THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 1089/2022

In the matter between:

DIE NEDERDUITSCH HERVORMDE KERK VAN AFRIKA GEMEENTE MEYERSPARK	**FIRST INTERVENING APPLICANT**
DIE NEDERDUITSCH HERVORMDE KERK VAN AFRIKA GEMEENTE PRETORIA TUINE	**SECOND INTERVENING APPLICANT**
DIE NEDERDUITSCH HERVORMDE KERK VAN AFRIKA GEMEENTE DIE WILGE POTCHEFSTROOM	**THIRD INTERVENING APPLICANT**
DIE NEDERDUITSCH HERVORMDE KERK VAN AFRIKA GEMEENTE KOSTER	**FOURTH INTERVENING APPLICANT**

In Re:

DIE NEDERDUITSCH HERVORMDE KERK VAN AFRIKA	**APPELLANT**

and

DIE WILGE HERVORMDE GEMEENTE	**FIRST RESPONDENT**
DIE WILGE VERENIGING	**SECOND RESPONDENT**
HERVORMDE GEMEENTE GROOTVLEI	**THIRD RESPONDENT**
DIE GEMEENSKAP VAN GELOWIGES GROOTVLEI	**FOURTH RESPONDENT**
HERVORMDE GEMEENTE KOSTER	**FIFTH RESPONDENT**
DIE DIAMANT VERENIGING	**SIXTH RESPONDENT**
HERVORMDE GEMEENTE MEYERSPARK	**SEVENTH RESPONDENT**
MEYERSPARK CHRISTELIKE VERENIGING	**EIGHTH RESPONDENT**
HERVORMDE GEMEENTE NOORDELIKE PIETERSBURG	**NINTH RESPONDENT**
YSTERBERG VERENIGING HERVORMDE GEMEENTE	**TENTH RESPONDENT**

SCHWEIZER-RENEKE	**ELEVENTH RESPONDENT**
HERVORMDE KERK VERENIGING	
SCHWEIZER-RENEKE	**TWELVTH RESPONDENT**
HERVORMDE GEMEENTE PREMIERMYN	**THIRTEENTH RESPONDENT**
HERVORMDE GEMEENTE	
PRETORIA TUINE	**FOURTEENTH RESPONDENT**
SAAMSTAAN VERENIGING	**FIFTEENTH RESPONDENT**
HERVORMDE GEMEENTE THERESAPARK	**SIXTEENTH RESPONDENT**
THERESAPARK VERENIGING	**SEVENTEENTH RESPONDENT**
HERVORMDE GEMEENTE RUSTENBURG	**EIGHTEENTH RESPONDENT**
RUSTENBURG CHRISTELIKE VERENIGING	**NINETEENTH RESPONDENT**
HERVORMDE GEMEENTE VREDE	**TWENTIETH RESPONDENT**
NH VREDE EIENDOMSVERENIGING	**TWENTY-FIRST RESPONDENT**
HERVORMDE GEMEENTE	
DENDRON/VIVO	**TWENTY-SECOND RESPONDENT**
DE LOSKOOP/BLOUBERG VERENIGING	**TWENTY-THIRD RESPONDENT**
HERVORMDE GEMEENTE	
OOSTELIKE PIETERSBURG	**TWENTY-FOURTH RESPONDENT**
MOREGLOED HULPVERENIGING	**TWENTY-FIFTH RESPONDENT**

Neutral citation: *Die Nederduitsch Hervormde Kerk van Afrika and Others v Die Wilge Hervormde Gemeente and Others* (1089/2022) [2024] ZASCA 128 (30 September 2024)

Coram: SCHIPPERS, MABINDLA-BOQWANA, SMITH and KEIGHTLEY JJA and HENDRICKS AJA

Heard: 10 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 at 30 September 2024.

Summary: Civil procedure – whether intervening parties should be joined in application for leave to appeal – whether high court misdirected itself in introducing new issue – privity of contract – not in dispute nor canvassed in pleadings – intervening applicants have direct and substantial interest in appeal – privity of contract irrelevant to dispute – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Janse Van Nieuwenhuizen J, sitting as court of first instance):

1 The Nederduitsch Hervormde Kerk van Afrika Gemeente Meyerspark, the Nederduitsch Hervormde Kerk van Afrika Gemeente Pretoria Tuine, the Nederduitsch Hervormde Kerk van Afrika Gemeente Die Wilge Potchefstroom, and the Nederduitsch Hervormde Kerk van Afrika Gemeente Koster (the intervening parties) are granted leave to intervene, and are joined as applicants in the application for leave to appeal.

