In the KwaZulu-Natal High Court, Durban

NOT REPORTABLE

Republic of South Africa

Case No : 9038/11

In the matter between :

Edwin Hugh Thornton	First Applicant
Marcel Christian Kwaan	Second Applicant
Barry Glen Stead	Third Applicant
Northside Christian Fellowship	Fourth Applicant

and

Accelerated Christian Education South Africa	First Respondent
Victory Christian Academy	Second Respondent

Judgment

Lopes J

[1] This is an application which concerns the ownership and administration of the second respondent, Victory Christian Academy ('the school') which is a school with a religious educational curriculum based on Christian principles.

[2] The history of the school as disclosed by the papers and which is relevant to the relief sought, may be summarised as follows :

a) the school was started in approximately 1991. It was started by the

fourth applicant, the Northside Christian Fellowship church ('the church') a voluntary association, which started out in Durban North as the Rhema Church, which then became the Rhema Lighthouse Church, which thereafter became the Rhema Bible Church, and which eventually became the Northside Christian Fellowship. When the church was called the Rhema Bible Church during or about 1991, it decided to start the school;

b) the school moved from place to place but eventually settled on the piece of land at 34 Ronan Road, La Lucia ('the property'). A 20 year lease over the property was secured from the KwaZulu-Natal Department of Education;

c) in 1993 and pursuant to negotiations between the church and the Department of Housing and Water, the property was donated to the school in terms of a deed of donation, and transferred to the school in whose name the property remains;

d) as the school expanded, funds were raised in the form of donations from the parents of scholars, and families of the church, to provide for the provision of classrooms and a multi-purpose hall;

e) during 2006 a mortgage bond was passed over the property in favour of ABSA Bank Limited to provide funds for the completion of a new administrative block and further classrooms;

f) during or about 2008 the senior pastor of the church, one Graham Temlett, stepped down and a transitional period ensued when the

leadership of the church was run by a transitional team. In 2008, the transitional team handed over the administrative control of the school to the first respondent, Accelerated Christian Education, South Africa ('ACE'). ACE is an association incorporated not for gain in terms of s 21 of the Companies Act, 1973, and which has as its main objective the promotion of religious educational curricula throughout South Africa;

g) in January of 2009 the first applicant, Edwin Hugh Thornton ('Thornton') assumed the position of Senior Pastor of the church. Thornton had his own vision for the future development of the school;

h) a power struggle developed between the church and ACE with rumours abounding of ACE intending to sub-divide and sell off a portion of the property on which the school was situated, and to that end one Graham Yoko of ACE was perceived as attempting to gain ultimate control of the school and hand it over to ACE;

i) that power struggle has escalated to the point where Thornton, the second applicant who is Marcel Christian Kwaan ('Kwaan'), the third applicant who is Barry Glen Stead ('Stead') and the church have brought an application seeking an order :

(aa) interdicting ACE and the school from alienating or encumbering the school's immovable property without the consent of the church;

(bb) interdicting ACE and any and all persons claiming

membership or office of the school from performing any executive or management decisions in respect of the school's business without the prior approval of the church;

(cc) a declaratory order that the church's constitution dated the28th May 2007 is the legitimate and valid constitution of the school and that the school is a 'ministry' of the church and that the membership of the school is constituted by the members of the church's congregation.

[3] The application is opposed by ACE which has, in the meantime, instituted an action out of this court against the church and the Registrar of Deeds under case number 2358/2012, seeking a declaratory order that the school is an 'institution' of ACE, together with further orders declaring ACE to be the owner of the property on which the school is situated, and directing the Registrar of Deeds to effect the relevant endorsements necessary to give effect to that order.

[4] This application brought by Thornton, Kwaan, Stead and the church against ACE and the school came before me on the 26th September 2012. Mr *Singh* SC, who appeared for the applicants submitted that because of the disputes revealed in the affidavits in the application, that this was an appropriate case to be referred for the hearing of oral evidence to enable the deponents to the respondents' affidavits to be cross-examined. To that end he did not persist with prayer 1 of the notice of motion, but sought, instead, an order referring the

matter for the hearing of oral evidence.

