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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN DIVISION, BISHO)**

CASE NO: 561/2023

In the matter between:-

**ETHIOPIAN CHURCH OF SOUTHERN AFRICA
AND 13 OTHERS**

Applicants

and

HASH TAG MANAGEMENT

First Respondent

FIRST NATIONAL BANK (VEREENIGING)

Second Respondent

THE MANAGER:

FIRST NATIONAL BANK (VEREENIGING)

Third Respondent

JUDGMENT

MATEBESE AJ

[1] In this matter the applicants approach the court seeking an order in the following terms:

“1. The applicants are hereby granted leave to bring this application as one of urgency and that all the normal formalities regarding notice, service, and time frames applicable thereto be dispensed with.

2. It is declared that the operation and execution of the judgements delivered by the Magistrate, Zwelitsha on 17 October 2022 and on 15 June 2023 in the matter between Hash Tag Movement v Johnson Sibonda Luphuwana and Others previously enrolled in the Magistrates’ Court for the district of Zwelitsha under case numbers 381/2023 is suspended pending the outcome of the appeal lodged in this court on 26 October 2022 and on 15 June 2023 under case numbers CA3/2023 and CA20/2023.

3. That during the suspension of the operation of the judgements referred to in prayer 1(one) (sic) the first and second respondents shall not unlawfully interfere with the lawful operation, use and management of bank account numbers 6[....]9 and 5[....]1 which are held by the first applicant with the second respondent.

4. That the respondents be and is hereby ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved.”

[2] The application is opposed by the first respondent. The applicants withdrew the application as against the second and third respondents. As a result, the second and third applicants filed a Notice to Abide the decision of the court.

[3] The decision to withdraw as against the second and third respondents sparked some debate in court. Primarily the debate was from the first respondent who sought to argue that the withdrawal meant that the entire case has died or has been rendered moot by such withdrawal. I find no merit to the contention or argument. This is so because the withdrawal or abandonment of the relief

against the second respondent leaves an order, if granted, that is enforceable against the first respondent and which will surely be of practical effect.

[4] Having said that I now turn to deal with the facts of the matter. I must mention that the facts hereunder, at least to the extent they are material to this matter, are common cause.

Factual background:

[5] On 17 October 2022, the first respondent, then applicant, sought and obtained an order in the Zwelitsha Magistrates Court against the second to the fourteenth applicants, then respondents.

[6] The order is to the effect that:

1. the second to fourteenth applicants are interdicted and restrained from operating all church operations for the church;
2. the second to fourteenth applicants were removed as members of the Committee of the Church; and
3. an interim committee is to be appointed to run and oversee the administration of the Church until a new Executive Church Council is appointed.

[7] On 26 October 2022, the second to fourteenth applicants noted an appeal against the judgement and order dated 17 October 2022.

[8] On 4 November 2022 and pursuant to the delivery of the Notice of Appeal the applicants' attorney informed the second respondent of the appeal against the order of 17 October 2022 and of the fact that the appeal has the effect of suspending the operation and execution of the order pending finalisation of the appeal and accordingly requested the second respondent to uplift a debit hold

over the first applicant's accounts. The second respondent then, on the strength thereof, uplifted the debit hold on the church's' accounts.

[9] On 25 November 2022 the second respondent re-instated the debit hold on the accounts. This resulted in the applicants addressing correspondence to the second respondent demanding the upliftment of the hold. The second respondent uplifted the hold on 29 November 2023.

[10] On 12 December 2022 the first respondent again sought and obtained an order from the Magistrate Zwelitsha, *inter alia*, in the following terms:

1. Interdicting and/or restraining the church and the applicants from proceeding with the Church's conference planned for 14 December 2022.
2. That the judgement of Zwelitsha Magistrate Court dated 17 October 2022 to remain effective pending finalization of the Respondent's intended appeal.

[11] On 15 December 2022 the applicants launched an application for reconsideration of the order dated 12 December 2022. The application was opposed and argued on 10 February 2023. Judgement was delivered on 8 June 2023, dismissing the reconsideration application.

[12] It is important to mention that the second respondent, whilst the reconsideration application was still pending, informed the applicants that the debit holds will continue. That, apparently, on the strength of the Magistrates order dated 12 December 2022.

[13] On 15 June 2023 the applicants launched an appeal against the judgement and order dated 8 June 2023. Both appeals, referred to herein, are still pending before the High Court, Bisho.

[14] I must mention that the respondents contend that the appeals have lapsed because they have not been prosecuted timeously in terms of the rules. The applicants deny that the appeals have lapsed.

