



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 108/2021

In the matter between:

LLOYD EUGENE HENDRICKS

APPELLANT

and

**THE CHURCH OF THE PROVINCE OF SOUTHERN
AFRICA, DIOCESE OF FREE STATE**

RESPONDENT

Neutral citation: *Hendricks v The Church of the Province of Southern Africa, Diocese of Free State* (108/2021) [2022] ZASCA 95 (20 June 2022)

Coram: MOLEMELA, NICHOLLS AND MBATHA JJA AND MATOJANE AND WEINER AJJA

Heard: 10 March 2022

Delivered: 20 June 2022

Summary: Canons applicable to the Anglican Church in relation to a request by the Bishop that a cleric be relocated to another parish – interpretation of Canon 25(6) – procedural fairness relating to the decision.

ORDER

On appeal from: The High Court of South Africa, Free State Division, Bloemfontein (Naidoo J with Chesiwe J concurring):

The appeal is dismissed with costs.

JUDGMENT

Weiner AJA (Nicholls JA and Matojane AJA concurring)

Introduction

[1] This appeal concerns a decision of the respondent, the Church of the Province of Southern Africa, Diocese of Free State ('the Church'), to revoke the appellant's licence to practise as a priest. The Church is a unit of the Anglican Church of Southern Africa and falls under the Diocese of Bishop Dintoe (the 'Bishop'). The decision to revoke his licence was taken as a consequence of the respondent's refusal to move to an alternative parish when requested to do so by the Bishop. The appellant appealed the Bishop's decision to the Archbishop. The Archbishop confirmed the Bishop's decision.

[2] The appellant launched an application in the Free State High Court (the high court) seeking, in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively, the common law, the review and setting aside of the Church's decision. He asked for consequential relief in the form of reinstatement as a priest and, specifically that he be stationed back at St Margaret's Church in Bloemfontein, where he was previously located.

[3] The appellant initially submitted in the high court that the revocation of his licence by the Bishop's office amounted to administrative action. The high court found that the decision of the Bishop did not amount to administrative action and was therefore not reviewable under PAJA. In this regard, the high court referred to *Calibre*

Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Another,¹ where this Court found that, for PAJA to operate, there must be a 'governmental element' to the impugned decision. Where a body is a voluntary association, and not a public body and is not connected to the State, its powers are contractual and not statutory.² It found that PAJA was not applicable.

[4] The high court dismissed the application. In arriving at this decision, it relied on the decision of Plasket J (as he then was) in *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others*.³ It found that the review application stood to be dismissed as the appellant had failed to seek an order reviewing the decision of the Archbishop. Such failure rendered the application for review academic, as the finding of the Archbishop would still stand even if the Bishop's decision was set aside. The high court relied in this regard on the following statement by Plasket J:

'When an applicant has suffered an unfavourable decision at first instance and it is confirmed on appeal, the situation is somewhat different. Both decisions must be taken on review and, for the applicant to achieve success, usually both decisions will have to be set aside'.⁴

[5] At the hearing, the parties appeared to be *ad idem* that PAJA was not applicable. The Bishop's decision did not amount to administrative action. The high court did not arrive at its decision based upon the applicability of PAJA, the common law grounds of review or the procedural irregularities alleged. Having set out certain principles in regard to these issues, it dismissed the review by relying on the decision in *Wings Park* and found the appeal to be academic, as the appellant had not sought to review the decision of the Archbishop. The high court correctly recognised that the conduct of a non-statutory body, such as a Church, must still comply with procedural fairness, subject to its own rules and regulations.

¹ *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA); [2010] 4 All SA 561 (SCA).

² *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) at 1375D-E.

³ *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 ECG (*Wings Park*).

⁴ *Ibid* para [34].

[6] In this Court, it appeared from the heads of argument that the appellant sought to have this Court overturn and set aside the high court's decision solely on the basis that the high court erred in its application of and reliance on the *Wings Park* decision.

[7] However, the appellant sought to rely on two additional grounds of appeal at the hearing. Firstly, the appellant submitted that the Church had failed to satisfy the jurisdictional prerequisites called for in applying the relevant Canons. He contended that having regard to the provisions of Canon 25(6), Canons 37(1) (*h*)–(*p*), and 39 were applicable. Secondly, he sought to deal with the merits of the review in regard to certain procedural irregularities. These related to the Bishop's failure to furnish him with reasons for the decision to move the appellant to a different parish and to afford him a proper hearing regarding both the required move and the revocation of his licence. Although these issues were raised in the high court, the merits of these two grounds of appeal were not dealt with in the appellant's heads of argument. It bears repetition that the appellant did not seek to review the Bishop's decision that he be moved; he only sought to review the decision to revoke his licence.

[8] The Canons relevant to the appeal are set out below:

Canon 25(6) (Change of Incumbent or assistant Cleric) provides that:

'If the Bishop of the Diocese considers that for pastoral reasons the work of God in a Pastoral Charge demands that there should be a change of Incumbent or other licensed cleric, or that for medical reasons the cleric concerned is unable to undertake adequately the functions or responsibilities of office, the Bishop shall (failing the consent of the said cleric to the change) take counsel with the Chapter of the Cathedral Church, or with the Senate, as the case may be, or if there be no Chapter or Senate, with three priests of the Diocese, and if the majority of them agree to such a course, after giving the said cleric an opportunity to be heard, the Bishop shall offer the cleric another ministry in the Diocese, stipendiary if the ministry was stipendiary. Should there be none in the Diocese, then the Bishop shall seek in consultation with the cleric another suitable ministry within the Province. However, if it appears to the Bishop, either before embarking on this process or during the process itself, that the reason for the need for a change in fact relates mainly or substantially to matters which could constitute charges or accusations in terms of Canon 37.1, then in the absence of any charge under Canon 37.1, . . . the Bishop shall proceed in terms of Canon 39, in respect of those matters and, in respect of any balance of issues that remain, may continue with the search should that be appropriate.'

