

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Case No.: 513/2014

Date Heard: 12 March 2015

Date Delivered: 24 March 2015

In the matter between:

AFRICAN GOSPEL CHURCH

Applicant

and

JACKSON NDYALIVANI

Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant seeks the confirmation of the rule *nisi* issued in this Court on 4 September 2014 interdicting the respondent from entering or being at the premises of the applicant's church in Dimbaza and granting certain ancillary relief.

[2] The applicant has for many years been plagued by dissension within its membership. This, sadly, has led to considerable litigation over an extended period and it is this dissension which lies at the root of the current dispute.

[3] The Reverend Gigaba (to whom I shall refer herein as "Gigaba") has attested to the founding affidavit on behalf of the applicant. He alleges that he is the moderator of the applicant and that he is therefore empowered by the constitution of the applicant to act on its behalf. The respondent disputes the authority of Gigaba to

represent the applicant in this matter and denies that Gigaba is the moderator of the applicant at all. It is accordingly necessary, before I turn to consider the merits of the application, to address the issue of Gigaba's *locus standi*.

[4] It is not in dispute that the constitution of the applicant authorises the moderator to act on its behalf and therefore to bring legal proceedings. Gigaba states that he is the duly and lawfully elected moderator of the applicant, having first been duly and lawfully elected as moderator by the annual conference of the applicant in 1994. He proceeds to state that he was thereafter duly and lawfully re-elected as moderator by annual conferences and/or special annual conferences of the applicant in 1999, 2008 and 2013 respectively. The election in 2008, he states, took place in accordance with an order of the Bhisho High Court and was assisted by officials from the Independent Electoral Commission. I pause to mention that the order of the Bhisho High Court referred to is an order issued by Nyangiwe AJ on 31 August 2006 in case number 1560/2005.

[5] The respondent admits that Gigaba was lawfully and constitutionally elected as moderator of the church in 1994, however, he contends that Gigaba's term of office expired in 1999 and that he was never re-elected in 1999. Gigaba, he says, was unhappy with the decision not to re-elect him in 1999 and he left the church declaring that he was still the moderator of the church. The respondent proceeds to declare that Gigaba has never been "duly elected" after 1994 and his group never complied with the order made by Nyangiwe AJ. The order made Nyangiwe AJ has not been placed before me but the respondent alleges that Nyangiwe AJ ordered that Gigaba, in his capacity as moderator, convene a meeting of the remaining

members of the Central Executive of the Church as lawfully constituted in 1996 for the sole purpose of determining an appropriate date for the holding of a special annual conference of the church. This, the respondent contends was never done and he denies that the 2008 election took place in accordance with the order of the court.

[6] As is apparent from the foregoing the respondent puts up a blanket denial that Gigaba was ever “duly elected” as moderator after 1994. The respondent does not take the Court into his confidence in explaining why he contends that Gigaba was not “duly elected”. It is nevertheless implicit in the averments made by the respondent himself that Nyangiwe AJ made an order that Gigaba should convene a meeting as set out above in his capacity as moderator. It appears therefore, on the version of the respondent, that this Court found Gigaba to have been the moderator of the applicant during 2006.

[7] I turn to consider the 2008 election. The applicant, in its founding affidavit, set out at some length the history of litigation involving the applicant. It referred extensively to an application brought in the High Court of KwaZulu-Natal in case number 14614/07 (to which I shall revert in greater detail later herein). At this juncture it is sufficient to refer briefly to some of the findings made. The application was referred to oral evidence and the trial commenced during 2009. The applicant states that the evidence ran for thirty court days over a period of four years terminating in an order made during March 2013. In his judgment, after hearing the extensive evidence, Ntshangase J held:

"I pause here to state that much is and has been said about recognition of two groups, the so-called Gigaba group and Zimu group, both purporting to operate as the African Gospel Church

What there is in fact in this church is a dissension amongst members and not a spilt of the church. There cannot be two independent groups operating as the African Gospel Church (each) with its own head Whoever is elected as Moderator ... is the Moderator of the entire African Gospel Church ..."

[8] Ntshangase J proceeded to hold that presently, by re-election in 2008 at Cedarville, Reverend Gigaba is the moderator. The judgment of Ntshangase J was delivered in March 2013. An application for leave to appeal against the judgment was refused by the Supreme Court of Appeal. I set out later herein the order issued by Ntshangase J.

