

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No A 52/2010

In the matter between:

**VINSON HAILULU**

**APPLICANT**

and

**THE PROSECUTOR-GENERAL**

**FIRST RESPONDENT**

**THE ANTI-CORRUPTION COMMISSION**

**SECOND RESPONDENT**

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**THE DIRECTOR: ANTI-CORRUPTION**

**COMMISSION**

**THIRD RESPONDENT**

**THE REGIONAL COURT MAGISTRATE,**

**WINDHOEK**

**FOURTH RESPONDENT**

**THE MINISTER OF SAFETY AND SECURITY**

**FIFTH RESPONDENT**

**Neutral citation:** *Hailulu v The Prosecutor-General* (A52-2010) [2014] NAHCMD 151 (30 April 2014)

**Coram:** VAN NIEKERK J

**Heard:** 3 March 2010

**Delivered:** 30 April 2014

**Flynote:**     **Contempt of court** – Alleged disobedience to court order – If contempt continuing the hearing of an application in contempt proceedings may be rendered urgent – Correct approach is to analyse affidavits to consider whether respondents are in fact continuing to commit contempt of court – *In casu* no case for contempt made out – Other relief claimed also not urgent – Application struck with costs.

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### **ORDER**

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The application is struck from the roll with costs.

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### **JUDGMENT**

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VAN NIEKERK J:

#### Introduction

[1] During 2007 – 2008 the second respondent, the Anti-Corruption Commission (hereinafter ‘the ACC’) initiated and pursued an investigation against the applicant on 12 charges under the Anti-Corruption Act, 2003 (Act 8 of 2003). As a result of this investigation the ACC arrested the applicant during November 2008 and initiated

criminal proceedings against him. The applicant was released on stringent bail conditions pending the finalization of the investigation.

[2] During February 2009 the applicant launched an application in this Court (in Case No A383/2008) in which he cited the following parties: the Director of the ACC (as the first respondent) ('the Director'), the ACC (as the second respondent), the National Union of Namibian Workers (as the third respondent) and the magistrate of Windhoek (as the fourth respondent). The applicant sought, *inter alia*, (i) the review of certain decisions by the Director and the ACC in Case No A383/2008; (ii) a declaration that his arrest had been unlawful; (iii) a declaration that section 43(2) of Act 8 of 2003 is unconstitutional; and (iv) a declaration that the criminal proceedings instituted against him in November 2008 were invalid.

[3] On 9 February 2009 Swanepoel AJ (as he then was) on an urgent basis granted certain interim relief as set out in prayers 2, 3, 4, and 6 of Part A of the notice of motion with immediate effect, pending the finalization of the main application for the relief mentioned in paragraphs (i) – (iv) above. The effect is that the interim relief granted reads as follows (some obvious typing errors in the notice of motion have been corrected):

'2. Reviewing and setting aside the decision in terms of section 18(1)(b) of the Anti-Corruption Act, No 8 of 2003 ("the Act") to conduct an investigation of the allegations against applicant, on grounds, each such ground being an independent basis for the relief sought by applicant on this prayer, that:

2.1 The Director of the Anti-Corruption Commission (such Commission hereinafter referred to as "the ACC"), or the party within the ACC responsible for such decision, failed to take the provisions of section 18(2) of the Act, in particular section 18(2)(a), (b) and (d), into consideration prior to coming to its decision;

- 2.2 The allegations against applicant did not amount to evidence of any involvement in any “*corrupt practice*” as contemplated by sections 33 to 48 of the Act, as a consequence whereof the decision to investigate the allegations against the applicant was *ultra vires* the powers and duties of the ACC as circumscribed by section 3(a), or any of the other subsections of section 3 of the Act;
  - 2.3 The decision was prompted by ulterior motives, and was taken in bad faith and for purposes of achieving the unlawful aim of undoing or reversing the retrenchment of former employees of the National Housing Enterprise (hereinafter “the NHE”) outside the scope of the legal remedies available to achieve such objective, and/or the unlawful aim of removing the applicant from his position as chief executive officer of the NHE;
  - 2.4 No rational and legitimate connection existed between the decision to investigate applicant, purportedly taken in terms of the provisions of section 18(1)(b), and the evidence presented to the ACC;
  - 2.5 The decision was not “*warranted on reasonable grounds*”, as required by the provisions of section 18(1)(b) of the Act.
3. Reviewing and setting aside the decision of the first and/or second respondent in terms of section 18(3) of the Act, that the investigation permitted by the decision taken in terms of section 18(1)(b) was to be conducted by the ACC, upon the grounds, each such ground being an independent basis for the relief sought by applicant under this prayer 3, that:
    - 3.1 The threshold requirement of a proper prior decision taken in terms of section 18(1)(b), for a valid decision in terms of section 18(3), was not complied with;
    - 3.2 The decision in terms of section 18(3) was prompted by ulterior motives, and was taken in bad faith and for purposes of achieving the

