KWAZULU – NATAL HIGH COURT, DURBAN
IN THE REPUBLIC OF SOUTH AFRICA

REPORTABLE
Case no: 11249/2010

In the matter between:

THE TWELVE APOSTLES' CHURCH IN CHRIST	First Applicant
CAESAR NONGQUNGA	Second Applicant
And	
THE TWELVE APOSTLES' CHURCH IN CHRIST	First Respondent
NAPHTALI VUSUMUZI MLANGENI	Second Respondent
MMELELI JOCKONIA KHUMALO	Third Respondent

JUDGMENT

MADONDO J

Introduction

[1] This is an application for an order directing the respondents to deliver to the applicants` legal representatives an adjustment and reconciliation account pursuant to paragraphs (iv) and (v) of Judge K Pillay's order of 26 February 2009 under case number: 902/2000, paragraph (v) as amended by paragraph 32 of the Full Bench of KwaZulu-Natal Provincial Division appeal judgment handed down by Govern J on 15 February 2010 under case number: 488/2009.

[2] In the alternative the applicants seek an order directing the respondents to deliver an adjustment and reconciliation audited account alternatively account, which should encompass and detail the following in respect of the period January 2000 to date of compliance.

"1(a) a detailed analysis and breakdown of:

(i) valuations in respect of all properties;

(ii) proof of all rates, taxes, water, electricity and sewerage charges levied and proof of payment thereof;

(iii) all leases in respect of such immovable properties including full details of rentals received, deposits and invoices in respect thereof;

(iv) proof of all alleged improvements including payments made in respect thereof together with all supporting vouchers and documents;

(v) all receipts of monies to be accounted for, in respect of the period 2000 to date;

(vi) a list of all bank accounts of whatsoever nature held at whatever institution, either in the Republic of South Africa and abroad;

(vii) bank statements in respect of the accounts referred to in paragraph (vi) supra from 2000 to date;

(viii) copies of all cheque stubs that were issued for the same period above;

(ix) copies of all and every deposit slip reflecting deposits into any bank account of the same period above;

(x) a schedule of EFT transfers reflecting payments of the bank accounts and copies of proof of such EFT transfers for the same period above;

(xi) a schedule of the above payments including the legal or factual basis upon which such payments were made;

(xii) copies of all tax returns prepared and submitted by the First and Second Respondents for the same period above;

(xiii) complete disclosure of all stocks and shares held in all Public Companies listed on the Johannesburg Stock Exchange in the name of the First and Second Respondents or in the name of any person(s) acting for or on behalf of the First and Second Respondent for the same period above;

(xiv) complete disclosure of all stocks and shares held in all Private Companies in the name of the First and Second Respondents or in the name of any person(s) acting for or on behalf of the First and Second Respondent for the same period above;

(xv) complete disclosure of all monies removed from the First Respondent's bank account that was not related in the normal course of business for the same period above;

(xvi) all unused cheque books, deposit books, books of accounts, journals and other books required for the continued administration of the affairs of the First and Second Respondents;

(xvii) all monies received by the First Respondent in respect of tithes;

(xviii) all monies paid out by or disbursed by either the First or Second Respondents setting forth the date and amount of each payment, the name of the payee and the reason for each payment together with all supporting vouchers and documentation;

(b) all the First Respondent's books of account, statements and records in the First and/or Second Respondent's possession."

[3] Further, the applicants seek an order granting them leave to reinstate the matter for hearing on the date to be arranged with the Registrar for relief set out in paragraph 2(a) – (e) of the Notice of Application. In the aforesaid paragraphs the applicants seek the following reliefs:

"2 (a) an order directing the first and second respondents to debate the said account with the first and second applicants within two weeks from the date upon the accounted referred to in paragraph 1(b) of the Notice of Application was rendered to the first and second applicants;

(b) failing agreement thereupon by the respective parties, one Konrad Buchner, an auditor in the firm of accountants, namely, Price Water House Cooper be and is hereby appointed as referee to effect and finalise such account and to debate same;

(c) determination of the account which is due to the first applicant pursuant thereto;

(d) judgment in the amount so determined;

(e) costs of the proceedings on a scale as between attorney and client."

