

SOUTH AFRICA / JUDGMENT

Mphethi NO and Another v Mphahlele and Another (88497/2018) [2019] ZAGPPHC 404 (2 July 2019) [2019] ZAGPPHC 404

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla

CASE / FILE NUMBER

88497/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISO, PRETORIA

CASE

NO.: 88497/2018

2/7/2019

In

the matter between:

ALTON

SENYANE MPHETHI NO

First Applicant

PAN

AFRICANIST CONGRESS OF AZANA NO

Second Applicant

and

LETLAPA

MPHAHLELE

First Respondent

LUTHANDO

MBHINA

Second Respondent

JUDGEMENT

SARDIWALLA J:

- [1] This is an urgent application in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court resulting from a refusal by the respondents to comply with a Court Order dated 13 September 2018. The applicants seek to interdict or restrain the respondents from misrepresenting themselves through the media in the name of the PAC of Azania (A) either through communication, issuing of statements or displaying paraphernalia with the true colours of the PAC.

Background

to the Application:

- [2] On 13 September 2018 in the Pretoria High Court under case number 4558/2015 in the matter between Alton Senyane Mpethi versus Philip

Dlamini N.O as the first respondent, Leonard Nkosi as the second respondent and Narius Moloto N.O as the third respondent a signed

settlement agreement was made an order of Court. The relevant clauses are inter alia that:

"1.1 Upon the terms of this settlement agreement being complied with and this agreement being made an order of Court, the content hereof will only dispose of the matter under case number 4558/2018 in its entirety.

1.2 The applicant herein, and in terms of this agreement, will .from the date of this agreement being made an order of Court, be reinstated as a member of the Pan Africanist of Azania sic with effect from date of his expulsion being 23 December 2014.

1.3 The applicant herein, and in terms of this agreement, will from date of this agreement assume his membership of the National Assembly as a representative of the PAC, which he lost as a result of his loss of party membership, immediately upon having been made an order of Court.

1.4 That the speaker of the National Assembly is hereby ordered to arrange that the applicant be sworn in a sic member of the National Assembly, with immediate effect from the date of obtaining this Court Order. "

- [3] It is the applicant submission that in December 2018 it came to its attention that the respondents were part of a group that issued and circulated to the public and the media, invitations, notice of agendas and the PAC nomination form PAC (A) to members through their purported NEC spokesperson Apa Pooe. The notice stated that a meeting was scheduled to take place on 9 December 2018 at the Mayibuye, Arts & Cultural Centre, Kimberly, Northern Cape. It is for this reason that the applicant launched this urgent application.

Applicant's Argument

- [4] The applicant's submission is that the respondents who purport to be leaders of the PAC are in contempt of the court order dated 13 September 2018 and continue to cause factions and disunity within the PAC. It also avers that there is no National Election Committee in existence as alleged by the respondents as the party is in fact still in crisis and the first applicant is ruling by presidential decree in terms of clause 14.2 of the PAC disciplinary code which has not been uplifted. Further that the applicant has established a clear right in terms of the above agreement and a letter to the second respondent by Parliament dated 14 September 2018 which the respondents have breached. That a failure to grant the interdict will cause further disunity within the party allow and will result in irreparable harm being caused to the applicant's reputation.

First Respondent's Argument

- [5] The second respondent opposes this application on the basis that the application lacks urgency and is without merit. He argues that this Court lacks the jurisdiction to hear the matter as it relates to the meeting of 9 December 2018 which was held in Kimberly and as such the application should have been brought in the Kimberly High Court. It also argues that the first applicant has no relationship with the PAC of which he is the current President. He further states that he is not associated with the PAC of Azania (A) and therefore cannot be interdicted from conduct related to that entity. He also alleges that the settlement agreement that the first applicant relies on could not be implemented by Parliament as the applicant was convicted of murder. He further indicated that the matter under case number 4558/2015 was dealt with in its entirety and since the respondents were not parties to those proceedings they cannot be held in contempt of court. He confirmed that he was present at the Unity Conference but that the conference was held by the organization to which he lawfully belongs and is not the same organization of the applicants. It lastly alleges that the first respondent was not properly served in terms of Rule 4 and R6 (5) (a) of the Uniform Rules of Court.

