IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE – GRAHAMSTOWN

CASE NO.: 354/2009

In the matter between:

PHINDIWE GREY **Applicant**

And

THE MINISTER OF HOME AFFAIRS, REPUBLIC OF SOUTH AFRICA **First Respondent**

THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS REPUBLIC OF SOUTH AFRICA **Second Respondent**

THE REGIONAL DIRECTOR OF THE DEPARTMENT OF HOME AFFAIRS, EAST LONDON **Third Respondent**

JUDGMENT

BESHE J:

[1] The applicant in this matter together with several other applicants sought and obtained a *rule nisi* against the respondents in terms whereof *Van der Byl AJ* ordered that:

> "1. THAT a Rule Nisi is hereby issued calling upon the First, Second and Third Respondents or the one or the other of them to show cause on Thursday 30th July 2009 at 10h00 or as soon as Counsel may be heard why:
>
> 1.1 the First, Second and/or Third Respondents or the one or the other of them should not be ordered to consider, and to take a decision on, the Applicant's application made upon or about 12th August 2005 within thirty days as from the date of this Order:
>
> 1.1.1 for the amendment of her date of birth as contained in the population register;

1.1.2 if granted, for the amendment of her South African identity document within thirty days of the granting of such application.

1.2 the First, Second and/or Third Respondents or the one or the other of them should not be ordered to consider in the event of the application being refused or it having already been considered and refused, to communicate the decision to so refuse her application to the Applicant and to furnish her with adequate reasons as to why the application was refused within thirty days of the granting of this Order;

1.3 the First, Second and/or Third Respondents should not be ordered to pay jointly and severally, the one paying the other to be absolved, the costs of this application on the scale as between attorney and own client.

2. THAT the Respondents' application for a postponement on the 11th June 2009 be and are hereby dismissed, with costs on an opposed basis.

3. THAT, in the event that the Respondents elect to oppose the relief sought in this Rule Nisi:

3.1 the Respondents shall file any answering affidavits by Friday the 26th June 2009;

3.2 the Applicant shall file any replying affidavit by Friday 10th July 2009.

[2] The said *rule nisi* was confirmed or made absolute by *Roberson AJ* as she then was on the 1st October 2009 with an amendment to the order as it related to costs.

[3] The applicant is now before court seeking an order declaring the respondents to be in contempt of paragraphs 1.1, 1.1.1, 1.1.2, and 1.2 of *Roberson AJ* order.

[4] The background to this matter can be briefly sketched as follows:
It is common cause that on the 12 August 2005 applicant submitted an application for the amendment of her date of birth as contained in the Population Register, to the third respondent.

However by January 2009 applicant despite making repeated enquiries about her application, had not been advised of the outcome thereof. As a result of this she consulted an attorney.

[5] Thereafter the application before *Van der Byl AJ* followed by the one before *Roberson AJ* (as she then was) ensued. At the time of the institution of the initial application before *Van der Byl AJ* third respondent's decision was still pending. Hence the confirmation of the *rule nisi* by *Roberson AJ*.

[6] Also common cause is the fact that although the respondents were represented by counsel in court when the *rule nisi* was issued, as well as at the stage when same was confirmed on the 1st October 2009, both these orders were served on respondents through the office of the State Attorney on the 10 August 2010. The Notice of Motion in respect of these contempt of court proceedings – dated the 30 June 2011 was also served through the office of the State Attorney on the 23 August 2011.

Contempt of Court

[7] The requisites that are to be proved by an applicant in contempt of court proceedings were summed up by *Cameron JA* (as he then was) in ***Fakie NO v CCII Systems (PTY) LTD 2006 (4) SA 326 (SCA) at 344-5*** as follows:

> "(a) ... ...
> (b) ... ...
> (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
> (d) ... ..."

[8] In resisting the application respondents raised the following defences:
The respondents did not have sight or knowledge of orders in question until the 12th September 2011 when consultations took place between respondents' legal representatives and one Mr Kabelo Samuel Mogotsi.
In their heads of argument respondents submit that the order was not served personally on any of the respondents.

And that a decision in respect of applicant's application could not be made because certain documentation was required from the applicant.

[9] The deponent to the answering affidavit, Mr Mogotsi, describes himself as an official of Department of Home Affairs who is responsible for bringing orders of court to the knowledge of first, second and third respondents and is also responsible for overseeing compliance with such orders. It would appear that the consultations that took place between him and the respondents' legal representatives, were as a result of the receipt of the Notice of Motion in respect of these proceedings. Respondents or Mr Mogotsi on behalf of the respondents became aware of the intended litigation regarding the alleged contempt of court by the respondents through the office of the State Attorney.