[4] Further, that an order that in the event of the First and/or Second Respondent failing to comply with the provisions of paragraph 1(a) and (b) of the Notice of Application, applicants are granted leave on notice to the respondents to amend their Notice of Application, by filing a supplementary affidavit in support thereto, setting forth the amount which it contends to be due to it.

[5] Lastly, that in the event of the respondents failing to comply with paragraph 1 of this order the Sheriff shall be authorised and directed to attach all records, statements, accounts and documents pertaining to the applicants in respondents' possession and to hand the same over to the applicants' attorneys of record.

[6] Paragraphs iv and v of Judge K Pillay provides:

"(iv) The First and Second Defendants are directed to render to the First Plaintiff within two months from the date of this judgment a true and proper statement of account together with sustaining documents reflecting all transactions relating to First Plaintiff's income, assets, expenditure and liabilities that have been within their possession or control since 1 December 1996.

(v) The First and Second Defendants are directed to debate the said account with the First Plaintiff within one month of the date it was rendered in terms of paragraph 1a above."

[7] Paragraph 32 of Judge Gorven's order provides:

"1. The Appeal succeeds in respect of paragraph (v) of the order which is amended to read as follows:

(v) The first plaintiff is given leave to set the account down for debatement on notice to the defendants.

2. Save for paragraph 1, hereof, the appeal is dismissed with costs."

Parties

[8] The first applicant is the Twelve Apostles' Church in Christ, a religious association duly registered as such in terms of the laws of the Republic of South Africa, and having its principal place of administration in East London.

[9] The second applicant is Caesar Nongqunga, a major male Chief Apostle and President of the first applicant.

[10] The first respondent is the Twelve Apostles Church in Christ, a religious association duly registered as such in terms of the laws of the Republic of South Africa, having its principal place of administration at Umgababa Headquarters and Mission, South Africa.

[11] The second respondent is Naphtali Vusumuzi Mlangeni, an major male chief apostle of the first respondent.

[12] The third respondent is Mmeleli Jockonia Khumalo, a major male treasurer of the first respondent and the member of executive.

Background

[13] The Twelve Apostles Church in Christ herein after referred to as the “mother church” was founded during 1973 by one Phakathi who became its first President, and the Chief Apostle. He died on 6 September 1994. After his death, four apostles constituted themselves as a Board of Apostles. The said apostles were Mlangeni,i Gelem, Khumalo and the second applicant.

[14] The Board of Apostles was created on 17 September 1994 as a temporary measure to step into the shoes of the deceased pending the appointment of the president. However, the constitution of the church did not make provisions for such board.

[15] After the death of Phakathi the assets of the mother church were sold by certain apostles without the authority of the central church and the Board of Trustees. In order to prevent the dissipation of the church assets the second applicant took a legal action. However, the action was eventually settled by the signing of the settlement agreement by the aforesaid functional apostles. They signed the agreement as the individuals of the church and not in their respective capacities, this was also partly done in order to protect the wife of Phakathi (the deceased), who had misappropriated church moneys from being prosecuted and possibly thrown into jail.

[16] The settlement agreement provided inter alia for the dissolution of the mother church and the formation of two separate churches in its place under the leadership of the second applicant and second respondent respectively, as well as the division of the assets owned by the mother church equally between the two new churches. However, the assets were never transferred in terms of the agreement, and some of the bank accounts were operated and used by the second respondent's faction.

[17] At the Central Council meeting held on 6 January 1996 the second applicant explained how the mother church was dissolved and the rationale for such dissolution. Members of the church that attended the said meeting mandated the second applicant to take the settlement agreement to court for annulment. The settlement agreement was according to the Central Council meeting unconstitutional and therefore not binding on the church. At no stage did the Central Council, Board of Trustees or the mother Church ratify or adopt the settlement agreement. The four signatories thereto had no authority to dissolve the church.

