THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 566/2016

In the matter between:

CORNELIUS JOHANNES ALEXANDER LOURENS **APPELLANT**

and

PREMIER OF THE FREE STATE PROVINCE **FIRST RESPONDENT**
PAN SOUTH AFRICAN LANGUAGE BOARD **SECOND RESPONDENT**

Neutral citation: *Lourens v Premier of the Free State Province & another* (526/16) [2017] ZASCA 60 (25 May 2017)

Coram: Maya AP and Fourie and Schippers AJJA

Heard: 19 May 2017

Delivered: 25 May 2017

Summary: Contempt of court: failure to comply with court order: no proof of non-compliance, wilfulness or mala fides: s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013: issues on appeal having no practical effect: appeal dismissed with costs.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Ebrahim J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Schippers AJA (Maya AP and Fourie AJA concurring):

[1] This is an appeal against the dismissal of the appellant's application for an order that the first respondent, the Premier of the Free State Province (the Premier), be held in contempt of an order issued by the court a quo on 7 November 2013 (the order); that he be imprisoned for 90 days; and that he pay costs on an attorney and client scale.

[2] The matter arises from the following facts. In 2013 the appellant applied to the court a quo for a declaratory order that the Premier failed to comply with s 6(4) of the Constitution, read with item 21(1) of Schedule 6 thereto,[1] by failing to regulate and monitor, through legislative and other measures, and within a reasonable time, the use of official languages in the Free State Province (the

[1] Section 6(4) of the Constitution reads:
'The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.'
Item 21(1) of Schedule 6 to the Constitution reads:
'Where the new Constitution requires the enactment of national and provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect.'

Province). The appellant also sought an order that within nine months of the grant of the declaratory order, the Premier be directed to put in place and finalise legislative and other measures regulating the Free State Provincial Administration's use of official languages in legislation and policy documents. Subsequently the parties agreed to the order, the relevant part of which reads:

'First Respondent shall, as far as it is within his authority and powers, give effect to the provisions of section 6(4) of the Constitution of the Republic of South Africa, 1996, read with item 21(1) of Schedule 6 to the Constitution, by putting in place legislative and other measures to regulate and monitor the use of official languages by the Free State Provincial Administration on or before 31 March 2014.'[2] (My translation)

[3] On the same day that the order was granted, the Premier wrote to the Member of the Executive Council for Sports, Arts, Culture and Recreation (the MEC), responsible for language matters in the Province. He requested the MEC to ensure that his department approved a language policy and language bill; that those documents were submitted timeously to the executive council; and that they were tabled before the Free State Legislature (the Legislature) on or before 31 March 2014. This was done. On 26 March 2014 the executive council approved the Free State Provincial Government Language Policy (the Language Policy) for implementation in 2014/2015 and directed that the Use of the Free State Official Languages Bill, 2014 (the Language Bill) be tabled before the Legislature. The MEC wrote to the speaker of the Legislature on 26 March 2014 and asked her to table the Language Bill or refer it to a committee, whichever process was quickest. On 28 March 2014 the Language Bill was published in the Provincial Gazette, and

[2] In its original form the order reads:
'Eerste respondent, insoverre dit binne sy bevoegdhede, gesag en magte is, gevolg sal gee aan die bepalings van Artikel 6(4) van die Grondwet van die Republiek van Suid-Afrika, 1996, gelees met item 21(1) van [S]kedule 6 van die Grondwet, deur wetgewende en ander maatreëls in plek te stel om die gebruik van amptelike tale deur die Vrystaatse Provinsiale Administrasie te reël en te monitor en wel voor of op 31 Maart 2014.'

was thus in the domain of the Legislature to be dealt with according to its rules and orders.

[4] On 28 March 2014 the appellant was informed in writing of these developments and told that the Premier had discharged his duties as envisaged in the order. The appellant however disagreed and took the view that the Premier was in control of the legislative process and that he could expedite it. By letter dated 22 April 2014 the appellant was again informed that the Premier, as the executive authority of the Province, had discharged his duties under the order insofar as it was within his responsibilities and powers, and that the legislative authority of a province vests in its provincial legislature in terms of s 104 of the Constitution.