[9] To the specific allegations made in respect of this litigation and the findings made by Ntshangase J the respondent did not reply at all in these proceedings and they accordingly remain entirely controverted. The bald denial, to which I have referred earlier, of the averment that the 2008 election took place "in accordance with the order of Court" is therefore untenable. The respondent does not attempt at all to set out the deficiencies in the 2008 election which he contends do not accord with the order of Court. The order of Court, as I have alluded to earlier, has not been annexed to the papers.

[10] That brings me to the 2013 elections. In this application the respondent does not deal at all with the events of 2013 and simply denies that Gigaba was elected. The denial is somewhat coy. He does not suggest whether it is contended that no

election took place or whether it is contended that the election which did take place was deficient in some manner or another.

[11] In ***Plascon-Evans Paints v Van Riebeeck Paints*** 1984 (3) SA 623 (A) at 634H-635A Corbett JA stated:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court ... and the Court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. ...”

[12] For the reasons set out above I am not persuaded that any real, genuine or *bona fide* dispute of fact exists as to the validity of the election of Gigaba as the moderator of the applicant in 2008 or 2013. The respondent did not avail itself of the right to apply for Gigaba to be called for cross-examination. I am accordingly satisfied that he has the *locus standi* to bring the application to Court on behalf of the applicant.

[13] I turn to consider the merits of the matter. Again it is necessary for purposes of the merits to set out the background to the events which occurred on 31 August 2014.

[14] The respondent, in his affidavit, acknowledges that the applicant is a juristic person able to own property. He then proceeds to state:

- “6. For several years now our church has been ravaged by factions which both do not recognize each other as the leadership of the church. Our group follows Zimu as the legitimate leader and Moderator of the Church whilst Gigaba is the leader of the rebel group which refuses to accept Zimu as the lawfully and constitutionally elected leader of the church as a whole. This stalemate has led to a flurry of litigation between the two groups which are divided at all levels. In terms of the Judgment of Mr Justice Ntshangase Reverend Gigaba is so far the lawful and constitutional Moderator but the Zimu faction is opposing the finding of Ntshangase J. To put it differently, Gigaba is a renegade former Moderator whose official term came to an end in 1999 but refused to vacate office ...
7. The standoff between my group and the congregation headed by Rayisa is a result of the leadership squabble in the upper echelons of the church. ... The Church building belongs to the national church from which Gigaba is a defector and has been whipping the emotions of the congregants by making false allegations. Until the dispute is finally resolved in the highest court of the land, no church building belongs to any particular faction and all the congregants have contributed in purchasing and developing church buildings.”

[15] I have referred earlier to the pertinent findings of Ntshangase J. An application for leave to appeal against the judgment of Ntshangase J was, as earlier

recorded, refused both by the trial Judge and by the Supreme Court of Appeal. There is no further appeal pending.

[16] The application before Ntshangase J was an application for contempt of court seeking to commit Zimu to imprisonment for his failure to comply with earlier orders of court. Ntshangase J imposed a period of imprisonment upon Zimu for contempt of court and imposed a further period of imprisonment which was suspended as follows:

- '2. The Respondent is committed and sentenced to imprisonment for six months of which four months are suspended for five years on the following conditions that the Respondent: (*sic*)
 - 2.1 shall not directly or indirectly hold himself out as holding any office of the African Gospel Church for which elections must be held, at a duly constituted conference, and especially that of Moderator, unless he has been duly elected to such office.
 - 2.2 shall not directly or indirectly call, organise, hold, attend or preside over any meeting, conference or election of the African Gospel Church at Fascadale or at any other place, and shall in particular not ordain any ministers and / or workers of the African Gospel Church whilst not lawfully holding the office of Moderator of the African Gospel Church.
 - 2.3 shall not alone or together with others hold himself out as holding office in or constituting an Executive Committee, central Committee, Council or any other governing body of the African Gospel Church or as acting in any executive capacity of the African Gospel Church unless he has been duly elected to such office.

2.4 the Respondent is, within a period of 14 days from the date hereof to sign a declaration.