unlawful aim of undoing or reversing the retrenchment of former employees of the NHE, and/or the unlawful aim of removing the applicant from his position as chief executive officer of NHE;

- 3.3 No rational and legitimate connection existed between such decision and the evidence presented to the ACC;
  - 3.4 Such decision was not warranted on "*reasonable grounds*" as required by section 18(3) of the Act.
4. Declaring the Applicant's arrest effected on 27 November 2008, to have been unlawful, and setting any process issued by court as a result of the Applicant's arrest, the arrest effected on such date and the bail conditions imposed upon applicant, aside, upon the grounds that, each such ground being an independent basis for the relief sought by applicant under this prayer 4:
- 4.1 The ACC, or any party acting in terms of a purported delegation under the Act, or in terms of a delegated power deriving from the Prosecutor-General, has no powers to effect any arrest prior to any decision by the Prosecutor-General taken in terms of the provisions of section 13(2) of the Act, other than for purposes of arresting a person who is found to have perpetrated a recent or contemporaneous offence in terms of section 28 of the Act;
  - 4.2 At the time of the arrest on 27 November 2008, the Prosecutor-General had not taken any decision as contemplated by section 31(2), and the applicant was not found perpetrating a recent or contemporaneous offence as contemplated by section 28 of the Act;
  - 4.3 The decision to arrest applicant, and the arrest itself, was prompted by the considerations set out in prayer 2.3 above;

- 4.4 The arrest was not intended to and could not serve the purposes of an arrest, namely the arraigning of an accused person for trial on specific charges, as no prior decision to prosecute applicant had been taken as at the time of his arrest;
- 4.5 The ACC ignored, in bad faith and prompted by the considerations set out in prayer 2.3 above, other measures not as severely infringing applicant's constitutionally entrenched right to liberty, that could have achieved applicant's presence in court, such as a summons, or a warning to appear in court;
- 4.6 The contents of the warrant of detention falsely stated that applicant was "*arraigned for trial on a charge of ... Count 1... contravening section 43(1) of the Anti-Corruption Act...*", whilst no decision to prosecute had been made;
- 4.7 None of the charges investigated by the ACC amounted to an offence in terms of section 43(1) of the Act, which section was falsely stated by the warrant of detention to represent the offence with which the applicant was charged;
- 4.8 In the absence of any proper or lawful or legitimate decisions taken in terms of the provisions of section 18(1)(b) and 18(3) of the Act, the threshold requirements for the authority of the ACC to effect an arrest, namely a validly established investigation, was absent, and the purported arrest was *ultra vires* the powers of the ACC.

5. ....

6. Declaring invalid the criminal proceedings instituted against the applicant in the Magistrates Court, Windhoek.'

[4] It is common cause in the application before me that, as a result of the above-mentioned interim order, the criminal proceedings against the applicant in the

Windhoek magistrate's court were withdrawn on the instructions of the first respondent in the instant application, the Prosecutor-General ('the PG'), on 27 February 2009.

### The relief sought

[5] On 15 February 2010, while the main application in Case No. A383/2008 was still pending, a summons was served on the applicant to appear in the regional court on 5 March 2010 on thirteen criminal charges which were, except for the first count, by and large the same charges as formed the subject matter of the criminal case that was withdrawn on 27 February 2009.

