

**IN THE HIGH COURT OF SOUTH AFRICA
BISHO**

CASE No. 207/2000

In the matter between:

EAST LONDON TRANSITIONAL LOCAL COUNCIL

APPLICANT

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE PROVINCE OF THE EASTERN CAPE
FOR HEALTH**

FIRST RESPONDENT

**THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE PROVINCE OF THE EASTERN CAPE
FOR FINANCE AND PROVINCIAL EXPENDITURE
AND MANAGEMENT SERVICES**

SECOND RESPONDENT

**THE EXECUTIVE COUNCIL OF THE PROVINCE
OF THE EASTERN CAPE**

THIRD RESPONDENT

JUDGMENT

EBRAHIM J:

1. These are civil contempt proceedings arising from the failure of the first and second respondents to comply with an order issued by this Court on 28 July 2000. The details of the circumstances which have given rise to this situation are set out hereunder.

The issues

2. On 25 July 2000 the Applicant launched motion proceedings, as a matter of

urgency, against the first, second and third respondents in which it sought, *inter alia*, the following relief:

- '1. Condoning the Applicant's failure to employ the usual forms and services and directing that this application be heard as a matter of urgency in terms of Rule 6(12).
- 2 That the First Respondent, alternatively the Second Respondent, alternatively the Third Respondent is liable to the Applicant in the sum of R913 470,00 and directing that such sum be paid to the Applicant forthwith.
3. Further and/or alternative relief. That the Respondent pay the cost of the application jointly and severally, the one paying the other to be absolved.'

3. On 26 July 2000, by agreement between the parties, the matter was postponed to 28 July 2000 for hearing. On that date, again by agreement between the parties, an order was issued in the following terms:

- '1. Judgment for the Applicant in the sum of R801 249,00.
2. The first and Second Respondent are directed to pay to the Applicant the sum of R801 249,00 forthwith.
3. It is recorded that the Applicant persists in its claim for payment of the sum of R112 221,00 being the difference between the sum claimed of R913 470,00 and the quantum of judgment herein being R801 249,00.
 - (a) The application is postponed for hearing to 17 August 2000.
 - (b) The Respondents are ordered to file answering affidavits, if any, on or before 7 August 2000.
 - (c) The Applicant is ordered to file replying affidavits, if any, on or before 14 August 2000.
4. The Respondents are ordered to pay the Applicant's costs to date of this order.'

5. Pursuant to the aforesaid order the respondents filed an answering affidavit. Therein the respondents acknowledged liability for the sum of only R20,00 in regard to the amount of R112 221,00 which was still in dispute, contending that an amount of R112 201,00 had been paid prior to the institution of these proceedings. Apart from this the respondents remained silent regarding payment of the sum of R801 249,00 in respect of which, as recorded in the order of 28 July 2000, judgment had been granted in favour of the applicant.

6. As a consequence of the aforesaid the applicant brought a further application, as a matter of urgency, wherein it sought, *inter alia*, an order for payment of the amount of R20,00 including an order that the first and second respondents be committed to prison for contempt of Court, alternatively that a rule *nisi* be issued calling upon the first and second respondents to show cause why they should not be committed to prison for contempt of Court.
7. On 17 August 2000, again by agreement between the parties, the following order was issued:
 - '1. That the First and Second Respondents be directed to pay to the Applicant the sum of R20,00 forthwith.
 2. That a rule *nisi* do issue calling upon the First and Second Respondents to appear personally at 10H00 on 21 August 2000 to show cause why they should not be committed to prison for contempt of Court.
 3. That the costs of 17 August 2000 be reserved for decision.
 4. That the order be served on both Respondents personally alternatively on a person over the age of 16 years and in charge of the offices of the Respondents, in the event of the Respondents being unavailable so that personal service cannot be effected.'
8. On 21 August 2000 the return day of the rule *nisi*, the first and second respondents did not appear personally but were represented by counsel. The respondents also did not file any affidavits to explain their non-compliance with the order which the Court had issued on 28 July 2000.
9. Mr Quinn SC, who appeared for the applicant, informed the Court that a cheque for the sum of R801 249,00, emanating from the respondents, had been handed to him immediately prior to the commencement of the day's proceedings. In view of this the applicant was no longer seeking to have the respondents committed

to prison for contempt of Court. However, since there still remained the issue of the Court's honour as the respondents had not complied with the rule *nisi* issued on 17 August 2000, the Court was entitled to an explanation from the first and second respondents for their wilful default of the Court's order. However, it was for the Court to decide on what further steps had to be taken in this regard.

