

55/

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 5833/2015

In the matter between:

THE AFRICAN PRESBYTERIAN BAFOLISI
CHURCH OF SOUTHERN AFRICA

Applicant

and

SEKAME DAVID MKWANAZI

1st Respondent

S J MOFOKENG

2nd Respondent

B W MOTAUNG

3rd Respondent

L F MOLEFE

4th Respondent

S N SITHOLE

5th Respondent

T MALENDU

6th Respondent

T MOLOI

7th Respondent

T MLABA

8th Respondent

MR TSWAMETSI

9th Respondent

MR TWALA

10th Respondent

L XABA

11th Respondent

G XABA

12th Respondent

T MOKOENA

13th Respondent

L J MAZIBUKO

14th Respondent

K MAPOLE

15th Respondent

JUDGMENT BY: **OPPERMAN, AJ**

HEARD ON: **24 MARCH 2016**

DELIVERED ON: **31 MARCH 2016**

Introduction

- [1] The matter serves before the court as an opposed extended return date of a rule nisi in which the applicant moves for a final interdict.

- [2] The applicant is the African Presbyterian Bafolisi Church of Southern Africa; not to be confused with the African Presbyterian Church. These are two definite different entities. The similarity in the nomenclature of the designations of the churches is a reality that has caused exploitation and confusion and may be the root of unremitting strife amongst the devout.
- [3] Litigation on various disputes involving the applicant served before courts in this division in the recent past. Assessment of the cases cannot but result in the inference that vagueness of rights and responsibilities; rules legally decreed to ensure stability and security, are the source of the animosity in a milieu that is historically supposed to be an environment of peace. Greed for power and financial gain is suspiciously lurking in the undertones of the evidence.
- [4] The respondents are private persons that forms part of the religious groups tangled in the conflict.
- [5] The applicant and respondents, as described above, will be referred to throughout the case (main and interlocutory) as such.
- [6] On the 17th of December 2015 the following order was made:
- “Having considered the notice of motion and the other documents filed on record and having heard Counsel for the applicant,
IT IS ORDERED THAT:

1. The matter is heard on an urgent basis and that condonation is granted in respect of the Applicant's non-compliance with the usual forms and manner of service as prescribed by the Uniform Rules of Court;
2. A rule nisi be issued, calling upon the respondents to show cause (if any) on Thursday, 28 January 2016 at 9:30 why a final order in the following terms should not be granted.
 - 2.1 The respondents to be stopped from doing anything which directly or indirectly obstructs, impedes, disrupts, postpones, delays or interferes with the activities of the Applicant and any of the applicant's officials, members and visitors in the executing of their duties, services and ordinary church activities;
 - 2.2 The respondents to be stopped from damaging any property of the applicant or property belonging to members of the applicant or members of the public;
 - 2.3 The respondents to be stopped from molesting, assaulting, threatening or intimidating any of the applicant's officials, members, visitors or any person present on the applicant's property;
 - 2.4 The respondents to be prohibited from coming within 100 meters of the applicant's churches at:
 - 2.4.1 Rankopane – situated in the Rankopane Village, Qwa-Qwa, Free State
 - 2.4.2 Tsheseng – situated in the Tsheseng Village, Qwa-Qwa, Free State
 - 2.4.3 Makwani – situated in the Makwani Village, Qwa-Qwa Village, Free State
 - 2.4.4 Makong – situated in the Makong Village, Qwa-Qwa, Free State
 - 2.5 The respondents to be stopped from in any manner whatsoever inciting, taunting, encouraging, instigating, prompting and/or provoking individuals to perform any of the acts described in paragraphs 2.1, 2.2, 2.3 and 2.5 above;

2.6 The sheriff of this Honourable Court and/or the South African Police Services to be authorised and directed to remove and expel from the property and premises of the applicant, any respondents who fails and/ or refuses to comply with paragraphs 2.1, 2.1, 2.3 and 2.5 above;

3. The relief sought in paragraphs 2.1, 2.2, 2.3,
4. 2.5 and 2.6 above shall serve as an interim interdict with immediate effect, pending the finalization of the relief granted herein;"

[7] The main motion was interrupted by notice from the respondents to apply for the striking out of specific paragraphs, with the annexures thereto, in the replying affidavit of the applicant: Rules 6(11) and 6(15) of the Uniform Rules of Court are applicable.¹ The contentions are that paragraph 7 be struck on the basis of being hearsay evidence and paragraphs 9 to 14 to be struck because it constitute an attempt by the applicant to introduce new evidence by way of the replying affidavit.

[8] The paragraphs are directly relevant to the merits in dispute in the main matter and the interlocutory notice is on points of law. It was therefore prudent to first hear and rule on the interlocutory arguments of law, before the merits be dealt with. I made an order on 24 March 2016 and declared that my reasons would follow in due course. These are my reasons.

