



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case no: AR361/2023

In the matter between:

AMRISH BISSOON

Appellant

and

DIVINE LIFE SOCIETY OF SOUTH AFRICA

First Respondent

AROONA DEVI MANGREY

Second Respondent

JOGINDRA KISHNAPPA NAIDOO

Third Respondent

MAWALALL CHATROOGHOON

Fourth Respondent

SACHIN HEERAMUN MAHARAJ

Fifth Respondent

AROON SUKHNANDAN

Sixth Respondent

KUMARASEN NAICKER

Seventh Respondent

LOGAN NAIDOO

Eighth Respondent

SANTOSH JAIRAM

Ninth Respondent

RAVEEN HARISUNKER

Tenth Respondent

JUDGMENT

Olsen J (Mathenjwa J & Zwane AJ concurring):

[1] With the leave of the Supreme Court of Appeal, Mr Amrish Bissoon appeals against the decision of the court *a quo* (Ploos van Amstel J) dismissing his application to review certain decisions made by the first respondent, the Divine Life Society of South Africa. The decision of the court *a quo* to dismiss the application followed findings by the court that the application had been unreasonably delayed, and that the delay could not be condoned or overlooked.

[2] The primary issue in this appeal is as to whether the decision of the court *a quo* to dismiss the application because it was delayed was correct. A decision on the question as to whether the appellant was entitled to any of the relief he sought is not reached unless we conclude that the decision to dismiss the application on grounds of delay was wrong. It is necessary to furnish an account of the nature of the Divine Life Society of South Africa (which is the first respondent, and which will be referred to as the "Society") in order to contextualise the enquiry into whether the dismissal of the application on grounds of delay was justified.

[3] The Society is a religious association or organisation which has its origins in India. It was founded by a person named Sri Swami Sivananda who was apparently referred to as the Divine Master. According to Mr Mangrey, the chairman of the governing Board of the Society who attested to the answering affidavit, the Divine Master directed one of his disciples referred to in the papers as "Swamiji" to establish the Society in South Africa, which was done in 1949.

[4] The Society has stressed in its answering papers that the central tenet of the Society, the central rule to which all its members are bound, is the duty of absolute

obedience to the Divine Master. This feature of the Society is perhaps best described in Mr Mangrey's words.

"In accordance with our tradition, Swamiji controlled the affairs of the Society on the basis that if any person challenged his authority, that constituted an act of disobedience and grounds for expulsion. The decision is not open to challenge.

Disobedience is contrary to the teachings of the Divine Master and is totally unacceptable. A rejection of this tenet is a rejection of the very essence of the spiritual doctrine of the Society.

Before Swamiji passed away the constitution of the Society was signed by him signifying his approval of it. The board was entrusted in terms of the constitution to run the Society and also to ensure discipline and compliance to the spiritual doctrine of the Divine Master and Swamiji. Whereas the document is called "constitution" it is not to be construed as some embodiment of democratic or constitutional values as legal scholars may understand. It is his will or rather his rules for the Society. To oppose the board is to oppose the constitution and so Swamiji and the Divine Master. It is unthinkable."

[5] Against that background the Society contends that its decisions are not subject to judicial review. But that point was not pressed by counsel in argument. The passages just quoted from Mr Mangrey's affidavit are only challenged by the appellant in one respect; he denies that the board is, as it were, the successor to Swamiji. Swamiji died not long after the Society's constitution was signed. The appellant points

out that, in terms of the constitution, on his death the Society would not have a spiritual head.

[6] According to the appellant the Society has a few hundred active and committed “householder members” and a few thousand other persons who attend irregularly. According to the Society it has an estimated 5000 devotees in South Africa. Both the appellant and the Society confirmed that there are twelve “renunciants”. These are individuals who have devoted their lives wholly to the Society, have no possessions and no home outside of the Society. They must conduct themselves in accordance with strict rules.