[10] Rule 4 (9) of the Uniform Rules of Court provides as follows:

> "(9) In every proceeding in which the State, the administration of a province or a Minister, Deputy Minister or Administrator in his official capacity is the defendant or respondent, the summons or notice instituting such proceeding may be served at the Office of the State Attorney situated in the area of jurisdiction of the court from which such summons or notice has been issued: Provided that such summons or notice issued in the Transvaal Provincial Division shall be served at the Office of the State Attorney, Pretoria, and such summons or notice issued in the Northern Cape Division shall be served at the Bloemfontein Branch Office of the State Attorney."

There is no merit in respondents' contention that there is a requirement, as they seem to suggest, that there must be personal service of the order. I am satisfied that service at the State Attorneys' office constituted proper service. That, service coupled with the fact that the respondents were represented on both occasions when the *rule nisi* was issued and later confirmed, leads to the conclusion that the applicant has succeeded in proving the requirement of service of the order.

[11] That the order in question was issued or made against the respondents is not in dispute. The requirements relating to

(i) order having been made and

(ii) service, having been established by the applicant, what remains to be determined are the requirements of non-compliance and wilfulness or *mala fides*.

Non-compliance and *mala fides*

[12] In terms of the order the respondents were required to:

1.1 Consider and to take a decision on the Applicant's application made upon or about 12th August 2005 within thirty days as from the date of order:

1.1.1 for the amendment of her birth date.

1.1.2 if the application is granted, amend her identity document within thirty days of the granting of such application.

1.2 in the event of the application being refused, to communicate that decision to the applicant and to furnish her with reasons for the refusal within thirty days of the granting of this order.

[13] It is common cause that the order was not complied with in any of the forms suggested or stipulated therein within thirty days of the order. Even if regard was to be had to the date on which the order was served at the office of the State Attorney some ten months after the order was made, there was no compliance with the order. Clearly the respondents were only spurred into action by the institution of the contempt of court proceedings, the present proceedings. It was only on the 13 September 2011 that a letter was addressed to the applicant in which it was stated *inter alia* that:

> "The department has considered your application for the amendment of your birth date. The department is still unable to make a decision in respect of your application unless you furnish the department with the following information:
>
> 1. a birth certificate;
> 2. an immunisation certificate;
> 3. a marriage certificate;
> 4. a passport or travel document;
> 5. a reference book if any;
> 6. a baptismal certificate; and
> 7. an affidavit from a person who is ten years older than you who can testify about your current date of birth."

[14] It has taken the respondents six years from 12 August 2005 when the application was made to advise her of the status of her application. Some two years after they were ordered by court per *Roberson AJ's* judgment, (as she then was), to consider and take a decision on applicant's application or in the case of the application being refused to furnish the applicant with adequate reasons. For a period of two years the respondents failed to comply with the order in question. I have rejected respondents' contention that they did not comply with the order because they were not aware of it by reason of the fact that they were not served with the order. Applicant having succeeded in proving the order, service thereof and non-compliance, it was left to the respondents to show that the disobedience / non-compliance was not wilful or *mala fide*. See ***Fakie NO v CCII Systems supra at 344-5 paragraph 42 (d)***. The respondents have not advanced any evidence to show that the non-compliance with the court was not *mala fide* and wilful. That being the case I am satisfied that the applicant has succeeded in showing that the respondents are in contempt of the order issued on the 1 October 2009. Accordingly the respondents are declared to be in contempt of the court order.

[15] In her Notice of Motion, in addition to asking that the respondents be declared to be in contempt of the order granted on 1 October 2009, she also prays that they be ordered to purge the contempt within ten days of the granting of the order, failing which the applicant shall set the matter down (with or without supplementation of the founding papers) as a matter of urgency, calling the respondents to show further cause why:

> (a) A warrant should not be issued authorizing and directing an Officer commanding a relevant South African Police Station, or such other person who may be directed by this Honourable Court, to immediately arrest Second and Third Respondents, and commit each to goal until such time as their contempt of the Order is purged, or such other period as this Honourable Court may deem fit, and why a fine should not, in addition or alternatively, be imposed on each in an amount to be determined by this Honourable Court.

(b) The Respondents should not be ordered to pay, jointly and severally each paying the other to be absolved, costs of such proceedings on a scale as between an attorney and own client.

[16] In my view the contempt has been purged by the respondents in that they have since, *albeit* two years after the issuing of the order, advised the applicant of the status of the application. No purpose will be served by ordering that the respondents should purge the contempt.

[17] As for costs there is no reason why costs in this matter should follow the result.

[18] Accordingly the following order will issue.

(a) Respondents are declared to be in contempt of paragraphs 1.1, 1.1.1, 1.1.2, and 1.2 of *Roberson AJ's* order (as she then was), granted on the 1 October 2009.

(b) The respondents are ordered to pay the costs of this application jointly and severally each paying the other to be absolved.

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N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard	2 February 2012
Date Reserved	2 February 2012
Date Delivered	6 December 2012