Canon 25(7) (Revocation of licence) provides that:

If the said cleric refuses to accept another ministry so offered, the Bishop, upon being satisfied after pastoral ministration that no other course is possible, shall have the right upon notice to the cleric to revoke, upon the expiration of three months' notice, the letters of institution, or the licence, as the case may be, subject to section 8 of this Canon.

Canon 25(8) provides that . . . the said cleric may, within two months of the date of such notice given, appeal to the Metropolitan (or, if the Metropolitan be the Bishop concerned, to the Dean of the Province), who shall then decide upon review whether or not the proposed revocation shall take effect.

Canon 37 provides for judicial proceedings. It sets out a list of the charges or accusations upon which any Bishop, priest, or deacon of this Province may be presented for trial'. The appellant sought to rely upon (h) to (p) of the list.⁵

Canon 39 provides for the procedures to be followed once Canon 37 comes into operation. This Canon is applicable if the charges against a priest are presented for trial.

Background

[9] It is common cause that the Church is regulated by its Constitution and Canons, developed over many years. The Church's power is derived from the Canons and because it is a *universitas*, from a contract, in this case, between the appellant and the Church.

⁵(h) conduct giving just cause for scandal or offence; including without limitation, offensive or abusive language, and any inappropriate relationship or activity of whatsoever nature;
 (i) fraudulent, corrupt or dishonest conduct;
 (j) negligence or recklessness in the management or control of church property or funds (including responsibility for the abuse of discretionary funds or breach of other fiduciary duties;
 (k) misappropriation or misuse of church property or funds;
 (l) violation of the Constitution or Canons of the Church of this Province or of Resolution of Permanent Force No 5;
 (m) conduct amounting to a breach or breaches of the trust relationship between the accused and any Bishop (including the Metropolitan) or any other cleric or body with whom a trust relationship should exist for any reason,
 (n) negligent or wilful contravention of, or negligent or wilful failure to fulfil responsibilities or functions under, the Constitution or Canons of the Church, the Acts, rules or regulations, either of the Provincial Synod, or of the Diocesan Synod of the Diocese in which the cleric holds office, or of the office itself, or acts or omissions in conflict with his or her Oaths or Declarations on taking office;
 (o) refusal to obey a reasonable and lawful instruction from the Metropolitan, Bishop, Dean, Archdeacon, or any other person authorised by any of the foregoing or by any provision of the Constitution or Canons to give such an instruction;
 (p) neglect of the duties of office.

[10] The Canons regulate many issues, including the appointment and tenure of the clergy and the election of bishops. They also deal with disciplinary issues relating to priests and bishops. The Church has three levels of clergy: bishops, priests, and deacons. Matters of placement of the clergy are a diocesan responsibility, carried out by the Bishop.

[11] It is also common cause that the moving of clergy to different parishes and ministries is the prerogative of the Church. The appellant stated that, at the time he was ordained as a priest, he publicly affirmed and answered certain standard questions. These confirmed, in his words:

‘ . . . that he or she was “called by God and His Church to the life and the work of a priest” and that he or she accepts “the discipline of this church and [will] reverently obey [his or her] bishop and other ministers set over [him or her] in the Lord.”’

[12] A priest is also required to take an oath of ‘canonical obedience’, which commits him or her to obedience to his or her ecclesiastical superior, in accordance with the Canons. In the present case, the Bishop was the appellant’s ecclesiastical superior.

[13] The Constitution and Canons set out the circumstances and the procedure by which a priest’s licence may be revoked. One of the ways in which this may occur is where a priest is charged with a disciplinary offence, brought before an ecclesiastical tribunal, and found guilty after being heard.

Chronology of Events

[14] In 2017, aspersions were cast against the appellant in relation to his dealings with the Church and financial mismanagement issues. On 10 January 2018, a Diocesan Resource Team was established to intervene at St Margaret’s following the allegations made against the appellant. A recommendation was made that the appellant should be taken to task on disciplinary grounds, but it appears that the Church did not do so. As far as the Church was concerned, those charges had been dealt with.

[15] In March 2018, the Bishop informed the appellant that he was considering moving some of the priests of the Church. Pursuant thereto, on 27 June 2018, the

Bishop sent a letter to the appellant stating that the Bishop's office intended to move him from St Margaret's with effect from November/December 2018. He was invited to engage with the Bishop's office in this regard. The appellant responded by asking the Bishop 'to shed some light on your reasons for the decision'.

[16] Following this response, the appellant and the Bishop met on 20 July 2018. At the meeting, the appellant was informed that the decision to move him resulted from the unhappiness of some parish members. On 30 August 2018, the appellant was requested to visit parishes in Welkom and Ladybrand as prospective parishes.

[17] The appellant refused to do so. He stated that he was not amenable to the aforesaid proposal as the Bishop had failed to provide any reasons for placement at another parish. He then communicated to the Bishop, on 12 September 2018, that, by visiting the other parishes, it could be construed that he was 'in agreement with a process with which he had 'a number of unresolved concerns. He, therefore, requested that such meetings be postponed until his concerns were addressed.

[18] In such correspondence, the appellant confirmed that, in terms of Canon 25(6), clergy placements rest with the Bishop. However, he complained that proper procedures had not been followed in his removal from St Margaret's. He questioned the motives behind the decision to move him and the reliance on the view of 'concerned parishioners'.

[19] On 14 September 2018, the Bishop responded by referring to the appellant's quote that the Canons provide that the clergy placement is a decision of the Bishop. The Bishop explained further that:

'The Office of the Bishop has decided to move you from St Margaret's for a new fresh start at this church. We believe that this will also give you a new fresh start away from St Margaret's. We are aware that you may not agree with this thinking and decision but it is what the Bishop's Office has decided.'

[20] This fresh start appears to have been a reference to the disharmony in the parish, as certain members of the congregation remained dissatisfied as no action had been taken against the appellant in 2017. The view was that a fresh start would be in

both the Church's and the appellant's best interests. It was further emphasised that clergy are often moved to different parishes. In this regard, the appellant's personal concerns were also taken into account, as they were when he was placed at St Margaret's. The Bishop stated that:

'It will not be in our interest to engage you in what you believe are the reasons for requesting you to move from St Margaret's as stated in your letter. The fact of the matter is that the life of full-time clergy has that element of being moved from one pastoral charge to the other.'

