

THE REPUBLIC OF SOUTH AFRICA



A19/15

IN THE GAUTENG HIGH COURT: PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **Not**
(2) OF INTEREST TO OTHERS JUDGES: **Not**
✓ (3) REVISED
DATE: 8-12-16 SIGNATURE:

8/12/2016

**THE SOUTH AFRICAN RUGBY LEAGUE ASSOCIATION
AND
DAVE VAN REENEN**

Applicant

Respondent

Heard: 15 November 2016
Delivered: 8 December 2016

Judgment

Molahlehi AJ

Introduction

[1] This is an application in terms of which the applicant seeks an order finding the respondent, Mr Van Reenen to be in contempt of the court order made on 27 February 2015. It is further prayed in the notice of motion that the respondent be committed to prison for a

period of 30 days, suspended for a period of one year on condition that the respondent complies with the court order.

[2] The order made against the respondent and others was issued on the interim basis. On the return day, the court discharged the *rule nisi* in relation to the second to further respondents. Aggrieved by that outcome, the applicant applied for leave to appeal against that judgment. The application for leave to appeal was granted with the *rule nisi* extended pending the hearing of the appeal.

[3] The application is opposed by the respondent.

Background facts

[4] It is common cause that the respondent was the president of the applicant dating back to 2004. The tension between the respondent and the executive committee of the board of the applicant developed during June 2011. It was apparently as a result of the conflict that executive board members passed a resolution of no confidence on the respondent during the same year.

[5] The Rugby League International Federation (RLIF) intervened, and recommended that the dispute between the parties be referred to mediation. The outcome of the mediation was that a task team was formed to consider the restructuring of the structures of the applicant pending the adoption of the new constitution and appointment of the board.

[6] The respondent, according to the deponent to the founding affidavit of Mr Botha the president of the applicant, rejected the appointment of the interim committee. He did the same with the board which was elected after the adoption of the constitution. The respondent continued to communicate with the RILF as if he was still the president and undermining the presidency Mr Botha. He, in this respect, continued communicating with the RILF as if he was the president. It was for this reason that the applicants sought the interdict against him. The interdict was granted by Mngqibisa-Thusi J on the 27 February 2014 and reads as follows:

“ . . . a provisional order in terms of prayers 1 to 4 of the notice of motion dated 13 March 2012 are granted against the first respondent with return day 29 April 2014:

1. The respondents are prohibited from representing in any manner whatsoever to any, person, entity, body or sponsor whomsoever that they represent the applicant or the South African Rugby League (hereafter “the SARL).

2. The respondents are prohibited from

2.1 alleging that they are representing the applicant on the SARL in any official capacity such as chairman and/or any office bearer and/or official of the applicant or the SARL referred above;

2.2 Alleging that they have any authority to act on behalf of the applicant or the SARL;

2.3 Contacting and/or in any way interfering in the applicant's negotiations with SASCOC;

2.4 Contacting SASCOC or the Rugby League International Federation.

3. The respondents, jointly and severally are ordered to provide the following property to the applicant:

3.1 The financial statements of the applicant's predecessor in title for 2009, 2010, and 2011 financial years;

3.2 All minutes of meetings of the applicant for 2009 to 2011, correspondence and other documents that belongs to the applicant and/or its predecessor in title;

3.3 All trophies, including plate trophies and memorabilia that are property of the applicant.

4. The first respondent pays the costs of the application on an attorney and client scale."

[7] The return date for the above provisional order was 31 July 2014 and served before Lephoko AJ. In terms of that judgment, made on 30 September 2014, the interim order was discharged. In discharging the interim order the Learned Judge found that, that order was *null and void* as against the second to the eleventh respondents for the reason that the application that gave rise to the order was not served on those respondents. Although the order is silent as to the first respondent it would appear, when regard is had to what subsequently happened in the leave to appeal, that the rule nisi was not discharged as concerning the respondent.

