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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
24 November 2024

DATE _____ SIGNATURE _____

CASE NUMBER: 18312/2018

In the matter between:
M. K.K obo F.I.M

FIRST APPLICANT

F[...] S[...] M[...]

SECOND APPLICANT

and

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

THE DIRECTOR GENERAL, DEPARTMENT OF HOME
AFFAIRS

SECOND RESPONDENT

SUMMARY: *Notice of Motion- Rule Nisi on contempt of court-The legal principles for confirmation of the Rule Nisi.*

ORDER

HELD: The Rule Nisi is discharged.
HELD: Each party to pay its own costs.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This matter came before me for the confirmation of the rule nisi for an order of contempt of court that was granted on 22 October 2024 by Madam Justice Khumalo, which order provides as follows-

‘1. The below order should be effected immediately and serves as an interim order until the rule nisi date of 29 October 2021, on which the respondents are to show cause why the interim order should not be made final.

1.1 The First and Second Respondents are found to be in contempt with the declarator Court Order issued by Honourable Acting Justice Snyman on the 4th of June 2024 within 14 days from date of service of the order.

1.2 That the First and Second Respondents be committed to imprisonment for a period of 6 months for contempt of court.

1.3 That the First and Second Respondents comply with the court order referred to above by issuing the Applicants with permanent residence certificates and identity documents/ cards as contemplated in the Identification Act 68 of 1997, as amended within 10 days of service of this order.

1.4 The Respondents are jointly and severally, the one paying the other to be absolved, ordered to pay the costs of this application on Attorney and Client Scale.’

[2] The Applicant is M. K.K., an adult male and a maternal uncle of F[...] S[...] M[...] and F.I.M. The First Respondent is the Minister of Home Affairs cited on his capacity as Executive Authority. The Second Respondent is the Director General, Department of Home Affairs cited on his capacity as Head of Department. The Applicant is represented by Adv. Van Niekerk. The Respondents are represented by Adv. Kelaotswe.

BACKGROUND FACTS:

[3] During 2018 the Applicant launched on behalf of F[...] S. M[...] and F.I.M. ('siblings') an urgent review application against the decision taken by the Respondents to revoke their citizenship. The Applicant obtained an urgent declaratory order by default which was granted by the honourable Snyman AJ on 4 June 2024. The declaratory order was served on the Respondents on 8 July 2024. In terms of the declarator order, the Respondents had to comply within ten days but failed to do so. The dies for compliance lapsed on 22 July 2024. The Applicant then issued a letter to the Respondents which was served on 29 July 2024 calling upon the Respondents to comply with the declaratory order. The Respondents failed to react to the letter. The Applicant then launched another urgent application for an order that the Respondents comply with the 4 June 2024 declaratory order. On 22 October 2024 the honourable Madam Justice Khumalo granted an interim order and found that both Respondents were in contempt of the declarator court order issued by Snyman AJ. The said court order was served on the First and Second Respondents on 24 October 2024.

ISSUE FOR DETERMINATION:

[4] The issue for determination is whether or not the rule nisi on the contempt of court should be discharged or confirmed.

SUBMISSIONS:

[5] I have considered oral and written submissions. The contention by the Applicant's Counsel is that the question of urgency was already determined at the time the rule nisi was granted and that the Respondents are the parties that had sought extension. The argument is that the requirements for contempt of court have been met. Counsel argues that the Respondents' defence was miscommunication and negligence by their attorneys and they intend to rescind the declaratory order. Counsel contends that to date no rescission application had been launched and argues that rescission does not stop the effect of the court order. The argument is that the case of **Fakie NO v CC 11Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** makes it clear what the Applicant must prove in contempt of court proceedings. Counsel submits that sufficient facts were placed before the Court to grant the relief.

[6] Counsel for the Respondent argues that there are serious defects in the application and that the declarator order amounted to judicial overreach. The submission is that the Applicant approached the court and obtained an order for permanent residency which affects immigration without making a case on the papers. The submission is that the declarator order is a nullity Counsel disputes service of the court order on the Respondents and wilfulness and

mala fide for non-compliance of the court order. Counsel conceded that there is non-compliance of the court order but without mala fide.