2 The application for leave to appeal is granted.

3 The appeal is upheld.

4 The order of the Gauteng Division of the High Court, Pretoria (the high court), that the issue between the parties has become moot in the action instituted by the respondents against Die Nederduitsch Hervormde Kerk van Afrika, under case number 5167/2016 (the action), is set aside and replaced by the following order:

4.1 The action is remitted to the high court for hearing by a judge other than Janse van Nieuwenhuizen J.

4.2 The plaintiffs shall pay the costs of the proceedings incurred in the high court from 25 January 2022. Such costs shall be paid jointly and severally, one plaintiff paying, the others to be absolved, and shall include the costs of two counsel where so employed.'

5 The respondents shall pay the costs of the intervention applications, the costs of the application for leave to appeal, and the costs of appeal. Such costs shall be paid jointly and severally, one respondent paying, the others to be absolved, and shall include the costs of two counsel where so employed.

JUDGMENT

Keightley JA (Schippers, Mabindla-Boqwana, Smith JJA and Hendricks AJA concurring):

[1] This is an application for leave to appeal, which was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The applicant is the Nederduitsch Hervormde Kerk van Afrika (the NHKA). It seeks leave to appeal against the judgment and order of Janse Van Nieuwenhuizen J (the trial judge), in the Gauteng Division of the High Court, Pretoria (the high court), in an action instituted by the respondents in that court. The respondents are former congregations of the NHKA and entities to which they transferred properties previously registered in the names of congregations affiliated to the NHKA.

[2] In addition, there are intervention applications by four parties (the intervening parties). They seek an order to be joined in the application for leave to appeal to this Court and, if successful, in the appeal. The intervention applications were also referred for oral argument.

[3] The parties have been at loggerheads for many years. While the origin of their dispute lies in theological and political differences between them, the legal dispute giving rise to the appeal has a more material focus. It concerns certain immovable properties, and the property rights attached to them; in particular, the professed right of certain of the respondents to transfer the properties to entities falling outside of the NHKA. These entities form the remainder of the respondent group.

[4] Until the decisive rift between the parties, the properties were registered in the names of various congregations of the NHKA. These congregations were all juristic entities with legal personality separate from that of the NHKA itself, and with the capacity to own property. The intervening parties describe themselves as being four of the congregations in whom ownership of the affected properties originally vested. They are Die Nederduitsch Hervormde Kerk van Afrika Gemeente Meyerspark (Meyerspark congregation); Die Nederduitsch Hervormde Kerk van Afrika Gemeente Pretoria Tuine (Tuine congregation); Die Nederduitsch Hervormde Kerk van Afrika Gemeente Die Wilge Potchefstroom (Wilge congregation); and Die Nederduitsch

Hervormde Kerk van Afrika Gemeente Koster (Koster congregation). I refer to them simply as the original congregations.

[5] In approximately 2010 and 2011, some members of the original congregations expressed dissatisfaction over the formal stance adopted by the NHKA on apartheid and its purported theological justification. This led ultimately to a breakdown in the relationship between these dissatisfied members and the NHKA. By majority vote within the original congregations, the dissatisfied members donated and transferred the affected properties from the original congregations to new juristic entities. The new entities were established and controlled by the dissatisfied members with the express purpose of taking transfer of the properties. The dissatisfied congregants broke completely from the NHKA and formed new congregations outside the NHKA, while retaining possession and use of the transferred properties for their own religious purposes.

[6] The first, third, fifth, seventh, ninth, eleventh, thirteenth, fourteenth, sixteenth, eighteenth, twentieth, twenty-second and twenty-fourth respondents are the new congregations formed by the dissatisfied NHKA members (the new congregations). The second, fourth, sixth, eighth, tenth, twelfth, fifteenth, seventeenth, nineteenth, twenty-first, twenty-third and twenty-fifth respondents are the juristic entities to whom the immovable properties in question were transferred. They are the current registered owners of the properties (the new owners).