1. Rule 6(11): Notwithstanding the a foregoing sub rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge. Rule 6(15): The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.

[9] The disputes

The disputes in the main matter revolve around the proof of ownership or even mere possession and identifiability of the church buildings and property on which the interim interdict is founded. A further issue is the vagueness of the allegations of interference by the respondents with the property, activities and members of the applicant. The consequent result is purported to be a vague court order that is not executable and legally proper.

[10] Paragraph 7 of the replying affidavit: Hearsay evidence

10.1 In terms of section 3(4) of **The Law of Evidence Amendment Act 45 of 1988** "hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

10.2 Paragraph 7 of the replying affidavit by the Archbishop of the applicant states that:

"The respondent's main defence is that they are part of the African Presbyterian Church of South Africa. I investigated this averment. According to the National Independent Council of Churches there is a church registered with the name of African Presbyterian Church. Their leader is the Presiding Moderator Bishop Matousu David Ramosedi."

10.3 The affidavit attached to the above replying affidavit by Matousu David Ramosedi states:

"1. I am a major male ordained minister and presiding moderator in the African Presbyterian Church at 8665, K9 Kutlwanong, Odendalsrus, Free State.

2. I am the head of the African Presbyterian Church. We have branches in the Northern Cape, North West and Free State and Gauteng. I am duly authorised to depose to this affidavit.
3. The facts contained herein fall within my personal knowledge and are both correct and true unless the contrary is expressed herein. Any legal submission that I make are made based on my own legal experience and the advice of the applicant's legal team.
4. I attach hereto the following:
 - a. As annexure A a copy of my designation as marriage officer of the African Presbyterian Church dated the 18th of January 2010;
 - b. As annexure B a copy of a certificate by the Registrar of Independent Churches dated March 2000;
 - c. As annexure C a copy of a certificate confirming the listing of the African Presbyterian Church dated 22 February 2013;
 - d. As annexure D a copy of the Certificate of Recognition of the African Presbyterian Church dated 30 March 2013."

10.4 The person upon whose credibility the probative value of the hearsay evidence in paragraph 7 depends is Archbishop Matousu David Ramosedi. He himself confirmed the evidence in paragraph 7 by means of sworn affidavit as depicted above.

10.5 The averment: "According to the National Independent Council of Churches there is a church registered with the name of African Presbyterian Church.", is hearsay from the National Independent Council of Churches but, the evidence itself is confirmed and is met by Matousu David Ramosedi. The evidence of Ramosedi falls within the definition of 'any person' in 'the probative value of which depends upon the credibility of any person.' The rule in the relevant Act does not demand that the National Independent Council of Churches itself confirms the evidence, but 'any person'.

10.6 In addition; the fact that there is a church registered as the African Presbyterian Church has not been placed in dispute by the respondents.

10.7 Appraisal of the conditions for the admission of hearsay evidence in section 3 of the Law of Evidence Amendment Act 45 of 1988 as a whole confirms that paragraph 7 is admissible and relevant.²

10.8 The prayer to struck paragraph 7 must be dismissed.

[11] Paragraphs 9 to 14:³ New evidence in reply.

11.1 All the allegations on which the applicant relies must be in his founding affidavit. He cannot adduce supporting facts in the replying affidavit. The rule is not absolute because the court

² Section 3 provides:

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
 (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 (c) the court, having regard to—
 (i) the nature of the proceedings;
 (ii) the nature of the evidence;
 (iii) the purpose for which the evidence is tendered;
 (iv) the probative value of the evidence;
 (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 (vi) any prejudice to a party which the admission of such evidence might entail; and
 (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
 (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
 (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

³ The paragraphs are comprehensive and will not be repealed in the judgment.

has a discretion, in certain instances, to allow new material in a replying affidavit subject to the proviso that the respondent should be given an opportunity to deal with it in a set of answering affidavits.

- 11.2 Different considerations apply before the court exercises its discretion in this regard. The court must distinguish between a situation where the applicant knew of the new material earlier but did not include it and a situation where the respondent's answering affidavits reveals the existence of evidence to be responded upon.
- 11.3 The court will not allow the introduction of a new matter if the new matter sought to be introduced amounts to the substitution of a new and completely different claim based on a different course of action. The court will also not allow an applicant to make out a case in reply when no case at all was made out in the original application.
- 11.4 Assessment of the paragraphs in issue shows that the replying affidavit of the applicant never endeavoured to fashion a new claim or reveal a new ground for relief. It is a mere answer to the merits and evidence that was revealed in the answering affidavit of the respondents. Further; the applicant already made out a satisfactory case in the founding affidavit; the facts of which caused the interim interdict to be allowed on the 17th of December 2015.
- 11.5 This point *in limine* is therefor also dismissed.

