible hearsay evidence.

*[33] **In the third place, the contempt component of the main application.** The version of the applicant was poorly narrated or drafted, I have to say. I tried to put the disjointed and scattered pieces of the puzzle together. Dairy was so a very cumbersome exercise. The picture that emerged showed that more than a century ago, in 1914 to be precise, a church was formed somewhere in this country. It was named African National Church by its founding fathers and mothers. It grew up with the passage of time. The growth led to the establishment of branches at various places. Among others, today the church has chapters in the following towns in this province: Botshabelo, Brandfort, Hennenman, Kroonstad, Odendaalsrus,

Phuthaditjhaba, Soutpan, Thaba Nchu, Theunissen, Ventersburg, Verkeerdevlei and Welkom.

- [34] Ninety five years after its formation the character of the church was incorporated. It was registered as an association in terms of section 21 Companies Act 21/1973 on 14 January 2009 as would more fully appear from “anx fa6”, “anx fa5” and “anx fa4”.
- [35] It would appear that the registration of the church as an associating incorporated under section 21, did not go down well among some of its members. The simmering dissatisfaction grew stronger and stronger. The church was ripped apart. The antagonists, those opposed to the incorporation of the church and the protagonists, those in support of the incorporation – failed to resolve their differences. Each faction claimed the right to exclusively occupy the church properties and the right to exclusively use the name of the church.
- [36] As time went by, the conflict intensified. The protagonistic faction considered the antagonistic faction to have dismembered itself. The latter faction was regarded as a splinter group or an association of disgruntled former members of the applicant church. They were called upon to leave the church but they refused. There were sporadic confrontations between the two hostile factions at different places. The routine activities of the church were adversely affected by specified of disruption, victimization, interference and intervention. The worst affected chapters were Brandford, Hennenman, Theunissen and Venterburg. The situation became so intolerable that the

members of those chapters ended up frequently travelling to Botshabelo to worship there on Sundays.

- [37] The sporadic running battles between the two factions has a long history of litigation which started in 2010 and is still continuing to this day. The church has had its fare share of internal squabbles. The acrimonious history of such infighting is documented in the following court files:

5489/2010, 2639/2011, 1220/2013, 5352/2014, 1581/2015 and now 2308/2016. More might still come unless sanity prevails and members of the fending factions embrace one another again as true brothers and sisters bond together by truly abiding and supreme values of Christian faith.

- [38] The first battle lines were drawn in the year 2010, the second in 2011, the third in 2013 and the latest in 2016. The disputes in all the previous litany of cases revolved around the control and management of the church.

- [39] On 14 July 2011 the applicant obtained a provisional order against certain respondents. Among them was TP Tsatsa, the first respondent in these proceedings, M Mkololo, now the 2nd respondent and R Mkololo, now the 3rd respondent and K Mperurana, now the 6th respondent. Their then six fellow respondents are not before me. The relevant part of the rule *nisi* by my sister Van Zyl J reads:

“2. A *rule nisi* is issued, returnable on the **18th** day of **August 2011** at **09H30**, calling upon the Respondents to show reasons, if any, why the following orders should not be made:

2.1 interdicting and restraining First to Ninth Respondent from:

2.1.1 in any way whatsoever, whether indirectly or directly and whether acting through other persons, disrupting – or interfering with the Applicant’s activities, in particular meetings of members of Board of Directors, church services or the like;

2.1.2 in any way whatsoever, directly or indirectly, and whether acting personally or through other persons, holding out to have authority to represent the management of – or form the management of Applicant or have any of management or decision-making on behalf of the Applicant;

2.1.3 from attempting, in any way whatsoever, whether directly or indirectly and whether acting personally or through other persons, to usurp the management functions of the Applicant;

2.1.4 attempting to deregister the Applicant as a company;

2.1.5 intimidating members of the Applicant, whether directly or indirectly and whether acting personally or through other persons;

2.1.6 using the name “African National Church”, other than for purposes lawfully authorized by the Applicant’s lawfully constituted Board of Directors;

- 2.1.7 participating in any other conduct or activity directly or indirectly aimed at or calculated at achieving any of the objectives intended by conduct covered by sub-paragraphs 2.1.1 to 2.1.6 above.”