[5] Mr *Potgieter* SC, who together with Mr *van der Merwe* appeared for the respondents, submitted that two points in limine fell to be decided. With regard to the merits of the application, his submission was that those should be decided at a trial in due course, submitting that the action of ACE against the church and the Registrar of Deeds under case number 2358/2012, was not *in pari materia* with this application. The two points in limine were :

a) the locus standi of all four applicants; and

b) that the applicants' case was excipiable on the basis that it was vague and embarrassing.

[6] With regard to the locus standi point, his submissions were as follows :

The first to third applicants

Mr *Potgieter* submitted that there were insufficient averments in the founding papers to establish locus standi on behalf of the first three applicants because, on their own admission, the church was a separate legal persona. I was referred to the rule in *Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189) as authority for the proposition that the first three applicants did not possess rights in respect of the relief sought by the church.

[7] The rule in *Foss v Harbottle* was summarised in *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] CH 204 at 210 F – H as follows :

'The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins L.J. in

Edwards v Halliwell [1950] 2 All E.R. 1064 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue.'

[8] The rule was considered in a number of South African cases. In *McLelland v Hulett and Others* 1992 (1) SA 456 (D) Booysen J considered the application of the rule in circumstances where the plaintiff, a 10% shareholder, sued for a loss suffered by the company as a result of the failure of the majority shareholders and directors to conclude a particular transaction. The plaintiff's loss was easily ascertainable, as a percentage of the loss to the company, as a result of the failure to conclude the transaction.

[9] At page 467B - J Booysen J stated :

'The rule in *Foss v Harbottle* is not an absolute rule ... Whilst it is clear that the primary rule that a company must sue for a loss such as that in question in this case, and not the shareholder, is a logical reflection of the concept of limited liability, in practice the real reason why the rule must exist is linked more fundamentally to the separate existence of the company, with the result that, if the shareholder is allowed to sue, any wrongdoer will be subject to "double jeopardy".

Where, as in the present case, that risk is non-existent, and a shareholder is left with a diminished patrimony, the continued application of the rule would amount to an unwarranted and technical obstruction to the course of justice. There is no basis for saying that the rule in *Foss v Harbottle* has been received into our law without the exceptions together with which it is framed.

Having regard to the peculiar facts in this case, I take the view that that aspect of the rule which requires the relief to be sought for the company does not apply.'

[10] I am by no means persuaded that the rule in *Foss v Harbottle* is applicable in the present matter because the situation of the members of the church and their relationship with the church cannot easily be equated to that of shareholders in a commercial corporation. That must be so because in the constitution of the church it is accepted that the leadership will vest in the Pastor (as leader) with all ecclesiastical functions being determined by him, which situation prevails unless and until a new Pastor is elected by the congregation. The Pastor also has the right to appoint persons to assist in the leadership of the church (referred to as 'the Leadership'). The financial affairs of the church are regulated by a financial board consisting of the Pastor and other persons, which may include members of the Leadership. Although this model appears to have been tempered by recent events leading to a wider form of leadership being accepted, the church remains theocratic in its governance and the members have followed their constitution in accepting that form of leadership and control. In those circumstances, comparisons with a corporate structure and the principle in *Foss v Harbottle* do not find application.

[11] Mr *Potgieter* also referred me to the matter of *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape, and Others* 2000 (4) SA 681 (CPD). That case concerned the locus standi of a purchaser and prospective

owner of property to apply to review the decision of the Minister of Agriculture, Planning and Tourism to dismiss an appeal against the local authority's refusal of an application for rezoning of the property. In this regard Thring J stated at 690 I – 691 B :

'For the applicant to have *locus standi* to bring this application, then, it seems to me that it must be established that :

a) he has a direct and substantial interest;

b) in the right which is the subject-matter of this litigation;

c) which is not merely a commercial or financial interest, but which constitutes a legal interest; and

d) which could be prejudicially affected by the outcome of the litigation.'

[12] Mr *Potgieter* submitted that the first to third applicants had failed to demonstrate any of the requirements set forth above. He queried why this particular litigation should be burdened with the submissions of these applicants in their individual capacities, and ultimately the costs incurred by their participation.

