IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **1986/2024**

In the matter between:

SHAYKH IRAFAAN ABRAHAMS	Applicant
and	
THE MUSLIM JUDICIAL COUNCIL (MJC) [SA]	First Respondent
SHUAID APPLEBEE **(Acting President MJC) [SA]**	Second Respondent
THE MJC [SA] IMAARAH COUNCIL **(Comprising 10 or so members, a Constitution elected organ of the MJC [SA] being the Senior Council]**	Third Respondent
RIAD FATAAR **(The newly elected President of the MJC [SA]**	Fourth Respondent

Coram:	Joubert, AJ
Dates of Hearing:	6 & 16 February 2024
Date of Judgment:	22 February 2024

JUDGMENT

JOUBERT, AJ

INTRODUCTION

1. The applicant, who on his version still is the duly elected President of the first respondent ("**the MJC**"), albeit currently under suspension, seeks, as primary relief, a declarator holding the respondents in contempt of court for non-compliance with various provisions of a court order made by the honourable Justice Salie in Case No 15296/2023 on 21 September 2023 by agreement between him and the MJC ("the order").

2. The applicant also seeks an order setting aside the election of the fourth respondent as President of the MJC, on the basis that such election also took place in contempt of the order.

3. The ancillary relief sought need not be dealt with in this judgment.

4. The order was taken by agreement pursuant to an application by the applicant to interdict the MJC from proceeding with what he considered to be unconstitutional early election of an Executive Committee, including the position of President of the MJC, which would also deprive him of his rights flowing from his contract of employment as incumbent President of the MJC.

5. Paragraphs 2 and 3 of the order are of most importance to this matter. They provide as follows:

> "2. That the Special Elections AGM convened in terms of clause 4.8 of the Respondent's constitution, and scheduled for **23 September 2023**, proceeds for all positions of the Executive Committee, save for the position of President which position the Applicant presently hoolds;
>
> 3. That the elections for a position of President of the Respondent is postponed to the date to be determined and set by the Respondent between **15 December 2023** and **15 January 2024**."

6. Paragraph 4 is too lengthy to set out in full and it suffices to say that it provides that the respondent would schedule, hold and finalise a disciplinary enquiry with the applicant before 15 November 2023. Certain further provisions and conditions are attached to this injunction.

7. In terms of paragraph 5, the applicant was formally placed on paid suspension from the date of the order pending the outcome of the election for the position of President on the date determined as per paragraph 3 of the order.

8. The applicant's case is that, in contravention of the order, the MJC did not hold a disciplinary enquiry as per paragraph 4 of the order, and proceeded with unconstitutionally convened elections on Saturday 27 January 2024, during which elections the fourth respondent was elected as President.

9. The respondents' main case in opposition to the application is that an oral agreement was reached by the parties during the course of settlement negotiations held on 24 October 2024, the essential terms of which were as follows:

    9.1 The MJC would pay the applicant an amount of R350 000;

    9.2 The applicant would resign as President of the MJC as well as all other positions that he holds at the MJC;

    9.3 The applicant would continue to remain as a member of the MJC General Majilis if he so wishes;

    9.4 The application under Case No 15296/2023 would be withdrawn.

10. On the respondents' case, the alleged oral agreement meant that all disputes between the parties were effectively settled and that none of the provisions of the order needed to be complied with any longer. At the very least, the respondents say, they genuinely believed that the whole case had been settled by oral agreement, and that their conduct was not *mala fide* or wilful.

RELEVANT LEGAL PRINCIPLES

11. An applicant who alleges contempt of court must establish that:

    11.1 an order was granted against the alleged contemnor;

11.2 the alleged contemnor was served with the order or had knowledge of it; and

11.3 the alleged contemnor failed to comply with the order.