See case number 2639/2011 – “anx fa7”.

- [40] The above provisional order was returnable on 18 August 2011 was extended. On the extended return day, 22 September 2011 my ex brother, Van der Merwe J, as he then was, confirmed the above rule *nisi* with costs. The provisional restraint order became a final restraint order against the 2nd respondent, 3rd respondent and 6th respondent among others. This is the first relevant order..
- [41] On 27 March 2013 the applicant sought and obtained a provisional order against certain respondents. Among them was, ZM Tsatsa. Now the 5th respondent in these proceedings and TJ Tsatsa now the 4th respondent. Their then one and only co-respondent is not before me. The relevant part of the 2013 rule *nisi* by my brother Daffue J was substantially the same as the 2011 rule *nisi* by my sister Van Zyl J.

“2. A rule *nisi* is issued, returnable on the **2nd of May 2013** at **09h30**, calling upon the Respondents to show reasons, if any, why the following order should not be made final:

- 2.1 Interdicting and restraining the First to Third Respondents from:

- 2.1.1 using the name “**African National Church**”, other than for purposes lawfully authorised by the Applicant’s Board of Directors;
- 2.1.2 in any way whatsoever, whether directly or indirectly or acting through other persons, disrupting, or interfering with the Applicant’s activities, including meetings of the members of the Board of Directors, church services, Passover-services or the like;
- 2.1.3 in any way whatsoever, directly or indirectly, and whether acting personally or through other persons, holding out to have authority to represent the management of the Applicant, or to form the management of the Applicant or to take any decisions on behalf of the management of the Applicant;
- 2.1.4 from attempting, in any way whatsoever, whether directly or indirectly to usurp the management functions of the Applicant;
- 2.1.5 intimidating members of the Applicant, whether directly or indirectly or whether acting personally or through other persons;
- 2.1.6 participating in any other conduct or activity directly or indirectly and/or calculated at achieving any of the objectives intended by conduct covered by sub-paragraphs 2.1.1 to 2.1.5 above;
- 2.1.7 holding or facilitating a meeting of members of the Applicant on **29 March 2013** at **13h00** at Brandfort in the name and style of the Applicant;

- 2.1.8 from attempting to convince, in any way whatsoever, whether directly or indirectly and whether acting personally or through other persons, that a meeting scheduled for **29 March 2013** at **13h00** at Brandfort, is a meeting of the Applicant.”

See case number 1220/2013 - “anx fa8”.

[42] The above provisional order was returnable on 2 May 2013. On the extended return day, 1 August 2013 the matter was before me. By agreement I made the final order:

- “1. The respondents withdraw their opposition of the application.
2. The *rule nisi*, granted in this matter, is confirmed and a final order is given.
3. The respondents pay the costs in this matter on an unopposed base, including the wasted costs occasioned by the postponements on 2 May 2013 and 30 May 2013.”

Therefore, the provisional restraint order against the 4th respondent and his brother, the 5th respondent, became a final restraint order. This is the second order relevant to the contempt component of these proceedings.

[43] The foregoing represent my summary of the material features of the applicant’s version. Although some of them are denied by the respondents, none of them can be seriously disputed in my view. This concludes the first phase of the turbulent times of the church.

