

SOUTH AFRICA / JUDGMENT

Oyakhilome and Another v Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (2015/42575) [2015] ZAGPJHC 299 (7 December 2015)

[2015] ZAGPJHC 299

COURT

South Gauteng High Court, Johannesburg

BEFORE

C Georgiades

CASE / FILE NUMBER

2015/42575

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2015/42575

In the matter between: -

PASTOR CHRIS OYAKHILOME

First applicant

CHRIST EMBASSY CHURCH

Second applicant

and

THE COMMISSION FOR THE PROMOTION AND

PROTECTION OF CULTURAL, RELIGIOUS AND

LINGUISTIC COMMUNITIES

Respondent

J U D G M E N T

GEORGIADES AJ:

Introduction

- [1] This is an application for interim relief, sought on an urgent basis. The applicants seek to interdict the respondent Commission from laying a criminal charge against the first applicant in terms of section 41 of the Commission for the Promotion and Protection of the Right of Cultural, Religious and Linguistic Communities Act, 19 of 2002 (“the Protection of Religious Communities Act”). In the alternative, the applicants seek the following two orders: first, that the notice issued by the Commission on 28 October 2015

under section 7(2) of the Protection of Religious Communities Act (which compels the first applicant to appear before the Commission to give evidence and produce documents) is suspended; and second, that the Commission is interdicted from issuing further notices under section 7(2).

- [2] The relief is sought in the interim pending the outcome of part B of the application wherein the applicants will seek a declaration that the notice issued by the respondent is unlawful and ought to be set aside, and a declaration that sections 7(2), 41(1)(d) and (e), and 41(2) of the Protection of Religious Communities Act are unconstitutional and unlawful to the extent that they confer upon the Commission investigative and enforcement powers beyond the Commission’s constitutional mandate.

The Constitution and legislative framework

- [3] The Commission is an institution created by chapter 9 of the Constitution. Section 185 of the Constitution endows it with the following objectives and powers: -

“(1) The primary objects of the Commission are –

- (a) to promote respect for the rights of cultural, religious and linguistic communities;
 - (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association;
 - (c) to recommend the establishment or recognition, in accordance with the national legislation, of the cultural or other council or councils for a community or communities in South Africa;
- (2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities;
- (3) The Commission may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation;
- (4) The Commission has the additional powers and functions prescribed by national legislation.”

- [4] The Protection of Religious Communities Act is the national legislation referred to in 185(4). In terms of section 4 of the Protection of Religious Communities Act, the Commission has the following objects: -

“4. The objects of the Commission are –

- (a) to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association;
- (c) to foster mutual respect among cultural, religious and linguistic communities;
- (d) to promote the right of communities to develop their historically diminished heritage; and
- (e) to recommend the establishment or recognition of community councils in accordance with section 36 or 37.”

- [5] Section 5 of the Protection of Religious Communities Act sets out the Commission’s powers and functions. Pertinent to these proceedings is section 5(1)(e), which confers upon the Commission the power to investigate certain matters for the purpose of achieving the objectives in section 4: -

“The Commission may do all that is necessary or expedient to achieve its objects referred to in section 4, including to –

...

- (e) monitor, investigate and research any issues concerning the rights of cultural, religious and linguistic communities...”

- [6] Section 7 deals with the Commission’s power when it conducts investigations. Pertinently to these proceedings, section 7(2) empowers the Commission to summon a person to appear before an investigation to give evidence or to produce documents: -

“(1) The Commission may conduct an investigation in terms of section 5(1)(e) itself or may designate one or more Commission members or other persons as an investigating committee to conduct the investigation on its behalf.

- (2) For purposes of an investigation, the Commission or any investigating committee may –
 - (a) by notice in writing summon a person to appear before the Commission or the Committee, as the case may be –
 - (i) to give evidence; or
 - (ii) to produce a document available to that person and specified in the summons;

(b) call any person present at a meeting whether summoned or not who want to give evidence before the Commission or Committee, as the case may be –

(ii) to produce a document in the person's custody at that meeting..."

[7] Section 41 creates an offence for failing to comply with a summons issued under section 7(2): -

"(1) A person commits an offence if that person –

....