2.4.1 that all ordinations of persons as ministers or evangelists over which the Respondent presided at Fascadale or any other place from 2001 to date; and

2.4.2 all “appointments”, “transfers”, or placements that the Respondents made of persons, whether ministers or evangelists or not to facilities and / or churches and / or premises of the African Gospel Church from 2001; and

2.4.3 all transactions which the Respondent undertook in the name of the African Gospel Church as a purported office bearer of the African Gospel Church

are null and void, and

2.4.4 that the Respondent is not and has never been elected to the office of moderator and has accordingly never held office as Moderator in the African Gospel Church, which, incidentally the Respondent has declared in his apology.’

[17] Ntshangase J further ordered that the said declaration referred in paragraph 2.4 of his order should be accompanied by an apology to be published to all congregants of the African Gospel Church and prominently at the respondent’s expense in the Ilanga and the Isolezwe newspapers in Zulu translated by a sworn translator and in English in the City Press and in the Sowetan and in the Daily Dispatch in English. This was duly done. In these circumstances the respondent’s claims of Zimu’s legitimacy set out in paragraphs 6 and 7 of his affidavit, which I have quoted above, are not only spurious and untenable but are contemptuous of

the order granted by Ntshangase J and in direct conflict with the declaration published by Zimu himself.

[18] During late 2013 or early in January 2014, after the judgment of Ntshangase J, the respondent herein, apparently acting on behalf of the Zimu followers entered into an agreement with the Buffalo City Municipality to purchase from them the premises on which the church of the applicant is situated in Dimbaza and thereby to obtain the title deeds in respect of the property. The respondent, who is by virtue of the order made by Ntshangase J not an office-bearer in the applicant, purported to act on behalf of the applicant. This prompted Gigaba to launch an application in the name of the applicant to set aside the sale to the respondent. A final order was obtained on 6 May 2014 in which Smith J issued an order setting aside the written agreement concluded between the respondent and the Buffalo City Municipality. He made a further order declaring that the African Gospel Church, represented by Gigaba in the litigation, was the lawful owner of the property.

[19] It is against this background that the respondent addressed a letter to the Reverend Rayisa on 26 August 2014. The respondent advised the Reverend Rayisa that on 31 August 2014 he and “the congregants” intend to come to the Dimbaza African Gospel Church to worship. This set the scene for the events which occurred on 31 August 2014.

[20] On Sunday 31 August 2014 the respondent and approximately 35 other persons came to the church in Dimbaza. The applicant states that they came and unlawfully invaded and occupied the Dimbaza Church. Gigaba states that the

purpose was to threaten the Reverend Rayisa and the applicant's congregants and force them to abandon the premises and to prevent the Reverend Rayisa, the minister of the applicant appointed to the applicant's church in Dimbaza, from worshipping on Sunday as they normally have done. Gigaba proceeds to state:

"When the Respondent and his cohorts finally left the premises, Respondent told South African Police Services (Dimbaza) that they intend to invade and occupy the said premises again on Sunday 7th September 2014 and finally take out Reverend Rayisa."

[21] I pause to record that Gigaba was not present on 31 August 2014, however, confirmatory affidavits of Reverend Rayisa and Reverend Mdlokolo, both of whom were present, were filed in support of the application.

[22] In response to these allegations the respondent admits that he and a group of other congregants did proceed to the church. He denies that they "invaded" the premises or threatened the lives of any people who were standing outside the church when they arrived there. He proceeds to state:

"To the extent that it is being suggested that we entered the premises unlawfully and wrongfully, this we deny, and call upon Gigaba to prove ownership of the church building, or permit to occupy the church premises and the church building. Gigaba and Rev Rayisa do not have such documents and from our side we have already paid R12000-00 to the Buffalo City Municipality for occupational permit."

[23] The respondent proceeds to deny that the intention was to force Rayisa out of the premises. He sets out his version of the events which occurred as follows:

“Just to put the court in the picture, when I and my congregants arrived at the church in the morning of 31 August, I told Rev Rayisa that we had to come to worship, and could he please give us access to the church building as already requested in my letter. Rev Rayisa refused and said he was going to call their legal advisers and people who were in charge of the church. As he was speaking on his mobile phone I could not hear what he was saying but he came to me and said he was calling the police. The police came and wanted to see court orders. ... Also present were Mrs Msomi and about 35 other congregants who were prevented by Rayisa and his group from entering the church and worship their God.”

