IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO. 992/2016

In the matter between:

NELSON MANDELA BAY MUNICIPALITY Applicant

and

SIPHO GCORA Respondent

JUDGMENT

MBENENGE JP:

Introduction

[1] This is a threefold application: the applicant municipality (the Municipality) seeks an order declaring the respondent to be in contempt of court and that he be punished therefor in terms of the law, as also an interdict restraining the respondent from defaming the Municipality, its officials and its legal representatives. The respondent, on the other hand, seeks orders of a declaratory nature, that the applicant has either breached or not fulfilled certain of its constitutional or statutory obligations,[1] has committed perjury on several occasions and has deliberately committed financial

[1] These being sections 165(4), 195 and 181(3) of the Constitution, Act 108 of 1996 and sections 10 and 21 of the Housing Consumers Protection Measure Act 95 of 1988.

misconduct in the manner contemplated in the Local Government: Municipal Finance Management Act.[2]

[2] The matter has a rather longish and unsavoury history, involving the applicant on the one hand, and the respondent and his wife[3] both of whom were, at all times relevant hereto, members of the Gobo Gcora Construction and Project Management CC (hereinafter referred to as the "*the CC"*), on the other.

Factual background

[3] The facts of this case are largely common cause or, at the very least, not in dispute. During October 2009 the Municipality called for tenders for the installation of municipal services and the construction of houses in Areas 9 and 10, Kwa-Nobuhle. W K Construction (Pty) Ltd and W K Pipelines (Pty) Ltd (hereinafter collectively referred to as "WK") were appointed contractors for Areas 9 and 10. W K in turn sub-contracted the construction of some of the houses to the CC. It transpired that WK failed and/or refused to make payment to the CC for some of the work done by the CC.

[4] The CC thereupon lodged a complaint with the Public Protector of South Africa, aggrieved at the manner in which it had been treated in the execution of the sub-contract. The complaint culminated in a report entitled "*Cost of Deviation*" being issued by the Public Protector on 29 January 2016. The report ordered the Municipality to take certain remedial steps in favour of the CC aimed at compensating the CC for the losses it allegedly incurred during the execution of the sub-contract and to apologise to the CC's members. The Public Protector further found that the appointment of W K, which had not been a registered homebuilder, was unlawful and ordered the Municipality to educate its supply chain management officials accordingly.

[5] The Gcoras launched an application under case no 992/2016 seeking an order compelling the Municipality to comply with the order referred to in paragraph 4 above insofar as it directed the Municipality to take remedial action in favour of the CC. The application to compel compliance with the Public Protector's remedial action was

[2] 56 of 2003 (the MFMA).
[3] The respondent and his wife will hereinafter be referred to jointly as the Gcoras.

postponed by agreement for the Municipality to lodge its review application to review and set aside the Public Protector's report, "*Costs of deviation*".

[6] The court, *per* Smith J on 2 April 2016, postponed the application to compel *sine die* and directed that it be heard simultaneously with the review application (whose founding papers had at that stage been in the process of being finalised).

[7] The Gcoras launched yet another application under the same case number as the review application seeking an order reviewing and setting aside, as an irregular proceeding, the alleged failure by the Municipality to comply with the terms of Smith J's order of 12 April 2016. The matter was heard by Plasket J. He dismissed the application with costs. Plasket J also pronounced as follows regarding the *locus standi* of the applicant and his wife:

> "[15] Both Mr Gcora and Ms Gobo-Gcora are unrehabilitated insolvents, final orders sequestrating their estates having been made by this court on 3 December 2013 and joint trustees having been appointed by the Master on 28 March 2014.
> [16] In terms of s 20(1)(a) of the Insolvency Act 24 of 1936, the effect of their sequestration is, inter alia, that they have been divested of their estates which first vested in the Master and then, on their appointment, in their trustees. That would include their member's interest in Gobo Gcora Construction and Project Management CC.
> [17] In terms of s 23 of the Insolvency Act, the capacity of an insolvent to institute legal proceedings is limited. For instance, s 23(6) provides that an insolvent may 'sue or be sue in his own name without reference to the trustee of his estate in any matter relating to status or any right insofar as it does not affect his estate or in respect of any claim due to or against him under section…'. Neither this subsection nor any of the other subsection of s 23 have any application to this matter.
> [18] The result is that Mr Gcora and Ms Gobo-Gcora have been divested of their member's interest and have no standing to represent the close corporation. As they are not vested with the capacity to sue in their own names in terms of any of the subsections of s 23, they have no standing in their personal capacities….
> [21] As Mr Gcora and Mrs Gobo-Gcora have no standing in their personal capacities,… the application must fall on this account."

