

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 3626/15
Date Heard: 4/02/16
Date Delivered: 5/05/16

In the matter between:

JOHANNES FORTUIN

Applicant

and

**CHURCH OF CHRIST MISSION OF
THE REPUBLIC OF SOUTH AFRICA**

First Respondent

NKUTHALO ELIJAH GONTSANA

Second Respondent

STEPHEN LASALA

Third Respondent

JUDGMENT

RENQE AJ:

Introduction:

- [1] The applicant brought review proceedings in terms of Rule 53 of the Uniform Rules for the review and setting aside of the decision of the first and second respondents to disfellowship him from the performance of his pastoral duties as ordained minister of Bloemendal Church of Christ Mission of the Republic of South Africa.

Parties:

- [2] The applicant, Johannes Fortuin, was the Minister of the Church of Christ Mission of the Republic of South Africa serving at its Bloemendal Congregation in Port Elizabeth.
- [3] The first respondent is the Church of Christ Mission of the Republic of South Africa (the Church), a voluntary religious association with power to sue and be sued made up of structures and operates in all provinces of the Republic of South Africa.
- [4] The second respondent, Mr Nkuthalo Elijah Gontsana, is the president of the Church presently residing at Ward 31 Gqwarhu Location, Bhala Administrative area, Flagstaff.
- [5] The third respondent, Mr Stephen Lasala, is the General Secretary of the Church residing at 1003 Afrikaners Street, Steynville, Hopetown.

Background:

- [6] The applicant had been a minister of the Church since 1986. On 13 June 2013 he divorced his then wife and remarried in November 2013.
- [7] In September 2013 at the Church Annual Assembly, Pretoria, the applicant wrote a letter to the Provincial Representative Mr Adams

advising the first respondent about his divorce. This letter was presented to the National Ministers Association for consideration.

[8] The following day, the applicant was summoned to a meeting by the National Minister's Executive Committee. At that meeting he enquired at the outset from the members of the Executive Committee whether the purpose of the meeting constituted a hearing. He was advised that its sole purpose was to obtain confirmation from him about his divorce in order to put the members of the committee in better stead for them to brief the National Executive Committee. On the last night of the conference he was advised by a Mr Mguzulwa that the President of the Church, Mr Gontsana, had announced at the conference that he had been expelled.

[9] The applicant spoke to the Deputy President, Mr Lewis, who told him informally that his ministry had been terminated. The applicant then approached a Mr Stemela, the erstwhile Secretary-General seeking written confirmation of the termination of his ministry and the reasons therefor. Mr Stemela advised him that no written confirmation will be forthcoming, a fact confirmed by Mr Lewis.

[10] Upon his return to Bloemendal Church the applicant explained to the members of his congregation that his ministry in the Church had been terminated. But the members of his congregation told him he will continue to minister at the Bloemendal Church until a formal notice

was received from the Executive Council. In March 2014 the applicant attended the Minister's meeting of the Church in Douglas in the Northern Cape. When the second respondent arrived at the meeting he announced that the applicant was not eligible to attend the meeting. The applicant objected and insisted that he be furnished with a formal written notification and the reasons for the alleged termination of his ministry. The second respondent stated that no such letter would be provided and then adjourned the meeting. Shortly thereafter the applicant was summoned by the Executive Council and advised by the second respondent that Executive Council had taken a decision to disfellowship him.

[11] Upon his return from Ministers' conference in Douglas, the applicant briefed the elders of the local Bloemendal Church about what had transpired at that conference thereafter, he addressed a letter to the Church Executive Council reiterating his stance that he would remain in the ministry until such time he was afforded a procedurally fair hearing in accordance with the prescripts of the Church's Constitution.

[12] The applicant learned for the first time after attending the meeting held on 24 January 2015, with inter alia, the Deputy President Mr Lewis where his expulsion was ratified and confirmed that he had been disfellowshipped pursuant to the decision alleged taken in October 2012

at a Ministers and Ministers wives where it was allegedly resolved that Ministers who divorce their spouse would be expelled from the Church.

[13] The applicant asserted that the Church's National Assembly is the highest decision making body that is competent to take such a resolution and it in fact never took such a resolution at any of its Annual Assemblies that he attended. The applicant contended that the actions of the Church are patently in contravention of the tenets of natural justice and that he had the right to be heard before the Church could properly take a decision to disfellowship him. Consequently, he contested his expulsion and demanded immediate reinstatement.

[14] The respondents raised three points *in-limine*. They contended that;

- (i) This court has no jurisdiction to entertain this matter,
- (ii) There was a misjoinder of the second and third respondent, and
- (iii) The court has no powers to determine religious disputes.

I deal with the points in turn hereunder.