[24] The averments relating to Rayisa’s rights of occupation to the church building are clearly spurious. Reverend Rayisa is a duly appointed minister of the applicant designated to Dimbaza. The allegations put forward in respect of his rights of occupation are again not only untenable but contemptuous of the order made by Smith J which I have referred to earlier herein. The applicant’s rights of occupation of the Dimbaza Church have already been decided in this court and no appeal is pending against the order made by Smith J. I pause to mention that the respondent herein initially delivered a notice of intention to defend the proceedings before Smith J, however, after obtaining legal advice, withdrew his notice of opposition. He now contends that he intends to move for rescission of the order which he says was obtained by default. I do not consider that the order was made by default. respondent, on his own version had proper service of the papers. He in fact entered an appearance to defend. He then enjoyed the benefit of legal advice before taking a conscious and deliberate decision to withdraw his opposition.

[25] What clearly emerges from the undisputed facts is that the Reverend Rayisa and his congregation were at their church on 31 August 2014 when the respondent and his supporters arrived. They sought leave to enter and their request was declined as the Reverend Rayisa was entitled to do. Thereupon they attempted to enter the premises against the wishes of the Reverend Rayisa and this for the reason that they dispute the rights of the applicant to the church.

[26] The averment in the founding papers that the respondent advised the South African Police that they intend to return to invade and occupy the said premises on 7 September 2014 and to finally take out the Reverend Rayisa has not been directly disputed at all in the papers. During argument before me I raised with Mr **Mbanjwa**, who appeared on behalf of the respondent, the absence of such denial. Mr **Mbanjwa** argues that on a proper reading of the papers the averment is denied. He points to two passages in the answering affidavit. In the first, the respondent, addressing the matter of urgency, denies that the application is urgent and states that the rule *nisi* should not have been granted “because no person had been intimidated, threatened or assaulted at all”. In the second passage upon which reliance is placed the respondent argues that the mere fact that no docket has been opened against any member of his congregation shows that no person was intimidated, threatened or assaulted.

[27] I have referred earlier to the decision in ***Plascon-Evans Paints***, *supra*, and the test to be applied where final relief is sought. Mr **Mbanjwa** argues that upon the application of the test set out in ***Plascon-Evans Paints***, *supra* the denial by the respondent should be accepted for purposes of the adjudication of the present

application. I do not agree. In my view no real, genuine or *bona fide* dispute of fact is raised in respect of the allegation that the respondent conveyed to the South African Police their intention to return the following week to invade the premises and to finally take out the Reverend Rayisa.

[28] In ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*** [2008] 2 All SA 512 (SCA) at 515 (para [13]) Heher JA stated:

“A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.”

[29] Heher JA proceeded at 519 (para [19]) to state:

“The second respondent’s general denial leaves important matters unanswered. The failure to deal issuably with the factual averments is unjustifiable on any rational basis.”

[30] I think that these comments find equal application in the present matter. There has been no attempt to deal specifically with the fundamentally important

allegation of the threat to return the following week and I consider that it remains uncontroverted.

[31] The applicant has accordingly established a clear right to its occupation of the church through its duly appointed servant Reverend Rayisa. On the facts which are common cause an injury to or an invasion of that right occurred on 31 August 2014 and it has established too that the applicant held a reasonable apprehension of a further invasion of that right on 7 September 2014. The applicant does not, to my mind have any other suitable remedy at its disposal but to seek an interdict to protect its rights.

[32] In those circumstances the applicant is entitled to relief. During argument I raised with Ms **Wild**, who appeared on behalf of the applicant whether some of the relief set out in the rule *nisi* was competent. Ms **Wild** concedes that paragraphs 1.2, 1.4 and 1.5 of the rule *nisi* should not be confirmed.

[33] In the result, the order which I confirm and the final order which I make is that:

1. the respondent is interdicted and restrained from entering or being at or upon or being within two hundred metres (200 m) of the premises of the African Gospel Church at 2731 Dimbaza Township;
2. the respondent is interdicted and restrained from assaulting, threatening, intimidating and harassing the Reverend Rayisa, Reverend Rayisa's family, and any minister or congregant of the African Gospel Church whether of the

Dimbaza Congregation of the African Gospel Church or of any congregation of the African Gospel Church;

3. the South African Police Services, whether from Dimbaza or any other unit are authorised to enforce this court order;
4. the respondent is ordered to pay the costs of this application on a scale as between attorney and client.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv J Wild instructed by Lyn Boswell Attorneys, King Williams Town

For Respondent: Mr Mbanjwa instructed by C Z Mbanjwa Inc, King Williams Town