[8] Following the above order applicant filed leave to appeal which served before Lephoko AJ on 12 December 2014. The leave to appeal to the full bench of this court was granted and the "*rule nisi* granted on 27 February 2014 is extended to the date of the hearing of the appeal."

[9] It is apparent from the papers that the applicant has delayed in the prosecution of its appeal. The reason for the delay according to the deponent to the founding affidavit was due to the problems related to the production of the record. The applicant has in this respect applied for condonation for the late filing of the record of the appeal. That application is not before this court. It is an application to be determined by the appeal court.

The applicant's case

[10] The present application arises from the lengthy email which the respondent addressed to Mr Baiteiri of the RILF. The email reads as follows:

"Subject: South African Rugby League (iEstablished 1988/9) – Players notification of grievance and intention to protest action – URGENT

ATT: Mr Tas Baitieri – Rugby League International Federation – Development Manager

Note: Copied to all South African League (iEstablished 1988) Board members as well – Private and confidential

Dear Tas,

Since we last spoke the situation has deteriorated and urgent attention will be required to the facts stated in this correspondence, and the attachment.

Recently we have experienced players from the faction side registering with us to play matches with our teams, because they complained that matches gets cancelled and that they do get match time.

Officials are also contacting us and some are joining us.

It so happened that players exchanged views and ideas and in the process the so-called "trials" which were held in Pretoria (by the Faction Group), to select a national side to play against Lebanon and Nuie caused serious unhappiness amongst the players registered with South African Rugby League (Estbalished 1988/9), and you will find the result of that in the attachment.

I have received these documents last Saturday after our Rhino Trophy and Presidents cup finals.

The contents of this attachment cannot be ignored – the call is out to that protest action will take place if the Lebanon and Nuie sides play in South Africa – for that matter all international competition will be affected till there is unity in the Rugby League sport in South Africa.

I have obtained legal advice in this regard and the recommendation was to report the matter to the Minister of Sport without delay – as it may cause international incidents which will not be accepted – also things can turn ugly if just ignored.

The attachment request that I reply to this Notification of Grievance by tomorrow 12th October 2016 and I have undertaken to do so.

At this stage some listed parties were informed either by letter or telephone – priority was given to the minister of Sport as mentioned above – the only party which I am unable to reach is the Nuie Representatives and I call on you to assist in this matter – or provide me with some contact details.

Although there was no request to involve RLIF I feel that you should know about the situation as Rugby League in South Africa is at the cross roads at this stage.

The bottom line is:

No International competition for South Africa till there is unity in South African Rugby League and equal opportunities exist for all players – a faction cannot represent South Africa any longer.

Effectively it means: Stop the Lebanon and Nuie visits

This is a further request that RLIF INTERVENE IN THIS ONGOING FEUD in South Africa.

At this stage I have requested all officials and players of South African Rugby League (Established 1988/9) not to engage with the press till I give them feedback tomorrow.

I am awaiting your early / urgent reply on this matter.”

[11] Following the above email Mr Baiteiri wrote to Mr Botha and stated the following:

"Kobus ... Good day ... And hope you are well ... Unfortunately I need to bring to your attention the details, provided below and also in the attachment. The details provided are concerning and before moving to the next level of intervention, I'd appreciate some clarity by you and your fellow board members on the grievance notice and selection process of the upcoming tour by Niue. Added is the issue surrounding the lawful body to control the game in South Africa following the court challenges at the time of Chris Botes. David Collier has also received a copy of the same email and we'd appreciate your position and reply on the allegations mentioned. Thank you for your comprehension in this matter and I trust the Niue matches will not be prejudiced by this ... after all the hard work and effort by both groups."

[12] On 28 October 2016 the respondent's attorneys addressed the letter to the applicant contending that the applicant has abandoned the appeal, apparently because of the delay in its prosecution. It is further contended in the same letter that the applicant no longer enjoys the protection provided for under the order made on 27 February 2014.

[13] The respondent further contended that because the *rule nisi* was discharged there existed no order to be in contempt of.