[7] The Society is a voluntary association. One ordinarily looks to the founding documents of such an association, commonly called its constitution, in order to determine the provisions of the contract to which members bind themselves when volunteering membership. However, in this case the constitution is something of a secret document. A copy of it was put up by the appellant with his founding papers. That elicited a response from the Society that Swamiji had decreed that the constitution should never be given to anyone and that those who wanted to view it could only do so by appointment at a particular branch of the Society. The appellant does not specifically deny that Swamiji decreed that, but rejects the contention that he is not entitled to a copy of it on the basis that it has become a public document, having been lodged with a public authority. It appears safe to conclude on an overview of all the papers that in practice ordinary members of the Society relate to it upon the footing that the word of the board is law; and work upon the assumption that the board acts in all matters in accordance with the teachings of Swamiji, and the Divine Master.

However, from the board's perspective, its members obviously being aware of the provisions of the constitution which are regarded as the product of the teachings of Swamiji, its conduct and activities are controlled by the constitution to which members of the Society do not have ready access.

[8] In giving an account of the provisions of the constitution of the Society I shall confine myself to matters which provide context, and to matters which have or may have a bearing on the issues raised in this litigation.

- a) The principal object of the Society "is to carry out religious, spiritual, educational and charitable activities within the Republic of South Africa".
- b) Whilst the Society may make money from the sale of books and tape recordings, and so on, of a religious character, and may let out any of its property not immediately required for its charitable purposes, its principal income is anticipated to be and is, on the papers, derived from donations.
- c) The Society may establish and maintain centres for the pursuit of religious ideals, meditation, prayer, and for the accommodation and training of disciples. It may erect and maintain schools and colleges for the education of children. It may also establish and maintain hostels, dormitories, and other homes or institutions.
- d) "All the business and affairs of the Society shall be managed and controlled by the Board of Management, who shall have full power to carry out the objects of the Society...". The Board shall control and direct policy and the activities of the Society.

- e) It may create, suspend or disband sub-committees and branches of the Society and delegate any of its powers to any such sub-committee or branch or to any office bearer of the Society.
- f) The board is empowered to engage and dismiss servants of the Society and to regulate their terms of service and remuneration.
- g) The board is directly responsible for the maintenance of discipline and standards of morality and behaviour of the members of the Society. It “shall be the judge of the spiritual suitability of any employee or member of the Society”. It has the power to “accept or to reject any candidate for spiritual or religious discipleship and to expel from any of the establishments of the Society of whatsoever nature any spiritual or religious disciple”. It has the power to forbid (or permit) any person, whether a member of the Society or not, to attend meetings and gatherings. With regard to these powers the board is not obliged “to give any reason whatsoever for any decision it may take by virtue of the powers hereby conferred upon it”.
- h) One of the central features of the organisation is that the board is in the nature of a self-appointed governing body. When members leave the board, successors are appointed by the board itself. With the exception of the late spiritual head, board members are obliged to retire from the board at age 65.
- i) The board must consist of at least five and not more than 18 members.
- j) The constitution may be amended only by a unanimous resolution passed after not less than ten days written notice is given to all the members of the board.

[9] The Society has an income of between R8 million and R10 million per year. It appears that a substantial portion of that income is dedicated to construction and the maintenance of buildings and facilities. The appellant states in his founding affidavit that the "Society's construction and critical infrastructure work is conducted via the projects committee". Some of the members of the projects committee act as, and are called, "project managers". Judging from what is said in all the papers these persons have a more "hands-on" role than other members of the committee. The projects committee is a committee of the board, and its members are appointed as such by the board.

[10] Membership of the projects committee is voluntary and unremunerated. It is clear on all the papers in this application that service on the projects committee is intended to be a contribution to the furtherance of the objects of the religious society to which members of the committee pledge their allegiance. Membership of the committee is not intended to be a device for the acquisition of personal gain. Membership of the committee is entirely voluntary.

[11] Prior to the course of events which gave rise to this litigation the appellant was a member of the Society's projects committee and one of the project managers. He was the secretary of the projects committee. He certainly appears to have played a prominent role in the affairs of the projects committee. The appellant had been a devotee of the Society since childhood and had chaired the Society's Cape Town branch since 2012.

[12] There is some evidence on the papers that the appellant was at least the senior or head project manager. He describes himself as “the project manager” but the Society’s answering affidavit asserts that the project management duties were shared with other members of the project management committee. The papers in these proceedings do not yield perfect clarity on this issue.

Events leading to this litigation.

