

IN THE HIGH COURT OF SOUTH AFRICA

Not Reportable

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 1499/14

Heard on: 27/03/2015

Delivered on: 23/04/2015

In the matter between:

**THE CHRISTIAN CATHOLIC APOSTOLIC
CHURCH IN ZION**

Applicant

and

LUBABALO LEONARD HLAMANDLANA

1st Respondent

AMOS MKE

2nd Respondent

ARTHUR MATWA

3rd Respondent

MANYANZELA MANCINCI NOMKHATSHULE

4th Respondent

JUDGMENT

NHLANGULELA ADJP:

[1] The principles governing an application for contempt of court, be it in *facie curiae* or *ex facie curiae*, are set out in the case of *Fakie NO CC11 Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) as follows at 344, para [42]:

- “(a) 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.
- (b) The respondent in such proceedings is not an ‘accused person’, but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
- (d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential 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.

- (e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”

[2] It is the applicant’s case that the respondents are in contempt of the court order that was issued by this Court on 15 November 2013, and confirmed on 20 February 2014. The terms of the court order read:

- “1.1 **That** the respondents be and are hereby ordered to return forthwith to the Applicant the church building at **Balasi Mission, Siphageni Administrative Area, Flagstaff**, all the property that belongs to the Applicant that has been removed from such church premises by the Respondents;
- 1.2 **That** the Respondents be and hereby interdicted and restrained from holding themselves out as leaders of the Applicant in any capacity;
- 1.3 **That** the Respondents be and hereby ordered to hand over to the Applicant’s current leadership under **Archbishop Wellington Mboyi** all stationery, documents and any other property of any description whatsoever that belongs to the Applicant and that is in their possession;

- 1.4 **That** the Respondents be and are hereby interdicted and restrained from interfering in any way whatsoever with the current leadership of the Applicant under **Archbishop Wellington Mboyi** in the execution of their duties as leaders of the Applicant;
- 1.5 **That** the 6th Respondent is ordered to remove forthwith the names of the 4th and 5th Respondents as signatories to the Applicant's **Account No. 287639215**, and to replace such names with the names that will be furnished to it by the Applicant's current leadership that is led by **Archbishop Wellington Mboyi**;
- 1.6 **That** the Respondents be and are hereby interdicted and restrained from holding any church meetings or gatherings under the auspices of the Applicant or utilising the name of the Applicant, without express authorisation by the current leadership of the church under the leadership of **Archbishop Wellington Mboyi.**"

[3] The facts which are common cause are that the members of the applicant church (the Church) are divided into at least two factions which have been

wrestling for the control of the church for quite sometime. Whereas the first factions is led by Mr Wellington Mboyi, the second is led by Mr Lubabalo Leonard Hlamandlana. The second faction consists of the respondents, including Mr Hlamandlana and many others.

[4] The Church is possessed of a number of assets, movable and immovable, such as the buildings situated at Hlwahlwazi No. 1 and Hlwahlwazi No. 2; Twazi No. 1 and Twazi No. 2; Marhasha Location; Mthontsasa Location and Balasi Mission. These assets are used by the Church as sites for the purposes of worshipping the name of God. They are all located within the district of Flagstaff. The site at Hlwahlwazi is the mission station and Headquarters of the Church.

[5] The Church is a huge organisation. The court orders under question illustrate the on-going tension that exists between the members of the Church. The members have been involved in numerous court cases brought before this Court under different case numbers.

[6] As a matter of law, the court order dated 15 November 2013 is a valid court order that is binding upon the parties to whom it is directed. The respondents cannot be heard to be contending otherwise despite the rumblings of protest raised by them on affidavit. It also bears mentioning that the order shall remain so valid and enforceable upon those to whom it is directed until such time as it has been set aside by a court of competent authority. Breach of a court order constitutes a punishable criminal offence to the extent that it violates the dignity, repute or authority of the court in enforcing its orders see *S v Beyers* 1968 (3) SA 70 (A) at 80C-G.

