



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO.: 311/2017

**Date heard: 18-06-2018
Date delivered: 28-09-2018**

In the matter between:

KR Letselebe **1st Applicant**

**Congregational Council of the Evangelical
Church in Southern Africa**

Cape Orange Diocese – St Martin Parish **2nd Applicant**

**Members of the Congregation of
The Evangelical Church in Southern
Africa Cape Orange Diocese – St Martin Parish** **3rd Applicant**

And

Bishop WR Bowles **1st Respondent**

Reverend MZ Manong **2nd Respondent**

MW Jongole **3rd Respondent**

Reverend AT Khunou **4th Respondent**

**Diocesan Council of the Evangelical
Church in South Africa Cape Orange Diocese** **5th Respondent**

CORAM: OLIVIER ADJP ET WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. This application was first launched as a matter of urgency on 8 February 2017 for relief under Part A of the Notice of Motion that:

“2. A Rule Nisi be issued calling on the Respondents to show cause on 24 February 2017 why the following order should not be granted as a final order of Court:

2.1 That the Respondents and/or any person acting under their instruction or authority be interdicted prohibited and/or restrained from enforcing the purported cross transfer and secondment of the Reverend Khumalo to either the South Eastern diocese of the Evangelical Lutheran Church in South Africa or to the KwaZulu – Natal Christian Council.

2.2 That the Respondents and/or any other person acting on its instruction or authority be interdicted, and/or restrained from enforcing any purported decisions of the Fifth Respondent regarding Reverend Khumalo before the finalisation of this application;

2.3 That Reverend Khumalo be reinstated with immediate effect on his full salary pending the finalisation of Part B of this motion:

2.4 That Paragraphs 2.1 and 2.2 serve as a temporary interdict with immediate effect.

2.5 The application and annexures together with the rule nisi and the court order be served on the Respondents;

3 Granting the Applicants further or alternative relief;

4. Ordering that the costs in respect of Part A of the Notice of Motion be determined at the hearing of Part B of the Notice of Motion.

2. Part B of the Notice of Motion, which was to be heard on a date to be arranged with the Registrar called for the following relief:

“7 Reviewing and setting aside the decisions taken by the Fifth Respondent to cross transfer Reverend Khumalo to the South Eastern Diocese of the Evangelical Lutheran Church in Southern Africa as a pastor in Bethlehem or his secondment to the KwaZulu – Natal Christian Council.

8. Granting the Applicants further or alternative relief.

9. Ordering those Respondents that oppose this application to pay the costs of this application jointly and severally.”

3. The application became opposed, with opposing papers filed on 28 March 2017. In the meantime Reverend N Khumalo filed an application to intervene and be joined as the 4th applicant in the application. This application for joinder was withdrawn on 4 April 2017.
4. On 19 April 2017, Reverend Khumalo again lodged an application to be joined as the 4th applicant in the application.
5. After a number of postponements, the applicants withdrew Part A of the Notice of Motion against the respondents.
6. This matter served before us on the basis that the application to intervene be dealt with first and that, thereafter, and if necessary, the review application be set down for hearing on some future date.
7. At this stage it is convenient to give a brief background of the events leading up to this application and which are not in dispute.
 - 7.1 During 2016 Rev Khumalo, who was the pastor of the St Martin Parish (Kimberley) of the Evangelical Lutheran Church in Southern Africa, Cape Orange Diocese (the ELCSA-COD), expressed his wish to be transferred to a parish closer to his family home in Kwazulu-Natal. After informal discussions with the Umgeni and Shiyane circuits of the Church which fall under the Evangelical Lutheran

Church in Southern Africa, South Eastern Diocese (ELCSA – SED), Rev Khumalo on 3 November 2016, wrote a letter to the 1st and 3rd respondents (respectively the Bishop and leader of the ELCSA-COD and the Chairperson of the Diocesan Council of the ELCSA-COD) asking them to grant him the opportunity to transfer should a vacancy be secured.

- 7.2 On 15 November 2016, the secretary of the ELCSA-SED addressed a letter to Rev Khumalo informing him that the Diocesan Council of the ELCSA – SED had resolved on 8-9 November 2016 that he be transferred to the Bethlehem Parish. Bethlehem falls within the diocese of the ELCSA-SED and is apparently about 120 km away from Rev Khumalo's hometown of Escourt in Kwazulu-Natal.
- 7.3 On 16-17 November 2016 the Diocesan Council of the ELCSA – COD met and resolved to grant Rev Khumalo's request for a transfer to the ELCSA-SED, effective from 31 December 2016.
- 7.4 Rev Khumalo was not happy with a transfer to Bethlehem and on 30 November 2016 addressed a letter to the 5th respondent, the Diocesan Council of the ELCSA-COD, advising that his request was for a cross transfer to the parishes of Umgeni or Shiyane and that it at least be

considered that he be placed within the province of Kwazulu-Natal.

