IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 5374/2014
DATE: 18 JUNE 2014

In the matter between:

SANTS PRIVATE HIGHER EDUCATION INSTITUTION Applicant

And

MEC FOR DEPARTMENT OF EDUCATION KZN First Respondent

AND NINE HUNDRED AND SEVENTY FIVE OTHER RESPONDENTS

JUDGMENT

D PILLAY J:

[1] Contempt of court arising from a failure or refusal to comply with an order of court is a criminal offence. The offence violates the dignity, repute and authority of the court. In so doing it trenches on the rule of law, the maintenance of which is constructed on the dignity, authority and capacity of the courts to execute their functions. The appellate authorities that elucidate these principles include *Fakie NO* v *CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 6 and *S v Mamabolo (E-TV and Others Intervening)* 2001 (3) SA 409 (CC) para 14.

[2] For committal, the non-compliance must be wilful, reckless or in bad faith.[1] Once the applicant proves the order, its service and the non-compliance, the onus shifts to the respondent to prove that the non-

[1] See *Clement v Clement* 1961 (3) SA 861 (T).

compliance was not wilful, reckless or in bad faith.[2] An order for payment of money is not enforceable via contempt proceedings. An order to do or abstain from doing something is enforceable by contempt proceedings.[3] A contempt application can be brought, not always for enforcing compliance but for the sole purpose of punishing the respondent contemnor.[4]

[3] The applicant, SANTS, seeks an order holding the second respondent in contempt of two orders of the court and certain mandatory relief. The first respondent is the MEC for the Department of Education in the Province of KwaZulu-Natal and the second respondent is the Head of the Department ('the respondents'). The third to 976th respondents are students against whom the applicant seeks no relief. In opposing the application the respondents relied on an opposing affidavit submitted by the Chief Director, Dr Nzama.

[4] It is common cause that both orders were not complied with as directed, or at all. All that remains for determination is whether such partial compliance as there was, and the non-compliance, was wilful or *mala fide*. I will deal with the first order first, thereafter the second order and then, in my analysis, consider whether the non-compliance was wilful or *mala fide*. Finally, I will turn to additional relief going forward in the relationship between the parties.

[5] The first order granted on 26 November 2013, reads as follows:

> 'It is ordered that:
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> 1. It is declared that the first respondent is obliged to make payment to the applicant of all the student fees due to the applicant for as long as the students with bursaries from the Department of Education of the Province of KwaZulu-Natal ("the Department") fulfil the terms and conditions of the bursary agreement that each student/respondent concluded with the Department for as long as those bursary arguments (agreements) remain in force and (effect) by consent;

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[2] See A Cilliers et al *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* at 1104.

[3] Cilliers et al *Herbstein and Van Winsen The Civil Practice* at 1106.

[4] Cilliers et al *Herbstein and Van Winsen The Civil Practice* at 1101.

2. The first respondent be and is hereby directed to make payment to the applicant of the student fees, currently due by each of the students in the total sum of R32 672 500.00 by 17 December 2013.
3. The first respondent be and is hereby directed to pay interest at the statutory rate of 15.5% on:
    3.1 The amount of R22 522 500.00 from 1 February 2013 to date of payment;
    3.2 The amount of R10 150 000.00 from 1 July 2013 to date of payment.
4. The first and second respondents are to pay the costs of the application.'

Payment of the amounts in terms of paragraphs 2 and 3.1 of the order were made on 31 January 2014 and 7 March 2014.

[6] The respondents refuse to pay the amount in paragraph 3.2. Their defence against non-payment in terms of the first order is twofold. The respondents contend, for the first time in this application, that the applicant is not accredited by the South African Qualifications Authority (SAQA) and that it was not enough for the applicant's courses to be registered with SAQA.

[7] When the Court enquired why this defence was not raised before the orders were granted, and whether such a defence was competent, counsel for the respondents replied that the respondents were not aware of this deficiency in the applicant until the Department received complaints from the students. However, the students were not the source of the information about the applicant's registration with SAQA. Indeed, the applicant itself was. This is all too clear from the applicant's founding affidavit in this application in the paragraphs describing the applicant. This description of the applicant in these proceedings is a cut and paste copy of its description in previous applications, in particular the application in which it obtained the first order. Therefore, it is apparent from the papers that the respondents knew or ought to have known the status of the applicant *vis-à-vis* SAQA long before this application was brought.