[13] Things did not go well with the project committee. A professor employed at the University of KwaZulu-Natal, who is a member of the committee, became disillusioned with the appellant’s role and, judging from the record, fell into conflict with the appellant. As early as October 2018 a member of the committee sent an email to committee members complaining of bickering at project meetings and observing that of the eight then members of the committee only four were actively involved in project operations. He expressed the opinion that the projects committee should cease to operate, that all its members should be removed, and that the board should appoint new members to fast-track operations. The appellant himself forwarded this email to the board recording his agreement with the views stated therein.

[14] It is apparent from the papers that matters did not improve, certainly from the perspective of the appellant. In June 2019 he wrote to the board stating that over the previous nine months he had been witness to a number of instances where senior members of the Society, including members of the board, had acted in a manner which would have serious legal and financial implications for the Society. There followed a

flurry of correspondence between the Society and the appellant in the course of which the appellant expressed his frustration at what he perceived to be the board's reluctance to take up the issues he had raised. The board instituted what should probably be regarded as an internal enquiry, utilising the services of its attorney to investigate the matters raised by the appellant. In August 2019 the attorney reported that he found no irregularity in the conduct of which the appellant had complained.

[15] On 28 October 2019 attorneys who had been engaged by the appellant wrote a letter to the board on his behalf. It made allegations of financial irregularities, mismanagement and dishonest or unlawful practices. It recorded the appellant's alleged grave concerns concerning the manner in which the Society's building projects had been carried out. It alleged that projects had been carried out in conflict with accepted standard building procedures in that "such building works" might be dangerous and require further costly remedial work. The letter recorded the appellant's demand that the members of the board should tender their resignation in writing by Friday 22nd November 2019 failing which the appellant would take steps to secure their removal.

The relief sought, and the decision of the court *a quo*.

[16] The board reacted in mid-November 2019. What the board and its members who are cited as the second to tenth respondents did, or are alleged to have done, then became the subject of the present review proceedings in which the appellant sought an order reviewing and setting aside the decisions of the board

“made on or about 15 and/or 18 November 2019 to suspend, prohibit and/or remove the applicant from:

- 1.1. attending any workshops, meetings, ashrams or premises of the Society;
- 1.2. acting as chairperson of the Cape Town branch of the Society;
- 1.3. acting as project manager on the projects committee of the Society; and
- 1.4. acting as secretary of the projects committee of the Society.”

[17] The appellant also sought what is in effect an order declaring the law applicable to the conduct of the board. He asked for a declaratory order that disciplinary decisions made by the board

“must comply with the principles of natural justice, including that any affected person must have fair prior notice of the decision that may be made against them, and a reasonable opportunity to make representations concerning that decision to an impartial and independent decision maker”.

It is not the role of a court of law to legislate for, or in effect to draft an amendment or addition to the constitution of, an association. It is the role of a court to apply legal principles to a given set of facts and circumstances. Declaring in advance what legal principles will apply, and must be observed, in all future actions of a type is likely to cause more harm than good. Not all circumstances of an alleged type are the same. The prayer for this relief was correctly not pressed before us in argument. I propose to say nothing more about it.

[18] The appellant's review proceedings were instituted in December 2020, more than a year after the decisions, or alleged decisions, of the Society were made. In its

answering papers the Society raised the issue of delay and asked that the proceedings be dismissed on that count alone.

[19] The court *a quo* was informed that the appellant was no longer pursuing paragraphs 1.1 and 1.2 of the relief he sought in the notice of motion. The issue of delay accordingly had to be considered upon the basis that the appellant sought to have reviewed and set aside decisions that he should no longer act either as project manager on the projects committee of the Society or as secretary of the projects committee of the Society. Before us the issue has been further confined. The only relief sought is setting aside the alleged removal of the appellant “as project manager on the projects committee of the Society”.

[20] The learned Judge in the court *a quo* found that the appellant had not adequately explained the delay and concluded that it was unreasonable. He found that there was no basis on the evidence before him on which he could exercise a discretion to overlook the delay, and was not satisfied that the interests of justice required the delay to be overlooked.

[21] Before us counsel for the appellant conceded that the delay was unreasonable and did not argue the point. Accordingly what is at issue is the decision of the court *a quo* that the unreasonable delay could not be overlooked.