12. Should the aforementioned elements be established, wilfulness and *mala fides* are presumed and the alleged contemnor bears an evidentiary burden to establish at least a reasonable doubt as to these elements. This is because of the application of the criminal standard of proof, namely that the contempt of court must be established beyond reasonable doubt.[1]

13. If it is to be accepted on these papers that an oral agreement was indeed concluded as referred to above, or that the respondents reasonably thought that to be the case, there can in my view be little doubt that their non-compliance with the order did not amount to contempt of court.

14. The respondents are also assisted by the "**Plascon-Evans** rule",[2] namely that in motion proceedings where disputes of fact have arisen on the affidavits, a final order may only be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order, This does not apply if the denial by a respondent of a fact alleged by the applicant does not raise a real, genuine or *bona fide* dispute of fact or where the allegations or denials of the respondent are

[1] **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at para 22
[2] **Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at p 634

so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

THE RELEVANT EVIDENCE

15. The relevant aspects of the evidence of the respondents' deponent, Sheikh Muhammad West, are the following:

15.1 On 5 October 2023, the MJC initiated a disciplinary hearing by sending a notice thereof together with the charge sheet to the applicant, to be held on 25 October 2023. In anticipation thereof, the parties engaged in a process of appointing three persons to serve on the disciplinary committee as well as other preparatory matters. An amended charge sheet was sent to the applicant on 18 October 2023.

15.2 In the meantime, the applicant had initiated discussions aimed at resolving the dispute through "round table discussions", which culminated in a letter by the applicant's attorney dated 23 October 2023 wherein it was confirmed that the applicant had secured a boardroom at his own cost for the discussions to be held on 24 October 2023.

15.3 On the appointed date, discussions took place which, according to the respondents, culminated in an oral settlement agreement in the terms referred to in paragraph 9 above. According to the respondents it was also expressly agreed that the terms referred

to were in full and final settlement of all the matters between the parties, including the pending disciplinary enquiry. At the conclusion of the meeting there was an exchange of goodwill and shaking of hands, and a final prayer concluded the meeting.

16. According to the respondents, the applicant's attorney was simply tasked to reduce the detailed oral agreement into writing for the sake of having a written record.

17. The applicant, however, alleges that the agreement, was there would only be a binding settlement agreement once it is reduced to writing and signed by the parties. It is trite that parties can conclude an oral agreement which includes a term that it shall only become binding when reduced to writing and signed by them[i3]. Whether or not the oral agreement included such a term that lies at the heart of the matter.

18. In his founding papers, the applicant *inter alia* states that "*After lengthy settlement negotiations it was agreed that my previous lawyers would reduce the terms of the settlement negotiations into writing which must then be signed by both parties*".

19. However, on a number of occasions in his affidavit he refers to what transpired as a "*negotiated settlement*". To be more precise, the construction that he places on events is that, "*It was agreed that the negotiated settlement agreement was conditional upon same being reduced to writing and signed by the parties*".

[3] **Van der Merwe et al: Contract General Principles**, Juta 4th Ed pp 130-131

20. I mention, in passing, that although the applicant states that his previous legal representatives who were present at that meeting can attest to his version, no affidavit from any person other than his own was presented in support of his application. The respondents, on the other hand, have presented confirmatory affidavits from the individuals who attended the meeting on behalf of the MJC.

21. In his founding affidavit, the applicant goes on to state that a day or so after the "negotiated discussions", he contacted his previous lawyer and raised concerns that he had with the "negotiated settlement", namely that he felt he had been unfairly treated especially since he was the duly elected President of the MJC and that had he never conducted himself in a manner unworthy of that position at all. He thus "*declined to proceed or accept the settlement as discussed in the meeting … and exercised (his) prerogative in this regard*".

22. In further support of his version, the applicant attached email correspondence between the MJC's attorney and his previous attorney dated 27 October 2023, from which it is clear that the applicant's erstwhile attorney adopted the position that the applicant's signature had to be obtained before the settlement agreement could be considered to be binding.