[18] At the Central Council meeting held on 24 January 2000, it was resolved that the resolution taken on 6 January to institute legal action with a view to having the settlement annulled and the second applicant installed as the president of the church should be implemented. The result of the settlement agreement had been that the church was divided into two factions, one belonging to the second applicant, named Twelve Apostles; Church in Christ, and the other to Mlangeni bearing the same name.

[19] The first applicant then instituted application proceedings under case number: 902/2000 in which it inter alia; sought an order declaring the settlement agreement to be null and void and of no force and effect and relief consequent upon the order. The second applicant sought an order declaring him the true successor to Siqu David Phakathi (the deceased) as Chief Apostle and President of the first applicant. On 26 February 2009 the court granted the reliefs sought by the applicants, and included in such reliefs were paragraphs (iv) and (v), which the respondents are presently required to comply with.

[20] The respondents appealed against the judgment of K Pillay J to the Full Bench of KwaZulu-Natal, Natal Provincial Division. Save for amendment to paragraph (v) of the order as contained in paragraph 32 of Gorven J's order, the appeal was dismissed with costs on 15 February 2010.

[21] The respondents then appealed against the Full Bench judgment to the Supreme Court of Appeal, and the appeal was once again dismissed with costs on 18 August 2010.

[22] In compliance with the order of K Pillay J the first respondents' attorneys addressed a letter to the applicants on 23 March 2010 in which they confirmed the first respondent's intention to fully give effect to the aforesaid judgment. They stated that the first respondent undertook to return to the mother church the properties listed in annexures "C" and "D" to the Particulars of Claim. Further, that following the purported settlement, which the court declared to be invalid, the second respondent on 6 January 1996 formed a new church with its own constitution and members and had collected tithes from such members and otherwise

accumulated funds and acquired assets. Further, that during the course of the *bona fide* possession of the aforesaid properties by the respondents numerous improvements were effected to the said properties. According to the respondents` attorneys such improvements increased the value of the properties and that therefore the respondents are entitled to be compensated. Lastly, they stated that, the settlement agreement having been declared invalid, the properties allocated to the second applicant should similarly be reverted to the mother church.

[23] In a letter dated 16 April 2010 the applicants' attorneys indicated to the respondents' attorneys that the information furnished was inadequate and insufficient in the following respects:

(a) the respondents did not furnish a list of all the applicant's assets, except the Umgababa Mission Head Office to which they claimed improvements, and Shakas' Kraal;

(b) no income and expenditure incurred during the period under review was provided in as much as proof thereof was not furnished;

(c) a list of assets acquired during the period of existence of the nullified settlement agreement was not furnished;

(d) liabilities incurred during the period under review were not disclosed;

(e) no title deeds and/or permission to occupy in terms of the applicants' immovable assets were provided;

(f) a true and proper account of monies collected in the form of titles etc from the congregants rendered; and

(g) banking statements were also not provided.

According to the applicants no proper account was ever received from the first and second respondents.

[24] On 22 September 2010 the applicants instituted civil contempt of court proceedings under case number: 11247/2010 in which they sought an order in the following terms:

"1. That is declared that the First and Second Respondents are in contempt of the order of this Honourable Court granted on the 26th February 2009 and as amended by the Full Bench of the Natal Provincial Division on the 15th February 2010, annexed hereto marked "CN3" and CN4" respectively.

2. That the First and Second Respondents are:

(a) committed to jail for contempt of court and for a period to be determined by the above Honourable Court, alternatively fined an amount of R100.000,00 for such contempt or such other amount as this Honourable Court in its discretion, may deem appropriate,

alternatively

(b) directed to comply within five (5) days with the terms and provisions of annexure's "CN3 "and "CN4" hereto, failing which the respondents are committed to jail for contempt of court and for a period to be determined by the above court, alternatively fined an amount of R100 000.00 for such contempt or such other amount as this court in its discretion, may deem appropriate.