[15] With regard to the first point, counsel for the respondents argued that there is no evidence before court confirming that any of the respondents reside or have as its main office within the jurisdiction of this court and that the decision sought to be reviewed was taken in Pretoria. The applicant contends that the decision sought to be reviewed was ultimately taken in Port Elizabeth on 24 January 2015, if regard is had to the Church's Constitution. Furthermore, the effect of

the decision to disfellowship is in respect of the ministerial duties that he conducted in Port Elizabeth. The applicant further contended that even if the decision was not taken in Port Elizabeth this court will have jurisdiction in terms of common law if the cause of action arose within the courts area of jurisdiction, which requires there to be a sufficient connecting factor between the court and the matter before it in order to enable the court to deal with the claim and making a binding judgment on the parties. The primary question which calls for adjudication is whether or not this court has jurisdiction to adjudicate this matter. Section 21 (1) (a) of the Superior Courts Act 10 of 2013 provides the basis of the High Court effectiveness and grants jurisdiction over persons, causes and other matters. In its terms a High Court has jurisdiction over all persons residing or being in its area of jurisdiction arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance. The decision to disfellowship the applicant from the performance of his pastoral duties was ratified and confirmed in Port Elizabeth on 24 January 2015. In terms of section 21 of the Superior Court's Act a division has jurisdiction in relation to all causes arising within its area of jurisdiction. Therefore the cause of action arose within the jurisdiction of this court.

[16] Regarding the second point *in-limine* , the respondents contended that second and third respondents are officials of first respondent who were at all material times performing official duties for and or on behalf of the first respondent in this matter. It was consequently contended that it was not appropriate for the applicant to cite them as parties in this matter. Thus their citation constituted misjoinder. The applicant argued that the second respondent was a party to the decision to “disfellowship” him. The applicant attached to his founding affidavit a Constitution that was applicable to the church when this contended matter arose. In terms of Article X of first respondent’s Constitution the president, which is the second respondent in this instance, is empowered to approve or otherwise recommend the suspension from office of any minister. Furthermore the second respondent is empowered to institute and defend any action in a court of law, either brought by or against the Church and take all such steps and to do all such things as he or she may deem necessary to carry the matter to its conclusion. It therefore follows that there was no misjoinder of the second respondent, considering the fact that the second respondent was a party to the decision to disfellowship the applicant and that he is empowered by the first respondent’s Constitution to defend any action brought against the first respondent. The applicant further submitted that the third respondent is, in terms of the Constitution responsible

for the day to day management of the first respondent and was merely cited as an interested party with no relief sought against him. I find the issue of miss-joinder devoid of any merit and therefore falls to be rejected.

- [17] The last point raised was the determination of religious disputes by courts. The respondents argued that their Constitution and the Bible as supreme authority precludes the Church member from challenging decision taken by the Church. Therefore, the applicant has no right to refer this matter to this court.

Counsel for the respondents argued that the first respondent is a voluntary association as a result its action through its functionaries do not fall within the definition of administrative action as contemplated in the Promotion of Administrative Justice Act No 3 of 2000. The applicant argued that the decision of the first respondent is of a contractual obligation or domestic tribunal and therefore subjected to review.

- [18] I now turn my attention to the powers of the court to review a decision taken by a church. Counsel for the respondent argued that the crisp question to be decided in this matter is whether or not the decision of the first respondent is that of a tribunal or officer performing judicial, quasi-judicial or administrative function in terms of Rule 53 (1) of the Uniform Rules. Counsel for the applicant argued that

this court has common law jurisdiction to review the decision of a contractual or domestic tribunal and the court will interfere and review the proceedings of such tribunal where it has disregarded its own rules or the fundamental principles of fairness have not been adhered to. See *Turner v Jockey Club of SA* 1974 (3) SA 633 where the following was stated at page 644 paragraphs G-H, 'The Tribunal is required to listen fairly to both sides and to observe "the principles of fair play" (*Marlin's case, supra* at pages 126 and 128). In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially (*Dabner v SA Railway and Harbours, 1920 AD 583 at page 589*). They require also that the tribunal's findings of the facts on which its decision is based shall be "fair and bona fide" (*Jockey Club of SA v Transvaal Racing Club, supra at p.450*) it is, in other words, "under an obligation" to act honestly and in good faith (*Maclean v Workers' Union supra* at page 623)'.

In my view there is ample authority in support of the proposition that courts are empowered to interfere with the decision made by a tribunal where the fundamental principles of fairness have been flouted. The issue to be taken into consideration is whether or not the tribunal was competent to make that decision and whether it complied with the requirements of procedural and substantive fairness.

However, this is effectively limited to whether the procedure or decision taken was tainted by irregularity or illegality. The judgment of

*Theron en Andere*¹, has already confirmed that a reasonableness test based on rationality was a competent basis under the common law powers to review decisions of voluntary associations.