[7] During arguments *Mr Nonkonyana*, counsel for the respondents, raised a point of *lis pendens*, contending that the enforceability of the court orders of 15 November 2013 and 20 February 2014 were suspended on 24 April 2014 when the respondents filed an application for leave to appeal against those orders as well as against the order of Majiki J issued on 21 February 2014 under Case No. 233/2012 setting aside the answering affidavit of the respondents on the basis that it was an irregular step. The problem with this contention is that in our law of civil procedure, Rule 49 (1)(b) , an application for leave to appeal a judgment or order has to be brought within 15 days after the date of issue thereof, provided that such period may be extended by the court on application. The

respondents filed the application for leave after approximately two months. But when that happened the application for condonation as envisaged in the proviso to Rule 49 (1)(b) was not brought. For these reasons I am bound to accept the submission advanced by *Mr Zilwa*, counsel for the applicant, that the application for leave does not comply with Rule 49 (1)(b). It can safely be regarded as *pro-non scripto*. Therefore, both the orders dated 15 November 2013 and 20 February 2014 as well as that of Majiki J were not suspended by the filing of the application for leave on 24 April 2014. Consequently, the point of law that the main application is pending determination on appeal must fail. The argument that there is pending application proceedings under Case No. 1383/2014 in which the leadership of Mr Mboyi is impugned must also fail because that matter is as yet to be decided. This decision brings one to deal with further the points of law raised on behalf of the respondents. I deal with those points below; but not necessarily in the order in which they were presented on the answering affidavit.

[8] The second point of law is that the Church was not properly represented when the main application was brought because Mr Mboyi, the deponent to the founding affidavit was not the Arch-Bishop of the Church who was clothed with constitutional power to sue on behalf of the Church. Evidently, Mr Mboyi

deposed to an affidavit in his capacity as such by a resolution of the Church to sue. For present purposes it can be accepted that the claim made by Mr Mboyi in the founding affidavit that he is the right person to sue is correct because the claim was not contradicted.

[9] The third point of law raised is that Mr Mboyi must be unsuited for this application because he failed to exhaust internal remedies for resolving disputes within the Church in contravention of clause 18 of the Church Constitution. In my view this point must also fail because the contempt of court proceedings concerns an attack against the reputation, honour and dignity of the Court; Mr Mboyi being merely the beneficiary to the court orders that have been violated.

[10] I will deal with the fourth point of law, raised that the application must be dismissed on the ground that Mr Mboyi should not have brought an application well knowing of the existence of disputes of fact on affidavits, in the course of analysing the facts of the case.

[11] The way has now been paved for me to decide the merits of the complaint that the respondents have conducted themselves in contempt of the court orders

dated 15 February 2013 and 20 February 2014. The gist of the applicant's complaint is encapsulated in paragraph 15 of the founding affidavit, which I paraphrase in the following terms:

1. The respondents have not given the applicant exclusive use of its assets in that:
 - (a) they continue to use the buildings in Hlwahlwazi No. 1 and Hlwahlwazi No. 2.
 - (b) they continue to use the buildings in Twazi No. 1 and Twazi No. 2.
 - (c) they continue to use the buildings in Marhashu Location.
 - (d) they continue to hold meetings in church buildings on Sundays.
 - (e) they continue to occupy the Headquarters of the applicant.
2. The respondents have not returned to the applicant about 50 chairs, two tables, sponge mattresses, one water tank, stamps and stationery.
3. The respondents are using applicant's stationery and stamps to make and sell baptismal certificates for many non-existent children.
4. On 09 February 2014 the second respondent chased away one Jackson Vusiwe, a *bona fide* member of the Church, from Hlwahlwazi No. 2 church building of the applicant.

5. On 23 February 2014 and at Twazi and Marhashu stations, the respondents held a church service known as “Inkonzo yoqoqo”, which proceedings were filmed and recorded in DVD.
6. On 18 April 2014 the respondents held their Passover Church Service at Hlwahlwazi No. 2 Church building where the Seven Utterances (Amazwi Asixhenxe) by Jesus on the Cross were preached.
7. On 19 April 2014 the respondents convened a meeting in a church building of the applicant and made resolutions suspending Mr Mboyi, as the leader, and the members of his group. Pursuant thereto, Mr Mboyi and the members of his group were dismissed as the members of the Church.
8. The respondents continue to hold themselves out as leaders of the applicant Church.

[12] The contention advanced on behalf of the applicant is that the actions of the respondents, individually and as a collective, as listed in the preceding paragraph were taken in breach of the court orders.

[13] Mr Hlamandlana, and the co-respodents by extension, did not deal pertinently with the allegations made on behalf of the applicant in paragraph 15 of the founding affidavit. Instead he raised the issues of leadership dispute and the meeting of the members of his group that took place on 19 April 2014 that decided to dismiss Mr Mboyi and his group from leadership positions and membership of the Church. He raised issues concerning the efforts being made by his group to effect regime change that are pursued in court proceedings under Case No. 1383/2014. With respect, these issues do not address the serious breaches which have been levelled against the respondents in paragraph 15 as aforesaid. The evidence that Mr Mboyi and the members of his group took the keys of the Balase Mission buildings from Chief Ndabankulu, invaded the mission buildings, assaulted a guard and destroyed the buildings in May 2014 is denied by Mr Mboyi in the replying affidavit. I have observed that the allegations made by Mr Hlamandlana do not directly implicate any one or more persons of Mr Mboyi's group. Neither did he seek confirmation of these allegations on affidavit from the guard and Chief Ndabankulu. These allegations do not constitute *bona fide* disputes of fact on a material matter, but they are sweeping statements which carry highly diminished evidential value in my view. They fall to be rejected out of hand without recourse to oral evidence.

