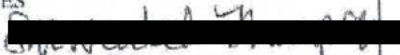


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2023-116557

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
14/3/2024	
DATE	SIGNATURE

PHEKO MPHO, JOHN

First Applicant

HLAKOTSA, TUMAKA RAYMOND

Second Applicant

MOLOI, THABO KOOS MOKOENA, NTELE NICODEMUS

Third Applicant

SHABANGU, MOKONE PAUL

Fourth Applicant

and

MADUNA, EDWARD EPHRAIM

First respondent

CINDI, PETROS MOKETE

Second Respondent

MALEKA, JONAS MOSEBETSI

Third Respondent

SWARTBOOI, NTELEI GABRIEL

Fourth Respondent

**AFRICAN PRESBYTERIAN BAFOLISI
CHURCH OF SOUTHERN AFRICA NPC**

Fifth Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Sixth Respondent

Introduction

- [1] This is an application brought by certain members of the African Presbyterian Bafolisi Church of Southern Africa ("*the Church*"), cited as the fifth respondent. The applicants seek declaratory and interdictory relief arising from the alleged unlawful registration of the Church as a non-profit company ("*NPC*") with the Companies and Intellectual Property Commission ("*CIPC*"), cited as the sixth respondent. The first, second, third and fourth respondents are alleged to be directors of the NPC, who I will refer to for convenience simply as "*the respondents*". However, I point out at the outset that at the time that the application was launched, Maduna was no longer a director of the NPC.
- [2] The relief sought can be categorised as follows:
- a. Declaratory relief: Declaring the registration of the Church as a NPC to be null and void.
 - b. Administrative relief: Authorising the applicants to approach the CIPC to de-register and remove the Church as an NPC.
 - c. Governance relief:
 - i. Directing that the Constitution of the church be used to elect a new leadership structure.
 - ii. Removing the respondents as directors of the NPC.
 - iii. Ordering the respondents to vacate their positions as directors of the Church and directing the CIPC to remove their names as directors.
 - d. Interdictory relief: Interdicting the respondents from:
 - i. occupying leadership or management positions in the Church;
 - ii. using the resources, funds and facilities of the Church;
 - iii. representing the Church at meetings or forums; and

- iv. acting as signatories to the Church's bank accounts.
- e. Interim Administrative Control: Granting the Church powers to appoint an interim leadership structure pending elections.
- f. Ancillary Relief: Directing the respondents to return the property belonging to the church.
- g. Costs in the event of opposition.

[3] Only Edward Ephraim Maduna ("Maduna") opposes the application.

Condonation

- [4] I note that the applicants insist that Maduna seek condonation for the late filing of his answering affidavit. This was a purely technical point aimed at getting me to disregard Maduna's answering affidavit.
- [5] In any event, Maduna did in fact seek condonation in his answering affidavit and it is overly technical to insist that he bring a separate application for condonation supported by a notice of motion. There was no prejudice suffered by the applicants as they have dealt with all of the allegations made in the answering affidavit in their replying affidavit. It is in the interests of justice that I grant condonation for the late filing of Maduna's answering affidavit.

Background and pertinent facts preceding the current application

- [6] The Church was established in 1908 and operated as a voluntary association serving Christian communities in several provinces of South Africa. The Church had historically operated as an unincorporated voluntary association. The affairs of the church are governed by its Constitution, which establishes a hierarchy of governance structures, including the Presiding Bishop and other office bearers. The Synod is the highest decision-making body within the Church and its resolutions are binding upon the Church and its members.
- [7] Around the early 2000s, the Church was headed by the late M. Moloi as its presiding Bishop. As per its Constitution, there were other office bearers, for

example, a Treasurer and a General Secretary, that assisted the late M Moloi in the leadership of the Church and in the execution of its duties.

- [8] In and around 2010 internal conflicts and factional disputes arose within the ranks of the Church and plans were set afoot to remove the late Bishop from his position. Amongst others, his advanced age and financial mismanagement were cited as the main reasons for the discontentment. Following the removal of the late Moloi from his position as Bishop, the internal conflicts, factional disputes and leadership contests intensified and it appears that splinter groups developed, with the applicants on the one side and the respondents on the other, although this appears to be a little more complicated as will appear below in this judgment.
- [9] In 2015, the Church was registered with the CIPC as a NPC under the Companies Act 71 of 2008 (*"the Act"*). The applicants contend that this registration took place without a resolution from the Synod authorising the conversion of the church into a NPC as prescribed in the Church's Constitution. In addition, the respondents registered themselves as directors of the NPC without proper authority from the Synod.
- [10] Moreover, the applicants complain that the respondents changed the principal place of business of the Church from Bethlehem to Wesselsbron without authority. The applicants complain further that the respondents placed the church under onerous company law governance provisions without proper approval of the Synod, obliging the Church to incur costs to ensure compliance and placing the Church at risk of incurring penalties in the event of non-compliance.
- [11] The applicants state that the respondents in fact failed to comply with the prescribed governance provisions set out in the Act in that they:
- a. failed to adopt a Memorandum of Incorporation (*"MOI"*);
 - b. failed to file the required annual financial statements and reports; and
 - c. acted in their own interests rather than the interests of the church.
- [12] During 2018, Maduna was removed as a director of the NPC. Maduna argues that his name was fraudulently removed from the register of directors held by the

CIPC and replaced with that of Shadrack Nkomo Moloi ("Moloi"), not the third applicant in these proceedings with the same surname. Maduna insists that the applicants were aware of his allegedly fraudulent removal as a director of the NPC and in fact encouraged him to report the matter to the police. In view of this, Maduna contends that he ought properly not to be joined to these proceedings and Moloi should have been joined in his stead.