[5] The Language Bill however lapsed and was not passed by the Legislature due to the general elections held in 2014. In a letter dated 9 October 2014, the secretary of the Legislature explained the position to the appellant, in summary, as follows. The term of the Legislature came to an end as a result of the general elections in 2014 and all outstanding proposed legislation also lapsed. Rule 141 of the Standing Rules and Orders of the Legislature states that the proceedings on any bill which lapsed owing to the dissolution of the Legislature, may be introduced in the new legislature, after which it must be referred to the relevant committee of the Legislature for consideration. This entails a briefing by the responsible department to the committee; a public participation process facilitated by the committee; consideration of inputs by the public and a report to the House, which then considers the report and the bill in terms of s 114 of the Constitution; and if passed by the Legislature, the Premier assents to and signs the bill, in terms of s 121 of the Constitution. The appellant was also told that once the Language Bill was tabled

by the MEC, the Legislature would ensure that it was considered and finalised without delay.

[6] Subsequently the Language Bill was republished in the Provincial Gazette in November 2014, resubmitted to the executive council, referred by the Speaker to a portfolio committee for consideration in June 2015 and all 11 Free State provincial government departments were consulted about the implementation of the Language Policy. The Language Bill was once again tabled before the Legislature.

[7] It is undisputed that under the Rules and Orders of the Legislature, the Premier has no power to intervene in the legislative process. In any event, s 104(1) of the Constitution makes it clear that the legislative authority of a province is vested in its provincial legislature. Despite this, in June 2015 the appellant launched the contempt application. The founding affidavit in that application states that the Premier 'deliberately failed to submit the Free State language legislation to the Free State Legislature, either personally or through the MEC responsible for this function'[3] (my translation); and that 'the actor in the Executive Authority is also the actor who plays the main role in the Legislature, in this case, the first respondent'[4] (my translation).

[8] In the light of the facts outlined above and s 104(1) of the Constitution, it will immediately be noted that these allegations are simply wrong. The Premier

[3] The relevant allegation is in these terms:
'Ek wil onmiddellik meld dat volgens my kennis dat tot datum van aflegging van hierdie verklaring eerste respondent gefaal en opsetlik versuim het om die Vrystaatse Taalwetgewing by die Vrystaatse Wetgewer in te dien hetsy persoonlik of hetsy toe te sien dat sy Lid van die Uitvoerende Raad, wat hiervoor verantwoordelik is, dit doen.'

[4] This allegation reads:
'… die akteur in die Uitvoerende Gesag ook die akteur, wat die hoofrol speel, in die Wetgewer is, synde die eerste respondent in hierdie geval.'

opposed the contempt application. He denied that he wilfully disobeyed the order and stated that throughout, he had acted on the advice of experienced and senior legal advisers in his department. The court a quo dismissed the contempt application with costs, because the evidence did not establish that the Premier had wilfully and mala fide disregarded the order.

[9] On 28 March 2017, whilst this appeal was pending, the Legislature passed the Use of Free State Official Languages Act, 2017 (the Languages Act), which will come into operation on 1 June 2017 as determined by the Premier by Proclamation No 9 of 2017 in Provincial Gazette No 16 of 12 May 2017. Given this development, Mr De Beer, for the appellant, rightly conceded that the order sought on appeal would have no practical effect or result, and that the appeal may be dismissed on this ground alone, as contemplated in s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013.[5]

[10] Consequently, the only issue that must be decided is costs. On the authority of *Biowatch*,[6] it was submitted that the appellant should not be mulcted in costs because he was asserting a constitutional right; and that he was substantially successful in doing so, by virtue of the promulgation of the Languages Act.

[11] The appellant however is mistaken. To begin with, properly construed, the relief sought – the committal of the Premier for 90 days for contempt of the order – is not the assertion of a constitutional right. Further, in his pursuit of that relief, the appellant was not successful at all: he failed to show that the Premier did not

[5] Section 16(2)*(a)*(i) of the Superior Courts Act reads:
'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'
[6] *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

comply with the order; or, if there was non-compliance, that the Premier acted wilfully and mala fide.