[22] With reference to *Buffalo City Metropolitan Municipality vs Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC), the appellant argues that the Judge *a quo* erred in failing to take into account the potential prejudice to affected parties caused by not

entertaining the review, the merits of the legal challenge against the decision sought to be reviewed and the question as to whether the court is constitutionally compelled to declare conduct unlawful in terms of section 172(1)(a) of the Constitution. On the merits, it is argued that the learned Judge erred by failing to take into account that the appellant was removed without any hearing or prior notice of any kind, and therefore contrary to the rules of natural justice; and that the board was not properly constituted both because it lacked sufficient renunciates and because it was not quorate.

[23] The text of the judgment of the court *a quo* is a transcript of the judgment delivered *ex tempore*. It is brief. But one can see that the learned Judge was referred, as we were, to the principles the appellant regards as applicable, the grounds of review, and the background leading up to the decisions of November 2019. I think it goes too far to suggest that the court failed to consider the merits of the appellant's complaints. It is correct that, despite having considered the judgment in *Buffalo City*, the learned Judge did not record his assessment of the merits of the appellant's case.

[24] Mr Pillay SC, who appeared for the Society, has argued that the discretion exercised by the Judge in the court *a quo* is a discretion in the "true" sense, as a result of which it would be inappropriate for us to interfere with his decision without finding that he was influenced by incorrect principles or a misdirection, or did not act judicially. In my view that is not the correct classification of the discretion exercised in the court *a quo*. The court was not confronted with a wide range of equally permissible options. It could grant or refuse condonation of the unreasonable delay. In making that decision the court was permitted to take into account the different relevant factors canvassed in the papers before it. Notionally this court is in as good a position as was the court *a*

quo to make a decision as to whether condonation should or should not be granted. It is not necessary first to decide whether the Judge acted otherwise than judicially, or misdirected himself. Nevertheless, when considering the request to overturn the decision of the court *a quo*, an appeal court should consider broader policy considerations and act with caution. (*Trencon Construction (Pty) Limited vs Industrial Development Corporation of South Africa Limited and another* 2015 (5) SA 245 (CC), paragraphs 83 to 89.)

The legal principles relied upon by the appellant.

[25] *Buffalo City* concerned a legality review. A municipality sought to review its own conduct in concluding a contract. The appellant's arguments are presented upon the assumption that it is correct to apply principles governing the approach to condoning unreasonable delay in a legality review of state action to the common law review of the disciplinary decisions of a voluntary association. No explanation or justification for that approach has been presented to us in argument. The two contexts are quite different. I do not propose to go into this question as in this particular case following the approach we are urged to by the appellant does not affect the outcome of the appeal. However it should be made clear that this judgment does not stand as authority for the proposition that the principles governing the condonation of unreasonable delay in a legality review of state action apply with equal force to a review of the proceedings of a domestic tribunal. We make no decision on that issue.

[26] The following principles are extracted from paragraphs 53 to 70 of the judgment in *Buffalo City*, selected upon the basis that they might arguably have a bearing on the

proper approach to the question as to whether the appellant's delay in this case should be overlooked.

(a) It is a feature of the rule of law that undue delay should not be tolerated.

There is a public interest in bringing certainty and finality to administrative action and a court should accordingly be vigilant in considering overlooking a late review.

(b) A basis for the court to exercise its discretion to overlook delay must be capable of being gleaned from the facts made available, or objectively available factors.

(c) The approach to overlooking delay is flexible; context is important.

(d) Potential prejudice to affected parties as well as the possible consequences of setting aside an impugned decision must be considered.

(e) The nature of the impugned decision must be considered. In conjunction with that the merits of the legal challenge should be considered. A "clinical excision" of the merits from the factors to be considered in enquiring whether delay should be condoned is impermissible. The materiality of any deviance from legal requirements is a consideration.

(f) Another factor is the conduct of the applicant for relief on review.

The conduct of the appellant, and prejudice.

[27] On the assumption that a decision was made to relieve the appellant of his position as a project manager (a subject to which I must revert), and upon the assumption that such a stand-alone decision would be of a disciplinary nature, the appellant knew very soon after that decision would have been made that it had been made. That is clear from the fact that, for the existence of such a disciplinary decision, the appellant relies upon a letter addressed by the Society's attorneys to him on 18th November 2019 which, he said, notified him of the alleged disciplinary decision. (Thus, I think, the reference to the date "18th November 2019" in the order he seeks.) He was equally well aware of the fact that on 15th November 2019 (the other date referred to in his form of order) the board had resolved to disband the entire project management committee, a decision he does not seek to have reviewed.