Legal principles governing contempt

The law governing consideration of a contempt of court application is summarised in **Lujabe v Maruatona**,¹ in the following terms:

"[6] The broad approach to adopt when dealing with the issue of contempt of Court order or judgment is well established in our law. The critical and starting point in contempt proceedings is whether there exists a Court order which is the subject matter of the complaint concerning non-compliance. The other aspects of the inquiry into the contempt proceedings entail determining whether the respondent was served with or notified of the order in question. Once these procedural aspects have been satisfied, the further evidentiary burden is on the applicant to prove beyond reasonable doubt that the failure to comply with the order was wilful and *mala fide* on the part of the respondent. In general, willfulness will be inferred once the applicant has established the failure by the respondent to comply with a Court order.

[7] It is trite that once the applicant has made out a case of willfulness and *mala fide* of the non-compliance with the order, the respondent bears the onus of showing on the balance of probabilities that non-compliance was not willful or *mala fide*. The general test to apply in considering contempt applications is set out in out in **Fakie No v CCII Systems (Pty) Ltd**,² in the following terms:

¹ (35730/2012) [2013] ZAGPJHC 66 (15 April 2013).

² [2006] ZASCA 52 2006 (4) SA 216 (O) at 220A-D

'The test for when obedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids an infraction. Even a refusal to comply that this objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).'

[8] After setting out the above test the Court in Fakie's case proceeded later in its judgment to summarise the general principles governing the approach to adopt when dealing with contempt as follows:

- '1. The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
2. The respondent in such proceedings is not an 'accused person', but is entitled to analogous protection is appropriate to motion proceedings.
3. In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and mala fides) beyond reasonable doubt.

4. But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidentiary burden in relation to wilfulness and mala fides; Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

5. A declaratory and other appropriate remedies remain available to a civil applicant on proof on the balance of probabilities.'

Evaluation

[14] In my view the issue of whether or not the appeal has lapsed is an issue, as stated earlier in this judgment, to be determined by the full bench on appeal and not this court. The same applies to the alleged non-compliance with the rules in as far as the appeal is concerned. It would appear at face value that, that issue will turn on whether the appeal court grants or refuses the condonation application filed by the applicant.

[15] The respondent has raised a number of points in his opposition to this application. The first point raised is that there is no court order upon which the applicant could base its complaint of contempt because the rule nisi was discharged by Lephoko AJ on 30 September 2014.

[16] It is apparent from the reading of the judgment of the Learned Judge and as stated earlier, the *rule nisi* was discharged in relation to the other respondents and not the respondent.

[17] The respondent criticises the order made by the Learned Judge in relation to the leave to appeal. It is, however, not his defence that he was confused and did not appreciate that the order was discharged only in relation to all the other respondents and not him.

[18] The respondent also raised the issue of failure by the applicant to join the other respondents cited in the initial application in this matter. His contention in this respect is that they have a substantial interest in the matter and further that they would be prejudiced if not included in the present matter. This argument bears no merit because the outcome of these proceedings has no bearing on the outcome of the appeal and the outcome of this matter will have no bearing on the other respondents. The only person accused of contravening the court order is the respondent. There is no evidence that any of the other respondents in the initial application has contravened the order. In any case, they could not be guilty of contempt because as there is no order against them, the *rule nisi* against them was discharged. In any case, the test in determining an appeal is different to that of determining contempt of court application. It should also be pointed out that in general contempt of court applications are generally directed at an individual who has failed to comply with the order or has failed to cause an entity to comply with the court order. It is only the respondent who is alleged to have contravened the court order by addressing the email in question to RLIF.