[8] Having been not satisfied with the judgment of Plasket J, the Gcoras launched an application whereby they sought an order declaring the judgment of Plasket J "*null and void and of no force and effect*." Eksteen J, before whom the application served, dismissed the application.

[9] The review application and the application to compel were eventually heard by Pickering J on 14 September 2017. In a judgment delivered on 21 September 2017 Pickering J ordered:

> "1. In case number 992/16 the application is dismissed with each party to bear their own costs.
>
> 2. In case number 1414/16 the application for the review and setting aside of the Public Protector's report succeeds to the following extent:
>
> a. The finding in paragraph 8.2.1 that the Metro irregularly used funds from the conditional grant for building the top structure for internal services, a purpose for which it was not intended, is set aside.
>
> b. The finding in paragraph 8.3.1 that the Metro improperly allocated insufficient funds for work done on the top structure for each housing unit is set aside.
>
> c. The finding in paragraph 8.4 that the complainant, Gobo-Gcora CC, suffered prejudice due to the conduct of the Metro is set aside.
>
> d. The remedial action set out in paragraphs 9.1.1, 9.1.2 and 9.1.3 is set aside.
>
> 3. The application in case number 1414/16 is dismissed in the following respects:
>
> a. The finding in paragraphs 8.1 to 8.1.5 that the tender for the construction of RDP houses in areas 9 and 10, Uitenhage, was irregularly awarded and that the Metro's conduct in this regard constituted improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act is confirmed.
>
> b. The remedial action set out in paragraph 9.1.4 and 9.1.5 is confirmed.
>
> 4. Each party is to bear their own costs."

[10] The respondent was displeased with the outcome of the cases referred to above. Besides unsuccessfully seeking leave to appeal the relevant judgments,[4] he resorted to penning a plethora of communications to wide raging recipients concerning Judges of this division, especially Pickering J, the applicant, certain of the applicant's functionaries and other public office bearers.

[11] The picture would not be complete without me alluding to an exchange that ensued between the respondent and Pickering J when the respondent's application for

[4] Leave to appeal against the judgment of Eksteen J both to the Supreme Court of Appeal and the Constitutional Court were refused by those courts; leave to appeal against the earlier judgment of Plasket J to the Supreme Court of Appeal was refused by Plasket J; Pickering J also refused the Gcoras leave to appeal against his judgment to the Supreme Court of Appeal.

leave to appeal was being heard on 22 November 2017, the essence of which is captured as follows in the relevant judgment:

> "Mr Gcora has further stated in a document filed on 19 November that my judgment is '*at war with itself*' and that:
>
> > 'Any conduct that is at odds with the rule of law and the Constitution is invalid, this includes judgments too. How will the public be protected if judges can decide to act against the same law they took an oath to uphold.'
>
> He has also accused me of somehow acting fraudulently in this matter with the result that my judgment is vitiated thereby and has no force or effect. Today, during the course of his argument, he expressly repeated his view that I acted fraudulently. I do not intend to dignify these contemptuous allegations with any response other than to state that they are devoid of merit and that I reject them.
>
> These are very serious allegations to level at a judge of the High Court. I have taken an oath to uphold the Constitution. In my 25 years on the bench I have always done so. Mr Gcora has displayed an alarming tendency to gratuitously and contemptuously insult a number of the judges of this court who have found against him from time to time. I have read through all these voluminous papers during the course of the review and in preparing for the application for leave to appeal. It is apparent that all these judges at all times treated Mr Gcora with nothing other than respect, but he has chosen to reciprocate with insults and contempt. His conduct is to be deprecated in the strongest terms."

[12] I deal hereunder copiously with the communication allegedly made by the respondent referred to in the applicant's founding papers as having been the most extreme examples of the offensive passages.