THE LAW:

(a) Urgency:

[7] An applicant who seeks urgent relief can launch an urgent application which application must comply with the provisions of Rule 6 (12) (b) of the Uniform Rules. Rule 6 (12) (b) provides that –

‘In every affidavit or petition filed in support of the application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.’

[8] In terms of Rule 6 (12) (a) the Court has the power to dispense with the forms and service provided for in the Rules. This Rule provides-

‘In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as it deems fit.’

[9] The Court has a discretion to condone or decline to condone non-compliance with the prescribed forms and service. It is recognised by our Courts that the failure to comply with Rule 6 (12) is fatal to an urgent application. It is trite that there are various degrees of urgency. The test for urgency is based on the reasons that an applicant claims that he or she could not obtain substantial redress at a hearing in due course.¹ Where the application lacks urgency, the court can on that basis decline to exercise its powers under Rule 6(12)(a). The procedure set out in Rule 6 (12) is not there for the taking.

[10] There are two main requirements in an urgent application- firstly, an applicant must file an affidavit setting out explicitly the circumstances which render the matter urgent, and secondly, there must be reasons why he or she cannot be afforded substantial redress at a hearing in due course. An applicant must therefore establish facts to justify the urgency of the

¹ See Luna Meubel Vervaardigers (EDMS) BPK v Makin and Another (t/a Makin's Furniture Manufactures) 1977 (4) SA 135 (W) at 137F-G.

application in order to be granted immediate relief and to circumvent the normal motion processes. Urgency must not be self-created.² It is the substance and not the form which must be considered in an urgent application. See **Sikwe v SA Mutual Fire & General Insurance 1977 (3) SA 438 (W)**.

[11] In **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767)** [2011] ZAGPJHC 196 (23 September 2011) it was held-

[6] The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. . . . Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.'

[12] An applicant must come to court to seek relief as soon as the event giving rise to an urgent application arises. In **Van Der Merwe and Others v Nel N.O. and Others (2483/2023)** [2023] ZAECKMHC 86 (11 August 2023 para [32] it was stated-

'Urgency is diminished where the litigant takes longer to act from the date of the event giving rise to the proceedings. In short, a party seeking relief must come to the court immediately or risk failing on urgency.'

(b) Rule Nisi:

[13] A rule nisi is generally issued on an *ex parte* application in which an applicant sets out fully the circumstances of the cause of complaint. It is an order which is issued by a court at the instance of a party calling upon another party to show cause on a stipulated date before that court why the relief claimed should not be granted. The rule nisi procedure is premised on the acceptance that the interest of justice requires the balancing of rights of the applicant and the respondent. This ensures that what is worthy of immediate protection is not prejudiced by the time it takes to hear the interested parties. The essential character and purpose of the rule nisi

² See **Dynamic Sisters Trading (Pty) Ltd and Another v Nedbank Limited (081473/2023)** [2023] ZAGPPHC 709 (21 August 2023) para [18].

procedure remains to ensure (a) that notice is given to an affected party and (b) that a prima facie case is made out for the relief sought and (c) such relief may be granted unless cause is shown why it should not be granted. See **MEC for the Department of Health, Eastern Cape v BM (213/2021) [2022] ZASCA 140** (24 October 2022) para [12] and para [14].

[14] In **National Director of Public Prosecutions v Mohamed NO and Others 2003 (4) SA 1 (CC)** held as follows in respect of rule nisi-

'[28] Our common law has recognised both the great importance of the audi rule as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the very rights sought to be enforced or protected. In such circumstances, the court issues a rule nisi calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final, and at the same time orders that the rule nisi should act immediately as a temporary order, pending the return day. This practice has been recognised by the South African courts for over a century:

The term 'rule nisi' is derived from English law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. Our common law knew the temporary interdict and, as Van Zyl points out, a 'curious mixture of our practice with the practice of England' took place and the practice arose of asking the court for a rule returnable on a certain day, but in the meantime to operate as a temporary interdict.'