- [13] Maduna concedes that, following his removal as a director of the NPC, he has headed up a Church under the name "*the African Presbyterian Bafolisi Church of Southern Africa*", the precise name of the Church that is the subject matter of this application. Maduna denies that this is the NPC with the same name as the entity he now trades under is a voluntary association. Maduna now appears to argue that the business of the Church when it was a voluntary association was not transferred to the NPC following its incorporation and thus denies that the NPC replaced the entity through which the Church traded as a voluntary association. Maduna thus now disputes that the voluntary association formed in 1908 ceased to exist in law following the incorporation of the Church as an NPC and contends that it continues to trade as the Church, now under his leadership.
- [14] This is contrary to the stance take in pending proceedings in the Bloemfontein High Court under case no 2341/2022, which I requested be uploaded. In these proceedings, Moloi is the deponent to the founding affidavit and the second applicant, Tumaka Raymond Hlakotsa ("*Hlakotsa*") is the deponent to the respondents' answering affidavit. Maduna and the current applicants are all cited as respondents in those proceedings, amongst other respondents, and aligned themselves with the contents of the answering affidavit and counter-claim brought against Moloi and the other applicants. For convenience I will refer to this matter as the "*Bloemfontein proceedings*."
- [15] In the Bloemfontein proceedings, Moloi alleged that the respondents, who had been expelled from the Church, had hijacked the Church's premises owned by the Church at various sites around the country and masqueraded, not only as members of the Church, but also as part of the leadership of the Church. Moloi sought interdictory relief against the respondents from alleging they were members of the Church, that they were part of the leadership of the church, from

conducting Church services from property owned by the Church and from utilising any property belonging to the Church.

- [16] What is interesting is that in response to Moloi's application, Hlakotsa stated in his answering affidavit that, following upon the incorporation of the Church as a NPC, the voluntary association ceased to exist, and with it, the Church's Constitution; he thus insisted Moloi could no longer rely upon the Church's Constitution as the NPC now fell to be governed as a corporation in terms of its MOI. In the counterclaim, relief was sought declaring Moloi's nomination and election as the Bishop of the Church to be null and void and declaring Maduna's position as acting Bishop to be lawful and constitutional until elections could be held.
- [17] What is sought further in the counter-application is an order declaring that the respondents/applicants in the counter-application are the lawful and constitutional leadership of the Church and in lawful possession of the properties registered in the Church's name. In addition, the respondent/applicants in the counter-application sought an order, similar to that now sought by the applicants in the current proceedings, that the incorporation of the Church as a NPC was unlawful and unconstitutional and should be set aside. This is an aspect I am called upon to decide, which is indeed pending in the Bloemfontein proceedings, which is an aspect to which I will return in due course.
- [18] In the answering affidavit Hlakotsa explained that Maduna had been elected Bishop at the Synod meeting held in December 2013 for a period of 5 years. It was argued that the elections held in 2018 electing Moloi as Bishop were unlawful and should be set aside. On 9 September 2017, a vote of no confidence had been brought against the then Bishop, Nteleli Gabriel Swartbooi ("Swartbooi"), who is the fourth respondent in the current proceedings. This vote of no confidence was apparently not challenged by Swartbooi. Following Swartbooi's removal as Bishop, Maduna was appointed as acting Bishop until elections could be held in December 2018.
- [19] It must be mentioned that in the answering affidavit Hlakotsa refers to the fraudulent removal of Maduna as a director of the NPC by Moloi in respect of

which a fraud case is pending. At this stage, therefore, Maduna was firmly in the camp of the respondents in the Bloemfontein proceedings.

- [20] It is also of some significance that in paragraph 67-69 of the answering affidavit Hlakotza argued that on the registration of the Church as an NPC, the Church as a voluntary association ceased to exist in law and in fact. So, it was argued, on registration with the CIPC as a NPC, the Church effectively developed into the NPC and the Church as a voluntary association and had no concurrent existence. Accordingly, so the argument went, in so far as Moloi and the other applicants sought to rely on the Constitution of the voluntary association to justify their actions, such justification and reliance had no merit at all. This, of course is contrary to the stance taken in the present proceedings. This was a position that Maduna aligned himself with in the Bloemfontein proceedings.
- [21] Maduna argues in these proceedings that the question as to who controls the Church and the legal status of the voluntary association is an issue pending in the Bloemfontein proceedings; he thus pleads *lis pendens* in these proceedings. However, what he says in these proceedings is contrary to the position taken by the respondents, including, Maduna in the Bloemfontein proceedings that on incorporation of the NPC, the Church as a voluntary association ceased to exist.
- [22] In the current proceedings, Maduna states in paragraph 4.1 of his answering affidavit that:

"4.1 From the outset I wish to state that the Applicants are not approaching the Honourable Court with clean hands. This I say because I am not a director of the Fifth Respondent and I find it very strange that the Applicants have cited me in their application as a director and member of the Fifth Respondent when they are well aware that I was fraudulently removed as a director during 2018. I reiterate that the Applicants have provided this Honourable Court with outdated records of the Sixth Respondent when they have full knowledge that I was fraudulently removed as a director and that Shadrack [Moloi] was appointed in my place as director of the Fifth Respondent. The Applicants together with my congregation had encouraged me to lodge a complaint with the Sixth Respondent and to open a criminal case of fraud and forgery with the South African Police. The Applicants are also aware that I have since my removal never conducted any business in the name of the Fifth Respondent and that I have no business and or dealings with the Second, Third and Fourth Respondent. I am currently conducted business/operating under the name of The African Presbyterian Bafolisi Church of South Africa (hereinafter referred to as "The

Church"), which is not the Fifth Respondent but a voluntary association" (emphasis added.)