[21] The appellant remained dissatisfied and continuously asked for better reasons to be furnished to him. The Church believed that it had acted within the realms provided for in the Canons, and pressed the appellant to accept the decision and make plans to move to an alternative parish.

[22] On request from the Bishop regarding his plans in this regard, the appellant responded on 24 October 2018 that he had no plans. On 31 October 2018, the Bishop accordingly informed the appellant that, as he had refused to visit the other parishes, and accept the Bishop's decision, the Bishop's office had no alternative other than to invoke Canon 25(6) of the Constitution. The Bishop informed the appellant:

'We request that you state in writing by this Friday 02nd November 2018 your refusal to be moved from the Parish of St Margaret's Bloemfontein. Please also be warned that should your response not be received by the stipulated time, this process will proceed with or without your response.'

[23] The appellant was apparently on leave until 12 November 2018 but responded on 14 November 2018. He informed the Bishop that he still did not agree with the Bishop's decision because due process was not followed in arriving at the decision and that his reluctance to be moved from the Parish of St Margaret's was due to the fact that to date, the Bishop had not yet provided him with reasons for the decision.

[24] The Bishop replied that neither the Canons, nor the Act, nor any rule requires that reasons be provided to a priest for his or her moving from a Parish. To this, the appellant replied on 16 November 2018, stating that the decision to move should not be taken arbitrarily, but based on justifiable pastoral reasons.

[25] The Bishop's office informed the appellant that the matter was being referred to the Bishop's Council in terms of Canon 25(6). On 6 December 2018, the Church informed the appellant that, at the sitting of the Bishop's Council meeting on 29 November 2018, the Council unanimously gave their support to the Bishop's office to invoke Canon 25(6) against him. This meant that the Bishop's office was empowered to revoke the appellant's licence within the Diocese of the Free State. The letter also set out the reasons for the decision to revoke his licence. These included:

- (a) All clergy were informed of pending moves to be made in February 2018;
- (b) The appellant had refused to take up the Rectorship at St Patrick's when requested;
- (c) On being informed of the Bishop's decision to move the appellant from St Margaret's, the appellant stated that the decision was improper and continued to request reasons;
- (d) He refused to visit the parishes of Welkom and Ladybrand, when requested;
- (e) When it was suggested that Canon 25 (6) was to be invoked, the appellant responded that Canon 25(6) required reasons to be given reasons for the decision to be moved.
- (f) The appellant's conduct amounted to canonical disobedience, which was in breach of both the Constitution and the Canons of the Church.

[26] This letter also informed the appellant that:

'You are now being made aware that the next step to follow with Canon 25(6) is for you to meet with the Bishop's office to hear you out and to consider as to whether there could be any possibilities to salvage your stay in the Diocese of the Free State.'

[27] The appellant did not avail himself of this opportunity. Instead, on 31 December 2018, he wrote to the Bishop indicating that he intended to appeal the decision of the Bishop's office to revoke his licence in terms of Canon 25(8). The decision to revoke was therefore suspended pending his appeal to the Archbishop. His letter further said:

'You advised in your letter of the 6th of December 2018 "that the next step to follow with Canon 25(6) is for [me] to meet with the Bishop's office to hear [me] out and to consider as to whether there could be any possibilities to salvage [my] stay at the Diocese of the Free State". I believe that you closed this door for me when you advised me that you were no longer going to engage

me any further regarding this matter and that I was free and welcome to approach any structure or office of the Anglican Church be it Diocesan or Provincial on this matter.’

[28] The reference to not further engaging with the appellant related to the Bishop’s decision to move him, not the decision to revoke his licence. In regard to the latter decision, he was afforded the opportunity to engage with the Bishop’s office, which he refused.

[29] On 2 January 2019, the Bishop’s office informed the appellant that, as a result of his continued challenge of its decision, his deliberate and wilful ignorance of its directives, and his deliberate and wilful failure to meet with the Bishop to discuss his future in the Diocese of the Free State, it had taken a decision to officially revoke his licence in the Diocese of the Free State with effect from 1 January 2019. The appellant’s persistent refusal to accept alternative placement at another parish within the Church precipitated this decision.

Procedural fairness

[30] Although the appellant’s counsel submitted that the appellant did not refuse to move, no other conclusion can be reached in this regard. His persistent refusal to accept the decision of the Bishop and to meet with the Bishop and/or other structures of the Church undoubtedly amounted to a refusal to comply.

[31] The appellant held the view that the Church’s decision (that of the Bishop) had to be based upon valid and justifiable reasons. The Church contended that this was diametrically opposed to the notion and accepted interpretation of the Canons, which provide that the placement of the clergy falls within the exclusive prerogative of the Church.

[32] The appellant relied upon *Joseph and Others v City Of Johannesburg and Others*,⁶ where it was stated that Hoexter⁷ described the importance of procedural fairness in this way:

⁶ *Joseph and Others v City Of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010(4) SA 55 CC para [41].

⁷ Hoexter *Administrative Law in South Africa* at 326-7.

‘Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.’ (Footnote omitted.)

Analysis

[33] It is clear from the correspondence that passed between the Bishop’s office and the appellant that it was accepted that decisions on the placement of clergy were the prerogative of the Bishop. More importantly, reasons were provided on several occasions; however, the appellant was not satisfied with the reasons. He was given the opportunity to be heard, and to engage with the relevant structures. He refused these invitations.

[34] As stated above, the appellant did not seek to review the Bishop’s decision that he be moved; he sought to review the decision to revoke his licence. He was invited to participate in the decisions. He refused the invitations to do so. The appellant cannot rely upon his own recalcitrant conduct to raise the issue of procedural irregularity.

[35] It is necessary to analyse the relevant Canons to determine their applicability in the circumstances of the present appeal. In summary, Canon 25(6) provides that if the Bishop considers that, for pastoral reasons, the work of God demands that there should be a change of a cleric at a parish, the Bishop shall (failing the consent of the said cleric to the change) take counsel with three priests of the Diocese and if the majority of them agree, after giving the said cleric an opportunity to be heard, the Bishop shall offer the cleric another ministry in the Diocese.