[13] Mr *Singh*, on the other hand, emphasised that it was necessary in considering the locus standi of the applicants to examine the factual matrix of their involvement in the matter. He referred in particular to the fact that the first to third applicants are members of a voluntary association.

[14] He referred me to *Molotlegi and Another v President of Bophuthatswana and Others* 1989 (3) SA 119 (BGD) at 125 A – B where Friedman J stated :

'In any event, he submitted that the first applicant, as the president of the club, has a real and substantial interest in ensuring that the property of the association is properly dealt with. He contended that the first applicant is entitled, as of right, to approach the Court to restrain any person who wrongfully and unlawfully prevents the club or association from dealing with its property, or indulging in its activities. See *Pillay v Harry and Others* 1966 (1) SA 801 (D) at 807 B.

Furthermore, the first applicant, in her capacity as aforesaid, has duties to perform under the club's constitution, and consequently has the right to approach the Court to restrain anyone who improperly prevents her from performing those duties.'

[15] As the Senior Pastor of the church, I am satisfied that Thornton falls within the category of persons entitled to safeguard the interests of the church. Kwaan and Stead, as members of the Leadership are also in my view correctly cited as applicants in the application.

See also : *Sewmungal and Another NN.O. v Regent Cinema* 1976 (3) SA 91 (NPD)

[16] The fourth applicant

With regard to the locus standi of the fourth applicant, Mr *Potgieter* referred me to *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D&CLD) where minority shareholders sought the winding up of a company. A point in limine was taken that the petition and supporting affidavit and documents did not contain sufficient information to support the relief sought. It was accepted by counsel for the applicant that the objection fell to be decided on the sufficiency or otherwise of the material in the petition and its annexures. This was on the basis that the

respondents' opposing affidavits had been filed as a 'plea over' in the event that the objection be overruled.

[17] Accordingly, Mr *Potgieter* submitted that in order to decide whether or not the church could litigate, it was permissible only to examine the founding affidavit and annexures, and in that regard to look at its constitution. He conceded that it was implicit in the church's constitution that it could litigate, but there was no indication of how that was to be authorised. He submitted that the only way in which there could be such authorisation was for a meeting of members to be held, and a resolution passed with regard to the litigation. For reasons set forth above, and in view of the theocratic nature of the structure of the church, I do not believe that to be correct.

[18] Mr *Singh* submitted that the views in *Hart* had been overtaken in *Valentino Globe BV v Phillips and Another* 1998 (3) SA 775 (SCA), where Harms JA referred to the right of a respondent, in spite of having filed an answering affidavit, to argue at the outset that the founding affidavits do not make out a prima facie case for the relief claimed. This is normally done on the basis that the procedure is akin to that of an exception, where the founding affidavits alone are considered and the allegations therein accepted as true.

[19] The learned judge of appeal however, pointed to an important difference between that procedure and an exception, in that an application contains

evidence, and not only allegations of fact, and what might be sufficient in a summons may be insufficient in a founding affidavit. He considered the analogy with an exception procedure to be inappropriate and likened the taking of points in limine rather to applications for absolution from the instance in a trial action.

[20] In this regard, in my view, sufficient evidence has been established in the founding papers – see *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and Others* 2007 (1) SA 142 (NPD) at 147 G – I. In any event it is the practice, as I understand it, in this division that where authority is challenged in answering affidavits, it can be dealt with in reply – see also *National Co-op Dairies Ltd V Smith* 1996 (2) SA 717 (NPD)

[21] Given the contents of the applicants' affidavits regarding the nature and style of the governance of the church, I am satisfied that the applicants have the requisite authority to institute proceedings in the name of the church. In this regard :

(a) the applicants have demonstrated in their affidavits that the church is a *universitas personarum* with no limitation on the right to institute proceedings, and that it has a real, direct and substantial interest in the subject matter of the application.

See : *Molotlegi* (supra).

(b) the respondents have not followed the correct procedure to object to the authority of the other applicants to bring proceedings in the

name of the church. Should they have wished to do so, they were bound to follow the procedure set forth in Rule 7(1) of the Uniform Rules of this Court.