[19] In now turn to the merits of the case. Article XIV of the Constitution of the Church sets out the code and article XV thereof deals with discipline and provides:

'15.3 Should the NEC satisfy itself of any misconduct prohibited in terms of the Constitution by a member, the NEC may decide to institute disciplinary proceedings against such member in respect of such misconduct and then refer the matter to the National Disciplinary Committee (NDC) or any other body authorised to conduct disciplinary proceedings.

15.4 A National Disciplinary Committee, which has conducted a disciplinary hearing in terms of this Constitution, may find any member guilty of any misconduct referred to Article 15.5 or any other misconduct prohibited in terms of the Constitution, only if it is satisfied that the evidence presented is of such cogent and sufficient nature as to prove the guilt of such member on a balance of probabilities.

15.5 The following conduct of member(s) shall constitute misconduct in respect of which disciplinary proceedings may be invoked and instituted against a member(s):

(a) behaviour which brings the COCM into disrepute, or unbecoming conduct by member(s).'

¹ *Theron en Andere v Ring van Wellington van die NG Sending Kerk in Suid-Afrika en Andere* 1976 (2) SA 1

[20] It is common cause that the applicant was disfellowshipped on the grounds that he divorced his wife and remarried someone else. Furthermore, it is clear from the provisions of the first respondent's Constitution that the applicant was entitled to a fair hearing before a decision was arrived at. The issue to be decided by this court is whether or not the respondents followed fair processes as contemplated in their own Constitution in arriving at a decision to disfellowship the applicant.

[21] The respondents argued that the applicant appeared before structures of the Church and that there is no doubt that he was given a fair hearing at various stages. The court here is dealing with a review in terms of Rule 53 of the Uniform Rules. The respondents were required in terms of Rule 53 (1) (a) to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings as they were called upon and no such record was filed. This defeats their assertion that there was such a disciplinary hearing. The applicant's contention that there was no hearing is supported by the affidavits of Mr Jonathan Blaauw and Mr Michael Stanely, who are both members of the National Executive Committee of the Church.

[22] Another issue that arose during the hearing of this matter was whether or not the matter should not be referred for oral evidence in order to deal with the alleged dispute of fact on whether or not there was a

hearing. Counsel for the applicant objected to this approach, stating that there was no genuine dispute of fact in this matter as the allegations made by the respondents were vague, unsubstantiated and devoid of any detail and therefore fall to be rejected. He further argued that in assessing the evidence the court should apply the principles as set out in *Plascon v Evans*².

[23] This matter concerns the respondent's failure to afford the applicant a hearing. The respondents had ample opportunity to demonstrate to this court that indeed the applicant was given a hearing and not just make bald allegations that are not supported by any cogent evidence. Such as minutes of the meetings and any record of the proceedings, which could have been easily presented to this court. Furthermore, no details of when and where the so-called hearing took place were provided to the court.

[24] As I have already said above, had all prescripts of the disciplinary process had been complied with by the respondents it would have been a simple matter for them to present evidence of that fact in support of their contention.

[25] Whilst the respondents were adamant that the decision complained of was taken during September 2013 and the application for review was not brought within a reasonable time. It appears that the applicant

²*Plascon –Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (2) All SA 366 (A)at 367 -368*

continued as minister as he was informed by the Church members to do so until a written letter with reasons was furnished for the decision to disfellowship him from the Church. The last meeting that he attended on 24 January 2015 at Bloemendal Church gave a final confirmation that he was indeed dis-fellowshipped and the reasons therefor were communicated to him. Consequently, the court cannot find any unreasonable delay as alleged by the respondents, given that the applicant instituted the review proceedings immediately thereafter.

[26] I now deal with the final aspect, during the hearing, Counsel for the applicant handed in an application to strike out part of paragraph 15.3 of the answering affidavit commencing with the words:

‘in the instant matter Deponent’s wife . . .’ , to the end of the paragraph, together with annexure “NG1” being the affidavit of Mr Douglass Joseph, be struck out on the grounds of being vexatious and irrelevant, and

The last sentence of paragraph 19 of the answering affidavit be struck out on the grounds of being vexatious and irrelevant.

[27] I find the offending allegations made in Mr Douglas Daniel Joseph’s affidavit irrelevant to the matter at hand. No disciplinary action was ever instituted by the respondents to deal with any of the allegations contained in Joseph’s affidavit. Consequently the application to have

part of paragraph 15.3 and the last sentence of paragraph 19 of the answering affidavit strike out is granted.

[28] For all the foregoing reasons, it is clear that the respondents failed to comply with their own Constitution and in the circumstances, the applicant has clearly made out a case for the relief sought.

[29] In the result the following order is made:

- (a) That the decision of the respondents to dis-fellowship and or suspend the applicant from the performance of his duties as Minister of the Bloemendal Church of the first respondent is reviewed and set aside.
- (b) The first and second respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved such costs to include the costs attended upon the application to strike out.

FY RENQE
ACTING JUDGE OF THE HIGH COURT

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