(c) That the respondents pay the costs of this application on an attorney and client scale.

3. That the Applicants be granted such alternative relief as this above Honourable Court may deem just "

This application has been referred for oral evidence on 25 and 26 February 2013.

Issue

[25] The crisp question for decision in this matter is whether the applicants are in law entitled to bring an application for an order directing the respondents to comply with paragraphs (iv) and (v) of Judge K Pillay's order, the latter as amended by the Full Bench of KwaZulu-Natal Provincial Division, while the civil proceedings for contempt of court against the respondents, arising from their failure to comply with the aforesaid order, are still pending before this court.

[26] All orders of court, whether correctly or in correctly granted, have to be obeyed until set aside. See Culverwell v Beira 1992 (4) SA 490(W) 494A; Jubhai v Minister of Home Affairs [2007] 4 all SA 778(T) para 51. Thus, civil contempt proceedings exist in order that court orders stemming from civil proceedings may be brought to a logical conclusion by the imposition of a penalty in order to vindicate the Court's authority. See also *Witham v Holloway [1995] 131 ALR 40 (HC) of Australia at 407-408.*

[27] The order in question is, in my view, clear and unambiguous and capable of enforcement. See Thutha v Thuta 2008(3) SA 494(TkH). The existence of the respondents` obligation to render proper account arises from K Pillay J's order, as amended. Secondly, the

respondents dealt with monies belonging to the first applicant and income derived from its properties. Therefore, they are in law and in fact obliged to furnish the first applicant with the statement of account. See *Musca v Musca and another 1995(4) SA 814(T) 818B-C.* Millions of Rands worth tithes that would have been paid to the mother church have been paid to the first respondent. In the result, the first applicant is entitled to be furnished with an account which will enable it to establish with certainty what has happened to its assets and funds. Also, without the required information it would be difficult, if not impossible, for the applicants to ascertain the amount due and payable by the respondents. See *Doyle and another v Fleet Motors PE (Pty) 1971(3) SA 760(A) at 767H; Krige v Van Dijk Executors 1918AD 110 and Mia v Cachalia 1934AD.*

[28] The respondents concede that they became obliged to render within two months after 18 August 2010 the statement of account and sustaining documents referred to in paragraph (iv). It is trite that the account should be of sufficient particularity in order to enable the first and second applicants to debate same. See *Doyle case, supra, at 763,767; Jones v Bailey 1974(2) SA 580(D).*

[29] It is common cause that the applicants have already received an account which they aver that it is in sufficient in the following respects:

(a) what the opening balances were in respect of the account;

(b) what withdrawals or deposits had been made into the account;

(c) what debits or credits had been effected;

(d) how the interest earned had been computed;

(e) when and how withdrawals were made and what the amounts is in respect of such withdrawals were;

(f) there were no supporting documents or vouchers, the limited documents annexed do not identify the cause or basis for any payments made out of the accounts and there was no evidence as to what happened to fixed deposits and credit balances in respect of closed accounts.

[30] The general principle laid down in Doyle case, supra at 767H is that a plaintiff, who is entitled to an account and receives one which he avers, is inadequate, is entitled to press his claim for a due and proper account. See also *Krige v Van Dijk Executors 1918AD 110 at 121* and M*ia v Cachalia 1934 AD 102.*

[31] The plaintiff is entitled to insist on his claim for the delivery of an account provided he can establish a *prima facie* case for relief sought. See *Dale Street Congregational Church v Hendrickse en 'n ander 1992(1) SA 133(Cka) 134F.*

[32] The respondents state that the statement of account with supporting documents as required by Madam Justice Pillay's order was rendered on 21 December 2010. The applicants aver that such account was inadequate and insufficient in various respects, as indicated above.