[6] This led to the application before me in which the applicant seeks on an urgent basis, *inter alia*, the following relief (the omissions and insertion are mine):

- '2. Declaring the first, second and third respondent to be in contempt of the order of this Honourable Court dated 6 February 2009 ....., in that:
  - 2.1 first respondent authorised and directed a criminal prosecution of applicant, as evidenced by the summons annexed to applicant's founding affidavit as Annexure "V3", contrary to the provisions and in violation of the Court order dated 6 February 2009;
  - 2.2 second and third respondents conducted investigations and laid charges against applicant in violation of such order, as reflected by the summons referred to in paragraph 2.1 above.
3. Directing and ordering first, second and third respondents to purge their contempt of court on or before 5 March 2010, failing which applicant may apply on the papers of this application, supplemented and/or amplified to the extent necessary, for an order imposing such penalty(-ies), that may include an order of punitive constitutional damages in favour of the applicant, on each of the first to third respondents, as this Honourable Court may deem fit;



4. Directing and ordering that the summons reflected in annexure "V3" to applicant's supporting affidavit be set aside, and declared to be of no effect whatsoever pending the finalisation of the applicant's review application launched under case A383/2008;
5. Directing and ordering the criminal proceedings initiated by the above summons to be invalid, and ordering that such criminal proceedings be set aside;
6. Restraining and interdicting the respondents from taking any further action of whatsoever nature, or from initiating any further proceedings of whatsoever nature, based on the evidentiary matrix of any of the investigations or charges contemplated by either case number A383/2008, or by this application, or any of the counts set out in annexure "V3" to applicant's founding affidavit, pending the finalisation of [the] review application ..... [under] case A383/2008;'

[7] The PG, the ACC and the Director oppose the application and filed answering affidavits. The applicant filed no reply.

### Urgency

[8] Before me counsel for the respondents raised a point *in limine* that the application is not urgent. In this regard the PG acknowledged in her answering affidavit that matters involving contempt of court could, in principle, be inherently urgent, particularly when the alleged contempt is ongoing. However, the PG stated further, this matter is not urgent because, in short, she has since the applicant's lawyers first corresponded with her about the matter before the application was launched, offered to stay the criminal prosecution pending the outcome of the review proceedings in an effort to resolve the dispute. Despite an undertaking to revert, the applicant did not. After the application was served, the applicant made certain counter-proposals which were not acceptable to her. However, the PG re-iterated her offer of a stay, to which

there was no response. As I understand it, the offer remained open during the hearing of the application. Mr *Geier* submitted on her behalf that the offer of stay can, in the context of the matter, mean nothing other than a withdrawal of the case. (I pause to note that at the close of arguments in this matter, I confirmed with the parties in Chambers that the PG was still willing to withdraw the criminal case, an undertaking that was given and accepted, pending the outcome of this judgment and the review application). He further submitted that these facts clearly undo any possible basis for urgency on which the applicant might rely.

[9] Mr *Namandje* on behalf of the applicant pointed to the fact that the notice of motion was already signed on 23 February 2010 before the PG made the first offer on 24 February 2010. The applicant's affidavit was commissioned on 24 February 2010 and steps had already been taken to serve the application. He also submitted that the applicant was entitled to an unconditional withdrawal of the criminal prosecution and to require the PG to comply with certain conditions which he did not disclose. As such, he submitted, the PG's offer was not acceptable and his client was entitled not to accept it. He submitted that the matter was clearly urgent.

[10] In *Protea Holdings Ltd v Wriwt* 1978 (3) SA 865 (W) it was stated (at 868H and 869A-B) that if it could be shown that the respondents in contempt proceedings were continuing to commit contempt of court, the hearing of the application on an urgent basis would be justified in order to attempt to get the respondents by way of the penalty imposed to desist from their continuing contempt. That case also concerned alleged disobedience to a court order. In that case the court, in dealing with the issue of whether the matter was urgent or not, proceeded to analyse the affidavits in order to consider whether it has been shown that the respondents are in fact continuing to commit contempt of court (at 869A-B). In my respectful view this is the correct approach.

[11] It is clear that the PG was never a party to the application in Case No. A383/2008. It is common cause that at the time that the application in Case No. A383/2008 was heard, the ACC's file containing the statements concerning the investigation had already been submitted to the PG for her consideration and decision. A copy of the application in Case No. A383/2008 was served on the PG, although she was not a party to the proceedings. It is further common cause that the ACC and/or its Director raised a point *in limine* on the basis that the application in Case No. A383/2008 was defective for lack of joinder of the PG in that application. The applicant opposed the point taken on the basis that the PG had no direct and substantial interest in the outcome of that application as she had not taken a decision on the ACC's investigation and was therefore not seized with the matter. Attention was further drawn to the fact that she had not intervened and the inference was drawn that she was not in agreement with the point taken about her non-joinder. Swanepoel AJ did not make any express finding on this point, but the point clearly failed, because he granted the interim relief without ordering that the PG be joined. It is common cause that no reasons were provided by the Honourable Judge for the order made.

