IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 19726/2010

DATE: 25 NOVEMBER 2011

In the matter between:

DEO GRACIAS KATSSHINGU Applicant

and

THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEES AFFAIRS 1st Respondent

THE REFUGEES STATUS DETERMINATION OFFICER, V E MAVUYO N.O. 2nd Respondent

THE MINISTER OF HOME AFFAIRS, RSA 3rd Respondent

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS, RSA 4th Respondent

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J U D G M E N T

BOZALEK, J:

This is an application in which the applicant seeks an order declaring the first and second respondents to be in contempt of an order requiring them to deliver to the Registrar of this

court the record of certain administrative proceedings in terms of Rule 53 of the Uniform Rules. The first respondent is the Standing Committee for Refugee Affairs and the second respondent is the Refugee Status Determination Officer.

The application is incidental to an application in terms of which the applicant sought to review two separate decisions by the first and second respondents refusing his application for refugee status. Those proceedings were argued on 25 October 2011 and judgment was handed down in favour of the applicant on 2 November. The sequence of events leading up to the present day are usefully set out in a chronology contained in heads of argument filed by the applicant's counsel at an earlier stage and is as follows:

> 3 September 2010 - the applicant files an application for review.
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> 13 September 2010 - the respondents file a notice of intention to defend but do not file the Rule 53 record.
>
> 18 November 2010 - the appellant applies for an order to compel the respondents to file the Rule 53 record.
>
> 14 December 2010 - Bozalek, J grants an order by agreement directing first respondent to furnish the

registrar with the Rule 53 record within 20 days.

9 February 2011 - the applicant applies for an order that the first and second respondents are in contempt of the order of Bozalek, J and asks that the court direct that the matter be heard only on the review papers filed by the applicant.

28 February 2011 - Saldanha, J orders the respondents to deliver the Rule 53 record by 5 March 2011 and to file an affidavit explaining to the court why it failed to comply with the order of Bozalek, J, why it should not be held in contempt of court and why respondents should not be held personally responsible for costs of the application. He directs that the matter be heard in the 3rd Division on 16 March 2011.

5 March 2011 - the respondents file a bundle of documents in apparent compliance with the order of Saldanha, J.

9 March 2011 - the state attorney files an affidavit in opposition to applicant's application for contempt.

16 March 2011 - Fortuin, J orders that the matter of contempt of court be deferred for hearing with the main review application on the semi-urgent role on 25 August 2011.

To complete the sequence of events, as mentioned, the main application was heard on 25 October on which day the contempt application was postponed to 24 November 2011 principally to allow the first respondent a further opportunity to state on oath why it should not be held in contempt of court and to establish who the members of the first respondent ("the Standing Committee") were at the relevant times. That order read in full as follows:

"1. The contempt proceedings are postponed to 24 November 2011.

2. The fourth respondent or his/her delegee or the first respondent is directed to serve and file an affidavit by no later than 10 November 2011:

2.1 setting out who the chairperson and the members of the Standing Committee are or have been since September 2010 to date and, if such persons are no longer members of the committee, the details of the termination of their membership.

2.2 confirming that all such members had been advised of the contempt proceedings, that they shall resume on 24 November 2011 and that they may

submit an affidavit by no later than 10 November 2011 as to why they should not be sanctioned by this court for contempt.

3. the applicant may reply to such affidavits if he so chooses before 17 November 2011."

Another affidavit has been filed on behalf of the first respondent as well as a reply thereto by the applicant. The affidavit filed on behalf of the first respondent is that of Mr Maemo Chipu who, although he does not state so, is the current chairperson of the Refugee Appeal Board. He was also a member of the first respondent until he resigned on 30 September 2010. His fellow committee members, during late 2010, were a Mr Claude Scravessandi and Mr Suleiman Lockat, whose present whereabouts are remarkably, but not surprisingly, not known to the Department of Home Affairs at present.

Mr Chipu further advises that the first respondent has three new members appointed in August 2011 and they have been informed of the terms of the order made on 25 October 2011 by this court. In the balance of the affidavit Mr Chipu explains that the files of asylum seekers are kept at the centres where their applications are processed whereas the members of the

Standing Committee are normally based at the Pretoria Head Office of the Department. Thus, explains Mr Chipu, it would have been impossible for any of the members of the first respondent to deliver the record to the applicant.

The above matrix of facts is relied upon by the first respondent to defeat any claim that any past or previous members of the first respondent were in contempt of this court's order of 14 December 2010 or any other later order. Also relied upon by the first respondent as a defence is the contents of an earlier affidavit by Mr Mhlana, the respondents' legal representative from the office of the state attorney which was attested to on 9 March 2011. In that affidavit it is submitted that a contempt order is incompetent because the individual members of the Standing Committee were not aware of these proceedings and were not given individual notice thereof.

Secondly, it is submitted therein that there was no question of wilful disobedience because the first respondent was stymied in finding the record in question by reason of the applicant's legal representative furnishing an incorrect reference number for the matter. This led, it is said, to a delay in finding the relevant file or material.

The issues which arise in this matter are, as I see it:

1. whether a finding of contempt can only be made against past or present individual members of the Standing Committee or whether it can be made against the committee as a whole.

2. whether the requirements for a finding of contempt have been met and if so;

3. what an appropriate sanction is for such contempt.

In Fakie N.O. v CCII Systems (Pty) Limited 2006 (4) SALR 326 (SCA), the court held that the respondent in civil contempt proceedings was not "an accused person" but was entitled to such analogous protections as were appropriate to motion proceedings. In particular, the applicant had to prove the requisites of contempt, namely the order, service or notice, non-compliance and wilfulness and *mala fides* beyond a reasonable doubt. Once the applicant had proved the order, service or notice and non-compliance, the respondent borne evidentiary burden in relation to wilfulness and *mala fides*. Should he fail to advance evidence that established a reasonable doubt as to whether his non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt. A declarator and other

appropriate remedies remained available to the applicant on a balance of probabilities.