The impugned remarks

[13] The respondent addressed an email to the City Manager of the Municipality, Mr Johann Metler (the Manager), on 23 December 2017 at 4:14pm, copied to the Executive Mayor's Personal Assistant, the Executive Mayor (Mr Athol Trollip), the Public Protector's legal representatives and Ms Roberts, the Municipality's attorney of record, in which he made the following remarks:

[13.1] "That is why I submitted that ….NMBM's lies about lack of contractual nexus which is a private law defence, was diversionary and impermissible to be relied on";

[13.2] "Pickering J has misled you like Schppers J (sic) misled the President in Nkandla, but in both these cases, you and the President are happy to be misled….";

[13.3] "But the difference, Schippers J as he had no malice assisted in getting clarity from the SCA, that is what an impartial and independent and incorruptible judge should do";

[13.4] "…I shall await to hear from you when you authorize more lies under oath, just take time to read the judgment on Adv Jiba by the PTA High Court, then you will know the consequences that will follow Sarah and [counsel]."

[14] On 24 December 2017 at 3:58pm, the respondent addressed a further email to the same parties detailed in paragraph [13] above threatening to have the Manager arrested and accusing him of "*negligence and recklessness*."

[15] On 27 December 2017 at 12:10am, the respondent addressed a further email to the same parties detailed above in which he made the following remarks:

[15.1] "…when I see that there is racial collaboration which runs up to court, that is problematic. The white monopoly capital which you seem to be its machinery must be stopped in its tracks";

[15.2] "…but now everybody including you [the Executive Mayor] and Metler are unsuccessfully covering this up because a white incompetent and corrupt employee messed up big time, and we caught him";

[15.3] "And I recommend to the councillors who are interested in transformation not you and Metler to investigate all the infrastructure projects they will see how your supporters have been looting from council";

[15.4] "In the Stadium we know there was collusion, why are you not acting against that corruption. The answer is easy, white corruption must be protected";

[15.5] "This is what makes you, Metler and Bonnie to protect Brummer and WK, it's their colour, white corruption is being protected" (Ms Bonnie Chan is the Head of the Municipality's Internal Audit, whilst Mr Calvin Brummer, the applicant's Senior Director: Development and Support (Human Settlements Directorate), deposed to the main affidavits in the review application and the application to compel.);

[15.6] "…racism especially with your arrival is terrible in PE";

[15.7] "I have been approached by business people, in PE and they told me that they are shocked with your racist management style";

[15.8] "You want everyone to comply with PP reports, but when they disclose white collar crime, you look the other way. That makes you corrupt and unsuitable to be a mayor.";

[15.9] ",,, all you are doing you are drinking expensive booze while ratepayers' money is at risk, where is your conscience?"

[15.10] "[the City Manager] has no right to take the PP on review unless he was insane or drunk when he wrote the letter."

[16] The respondent addressed a further email to the same parties on 28 December 2017 at 8:45am in which he said:

> [16.1] "I have appeared before Pickering J 2 times before the review application, I could not gather that he is a racist judge. And my heart is sore about what he has done to his name. But surely someone did something that led him to misconducting himself. This is bad for the judiciary. What did you do to this judge? Why are you corrupting the judges, Trollip and Metler?";
>
> [16.2] "You need to sort this mess you have done, … I know whites are corrupt";
>
> [16.3] "I know in the NMBM from the cleaner to the ED, they steal and lie, now the CM ordinarily before he himself decides to be corrupt and dishonest, he is surrounded by thieves and liars."

[17] On the same day (28 December 2017) and at 9:56am, the respondent sent another email to the parties detailed above and Mr Mmusi Maimane, the leader of the official opposition in Parliament, the Democratic Alliance, its Federal Council chairperson, Mr James Selfe and elsabeo@da.org.za wherein he referred to them as "*a bunch of incompetent, corrupt and racist criminals*."