[12] Facts in dispute

The parties also applied that the court adjudicate whether a dispute of facts might have arisen and dispose of the matter accordingly during the interlocutory proceedings.

12.1 Dispute of facts exists where the applicant and respondent both file conflicting reports. Applications are designed for matters where there are no dispute of facts.

12.2 If there is a dispute of facts in an application for a final interdict the Plascon Evans-rule⁴ applies. Paragraphs 634E-635D describes the test as follows:

“Where in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavit and which have been admitted by the respondent, together with the facts admitted by the respondent, together with the facts alleged by the respondent justify such an order.”

12.3 As it stands the evidence does not justify an order. The case as a whole lacks clarity on the identification and description of the site/place/locality of the activities of the applicant, identification and description of the locality and the property itself. Proof of ownership or possession to establish legal standing of the applicant to apply for the final interdict in regard to the property referred to and specific evidence describing the acts of obstruction, disruption, interference, molestation,

⁴ Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).\

threatening and intimidation perpetrated by the fifteen respondents, are lacking.

12.4 This court is unable to decide the matter on paper because the reports are vague and void of detail. This is due to the conflicting versions by both parties. The cause of the disputes, however, are material and clear. Everybody has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court; the parties and communities besieged by this unrest deserves final management and protection of their affected rights.

12.5 In addition; the essential features of a court order as demanded in law and the formulation of the interim interdict the applicant relies upon, cause the evidence in this application to culminate into a clash of evidence and law; an effective interdict is not possible due to vagueness of the facts and rights.

“[73] A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of noncompliance. In cases where, as here, the order deals with the parties’ property rights which are subject to protections guaranteed by section 25 of the Constitution, a court granting the order is duty bound to issue an appropriate and effective order. The order of July 2013 was not effective because it was not enforceable.

[74] If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a

fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies, the discretion to comply or disregard it.”⁵

12.6 I may now dismiss the application, refer the matter for oral evidence or refer the application for trial. It will be undesirable to endeavour to decide the application upon affidavit with the above in issue. In such a case it is preferable that oral evidence be led to enable the court to see and hear the witnesses before coming to a conclusion; this in order to make an order that will ensure a just and expeditious decision that will bring finality to the dispute.

[13] **ORDER**

1. The application for paragraphs 7 and 9 to 14 to be struck from the applicant’s replying affidavit is dismissed.
2. The matter is referred for oral evidence on the following questions:
 - a) Identification and description of the site/place/locality of the: “activities of the applicant and any of the applicant’s officials, members and visitors in the execution of their duties, services and ordinary church services” as referred to in paragraph 2.1 of the interim interdict dated 17 December 2015.
 - b) Identification and description of the locality and the property itself, referred to as: “any property of the

⁵ Eke v Parsons 2015 (11) BCLR 1319 (CC).

applicant or property belonging to members of the applicant or members of the public” as referred to in paragraph 2.2 of the interim interdict dated 17 December 2015

- c) Identification and description of the locality and the property itself, referred to as: “on the applicant’s property” and as referred to in paragraph 2.3 of the interim interdict dated 17 December 2015
 - d) Proof of ownership or possession to establish legal standing of the applicant to apply for the final interdict in regard to the property referred to in paragraphs 2.2, 2.3 and 2.4 of the interim interdict dated 17 December 2015
 - e) Specific evidence describing the acts of obstruction, disruption, interference, molestation, threatening and intimidation perpetrated by the fifteen respondents.
3. Evidence shall be that of any witness whom either of the parties may elect to call and no party shall be entitled to call any witness unless:
- 3.1 it has served on opposing parties 14 days before hearing (respondent) or 10 days before hearing (applicant) a statement wherein the evidence to be given in chief by such person is set out; or
 - 3.2 the court allows the person to be called despite lack of notice.
4. Either party may subpoena any person to give evidence whether that person has consented to furnish a statement or not.

5. The fact that the party has served the statement or subpoenaed a witness does not oblige them to call the witness concerned.
6. Within 21 days of this order, each party shall make discovery on oath of all documents relating to the issue referred to in paragraph 2 which are or have at any time been in possession or control of the party. The discovery shall be made in accordance with Rule 35 and the provisions of the rule regarding inspection and production of discovered documents shall be operative.
7. The rule nisi issued on 17 December 2015 is extended to the 21 June 2016.
8. The matter remanded to 21, 22 and 24 June 2016 for oral evidence.
9. The costs incurred up to now shall be determined after the hearing of oral evidence.


M. OPPERMAN, AJ

On behalf of the applicant:

Adv. LA Roux
 Instructed by: DH Murray
 Lovius Block Attorneys
 BLOEMFONTEIN

On behalf of the respondents:

Adv. C Snyman
 Instructed by:
 Phatshoane Henney Inc.
 BLOEMFONTEIN