[14] I accept the version of events as outlined in paragraph 15 of the founding affidavit.

[15] The fact that the respondents were served with the court order dated 15 November 2013 is evidenced by the Sheriff's returns of service. It is clear from the returns that the nature and exigencies of the court order were explained and understood by each of the respondents. The submission by *Mr Zilwa* that the respondents were legally represented in court on 15 November 2013 and 20 February 2014, as so confirmed by the contents of those orders, re-inforces the conclusion that not only were the respondents served but they knew very well what the orders enjoined them to do. It must follow, therefore, that the defences raised that the respondents did not know about the existence of the orders nor appreciate the import thereof by reason that they were not present in court, they thought that the orders served upon them were the summons or a warrant of execution and that their lawyers confused the orders for some unrelated interlocutory application(s) cannot make sense.

[16] I find that the order of court made on 15 November 2013 was served upon the first, third and fourth respondents on 22 November 2013; and served upon the second respondent on 06 December 2013. And they have been shown

beyond a reasonable doubt to have wilfully and with *mala fides* elected not to comply with the orders.

[17] The respondent's defence that the resolution of the Church conference, held on 19 April 2014, ex-communicating Mr Mboyi and substituting him and his group with the respondents faction requires to be given priority over the court orders must be given a short shrift. Such a resolution cannot prevail over the court order that was lawfully issued. The applicable rule is that all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. See: *Di Bona v Di Bona & Another* 1993 (2) SA 682 (C) at 688C-E.

[18] I must now deal with the relief sought by the applicant that the respondents be committed for the contempt of court and be given such punishment as to the Court seems meet. The punishment called for includes committing the respondents to jail. In other words, the applicant's relief is not limited to a declarator and the enforcement of the court orders. It would appear from the case of *East London Local Transitional Council v MEC For Health, Eastern Cape, And Others* 2001 (3) SA 1133 (Ck) that a criminal sanction, or its

threat, may be applied to compel compliance with a court order that has been disobeyed. In that case Ebrahim J said the following at 1140, para. [28]:

“The essential object of contempt proceedings is to obtain the imposition of a penalty in order to vindicate the Court’s honour consequent upon the disregard of its order as well as to compel performance in accordance with the order. The proceedings may also be brought for the sole purpose of punishing the respondent. (Herbestein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (Dendy, ed) 4th ed at 817. See, further, *Protea Holdings Ltd v Wriwt and Another* 1978 (3) SA 865 (W) at 878B; *Sparks v Sparks* 1998 (4) SA 714 (W) at 725H-I; *Bruckner v Bruckner and Another* [1999] 3 B All SA 544 (C) at 549i-j and 550a.) When the object is primarily to compel performance of the court’s order the period of imprisonment imposed by the Court as a punishment is often suspended pending fulfilment by the defaulter of his or her obligations. (*Herbestein and Van Winsen (op cit* at 817) and the cases cited there.)”

[19] In this case there is a need to advance the objects of contempt of court proceedings, punishment and enforcement because the respondents very clearly wilfully and *mala fide* neglected the orders of court and later on, as an excuse

for not complying therewith, they held a meeting on 19 April 2014 to pass resolutions the effect of which it was to emasculate the provisions of the orders. Such conduct cannot be tolerated. An award of a punitive order of costs is warranted as a mark of the Court's displeasure with the conduct of the respondents.

[20] Now that the respondents have been found to be in contempt of court, the next step is the fixing of sentence taking into account that strictly speaking this Court, a civil court, is not a criminal court where the respondents would have been brought to court on summons and a charge sheet/indictment setting out the rights of the respondents in terms of s 35 of the Constitution Act, 1996.