- [44] The version of the applicant went a step further. This marks the beginning of the second phase of the turmoil. Notwithstanding the aforesaid restrained orders, the battle for the control and management of the church continued. The efforts of the Jiya's faction to revive the chapters were frustrated by the relentless actions orchestrated by Tsatsa's faction. The disgruntled first respondent faction victimized the members of the applicant. They disrupted church services. They occupied the church premises. They consumed water and electricity supplied to those church properties but paid no related municipal bills. Above all these harmful acts of interference, they also abused the name of the church. By doing all these things they disobeyed the aforesaid court orders. So alleged the applicant's deponents.
- [45] The faction led by Jiya decided to launch an application against the leaders of the faction led by Tsatsa. The latter was regarded as an association of troublemakers or dissidents. The sole purpose of the 2015 application was an attempt to hold such an association accountable for the disobedient and disruptive actions of its members. On 30 July 2015 the rule *nisi* was granted against those regarded as the leaders of the disgruntled group. The rule *nisi* was, however, ultimately discharged on account of financial constraints – See case number 1581/2015. So alleged the applicant's deponents.
- [46] With the passage of time the applicant realized that the interdicted leaders of the breakaway group were acting through their agents or other ordinary followers or members of their association, to undermine the court orders. The situation became

so serious that the church activities at some chapters such as Brandfort ceased. The members of such chapters had to travel to Botshabelo to attend church services. The applicant's properties at Brandfort, Theunissen and Ventersburg were unlawfully taken over and occupied by the dissents. So alleged the applicant's deponents.

[47] The Brandfort congregation became restless and agitated. A decision was taken to resume church activities there. The dissidents who were in an unlawful occupation of the church properties were given notices to vacate such properties – see “anx fa11.1”, “anx fa11.2” in respect of Brandfort and Ventersburg respectively. So alleged the applicant's deponents.

[48] I now turn to the respondents. It is convenient to start with the 5th respondent. The applicant's case was that the 5th respondent prevented and disrupted the church services at Brandfort. The details of the incident were very scatchy. I could not ascertain when the 5th respondent precisely prevented the holding of the church services there. The word prevention presupposes that the service did not take place as planned as a result of the 5th respondent's obstructive conduct. It was unclear to me as to in what way the 5th respondent's prevented the holding of the church service. Did he stand at the gate and prevent members of the church from entering the church premises? Did he stand at the door of the temple and prevent members of the church from entering the temple? There is uncertainty.

- [49] The second complaint levelled against the 5th respondent was that he disrupted the holding of the church service. Implicit in this complaint was the idea that the service had already started and that the worshipping was in progress when the 5th respondent emerged on the scene and disrupted the proceedings of the service. Did the 5th respondent walk up to the pulpit, where he confront the preacher and pulled him out? Or did he walk up and took over as the preacher? Or did he force everyone out of the temple? I simply have no idea of how the 5th respondent disrupted the service. The uncertainty deepens.
- [50] All I was indirectly made to know was that on 2 April 2017 a meeting was held somewhere; that the 5th respondent was at that meeting; that the meeting was held under the name of the African National Church; that it was decided to derail the re-opening of the Brandfort chapter; that the purpose was to disrupt the proceedings in order to frustrate the applicant's revival campaign of the disused chapters; that the applicant's founding deponent, Jiya heard all about the meeting in question from Mzunjani Masoeu. According to Jiya the meeting was held after the applicant had decided to revive its chapters.
- [51] The difficulty I had was that no supporting affidavit was obtained from Mosoeu to verify the above allegations against the 5th respondent. Therefore, Jiya's version lacked probative value.
- [52] It would appear that Jiya was at Brandfort on the unknown day of the incident for the re-opening service of the chapter. The following extracts from the founding affidavit made and signed by

Jiya are important in considering whether the 5th respondent wilfully disobeyed the court order – anx fa3:

“20.2 Upon arrival at the property same day it was evident that the members of the Respondent was all of a sudden there to ‘hold church’ under the leadership of a certain Mzunjani Mosoeu, the **7th Respondent**, who was unbeknown to me at the time.”

[53] As can be seen the spotlight fell on the 7th respondent, the alleged group leader, as to what happened at the Brandfort chapter on the day of the incident. The name of the allegedly preventative and disruptive 5th respondent hardly featured. Since the respondents were all natural persons it was a misnomer to allege, as the applicant did, that their members suddenly emerged on the scene on the day of the incident. Who were led by the 7th respondent? Did they actually hold the church service?