[7] Against this background, the respondents instituted proceedings in the high court against the NHKA as defendant. They sought certain declaratory relief which, in essence, would confirm that they had the authority to transfer the properties to the new owners. The only party cited by the respondents in the high court action was the NHKA. None of the original congregations were cited albeit that, until the contested transfers, they were the registered owners of the affected properties. After summons was issued, the NHKA filed its plea and instituted a counterclaim. The original congregations applied to intervene as co-defendants in the action and as co-plaintiffs in the NHKA's counterclaim.

[8] Subsequently, a case managing judge, Fourie J, was assigned to manage the litigation between the parties. By agreement between them, Fourie J formulated a separated issue for determination prior to the hearing of further disputes

(the separated issue). It is important to record that the parties agreed that the intervention applications by the original congregations would be held over until the separated issue had been determined. So too, would the exchange of further pleadings in the counterclaim. Consequently, as things stand at present, the pleadings in the action, including the counterclaim and application for intervention, have not closed.

[9] The separated issue was formulated by Fourie J in Afrikaans as:

'Kan lidmate of 'n gemeente van die NHKA wat probleme het binne of met die NHKA en/of wil wegbreek en/of weggebreek het uit die NHKA, by meerderheidsbesluit die bates van 'n gemeente van die NHKA aan vrywillige verenigings of gemeentes wat buite die NHKA funksioneer vervreem.'

The English translation of the question being:

'Whether members or a congregation of the NHKA who have problems within or with the NHKA and/or want to break away and/or has broken away from the NHKA by a majority decision sell or donate its assets to a voluntary association or another congregation that does not form part of the NHKA.'

[10] The separated issue was set down for hearing on 25 January 2022, before the trial judge. During the course of the proceedings, matters took a turn that ultimately led to this appeal and the associated applications. The trial judge *mero motu* (of her own accord) raised an issue of 'privity of contract' and directed the parties to address her on it. The trial judge's view was that a determination of this issue would obviate the necessity of making a finding on the separated issue identified by Fourie J and would bring the proceedings to an end.

[11] The privity of contract issue was whether the NHKA, which was not the registered owner of the affected properties, could legally challenge the validity of the contracts of donation in terms of which the new congregations had alienated the properties to the new owners. As the trial judge expressed it, only the parties to a contract of donation are bound by it, and a third party, like the NHKA, cannot sue or be sued on it. Counsel for the respondents aligned himself with the view of the trial judge. Counsel for the NHKA disagreed with the trial judge and with counsel for the respondents. He contended that the issue raised in the pleadings and separated issue was whether the dissatisfied members had the necessary authority to transfer the properties, rather than the question of privity of contract. However, his submissions

found no traction with the trial judge, who ordered that 'the issue of whether the (NHKA) has privity of contract in respect of the contracts of donation between (the respective dissatisfied members and the new owners) is separated from the remainder of the issues between the parties'. She directed that this issue be argued the following day.

[12] At the resumption of proceedings the following day, it was recorded that counsel for the NHKA conceded that it was not a party to the donation agreements. Consequently, the matter stood down to the following day for submissions to be made on the legal and procedural consequences of the trial court's finding that there was no privity of contract between the NHKA and the relevant respondent parties. Having heard the parties' submissions, the high court handed down the judgment and order that form the basis of the applications before this Court.

[13] The high court concluded that its finding on the privity of contract issue meant that the NHKA had no legal standing to challenge the relief sought by the respondents and that, consequently, the dispute between them was moot. It made an order to this effect and directed the NHKA to pay costs from 25 January 2022, being the date on which the high court had raised the privity of contract issue.

[14] I start with the intervention applications, which are opposed by the respondents. They contend that there is a factual dispute as to whether the intervening parties exist as congregations, and hence as legal personae, at all. They say that the new congregations are in fact and in law the same congregations that were originally part of the NHKA, save that they no longer function within the NHKA. According to the respondents, once the new congregations left the NHKA, all that remained were the individual church members who had decided to retain their ties with the NHKA. It follows, they say, that the intervening parties have no *locus standi* to apply to intervene as parties in the appeal.

[15] The respondents submit further that this Court cannot consider the intervention applications without resolving what they describe as the factual disputes concerning the existence of the intervening parties as congregations. Based on the principles laid down in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd*,[1] (*Plascon-Evans*) the

[1] *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634C-I and 635A-C.

respondents submit that their factual version must prevail, with the consequence that this Court must accept that the intervening parties do not exist as congregations and cannot be joined in the appeal.