10. Mr Swartbooi, who appeared for all three respondents, submitted that the first and second respondents had not disregarded the Court's order of 28 July 2000. He contended that since they had complied therewith within three weeks it was a reasonable period of time. He premised his argument on the interpretation that had to be given to the word 'forthwith' as employed in the Court's order of 28 July 2000. Notwithstanding this, he was unable to provide any explanation why neither the first nor the second respondent had failed to respond to the rule *nisi* calling upon them to show cause why they should not be committed to prison for contempt of Court. Accordingly, he was not in a position to offer any reasons why warrants for their arrest should not be authorised. Warrants for the arrest of both the first and the second respondent were thereupon authorised by the Court.
11. Prior to the execution of the warrant of arrests, but as a direct consequence of the issue of such warrants the matter came before the Court again on 23 August 2000. The respondents were now represented by Mr Notshe and the applicant by Mr Chemaly. Mr Notshe handed in affidavits attested to by the first and second respondents and in addition thereto both the respondents testified.
12. The explanation that the first respondent tendered was that he was informed

verbally only at 12:00 noon on Monday 21 August 2000 that he had to appear in Court. He was advised, however, by a member of the State Attorney's office that as the second respondent could not be found it was not necessary that he (the first respondent) appear in Court.

13. In his affidavit the first respondent has expressed himself as follows:

'I respectfully submit that I am deeply embarrassed by the situation I find myself in. Furthermore I want to state categorically that I believe in the dignity of the court and identify myself with the fact that orders given by the court should be given effect to by my department. I further state that it was not my intention to be in contempt and any indication otherwise was not wilful.'

14. It emerged from the explanation tendered by the second respondent that he had not received the Court order. During the period 14 to 21 August 2000 he had been away from his office. He had gone firstly to Umzimkhulu on business and then to Mafikeng to attend a NUMSA National Conference and returned to office on Tuesday 22 August 2000. He had only heard of the Court's order at 2:00 pm on Monday 21 August 2000 while he was in Mafikeng. Had he been made aware thereof earlier he would have appeared in Court. His legal team had also told him, when the order dated 17 August 2000 was served on his department, that it was their understanding that there would not be any need for him to appear in Court on 21 August 2000 should the money be paid to the Applicant. Further, once the money was paid his legal team deemed it unnecessary to inform him that he had to appear in Court on 21 August 2000.

15. The second respondent also stated that his department was responsible for processing the requisite payments upon receipt of the relevant documents from

another department. In the instant matter the requisition for payment had been received by his department on 17 August 2000 and a cheque for payment of the amount was processed on 18 August 2000.

16. The second respondent asserted, therefore, that he '*was not in wilful contempt of court*' and identified himself '*with the principle that court orders must be given effect to and obeyed and the dignity of the court should be upheld*'. In addition, if he received a Court order that a particular department had to pay a certain amount he would give effect to such order even if the department were to object to payment thereof.

Is the Court's order enforceable by contempt of Court proceedings?

17. It has been held by our Courts, in a long line of decisions, that contempt of Court is the wilful and *mala fide* refusal to comply with an order issued by the Court. See *Clement v Clement* 1961 (3) SA 861 (T) at 866A; *Consolidated Fish (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C) at 523A; *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 at 691A-D; *Frankel Max Pollak Vinderine v Menell Jack Hyman Rosenberg* 1996 (3) SA 355 (A) at 367H.
18. Mr Notshe submitted that since the order which the Court issued on 28 July 2000 is an order *ad pecuniam solvendam* it is not enforceable by means of contempt proceedings. It is so that the approach of our Courts has been that the remedy of committal for contempt is available only in the case of orders *ad factum praestandum*. See *Metropolitan Industrial Corporation v Hughes* 1969 (1) SA 224 (T). It is significant to note, however, that an order for periodical payments

for maintenance for a spouse or child, which one would have regarded as being an order *ad pecuniam solvendam*, has been accepted by our Courts as being an order *ad factum praestandum*. See *Ferreira v Bezuidenhout* 1970 (1) SA 551 (O) at 553D-H.

19. Mr Notshe, quite correctly, has drawn the Court's attention to a judgment of the full bench of the Transkei High Court in the matter of *Mamthwana Mjeni v The Minister of Health and Welfare Eastern Cape Province* (Case no 824/96) (handed down on 6 April 2000 but not reported thus far). There Jafta J in reaching the conclusion that ministers of state and other public officials could be held in contempt of Court, reasoned as follows:

'However, the difficulty which the appellant was faced in this matter is the common law rule which excludes the use of contempt of court proceedings in enforcing an order for the payment of money coupled with the statutory provision prohibiting execution against state property. The common law distinction between orders **ad pecuniam solvendam** and those **factum praestandum** regarding contempt of court proceedings would not, in my view, make sense in cases where the state is the judgment debtor in the light of the provisions of sec. 3 of Act 20 of 1957. It would simply mean that the judgment creditor cannot enforce the judgment in the event of failure to pay whereas his counterparts would be able to do so against judgment debtors who are private persons. Effectively, it would mean those who sue the state run the risk of obtaining hollow and unenforceable judgements. The state could just ignore such judgements with complete impunity.