[28] The appellant did not notify the board that he regarded his removal as a project manager invalid, despite the fact that he obviously knew what is common cause, that he received no notification of an intention so to remove him as a project manager and was not afforded a hearing on the subject. On the papers before the court he instead pursued his allegations of irregularities in the conduct of the board and some of its members, and complaints that others had been mistreated by the board. He knew that following the disbandment of the project management committee of which he had been a member and secretary, the board called for volunteers for positions on a new committee. He did not volunteer. He knew that following that process a new committee

was appointed in December 2019. The earliest notification from the appellant to the board that he objected to his “removal” that I am able to find in the papers is contained in a letter dated 21st September 2020 addressed by the appellant’s attorneys to the board. The subject of the letter is a call for mediation, and one of the subjects mentioned for mediation is “the improper removal of our client”.

[29] In the affidavits he has signed in these proceedings the appellant presents himself as a faithful member of the Society whose predominant if not sole concerns are the interests of the Society and its works. Implicit in everything that he says about his role as a project manager is a contention that he is the one person who proved capable of realising that project management was not running properly, and that there were indeed material irregularities in the conduct of others when making management decisions concerning the Society’s projects.

[30] Taking these factors into account, in my view it was the responsibility of the appellant to notify the board forthwith that he challenged the validity of the decision which led to him no longer being a project manager. Some subsequent delay in the institution of his review proceedings might have been understandable whilst mediation with a view to settlement was pursued. Given that, on the appellant’s case, his failure to take any steps to challenge his removal as a project manager would have meant that project management would continue to be performed in an irregular and arguably incompetent manner, the failure of the appellant to notify the board immediately in November 2019 that he contended that his removal was invalid, and to indicate that legal proceedings would be instituted if the settlement of that issue could not be reached promptly, is not readily excusable.

[31] In the result, on the appellant's version, the Society has been prejudiced by the appellant's delay both in raising a challenge to its alleged decision to remove him as a project manager, and by the subsequent further delay in instituting the review proceedings. If a challenge was to be made to the project management regime of the Society, involved as it was substantially in charitable construction works, it was necessary to avoid an extended period of uncertainty amongst its members, and potential donors, on the question as to whether the proper management of charitable funds was being undermined. Given the nature of the Society, and the responsibilities and powers of its board, it is not inconceivable that such misgivings or suspicions might take on a religious dimension.

[32] On the appellants case he would suffer no measurable prejudice if his delay was not condoned. He has laid out facts which illustrate that the relationship between him and the board had broken down entirely. His real demand was that the entire board should resign and be reconstituted in a manner not sanctioned by the constitution of the Society. A decision reviewing and setting aside his alleged removal as project manager would not easily solve any of the problems which the appellant describes, because on his own case the appellant and the present board cannot work together. The grant of the relief on review would constitute little more than a point scored in very much wider conflict. That does not constitute a ground justifying overlooking the admittedly unreasonable delay.

[33] Finally on the question of prejudice, and in case it should be thought that the obvious has been overlooked, it must be mentioned that the appellant would suffer no

financial prejudice if the review is not heard. The position of project manager is occupied voluntarily and is unremunerated. If, as a matter of fact, the appellant derived what one might call a secondary financial benefit from occupying a position of a project manager, then he has not disclosed it.

The merits of the review as a factor.

[34] I turn now to the main criticism of the judgment of the court *a quo*, that in concluding that the appellant's delay could not be overlooked, the court failed to take into account the merits of the review proceedings. *Buffalo City* is no authority for the proposition that a court considering the question as to whether unreasonable delay should be condoned must first decide the merits of the review proceedings. The merits are a factor which must be considered. The position is put as follows in *Golden Core Trade and Invest (Pty) Ltd vs Merafong City Local Municipality and another* [2023] 4 All SA 589 (SCA) para 51.