(a) after having been summoned in terms of section 7(2)(a) fails –

(i) to be present at a meeting of the Commission or an investigating committee at the time and place specified in the summons; or

(ii) to remain present until excused by the Commission or Committee;"

Factual

Background

[8] It is common cause that, on 20 August 2015, the Commission launched a national investigation which it describes as an investigation "into the commercialisation of religion and abuse of people's belief systems". The Commission states that it had received several complaints from communities in the religious and cultural sectors, including the South African Council of Churches, against specified religious leaders and churches. The identity of the churches and pastors complained of is not relevant to these proceedings, save that the applicants were not amongst those against whom complaints had been lodged. The Commission launched its investigation in response to the complaints. It describes the conduct of its investigation as follows: the Commission "decided to summons a range of pastors, prophets, priests, religious leaders... whom we feel can add value to our investigative study even though there are no specific complaints around them." On 20 October, the Commission issued a media statement in which it summarised the progress of the investigation and set out the schedule of hearings to be held in Gauteng.

[9] On 28 October 2015, the Commission issued the notice in issue in the proceedings. The notice summoned the applicants to appear and give evidence before the Commission on 4 November 2015, and to produce at the hearing the range of documents specified in the notice. The notice listed some 12 documents which related to a range of matters from proof of the first applicant's ordination to the second applicant's financial statements. The applicants objected to appearing at the hearing and to producing the documents listed in the notice. The ensuing exchange of correspondence culminated in the applicants' attorneys advising the Commission that the applicants intended to review the notice and seek to have it set aside.

[10] On 26 November 2015, the applicants sought a written undertaking that the Commission would not take any enforcement step

against the first applicant. The Commission refused to give the undertaking sought. On 27 November, it advised the first applicant to appear before the Commission on 2 December 2015 at 12:00, failing which it would lay a criminal charge against the first applicant, thus triggering section 41 of the Protection of Religious Communities Act. These proceedings were instituted pursuant to this state of affairs.

Urgency

[11] The Commission contended that the matter was not urgent as the applicants knew as early as 28 October 2015 that failure to heed the summons would result in section 41 being invoked. The urgency was therefore self-created. I do not agree with this contention. The applicants took a decision to challenge and set aside the notice on 26 November

2015. They sought an undertaking staying the effects of section 41. This was refused. They were left with no option but to seek urgent relief. I am satisfied that the matter is urgent in the circumstances.

Prima Facie Right

[12] The nature of the prima facie right which must be established in proceedings for an interim indict pending the review of an administrative decision is uncontroversial:

a prima facie right is established by demonstrating a prospect of success in the review.[1] In order to succeed on interim relief therefore, the applicants must establish prima facie that the section 7(2) notice ought to be set aside on one or other of the bases pleaded.

[13] The applicants' position is that the Constitution and statutory provisions do not empower the Commission to investigate, intervene in or regulate the operations and affairs of any particular church or religious institution. It is not afforded the enforcement and subpoena powers that it purports to exercise in the notice issued. Its mandate is only a general investigative one, that is to investigate community rights issues.

[14] On the face of it, the Commission's power to investigate is constrained in the following two respects. First, it is given the power to investigate for the purpose of giving effect to the objectives in section 4. Those objectives are, amongst others, to promote respect for and further the protection of the rights of religious communities; to promote and develop tolerance

and national unity among and within religious communities on the basis of equality, non-discrimination and free association; and to foster mutual respect among religious communities. The emphasis is on religious communities. Section 5(1)(e) repeats this language: it confers the power to investigate issues that concern the rights of religious communities for purposes of achieving the objectives in section 4.

- [15] The Commission did not argue, nor does it appear from the legislation, that its powers of investigation extend to individuals or institutions (such as churches like the second applicant), or to the internal doings or workings of any particular religious leader or religious institution per se or in relation to a religious community. Nor did the Commission demonstrate how the investigation of the applicants or their evidence, or the production of the documents listed in the notice, is related to the rights of any particular religious community.
- [16] Accordingly, the applicants have prima facie established the right to the relief in part B of the Notice of Motion to set aside the notice as unlawful.