[18] The respondent sent a third email on the same day at 6:41pm, addressed to the "*Councillors of the Coalition Government*" – although the recipients are reflected as "*undisclosed*" – making reference to Pickering J in the subject line (copied to the Manager and Ms Roberts) and wherein he stated:

> [18.1] "Only an incompetent and compromised City Manager can do this madness";
>
> [18.2] "The High Court set aside the findings of the Public Protector in paragraphs 8.2.1 and 8.3.1. This was interesting as these were not the only findings, was the judge drunk or what?";
>
> [18.3] "…we obviously approached the police regarding this perjury that has been committed by Calvin Brummer in his affidavit, and we do not recognise the judgment as it is influenced by lies by the judge, …and Calvin Brummer."

[19] On 1 January 2018 at 9:39pm, the respondent sent an email to, *inter alia*, the Executive Mayor, Mr Maimane and the Manager in which he made the following remarks:

> "This fellow [the Manager] needs to be investigated for this gross misconduct instead of being protected by Trollip. I have so much evidence about how bad this guy is. Either you hold him accountable or the mayor must fall."

[20] At 14:07 on the same day (01 January 2018), the respondent addressed an e-mail to undisclosed recipients, which was received by at least both Ms Roberts and the Manager, wherein he made the made the following remarks:

> [20.1] "…it accepted DA's evidence without any explanation – this is what I am objecting against in Pickering J's judgment – this is a sign that the DA has an improper and cosy relationship with certain members of the judiciary and certain Judges are busy with political games which support whites and oppression and persecution of Africans. This is wrong and it must be defeated, racist and political Judges must resign and join the politics of the DA openly not hiding in Court resources.";
>
> [20.2] "…white people are the most corrupt people in the World. AND IT IS MY DUTY TO EXPOSE THEM – EVEN SOME WHITE JUDGES ARE VERY CORRUPT.";
>
> [20.3] "…I am perturbed by the corrupt judgment of Pickering J."

[21] On 4 January 2018 at 1:07pm, the respondent addressed another email to, *inter alia*, the Executive Mayor and the Manager saying:

> [21.1] "…and how subcontractor issues have been dealt with before by courts that are not insane and racist"…;
>
> [21.2] "…do not be misled by that foolish corrupt Brummer"; and
>
> [21.3] "I will not explain the authorities, you have lawyers you are paying, they must start being honest, they are not half the Advocate Madonsela is."

[22] The respondent addressed a further email to the Councillors of the Coalition Government on 05 January 2018 at 11:55am in which he stated:

> [22.1] "it is very clear that Eastern Cape lawyers are dishonest, corrupt and incompetent or not understand how the Constitution affects all the other law,"
>
> [22.2] "it is crazy for a lawyer not to see that what he tells you is against the Constitution, that person is not a lawyer, that is just a fool;";
>
> [22.3] "…the PP has power to investigate the NMBM, and if she finds improper conduct she has power to take appropriate remedial action – no law or judge can take that power away, it is conferred by supreme law, only a bribed judge can attempt to do that."

[23] On the following day, 6 January 2018, at 7:24pm, the respondent addressed another email to, *inter alia*, the Executive Mayor, councillors, officers of the DA and the Manager headed "*WHAT HAPPENS WITH UNLAWFUL TENDER AWARDS WHERE JUDGES DO NOT TAKE BRIBES*" and wherein he made the following threat:

> "Spend another cent defending corruption at your peril. Your conduct is evil from any front, political, legal and morally. But let (sic) see how far you can stretch without sinking with this Titanic."

[24] On 9 January 2018 at 6:19am, the respondent addressed yet another email to "*undisclosed recipients*" but received, *inter alia*, by the Manager and in which he said:

> "Despite Metler's and Trollip's efforts, the findings have not been reviewed. The findings have not been set aside, the remedial action has not been reviewed, therefore the review application was a gross waste of state resources as the NMBM is back to square one. The judge did his best to help Metler and Trollip, but he failed to review, then set aside the findings, he also failed to review, set aside the remedial action and then propose a just and equitable remedy."

[25] In an email dated 9 January 2018, and sent on that day at 19:31, to Mr Maimane and Mr Selfe, the respondent remarked:

> "This is exactly the fate that has been suffered by Pickering J's judgment – it is null and void, and we have not accepted it as a judgment as he has lied on several occasions."