“Whether a delay should be overlooked does not and should not entail a determination of the merits of the review or collateral challenge. The merits of the challenge are to be weighed on the following basis: if the delay is to be overlooked, is there a challenge that warrants the attention of the court? In other words, whether there is a serious question to be decided. To decide the merits assumes the very jurisdiction that is yet to be determined. And more, it inevitably skews the weighing of factors that *Khumalo* requires.”

(*Khumalo and another vs Member of the Executive Council for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC)).

[35] The present case is not an occasion for a dissertation on the scope of judicial interference in the proceedings of voluntary associations. The question raised by the appellant in his review proceedings is whether, in connection with a disciplinary decision that he should be removed as a project manager, the applicable fundamental principles of justice were not observed as a result of which this court may interfere with the decision. I use the term "disciplinary" to describe the decision both because that is how the decision has been identified and treated by the appellant in his papers, and because it is in connection with decisions of that nature that our law permits judicial interference in the ordinary functioning of a voluntary association. The essential requirement for interference is that there should have been a deviation from the associations own rules concerning the process to be followed in disciplining a member of an association. The fundamental principles of justice (referred to by the appellant using the term "natural justice") apply either because the rules state so expressly, or because, given the nature of such proceedings, those principles are implied. The precise content of such implied rules is not an issue which arises in this case, and neither does any issue arise as to what the position may be if the rules state in so many words that in disciplining a member the association shall not be obliged to follow a just or fair procedure. The constitution of the Society may generate an observation that it is a licence for despotic conduct on the part of the board of the association. But it contains no provision which says that in connection with disciplinary proceedings the fundamental principles of fairness and justice should not be observed.

[36] The appellant's complaint is that a disciplinary decision against him ought to have been made by an independent body, that he ought to have been advised in advance of the complaint against him, and that he ought to have been allowed to be

heard in defence of his position. Save for the first component of his complaint (about which there may be some doubt in our law) there seems to be no contradiction between the appellant's contentions and the usually implied rules of voluntary associations dealt with in cases such as *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A). Mr Pillay conceded that if there had been a disciplinary decision that the appellant should be denied the role of project manager, those usual principles would have applied. If the board itself was conflicted because members of it were themselves involved, it had the power to appoint a committee.

[37] It is common cause that no such committee was appointed, that no notice was given to the appellant of any disciplinary proceedings and that the appellant was not heard in any disciplinary proceedings. What is not common cause is that there were any disciplinary proceedings at all.

[38] According to the appellant what brought to his notice the fact that there had been disciplinary proceedings was the letter of 18 November 2019 which he received from the Society's attorneys. The first 11 paragraphs of the letter are an account, from the perspective of the board, of the disputes which had arisen between the appellant and the board concerning the appellant's attack, especially on certain members of the board, and the complaints he had raised which, if true, would reflect poorly on the board. It is obviously all very one-sided. The twelfth paragraph of the letter then reads as follows.

"Finally, and given your clients relentless pursuance of this matter:

- 12.1. the board is of the view that your client is not fit and proper to chair the Society's Cape Town branch, or make any meaningful contribution to its project committee;
- 12.2. your client appears to be possessed of an ulterior motive that does not further the mission of the Society;
- 12.3. your clients conduct, contrary to his utterances, appears to be destined to destabilise the institution and create an atmosphere of chaos.

In the circumstances, the board is left with no alternative but to relieve your client of his duties as chair of the Cape Town branch and a member of the projects committee."

(My underlining)

[39] The record of the Society's decisions was produced. It includes relevant minutes of the meetings of the board. There is no minute or record of a decision by the board to "relieve" the appellant of his duties as a member of the projects committee. There is no record of any disciplinary proceedings directed at disciplining the appellant.

[40] There is a resolution of the board taken on 15th of November 2019 to disband the projects committee with immediate effect, upon the basis that it would be reconstituted later. This was an operational or management decision. It is the Society's case that the effect of the disbandment of the projects committee was that the members of it who were conducting themselves as project managers would no longer be regarded as project managers. As far as can be determined on the papers this has

always been the boards understanding of the position. The resolution to disband the projects committee is followed by a direction that municipalities should be informed that the appellant would no longer be operating as a project manager. The argument for the Society advanced by Mr Pillay is that if there had been a disciplinary decision it would have post-dated the decision of 15th November 2019 and would have had no effect whatsoever, as all members of the projects committee, including the appellant, were no longer on that committee and they had all been advised under the hand of the secretary of the board by letter or notice dated 16th November 2019 of the decision of the Society to dissolve the committee.