As the rationale behind the common law rule is that the successful party has other options to enforce an order **ad pecuniam solvendam**, I am of the opinion that its application cannot be extended to matters where the state is the judgment debtor because no such option is available to the successful party. To hold otherwise would lead to consequences too ghastly to contemplate. In effect, the courts would be condoning and encouraging deliberate disobedience of their orders or even conduct which holds such orders in utter contempt.

Upholding respondent's defence could easily lead to unpleasant consequences referred to in **Amod v Multilateral Vehicle Accidents Fund 1999 (4) SA 1319 (SCA)**. At para [23] Mohammed CJ remarked as follows:

" 'The common law is not to be trapped within the limitations of its past'. If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict

between and in pursuit of justice among the citizens of a democratic society. For this reason the common law constantly evolves to accommodate changing values and new needs.”

Secondly, it would mean that the interests of thousands of creditors who attempt to enforce payment of their debt from the state through judicial process are not taken seriously if the court were to uphold the common law principle. In **Matiso and Others v Commanding Officer PE Prison and Others 1995 (4) SA 631 (CC)** at para [26] it was held by Didcott J in a different but not unrelated context that:

Credit plays an important part in the modern management of commerce. The rights of creditors to recover the debts that are owed to them should command our respect, and the enforcement of such rights is the legitimate business of our law.”

20. Mr Notshe, *in casu*, urged upon the Court that it should not follow the decision of the full bench of the Transkei High Court in the *Mjeni* case (*supra*) since it was, in his contention clearly wrong. I do not agree. I am in respectful agreement with the *ratio* in that judgment. There is no doubt that in the absence of civil contempt proceedings a creditor is rendered powerless to enforce the judgment against the state (whether it be against a national or provincial department). If such a situation were to prevail it would unquestionably have far-reaching economic consequences as it is hardly likely that anyone would want to conduct business with a state department. The reason for this should be fairly obvious since, were a state department to neglect or refuse to pay an amount owing, the creditor would not be able to enforce payment by way of recourse to court proceedings. I am, therefore, respectfully in agreement with Jafta J that if the rights of successful litigants cannot be enforced then the process of taking disputes to court for adjudication would be rendered meaningless.
21. I also respectfully agree with the conclusion reached by Jafta J that public officials and even ministers of state may be held in contempt of court in

matters such as the instant one. But, in my view, there is a further reason for concluding that contempt proceedings are justified against them even though the judgment is for payment of a debt.

22. It is evident from the papers that the initial proceedings were instituted against both the first and second respondents as nominal respondents. They have been cited in their representative capacities as members of the Executive Council of the Province of the Eastern Cape responsible respectively for the Department of Health, and the Department of Finance, Provincial Expenditure and Management Services. It follows, therefore, that neither of them is being held liable personally for the amount owing to the applicant.
23. It is apparent that where the debt has been incurred legitimately on behalf of a particular department that the funds to be utilised to effect payment of the debt are provided by either the national or provincial treasury, as the case may be. In these circumstances there is manifestly no question of either of the two respondents attracting personal liability in respect of the debt. Notwithstanding this, however, they attract liability of a different nature, in my view, by virtue of their official capacities. It is their obligation to ensure that the Court's order is complied with and that the amount owing to the applicant is paid. The obligation rests on them to initiate the appropriate steps so that payment may be effected.
24. The *modus operandi* of the state, and the respective government departments, is to all intents and purposes virtually the same as that of a company or other legal *persona*. It is only through its ministers of state and other government

officials that the state is able to carry out its functions. They fulfil a pivotal role, therefore, in ensuring that the state honours its obligations to other parties. Thus, whether a Court's order is complied with will depend on whether or not a minister of state as well as some or other government official has carried out his/her respective duties.

25. An important issue that this focuses on is that the terms of the Court's order will invariably determine the identity of the person whose refusal or failure to comply with the order is punishable. See *Höltz v Douglas and Associates (OFS) CC en Andere* 1991 (2) SA 797 (O) at 802C.

26. In regard to the state it is ultimately the responsible minister (as the head of the particular state department), and not some lesser official, who must answer for the department's non-compliance with the order of the Court. I consider the minister's obligations in this regard to be akin to that of a director of a company. In *Twentieth Century Fox Film Corporation and Others v Playboy films (Pty) Ltd and Others* 1978 (3) SA 202 (W) at 203C-D, King AJ, as he then was, reached the conclusion that:

'A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of contempt of Court. By his act or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a Court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order.'