[23] At paragraph 4.3.5, goes on to explain that:

"During 2015 that the Fifth Respondent (hereinafter referred to as "The NPC") was incorporated and registered with the Sixth Respondent. At that stage I was appointed as director with the Second, Third and fourth respondents as directors. At that Stage I was the Bishop with the Fourth Respondent [Swartbooi] as the Presiding Bishop, the Second Respondent [Petros Mokete Cindi ("Cindi")] as the General Secretary and the Third Respondent [Jonas Mosebetsi Maleka ("Maleka")] as the Deputy General-Secretary. All information relating to the incorporation of the NPC, I belief must be in the possession of either the Second, Third or Fourth Respondent;"

[24] Maduna then seeks to explain his change of stance in the current proceedings in paragraph 4.3.6:

"My understanding of incorporating and registering of the NPC was that the church as a voluntary association would cease to exist and that the NPC would become the church. This however were not achieved because of infighting, squabbles, disunity and lawsuit;"

[25] He added to this explanation in paragraph 4.3.11:

"Myself and the applicants proceeded to operate under the name of the Church because we believed that we are the legitimate church and that Shadrack together with the Second, Third and Fourth Respondents are part of a splinter group which had hijacked the NPC.

[26] He went on to state in paragraph 4.3.12:

"I need to mention that myself, the First and Second Applicant together with other members of the church registered the church with the National Register of Independent Churches (hereinafter referred to as "NRIC") and was issued with a registration certificate. We were later informed by NRIC that they were requested to remove the church from their register by Shadrack."

[27] Maduna's relationship with the applicants obviously went sour when on 9 December 2023, they were expelled by the Synod as members of the Church. There is some confusion whether this occurred in 2017 but the confirmatory affidavit relied upon to establish their expulsion states that it occurred on 9 December 2023.

- [28] Maduna explained that during 2017, Hlakotsa tabled a vote of no confidence against Swartbooi, following which Moloi, Cindi and Maleka were expelled from the Church. It was after they were expelled that Moloi and the respondents in the current proceedings set about fraudulently removing him (Maduna) as a director of the NPC. It was shortly after their having secured the removal of Maduna as a director during 2018 that Moloi et al instituted proceedings in Bloemfontein under case no. 2140/2018 challenging their expulsion which was decided on 28 November 2019. These proceedings are separate to the proceedings brought in Bloemfontein under case no. 2341/2022.
- [29] In those proceedings Moloi asserted his control over the NPC and argued that he retained control of all property registered in the Church's name as the voluntary association continued to exist following the incorporation of the NPC and has since then existed alongside the NPC. He maintains that when incorporating the NPC it was the intention to transfer the properties belonging to the Church to the NPC.
- [30] It would thus seem that both the legal status of the Church and the ownership of the property owned by the Church is indeed the subject of the pending legal proceedings in Bloemfontein. Should I make an order as now requested in these proceedings that the registration of the Church is null and void, removing Maduna (who has established he is no longer a director of the NPC), Cindi, Maleka and Swartbooi as directors of the NPC, and interdicting them from occupying leadership positions in the Church, using the resources and funds of the Church, representing the Church and acting as signatories on the Church's bank accounts, I will effectively be sterilising the camp who maintain that the Church and its assets now operate under the umbrella of the NPC. The effect would be that control over the Church and its assets would pass to the applicants.
- [31] This is precisely what Moloi seeks to achieve in the Bloemfontein proceedings in which he seeks that the current applicants and several other respondents cease occupying and running services from the Church's various properties and misrepresenting that they are part of the leadership structures of the Church. This makes the non-joinder of Moloi pertinent as he would clearly have a direct and substantial interest in these proceedings.

- [32] What is more, in the Bloemfontein proceedings the applicants have themselves sought to declare the incorporation of the Church as an NPC invalid and unlawful for failure to obtain the requisite consent of the Synod. This is precisely the declaratory relief sought from me in these proceedings raising the distinct possibility of conflicting judgments.
- [33] Although Maduna is no longer a director of the NPC, he has clearly opposed these proceedings as the interdictory relief sought is not tied to the relief sought against the directors of the NPC; what is sought is that he and the extant directors be interdicted from occupying leadership or management positions in the Church, using the resources, funds and facilities of the Church, representing the Church and meeting or forums and acting as signatories on the Church's bank accounts. As Maduna states that he is currently in command of the Church and trading through the voluntary association, the aforementioned interdict would preclude him from continuing doing so.
- [34] It is readily apparent that there are three distinct factions seeking control over the Church, the current applicants, Moloi and Maduna, all of which are playing out in the current proceedings and before the court in Bloemfontein.
- [35] Should I grant the orders sought and it is found that the business of the Church was never transferred to the NPC by the Court in Bloemfontein, this will render any interdictory relief granted by me against the second, third and fourth respondents to be entirely academic.
- [36] Moreover, should I grant the interdictory relief sought, I will cut the leadership position in the Church Maduna professes to hold beneath his knees, notwithstanding that he is no longer a director of the NPC.
- [37] Should I grant the interim relief sought and direct that elections be held to determine who should occupy leadership positions in the Church, with the applicants' opponents out of the picture, it can be assumed that the applicants will seek to gain control over the Church and its assets. As Moloi is a director of the NPC he would be bound to relinquish his directorship and would also be precluded from holding any leadership positions in the Church, making it all the more obvious that he should properly have been joined to the current

proceedings. Although this would not preclude his continuing the Bloemfontein proceedings as he was a director of the NPC at the launch of those proceedings, it would substantially weaken his position in those proceedings.