[15] Counsel for the first respondent conceded during argument that the fact that the appeals are deemed lapsed does not mean that they are non-existent but only that if the applicants still pursue them they must either apply for their reinstatement or for condonation. He conceded that both such applications must be made to the appeal court.

[16] After the filing of the appeal against the order of 8 June 2023 the applicants' attorneys addressed a letter to the second respondent advising them that the judgement and order is the subject of an appeal and that the execution thereof is, by law suspended, pending finalisation of the appeal. The applicants, through their attorneys, also addressed a letter dated 25 July 2023 to the first respondent demanding that it withdraws its instruction to the second respondent for the latter to enforce a debit hold against the first applicant's accounts.

[17] In response to the letter the first respondent's attorneys, per their letter dated 26 July 2023, *inter alia*, stated:

"You further advised our client that as long as there are further Appeals, the judgement is suspended. You are herein referred to Rule 50 of the Uniform Rules in this regard..."

Please be advised that our clients are not going to uplift any Debit Hold on First National Bank...."

[18] It is clear from the above quoted letter that the first respondent made it clear on 26 July 2023 that it is not prepared to instruct the second respondent to uplift the debit hold. It held the view that to do so would not accord with rule 50 of the

Uniform rules of court. It is not clear how the first respondent interpreted the rule but what is clear though is that it is at that stage, as the applicants contend, that it became clear that the parties are not *ad idem* on the effect of the appeal on the judgements and orders by the Magistrate.

[19] On 10 August 2023 the applicants instituted these urgent proceedings. Initially they were intended to be heard on 5 September 2023. For some reason they were postponed to 12 September 2023.

[20] In opposition of the relief sought the first respondent, first, contends that the second to fourteenth applicants lack the authority to act on behalf of the first applicant. The first respondent's argument departs from an incorrect position that the appeal dated 26 October 2022 was filed by the second to fourteenth respondents under the name of the first applicant. This, as I have stated is factually incorrect. The first applicant is not a party to the appeal launched on 26 October 2022. The second to fourteenth applicants are therefore not acting on behalf of the first applicant in so far as the said appeal is concerned.

[21] The first applicant is a party only to the appeal against the order dated 8 June 2023. Even in the said appeal the first applicant is not represented by the second to fourteenth respondents. It is acting in its own name and the second to fourteenth respondents are acting in their own names. This is the case even in these proceedings. That the deponent to the affidavit deposes on behalf of all the applicants does not and cannot mean he is instituting proceedings on behalf of the first applicant. He is merely a witness on behalf of all the applicants including the first applicant. It is trite that he needs no authority to testify on behalf of them.

[22] Accordingly, this point must fail.

[23] The second point taken by the first respondent is that this court lacks the jurisdiction to entertain this matter. It is contended that absent an appeal against

the Magistrate's order this court lacks jurisdiction to suspend the orders. There is no merit to this point. First, on the admitted facts there are appeals against the orders that are pending before this court. That the first respondent believes they have lapsed does not change this fact.

[24] In any event it is incorrect that the appeals have lapsed. Appeals in the magistrate's court are noted in terms of the Magistrates Court rules and are prosecuted in terms of Uniform rule 50. The Magistrates court rules provide for the filing of reasons by the Magistrate 15 days after the noting of an appeal. The first respondent failed to factor this time period in its calculation of the 60 days for the prosecution of the first appeal. The sixty day period for the prosecution of the second appeal has not expired, if it has started yet.

[25] Accordingly, there are valid appeals before the Bisho High Court. If there is any delay resulting in the appeal being deemed to have lapsed or necessitating a condonation, that may be done at any time and must be heard by the appeal court.

[26] Second the proceedings before this court are interlocutory in nature. They are proceedings incidental to the appeals that are pending before this court. That is clear from the pleadings to which one must look at to determine jurisdiction.¹ Accordingly, these being interlocutory proceedings this court retain jurisdiction.

[27] The first respondent also contends that the issue before this court is *res judicata*, same, so the argument goes, having been determined by the Magistrate as per the order dated 12 December 2022.

[28] When asked if the magistrate has the power, in terms of the Magistrates Court Act 32 of 1944 to grant the order for execution pending appeal, counsel for

¹ Speaker of the National assembly v Public Protector and Others 2022 (3) SA 1 (CC) para.30

the first respondent was constrained to concede that no such power exists in the Magistrates Court Act.

[29] It is trite that a Magistrate is a creature of statute and he can only grant orders which are authorised by the Act.²

[30] Accordingly, to the extent that the Magistrate has no power to grant the order, which is conceded by the first respondent, such order is a nullity.³ It therefore cannot found a basis for *res judicata* defence. I therefore find no merit to the first respondent's contention.