“20.3 This person along with Numsa Qai, the **8th Respondent**, as well as their followers indicated that they are the ‘**African National Church**’ and that they will not allow us to proceed with our church service or the like.”

There was no averment that the 5th respondent was among the alleged followers of the 8th respondent or 7th respondent.

[54] As can be seen here the spotlight fell on the 8th respondent. Again nothing was said about the 5th respondent. It would appear that the prominent and vocal spokespersons among the alleged troublemakers were the 7th respondent, Mzunjani Mosoeu and the 8th respondent, Nomsa Qai and not the 5th respondent. The allegation was that the 5th respondent “magically appeared” at the

applicant's Brandfort property. They threatened to prevent the church service from being conducted. No such threat was pertinently attributed to 5th respondent. The essence of the complaint softened from the earlier accusation actually preventing the service of an accusation of only threatening to do so.

[55] The high watermark of the applicant's case against the 5th respondent was that the 5th respondent disobeyed the court orders through the 7th respondent and the 8th respondent. The following extract underscore the point:

- “21.1 The **1st – 5th Respondents** disobeyed said orders by acting contrary thereto in preventing the Applicant from being able to hold Church at its chapter in Brandfort on the property known as Stand 1809, Majwemasweu, Brandfort, through the **7th & 8th Respondents**.
- 21.2 I submit that it is clear from the averments contained (sic) herein that the **1st – 5th Respondents** acted through the **7th & 8th Respondents**.”
- “7.3 As is evident from **Part A** hereof, the orders were disregard and the **1st – 5th Respondents** in acting through the **7th & 8th Respondents** disrupted the Applicant in preventing it from holding church services or the like at its chapter in Brandfort.”
- 19.3.5 “This is important because the **1st – 5th Respondents** in acting through the **7th & 8th Respondents** ‘magically’ appeared at the property of the Applicant’s chapter’s same day they ...”

[56] The excision of those specific passages leaves the applicant's version virtually irredeemable. In my view, the applicant failed to

prove that the 7th respondent or 8th respondent or anyone else factually acted as the 5th respondent's instrument and on his behalf prevented the religious business of worshipping at Brandfort on the undisclosed Sunday of the incident.

- [57] The applicant wanted to see the 5th respondent jailed at all costs. This much is apparent from par 8.1 of the founding affidavit where the applicant stated:

"8.1 The court granted an interdict under case number 2639/2011 against *inter alia* the **1st – 5th Respondents** as well as the **6th Respondent**."

The allegation was unsubstantiated. The interdict granted under case 2639/2011 on 22 September 2011 by Van der Merwe J did not apply to the 5th respondent. He and his brother were not cited as respondents. - See "anx fa2".

- [58] The applicant stated the following allegation at paragraph 19.3.

"19.3 I acted on behalf of the Applicant and approached my Attorneys of Record in an attempt to prevent a situation where the Applicant cannot hold church services or the like at its property due to the Respondents of previous litigation or rather members of the Association, claiming that they hold church there."

- [59] At paragraph 19.3.4 the applicant rather surprisingly stated that:

"19.3.4 It is any (sic) event clear that even if the Respondents claim that they hold church at the chapter every Sunday, it cannot be anything close to the truth as the property has shamefully clearly been deserted for a long period."

The allegation that the applicant's property at Brandfort had been deserted for a long time could not be reconciled with the allegation that the property was occupied by a member of the dissents' group. If the property was deserted why was the applicant's attorney instructed to evict the unnamed dissidents who were in an unlawful occupation of the applicant's property?

[60] The 5th respondent was interdicted on 1 August 2013 under case number 1220/2013 from using the applicant's name, African National Church. – See court order “anx fa3” read with paragraph 2.1.1 “anx fa8”. Now the applicant wants to have the 5th respondent imprisoned or fined on the grounds that the applicant has every reason to believe that the 5th respondent continues to use its name notwithstanding the restraint order. No concrete facts for the alleged belief were stated. In **EB Steam Company (Pty) Ltd v Eskiem Holdings Soc Ltd** (2014) ALL SA 294 (SCA) par [22] the court held that enough factual information must be given to enable the court hearing an application to decide whether there was substance in the alleged reason on which the belief was grounded.