[36] As appears from the chronology of events set out above, the appellant was informed of the prospective move and that he should engage with the Bishop in this regard. The appellant required reasons for the move. The Bishop and the appellant then met, and the Bishop informed the appellant that there was disharmony in the parish between the appellant and certain parishioners. These reasons did not satisfy the appellant. He stated that due process was not followed because he was not given adequate reasons.

[37] In the correspondence, the appellant acknowledged that clergy placements rest with the Bishop in terms of Canon 25(6). The appellant was also reminded that the life of full-time clergy has the element of being moved from one pastoral charge to another. He, however, complained that proper procedures had not been followed in his removal from St Margaret's. He questioned the motives behind the decision to move him and the reliance on the view of 'concerned parishioners'.

[38] The appellant was asked to visit prospective parishes, which he refused to do until he was furnished with reasons for the move. The Bishop responded by stating that the Canons did not require reasons to be given. In any event, reasons had been given - there was disharmony, and a fresh start for both the appellant and the parish was considered appropriate. As the appellant had refused to consent to the move, the Bishop followed the prescripts of Canon 25(6). The appellant was informed that the matter was to be referred to the Bishop's Council, which it was. The Council supported the Bishop's decision to invoke Canon 25(6).

[39] The appellant was then informed that he should meet with the Bishop's office to hear him out and consider whether there were any possibilities to salvage his stay in the Diocese. He did not take up the opportunity. The Bishop thus informed the appellant that, as a result of his continued challenge of the Church's decision, and his failure to meet with the Bishop to discuss his future in the Diocese, the Church had taken a decision to officially revoke his licence, in terms of Canon 25(7).

[40] The appellant argued that he was not offered pastoral ministration in breach of Canon 25(6) and 25(7). However, from the correspondence referred to above, it is clear that meetings with the Church were offered on several occasions, but the appellant never took up the offer.

[41] In regard to Canons 37(1) and Canon 39, the appellant at no stage in the correspondence relied upon these Canons. At the hearing, his counsel contended that the reasons for requiring him to move were not purely pastoral, as they involved the allegations relating to the events of 2017, where there were aspersions cast on him involving financial mismanagement of church funds. He thus contended that Canon 25(6) required that *'if the Bishop was of the view:*

'either before embarking on this process or during the process itself, that the reason for the need for a change in fact relates ... to matters *which could constitute charges or accusations in terms of Canon 37.1, then in the absence of any charge under Canon 37.1, the Bishop shall proceed in terms of Canon 39, in respect of those matters and, in respect of any balance of issues that remain, may continue with the search should that be appropriate*'. (Emphasis added.)

[42] Canon 37(1) refers to charges or accusations relating, inter alia, to financial mismanagement. The appellant submitted that because he had previously been accused of such offences, the provisions of Canon 25(6) emphasised above required that Canon 39 be implemented. Canon 39 sets out in detail the processes to be followed, in dealing with complaints, accusations, and sanctions. The appellant contended that the Church did not follow the required procedure in the appellant's case.

[43] The appellant submitted that the reasons that the Bishop required him to move were because of the previous aspersions cast upon him and that such allegations were covered in the provisions of Canon 37. He relied for this submission on the Bishop's letter to the Archbishop on 31 January 2019, where the Bishop referred to a request for him to clarify the pastoral reasons for the appellant's requested move. The Bishop referred the Archbishop to certain correspondence from parishioners who were unhappy with the appellant's conduct at St Margaret's, which involved complaints from parishioners about, inter alia, financial mismanagement and the fact that these had not been dealt with satisfactorily was causing disharmony in the parish. Thus the appellant submitted that the allegations made in 2017 formed the basis for the request to move, and he was entitled to the benefit of Canon 39.

[44] The fact that the Archbishop requested reasons and the Bishop referred to the reasons for the disharmony does not mean that the Bishop's decision was based upon the allegations made in 2017. The Bishop explained to the Archbishop the background which had caused the disharmony. The disharmony and not the actual allegations formed the basis of the Bishop's decision. This disharmony was the reason given throughout for the Bishop's decision.

[45] Canon 37(1) provides specifically for two procedures. If no charges have yet been laid, then the Bishop shall proceed in terms of Canon 39. But, whilst those procedures are being followed in pursuance of a prospective trial, the Bishop is to continue to deal with the issue of the move of the cleric.

[46] Two issues arise from these provisions: Firstly, there must be an intention to proceed to trial with those charges. In this case, it is clear that this was not the position. The allegations had been dealt with in 2017/18, and there was no intention on the part of the Church to proceed to trial on them. Secondly, if applicable, the procedures under Canon 39 would not interfere with the Bishop's powers to continue to deal with the prospective move of the appellant.

[47] It is also necessary to take cognisance of the fact that courts are reluctant to involve themselves in the internal affairs of a religious body.⁸ This Court in *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another (De Lange)* held that:⁹

'As the main dispute in the instant matter concerns the internal rules adopted by the Church, such a dispute, as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.

High Court judgments . . . appear to accept that individuals who voluntarily commit themselves to a religious association's rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies.'

This was a comment made by Ponnar JA in the majority judgment in this Court. The Constitutional Court in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*,¹⁰ referred to this view as follows:

'The Supreme Court of Appeal held that the doctrine of entanglement strongly informs courts not to get involved in religious doctrinal issues. The effect of the doctrine is that courts are

⁸ *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* 2015(1) SA 106 (SCA) at 127E-G.

⁹ *Ibid* at 39-40.

¹⁰ *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* CCT223/14C [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC).

reluctant to interfere with religious doctrinal disputes. See also Supreme Court of Appeal judgment *id* at para 33, where the Supreme Court of Appeal discusses *Ryland v Edros* 1997 (2) SA 690 (C) wherein the High Court recognised this doctrine as part of our new constitutional dispensation.¹¹

[48] Although the present matter involves certain procedural issues, it is in essence a matter dealing with doctrinal issues dealing with the placement of clergy and the consequences of disobeying a decision of the Bishop. In my view, and for the reasons stated above, Canon 25(6) was correctly applied. The issue of placement of clergy is the prerogative of the Bishop. He followed all the requisite procedural steps in making his decision to move the appellant and in deciding to revoke the appellant's licence. Procedural fairness in line with the rules and regulations of the Church was complied with. The reasons provided by the Bishop for the move did not require the invocation of Canon 37(1) and/or Canon 39.