Prayer 1: interdicting the Commission from laying a charge against the first applicant

- [17] Nonetheless, the applicants cannot succeed insofar as they seek to interdict the Commission from laying a criminal charge against the first applicant. Various submissions were made that the might of the State machinery will be brought to bear on the first applicant and that he will be arrested; but no facts were advanced in support of these submissions and they remain speculative.
- [18] It is by no means a foregone conclusion that the first applicant will be arrested should charges be laid against him. First, the decision to prosecute lies in the hands of the prosecuting authority. It is only once the decision to prosecute is taken, if it is at all, does the question of arrest come into play. Second, in the event that the relevant authority decides to prosecute, the first applicant's arrest is still not a foregone conclusion. Section 38 of the Criminal Procedure Act, 51 of 1977, provides four methods by which an accused's attendance in a criminal court may be secured: arrest, summons, written notice and indictment. Arrest is only one of those methods. Neither is a warrant of arrest available for the asking: section 43 of the Criminal Procedure Act requires a warrant of arrest to be issued only by a magistrate or justice of the peace and only upon the written application of a public prosecutor. The applicants have led no evidence of any of this and this prayer cannot succeed.

First alternative prayer: suspension of the notice

- [19] I have said above that the applicants' case on review is prima facie established. But even were I to assume in the Commission's favour that it had the power to conduct its investigation into what it describes as "the perceived commercialisation of religion and alleged abuses of religious belief systems", it is my view that the issuing of the notice to the applicants, as well as the contents of the notice, are not rationally related to the subject matter of the investigation.
- [20] It is common cause that the Commission has not received any complaint against the applicants. There was no intimation that there is even a suspicion that the applicants are suspected of commercialising religion or of any abuse on their part.

[21] The applicants were chosen at random. The Commission itself says so in its answering affidavit : -

“5.7 Prior to the hearing which was being conducted there was a random choosing of various churches summonsed to appear before the Committee.

5.8 Leaders of the church who are summoned in terms of section 7.2 are given a generic list of questions that will be asked and the list of documents required to be produced by the leaders.”

[22] It is not rational to choose churches at random to appear before the Commission when the stated purpose of its investigation is to look into “the perceived commercialisation of religion and alleged abuses of religious belief systems”. The Commission could not explain how or why evidence and documents from random churches and church leaders, particularly those against whom there has been no complaint, would assist it to establish the subject matter of its investigation.

[23] As regards the balance of convenience, the applicants contend that they are being asked to open themselves up to an inquiry, the unlawfulness of which is prima facie established.

[24] In my view, the Commission’s submissions cannot be upheld: the Commission, as much as the applicants and the general public, has an interest in establishing whether the notice was lawfully issued. The balance of convenience accordingly favours the applicants. I am also satisfied that the applicant had no alternative remedy than to approach this Court.

[25] In all the circumstances, I am satisfied that the operation of the notice ought to be suspended.

Second alternative prayer: to interdict the Commission from issuing further notices

[26] I am also asked in the alternative to interdict the Commission from issuing fresh notices. It is obvious that the Commission, having failed on a substantive basis in this regard, cannot issue a notice in identical terms to the one that I have suspended. I cannot however, interdict any future notices in general terms. The facts may change in future and the substantive terms of fresh notices may be different. No facts were placed before me as to what those new terms could be. I am therefore not inclined to interdict the issue of fresh notices in future.

Costs

[27] As far as the costs are concerned, the applicants initially sought an order interdicting the laying of a charge. It was only once the hearing of the matter commenced that the alternative relief of setting aside the notice on an interim basis was sought coupled with an interdict of future notices. The applicants were therefore only partly successful. Also, I only considered the rationality aspect of the review and not the other grounds. This was the only relevant aspect as far as interim relief was concerned. I have not considered the prima facie rights of all the other grounds raised by the applicants. In the circumstances I think that the costs should be determined in part B of the application.

Order

I make the following order: -

1. The notice issued by the respondent to the first applicant on 28 October 2015 is suspended pending the final determination of part B of the notice of motion.
2. The costs of this application are to be determined in part B of the application..

C GEORGIADES

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

DATE OF HEARING:

4 December 2015

DATE OF

JUDGMENT:

7 December 2015

For the applicants :

Adv D Fisher SC

Adv J Bleazard

Instructed by:

Sim & Botsi Attorneys Inc.

For the respondent :

Adv A Laka SC

Instructed :

Maluleke Seriti Makume Matlala Inc.

- [1] South African Informal Traders Forum and others v City of Johannesburg and others; South African National Traders Retail Association v City of Johannesburg and others 2014 (4) SA 371 (CC) para 25 and the authorities cited in fn 24 thereto.

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