[16] There are several difficulties with the respondents' opposition to the intervention application. I highlight only two. In the first instance, this Court is not called upon to resolve any factual dispute about whether the intervening parties exist as congregations or not. This is not an issue that calls for purely factual determination. It is an issue that will be determined substantially on an interpretation and application of the NHKA's governing documents, being the Church Order and Constitution. The respondents are, therefore, incorrect in their assertion that *Plascon-Evans* resolves the dispute in their favour.

[17] Secondly, the respondents' argument disregards the agreement in the trial to place the joinder applications on hold until the separated issue is decided. The only question for this Court is whether the intervening parties have a legal interest in the application for leave to appeal, and the appeal against the high court's order. The trite principle that governs intervention applications is whether the intervening parties have a direct and substantial interest that may be prejudicially affected by the judgment of the court in the relevant proceedings. In other words, do they have a legal interest in the subject matter of the dispute?[2]

[18] It seems to me axiomatic that as the original title holders to the property before the disputed transfers took place, the intervening parties have an obvious and very real interest in the outcome of the appeal. In fact, the high court expressly recognised that the original congregations have a direct interest in the dispute. The trial judge noted the following in an exchange with counsel for the respondents:

'Ja maar daar is geen sulke gemeentes voor my tans nie. Ek sou verwag het dat daardie gemeentes, as hulle dan bestaan het, die verweerders in hierdie saak is want hulle het 'n direkte belang.'

This statement may be translated as:

[2] See *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) para 9, affirmed in *Lebea v Menye and Another* [2022] ZACC 40; 2023 (3) BCLR 257 (CC).

'Yes, but there are no such congregations presently before me. I would have expected those congregations if they existed, to be defendants in this case because they have a direct interest.'

[19] It is accepted by all parties that the trial judge was not aware, nor was she made aware, of the applications for joinder by the intervening parties, or that these applications had been placed on hold by agreement between the parties to the action, pending the determination of the separated issue. It is clear that had the trial judge been made aware of those applications when she made the above remarks, the case before her would not have proceeded as it did.

[20] I conclude on this issue that the intervening parties, as the original titleholders of the properties forming the objects of the dispute, have a legal interest in the application for leave to appeal and the appeal. They must be joined as parties.

[21] As to the merits of the appeal, this turns on the simple question of whether the high court misdirected itself in raising the privity of contract issue *mero motu* and concluding on that basis, that the dispute between the NHKA and the respondents was moot. This Court stated in *Fischer and Another v Ramahlele and Others* (*Fischer*)[3] that it is for the parties in civil litigation, and not for a court, to set out and define the nature of their dispute. The nature of the dispute appears from the pleadings.[4] It is not for a court to raise new issues not traversed in the pleadings.[5]

[22] *Fischer* recognises that:

'There may . . . be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. . . . If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.'[6]

Further, that:

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[3] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA).
[4] Ibid para 13.
[5] Ibid para 14.
[6] Ibid paras 13-14.

'A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point.'[7]

[23] The high court found support in *Fischer*, on the basis that all it had done was to suggest a line of argument or an approach to the case, in accordance with what *Fischer* considers acceptable. Counsel for the respondents submitted to this Court that the high court was correct in this respect.

[24] The question is whether the nature of the dispute, as defined in the pleadings, turned on the issue of privity of contract. If it did, then it may have been open for the high court to suggest to the parties that they consider separating this issue from the remainder of the trial for pre-determination. If the parties were agreeable to this, there would have been no difficulty with matters taking such a course. In fact, this is what appears to have occurred when Fourie J identified the original separated issue which was adopted by agreement between the parties.

[25] However, the nature of the dispute as set out in the pleadings was not about privity of contract. The respondents approached the high court for declaratory relief, including an order that:

'… elke eiser wat as gemeente enige roerende of onroerende eiendom geskenk het aan enige eiservereniging, geregtig was om dit te doen ingevolge die grondwet en kerkorde van die NHKA, by wyse van meerderheidstem van die gemeente.'[8]

What the respondents sought was confirmation from the court that the new congregations had the right in terms of the Constitution and Church Order of the NHKA to donate property to the current owners by a majority vote. In short, the dispute turned on the question of whether the new congregations had the authority under the governing documents of the NHKA to alienate the relevant properties to the new owners. The centrality of this issue to the dispute was expressly recognised in the separated issue formulated by Fourie J.