[8] Furthermore, the respondents fail to substantiate their bald allegation that accreditation by the applicant with SAQA was a prerequisite for

payment. For the SAQA registration as one of the two defences raised by the respondents to avert the contempt complaint and non-payment in terms of the first order, the Court looked to counsel for assistance. It was not for the Court to scour the authorities to find support for the respondents' defence. Respondents' counsel was unable to point the Court to any authority to substantiate accreditation by the applicant with SAQA as a prerequisite for rendering services as a tertiary institution and consequently for payment by the Department.

[9] Allegedly, the accreditation with SAQA was a prerequisite because it impacts on the quality of services provided. Without more, this submission requires a Court to make a huge leap of logic. Dr Nzama offers nothing to explain how registration with SAQA would impact on quality of the applicant's services. If quality control and supervision are concerns then oversight and supervision by SAQA is achieved by registering the courses. Crucially the courses are registered and accredited with SAQA, and this is common cause. The SAQA defence is therefore a red herring. If registration was a prerequisite, then the Department failed in its duty to ensure that the applicant complied with all the requirements before contracting the applicant into the bursary agreements.

[10] The second defence to the first order is that the respondents wanted to audit the applicant's student enrolment. Other than Dr Nzama's bald assertion, there is not a shred of evidence that the respondents ever requested an audit. Who requested the audit, to whom that request was made and when it was made and when, by whom and how the applicant refused to submit to an audit is not disclosed.

[11] In contrast, the applicant points to three occasions between 11 February and 31 March 2014[5] when it invited the respondents to engage with it to resolve their differences. For instance, on 11 February 2014 the applicant invited both respondents personally to 'experience what SANTS is offering to students in the five rural districts.' The respondents did not reply to these written requests for engagement and participation.

[12] The respondent did not need the applicant in order to conduct an

[5] See pages 48, 150, 171 of the pleadings.

audit. It had the contact information of all the students with whom it had contracted to award bursaries. It could have approached the students directly; it did so when it summoned them to meetings by notice on its website.

[13] Furthermore, as the government department responsible for education, it has authority to call on and investigate any site where education services are rendered. As the payer under the bursary agreements, it had a duty as the disburser of the public purse to ensure that the funds it disbursed were used for the purposes intended before it committed itself to making such payments.

[14] Dr Nzama offers no evidence as to what steps, if any, the Department took to audit the applicant. In the absence of such evidence the Court must infer that no steps were taken. The defence of requesting an audit is therefore another red herring.

[15] The second order granted on 24 January 2014 reads as follows:

> 'It is ordered (by consent) that:
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> 1. The second respondent is directed to publish a letter on the Department's website by no later than close of business on 26 January 2014 and furnish the letter to the applicant within the same period, which notice to contain the wording set out in Annexure "X1" and be published on the Department's letterhead; or
> 2. adjourned *sine die.*
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> The letter 'X' read:
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> 'To all students with bursaries from the Department of Education of the Province of KwaZulu-Natal to study with Sants Private Higher Education Institution (Pty) Limited ('Sants'):
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> "You are hereby notified that you are entitled to enrol and study with Sants Private Higher Education Institution (Pty) Limited for the degrees of BED (FB) or BED (IP) entirely at your own volition.
>
> The Department will honour your bursary agreement if you choose to study through Sants.
>
> Your bursary agreement will automatically renew for a year at a time until the completion of the approved course, provided you furnish the Department with your results after every examination period as well as

the qualification certificate upon completion. Dr Sishi, Head of Department.'

[16] Although this order reflects that it was obtained by consent that is not accurate. The applicant's counsel prepared the draft order and conferred with counsel for the respondents in drafting the letter. Counsel informed me that the order obtained was not with the consent of the respondents. Dr Nzama alleges that the second respondent did not publish the letter

> 'because it was engaged [in] publishing circulars which had the same effect and made a public announcement on FM radio informing the students of the import of the letter.'[6]

[17] The circular relied on, read as follows:[7]

> 'Staff news, date, 4 February 2014.
>
> Sants has been paid by the Department.
>
> The Department of Education in KwaZulu-Natal wants to put it on record that on 28 January 2014, the Department paid Sants all the money due to the institution. The Department wants to reiterate its position that the learners who want to enrol with SANTS are free to do so, in the same manner that learners are free to enrol with any other institution of their choice.
>
> Issued by Communications and Publications.'