[26] On 10 January 2018 at 11:39am, the respondent addressed a further email to the Executive Mayor, to unidentified recipients, which was also received by the Manager, in which he made the following remarks:

> [26.1] "…Pickering J effectively authorised payment to WK, but the two apex courts said a court cannot do that – then we have to agree, there is no judgment from Pickering J, he acted at a personal capacity not a judicial capacity – I do not recognise a judgment from a criminal, and the 3 other judges, when they issued the judgments ordering payment to WK, they could not be regarded as judges, they issued illegal orders and criminal orders – they should be in prison together with Warren Parker, Greg Parker, Johann Huisamen, Sarah Roberts, Philip Zulch, Reza Boltman, Greg Cummings and whatever advocate supported Sarah, they should be in prison, they are nothing but criminals";
>
> [26.2] "I have advised you that the Municipal Officials need to approach SAPS and sign an admission of guilty over their conduct. These officials are guilty of criminal conduct and you cannot ignore this. You (sic) ignorance of this makes [you] guilty as well."
>
> [26.3] According to the content of the letter, it was copied to "The Law Society, the GCB, the PE Society of Advocates, the Chief Justice, the Minister of Justice, the Presidency, the AG, the JSC, SALGA, the JP for Eastern Cape Division of High Court, the Minister of Police and I will forward it to any other office I believe deserves to know about it."

[27] On 14 January 2018 at 2:30pm, the respondent addressed a further email to the Head of the Judiciary, Chief Justice Mogoeng Mogoeng, and copied to the Manager in which he remarked:

[27.1] "…how dangerous Pickering J is in the image of the judiciary";

[27.2] "an objective and impartial judge would have noticed that there are other grounds apart from contractual nexus that give rise to an employer having to pay a subcontractor";

[27.3] "The judgment of Pickering J is illegal and unconstitutional, and he should be held accountable for this judgment";

[27.4] "…we do not want to judged (sic) based on judges that undermine decisions of the Constitutional Court and the Supreme Court of Appeal….We ask you Sir to protect us against this oppression and racism through available systems within the management of judicial affairs";

[27.5] "…we cannot allow illegal judgments to stand in our way";

[27.6] "The suffering of my children, my elderly mother, my wife and my derailed career does not give me enough time to go through an appeal process properly, especially because there is nothing to appeal, I do not have to recognise a racial and unlawful judgment";

[27.7] "The Eastern Cape High Court cannot be allowed to pretend to be a court of higher status that (sic) the CC and the SCA. This is racism I reject"; and

[27.8] "I have every reason to believe that certain judges in our courts are settling certain scores using judicial officer and we are victims of certain unspoken racial tensions within the judiciary. I urge you Sir, to establish a mechanism for urgently investigating this despicable conduct."

[28] The respondent addressed a further email on 18 January 2018 at 6:53am to, *inter alia*, the Manager and the Executive Mayor wherein he made the following remarks:

[28.1] "the judgment of Pickering is null and void";

[28.2] "the judge simply embarrassed himself and the entire legal profession and judiciary";

[28.3] "we know judges are not scrupulous people hence I am promoting ADR";

[28.4] "I am warning you about the lawyers you are using they are lying to you not that I trust attorneys and SC"; and

[28.5] "The NMBM and Pickering J failed dismal (sic) to set aside Madonsela's report…"

[29] On the same day, 18 January 2018, the respondent addressed an email to, *inter alia*, Mr Maimane wherein he said the Public Protector's report had not been reviewed and set aside at all.

[30] On the following day, 19 January 2018, the respondent addressed a further email to, *inter alia*, Mr Maimane in which he threatened to have the Municipality's "*lawyers*

locked up." He further remarked that the judgments of the Port Elizabeth High Court should not be relied upon.

The applicant's case

[31] The applicant laments, in pursuit of the declaratory relief, that these communications have brought the judicial process into disrepute and detracts from the rule of law; the respondent should be held to be in contempt of court and punished in a fitting manner.

[32] Insofar as the interdictory relief, it is contended that the requisites for the grant of an interdict have been fulfilled and that there is no alternative remedy at the applicant's disposal.