- [38] What is patently obvious is playing out before me in these proceedings is simply a power struggle between the three aforementioned factions seeking to wrestle control over the Church and has nothing to do with corporate governance. The Church was incorporated as an NPC during 2015 and the applicants failed to complain that no resolution authorising such incorporation was obtained from the Synod. It is only now that this is raised because Moloi, on the one hand, and Maduna on the other, are seeking to gain or have gained control over the Church, its property and its assets.
- [39] Maduna argues that the current application is vindictive and serves the sole purpose of disqualifying him from becoming a director of any company to be formed, it is assumed to continue the business of the Church. He contends that the application is vexatious in so far as it concerns him.
- [40] The stance taken by Maduna in these proceedings is somewhat contradictory as he was clearly instrumental in securing the conversion of the voluntary association to a NPC in 2015 and his own appointment as a director of the NPC. It would appear that only following his alleged fraudulent removal as a director, and Moloi's appointment in his stead, has he disputed that the business of the Church was indeed transferred to the NPC and now, rather opportunistically, maintains that he has continued to trade under the name of the Church, which he now claims did not cease to exist following the voluntary associations conversion to a NPC as he had claimed in the Bloemfontein proceedings.
- [41] Indeed, Maduna alleges that since his removal as a director of the NPC he has operated under the name of the Church as a voluntary association, as it had done since it was founded in 1908. He states that his church operates under the same Constitution set out by the applicants in their founding affidavit. It is not without significance that following the removal of Maduna as a director of the NPC, the applicants were all expelled from the Church. He then operated under the name and style of the Church to their exclusion.

- [42] There is, however, a twist in the background facts preceding the current application: Maduna states that the registration of the NPC with the CIPC was cancelled on 30 November 2020, whereafter it was registered as a voluntary association again. If this is true, it is difficult to see the purpose of the current application and this is a material dispute of fact that cannot be resolved on the facts before me. I will deal with this later in my judgment, save to state at this stage I have my reasons why in accordance with the Plascon Evans Rule I should not simply accept Maduna's version on this, without any supporting documentation.
- [43] Furthermore, although on 13 May 2015 the Church was registered as a company, with the respondents all being directors and shareholders of the company, on 10 December 2020, the Church, which had been registered on 30 January 2009 was removed from the National Register of Independent Churches. This is the year before the late Moloi was removed as the Bishop of the Church. The second applicant, Hlakotsa was apparently aware of this.
- [44] The plot thickens, as on 28 February 2021, Hlakotsa wrote a letter to the CIPC in which he sought to be heard regarding the complaint lodged by Maduna concerning his removal of as a director of the NPC. He stated that at the time of the conversion of the voluntary association to an NPC, the members of the Church were assured that they would be shareholders of the NPC. However, it was pointed out that the person mandated to attend to the incorporation of the company (who was not identified) failed to conclude a MOI.
- [45] Also in this letter, Hlakotsa stated that on 9 and 10 December 2017, Cindi, Maleka and Swartbooi were expelled as members of the Church and ought to have been removed as members of the NPC. After their expulsion, it was stated in the letter that the aforementioned directors of the NPC then set about removing Maduna as a director of the NPC. It was alleged in the letter that the removal of Maduna as a director of the NPC had been orchestrated by Moloi. At this time it was stated, Moloi was about to launch proceedings in the Bloemfontein High Court under case no. 2140/2018 challenging his and the other members' expulsion. The application in the aforementioned matter was launched on 26 April 2016 and is the application under case no. 2140/2018 mentioned earlier in this judgment.

[46] It is readily apparent to me that the true motive behind the present application is to gain control over the Church and ensure that it does not operate as a NPC. This can be gleaned from the definition of a NPC in the Act. There a NPC is defined as:

"a company

(a) incorporated for a public benefit or other object as required by item 1 (1) of Schedule 1; and

(b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1 (3) of Schedule 1."

[47] Item 1(3) of Schedule 1 provides:

"The Memorandum of Incorporation of a non-profit company must set out at least one object of the company, and each such object must be an object relating to a cultural or social activity, communal or group interests, or any other object not involving the carrying on of business for profit."

[48] In essence, therefore, item 1(3) reinforces the principle that NPCs exist to pursue public, communal, or social objectives rather than commercial profit. It has become well-known that churches are good business and generate large profits from the contributions of its members, often distributed amongst the church's controllers. For so long as the Church remains a NPC, it is not permissible for the applicants' faction or the faction operated by Maduna or Moloi to lawfully divert the income of the Church to its controllers.

[49] All the foregoing facts and circumstances tend to support my view that what is truly behind the current application is not that which is on the papers before me. What I am certain of is that the present dispute is not about a genuine concern for the governance of the NPC but is all about money and the control over the leadership and assets of the Church.

[50] I turn now to deal with the *in limine* points raised by Maduna.

In limine points raised by Maduna

[51] Maduna has raised a number of issues *in limine* concerning jurisdiction, mis-joinder and non-joinder, *locus standi*, authority and *lis pendens*. These are dealt with in turn.

a. *Jurisdiction*

[52] The first *in limine* point raised is that this Court lacks jurisdiction because the principal place of business of the Church is situated in Bethlehem in the Free State.

[53] This is easily disposed of. Section 21(1) of the Superior Courts Act 10 of 2013 provides that a High Court has jurisdiction over all persons residing or being within its area of jurisdiction. It is common cause that Maduna resides within the jurisdiction of the court; it is not required that all the respondents reside within the court's jurisdiction.

[54] Indeed, Maduna's counsel did not pursue this point in argument.

b. *Non-joinder and misjoinder*

[55] Maduna disputes that he currently serves as a director of the NPC. He alleges that, to the knowledge of the applicants, he was removed as director in 2018 and replaced by Moloi, who has not been joined in these proceedings.

[56] The test for non-joinder is whether a party has a direct and substantial interest in the order sought.

[57] This principle was articulated by the Supreme Court of Appeal in *Amalgamated Engineering Union v Minister of Labour*¹, and reaffirmed in *United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd*.² A party with a direct and substantial interest in the order sought must be joined.