Interim Interdict

- [6] A request for an interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In this regard the Constitutional Court said the following:[1]

" An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim

interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo." [2]

[7] The requirements for the granting of an interim interdict are the following: a prima facie right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim relief, and that the applicant has no other satisfactory remedy.[3] In this regard Holmes JA[4] said the following:

"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in *Setlogelo v Setlogelo*, 1914 AD 221 at p. 227. In general the requisites are -

- (a) a right which, 'though prima facie established, is open to some doubt';
- (b) a well grounded apprehension of irreparable injury;
- (c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities, see *Olympic Passenger Service (Pty.) Ltd. v Ramlagan*, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."

[8] Where the right is clear

"... the remaining questions are whether the applicant has also shown:

- (a) an infringement of his right by the respondent; or a well-grounded apprehension of such an infringement;
- (b) the absence of any other satisfactory remedy;
- (c) that the balance of convenience favours the granting of an interlocutory interdict. "[5]

[9] In this case the applicant seeks an interdict the respondents from convening a meeting under the auspices of the second applicant by preventing it from using invitations which have been circulated to the public and the media with the logo and colours of the PAC dated the 30th November 2018. The question therefore is whether it has established a prima facie right. The approach to be adopted in considering whether an applicant has established a prima facie right has been stated to be the following:[6]

" The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant,

together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."[7]

Contempt proceedings

[10] It is trite that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution - (JSO v HWO (24384/2009) (2014) ZAGPPHC 133 (19 February 2014)). Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006

(4) SA 326 (SCA) is the leading authority on contempt of court proceedings. In this decision the Supreme Court of Appeal describes the application for committal for contempt by a private party as a 'peculiar amalgam' because

'it is a civil proceeding that invokes a criminal sanction or its threat.' (para [8]).

The Court continues in paragraph [9]

'The test for when the 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,...'.

However, in paragraph [41] the Court holds

'... this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites..., unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide the requisites of contempt would have been established The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but, but only need evidence that establishes a reasonable doubt.'

[11] The Supreme Court of Appeal summarised its findings in paragraph [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 requirement.
- 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.

[12] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015]ZACC 10 in a unanimous decision delivered by Nkabinde J, the Constitutional Court subsequently explained that:

"[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the role of law.

[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (*ad factum praestandum*), the following elements need to be established on a balance of probabilities: (a) the must order exist; (b) the order must have been

duly served on, or brought to the notice of, the alleged contemnor; (c) there must have been non-compliance with the order; and (d) the non-compliance must have been wilful or mala fide'.

[13] The Constitutional Court confirmed the decision by the Supreme Court of Appeal in Fakie (supra) and held in paragraph [36] that the decision creates a presumption in favour of the Applicant-

'Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.'

[14] Nkabinde J continued in paragraph

"

[37] -

- However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief a mandamus demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance. '

The current application

[15] It is common cause between the parties before the Court that the first three elements of the test for contempt have been established. The second respondent admits in paragraphs [30.2.1] of his answering affidavit that the said settlement agreement states that "the

content hereof will only dispose of the matter under case number 4558/2015 in its entirety". He however denies being in contemptuous default in that he was not a party to that matter and therefore cannot be bound by that order.

[16] Since the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the respondents are able to lead evidence sufficient to create reasonable doubt as to their existence.

The respondents thus need to rebut the presumption of mala fides and wilfulness.

[17] The meaning of the terms mala fides and wilfulness need to be determined. It was held in Fakie (supra paragraph [9]) that a deliberate (wilful!) disregard is not enough, 'since the non-complier may genuinely, albeit mistakenly, believe him of herself entitled to act in a way claimed to constitute contempt. In such a case good faith avoids the inference. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).'

[18] In light of the facts of this application the question would be whether

- (i) the respondents indicated in their affidavit a factual inability to comply with the court order;
- (ii) and, if such a factual inability is evident from the documents before the Court, whether the Respondent honestly believed that non-compliance with the court order due to a factual inability to comply is justified.