[61] Faced with all those inadequacies relative to the material consideration of an injury to the applicant's right, Mr Lubbe, counsel for the applicant, disingenuously attempted to fill up the gaps by falling back on the applicant's averments under case number 1581/2015. Mr Els, counsel for the respondent, objected on the grounds that the *rule nisi* granted in favour of the applicant in that case was ultimately discharged. I am of the view that there

was substance in the objection. The applicant was precluded from relying on the averments contained in its previous affidavit in order to have the 5th respondent found to be in contempt of court. The reason for this is obvious. The 5th respondent's answering affidavit was confined to the allegations as set out in the 2016 founding affidavit only.

[62] It was the applicant's case that the chapters at Brandfort, Henneman, Theunissen and Ventersburg were the worst affected by the wrongful and harmful acts committed by the 5th respondent and others. The 5th respondent denied any involvement at any of those places and accordingly dismissed the applicant's allegation that he disobeyed the court order as false.

[63] The 5th respondent lived at Phuthaditjhaba at all times material to these current proceedings. If he was at Brandfort last year on the day of the incident, one would have expected one confirmatory affidavit from at least one member of the Brandfort congregation or chapter. However, none was filed. Therefore, the version of the 5th respondent has to prevail over that of the applicant's founding deponent, Jiya also failed to throw any light on the disputed point. The applicant's replying deponent, L.B Gonyongo. There was nothing in any of those paragraphs to sustain the allegation that the 5th respondent was, beyond any reasonable doubt guilty of contemptuous conduct towards the court. All that he could say about the 5th respondent was vaguely worded. He said:

“50. An order was made and the 1st – 6th **Respondents** are accordingly in contempt thereof as averred in terms of Part A.”

Part A consisted of paragraph 17 up to 22 of the founding affidavit.

- [64] The applicant’s case that the 5th respondent and others gathered at the applicant’s property erf – Brabdfort one Sunday in 2016 under the mistaken belief that they could rightfully do so. To sustain a punitive sanction based on contempt of court, it is incumbent upon the applicant to show that the respondent’s disobedient conduct was actuated by deliberate *mala fides* or wilful intent and not a mistaken belief.
- [65] In a desperate attempt to rope the 5th respondent into the disturbingly wide network of disobedient troublemakers, the applicant insinuated that the 5th respondent indirectly disobeyed the court order through the 7th respondent and the 8th respondent. The 5th respondent denied that he engaged the 7th respondent or the 8th respondent to do what the court order restrained him from doing. In my view there was no factual basis whatsoever to support the spurious, wild and unsubstantiated allegation that the 5th respondent used anyone as a destructive instrument of his extended ego. In reply no attempt was made by the applicant’s replying deponent to substantiate the founding deponent’s allegation against, the 5th respondent. Instead the replying deponent repeatedly kept on referring to the founding affidavit.

[66] Yet another twist in the tail was the founding deponent's averment that the respondents, which obviously includes the 5th respondent, rarely disrupt the church activities in person since they were interdicted. The applicant concedes that to prove that the interdicted 5th respondent was the actual driving force behind the actions committed by third parties was almost impossible. The concession was an honest admission that the applicant found it difficult if not impossible to prove, beyond reasonable doubt, that anyone, the 5th respondent, using any third party, deliberately but indirectly violated the court order.

[67] In **Fakie N.O v CC11 Systems (Pty) Ltd** [2006] JOL 17080 (SCA) the court held that in punitive committed proceedings the applicant must prove contempt on a high standard of prove beyond reasonable doubt. At paragraph 30 Cameron J said the following the requisite proof:

"[30] While the applicant may disavow punishment as a motive (a matter to which I return), the means the court is asked to employ remain the same: the public sanction of imprisonment for disobedience of a court order. The invocation of that sanction, in my view, requires conclusive proof. No less than punitive committal, purely coercive committal uses imprisonment, or its threat; and whenever loss of liberty for disobedience of an order of court is threatened it seems to me necessary and proper that the infraction should be proved conclusively."