[12] The requirements for contempt of court in a matter like this one were set out in *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 (2) SA 517 (C) at 522E-H as follows:

'An applicant for committal needs to show -

- (a) that an order was granted against respondent; and
- (b) that respondent was either served with the order (*Godefroy v. The State*, (1890) 3 S.A.R. 113; *Eaton Robins & Co v Voges*, 19 C.T.R. 140; *Resident Magistrate, Humansdorp v Kosana and Another*, 1915 E.D.L. 4); or was informed of the grant of the order against him and could have no reasonable ground for disbelieving the information (*Burgers v Fraser*, 1907 T.S. 318;

*Scholtz' Estate v Carroll*, 23 S.C. 430; *Botha v Dreyer*, 1 E.D.C. 74; *In re Cousins and Another*, 1911 CPD 463 at pp. 470 - 471; *In re The Corinbatore*, 18 N.L.R. 179); and

(c) that respondent has either disobeyed it or has neglected to comply with it.

(In this instance it is undisputed that the order was duly served).

Once it is shown that an order was granted and that respondent has disobeyed or neglected to comply with it, wilfulness will normally be inferred (*R v Mcunu*, 1928 NPD 237; *R v Rosenstein*, 1943 T.P.D. 65 at p. 70; *Wickee v Wickee*, 1929 W.L.D. 145 at p. 148) and the onus will then be on respondent to rebut the inference of wilfulness on a balance of probabilities (*Waterston v Waterston*, 1946 W.L.D. 334; *R v Van der Merwe*, 1952 (1) SA 647 (O) at p. 650; *Jacobs v Jacobs*, 1911 T.P.D. 768 at pp. 770 - 771; *Wickee v Wickee*, *supra*; *Reed v Reed*, 1911 E.D.L. 157; see also *Traut v Rex*, 1931 S.W.A. 29 at p. 32).'

[13] In the matter before me it is clear that the PG was never a party to the earlier proceedings and that the interim order was not granted against her. Clearly she does not meet the requirements as set out above in *Consolidated Fish Distributors (Pty) Ltd v Zive* and as such cannot be held to be in contempt of the interim court order.

[14] As far as the ACC and its Director are concerned, it was conceded on behalf of the applicant that they had taken no further action or failed to do anything after the interim order of 6 February 2009 which indicates in any way that they disobeyed the order or neglected to comply with it. It was certainly not evident from the papers before me that the ACC or its Director had done anything to bring themselves within the ambit of the grounds for contempt of court as set out in prayer 2.2 of the instant application, which charges them that they 'conducted investigations and laid charges against applicant in violation of' the interim order.

[15] There is therefore, as far as the contempt proceedings are concerned, no basis on which the applicant is justified in launching the application on an urgent basis.

[16] Mr *Namandje* drew attention to the relief sought in prayers 4, 5, and 6 of the notice of motion and submitted that this relief is urgent on a different basis. However, no basis was laid in the papers for urgency on this score. In any event, the PG's tender to stay the proceedings pending the outcome of the review proceedings renders the relief sought in prayers 4 and 5 not urgent.

[17] As far as prayer 6 is concerned, there is no basis laid in the papers from which it may be assumed that any further action or proceedings based on 'the evidentiary matrix of any of the investigations or charges contemplated by either case number A383/2008, or by this application, or any of the counts set out in annexure "V3" to applicants founding affidavit' is to be anticipated or feared in the immediate future which is such as to render the application urgent.

#### Costs

[18] In respect of the first respondent her counsel prayed for a costs order on the ordinary scale. However, in respect of the second and third respondents he submitted that the application was exposed to be without any basis in its entirety and that their costs should be awarded on an attorney-and-own-client-scale.

[19] While I agree that there was no basis on which the second and third, or, for that matter, the first respondent, could have been charged with the allegation of contempt of court in this case, it is so that, in principle, the claim for the interdictory relief against them remains. As I propose to strike the application for lack of urgency only, I think that it would be more prudent at this stage to award costs against the applicant on the ordinary scale.

#### Order

[20] The result is that the application is struck from the roll with costs.

\_\_\_\_\_ (signed on original) \_\_\_\_\_

K van Niekerk

Judge

APPEARANCE

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For the applicant:

Mr S Namandje

of Sisa Namandje & Co

For the respondents:

Adv H Geier

Instr. by Government Attorney