[31] The first respondent also contends that the second to fourteenth applicants lack locus standi to bring these proceedings. It is trite that locus standi in the legal sense has two connotations. In the first one it connotes a right or capacity to litigate. In the second it connotes that a person must have a direct and substantial interest in the order sought in the proceedings. The applicants have the capacity to litigate and are affected by the orders sought to be suspended or declared suspended as they were sought and granted against them. The applicants satisfy both requirements. There is accordingly no merit to this point.

[32] The last point raised by the first respondent is that the applicants have failed to satisfy the requirements of rule 6(12) of the Uniform rules of court. The argument advanced is that the applicants have delayed in bringing these proceedings and that in any event the alleged reasons for urgency are not true in that the overdue amounts for rates and services are not occasioned by the debit holds and it is not true that the first applicant is unable to pay its lecturers as the lecturers are not receiving any payments for their work.

² Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit 2023 (2) SACR 1 (CC) para.62.

³ Siyangena Technologies (Pty) Ltd v Passenger Rail Agency of South Africa and Others 2023 (2) SA 51 (SCA) para. 27

[33] I am of the view that the applicants have set out sufficient facts to show that the matter is urgent and they have also set forth circumstances why they believe they cannot obtain substantial redress at a hearing in due course. As stated above it was only on 26 July 2023 that the first respondent made clear that it is not going to instruct the bank to uplift the debit holds and when it made it clear that it has a different understanding of the effect of the appeal on the order of the Magistrate. This is what triggered this application which was instituted on 10 August 2023.

[34] In any event it is clear to me, from what the first respondent's counsel stated during argument, ie that the first respondent is not operating the account and has no intention of doing so on its own, that this frustration meted upon the applicants by the first respondent is unwarranted and deserves to be dealt with urgently.

[35] Accordingly, I am of the view that this matter is urgent enough to warrant being heard as such in terms of rule 6(12) of the Uniform rules.

[36] Regarding the merits of the matter, it is trite, and was even conceded by the first respondent's counsel, that the filing of an appeal suspends the operation and execution of the order.

[37] The argument by the first respondent is that it is the filing of a valid appeal that suspends the order. In essence it contends that only so called valid notices of appeal suspend the execution of the order.

[38] However, the first respondent does not state who determines if a Notice of appeal of an appeal qualifies as a valid appeal or not. In my view, the first respondent's argument means that if a party is served with a Notice of Appeal and such party takes the view that the Notice is defective or the appeal is not

valid, then such party is entitled to execute on the judgement or order which is the subject of an appeal.

[39] I disagree with the first respondent in this regard. If this view was to be accepted it would surely result in chaos. It, in fact, encourages self-help.

[40] Accordingly, I hold the view that the mere fact of the filing of the appeal suspends the operation or execution of the order. Whether the appeal is valid or has lapsed is for the court to determine. It is for that reason that the respondent in an appeal has a right to apply for dismissal of an appeal or a declaration that an appeal has lapsed and apply for costs.

[41] I am therefore satisfied that the applicants have made out a case for the relief sought in the Notice of Motion.

[42] I find no reason why the costs of this matter should not follow the result.

[43] In the result I make the following order:

- 1. The applicant's non-compliance with the normal rules of court on bringing this application is condoned and the applicants are granted leave to bring this application as an urgent application in terms of rule 6(12) of the Uniform rules of court.**

- 2. It is declared that the operation and execution of the judgements delivered by the Magistrate, Zwelitsha on 17 October 2022 and on 8 June 2023 in the matter between Hash Tag Movement and Johnson Sibonda Luphuwana and Others under Zwelitsha case number 381/2022 is suspended pending the outcome of the appeal by the applicants under Bisho case Number CA 3/2023 and Bisho Case Number CA 20/2023.**

3. That during the suspension of the operation and execution of the judgements and orders, referred to above, the first respondent shall not, unlawfully interfere with the lawful operation, use and management of bank account numbers 6[....]9 and 5[....]1 held by the first applicant with First National Bank.

4. That the first respondent shall pay the costs of this application.

Z.Z. Matebese
Acting Judge of the High Court

Appearances:

For the applicant: Adv A. Bodlani SC (with Adv L van Vuuren)
Instructed by: Sakhela Incorporated

For the respondents: Adv M. Sebopa
Instructed by: Faku Incorporated Attorneys

Date Heard: 12 September 2023
Date delivered: 14 September 2023