[33] If the applicants have received all the required and available information, it would no longer be proper and right for them to seek an order directing the respondents to render an

account. In order to decide whether to order the rendering of a proper account, I have to inquire into and determine the issue of sufficiency. See *Doyle case, supra, at 763B.*

[34] Though the respondents are adamant that an account was rendered to the applicants they are silent on the adequacy and sufficiency of such account. There is nothing to suggest let alone to show that the issues complained of have been addressed to such an extent that the applicants are in a position to determine what the true position of the first applicant's estate is, as a consequence, there is nothing gainsaying the version of the applicants in this regard. In my view, furnishing of sufficient account and full information will make it possible for the applicants to make a full examination of the books and records and determine whether any funds have been siphoned out or embezzled. See *Zalow Mauer Berger Ltd 1936 CPD 205 at 208 per Jones J.*

[35] It has been argued on behalf of the applicants that they are entitled to approach this court for relief sought. To the contrary, the respondents contend that the applicants' remedy for failure to obey the order is to institute contempt proceedings against the respondents not by seeking a fresh order in the same terms. The applicants have under case number: 11247/2010 sought an order to commit the respondents for contempt of court for failure to obey paragraphs iv and v of K Pillay J's order and this application has been referred for oral evidence. The respondents contend, further, that the issue between the parties is already before the court in an earlier application and that this application is vexatious. According to the respondents the present application is fatally misconceived in all respects and should therefore be dismissed with costs. It is the respondents' contention that the applicants have sought the wrong remedy

and that they should have sought to enforce the order by contempt proceedings. In the applicants' argument the order sought under case number: 11247/2010 only penalises the respondents for their failure to comply with the court's order.

[36] The respondents contend that since the issue between the parties is before court in the application referred to above the present application is vexations. In support of their contention in this regard, they rely on the decision of the Supreme Court of Appeal in Nestle (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA) para 16. In the said case the court held that once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). See also *Socratis v Grindstone Investments 2011(6) SA 325 (SCA) para 13,* in this regard.

[37] A court has a jurisdiction to stay an action brought before it where a similar action is already proceeding in another court. When dealing with an exception of *lis pendens* Smith J in Miclianelson v Lowestein 1905, TS 324 said the following:

> "It seems to me that this exception is not absolute bar, but that it is a matter within the discretion of the court to decide whether an action brought before it should be stayed pending the decision of another previously brought between the same parties, for the same course and in respect to the same subject matter, or whether it is more just and equitable that it should be allowed to proceed."

[38] However, the matter must have been submitted for decision between the same parties, regarding the same subject matter and arising from the same cause of action because when a

law suit has been commenced it ought then and there also to be brought to a finish. See *Osman v Hector 1933 CPD 503 at 507.*

[39] In Mc Henry v Lewis 22 ch.D397 at 400 Jesse MR said:

> "In this country, where the two actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies it is prima facie vexatious to bring two actions where one will do."

This is in accordance with our law and the same principle is applicable.

[40] In Painter v Strais 1951 (3) SA 307(T) at 312, it was held that to bring two actions in one court in regard to the same matter is prima facie vexatious, and the same could be said where the actions are brought in different courts. There is a room for the application of that principle only where the same dispute between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.

[41] In Cape Times v Union Trades Directories and others 1956(1) SA 105 (N) at 121E, it was held that punishment for a civil contempt per se, must always be for the purpose of coercing the offender to do or refrain from doing something in accordance with an order obtained against him, and not merely punitive. In Naidu v Naidoo 1993(4) SA 542(D) 544 the court held:

> "a litigant has no locus standi to seek an order for contempt arising out of a breach of an order obtained in a civil proceedings where the punishment is not calculated to coerce compliance with the order."

[42] However, civil proceedings for contempt of court need not always have the object of compelling performance of the court's order but may be brought for the sole purpose of punishing the respondent. In Cape Times case, supra, at 120D, it was held that punishment by way of fine or imprisonment for the civil contempt of an order of court made in civil proceedings is only imposed where it is inherent in the order made that compliance with it can be enforced only by means of such punishment.