[41] Perhaps mindful of this difficulty once the record had been provided by the Society, in his supplementary founding affidavit the appellant sought to make the case that he had an appointment as a project manager quite independently of his membership of the project committee. His affidavit does not disclose when he was appointed in that fashion, and what the terms of the appointment were. The seeds of the potential rejection of this claim in the main review proceedings were laid in the way in which he framed his argument for the existence of such a position independently of membership of the projects committee. He states that it is obvious that the position of project manager is separate and distinct from service on the projects committee. It is obvious because “many people serve on the projects committee who are not also the projects manager”. Far from being obvious, the argument does not logically support the conclusion that there is a separate office of project manager.

[42] Furthermore the wording of the relief sought in the notice of motion suggests that in truth the appellant always saw the position as the board does. He asked for an order reviewing and setting aside the decision of the board to remove him from “acting as project manager on the projects committee of the Society”.

It is self-evident that if the projects committee of the Society was dissolved, the appellant automatically ceased to be a “project manager on the projects committee of the Society”. The decision to dissolve the committee was an operational or management decision. That is presumably why it was not challenged by the appellant.

[43] I conclude that on this, the main pillar upon which the appellant rests his claim to have prospects of success, the appellant has failed to establish that his case is a compelling one which demands a hearing.

[44] I turn to the contention that the board was not properly constituted at the material time. The supplementary submission, that when the board allegedly made a disciplinary decision affecting the appellant, it was not quorate, was not pressed in argument. In terms of the constitution a quorum is five members of the board. There is no evidence that any decision which may have a bearing on these proceedings was taken by board members numbering less than five.

[45] The constitution to which I have referred to in this judgment is the one signed at Durban on 1st September 2007, and produced by the appellant as an annexure to his founding papers. It provides that the board shall consist of at least five and not

more than eighteen members. The Society's answering papers admit that the constitution annexed to the founding affidavit is the constitution of the Society.

[46] The contention that the board was not properly constituted is directed at both its numbers and composition. In his replying affidavit the appellant introduced another (unsigned) version of the constitution which he had plucked from papers delivered in an application which bears a 2008 case number. The advantage he seeks to gain from that is that this different version of the constitution provides for the board to be comprised of at least ten and not more than twenty-one members. In his replying affidavit he in effect challenged the Society to deliver a fourth set of affidavits to deal with his contention in reply that this second version of the constitution is in fact the correct one. It is argued that the Society's failure to take up that challenge would lead the court hearing the review to conclude that the second version of the constitution is the correct one.

[47] This argument is without merit.

- a) Once the Society accepted as true the allegation by the appellant in his founding affidavit that the signed constitution is indeed the constitution of the Society, each of the parties was in the position of a litigant who had made an admission. There was no *lis* between the parties as to the text of the constitution. The door was closed against the introduction of any other version of the constitution. To open it the appellant would have had to apply for leave to supplement his founding affidavit with an affidavit explaining his error in recognising the signed constitution, and proving the provenance of the second version. He would have been asking for leave to withdraw a

material admission. The appellant had no right to pursue that course in reply.

- b) The evidence relied upon by the appellant is an extract from the affidavit of the person who produced the second version of the constitution in the proceedings dating from 2008. It is hearsay and inadmissible.
- c) The heading of the second version of the constitution reveals that, if it had been approved, it would have been passed by way of an amending resolution of the board of management “dated 2008”. The date of the amending resolution does not appear in the document, and it is unsigned at the end.

[48] The appellant then relies on a document which is appendix 1 to the Society’s constitution headed “Important decisions taken by the board of management”. It contains a list of dated decisions taken by the board of management between 1998 and 4th August 2007; that is to say decisions which the board had taken before the constitution was signed on 1st September 2007. The appendix reflects a board decision made on 15 March 2003 that the board would comprise both householders and renunciants. The appellant’s argument is that the board was comprised wholly of householders.