[58] Maduna argues that the relief sought by the applicants directly concerns the validity of the registration of the Church and the authority of those who purported to act as directors. Moreover, the relief sought by the applicants includes the removal of directors and the restructuring of the governance of the Church. Such

¹ 1949 (3) SA 637 (A)

² 1972 (4) SA 409 (C)

relief would directly affect the rights of the current directors of the company. The failure to join Moloi thus constitutes a material non-joinder.

[59] Maduna states that in March 2024, the applicant's attorney's attention was drawn to the non-joinder of Moloi, yet no steps were taken to join him.

[60] I have already stated that I am of the view that Moloi should properly be joined to these proceedings and that I ought not to make any order in these proceedings unless and until he has been joined.

[61] On the other hand, Maduna insists that he ceased to be a director in 2018, when Moloi replaced him; and he has thus been improperly joined in these proceedings. Maduna submits that the applicants have deliberately relied on outdated company records evidencing him as a director instead of Moloi and has attached updated company records to prove this.

[62] Maduna argues that Hlakosta's letter dated 28 February 2023 referred to above demonstrates that at least as at that date, Hlakotsa was aware of the registration of the Church as an NPC and that he had been removed as a director of the NPC. This notwithstanding, he has been cited as a respondent in the current proceedings and interdictory relief has been sought against him. Maduna argues that as he is no longer a director of the NPC, no interdictory relief can be sought against him.

[63] It is my view that Maduna was joined to the proceedings by the applicants, although they know full well that he is no longer a director of the NPC, because they know they will kill two birds with one stone and deliberately framed the interdictory relief sought in the notice of motion broadly so that it would preclude Maduna continuing to run the Church as he has clearly been doing. They make no mention of this in their papers at all and appear to seek relief against Maduna based solely on the fact he is a director of the NPC. Indeed, the central issue in this application is whether the incorporation of the Church as an NPC had been authorised, with the remaining relief sought flowing from a positive answer to this question.

- [64] However, that does not mean that Maduna ought not to have been joined to the proceedings. Of interest to Maduna is the declaratory relief sought declaring that the incorporation of the Church as a NPC was *ultra vires* the Constitution, invalid and should be set aside, as it would appear that he was instrumental in converting the voluntary association into a NPC; this is particularly so as it is alleged that this was done without the authority of the Synod. I thus find that it was appropriate that Maduna be joined to the current proceedings but not that interdictory relief be sought against him as he is no longer a director of the NPC.
- [65] Should the applicants wish interdictory relief against him other than as a director of the NPS, it was incumbent upon them to establish a basis for this, and at least a clear right to the relief sought.

c. *Locus Standi*

- [66] The requirements for *locus standi* are the mirror of that for non-joinder and as articulated in *Goss and Others v Venter*,³ and reaffirmed in *Wheel Drive Accessories Distribution CC v Leshni Rattan NO*,⁴ and requires that the applicants must demonstrate a direct and substantial interest in the subject matter of the litigation.
- [67] Maduna contends that the applicants were expelled from the church following internal disciplinary processes and therefore lack standing to challenge the governance of the church and to bring the current proceedings. The applicants dispute this and maintain that they remain members of the church and have a legitimate interest in its governance. In this regard the applicants point out that their expulsion has been challenged by them through the Church's authorised and mandated Judicial Committee which has not pursued the matter further against them.
- [68] Maduna argues that the applicants have not produced documentary evidence establishing their current membership, notwithstanding that they bear the onus to demonstrate their standing. However, as the validity of their alleged expulsion is disputed and has been referred to the Judicial Committee for reconsideration,

³ 2009 (1) SA 356 (T)

⁴ 2017 (5) SA 299 (SCA)

and it is not disputed that the applicants were members of the Church prior to its conversion to a NPC, I am satisfied that the applicants have sufficient interest in the governance of the church to confer standing for the declaratory relief sought in prayer 1 of the notice of motion. As the remaining relief flows as a necessary consequence of this relief, I find that the applicants have sufficient standing to seek the relief sought in the notice of motion against the respondents, but not against Maduna.

[69] Moreover, and perhaps more importantly, it appears from Mbathane Peter Gaba's confirmatory affidavit attached to Maduna's answering affidavit that the applicants were expelled at the sitting of the Synod on 9 December 2023. As the current proceedings were launched on 6 November 2023, the applicants had *locus standi* at the relevant time, being the date of institution of proceedings and not the date of the hearing of the proceedings.

[70] I am thus satisfied that the applicants have *locus standi* to bring the current proceedings.

d. *Authority*

[71] Maduna further contends that the applicants lack *locus standi* to bring the present proceedings because they have not been authorised by the Synod to bring the proceedings, nor is it likely that they could be so authorised as they are currently suspended from the Church.

[72] However, the applicants do not purport to bring the current proceedings in the name of the Church and bring the application as affected members of the Church.

[73] I thus dismiss this point *in limine*.

e. *Lis Pendens*

[74] A plea of *lis pendens* constitutes a dilatory defence aimed at preventing the duplication of litigation and the possibility of conflicting judgments in respect of the same dispute. The requirements for the successful invocation of the plea are well established in our law. The party raising the defence must demonstrate that the litigation in question involves the same parties (or their privies) litigating in

the same capacities, the same cause of action, and the same relief, and that the earlier proceedings are still pending before a competent court. These requirements correspond closely with those applicable to the defence of *res judicata*, save that in the case of *lis pendens* the earlier proceedings have not yet been finally determined.

[75] The Supreme Court of Appeal reaffirmed these principles in *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC*,⁵ where it held that a plea of *lis pendens* requires the existence of the threefold identity of parties, cause of action and relief, and emphasised that the doctrine serves to prevent a duplication of proceedings and the risk of inconsistent judgments. Similar observations were made in *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*,⁶ where the court explained that the principles underlying *lis pendens* and *res judicata* are rooted in the need for finality in litigation and the avoidance of a multiplicity of actions concerning the same subject matter.