[43] The object of proceedings that are concerned with the unlawful and intentional refusal or failure to comply with an order of court is the imposition of a penalty in order to vindicate the courts' honour. In this case the applicants aver that the contempt order sought is for punitive purposes. The applicants sought an order declaring that the respondents are in contempt of the order granted by K Pillay J on 26 February 2009 as amended by the Full Bench of KwaZulu-Natal on 15 February 2010, and committing them to jail or directing them to pay fine. I agree that to this extent the order sought in this regard is punitive in nature. However, seeking in the alternative an order directing the respondents to comply with K Pillay J's order within five (5) days of the order, failing which the respondents will face imprisonment or a fine changes the scenario. On the whole the order sought is obviously calculated to ensure compliance with the order referred to above. It could not therefore be true and correct that the order sought is only punitive, but it is also coercive. In *Dazius v Dazius 2006(6) SA 395(T) at 398A,* the court held that the form of committal is the imprisonment or a fine. Such punitive coercion is intended to assist the complainant to enforce his or her remedy. Civil contempt of court provides the ultimate sanction against the defaulter who refuses to comply with an order of court.

[44] When the principal object of the proceedings is to compel the performance of the court's order by means of personal attachment and committal to gaol, the imprisonment imposed is very often suspended pending fulfilment by the defaulter of his obligations. Naidu and others case, supra, at 544J. The court in its discretion may deem the coercive measure appropriate in the circumstances of this case.

[45] In Witham v Holloway [1995] 131 ALR 40 (CHC) of Australia at 407 – 408 the following was said:

> "Proceedings for breach of an order or undertaking have the effect of vindicating judicial authority as well as remedial or coercive effect."

In Bannatyne v Bannatyne and another 2003(2) BCLR 111(CC) para 20, it was held that contempt of court proceedings are recognised method of putting pressure on a defaulter to comply with an obligation, and was also thereby elevated to a salutary constitutional relief.

[46] Where the imprisonment is imposed it is usually suspended or the order may take the form of a fine with an alternative period of imprisonment, with a further period of imprisonment suspended on conditions. See *Singer's Estate v Kotze 1960(2) SA 304(C) and Protea Holdings Ltd v Wriwt and Another 19768(3) SA 865(W) 872 C-D.*

[47] As I have indicated above in the earlier application the contempt of court proceedings are mainly intended to induce the respondents to comply with the order, granting the order sought in the present application will therefore have no different consequence, save to

duplicate the application proceedings. In essence, the respondents are in the present application sought to do what they are required to do in the earlier application.

[48] Though the respondents are in law obliged to furnish the applicants with the statement of account of sufficient particularity in order to enable them to debate same, I am not satisfied that the circumstances of this case so demand before the decision of the court on the earlier application. There is a dispute of fact whether or not the respondents rendered the required statement of account, and if they did, whether it was of sufficient particularity. The dispute of fact inherent in the earlier application, in my view, still continues to exist even in the present application. By referring the earlier application for the hearing of oral evidence on 25 and 26 February 2013, it is intended to establish the sufficiency of the account the respondents allegedly rendered to the applicants. In the premises, it is necessary, reasonable and appropriate to allow the contempt of court proceedings between the parties in the earlier application to proceed to finish.

[49] In my view, the relief sought by the applicants in the earlier application carries a sting with it in the event of the respondents failing to comply with their obligations, which the present application does not instantly have. If the respondents were to disobey the order sought, if granted, the applicants would once again institute the contempt of court proceedings, and that will only serve to replicate applications. In the circumstances, the contempt of court proceedings in the earlier application are more appropriate, effective and provide an adequate remedy as compared to the relief sough in the present application.

[50] In the result, I am not satisfied that the applicants have made a case for the granting of the relief sought before the court's decision on the earlier application. The application is accordingly dismissed with costs.

Date reserved:	20 November 2012
Date delivered:	16 January 2013
Counsel for Applicants:	Adv Lennard
Applicant attorneys:	Magigaba Incorporated
Counsel for Respondents:	Adv Southwood SC
Respondents attorneys:	AP Shangase & Associates Ref: TM/C2057/nn