[18] Manifestly, the circular does not comply with the letter ordered by the court in the following respects:

1. It was not issued on 4 February 2014;
2. The identity of the person issuing the circular is not Dr Sishi;
3. The identity of the author of the circular is not disclosed;
4. The contents of the circular differ from the letter; and
5. The circular is addressed to the staff. There is no evidence that it was addressed to all students or published on the website.

[19] I find that the non-compliance is material for the following reasons: The timing of the publication of the letter was prescribed in the second order because it was crucial. The application was brought and granted urgently on

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[6] See answering affidavit, page 179.

[7] See page 139 of the pleadings.

24 January 2014. The relief granted had to be implemented within two days thereafter by publishing the letter in the name of the second respondent, i.e. Dr Sishi, on the Department's website. Timing was material because it was the beginning of the new academic year. The applicant had to enrol students. The applicant was compelled to obtain the second order when it learnt from postings by students on its Facebook page that the Department was influencing students to switch their enrolment to other universities. The second order was aimed at clarifying the Department's position regarding its contracts with the students and their on-going enrolment with the applicant.

[20] Not only the timing, but also the content of the letter which was carefully crafted by counsel in court, was material. What emerged in the circular was dishonest and misleading. To publish that 'all money due to the institution' was paid on 4 February 2014 was an untruthful misrepresentation. The two amounts of interest had not been paid.

[21] Furthermore, the second order did not require the respondent to inform the students that they were free to enrol with other institutions of their choice. Adding this information to the circular opens the door to enquiring what the intention of the circular really was. Contrary to the respondents' contention, the circular was not intended at only allaying students' concern that their fees would be paid. It was also encouraging students to enrol at other institutions.

[22] Against these facts, Dr Nzama contends that the applicant delayed until 17 April 2014 to launch this application. Students had already elected their institutions to pursue their studies. The respondents cannot rely on the applicant's delay in launching the contempt application to absolve the second respondent from non-compliance with the second order because there is no logical connection between them.

[23] An application for contempt can be brought at any time for as long as the three requirements mentioned above are in place, namely, proof of the order, service and non-compliance. Furthermore, the authorities also contemplate contempt proceedings, merely to punish the contemnor. The delay defence compounds the contempt the respondents showed in not complying with the second order.

[24] The circular is attached to the applicant's founding affidavit. The respondents do not deny that the Department issued it. In fact, they rely on it. However, as counsel for the respondents pointed out, the content of the circular is entirely hearsay. Even though the respondent relied on the circular as purported proof of compliance with the second order, they have not disclosed who the author of the circular was, what circumstances prompted the respondents to issue it at that time, in that form and in substitution of the letter that forms part of the second order. Furthermore, the manifestly dishonest and misleading statements in the circular go unexplained. Effectively, the respondents relied on hearsay to avoid the second respondent being held in contempt.

[25] I find that the respondents failed to comply with the second order. Instead, they deliberately set out to subvert it in every way possible. The defence that the circular amounted to compliance is disingenuous. The conduct of the respondents' officials amounts not just to an omission but deliberate defiance of the second order. The respondents proffer no explanation whatsoever as to why they unilaterally elected not to publish the order as directed two days after it was granted. They provide no evidence that circumstances changed over the two days between the granting of the order and the date it was due for implementation. Even if circumstances did change, the respondents' remedy lay in applying to court to vary the order.[8] For this omission, too, the respondents offer no explanation. It is not as if the respondents as representatives of the state are without advice or assistance from the most competent counsel. In fact it is obliged, in terms of Treasury Rules, to seek such advice when in doubt.[9]

[26] Do the respondents have *bona fide* defences? None of the three defences raised against non-compliance with the court orders are genuine. The SAQA and audit requirement defences to the first order are reflexive responses recently invented merely to resist this application. As for the

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[8] See *Minister of Health and others v Treatment Action Campaign and others (No 1)* 2002 (5) SA 703 (CC) par 11

[9] '12.2.2 If in doubt, the accounting officer of the institution must consult the State Attorney on questions of law on the implementation of paragraph 12.2.1.'
And
'12.7.4 If in doubt, the accounting officer of the institution must consult the State Attorney on questions of law in the implementation of paragraphs 12.7.1 and 12.7.3.'

publication of the circular, which was the defence to the second order, the Court found above that it was a deliberate strategy to subvert the second order. On Dr Nzama's version, the strategy was successful insofar as by April 2014 some students elected to enrol with other institutions. Dr Nzama expects the Court to accept that, notwithstanding the Department's well-publicised opposition to the applicant, that the Department did not actively dissuade the students from registering with the applicant. That proposition lacks credibility altogether.