The respondent's case

[33] Besides raising preliminary issues,[5] in his opposing affidavit the respondent contends that he is not liable to be found guilty of contemptuous behaviour because he "*neither disobeyed any court order nor any court proceedings*". Apropos the interdict, the respondent contends that, because he had made undertakings to the applicant that he would not be communicating with it any further, there is nothing remaining for him to be precluded from doing.

[34] In addition, the respondent has this to say in his opposing affidavit:

> "10.2.2.7 The application is an attempt by the Applicant to prevent its hypocrisy from being known as it advises the public that it stands for a corrupt free society, good governance, while as a matter of fact it spends public funds protecting maladministration and illegalities.
>
> 10.2.2.8 The application is an attempt by the Applicant to use court resources to only act against some, whilst protecting some, I say so because it is a matter of public record that the Municipality has launched an application in this court seeking relief for recovery of certain funds spent in pursuit of what it submits is an illegal contract, while on the other hand, it is defending its conduct which has been confirmed by the above Honourable Court and the former Public Protector to be misconduct, maladministration, unlawful, violation of the section 195 of the Constitution and violation of section 217 of the Constitution. I refer to

[5] Lack of urgency; lack of jurisdiction by reason thereof that the entire Division is affected by the application and that, therefore, none of the judges in this Division should hear the matter; *sub-judice* and *lis pendens*, because there are pending applications for leave to appeal in related proceedings.

Annexure D and the review application under case number 1414/2016 read with Annexure C in the founding papers.

10.2.2.9 In essence, the Applicant seeks an order that will ensure that its hypocrisy is protected.

10.3 There is nowhere in its papers where the Applicant has stablished by any facts any incident where I have prepared and printed any defamatory material and made it available to public, there is nowhere. The word public means "concerning people in general".

10.4 I have of cause reported certain irregularities and conduct that is precluded by law which relates to how the Applicant has put the name of judiciary and public administration in doubt and in disrepute.

10.5 Those irregularities have been reported to relevant people such as the Executive Mayor of the Applicant, council members of the Applicant, Members of the Democratic Alliance which is the party that has been in the forefront or presented itself to be in the forefront regarding fighting against illegalities, maladministration, violation of the rule of law and corruption in state affairs.

10.6 Due to the offices and interest these persons I have chosen, represent in our society they are not general public, they are relevant persons who should be made aware of the very same conduct they have assured South Africans that they will fight it wherever it surfaces, and some of these persons are under obligation in terms of the law to fight those irregularities hence they have been advised of these irregularities.

10.7 There is therefore no basis for the relief sought by the Applicant, the application should be dismissed and the City Manager of the Applicant should be held personally responsible for the legal fees he paid to counsel for the Applicant for pursuing this futile application, which itself will only cause further harm to the image of our judiciary and public administration over and above the issues I deal with here under."

The counter-application

[35] In his counter-application the respondent has averred that the statements made by the Manager in support of the applicant's review application in previous related proceedings, insofar as these relate to payment certificates not revealing what amount was paid for houses and for internal services, had been false, with the result that the applicant should be found to have deliberately committed financial misconduct in terms of the MFMA.

[36] After the applicant had delivered its replying affidavit, the respondent delivered, amongst others, an "*additional affidavit*" wherein he states, *inter alia*, that the comments he previously made about the court and the applicant (including its officials)

were made *"foolishly and without proper application of mind"*. He further states that the statements were "*inappropriate, unfortunate and embarrassing*". He tenders an apology, adding that he "*acted out of frustration and pain*". He specifically apologizes to Pickering J and claims to lack sufficient words to express his embarrassment towards the judge. In the same affidavit he seeks to justify his conduct in certain respects.

Issues for determination

[37] The preliminary issues referred to in paragraph [33] above were, correctly so in my view, not persisted in when the matter was being heard. This leaves the Court having to determine the following issues:

(a) whether-

(i) the statements made by the respondent of and concerning the court and the applicant and its officials are offensive and render the respondent liable to be found guilty of contemptuous behaviour; and

(ii) a case has been made out for restraining the respondent from making the impugned statements;

(b) whether the counter-application passes muster; and

(c) what costs order should be made.