(c) Contempt Proceedings:

[15] There is a duty on all persons to abide by Court Orders as the failure to do so is a direct attack on the rule of law. The rule of law which is the cornerstone of democracy requires that the dignity and authority of the courts be upheld. Section 165 (5) of the Constitution provides that an order or decision issued by a Court binds all persons to whom and organs of state to which it applies. It is for this reason that it is a crime to unlawfully and intentionally to disobey a Court Order.³ This ensures that the dignity and authority of the Courts is maintained. Civil contempt procedure is a valuable mechanism for securing compliance with Court Orders.

[16] The requirements for civil contempt of Court are—

(i) The existence of a Court Order.

³ See *Attorney – General v Crockett* 1911 TPD 893 at 925.

- (ii) The contemnor must have knowledge of the Court Order.
- (iii) There must be non-compliance with the Court Order.
- (iv) The non-compliance must be wilful and mala fide.

[17] In contempt proceedings where there is no criminal sanction, the standard of proof that an applicant must discharge is on the balance of probabilities. Where a committal is ordered, the standard of proof is similar to a criminal standard. The elements must be proved beyond reasonable doubt. Once an applicant has proved the first three elements, wilfulness and mala fide are presumed. There is an evidential burden on a respondent to establish reasonable doubt. If the respondent fails to discharge this evidential burden, then the crime of contempt is established.

[18] In **Fakie NO v CC 11Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** paras [9] and [10] Cameron JA stated *'The test for when disobedience 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 the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith). 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.'*

ANALYSIS:

[19] The aspect of urgency was dealt with by the Honourable Madam Justice Khumalo who granted the interim order on 22 October 2024. In view of the prevailing circumstances, I am satisfied that the application is urgent. The crisp issue for determination in these proceedings is whether or not the interim order should be confirmed or discharged. Before I deal with the issue, I deem it prudent to remark on the question that arose whether or not the declarator

order is a nullity. In my humble view, the declarator order once it was granted by the Honourable Acting Judge Snyman it operates as a final order unless it is set aside by a competent court. The declarator order remains valid and enforceable until it is set aside. It is for this reason that I am not persuaded that this court (which is approached to enforce the declarator order) is competent to pronounce on its validity or nullity. In other words, it would be improper to review the declarator order when the issue is the interim order for the contempt of court. I hold this view simply because this court is called upon only to enforce compliance of the declarator order. To pronounce on the nullity or otherwise of the declarator order would lead in my view to legal uncertainty if court orders can be indirectly reviewed in subsequent unrelated proceedings.

[20] The rule nisi that was granted by the Honourable Justice Khumalo calls upon the respondents to show cause why they should not be held in contempt of court for the failure to comply with the declarator order. It is common cause that there is a declarator order which was granted on 4 June 2024. It is also common cause that the said order was duly served upon the Respondent. It is not necessary to pronounce on the validity of the service of such order for the reasons which will become clear.

[21] The Respondents through the answering affidavit deposed to by Ms Sebitso raises valid *points in limine*. For the purpose of this ruling, I will only deal with *one point in limine* which in my view is interlinked with the issue for determination. The Respondents have raised a relevant *point in limine* in that the date in the notice of motion is misleading. There is the first Notice of Motion dated 1 October 2024 which provides the date of hearing as being on 22 October 2024 (see Case Lines 000-1). This first Notice of Motion was duly served upon the Respondents on 2 October 2024 as well as on 3 October 2024 at 12h00. When the matter proceeded before the Honourable Madam Justice Khumalo, no fault could be attributed to the presiding judge on the basis that the Notice of Motion cited the date of hearing to be 22 October 2024. When the Honourable Justice Khumalo granted the interim order, such order was then served upon the Respondents as per the service affidavit by Ms D. Bogosi.