"I am in agreement".

[68] Still in **Fakie**, *supra*, the distinguished judge went on to say the following about the true nature of this type of legal proceedings:

“[40] This approach conforms with the true nature of this form of the crime of contempt of court. As pointed out earlier (paragraph [10]), this does not consist in mere disobedience to a court order, but in the contumacious disrespect for judicial authority that is so manifested. It also conforms with the analysis in *Beyers* (paragraph [11] above), where this Court held that even though enforcement is the primary purpose of committal, it is nevertheless not imposed merely because the obligation has not been observed, "but on the basis of the criminal contempt of court that is associated with it". The punitive and public dimensions are therefore inextricable: and coherence requires that the criminal standard of proof should apply in all applications for contempt committal.”

[69] In this instance, the applicant had proved the first element of the crime of contempt. However, the determinant factor in the case revolved around the element of non-compliance. About that element the court said the following in **Fakie**, *supra*, par [10].

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

[70] I was at pains to consider the applicant's case as regards the alleged disobedience of the court by the 5th respondent. In view of the critique I have earlier outlined, I am not persuaded that the applicant has discharged the onus of proving beyond a reasonable doubt that the 5th respondent deliberately disregarded

the court order directly or indirectly as the applicant alleged he did. On the applicant's own version, even if one were to reject the 5th respondent's version, which cannot be fairly rejected – I must say, serious doubt, fuelled by vagueness, exists whether any reasonable court hearing the applicant's version can commit the 5th respondent for the crime.

[71] In **De Lange v Smits** 1998 (7) BCLR 779 (CC) the court held, per O' Reagan J:

“The power to order the summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite imprisonment for coercive purposes may involve a significant inroad upon personal liberty.”

The evidence tendered by an applicant in support of such coercive sanction must be beyond reproach. It was not in the instant matter.

[72] Although the 5th respondent was not an accused in the strict sense as in criminal law, in motion proceedings he was nonetheless entitled to similar protection by way of a high standard of proof. The applicant had to prove the court order relied upon, the service thereof upon the accused respondent, the respondent's non-compliance or infringement, his wilfulness and his *mala fides* – beyond reasonable doubt. On the facts, the last three elements were not established. As for the 5th respondent, all that was required of him was an evidential burden in relation to the element of wilfulness and that of *mala fides*.

[73] Given the peculiar circumstances of this particular case, I am inclined to decide the determinant question whether the applicant has shown that the 5th respondent wilfully disobeyed the court and thereby deliberately violated the dignity, respect and authority of the court – negatively in favour of the 5th respondent. This completes my consideration of the case against the 5th respondent.

[74] Now I turn to the 4th respondent. The observations, critique, reasons comments, findings and conclusions I made in respect of the 5th respondent apply to the 4th respondent as well.

[75] Although the 1st respondent, 2nd respondent, 3rd respondent and 6th respondent did not formally file opposing papers. They appeared in person and generally denied the accusations that they directly or indirectly defied the court order as the applicant alleged. Their denials were not farfetched. I would, therefore, also exonerate each one of them.

*[76] **In the fourth place, the interdict component of the main application.** As regards the 7th respondents and the 8th respondent, the applicant regarded them as new trouble makers who acted in the similar manner as all the respondents in the previous litigation. - See par 26.1 founding affidavit. At best for the applicant, the two respondent's were at the applicant's church premises at Brandfort one Sunday last year where they threatened to prevent the holding of a church service for the revival of that particular chapter. The allegations were not verified

by a single member of that chapter. It appeared very odd to me bearing in mind the alleged restless and agitation of the members of that chapter who wanted to have it re-opened.