[19] Another defense raised by the respondent is that he did not willfully disobey the order but that in acting as he did, he did so on the basis of the advice that the appeal of the applicant has lapsed. This, it would appear to me to be an afterthought that came about as the respondent was called upon to account for his conduct. In this respect, he does not attach any supporting affidavit from his attorneys or any person who may have given him such an advice. It is also strange that his attorneys of record do not mention in their letter of 28 October 2016 that they had advised him that he was entitled to act as he did because as he alleges, the appeal had lapsed. This is in the context where they were responding to the letter of the attorneys of record of the applicant dated 18 October 2016. They said nothing about having advised the respondent that he was entitled to ignore the order for the reason that he gave. The letter to which his attorneys of record were responding to, amongst other things, spells out the conduct of the respondent which the applicant was complaining about.

[20] The argument that the respondent was representing South African Rugby League (Established 1988/9) when he communicated with Baiteiri is also not sustainable. There is nowhere in the email where he says that he is communicating on behalf of that entity. Of course, the email states the subject as "South African Rugby League (Established 1988/9)." It should be noted that, even if this was the case, the order prohibits him from communicating specifically with RILF on matters concerning South African Rugby League.

[21] I have already indicated somewhere else in this judgment that it is not the defence of the respondent that he did not understand the contents of the order. To emphasise the order

does not deal only with the prohibition of purporting to represent SARLA but deals broadly with the South African Rugby League. There seem to be no doubt, in my view, that the email, which is clearly deliberate in its essence, deals directly with issues related the Rugby League in South Africa, a subject matter which the court order says the respondent, in any capacity he so wish, should refrain engaging in with the entities referred to in the order and those include RILF.

Findings

[22] In light of the above analysis I find that, in sending the email in question to Baiteiri, the respondent did so deliberately, with *mala fide* intention of undermining and disobeying the order made by this court.

[23] It is clear that the order deals with issues related to South African Rugby League which covers South African Rugby League (est 1988/89). The order was, in light of the judgment Lephoko AJ directed at the respondent and any other person. Similarly, the order was not directed at the South African Rugby League (est 1988/89) as an entity but against the respondent as an individual.

[24] The issue of the delay in the prosecution of the appeal is a matter to be dealt with the full bench.

[25] As concerning the issue of urgency, it is generally accepted that contempt proceedings need to be dealt with on an urgent basis. The underlying consideration for this approach is

set out in **Victoria Park Ratepayers Association v Greyvenouw CC**,³ where the court held that:

"I would add that it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow."

[26] It is, therefore, my view based on the earlier discussion in this judgment that the applicant has discharged its onus of showing the existence of a court order which the respondent is aware of but deliberately failed and/ or refused to obey. The respondent has, on the other hand, failed to discharge his evidentiary burden of showing that the non-compliance with the order was not deliberate or malicious. I am however of the view that the period for committal prayed for the applicant in its notice of motion is too harsh and as will appear in the order I have imposed a sanction which I believe is fair and equitable in the circumstances.

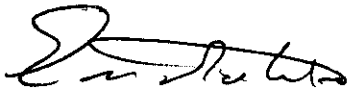
³ (511/03) [2003] ZAECHC 19 April 2003.

[27] I see no reason why costs should not follow the results. In the circumstances of this case I have however not been persuaded that it would proper to impose punitive costs.

Order

[28] In the premises the following order is made:

1. The requirements pertaining to form and service are dispensed with and the matter is treated as one of urgency in terms of rule 6 (12) of the Uniform Rules of the Court.
2. It is declared that the first respondent is in contempt of the order of the court handed down by Mngqibisa-Thusi J on 27 February 2014.
3. The Respondent is committed to prison for a period of 10 days, which committal is suspended for a period of six months, on condition that the Respondent immediately complies with the court order mentioned in paragraph 2 above.
4. Should the Respondent fail to comply with the Court Order mentioned in paragraph 2 above the Applicant is permitted to approach this Court for an order to have the Respondent committed to prison on the same papers, supplemented where necessary.
5. The Respondent is pay costs of the Applicant.



EM Molahlehi

Acting Judge of the South
Gauteng High Court

APPEARANCES

APPLICANT: Adv J A Venter.

Instructed by Weavind & Weavind Attorneys.

RESPONDENT:

Instructed by Ehlers Fakude Incorporated.