[22] However, inexplicably the Applicant issued an amended the Notice of Motion (see Case Lines 000-7) in which the Respondents were given notice that there will be an application which will be heard on 22 November 2024. This amended Notice of Motion sought similar relief as the Notice of Motion dated the 22 October 2024 which it was served electronically by email.

Applying the trite principles on interpretation⁴, the reference to ‘amended notice of motion’ meant that the original notice of motion is sought to be amended. This not only causes confusion but affects the validity of the application for contempt of court which I am called upon to confirm or dismiss. I make this finding for the simple reason that there is no need to issue any other notice of motion (whether termed ‘amended’ or not) since there is already a rule nisi that has been granted on 22 October 2024. All that was required is to proceed on the same papers in latter rule nisi proceedings for the determination of the rule nisi. Effectively, the Applicant set in motion two proceedings on the same issue of contempt of court proceedings.

[23] The Applicant in addressing this confusion on the amended Notice of Motion avers in the replying affidavit *‘It is apparent therefrom that the date of the 22nd of November 2024 was a typing error as the original date on the original notice of motion was the 22nd of October 2024. In any way, the urgent court took cognizance of the same hence it only issued a rule nisi on the 22nd of October 2024 with a return date of the 29th of October 2024, which clearly cured any alleged defects and/ or irregularities as the Respondents were afforded notice to oppose this application and are currently before this honourable.’* The averment that the rule nisi has cured any irregularities is with respect unconvincing. It is hard to understand why the said amended Notice of Motion was then served upon the Respondent if all that it was is a mere typing error. Issuing an amended Notice of Motion for the same relief effectively altered a legal process i.e. amended the original motion proceedings. Any confusion or defect would have simply been cured by formally withdrawing such amended Notice of Motion. Since there is no formal withdrawal of the amended Notice of Motion, this brings about pertinent questions- what is the effect of the amended Notice of Motion which was issued and served long after the interim order? Did the launch of the amended process not amount to the Applicant simply abandoning the initial process on which the initial interim order is based?

[24] I am persuaded that to confirm the interim order in view of the sanction thereto would lead to extreme prejudice to the Respondents and be contrary to the interest of justice. There is in my view a defect in the application that cannot be cured by the replying affidavit. See **Poseidon v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another 1980 (1) SA 313 (A)**.

[25] In the event that my reasoning above is incorrect, having considered the totality of the evidence, the Respondents have discharged the evidential burden to demonstrate that the

⁴ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras [17] to [19].

disobedience of the declarator order was not mala fide. Ms Sebitso avers in the answering affidavit '*There is no proof that the Minister and Director General were served.*' She further avers '*This being the case, as the attorney who took over Ms Wasserman's office, I was not made aware of the developments and correspondences in the matter. I all along thought that the matter was not active... It appears that at all material times the applicants have been serving Mr Snyman, Mr Ngwatle and Ms Wasserman who has long left the office of the state attorney, with the papers. Without passing any blame to the applicants in respect of the manner in which they served and/or the people on which they served the papers, I must inform the court that in between the replying affidavit being delivered and 28 October 2024, no correspondence or court document came to my attention in this matter.*'

CONCLUSION:

[26] In conclusion, I am satisfied that the interest of justice will be best served in having the rule nisi discharged for the reasons set out above. It is best to err on the side of caution. The Applicant can approach this court for any other relief including a fresh contempt application that is not tainted by any irregularity or defect.

COSTS:

[27] The basic principle on costs is that the Court exercises a discretion which has to be exercised judicially. The Applicant launched this application for the benefit of the siblings and applying the Biowatch⁵ principles on the facts of this matter, a just cost order is that each party to pay its own costs.

Order:

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

- (1) The rule nisi is discharged.
- (2) Each party to pay its own costs.

MNCUBE AJ

⁵ Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances:

On behalf of the Applicant : Adv. X. Van Niekerk

On behalf of the Respondents : Adv. H. L Kelaotswe

Date of Judgment : 24 November 2024