[49] The appeal must therefore fail, and the issue as to whether it was necessary to impugn the Archbishop's decision does not, therefore, arise and need not be dealt with.

[50] Accordingly, I make the following order:
The appeal is dismissed with costs.

S E WEINER

ACTING JUDGE OF APPEAL

Molemela JA (Mbatha JA concurring)

[51] I have read the judgment of my colleague, Weiner AJA (the majority judgment). In paragraph 48 of the judgment, it is stated that the Bishop followed all the requisite procedural steps in making his decision to move the appellant and in deciding to

¹¹ *Ibid* fn 21 in reference to the SCA judgment at para 30.

revoke the appellant's licence. It is also stated that procedural fairness in line with the rules and regulations of the Church was complied with. For reasons furnished in the succeeding paragraphs, I respectfully disagree with the reasoning and conclusion of the majority judgment.

[52] Although the appeal was premised on the failure of procedural fairness, it can, however, not be disposed of without traversing the substantive issues raised in the papers before us. I will demonstrate that the revocation of the appellant's licence, with its drastic consequences, was a direct result of a failure to follow peremptory procedures laid down in the Church's canons. Furthermore, to the extent that unsubstantiated allegations were regarded as 'evidence' of wrongdoing on the appellant's part without following the steps set out in canon 39 (referring the complaints to a Board of Enquiry), the decision was irrational.

[53] Before I delve deeper into the issues, there is a contention that needs to be debunked from the outset. Relying on this Court's judgment in *De Lange*, it was contended that courts are reluctant to involve themselves in the intimate affairs of religious bodies.¹² This contention does not take proper account of the nature of the dispute that was raised for determination in *De Lange*. Further, and in any event, it is necessary to pay due regard to the following dictum in *De Lange* because it provides important context to para 39 of that judgment:

'In *Lakeside Colony of Hutterian Brethren v Hofer*, Gonthier J said of the complex issues involved in reviewing the decisions of a religious tribunal in Canadian law:

'It is not incumbent on the court to review the merits of the decision to expel. *It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without mala fides.*'¹³ (Emphasis added).

It is plain from the passage above that there are circumstances in which courts are *required* to intervene in disputes involving religious bodies. To my mind, this can only mean that where religious bodies have proceeded in a manner that is not consonant with the principles of natural justice, courts will intervene. While I agree that a court

¹² *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* [2014] ZASCA 151; 2015 (1) SA 106 (SCA); [2015] 1 All SA 121 (SCA) para 39.

¹³ *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* [2014] ZASCA 151; 2015 (1) SA 106 (SCA); [2015] 1 All SA 121 (SCA) para 38.

should refrain from determining religious doctrinal issues in order to avoid entanglement,¹⁴ it bears emphasising that the majority judgment in *De Lange* did not introduce a blanket prohibition on the determination of disputes that involve religious bodies. From my point of view, the high court's deference was uncalled for, because the dispute before it did not pertain to doctrinal issues or customs constituting the core of religious functions. Crucially, the instant matter does not pertain to an individual who, having voluntarily committed himself to a religious association's rules, is not prepared to accept the outcome of a *fair* hearing conducted by the same body. The fatal defect in the Bishop's decision is that it is tainted by a procedurally *unfair* process.

[54] Juxtaposing the main dispute in the instant matter with what the court had to determine in *Lakeside Colony of Hutterian Brethren v Hofer* (as set out in the passage above), the similarity is that in the instant matter, too, the high court was not called upon to review the merits of doctrinal issues of the Church. Rather, at the heart of the parties' dispute is the Church's failure to afford the appellant the protection of its own canons relating to the observance of the well-known *audi alteram partem* principle. Put differently, the appellant was denied the procedural protections afforded by the very canons of the respondent, and this brings the dispute within the realm of the exceptions envisaged in para 39 of *De Lange*. Plainly, the respondent's reliance on *De Lange* is misplaced.

[55] It is interesting to note that the role of the courts in matters of this nature was recognised as early as 1863 in the judgment of *Long v Bishop of Cape Town*,¹⁵ where the colonial court in South Africa recognised the principles of natural justice. It held that if a religious body constitutes a tribunal to determine disputes, it has to proceed in a manner consonant with the principles of natural justice. As a consequence, a sentence of suspension or deprivation visited by the Bishop of Cape Town on an incumbent who had refused to give notice in his Church for the election of delegates to the Synod was considered unwarranted. I refer to this matter only to highlight that the court's intervention has consistently been recognised when a sanction had the effect of depriving the incumbent of due process.

¹⁴ Ibid para 39.

¹⁵ *Long v Bishop of Cape Town* [1863] Eng R 277, (1863) 1 M00 PC Ns 411, (1863) 15 ER.

[56] In my opinion, there is no reason why religious bodies should not, like other domestic tribunals, observe principles of fair play.¹⁶ This is more so where they have constitutions that urge them to comply with their own rules and regulations. It would be a sad day if a laudable approach which was embraced long before the advent of the Constitution was to be jettisoned in a constitutional democracy. I now consider why the high court dismissed the appellant's application for review.

[57] As rightly stated in the majority judgment, the high court dismissed the appellant's review application on the basis that the appellant had failed to seek an order reviewing the decision of the Archbishop. The majority judgment then found that the issue about the failure to impugn the decision of the Archbishop did not arise because the appellant had not shown that the Bishop had failed to comply with the canons. Since I believe that the Bishop did not comply with canon 25(6) and that his decision was irrational and consequently reviewable, I am obliged to deal with the high court's finding in this part of the judgment. It is to that aspect that I now turn.