[76] Importantly, even where the technical requirements for *lis pendens* are satisfied, a court retains a discretion whether to uphold the plea. This discretion arises from the court's inherent power to regulate its own process and to ensure that justice is done between the parties. In *Loader v Dursot Bros (Pty) Ltd*,⁷ the court recognised that the doctrine is grounded in considerations of equity, fairness and convenience, and that a court may decline to uphold the plea where the circumstances so warrant. Accordingly, where the threefold identity between the two proceedings is established and the earlier matter remains pending before a competent court, the later proceedings will ordinarily be stayed or dismissed unless the interests of justice indicate otherwise.

[77] I propose to deal with the requirements for the defence of *lis pendens* as follows:

⁵ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) para 2; *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) para 2.

⁶ *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16.

⁷ *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) at 139; see also *Kerbel v Kerbel* 1987 (4) SA 895 (W) at 901-902.

a. *The same parties*

[78] In principle, the plea of *lis pendens* requires that the litigation be between the same parties, but the requirement is not applied with rigid formalism. The courts have held that it is sufficient if the parties in the two proceedings are substantially the same or are litigating in respect of the same interests, even if they are not perfectly identical in number or description. The decisive inquiry is whether the parties in the second matter are the same as, or in legal privity with, those in the earlier proceedings, such that the determination of the pending matter will effectively dispose of the dispute between them.

[79] The requirement that the parties be the same must therefore be understood in a substantive rather than purely formal sense. Thus, the presence of additional parties in one set of proceedings will not necessarily defeat a plea of *lis pendens*, provided that the core dispute between the parties common to both proceedings is the same and the earlier proceedings are capable of determining the issues raised in the later action.

[80] Although the traditional formulation of the defence requires identity of parties, cause of action and subject-matter, our law does not apply those requirements with mechanical rigidity. The true inquiry is whether the two proceedings concern the same *lis*, such that permitting both to continue would duplicate litigation and create the risk of contradictory judgments. Thus, while the defence is classically expressed as requiring the same plaintiff to sue the same defendant for the same thing arising from the same cause, the Supreme Court of Appeal has made it clear that, where the circumstances justify it, the requirements are not to be applied formalistically, and that what is decisive is whether the central issue is substantially the same in both matters and whether the parties are, in substance, the same for purposes of the dispute before the court.⁸

[81] Applying these tests to the facts at hand it is clear that, although the proceedings are not between the same parties, at least Phoko, Hlakotsa Mokoena are

⁸ *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16; *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) paras 2 and 21; and *Spencer and Others v Memani and Another* 2013 (1) SA 341 (SCA) para 10

respondents in the Bloemfontein proceedings and are parties to the counter-application brought in those proceedings.

b. Cause of action and relief sought

[82] The main action in the Bloemfontein proceedings was brought by Moloi in the name of the Church and the NPC. He sought to preclude the respondents from misrepresenting that they were members of the Church, held leadership positions in the Church and from conducting Church services in the name of the Church from properties owned by the Church. The cause of action was that the Church operated as an NPC under his control, after having been incorporated as such in 2015, and that splinter groups were masquerading as the Church. The relief sought by him was thus to regain control of the property of the Church and make it clear that he alone was Head of the Church and its leadership.

[83] Thus it is clear that the cause of action and relief sought by Moloi in the Bloemfontein proceedings was in essence the reverse of what the applicants now seek in the current proceedings.

[84] On the other hand, the cause of action and relief sought in the present proceedings is substantially the same as in the counterclaim brought by the respondents in the Bloemfontein proceedings. In the counter-claim the respondents seek to set aside Moloi's appointment as Presiding Bishop by setting aside the nomination process that took place on 1 July 2008 and the elections held on 8 December 2018, after the removal of as a director of the NPC.

[85] The interim relief sought is similar in both applications save that whereas in the Bloemfontein proceedings, it was prayed that be appointed as the acting Bishop until elections could be held, in the current proceedings it is sought that the Church be given the power to appoint an interim leadership structure pending elections.

[86] However, the same relief is sought by the respondents in the Bloemfontein proceedings as in the current proceedings in so far as they seek an order declaring that the incorporation and registration of the Church as an NPC was unlawful and unconstitutional and should be set aside. This is the main relief sought in the current proceedings and is the basis upon which the interdictory, interim and ancillary relief is sought in the current proceedings. This relief is predicated upon the invalidity of the incorporation of the Church as an NPC and the reversion of control over the Church and its assets and properties to the voluntary association through which it had prior to its incorporation as an NPC conducted business.

[87] The main dispute in these proceedings is thus in essence the same as in the Bloemfontein proceedings.

[88] Therefore, there is a possibility that any judgment which I may give could potentially conflict with that ultimately found by the Court in the Bloemfontein proceedings.

[89] I thus find that the plea of *lis pendens* is good in law and is upheld.

[90] I turn now to deal with the merits of the application and the grounds upon which the declaratory relief is sought.

The Merits of the declaratory relief sought

a. *The registration of the Church was ultra vires its constitution*

[91] The applicants' case rests on the proposition that the registration of the church as a company required authorisation from the Synod, being the highest governing body under the Church's Constitution.

[92] Neither Maduna nor any of the remaining respondents have provided any evidence of a Synod resolution authorising the conversion of the church into a company. In the absence of such evidence, the applicants' contention that the registration occurred *ultra vires* the Church's constitution would appear to be clearly established.