Contemptuous behaviour

[38] The respondent's concession that he made the impugned statements without reflection and his regret at having made same, do not, in the circumstances of this case, translate into an unequivocal admission of guilt on his part; he seeks to justify his conduct and contends that he never breached any court order and is thus not liable to be declared to be in contempt of court. Annexed to the affidavit embodying the apology is

a letter written on a "*without prejudice*" basis. The letter does not admit guilt or liability to the Manager for any harm that the statements may have caused to him or any other person. Therefore, a pronouncement regarding what these statements constitute is still required.

[39] It is indubitably so that the remarks made by the respondent adumbrated above constitute contemptuous conduct; they constitute unlawful disdain, in the extreme, for judicial authority. The remarks render nugatory the provisions of section 165 of the Constitution which effectively vouchsafes judicial authority and the supremacy clause of the Constitution which accords judicial authority on the courts and precludes any person or organ of state from interfering with the functioning of the courts.[6]

[40] The remarks in question are a classic example of contempt *ex facie curiae,* particularly scandalizing the court, which is clearly covered by the following definition by C R Snyman:[7]

> "Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or a judicial officer in his judicial capacity…"

[41] The question as to why there is such an offence as scandalising the court at all in this day and age of constitutional democracy was answered by Kriegler J in *S v Mamambolo (E TV & Others Intervening)* [8]as follows:

> "The answer is both simple and subtle. It is, simply, because the constitutional position of the judiciary is different, really fundamentally different. In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the State."

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[6] Also see article 9(b)(iii) of the Code of Judicial Conduct adopted in terms of section 12 of the Judicial Service Commission Act 9 of 1994 which makes it incumbent on judicial officers to be courteous to the parties, and to require them to act likewise.
[7] Criminal Law (5th Ed) p325
[8] 2001 (3) SA 409 (CC) at para [16]

[42] I am satisfied that the respondent has been proven with the requisite degree to be in contempt of court *ex facie curiae* resulting from his contumacious conduct and the contemptuous remarks he made.

Sanction

[43] It now remains to consider an appropriate sanction. This is done not with a view to protecting the dignity of the judicial officers scandalized, but the integrity of the administration of justice.[9] The following remarks by Gubbay CJ in *In re Chinamasa*[10] are apposite:

> "The recognition given to this form of contempt is not to protect the tender and hurt feelings of the judge or to grant him any additional protection against defamation other than that available to any person by way of a civil action for damages. Rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed."

[44] It is a matter of concern that, despite having been cautioned against levelling serious allegations against members of the bench by Pickering J, the respondent persisted in his wanton attacks, heedless of the cautioning. The apology tendered by the respondent and his explanation for why he behaved in an unbecoming fashion, count in his favour. When the matter was heard the respondent evinced contriteness, and addressed the court as follows:

> "If it pleases the Court I would like to address the issues before the Court to the best of my ability. First of all, and with the greatest respect, I wish to put it to the Court that I am here today because I respect the law of the country, I respect the authority of this Court. I have not been forced to be here today when I became medically fit to be here. I am here because I respect that this Court is got authority over everyone in the region. I am here exactly because I fully acknowledge and respect the authority of the Court, but this is a very difficult situation. In the papers I have tried to point out certain difficult periods in my life. In front of me I have got a report from doctors that confirms that I am suffering from stress…
>
> In my entire life I have never intended to be involved in criminal conduct. As a result I have spent every day I have had in my life trying to better myself by studying. As a result I have managed to have a formal qualification in Civil Engineering from the Nelson Mandela Bay University. As a result of that qualification and further studies I did with association of arbitrators of South Africa, and the experience I have gathered starting from the mediation proceedings I participated in these projects. I have been able

[9] *Mamabolo* case(*Supra*) para [25]
[10] 2001(2) SA 902 (ZS); 2000 [12] BCLR 1294 at 1311 C-D

> to play a different role in the industry in the form of assisting SMME's with their dispute resolution mechanisms. And as we speak I have over 108 SMME's I have represented. Their matters are being considered, their arguments have closed, but obviously not in court because I do that in terms of the ADR… If I can be incarcerated sir a lot of people are going to suffer. It is not a matter of trying to influence the Court, my family has been depending on me and entirely on me. And I think part of the damage I have been watching happening to my family must have… driven me to lose control and say things I would not have said if I had appropriate support… "

[45] In all the circumstances of this case, taking into account the mitigating and aggravating circumstances, and regard being had to the triad,[11] a non-custodial sentence seems just and equitable.

