



Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

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

CASE NO: 1233/14

In the matter between:

KEITH VAN NIEKERK	1 st Applicant
FRANK LOUW	2 nd Applicant
JS REID	3 rd Applicant
GS ROOI	4 th Applicant
FW NOWALAZA	5 th Applicant
DIE UITVOERENDE RAAD VAN CHRISTEN GEMEENTES INTERNASIONAAL	6 TH Applicant
And	
PIETER PRETORIUS	Respondent

Coram: Olivier J et Lever AJ

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Lever AJ

1. This is an application for leave to appeal the costs order which formed part of a judgment handed down by myself and my Brother Lacock J on the 26 June 2015. The present application for leave to appeal appears to have been filed on the 25 November 2016.
2. The issues to be decided in the present application for leave to appeal are twofold. Firstly, whether the period within which the Notice of

Application for leave to Appeal should be extended. Secondly, whether the order for costs that formed part of the judgment handed down on the 26 June 2015 is ambiguous.

3. It is necessary to give a bit of background to place these issues in context. The original application and the judgment handed down dealt with the review and setting aside of a decision to suspend the applicant in the original application (Pieter Pretorius hereinafter referred to as the respondent) from certain offices he held in the church concerned, pending the completion of an investigation into certain allegations against him.
4. As is evident from the judgment concerned, the court found in favour of the respondent and set aside the said suspension. The court also ordered the first, second and third applicants herein to pay the costs of the original application, the one paying the others to be absolved.
5. Turning now to the first issue, whether or not the 15 day period within which an application for leave to appeal should be filed. It is common cause that the judgment concerned was handed down on the 26 June 2015. It is also common cause that the Notice of Application for leave to appeal was filed on the 25 November 2015. The said notice regarding the application for leave to appeal was filed some 17 months after the judgment was handed down.

6. Paraphrasing the reasons put forward by the applicants in order to show 'good cause' to extend the relevant 15 day period, the applicants state that: They were advised that it is not always cost effective to appeal a costs order; They should try and settle this issue or wait until there was an attempt to execute the costs order; and They suspected that the respondent was litigating with church money.
7. There is no effort in the present application to show that there was any bona fide attempt on the part of the applicant to try and settle the issue of costs with the respondent. The only correspondence attached by the applicants is a letter dated 8 March 2016, which invited the respondent to establish that he was not using church funds in the litigation concerned. There is no attempt to explain why there was a delay from the 8 March 2016 to the date that the present application was filed on the 25 November 2016. Nor is there any attempt to explain what happened in this period or why it took applicants from the 26 June 2015 to the 8 March 2016 to write the relevant letter.
8. However, having regard to the special circumstances that will become apparent when considering the relevant costs order it is both just and equitable to give the applicants the benefit of the doubt and extend the period within which to bring an application for leave to appeal as contemplated by Rule 49(1)(b) of the Uniform Rules of Court (the Rules).

9. In the original application the first, second and third applicants herein were cited as respondents in their dual personal and official capacities. The executive committee of the church concerned was cited as the sixth respondent. However, both the Notice of Motion and founding affidavit in the original review application indicated that no relief was sought against the sixth respondent. The third respondent is a special case which will be dealt with separately below.
10. There was also a controversy as to who took the decision that was subject to the review. The present applicants, maintained that the said decision was taken by the 'Workers Council' the highest decision making body in the said church. The present respondent maintained that it was the "Executive Council' that took the decision that was the subject of the review. The first to third applicants herein were or are members of both the 'Workers Council' and the "Executive Council' of such church. The executive council was the sixth respondent to the original review application, but the 'Workers Council' was not cited as a party to the original review application. Also, no order for costs was sought against the 'Executive Council, the sixth respondent in the review application. Therein lay the dilemma.
11. Where parties are cited in both their official and personal capacities and they are taken to task for their conduct of their official duties, it is only in special circumstances that they will be held personally liable for the legal costs of such litigation. The judgment shows that such special

circumstances were not outlined and assessed. This is a strong indication that the intention of the court a quo wished to hold them liable for the costs in their official capacities. Having regard to the dilemma outlined above, this would have been the equitable order to have made.

12. However, the order relating to costs reads, "The 1st , 2nd and 3rd respondents are to pay the costs on a party and party scale, the one paying the others to be absolved." The qualification, 'the one paying the others to be absolved', is an indication that costs were awarded against them in their personal capacities.
13. The Notice of Motion and founding affidavit in the review application shows that the applicant therein (present respondent) sought a punitive costs order against the first, second, fourth and fifth respondents in their personal capacities. The founding affidavit also shows that the third respondent was cited only in his official capacity so that he would have knowledge of the review proceedings. No costs order was sought against the third respondent in the review application.
14. From what is set out above, it is clear that the order relating to costs in the judgment handed down on the 26 June 2015 is at least ambiguous. In these circumstances leave to appeal to the full bench of this division must be granted. The full bench of this division will have to decide if costs should be awarded against first and second

respondents in their official capacities and whether or not costs should be awarded against the third respondent in any capacity.

15. In my view it is unnecessary and undesirable to make the declaratory order requested by the applicants in their application to extend the relevant time period for the filing of an application for leave to appeal that the provisions of s 18(1) of the Superior Courts Act 10 of 2013 applies pending the finalisation of this application for leave to appeal.
16. Finally, in regard to the costs of this application, it will be equitable to order that they be costs in the appeal.

In the circumstances the following order is granted:

- 1) The extension of the time period required by Rule 49(1)(b) is granted.
- 2) The applicants are granted leave to appeal the costs order made in the judgment handed down on the 26 June 2015.
- 3) The said appeal will be to the full bench of this division.
- 4) The costs of the application for leave to appeal will be costs in the appeal.

Lawrence Lever

Acting Judge

Northern Cape Provincial Division

I agree,

Judge Olivier

Judge

Northern Cape Provincial Division

On behalf of Applicants :	<u>Mr</u> Elliott, Maris, Wilman & Hay
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On behalf of Respondent:	<u>Ms</u> Duncan & Rothman
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Date of Hearing:	15 February 2017
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Date of Judgment:	15 February 2017
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