[49] There are in fact two appendices to the constitution. Appendix 2 is headed “Restrictions on named persons”. Some of them have been banned for life from the Society. Others have been forbidden from living at a certain place such as La Mercy. Yet others had restrictions placed on them as to how they might participate in the Society’s affairs.

[50] Appendix 1 contains similar restrictions on particular persons, and otherwise furnishes directions as to behaviour and the conduct of religious devotion. Clause 33 of the constitution introduces the two appendices.

“The following appendices are supplementary attachments to this constitution”.

The appellant relies upon the judgment of Sibiya AJ in *Parshotam v Divine Life Society of South Africa and others* [2023] ZAKZDHC 100 (22nd December 2023) which holds that appendix 1 contains provisions of the constitution; as a result of which, by reason of the March 2003 decision of the board, there is an additional requirement concerning the composition of the board, that it should include renunciants. This is no occasion to make a decision as to whether on this issue *Parshotam* was correctly decided. We are not deciding the review, but rather considering its potential merits. However, there is a substantial argument for the proposition that on this issue *Parshotam* was wrongly decided. Most of the so-called important decisions made and recorded in appendix 1 are not constitutional provisions at all. But the decision of March 2003 (the last one on the subject of the composition of the board) is of a type that could be regarded as suitable for inclusion in a constitution. But why, if it was intended to entrench in the constitution a requirement that there should be both renunciants and householders on the board, was it not included in the clause which provides that the board should consist of at least five and not more than eighteen members? The constitution provides for its amendment following a special procedure. If it was seriously contemplated that the March 2003 decision of the board could only be amended following that procedure, then it is startling indeed that the requirement that the board should comprise both householders and renunciants was not included in the text of the constitution.

[51] As it turns out it is common cause on the papers that of the ten members of the board appointed at the time material to the review proceedings, eight were householders and two renunciants. However, the two renunciants were under suspension; but they were not removed from office.

[52] The conclusion must be that if the merits of the review were to be decided, the appellants prospects on the ground that the board was wrongly constituted does not enjoy good prospects.

[53] The submission made by counsel for the appellant is that a consideration of the merits of the review proceedings must result in a conclusion that the appellant would enjoy good prospects of success. In my view that submission is wrong. Accordingly, the submission that in terms of section 172(1)(a) of the Constitution of the Republic of South Africa a court confronted with review proceedings such as these is compelled to declare conduct unlawful "where the unlawfulness of the impugned decision is clear and not disputed" also lacks a foundation. (Why section 172(1)(a) of the Constitution applies to common law review of domestic tribunals or private associations was not explained in argument for the appellant.)

[54] Finally, in support of his argument that his delay should have been overlooked, the appellant argues that the Society, through the deponent to its affidavits, has committed perjury (or rather statutory perjury), and that such conduct ought not to pass uninterrogated and undecided, merely because of the appellant's delay in pursuing his review. This alleged conduct post-dates both the events which are the subject of the review proceedings, and indeed the institution of review proceedings. There would be

no need for the court determining the review to consider the question as to whether any false evidence had been put up by the Society concerning events which happened later. I am in any event quite unsatisfied that the appellant's accusations of perjury have been established, even *prima facie*.

Conclusion.

[55] After examining the material that the appellant says the learned judge *a quo* ought to have considered but did not consider, no reason to upset the decision of the court *a quo* emerges. Those considerations aside, the judge's finding that the delay was unreasonable is no longer challenged. In my view his finding is unassailable that, on the evidence before him, there was no basis on which he could exercise his discretion to overlook the delay.

[56] The Society launched an application in advance of this appeal to be permitted to lead further evidence of events which post-dated the judgment of the court *a quo*. The evidence is to the effect that a decision had been made to disband the project management committee altogether as a result of which there is no position left for the appellant to occupy if he should succeed in the appeal. The application to lead further evidence was opposed. There is no need to consider the application as granting it would not affect the outcome of this appeal.

[57] The following order is made.

- a) The appeal is dismissed with costs, including the costs of two counsel where employed. The costs of senior counsel shall be taxed on scale C and those

of junior counsel on scale B.

- b) There shall be no order as to the costs incurred in the application to lead further evidence.


Olsen J


Mathenjwa J


Zwane AJ

Case Information:

Judgment reserved:
Judgment delivered:

31 January 2025

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