- 7.5 On 13 December 2016 Rev Khumalo addressed a letter to the 5th respondent withdrawing his request for a transfer.
- 7.6 On 6 February 2017 Rev Khumalo approached the 5th respondent, informing the members of a written job offer he had received from the Kwazulu-Natal Christian Council as a Child and Youth Development Coordinator with effect from 4 February 2017 for a 3 year contract period. He requested the 5th respondent to second him to the Kwazulu-Natal Christian Council. The 5th respondent acceded to this request and confirmed the secondment of Rev Khumalo to the Kwazulu-Natal Christian Council in a letter erroneously dated 6 January 2017 instead of 6 February 2017.
- 7.7 However on 9 February 2017 the 5th respondent addressed a letter to the Rev Khumalo withdrawing the secondment since *“after deliberations with the South Eastern Diocese it has come to our attention that we (ELCSA –COD) do not have the constitutional mandate to have granted you the secondment.”*
8. Rev Khumalo states in the application to intervene that he was not a party to the proceedings when the main application was

instituted, since he was in Kwazulu-Natal. He had however since been advised that, as he had a direct and substantial interest in the matter, he should be joined as an applicant. He furthermore makes the allegation that since he was seconded by the 5th respondent on 6 February 2017 (regardless apparently of the withdrawal of the secondment on 9 February 2017), he was still in the employ of the ELCA-COD and was therefore entitled to reinstatement pending the finalisation of the review application. It is interesting to note that the 1st applicant, who deposed to the replying affidavit in the main application, refers to Rev Khumalo's entitlement to reinstatement only after the expiration of his contract in Kwazulu-Natal.

9. The respondent's opposition to the joinder of Rev Khumalo as an applicant is two-fold. Firstly, that the applicants in the main application have no *locus standi* to bring the application and that Rev Khumalo's joinder as an applicant would not be able to resurrect an application which is fatally defective. Secondly, that Rev Khumalo's joinder as an applicant will in any event be of no consequence, since the review application would still remain fatally flawed due to the non-joinder of necessary parties and Rev Khumalo's failure to first exhaust his internal remedies.
10. Mr Eillert, who appeared for the applicants, conceded in his heads of argument and before us that the provisions of the Constitution and By-laws of the ELCSA do not afford the current applicants a legal interest in the relief sought in the

main application. The Congregational Council the 2nd applicant, of which the 1st applicant is the chairperson and 3rd applicant, the congregation of the St Martin parish have, in terms of the Bye-laws to the Constitution of the ELCSA, no authority to refer any matter to a higher body or Council of the Church except through the channel of the Parish Council (Part 1, 1.3 of the By-Laws). The argument is however that the joinder of Rev Khumalo, who has a direct and substantial interest in the application and therefore clearly has *locus standi*, would cure the defect and would be able to advance the application to the conclusion thereof, should leave to intervene be granted.

11. Whether or not the joinder of Rev Khumalo is permissible to cure the lack of *locus standi* of the 1st to 3rd applicants is certainly arguable. The notion was entertained in *Kinekor Films (PTY) Ltd vs Drive-In Home Movies 1976(2) SA 87 (OPD)*, where the applicant claimed in the alternative that should it fail on grounds of lack of *locus standi*, that leave be granted to join certain parties which would have *locus standi*. The court there found that such a procedure would result in the matter being dealt with piecemeal with resultant additional expense and inconvenience to the respondent and that a party who is of the opinion that he has a claim and wishes the joinder of himself as an applicant must apply therefor at the earliest opportunity so that the court could hear the matter as a whole. That application of joinder was accordingly refused.

12. I fortunately do not have to make a pronouncement on whether a party can be joined to cure a lack of *locus standi*, since the fate of the application for joinder can be decided on the other issues raised by the respondents.
13. In *Ex parte Moosa: In re Hassim v Harrop – Allin 1974(4) SA 412 (T)*, the court held at p 414B thereof, that in an application for leave to intervene the intervening party must show that he has a legal interest and that his legal interest could be prejudicially affected by the judgment of the court, that it was not necessary for such a party to satisfy the court that he will necessarily succeed in the litigation and that it was sufficient for him to make such allegations as would show that he has a *prima facie* case and that his application is made seriously and is not frivolous.
14. There is no doubt that Rev Khumalo has a legal interest in the subject-matter and outcome of the main application. The core issues to be determined, however, are whether he has made out a *prima facie* case and whether he is serious about the application.
15. Ms Erasmus for the respondents was at pains to point out that the actions and attitude of Rev Khumalo were at odds with a person seriously desiring to enforce his rights. Not only was the initial application to intervene as an applicant withdrawn without any explanation and thereafter pursued again, but the fact that Rev Khumalo failed to pursue the internal remedies

provided for in the Constitution of the ELCSA and opted instead to take up employment with the Kwazulu-Natal Christian Council under a 3 year contract itself speaks volumes. It also explains why the 1st to 3rd applicants withdrew Part A of the Notice of Motion which called for the immediate re-instatement of Rev Khumalo.