27. In its strict sense the order that this Court issued on 28 July 2000 for payment of the sum of R80l 249,00 is an order *ad pecuniam solvendam*. But, the crucial issue that falls to be considered is in what manner such an order operates

against the first and second respondents and what the effect thereof is. In my view, its operation is similarly to that of an order which indicates the manner in which maintenance must be paid. See *Carrick v Williams* 1937 WLD 76 at 83.

28. *In casu*, even though the order directs that the debt be paid it is issued, and operates, against the respondents in their nominal capacities. At the same time, and because of their official capacities, it imposes an obligation on them to take such steps as are necessary to enable the relevant departmental procedures to be implemented so that payment of the debt can be effected. The obligation it imposes is not of a financial nature but one that requires them to carry out one or other function which forms an integral part of their official duties. In this respect, I consider that the Court's order of 28 July 2000 operates against the first and second respondents as an order *ad factum praestandum*. Consequently, on this basis, a creditor acquires the right to initiate contempt proceedings against a minister of state, members of the executive council of the province, divisional and local councils including government officials at every level of government.

29. 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. (Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th ed 817); See further, *Protea Holdings 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 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/her obligations. (Herbstein *Van Winsen op cit* 817 and the cases cited there).

Are the first and second respondent's guilty of contempt of Court?

30. There is manifestly no question at all that both the first and second respondents failed to comply with the terms of the Court order issued on 28 July 2000. The same applies in respect of the order issued by the Court on 17 August 2000. Both the respondents have furnished explanations, and tendered their apologies, for their failure to comply with these orders. They have also proclaimed their respect for the dignity of the Court as well as its orders. By virtue of the evidence that has been tendered by the first and second respondents, and which has not been gainsaid by the applicant, I cannot hold that they have been wilful and *mala fide* in their failure to comply with either the order of 28 July 2000 or that of 17 August 2000. Consequently, neither the first nor the second respondent are guilty of contempt of Court.

31. Notwithstanding my aforesaid finding I need to express my concern at certain developments. I perceive, on the part of various officials in the departments of the first and second respondents, a distinct failure to recognise that they are required to act expeditiously in giving effect to the orders of this Court. The present case is by no means an isolated example of conduct of this nature. There have been a number of applications before this Court in which various applicants have sought orders against one or other department of the provincial

government to compel payment of an amount owing. It is also common knowledge that applications of a similar nature have, not infrequently, been brought in other High Courts. Invariably the reason for the delay in paying the amounts owing have been attributable to either negligence, dilatoriness or indifference on the part of government officials in taking steps to give effect to the Court's order. Such a state of affairs cannot be permitted to continue. It undermines the authority of the Court and impacts negatively on the efficacy of its orders. This is apart from the obvious additional, and quite unnecessary, financial burden it places on the treasury as a consequence of the state being ordered to pay the applicant's costs in respect of such application.

32. It should be clear, therefore, that unless the first and second respondents take active steps to eliminate any further remissness on the part of certain officials the respondents may very well, on some future occasion, find themselves in a position where they are unable to escape the consequences of the indifference or negligent acts or omissions of their underlings.

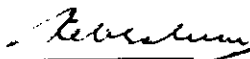
Costs

33. There remains the issue of costs. Notwithstanding my finding that neither the first nor second respondent is guilty of contempt of Court it does not necessarily follow that costs may not be awarded against them. These proceedings would never have reached this stage had the respondents complied timeously with the Court's order issued on 28 July 2000. It is their failure to do so that necessitated that the applicant launch the contempt of Court application. The applicant, in my view, was justified in taking these steps and is, accordingly, entitled to its costs.

Order

34. In the result, in regard to the rule *nisi* calling upon the first and second respondents to show cause why they should not be committed to prison for contempt of Court, I make the following order:

1. The rule *nisi* issued on 17 August 2000 is discharged.
2. The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.



Y EBRAHIM

JUDGE OF THE HIGH COURT (BISHO)

Date: 28 September 2000

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| Heard on | : | 23 August 2000 |
| Judgment delivered on | : | 28 September 2000 |
| Counsel for the applicant | : | Adv. R Quinn SC and Adv T M Chemaly |
| Attorneys for the applicant | : | Smith Tabata Loon & Connellan Inc. 126 Alexandra Road KING WILLIAMS TOWN |
| Counsel for the first, second and third respondents | : | Adv S V Notshe and Adv S J Swartbooi |
| Attorneys for the first, second and third respondents | : | State Attorney Old RSA Embassy Building No. 1 Prince Alfred Square KING WILLIAMS TOWN |