[58] It bears mentioning that despite finding that PAJA was not applicable, the high court, purporting to rely on the decision in *Wings Park*, held that the failure to impugn the decision of the Archbishop rendered the application for review academic, as the finding of the Archbishop would still stand even if the Bishop's decision was set aside. I disagree with the high court's finding and its ruling dismissing the application. In my view, *Wings Park* is distinguishable from the present matter because procedural unfairness was not raised as an issue in that matter. Furthermore, PAJA is not applicable in casu, and the Bishop's decision did not amount to administrative action.

[59] In any event, it is important to note that the court's findings in *Wings Park* were made with reference to circumstances where the internal appeal amounted to a hearing *de novo*. In this matter, the role of the Archbishop was only to decide whether the revocation of the appellant's licence should take effect. The Archbishop's appeal

¹⁶ *Turner v Jockey Club* of SA 1974 (3) SA 633 at 644 G-H.

was not a re-hearing of the matter;¹⁷ the manner in which it was conducted attests to this. In *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd*,¹⁸ it was held that the effect of a gross procedural irregularity in the first decision could not, in any way, have been cured by an appeal process that did not constitute a re-hearing of the matter. Based on the same reasoning, I am of the view that the procedural unfairness which manifested itself in denying the appellant in this matter a hearing and failing to ventilate the allegations against him as envisaged in canon 39, was so material that it can only be concluded that what was laid before the Archbishop for consideration on appeal was a fatally tainted process. Given that the appeal process did not constitute a re-hearing of the matter, it could not have cured the defects in the Bishop's process.¹⁹

[60] Furthermore, and in any event, to the extent that *Wings Park* relied on *Oudekraal*, it is noteworthy that, in *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others*,²⁰ this Court held that where an administrative action was invalid, consequent acts had legal effect only as long as the initial act was not set aside by a competent court. However, if the first administrative act was set aside, the second act that depended for its validity on the first act would also be rendered invalid, as the legal foundation for its performance was no longer extant. In making the point that the high court's reliance on *Oudekraal* was misplaced, I need only reiterate what was stated in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*,²¹ where the Constitutional Court held as follows:

'In *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 14, the Court, applying *Oudekraal*, held that acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside. At para 13 the Court rightly

¹⁷ For a distinction between a narrow and a wide appeal, see *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F-591A.

¹⁸ *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* [2005] 2 All SA 239 (SCA) para 33-35.

¹⁹ *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2008 (3) SA 91 (E) at para 33, 34, 74-76.

²⁰ [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 14.

²¹ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) fn 74.

rejected an argument, in misconceived reliance on *Oudekraal*, that the later (second) act could remain valid despite the setting aside of the first.’

[61] Reverting to the facts of this matter, the Archbishop’s decision (the second decision) was only limited to deciding whether the revocation of the licence should take effect. He, therefore, entertained the internal appeal on the assumption that the Bishop’s decision was valid. By parity of reasoning, it follows that, once the Bishop’s decision (the first decision) is set aside, the Archbishop’s decision will, by application of the law, be of no force and effect as it would have been taken consequent to an invalid act.

[62] It is now convenient to briefly consider the submissions of the parties in relation to substantive issues. The provisions of canon 25(6) have been set out in para 8 of the majority judgment. It is clear from these provisions that if a priest has not consented to the placement change, the Bishop shall take counsel with the following incumbents: the Chapter of the Cathedral Church or the Senate, or, in the absence of these, with three priests of the Diocese. However, if either before embarking on the process, or during the process itself, it becomes evident that the reasons for the placement change relate substantially to matters which *could* constitute charges, then the Bishop *shall* proceed in terms of canon 39, which enjoins the Bishop to refer the matter to a Board of Enquiry. It is discernible from a plain reading of this canon that a priest who has not consented to a placement change has a right to be heard. This provision is peremptory and does not give a Bishop discretion.

[63] A proper interpretation of the proviso in canon 25(6) is key in this matter. It provides that:

‘ . . . if *it appears* to the Bishop, either before embarking on this process or during the process itself, that the reason for the need for a change in fact relates *mainly or substantially* to matters which could constitute charges or accusations in terms of canon [37(1)], then in the absence of any charge under canon [37(1)], the Bishop ‘*shall*’ proceed in terms of canon 39’ (Emphasis added.)

[64] Significantly, the document entitled Licensing of the Clergy, referred to by the appellant as ‘the monograph’ published by the respondent and which was an exhibit in the proceedings, states as follows:

‘The pastoral course is laid out in Canons 25(6) to (8), which specify the course to be followed in the circumstances set out in those Canons. If it is found that the problem at the heart of the matter in fact lies in acts or omissions which *could* form the basis of charges under Canon 37(1), then the pastoral process *must* be *deferred or abandoned* and the disciplinary Canons in Chapter VII applied. Nothing entitles a Bishop to withdraw a licence on a discretionary basis. Considering the position and role of a Minister . . . this is appropriate.’ (Emphasis added.)

It is telling that this monograph states that the pastoral process ‘must be deferred or abandoned and that the disciplinary canons in Chapter VII be applied.’

[65] The passage above makes it plain that in circumstances like the present, where the placement to another parish was prompted by allegations of financial mismanagement (which are proscribed in canon 37), the process enunciated in canon 39 should have been followed. Any other interpretation of canon 25(6), read with canon 37 and 39, would simply fall foul of the trite principles of interpretation propounded in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.²² The architecture of the canons is unmistakeably based on fairness and due process at every level. The monograph emphasises the need to adhere carefully to the procedures set out in the Canons when considering the withdrawal of a license’. The appellant, however, was not afforded this due process.

[66] It is undisputed that in the discussion about the intention to change the appellant’s placement, which took place on 20 July 2018, the Bishop disclosed to the appellant that the placement change was because parishioners were unhappy with him. As will become evident from the Bishop’s averments, it appears that from the outset, the Bishop’s reason for moving the appellant was the discontent arising from allegations of financial mismanagement. Given that these allegations were the foundation of the decision to remove the appellant from St Margaret’s parish, the Bishop ought to have put the machinery set out in canon 39 in motion the moment it

²² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

became apparent to him that the appellant was not consenting to the placement change. I will return later to this aspect.