[19] The applicant avers in the founding affidavit that the respondents are mala fide and in wilful contempt of the Court order. It is evident from both the applicants and respondent's affidavits that the PAC (A) has been embroiled in extended litigation for more 10 years and that the relationship between the parties is acrimonious. The applicants aver that the respondents are no longer members of the PAC (A) and have lost their membership at the National Assembly. However, in addressing the first question, namely, whether the second respondent has indicated in his affidavit a factual inability to comply with the court order, it is imperative to take cognisance of the fact that the Court is not called now to adjudicate a grievance dispute between the parties. Kirk-Cohen J stated unequivocally in *Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng* 2002

(1) SA 660 (T) at 6730-E-

'Contempt of court is not an issue inter parties; it is an issue between the court and the party who has not complied with a mandatory order of court. '

[20] I am not convinced that the respondents have discharged the evidentiary burden in creating reasonable doubt as to the wilfulness and mala fides of their default to perform in terms of the court order. Although there is no onus on the respondents, but merely an evidentiary burden to create a reasonable doubt as to the existence of wilfulness and mala fides, the vague and unsubstantiated statements contained in the second respondent's answering affidavit did not succeed in rebutting the

presumption of wilfulness and mala fides. The second respondent did not once state, and neither was it offered in oral argument from the bar, that he honestly believed that the fact that he was, in his view, not in contempt of the court order under case number 4558/2015. The second respondent did not succeed in creating a reasonable doubt as to his non-compliance with the court order being wilful and mala fide. He did not offer an explanation as to why if the court order dated 13 September 2018 did not in fact apply to him, why Parliament would address a letter specifically to him advising him of his loss of membership to the National Assembly based on that Court Order and request that his parliamentary entry permits be returned. At no stage did the second respondent even deny receipt of the letter to which his attention was drawn to the said Court order nor did he allege the letter was incorrect and that he at any point prior to the institution of these proceedings challenged its contents. Therefore there cannot be said to be reason or even a possibility of the second respondent's inability to comply with the order.

[21] The final question then is whether there are any alternative means through which the court can ensure compliance with the court order dated 1 September 2018. I am of the view that an interdict would have the desired result to coerce the respondents to comply with the relevant court order. I am satisfied that the balance of convenience favours the applicants and that a failure to grant the interdict would result in irreparable harm being done to the second applicant to which there is no alternate remedy.

[27] Accordingly, the following order is made:

1. Declaring the first and second respondents to be in contempt of a Court order that was granted against them on 13 September 2018 by the above honourable Court;
2. That the contempt of court is wilful in that the two respondents in disobeying the Court Order acted mala fide as they had no intention

of complying or obeying it;

3. That the respondents and/or other person(s) acting at the two respondents instance are interdicted and/or restrained from calling and/or issuing invitations to any person(s) to attend the above mentioned PAC (A) Elective Conference or communicating and/or issuing

statements, either through the electronic or printed media, to the public in the name of the PAC of Azania (A) and/or appearing in such media, wearing apparel with the true colours and acronyms of the PAC (A), and displaying paraphernalia also with the true colours of the PAC;

4. That the respondents and/or other person(s) are interdicted from blocking and/or obstructing any premises, buildings and/or structures where the second applicant's National Executive Conference is scheduled to take place at Mayibuye Arts and Cultural Centre, Kimberly, 14-16 December 2018;
5. Costs are awarded as between attorney and own client scale on those respondents that oppose the application, one paying the other to be absolved.

CM SARDIWALLA

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing

08 December 2018

Date of judgment (reasons) 01 July 2019

Applicant's Counsel

Adv.: D S Kumalo (SC)

Respondent's Counsel Mr . Gwe

- [1] In National Gambling Board v Premier, Kwa-Zulu Natal and Others 2002(2) SA 715 CC
- [2] At 730 - 731{49}
- [3] See: Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another 1973{3}SA 685 (A) Knox D Arcy Ltd v Jamison and Other 1996(4) SA 348 (A) at 361
- [4] In Eriksen Motors {Welkom) Ltd v Protea Motors Warrenton and Another, supra, at 691
- [5] Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W) at 592 - 593.
- [6] In Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA).
- [7] At 228; See also Webster v Mitchell 1948 (1) SA 1186 (W) at 1189, Manong & Associates (Pty) LTD v Minister of Public Works and Another 2010 (2) SA 167 {SCA) at 180.
- [7] At 228;

See also Webster v Mitchell 1948 (1) SA 1186 (W) at 1189,

Manong & Associates (Pty) LTD v Minister of Public Works and Another 2010 (2) SA 167 {SCA) at 180.

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