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[7] Ibid para 14.

[8] The English translation is:

'…[whether] each plaintiff as a congregation, which has donated any movable or immovable property to any plaintiff association, was entitled to do so in terms of the Constitution and Church Order of the NHKA, by means of a majority vote of the congregation.'

[26] As plaintiffs, the respondents bore the onus of establishing that under the NHKA Constitution and the Church Order they had the authority to donate the properties to the new owners in the manner adopted. The high court misinterpreted the nature of the dispute by re-framing the NHKA's opposition to the respondents' case as being an attack on the validity of the contracts of donation. The high court failed to appreciate that the dispute turned on the question of authority, as determined by the Constitution and Church Order. The NHKA obviously has a legal interest in the question of whether congregations may, under its constitutive documents, alienate property to third parties outside of the NHKA. The high court's misunderstanding of the issues in dispute had the further consequence that it erroneously found that the NHKA had no legal interest in the matter and that the dispute between the parties was moot.

[27] I conclude that, contrary to the high court's view that it had acted within the bounds of *Fischer*, it clearly acted outside of them. It did not simply raise a new 'issue' or 'approach'. It raised an entirely new question of law not in issue in the pleadings. Counsel for the respondents had attempted to make this clear to the high court when the matter was heard. However, as I noted earlier, his submissions were rejected. In this respect, too, the high court failed to heed the caution for judicial restraint expressed in *Fischer*, and instead directed the parties to deal with an issue that was not pleaded. This was clearly to the prejudice of the NHKA, which was denied its right, as a cited defendant, to properly oppose the relief sought by the respondents.

[28] Since *Fischer*, this Court has repeatedly emphasised that courts must decide only the issues as pleaded by the parties.[9] In this case, the unfortunate consequence of the high court's failure to comply with this oft-stated principle, is that the matter will have to be remitted to the high court, with the attendant waste of costs for the parties, court time and resources.

[29] For all of these reasons, the appeal must be upheld. I make the following order:

1 The Nederduitsch Hervormde Kerk van Afrika Gemeente Meyerspark, the Nederduitsch Hervormde Kerk van Afrika Gemeente Pretoria Tuine, the Nederduitsch Hervormde Kerk van Afrika Gemeente Die Wilge Potchefstroom, and the Nederduitsch

[9] See, for example, *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; [2022] 2 All SA 607 (SCA) para 9; *Road Accident Fund v Taylor and Others* [2023] ZASCA 64; 2023 (5) SA 147 (SCA) para 31.

Hervormde Kerk van Afrika Gemeente Koster (the intervening applicants) are granted leave to intervene and be joined as co-applicants in the application for leave to appeal.

2 The application for leave to appeal is granted.

3 The appeal is upheld.

4 The order of the Gauteng Division of the High Court, Pretoria (the high court), that the issue between the parties has become moot in the action instituted by the respondents against Die Nederduitsch Hervormde Kerk van Afrika, under case number 5167/2016 (the action), is set aside and replaced by the following order:

4.1 The action is remitted to the high court for hearing by a judge other than Janse van Nieuwenhuizen J.

4.2 The plaintiffs shall pay the costs of the proceedings incurred in the high court from 25 January 2022. Such costs shall be paid jointly and severally, one plaintiff paying, the others to be absolved, and shall include the costs of two counsel where so employed.'

5 The respondents shall pay the costs of the intervention applications, the costs of the application for leave to appeal, and the costs of appeal. Such costs shall be paid jointly and severally, one respondent paying, the others to be absolved, and shall include the costs of two counsel where so employed.

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R M KEIGHTLEY

JUDGE OF APPEAL

Appearances

For appellant:	J G Cilliers SC with M Barnard
Instructed by:	Awie Moolman Attorneys, Pretoria
	McIntyre van der Post Inc, Bloemfontein
For respondent:	R du Plessis SC with M Boonzaaier
Instructed by:	Ross and Jacobsz Inc, Pretoria
	EG Cooper Majiedt Attorneys, Bloemfontein