[67] It is obvious from the correspondence exchanged after the meeting of 20 July 2018 that the appellant was interested in finding out who was unhappy with him and why that was the case and that he was not consenting to the change in placement. I can find nothing wrong with the appellant's interest in the source of the parishioner's discontent, given the stipulations of the proviso in canon 25(6), which is set out in para 63 above.

[68] In the appellant's letter to the Bishop, dated 12 September 2018, he quoted parts of canon 25(6) and expressly stated that the procedures laid down in canon 25(6) pertaining to his right to be heard by the incumbents mentioned in that canon had not been afforded to him. He mentioned that he was not keen to meet with the church-wardens as per the Bishop's proposal. He openly indicated that his reluctance to do so stemmed from his belief that meeting with the church-wardens could be perceived as agreeing to the placement change. This letter would have left the Bishop with a clear impression that the appellant was not amenable to the change. Despite this, the Bishop's response dated 14 September 2018 did not pertinently address itself to the issue of non-compliance with those procedures and merely emphasised that the prerogative of clergy placement rests with the Diocesan Bishop.

[69] On 14 November 2018, the appellant stated that the reason for disagreeing with the invocation of canon 25(6) was that due process was not followed in arriving at that decision. Contrary to the plain provisions of canon 25(6), which decrees that if the majority of the incumbents mentioned in that canon agree that he should be moved, he must be given an opportunity to be heard, the Bishop informed the appellant that he was referring him to the Bishop's Council (council) but did not invite him to that meeting. Once that meeting of the council had taken place, no further opportunity to be heard was given to the appellant.

[70] Instead, in a letter dated 6 December 2018, the appellant was informed that the Bishop's office has been 'empowered to revoke [his] license'. The Bishop then recited the reasons that had led to the revocation of his licence. At that stage, it was beyond

doubt that the decision to revoke the appellant's licence had already been taken. It is on this basis that the appellant indicated his intention to appeal that decision within the contemplation of canon 25(8). Moreover, despite the canons advocating for transparency and fair application of the rules of natural justice, it was also apparent that the decision to revoke the appellant's licence was taken without affording him the right to be heard by the council. In a letter dated 2 January 2019, the Bishop bemoaned the appellant's decision to lodge an internal appeal and stated that it showed his 'total disregard and disrespect for the Bishop's office'. It is difficult to comprehend how the appellant's exercise of the right to appeal afforded by the canons could be equated to disrespect.

[71] I am unable to find persuasion in the submission that the reasons for removing the appellant from St Margret Parish were of a pastoral nature. In this regard, it is important to consider what the Bishop considered to be 'pastoral reasons'. It is telling that in his letter to the Archbishop, the Bishop *inter alia* stated that moving the appellant from St Margaret's parish was 'largely because of the issues that came to light in 2017.' He further said:

'[The] appellant was requested to move from St Margaret's due to pastoral reasons . . .'. The Bishop's office had to intervene as the parish was really starting to suffer significantly through divisions and people moving away. We have attached some of the *evidence* as in Annexure A pages 1–19.' (Emphasis added).

[72] As regards the passage in the preceding paragraph, it is striking that the appellant's assertion (in his letter dated 17 July 2018) that 'there has been a general positive spirit among parishioners with a number of new members joining the parish' was never disputed. This is the same letter that the Bishop, in his affidavit, described as 'important'. The undisputed statement made in the appellant's letter refutes any suggestion that there was general discontent among parishioners causing them to leave on account of the appellant's conduct.

[73] It is clear from the annexures sent by the Bishop to the Archbishop as 'evidence' that the transgressions the appellant was accused of were those censured in canon 37(1)(p)–(q). The Bishop conceded this. It is noteworthy that in one of these annexures, the Bishop personally stated that there had been 'a number of allegations

that have been raised with regard to administration, financial and ministry' of the appellant.

[74] Referring to the discussion that took place in July 2018 between him and the appellant concerning the placement change, the Bishop averred as follows in his answering affidavit: 'it is correct that I mentioned to him that certain members of the parish were unhappy with issues relating to inter alia financial- and administrative management of his parish'. This averment is far-reaching as it reveals that from the outset, the real reason for the placement change was types of misconduct which fell squarely within the purview of canon 37(1)(k) and (j). It is for this reason that I opine that the Bishop ought to have invoked canon 39 from the outset. It is disconcerting that in his letter to the Archbishop, the Bishop deemed it appropriate to describe unsubstantiated allegations as 'evidence' despite the fact that the appellant had never been given an opportunity of challenging them.

[75] Notably, the Bishop did not dispute that in 2017, there was a recommendation that the appellant be taken to task on disciplinary grounds. It is common cause that no disciplinary steps were initiated against the appellant. Notwithstanding this, the Bishop averred that the fact that disciplinary charges were recommended was 'one of the reasons that ultimately informed the decision concerning his placement'. Against the background of these averments, there is no need to speculate about the pastoral reasons that, subjectively, informed the decision to remove the appellant from St Margaret's parish. The Bishop spelt them out in his affidavit. It is significant that all the accusations levelled against the appellant are transgressions listed in canon 37(1). Unquestionably, the circumstances of this matter cried out for the invocation of the proviso in canon 25(6). On the plain reading of that proviso, there can be no doubt that the Bishop was, in the absence of a charge envisaged in canon 37(1), enjoined to proceed in terms of canon 39. He did not do so.

[76] Had canon 39 been invoked, the Bishop would have referred the matter to the Board, at which forum the appellant would have had the right to lead and give evidence and cross-examine witnesses. Depending on the recommendation of the Board, the matter could have been referred to a Tribunal, alternatively laid to rest. In this way, the appellant's guilt or innocence could have definitively been resolved in a forum where

he would have been entitled to refute the allegations. Finalisation of these processes would probably have restored harmony in the parish. Instead of invoking disciplinary processes stipulated in 25(6) read with canon 37 and 39, a lot of time was dedicated to exchanging letters. In lieu of ventilating the issues at the appropriate forum, a flawed procedure was followed. This approach unfairly denied the appellant a chance to state his side of the story and to clear his name.