[77] As I have earlier remarked, the alleged incident was not adequately particularized. The applicant seemed to accuse the 7th respondent as an instrument of the 5th respondent and others. Implicit in the complaint were the accusations that the 7th respondent disrupted the religious activities of the applicant; that he interfered with such activities; that he falsely held himself out as an authorised representative of the applicant's management structure; that he usurped the functions and powers of the church management; that he intimidated members of the applicant; that he wrongly used the name of the applicant, that he participated in programmes calculated to attain the objectives of the dissidents group and that he threatens to carry on – see “anx fa7”.

[78] On the strength of such vague and broad accusations it cannot be convincingly argued that the applicant has established any injury to its right or any reasonable apprehension of harm. Therefore, second requisite of harm committed or about to be committed by the 7th respondent was amiss. That being the case, applicant is not entitled to any interim protection of its right – **Sellogelo v Sellogelo** 1914 AD 221. The same considerations and conclusion applies to the 8th respondent.

[79] As regards the 9th respondent and 10 respondent, the applicant's case was that they disrupted church revival service at

Hennenman on Sunday 17 April 2016. The applicant's founding deponent alleged:

"I was personally there with fellow members of the Applicant where I was told by the **9th & 10th Respondents** that they are the 'African National Church' and that the Applicant is not to hold its church services there."

[80] Once again precisely what the alleged disruption entailed was never explained. Again not a single confirmatory affidavit from a member of the Hennenman chapter was attached to the founding affidavit. The impression created here, indeed as in the case of the 7th and 8th respondents, was that the applicant was very eager to obtain restraint orders against the 9th and the 10th respondents at all costs so that in due course it could also launch contempt proceedings against them as well. It quite apparent that the applicant desperately needs the support of the police. The understanding of the applicants founding deponent was that that the police would come to the rescue of the applicant provided the troublesome dissidents were committed for contempt of court.

[81] In my view it was not enough for the applicant to simply allege that the 9th respondent had infringed its right(s) in pretty much the same manner as the respondents in the previous cases did. I did not adjudicate the previous cases. Therefore, I have no idea of how the respondents in those previous cases had infringed the applicant's right. At least one of those previous applications was dismissed and at least one of the previous provisional orders was discharged. I am not certain whether 9th respondent knew how

the previous respondents conducted themselves because he was not one of them.

[82] It must be borne in mind that there has been a long series of similar applications against a great variety of respondents since the year 2010. All these are important considerations. Grave injustice may be done if such wide and unsubstantiated allegations were relied upon to sustain the interim relief sought against the 9th respondent.

[83] Consequently I have come to the conclusion that a proper case has been made out to justify the grant of an interim interdict against the 9th respondent or the 10th respondent. Where, as in this case one of the requisite of an interim interdict has not been proven, such relief cannot be granted. The onus of proving all the requisites, including the harmful act by the respondent rested on the applicant. The applicant failed to discharge the onus. I would, therefore, refuse the relief sought.

[84] Accordingly I make the following order:

- (a) The application to have the 1st respondent, 2nd respondent, 3rd respondent, 4th respondent, 5th respondent and 6th respondent committed for contempt of court is dismissed with costs;
- (b) The application to have the 7th respondent, 8th respondent, 9th respondent and 10th respondent provisionally restrained is dismissed with costs;

- (c) The application to have the late filing of the answering affidavit of 4th respondent and 5th respondent condoned is granted without any order as to the costs made one way or the other;
- (d) The application to strike out brought by the 4th respondent and the 5th respondent is granted with costs.

MH RAMPAL, J

On behalf of applicant: Adv E.G Lubbe
 Instructed by: Bezuidenhout Inc
 Bloemfontein

On behalf of 1st respondent: No appearance

On behalf of 2nd & 3rd respondents: In persona

On behalf of 4th & 5th respondent: Adv J Els
 Instructed by: Phatshoane Henney Inc
 Bloemfontein

On behalf of 6th – 10th respondent: No appearance