The court stated in paragraph 8 of its judgment:

> "In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction of its threat and while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sallies the authority of the courts and detracts from the rule of law."

Cameron, JA, in discussing the public dimension present in contempt proceedings, quoted with approval from the judgment of Plasket, JA in the Victoria Ratepayers case, this at page 343h-344a:

> "It is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they

> fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system...That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

I refer to these remarks because in the present case the order in question has been complied with but that does not mean the end of the matter since there remains the public dimension of whether the initial failure to comply with a court's order must be visited with a suitable sanction for contempt.

Firstly, it is clear that there can be no question of the second respondent being in contempt, since the order of 14 December places an obligation to provide the record only upon the first respondent. Turning to the first respondent, although it is a statutorily established committee the Standing Committee for Refugee Affairs does not appear to have a separate legal authority. Section 9 of the Refugees Act 130 of 1998 provides that there is established a Standing Committee for Refugee Affairs, whilst section 10 provides that it must consist of a chairperson and such number of other members as the minister

may determine having regard to the likely volume of work to be performed by the committee.

Given the lack of legal personality and the committee's shifting composition, I consider that the first respondent itself is an inappropriate body to visit with a contempt citation. It would have been better had the chairman of the committee been cited as the first respondent. An attempt was made to proceed along this route by the applicant by changing the citation of his papers to cite the first respondent as the chair of the Standing Committee but a change in parties or the addition of a party cannot be accomplished in this manner.

There appears, however, to be two members, Messrs Scravessandi and Lockat, who were serving on the committee at the time the alleged contempt was committed and thus the contempt inquiry can proceed against them. This brings into focus the various excuses for the non-compliance raised on behalf of the Standing Committee. The first is that as a result of being given a wrong reference by the applicant's attorney, the search for the relevant file was prolonged and by implication there was no wilful or *mala fide* non-compliance. This excuse holds no water, however. The reference by the state attorney to an incorrect reference is not fully explained in Mr Mhlana's affidavit of 9 March 2011 and the only incorrect

reference known to the applicant or his legal representative is the insertion of the incorrect state attorney's name on the notice of motion. This error was soon picked up, however, and could hardly have delayed any search by the Department for the relevant file.

In any event, whatever difficulties may have arisen prior thereto, on 14 December 2010 the first respondent, represented by the state attorney, agreed to undertake to furnish a copy of the record to the registrar within 20 days and to notify the applicant thereof. It agreed furthermore to this undertaking being made an order of court. I can only presume therefore, there being nothing to the contrary before me, that this was done on the instructions of the first respondent and that the contents of this order was made known by the state attorney to his client. The order having been taken by agreement, the clock began ticking on 14 December 2010. Notwithstanding this, by 28 February 2011, no record had been produced and on that day the order giving rise to these proceedings was made by Saldanha, J. Thereafter, on 5 March 2011, the record was produced but notably only after two interlocutory applications for contempt had been launched.

The second excuse raised for the non-compliance surfaced in the affidavit of Mr Chipu, namely that the committee members

were based in Pretoria and the file was in Cape Town. I regard this excuse as fatuous. A Rule 53 record must be delivered by the party who takes the challenged administrative decision. If it is not in such body's possession it is within their control and such person must accept responsibility for giving the necessary instructions to ensure that the record is placed before the registrar. In any event all the relevant facts must have been known to the state attorney and the first respondent before the first respondent consented to the order made on 14 December 2010 in which the first respondent undertook to file the record.

In the result I am satisfied on a balance of probabilities that the first respondent, through its members, was in contempt of court by failing to deliver the record within 20 days of 14 December 2010. There was an order and notice thereof must have been given to the first respondent. There was subsequent non-compliance and given that I have rejected the excuses raised on behalf of the first respondent, the non-compliance appears to have been wilful and *mala fide*.

However, before sanctioning for contempt, I must be satisfied that the non-compliance was wilful and *mala fide* beyond a reasonable doubt and in the circumstances of this matter, I consider that I cannot make such a finding until such time as

Messrs Scravessandi and Lockat have had an opportunity to respond to the allegations. They might, for example, say that they gave no instruction for the proceedings to be opposed on behalf of the first respondent or gave no instructions to consent to the order of 14 December being made or were never apprised of its contents.

I find then that *prima facie* the two members of the Standing Committee, Messrs Scravessandi and Lockat were in contempt of this court's order dated 14 December 2010 and I am referring this matter to the Director of Public Prosecutions for that office to investigate a prosecution of Messrs Scravessandi and Lockat or any other member of the Standing Committee at the relevant time for contempt of court. I direct the Registrar, furthermore, to send a copy of this judgment to the first, third and fourth respondents in the hope that it will assist in ensuring that similar instances of non-compliance with court orders, with the consequent proliferation of litigation and unnecessary use of public funds on legal costs, do not occur in future.

This leaves the question of costs. The applicant initiated these proceedings initially in an attempt to obtain the record of the decision-making proceedings. After it obtained the record, the applicant was of assistance to this court in considering the

factual and legal questions arising from the contempt proceedings and is thus entitled to all its costs arising out of such proceedings. These include, but are not limited to, the application heard by Saldanha, J on 2 February 2011, that heard by Fortuin, J on 16 March 2011, the appearance on 25 August 2011 when it was postponed by Hlophe, JP and the hearings before myself on 25 October and 24 November 2011. These costs must be paid by the first and third respondents, the one paying the other to be absolved.

BOZALEK, J