[12] It is now settled that an applicant must prove the requisites of contempt (the order, service or notice, non-compliance, wilfulness and mala fides) beyond reasonable doubt. But once these requisites have been proved, the respondent bears an evidential burden of showing that non-compliance was not wilful and mala fide.[7] Disobedience of a civil order will constitute contempt only if the breach of the order was committed deliberately and mala fide. Unreasonable non-compliance, provided that it is bona fide, does not constitute contempt.[8] And where, as in this case, an applicant approaches a court on notice of motion, a dispute of fact as to whether non-compliance was wilful and mala fide falls to be determined on the respondent's version; unless the court considers that the respondent's allegations do not raise a real, genuine or bona fide dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[9]

[13] Applying these principles to the facts in the instant case, it is clear from the order that the Premier was required to give effect to the provisions of s 6(4) of the Constitution, 'as far as it is within his authority and powers'. This, the Premier did. Immediately after the order was issued, he ensured that the relevant department approved the Language Policy and Language Bill; that it was approved by the executive council; that the Language Bill was published in the Provincial Gazette; and that it was tabled before the Legislature. Once the Language Bill was before

[7] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42.
[8] *Fakie* fn 7 above paras 9 and 10.
[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C; *Fakie* fn 7 paras 55 and 56.

the Legislature, it alone had legislative authority, as envisaged in s 104(1) of the Constitution. In terms of s 121(1) of the Constitution, the Premier then only had the power to assent to and sign the Language Bill, or refer it back to the Legislature if he had reservations about its constitutionality.[10] It follows that the Premier complied with the order and for this reason alone, the contempt application had to fail.

[14] Apart from this, there was no wilful and mala fide non-compliance with the order. In the answering affidavit, the Premier states that in giving effect to the order, throughout he had acted on the advice of his legal advisers. There is no evidence to gainsay this and it cannot be suggested that the explanation is untenable. The court a quo was thus correct in dismissing the contempt application on the basis that the appellant had not proved wilfulness and mala fides.

[15] What remains is the appellant's reliance on *Biowatch*. The Constitutional Court in *Biowatch* affirmed the general rule laid down in *Affordable Medicines*,[11] namely that in constitutional litigation between private parties and the government, ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.[12] But this rule is not unqualified: if an application is frivolous, vexatious, manifestly inappropriate, unreasonable or unnecessary, the applicant may be ordered to pay costs.[13]

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[10] Section 121(1) reads:
'The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.'
[11] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 138.
[12] Biowatch fn 6 above para 22.
[13] *Biowatch* fn 6 above para 24, citing with approval *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape & others* 2005 (6) SA 123 (E) at 144B-C.

[16] The contempt application, indirectly related to a constitutional provision, was in the circumstances manifestly inappropriate and unreasonable. In March 2014 and again in April and October 2014, the appellant was informed of the steps which the Premier had taken in giving effect to the order; and the reasons why the Language Bill had not been passed by the Legislature. It should then have been clear to the appellant that the Premier had done everything in his power to give effect to the order; and that an application for contempt of court was doomed to failure from the outset. Even after the answering affidavit was delivered, the appellant persisted with the contempt application, to the point of appealing the decision refusing it. Moreover, the Premier was compelled to oppose an application seeking his imprisonment, and incur unnecessary costs, ultimately paid by taxpayers. In this regard, it should be noted that the appellant is no ordinary litigant: he is an attorney. He thus should be familiar with the relevant constitutional provisions and the principles relating to contempt of court, especially since he launched identical proceedings in the North West Province; and threatened to bring a similar application in terms of s 6(4) of the Constitution, in KwaZulu-Natal.

[17] In the circumstances, fairness dictates that the appellant should be ordered to pay the costs of the appeal.

[18] In the result, the appeal is dismissed with costs.

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A Schippers
Acting Judge of Appeal

Appearances

For Appellant:	R J de Beer Instructed by: Lourens Attorneys, c/o Symington & De Kock Attorneys, Bloemfontein
For Respondent:	J Lubbe Instructed by: The State Attorney, Bloemfontein