[27] However, if the respondents' reasons or defences are not genuine explanations for resisting the court orders, what is? Dr Nzama claims that the quality of services rendered by the applicant is inferior. He relied on the affidavit of some 230 students. The applicant issued a Rule 35 notice requesting production of the affidavits. The respondents ignored the notice. Any complaint about the services provided by the applicant is wholly unsubstantiated in these proceedings.

[28] On the evidence in this application, Dr Nzama proffers no justification for non-compliance with both orders. Fatal to the Department is the respondent's failure to deliver opposing affidavits attesting to their intention regarding the court orders. They bear the *onus* of proving that they did not wilfully, or in bad faith, fail or refuse to comply with the second order. Any evidence Dr Nzama tenders about the second respondent's intentions regarding the second order is hearsay. Applying the test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 at 368; 1984 (3) SA 623 (AD)) at 634I-635B the Court must find that the defendant has not put up a *bona fide* defence. It cannot rely on anything that the respondents have submitted to resist this application. The Court must accept the applicant's version.

[29] Applying the authorities cited above, the remedy for non-payment of a debt is not contempt proceedings, but execution against the assets of the Department. This applies to the first order. Contempt proceedings are the appropriate remedy for the second order. Publication of the letter remains relevant as the bursary agreements contemplate a four year relationship amongst the applicant, the respondents and the students.

[30] Pursuant to paragraph 1 of the first order, the fact that the students remain enrolled with the applicant results in the last tranche for 2013 and the first tranche for 2014 falling due. The further relief this court grants aims to facilitate payment going forward. This takes care of the relief sought by the applicant.

[31] Diagnosing the true reason for the respondents' non-compliance falls beyond the scope of this application. However, the diagnosis is urgent. The bursary agreements are for four years, automatically renewable annually. The applicant is stipulated as the service provider and beneficiary under the bursary agreements. Although the applicant has no contract with the Department for rendering services, it has a material interest in the bursary agreements. If the Department has problems with the applicant's quality of services or if the procedures were not followed in compliance with s 217 of the Constitution of the Republic of South Africa 1996, or for whatever other genuine reasons that might exist for resisting the orders, the obligation rests on the respondents to act accountably, transparently and decisively to fix the problem.[10]

[32] Every payment that the applicant has sought since it was contracted into the bursary agreements has required the intervention of the Court. Public administration by litigation is not what s 195 of the Constitution contemplates. In granting this application it must be clear that the Court is not in any position to assess the quality of services of the applicant or whether the respondents' resistance to the applicant has foundation.

[33] Section 38(1)(f) of The Public Finance Management Act 1 of 1999) provides:

> '(1) The accounting officer for a department, trading entity or constitutional institution
> …
> (f) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period... .'

[10] s 195 of the Constitution of the Republic of South Africa 1996

The Treasury Regulations pursuant to that section, GN R225, *GG* 27388, 15 March 2005, at paragraph 8.2.3, read:

> 'Unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice or, in the case of civil claims, from the date of settlement or court judgment.'

Clearly, the respondents have not complied with the Treasury Regulations.

[34] When the respondents failed to comply with the first order the applicant attached the Department's motor vehicles in January 2014. The sale in execution was scheduled for 3 March 2014. *The Witness*, a newspaper circulating predominantly in KwaZulu-Natal, quoted the spokesperson for the first respondent, Bheksisa Mncube, as threatening to take away the applicants operating licence if it persisted with demands for the interest and to 'drag them to Court for six years to get the licence back.'[11]

[35] These allegations form part of the applicant's case for contempt. If the respondents disputed the correctness of the report then it should have corrected it, if not when it was issued then at least in opposition to this application. If the spokesperson was correctly quoted then his response is hardly a mature and lawful response on behalf of the political head of education in the province. The spokesperson seems oblivious to the Department's constitutional obligation to abide by court orders. He also appears to be unaware of the basic values and principles governing public administration in s 195 of the Constitution. To remind, they include promoting and maintaining a high standard of professional ethics and the efficient economic and effective use of resources. Being accountable and transparent are also hallmarks of good public administration. The alleged utterances of the spokesperson require further investigation by the Public Service Commission.