16. Whilst Mr Eillert is correct in contending that under the common law, as *in casu*, an applicant need not exhaust his internal remedies before seeking relief in a court of law, this proposition is not completely unqualified. It was held in *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (AD) at 503, that domestic remedies need not be exhausted in circumstances where the aggrieved person's very complaint is founded on the illegality or fundamental irregularity of the decision being challenged.
17. This brings me to the nature of the complaint as set out in the founding affidavit to the main application and as confirmed by Rev Khumalo in his affidavit in the joinder application. In short the applicants contend that, since the Constitution of the ELCSA, Chapter 5 of the Part X, clause 5.9, provides that the **Church Council** "*shall be responsible for the assignment and cross transfers of ordained servants to the Dioceses in Consultation with the Diocesan Councils.*", the 5th respondent, the Diocesan Council of the ELCSA-COD, did not have the authority to cross transfer Rev Khumalo. Consequently it is contended that the decision taken by the 5th respondent is ultra

vires and void ab initio and should be set aside. The same it is contended holds for the decision taken by the ELCSA-SED. While the anomaly of the situation where the very person who pleaded with both the ELCSA - SED and the ELCSA COD to accommodate him with a transfer to the SED should a vacancy arise, now claims that such a decision by either institution would be *ultra vires* and *void ab initio* is not lost on me, the involvement of the Church Council in the decision has in my view not been shown to be excluded. In fact the record of decision supplied by the respondents in the review application include the minutes of a Church Council meeting held on 28-31 May 2017 wherein it is recorded that ELCSA-SED had informed the Church Council of the absconding of Rev Khumalo who was now employed by another institution. The Church Council resolved that Rev Khumalo be subjected to a disciplinary enquiry by the SED. This in my view shows at the very least that the Church Council was aware of the cross transfer of Rev Khumalo to the SED and approved of it. I am of the view that the applicants would be hard pressed to succeed in these circumstances with an argument that Rev Khumalo's complaint is of such a nature as defined in the *Welkom Village Management Board* case that he need not exhaust his internal remedies before approaching this Court on review.

18. This brings me to the issue of non-joinder raised by the respondents. As I understand the argument by Mr Eillert, the applicants do not deny that the ELCSA-SED, the receiving institution in the cross transfer of Rev Khumalo, and the Church

Council who approves of such transfers, have a direct and substantial interest in any order which may be made in the review application and as such are necessary parties to the proceedings. The attitude adopted by Mr Eillert is that an application for the joinder of these parties could be made later, after the issue of the joinder of Rev Khumalo has been decided. To adopt this procedure is reminiscent of the reasons why the application for joinder in the *Kinekor Films* matter referred to in paragraph 11 herein failed. It would result in another application for joinder with the additional unjustifiable expense and inconvenience for all the parties concerned. The long and short of the matter is that Rev Khumalo has failed to show that he has a *prima facie* case or that he is serious in obtaining the relief sought in the review application. I am hesitant to make a finding that the application to intervene and be joined as an applicant is frivolous, but I must add that such a finding would not be totally unsupported by the facts of this matter.

19. In my view the application for Rev Khumalo to intervene and be joined as an applicant must in all of the circumstances be dismissed. There is no reason why costs of this application should not follow the event. Ms Erasmus has however requested that the applicants should also be ordered to pay the costs of the proceedings in respect of Part A of the Notice of Motion, which was withdrawn by the applicants without tendering costs. Mr Eillert could not make any submissions in this regard. In the absence of any reasons why the respondents should not be entitled to its costs, the applicants

stand to bear the costs of the proceedings related to Part A of the Notice of Motion.

In the result the following orders are made:

a) The application for the joinder of Rev Khumalo as an applicant is dismissed with costs.

b) The applicants are ordered to pay the costs in respect of the proceedings in Part A of the Notice of Motion.

CC WILLIAMS
JUDGE

I concur

CJ OLIVIER
ACTING DEPUTY JUDGE PRESIDENT

For Applicants:

Adv A Eillert
Geoff Smith Attorneys

For Respondents

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Adv S L Erasmus
Mzuzu Attorneys