[93] However, Maduha disputes the applicants' version and contends that the Church was incorporated as an NPC in 2015 with himself and the other respondents as directors. He points out that the applicants raised no objection at the time of incorporation and it was only on 6 November 2023, some eight years later, that the Church launched the current proceedings to challenge the Church's incorporation.

b. Voluntary Associations

[94] Churches and similar religious organisations are commonly organised as voluntary associations governed by their Constitutions.

[95] The legal principles governing voluntary associations were considered in *Turner v Jockey Club of South Africa*.⁹ In *Turner* the Appellate Division recognised that courts generally refrain from interfering in the internal affairs of voluntary associations unless their Constitutions are violated or principles of natural justice are breached. The fact that the Synod did not pass a resolution authorising the conversion of the Church, then a voluntary association, into a NPC, is such a case that would warrant the court to interfere in the affairs of the voluntary association.

b. Memorandum of Incorporation

[96] In further support of the merits in the current application, the applicants rely on the provisions of the Act, which require a company to adopt a MOI regulating its governance.¹⁰ Such an MOI is required to define the rights and obligations of directors and members of the company. The applicants maintain that the NPC has not adopted such an instrument and has thus failed to comply with its statutory reporting obligations. This has not meaningfully been disputed in the answering papers.

[97] As such, the applicants would ordinarily be entitled to the declaratory relief sought. However, their delay in bringing the proceedings needs to be addressed

⁹ 1974 (3) SA 633 (A)

¹⁰ Section 15 of the Act

to determine whether they have waived their rights to at this late stage to object or should be estopped from doing so in law.

c. Delay

[98] Maduna points out that the present application was launched eight years after the Church's incorporation as an NPC and states that the applicants have not provided a satisfactory explanation for this delay.

[99] I am in agreement with Maduna that the applicants have not explained their inordinate delay in seeking the relief sought in the current proceedings. Even the relief sought in the counter-claim in the Bloemfontein proceedings of the same nature was only brought on 4 August 2022, some 7 years after the incorporation of the Church as an NPC.

[100] The fact that the applicants only sought to challenge the validity of the Church's incorporation as an NPC eight years after the event does raise serious questions about the *bona fides* of the applicants in the current proceedings and suggests that there could be ulterior motives at play in their bringing the current proceedings at this stage. The sense that I get is that the truth is not wholly disclosed in the papers before me and that in truth and in fact the current application is a power play for control over the Church and its assets and property.

[101] However, I am mindful that ulterior motive is not necessarily decisive where good grounds are established for the application. As was explained by Harms JA in *National Director of Public Prosecutions v Zuma*,¹¹ a bad motive does not destroy a good case. At paragraph 37 the then Deputy President of the Supreme Court of Appeal had this to say:

"A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent... The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does

¹¹ 2009 (2) SA 277 (SCA)

not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions."

[102] Nevertheless, the courts have repeatedly held that unreasonable delay may justify refusal of discretionary relief, particularly in applications seeking declaratory and interdictory orders affecting established legal arrangements.

[103] In *Wolgroeiers Afslalers (Edms) Bpk v Munisipaliteit van Kaapstad*,¹² the Appellate Division stated:

*"Where a party has delayed unreasonably in bringing proceedings, a Court may in the exercise of its discretion refuse relief, particularly where the granting of such relief would cause prejudice or disturb rights that have come into existence in the meantime."*¹³

[104] Similarly, the Supreme Court of Appeal found in *Associated Institutions Pension Fund v Van Zyl*¹⁴ that:

*"It is a long-standing rule that courts have the power to refuse relief where there has been an undue delay in seeking it. The principle is based on considerations of fairness and certainty."*¹⁵

[105] There are strong policy reasons for refusing relief when there has been a long delay, as was explained in *Gqwetha v Transkei Development Corporation Ltd.*¹⁶ There the court emphasised the need for finality and stability in legal relationships and stated:

*"The rule that delay may bar a remedy is rooted in sound public policy which requires that disputes be raised within a reasonable time so that the parties and the administration are not prejudiced by stale claims."*¹⁷

¹² 1978 (1) SA 13 (A)

13 At 41 A-B

¹⁴ 2005 (2) SA 302 (SCA)

15 At para 46

¹⁶ 2006 (2) SA 603 (SCA).

¹⁷ At para 22

[106] In *City of Cape Town v Aurecon South Africa (Pty) Ltd*,¹⁸ the Constitutional Court reaffirmed the delay principle in legality and review proceedings and stated:

*"Courts have emphasised that delay can prejudice the interests of justice and the proper functioning of public administration, and may justify a refusal to entertain the claim."*¹⁹

[107] To my mind, the delay smacks of *mala fides*; but that is not to say that I accept the *bona fides* of Maduna; I do not. He has clearly been opportunistic in first seeking to incorporate the Church as a NPC and then, after having been removed as a director of the NPC, claiming that the business of the Church was never transferred to the NPC and is now currently being run by him as a voluntary association. The pending litigation concerning the legal status of the Church and which entity controls the business of the Church and owns its properties and assets is the subject matter of the proceedings currently pending in Bloemfontein.

[108] The courts should not be used as tools to fight factional battles; it constitutes an abuse of process; both the applicants and Maduna are guilty of this.

The Interdictory Relief sought

[109] The interdictory relief sought flows from the declaratory relief, and as such is similarly tainted by *mala fides* and abuse of process.

[110] The applicants have sought final interdictory relief. The requirements for a final interdict were set out in the now oft quoted Appellate Division case of *Setlogelo v Setlogelo*.²⁰ The principles set out are now trite and require that an applicant for final interdictory relief must establish a clear right, injury actually committed or reasonably apprehended and the absence of an adequate alternative remedy.

a. Clear right

¹⁸ 2017 (4) SA 223 (CC)

¹⁹ At para 47

²⁰ 1914 AD 221

[111] From the papers before me, I am satisfied that the registration of the Church as a NPC occurred without clear authorisation from the governing structures prescribed by the Church's constitution. I also find that the fact that the NPC has no MOI is fatal to its continued operation.