[36] The possible violations of Treasury Rules and s 195 of the Constitution have surfaced in this application. Investigating them fall beyond

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[11] See note page 146.

the scope of the application. In the public interest the Court is duty bound to refer this judgment to the relevant supervisory authorities, to investigate and deal with the issues raised in this judgment as they deem fit. Particularly disturbing is the fact that the respondents raise spurious defences that they must know or should reasonably have been advised against. The costs of these defences are for the public purse.

[37] The relationship between the applicant and the respondent is toxic. Third party intervention to facilitate the relationship onto a less pugilistic platform to either continue the relationship or terminate it on mutually agreed terms is necessary. Whatever the outcome is of any processes going forward the primary interest must be the students enrolled with applicant.

[38] With regard to the students, the parties are reminded that the bursary scheme that the Department introduced was a commendable plan to educate and train some 1 200 unemployed matriculants in rural areas of KwaZulu-Natal over four years to be teachers. If successful, the scheme held the promise of remedying serious deficits in education at basic and higher levels.

[39] The conduct of officials in the Department is a chilling reminder of our unhappy authoritarian past. In the immortalised words of the late Etienne Mureinik, our Constitution represents a bridge from a culture of authority to a culture of justification. Going forward, it lies squarely within the responsibility of the Department to justify its conduct. In the circumstances, the order for costs on an attorney and client scale is entirely justified.

[40] The order I grant therefore is in terms of Exhibit XX which was handed in by counsel for the applicant. It reads:

1.1 The second respondent is held in contempt of paragraph 1 of the order of this Honourable Court on 24 January 2014, under case 2014/468, the January 2014 court order.

1.2 The respondent is directed to comply with the January 2014 court order within two days from date of the granting of this order, publishing the letter he was directed to publish in terms of paragraph 1 of the January 2014 order.

1.3 That failing compliance with the January 2014 order the second respondent is to be committed to a period of imprisonment of thirty (30) days.

2.1 The second respondent is directed to pay the applicant the third tranche of the 2013 student fees in the sum of R10 150 000.00, together with interest thereon at the statutory rate of 15.5% per annum calculated from 10 February 2014 to date of payment.

2.2 The second respondent is directed to pay to the applicant the first tranche of the 2014 student fees in the sum of R17 010 000.00 together with interest thereon at the statutory rate of 15% per annum, calculated from 4 April 2014 to date of payment.

3.

3.1 The Department is directed, within ten days from date of this order, to provide the applicant with details of reciprocal contact persons with whom SANTS can liaise.

3.2 The applicant is to provide the Department with the details of all enrolled students for that particular academic year by 1 February of each academic year.

3.3 The Department is to scrutinise the list of enrolled students and indicate any queries that the Department may have within fifteen days after receipt of the list in paragraph 3.1 above.

3.4 In respect of the respondents' academic results:

3.4.1 The applicant is to supply to the Department with the students' first semester results by 31 July 2014.

3.4.2 The applicant is to supply the Department with the students' second semester results by 23 December 2014.

3.5 The Department is to scrutinise the results of each student and indicate any queries that the Department may have:

3.5.1 In respect of the first semester results, within fifteen days, after receipt of the results referred to in 3.4.1 above; and

3.5.2 In respect of the second semester results, within twenty-five days after receipt of the results, referred to in 3.4.2 above.

4. The second respondent is directed to pay the costs of this application on the scale of attorney and client.

Names of counsel	Adv DR van Zyl for Applicant Adv A.B.G Choudree for First and Second Respondents

Names of attorneys

For Applicant:

Gildenhuys Malatji attorneys, Pretoria
Robyn Wills attorney, Pietermaritzburg

For First and Second Respondents:

State attorney, Durban
Cajee Setsubi Chetty,
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Date of Hearing: 17 June 2014
Date of judgment: 18 June 2014