Interdict

[46] There is no doubt that the applicant has a clear right not to have it and its officials and agents persistently and gratuitously defamed in the manner revealed by the impugned communications. Consequent upon the contumacious conduct of the respondent, the applicant, its employees and agents have been proven to have been interfered with and harmed. It affords cold comfort for the respondent to merely say he will not repeat the remarks. The applicant's assertions that harm might ensue even in due course are, in my view, well-grounded. I am also satisfied that in the circumstances of this case there is no other satisfactory remedy available to the applicant.

Counter-relief

[47] The affidavit filed in opposition to the application is styled *"answering affidavit and grounds for counter relief"*. The respondent seems to point to certain irregularities allegedly committed by the applicant which the court did not pick up on previous occasions. Besides making conclusions of law relating to the violation of certain statutory provisions, the respondent has not placed any credible, admissible or relevant evidence in support of the counter-relief he is seeking. The averments made in the supporting affidavit do not disclose a cause of action.

[48] Regard being had to the fact that the respondent was, on a previous occasion, found to lack the requisite *locus standi*, the capacity in which the respondent seeks the

[11] The interests of society, the nature and seriousness of the crime and the personal circumstances of the offender (*S v Zinn* 1969 (2) SA 537 (A))

relief is not discernible. The issue relating to sections 10 and 21 of the Housing Consumers Protection Act 95 of 1998 is sufficiently traversed in the judgment by Pickering J and has thus become *sub judice*.

[49] There are, in my view, no bases upon which this court can exercise its discretion in favour of granting the declaratory relief being sought by the respondent.

Costs

[50] The applicant has been successful in his quest for declaratory and interdictory relief, and in resisting the grant of the declaratory relief sought by the respondent. Insofar as it could be contended that there should, on the basis of the *Biowatch* rule,[12] be no order of costs in the counter-application, this is not an appropriate case for the invocation of the rule. To begin with, the principle enunciated in the *Biowatch* case does not apply without exception. In *Affordable Medicines Trust v Minister of Health*[13]Ngcobo J (as he then was) laid down the exception to the rule as follows:

> "There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court to order an unsuccessful litigant to pay costs."

[51] Exceptions to the *Biowatch* rule were defined as follows in *Lawyers for Human Rights v Minister of Home Affairs*:[14]

> "What is '*vexatious*'? In *Bisset* the court said this was litigation that was '*frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant*' [a]nd frivolous complaint? That is one with so serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious."

[52] The principle enunciated in *Affordable Medicines* and *Lawyers for Human Rights* applies with equal force in this matter. As already stated, the respondent's papers do not disclose a cause of action. The mere reference to the provisions of the

[12] A term that has been developed from *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) requiring that an unsuccessful party in proceedings against the State be spared from paying the State's costs in constitutional matters.
[13] 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para [138]
[14] 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC)

Constitution without substantiation does not bring a case within the purview of the *Biowatch* rule. In my view, costs should follow the result.

Order

[53] I therefore grant the following order:

(a) *The respondent is declared to be in contempt of court and is hereby sentenced to undergo 6 months' imprisonment, the whole of which is suspended for 5 years on condition that he is not found guilty of contempt of court, committed during the period of suspension.*

(b) *The respondent is restrained and interdicted from, in any manner whatsoever, defaming or making derogatory remarks of and concerning the applicant, its official and legal representatives.*

(c) *The respondent's counter application is dismissed with costs.*

(d) *The respondent is directed to pay the costs of the application, including all reserved costs of 26 April 2018.*

_____

S M MBENENGE
JUDGE PRESIDENT OF THE HIGH COURT

I agree

_____

M MAKAULA

JUDGE OF THE HIGH COURT

I agree

_____

L NTSEPE

ACTING JUDGE OF THE HIGH COURT

Counsel for the applicant	:	*S C Rorke SC* (with him *A Rawjee*)
Instructed by	:	Gray Moodliar Inc. Attorneys Port Elizabeth
The respondent	:	*In person*
Date heard	:	7 June 2018
Date judgment delivered	:	10 July 2018