[112] In light of the findings above, I find that the applicants have demonstrated a clear right to challenge conduct undertaken in violation of the church constitution.

b. Reasonable apprehension of harm

[113] The applicants contend that the unlawful registration of the Church as an NPC places the Church's governance and assets at risk. The applicants argue that the conduct of the respondents threatens the sustainability and governance of the Church. They maintain that the continued control by them exposes the Church to regulatory and financial risk. Accordingly, it is alleged that the Church and its members will suffer irreparable harm if the respondents remain in control of the Church.

[114] In support of this argument, the applicants allege that the actions and conduct of the respondents are harmful to the sustainability of the Church in as much as they fuel tensions and strife bedevilling the Church. It is argued that the respondents have acted in blatant disregard for the Constitution of the Church and are motivated by self-interest and that there is nothing in their conduct that shows consideration for the interest of the Church.

[115] Furthermore, the applicants argue that the Act obligates companies to submit reports, to appoint auditors and other role players. The respondents have, for a period in excess of 10 years, failed to ensure that the NPC complies with these obligations, thereby exposing the Church to the risks associated with non-compliance. It is the applicants' case that the respondents have failed to show accountability to the Church and their continued occupation of their positions as directors harm the interests of the Church.

[116] I have already said that the background to this matter evidences that in truth and in fact the applicants are not so much concerned about the internal governance of the NPC as they are about securing power over and control of the Church for the faction they represent. I do that think that they subjectively perceive that should the interdictory relief sought not be granted the Church will suffer irreparable harm. But the test is objective, and I accept that the failure to comply with the provisions of the Act reasonably puts the business of the Church at risk.

c. Absence of adequate alternative remedy

[117] The applicants contend that the interdictory relief sought is the only effective remedy. The applicants insist that an interdict is the only means to prevent the respondents from continuing to act as directors of the NPC pending its deregistration. They argue that should the respondents remain in their positions, the CIPC may issue charges against the NPC and levy penalties which will deplete the allegedly scant resources of the Church.

[118] I accept that should I grant the declaratory relief sought, the interdictory relief sought would be appropriate to protect the property and assets of the Church.

[119] But I reiterate that whether this is indeed correct, depends upon whether the business of the Church was transferred to the NPC together with its assets and properties at the time of incorporation, or whether they remained with the voluntary association as contended by Maduna in these proceedings. This crucial question is itself pending before the Bloemfontein Court.

[120] Although Maduna was party to the incorporation of the NPC, he now maintains that all of the assets and property of the Church were retained by the voluntary association through which he currently runs the business of the Church under an identical name.

Disputes of fact

[121] Maduna points to several disputes of fact that in motion proceedings must be resolved in accordance with the so-called *Plascon Evans Rule*. The well-known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*²¹ requires that where disputes of fact arise on the papers, the court must determine the matter on the facts stated by the respondent together with those facts admitted by the respondent. This means that where disputes of fact arise, the court must determine the matter on the respondent's version unless that version is so far-fetched or untenable that it can be rejected on the papers. The effect is that where genuine disputes of fact appear on the papers before me, Maduna's version must prevail, alternatively ought to be referred for the hearing of oral evidence.

[122] Because Maduna's version is so markedly different from that presented by him in the Bloemfontein proceedings, it would be remiss of me to decide this matter on paper on the basis of the version now preferred by him. In Bloemfontein he was of the view, as were the applicants in these proceedings, that the voluntary association ceased to exist on the incorporation of the NPC. It was also the view taken by the respondents in those proceedings that the properties of the Church remained in its name and not in the name of the NPC, although Moloi states that this was always the intention. The interdictory relief sought in these proceedings would be entirely academic were the business of the Church to have been retained by the voluntary association.

[123] As this is a question that is crucial to the interdictory relief sought in the current application and is currently pending in the proceedings in Bloemfontein, it is appropriate that this application be stayed pending the outcome of those proceedings. In addition, it would not be proper for these proceedings to be heard without Moloi being joined to these proceedings.

[124] In view of the several disputes of fact in the current proceedings and my sense that what has been put on paper before me is but a version of the true position, I cannot see this matter proceeding without the hearing of oral evidence.

²¹ 1984 (3) SA 623 (A)

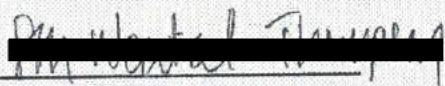
[125] Obviously, the interdictory relief against Maduna cannot be sustained in so far as it is tied to his current status as a director of the NPC. I have already found that the applicants intentionally joined him to these proceedings, full well knowing that he had been removed as a director in 2018. What was in fact sought in joining Maduna was to stifle his current claims to be running the Church under his fiefdom through the supposedly defunct voluntary association.

[126] Because I do not accept the *bona fides* of either the applicants or Maduna in the current proceedings in view of their entirely different stances taken in the Bloemfontein and in the current proceedings, it is not appropriate that I make an award for costs and intend directing that costs be costs in the cause.

Order

[127] I thus make an order in the following terms:

- a. Directing that Shadrack Nkomeni Moloi be joined to the proceedings within 15 days of this Order;
- b. Directing that this matter not be proceeded with unless Moloi has been joined to these proceedings.
- c. Directing that this matter be stayed pending the outcome of the matter under case no. 2341/22 in the High Court of South Africa, Free State Division, Bloemfontein between *The African Presbyterian Bafolisi Church of Southern Africa and others v Edward Ephraim and others*.
- d. Directing that costs be costs in the cause.



WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv. A Motake
Instructed by: Maebela Joseph Attorneys

For the Respondent: CS Mabetshu (attorney)