[21] The cases of *Uncedo Taxi Service Association v Maninjwa And Others* 1998 (3) SA 417 (E); and *Uncedo Taxi Service Association v Mtwla And Others* 1999 (2) SA 495 (E) provide helpful tools for fashioning an appropriate order in this matter. In the first *Uncedo* case Pickering J makes a relevant remark on the mis-conception that the civil court is a suitable forum at which to punish a contemnor criminally. He said the following at 424E-G:

“In my view, the right contained in s 35 (3) (a) is amply
afforded to an alleged offender in summary proceedings

instituted by way of notice of motion. The founding affidavit of the applicant will of necessity set out in some detail the averments in support of the application for committal and will specify the respects in which the offender allegedly committed contempt of Court *ex facie curiae*. The fact that these averments are contained in a notice of motion and affidavit and not in a charge-sheet seems to me to be of no consequence whatsoever. If anything, the offender would in the normal course of events be afforded a great deal more particularly concerning the alleged contempt in an affidavit than in a charge-sheet. A wide range of conduct may fall within the ambit of contempt of Court *ex facie curiae*. (See *Milton (op cit at 177 et seq.)*.) It does not follow therefrom, however, that the ‘charge’ against the offender cannot be formulated with sufficient clarity and certainty in the affidavits filed in support of the summary procedure. Once the details of the alleged contempt have been so specified, the requirement entrenched in s 35 (3)(a) will have been met (cf *S v Lavhengwa [1996] (2) SACR 453 (W)*] (*supra* 484h-j)).”

[22] Pickering J expanded his remarks as follows at 429C-D:

“... it is clear, in my view, that the fact that contempt proceedings are brought summarily by way of notice of

motion does not mean that they cannot be conducted fairly in consonance with the provisions of s 35 (3) of the Constitution Act. As in *R v Cohn (supra)*, it will be the responsibility of the Court hearing the matter to ensure that the procedure adopted complies with the principles of fundamental justice measured against the yardstick of the provisions of s 35 (3).”

[23] I did not hear *Mr Nonkonyana* to be protesting deprivation of the respondents’ protected rights under ss 35 of the Constitution Act.

[24] In the second *Uncedo* case, *supra*, Mbenenge AJ had the occasion to deal with the issue of penalty to be imposed in circumstances identical to those of the present case, and on the premise that the papers placed before him sufficiently disclosed a prolonged and substantial breach of the court order by respondents. The learned Judge went on to impose a sentence of payment of R1 000,00 fine or, in default of payment, a term of 2 months imprisonment to be served. In doing so the learned Judge applied the *dictum* of Nestadt J in *Protea Holdings Ltd v Wriwt And Another* 1978 (3) SA 865 (W) when the following was stated at 871H:

“It is vital to the administration of justice that those affected by Court orders obey them. Our Courts cannot tolerate disregard of its orders. Accordingly, it seems to me that I would be failing in my duty if I did not impose a punishment which takes into account the serious nature of this type of offence.”

And at 872 B:

“I must, however, bear in mind that the Court is loath to restrict the personal liberty of the individual in matters of this kind (see Buckle *The Civil Practice of the Magistrates’ Courts in South Africa* 6th ed at 88) and that, if a period of imprisonment in this type of case is imposed, it is usually or often suspended (*Herbstein and Van Winsen (supra* at 583); Hunt *South African Criminal Law and Procedure* vol III at 201).”

[25] The correctness of the approach to contempt of court proceedings by our division in both *Uncedo* cases as aforementioned received the *imprimatur* of the Supreme Court of Appeal in the case of *Fakie, supra*. That said this Court is at large to sentence the respondents in the manner that is appropriate and duly guided by the contents of the affidavits that have been placed before me.

[26] I take into account the relevant factors as stated on affidavits without repeating them in this judgment. Those factors include the circumstances of the respondents that they are Church members, but who have shown unwarranted disdain towards the orders issued against them and aggravated by the fact that they have not taken a single step towards complying with the orders for a period spanning two years.

[27] In the result, I hope that the order to be made will meet the exigencies of the peculiar facts of this matter. It shall be the following:

- 1. The Respondents be and are hereby declared to be in breach and in contempt of the Court order granted by the Honourable Mr Justice Nhlangulela in Case No. 233/2012 on 15 November 2013 as confirmed by the order of the Honourable Mr Justice Hinana AJ on 20 February 2014.**
- 2. The Respondents are each sentenced to undergo three months imprisonment, which is suspended for a period of five years on condition that the respondents are not convicted of contempt of court committed during the period of suspension.**

3. The Respondents to pay costs of this application on attorney and client scale jointly and severally, the one paying, the other to be absolved from liability.

Z. M. NHLANGULELA
ACTING DEPUTY JUDGE PRESIDENT

Counsel for the applicant : Adv. P.H.S. Zilwa SC
Instructed by : Linyani & Somacala Inc
FLAGSTAFF.

Counsel for the respondent : Adv. M. Nonkonyana
Instructed by : Mpumelelo Notununu & Associates
MTHATHA.