23. Such contemporaneous correspondence is obviously helpful in establishing what the intention of the parties was at the time and the

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applicant points to this correspondence as providing collateral evidence in respect of his version. In particular, he points to the fact that, in the first letter in the chain of correspondence on 27 October 2023, the MJC's attorney *inter alia* stated that "*We presume that you have now received any final instructions from your client alternatively your client has no withdrawn his agreement from the table*".

24. It is so that the reference to "final instructions" could notionally support the applicant's version that there was not yet a final and binding settlement.

25. However, this construction does not take account of the evidence on behalf of the respondents that the first communication between the respective attorneys, prior to the written correspondence, was a telephone call that the respondents' attorney made the previous day to the applicant's erstwhile attorney, during which he requested the letter recording the oral agreement. During this conversation, the applicant's attorney advised that the applicant was not happy with the agreed amount and wanted an increase. According to the respondents' evidence, the MJC's attorney "*reiterated that the oral agreement had been concluded and was legally binding, and they were not open to renegotiation*".

26. Significantly, this evidence was not contested in reply.

27. Placed in the context of this telephone conversation, the reference in the MJC's attorneys' letter of 27 October 2023 to "final instructions from

your client" can be construed as a reference to a final decision by the applicant as to whether or not he was going to renege on the agreement, as opposed to indicating an acceptance that the applicant could still decide whether or not to agree to the terms.

28. Further events, such as a meeting held on 30 November 2023 at the offices of the MJC, at which meeting the applicant was, according to him, ambushed and poorly treated because of the stance that he adopted regarding the oral agreement, and further correspondence and events thereafter leading to the election held on 27 January 2024, are in my view of little relevance to the real dispute, and no purpose will be received by dealing with those issues in this judgment

29. One issue raised in the papers relating to the dispute about the oral agreement, particularly the alleged condition or proviso thereto, is to the fact that the MJC alleges that it, in pursuance of the oral settlement agreement, made four payments to the applicant which were accepted by him, the import of this being that the applicant in fact accepted that a binding settlement had been reached.

30. However, in reply, the applicant states that those payments were in fact salary payments, which were demanded by his erstwhile attorney in a letter dated 31 October 2023, which rather supports his case. The MJC's attorneys responded to that letter on the same day stating that "*Our clients have made arrangements to make his payment as stated previously*". The amount of those payments do accord with what the

applicant's salary was, namely R45 230 which, after deductions, resulted in a net of R35 481.79.

31. The respondents, on the other hand, point out that in the MJC's payment schedule, those payments were referred to as "DC settlement pay-out" and on the MJC's bank statement as "MJC settlement payment" and "corporate once-off payment". The amounts of the payment are also very close to what the settlement amount, broken up into seven payments, amounted to.

32. The fact that those amounts coincided exactly with the applicant's salary, does tend to support his case but, on the other hand, this is counterweighed by the references in the schedule and the bank statements. Ultimately this evidence does not support the applicant strongly enough to overcome the hurdle of the "**Plascon-Evans** rule".

33. As has already been alluded to, the applicant is faced with the further hurdle that his case must be proved beyond reasonable doubt. On a conspectus of all of the evidence, the respondents have established at least reasonable doubt as to whether non-compliance with the order amounted to contempt of court.

CONCLUSION

34. In the event, the application must be dismissed.

35. At the hearing of the matter I pointed out to the parties that neither side had complied with Uniform Rule 41A and directed them to indicate to

the Court whether they are amenable to mediation and, if not, their reasons for such stance. The respondents indicated that they were not amenable to mediation, the reason being that serious allegations had been made against MJC and its members which had to be resolved or clarified. The applicant indicated that, in the light of the respondents' stance, he accepted that mediation was not feasible.

36. It is well-established that both parties have a duty to comply with Uniform Rule 41A and the fact that neither of the sides did so, has the result that costs must simply follow the result.

37. Accordingly, I make the following order:

37.1 The application is dismissed.

37.2 The applicant shall pay the respondents' costs on the scale as between party and party.

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DC JOUBERT AJ

Date: _____