See : *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) at 43 E - I

[22] That the applicants' case is excipiable

Mr *Potgieter* further referred to prayer 2.2.2 of the applicants' notice of motion which seeks an order that the school be declared a 'ministry' of the church and that the membership of the school is constituted by the members of the church's congregation. I was referred to the dictionary definition of 'ministry', and Mr *Potgieter* submitted that a 'ministry' was an area of work pertaining to a priest, and perhaps contained a proprietary interest. He submitted that the prayer sought is vague and embarrassing because the respondents are unable to determine what precisely is referred to by the use of the word 'ministry'.

[23] It is interesting in this regard to note that in the action instituted by ACE against the church and the Registrar of Deeds, it seeks a similar order declaring that the school is an 'institution' of the plaintiff. It seems clear that the competing views are :

(a) the applicants view the school as a separate and independent entity, but that the members of the *universitas* comprising the school are the same persons who constitute the *universitas*

comprising the church;

(b) ACE contends that it is the owner of the school.

[24] If one considers the way in which the school has conducted itself over the years, it is evident that it has an independent existence with an estate separate from its members. It has perpetual succession because it continues to exist as its members are replaced by others. Mr *Singh* drew attention to the following factors :

(a) that the school has been in existence for 20 years;

(b) that it employs people as a separate institution;

(c) that it concluded an agreement with the government for the donation of property;

(d) that the property has been registered in the name of the school;

(e) that the school has, in its own right, bonded the property in favour of ABSA Bank Limited by granting it a mortgage bond;

all of which indicate the separate and independent existence of the school as a voluntary association.

[25] With regard to the definition of 'ministry' Mr *Singh* submits that it is no more than an area of work, with its own calling as a ministry for children – it is controlled by the common desire of persons to be bound by an agreed constitution, as are other churches and religious organisations.

See : *Church of the Province of Southern Africa (Diocese of Cape Town) v*

CCMA and Others [2001] 11 BLLR 1213 (LC) paragraph 7

[26] In my view the word 'ministry' is no more than a label denoting an association between the church and the school. It is clear from the applicants' affidavits, that the case which it seeks to make is that the control of, and authority over, the running of the school vests in the church by virtue of the co-incidence of persons forming each *universitas*. Whether that is the case, or whether ACE owns the school, is something which can only be determined after the matter is fully ventilated at a hearing. Suffice it to say that that is something which I should not, and cannot, decide at this stage. I do not, however, accept that the church's case is so insufficiently made out that its claim is excipiable.

Future proceedings

[27] Mr *Potgieter* submitted that the matter should be referred to trial. Mr *Singh* urged me to refer the matter for the hearing of oral evidence for the cross-examination of the respondents' witnesses, as per the annexure to his heads of argument. In my view, it would be best if the entire matter were to be aired at a full trial. Once pleadings have been exchanged it seems probable that the parties will wish to consolidate the matter with the action instituted by ACE.

Costs

[28] With regard to costs, Mr *Potgieter* conceded that costs of an application to stay proceedings, which had been brought by ACE, but abandoned, should be paid for by the respondents. In this regard and with regard to the litigation generally, I see no reason why the school should be mulcted in costs when the fight is really between ACE and the church. In those circumstances ACE should bear the costs of that application. The costs of this hearing should be decided by the Court hearing the action.

[29] I accordingly make the following order :

(a) The application under case number 9038/2011 is referred to trial on the 11th to the 15th days of March 2013.

(b) The first to fourth applicants as plaintiffs are to deliver a declaration by no later than the 19th October 2012.

(c) The first and/or second respondents as defendants are to deliver their pleas by no later than the 17th November 2012.

(d) Any application for consolidation of the action referred to trial, with the action under case number 2358/2012, is to be delivered by no later than the 29th November 2012.

(e) The costs of this application are referred for decision by the trial court.

(f) The applicants' costs of opposing the application to stay proceedings, which application was dated the 26th April 2012, are to be paid by the first respondent.

Date of hearing :26th September 2012

Date of judgment : 2nd October 2012

Counsel for the Applicants : N Singh SC (instructed by Woodhead Bigby & Irving Inc)

Counsel for the Respondents : MvR Potgieter SC with H A van der Merwe (instructed by Senekal Simmonds Inc)