[77] A contextual reading of the correspondence sent by the appellant leaves one with no doubt that the appellant was aggrieved by the fact that the reason for his placement change was related to serious but unsubstantiated allegations, and that he considered this unfair because the injunctions of the canons had not been followed. That he did not, in his correspondence, expressly mention canon 37 is of no moment, in my view. Of significance is that he alluded to these canons in his founding and supplementary affidavit.

[78] Correctly, the majority judgment acknowledges that, by the Bishop's own admission, there were complaints from parishioners about financial mismanagement and the fact that these had not been dealt with satisfactorily was causing disharmony in the parish.²³ This state of affairs attested to the rationale for the need to defer to the placement pending the canon 39 processes, as set out in the canon 25(6) proviso, which is that another parish should not have to inherit the service of a priest who has a cloud of serious allegations hanging over his head. On the facts of this case, the inextricable link between the unsubstantiated allegations and the decision to change the appellant's placement could not be clearer. It is for this very reason that I do not agree with the majority judgment's finding that the disharmony and not the actual allegations formed the basis of the Bishop's reasons.

[79] In his correspondence, the Bishop did not explain why the appellant was not, within the contemplation of canon 25(6), afforded the right to be heard. Instead, on 18 November, he was merely informed that the council would determine his future but was not afforded an opportunity to be heard by that council. Thereafter, he was merely apprised that at the sitting of the council, it had expressed its support for the Bishop's

²³ Majority judgment at para 43.

decision. It cannot be right that disharmony among parishioners is addressed by encroaching on the rights afforded to a priest in terms of the canons. Doing so in contravention of the canons amounts to a serious irregularity, in my view.

[80] Much was made about the fact that in the letter dated 14 September 2018, the appellant was informed that moving him away from St Margaret's would give the Church and him 'a fresh start.' As stated before, it was evident that the appellant was very keen to clear his name. Instead of affording him the right to be heard by referring the process to the Board of Enquiry or Tribunal, a decision was made to move him to another parish under a cloud. It is difficult to imagine how the appellant could possibly make a fresh start with a cloud of unsubstantiated allegations hanging over his head.

[81] There can be no doubt that both the Church and the applicant would get 'a fresh start' in the true sense of that expression only once the Board of Enquiry or the Tribunal had finalised the disciplinary processes set forth in the canons. Under the circumstances, the appellant's statement to the Bishop in his letter dated 14 November 2018, opining that due process was not followed in arriving at the decision to remove him from St Margaret, was a correct encapsulation of what had eventuated. It is ironic that his steadfastness in wanting to clear his name is what led to his licence being revoked; this, despite the very nature of the allegations levelled against him requiring the invocation of disciplinary processes set forth in canon 37 and 39.

[82] The total disregard of fundamental principles of fairness enunciated in the respondent's canons warranted the high court's intervention by way of a review, all the more so because the decision of the Bishop is far-reaching. On this aspect, the appellant explained that as a result of the revocation of his licence, he is not allowed to hold any office or perform any ministry within the respondent Church. It offends one's sense of justice that such a drastic decision can be arrived at based on unsubstantiated allegations made by parishioners against a priest without affording the latter an opportunity of refuting such allegations.

[83] The vocation of priesthood does not disentitle priests from enjoying the protection that comes with the application of principles of natural justice as espoused in our Constitution. To my mind, there is no reason why our courts cannot adjudicate

disputes emanating from organisations,²⁴ including churches,²⁵ which have incorporated these laudable principles of natural justice in their constitutions and their rules and regulations. Our courts have, in a plethora of cases, including those predating the Constitution, not shied away from this responsibility and should not do so in this case.²⁶

[84] To sum up, on a plain reading of canon 25(6) and the monograph, it is clear that the Bishop did not have an unfettered discretion to move the appellant. The procedure laid down in Canon 25(6) is peremptory and may not be dispensed with where accusations of impropriety or financial mismanagement have been levelled against a cleric. In my opinion, the clear and peremptory provisions of the proviso in canon 25(6), which call for the invocation of canon 39, were inexplicably disregarded.

[85] The undisputed evidence shows that the decision to change the appellant's placement at St Margaret's parish was predicated exclusively on serious allegations which called for the invocation of canon 39. There is no evidence of a 'balance of issues', i.e. reasons unrelated to canon 37(1), which could have prompted the Bishop to proceed with the placement change before invoking canon 39. That being the case, the placement ought to have been deferred while the machinery in canon 39 was being set in motion. Instead of invoking canon 39, the Bishop proceeded to revoke the appellant's licence. Clearly, the decision to revoke the appellant's licence was taken prematurely and was irrational.

[86] The procedurally flawed decision to change the appellant's placement was obviously the root cause of the revocation of the appellant's licence. Given that this procedural irregularity goes to the root of fairness principles espoused in the Constitution and the respondent's own canons, I am of the view that the only

²⁴ *Dabner v SA Railway and Harbours* 1920 AD 583 at 589; *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 351.

²⁵ *Taylor v Kurtsag NO and Others* 2005(1) SA 362 (W) at 382.

²⁶ *Theron en Andere v Ring van Wellington van die NG Sending Kerk in Suid Afrika en Andere* 1976(2) SA 1; *Mbombo v Church of the Province of Southern Africa, Diocese of Highveld* [2011] ZAGPJHC 93; *Fortuin v Church of Christ Mission of the Republic of South Africa and Others* [2016] ZAECPHC 18; *Bisho Mlibo Ngewu v The Anglican Church of Southern Africa and Ten Others* [2016] ZAKZPHC 88 para 33.

appropriate remedy is for the proceedings to start *de novo* before the respondent and for the stipulations of the proviso in canon 25(6) to be complied with.

[87] Based on all the circumstances and upon a conspectus of all the relevant facts, I conclude that the high court should have reviewed and set aside the Bishop's decision with costs. I would therefore uphold the appeal with costs, set aside the decision of the High Court and replace it with an order reviewing and setting aside the Bishop's decision (and any acts consequent upon it) with costs and remitting the matter back to the respondent for the holding of an inquiry envisaged in canon 39.

M B MOLEMELA
JUDGE OF APPEAL

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