

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 62810/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[18 January 2021]

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SIGNATURE

In the matter between:

M A MASOGA

1st Applicant

M A B MASHIANE

2nd Applicant

and

**EVANGELICAL LUTHERAN CHURCH IN SOUTHERN
AFRICA**

1st Respondent

**THE CHURCH COUNCIL OF THE EVANGELICAL
LUTHERAN CHURCH IN SOUTHERN AFRICA**

2nd Respondent

**THE COUNCIL OF THE CENTRAL DIOCESE OF THE
EVANGELICAL LUTHERAN CHURCH IN SOUTHERN
AFRICA**

3rd Respondent

**PRESIDING BISHOP OF THE EVANGELICAL LUTHERAN
CHURCH IN SOUTHERN AFRICA, THE RIGHT REV.
A M MNISI**

4th Respondent

**THE BISHOP OF THE CENTRAL DIOCESE OF THE
EVANGELICAL LUTHERAN CHURCH IN SOUTHERN
AFRICA, THE RIGHT REV. DR W M RAKUBA**

5th Respondent

J U D G M E N T

MUDAU, J:

- [1] The two applicants are members of the Evangelical Lutheran Church of Southern Africa (the first respondent). They have held the office of self-supporting pastors of the Tembisa West Parish of the first respondent ("the church"). This is an application for relief in the following terms: (a) an order reviewing and setting aside a decision, number 199 of 24 January 2018 of the third respondent removing the applicants as pastors of the Tembisa West Parish; (b) an order reviewing and setting aside decision number 141 (taken during on or about 27 to 30 May 2018) of the second respondent withdrawing the ordination rights of the applicants with effect from 24 March 2018; and (c) an order that the applicants' ordination rights be restored and that they be reinstated as pastors of the Tembisa West Parish.
- [2] The first respondent is the Evangelical Lutheran Church in Southern Africa ("the church"), with offices situated at No.24 Geldenhuys Road, Bonaero Park, Johannesburg, is a duly registered non-profit organisation in accordance with the laws of the Republic of South Africa. In terms of Part II, Chapter 1 of its constitution, the church can sue or be sued in its own name.
- [3] The second respondent is the Church Council of the Evangelical Lutheran Church in Southern Africa ("the church council") established in terms of the provisions of Part X, Chapter 4 of the constitution. It purports to be the highest Administrative Council of the 1st respondent, primarily responsible for the

management and administration of the broader business of the 1st respondent, with offices situated at the 1st respondent's Head offices.

- [4] The third respondent is the Diocesan Council of the Central Diocese of the Evangelical Lutheran Church in Southern Africa established in terms of the provisions of Chapter 5 of Part IX of the constitution. The third respondent ("Diocesan Council") is responsible for the administrative affairs of the Diocese of the 1st Respondent, with offices situated at No. 833 Diokane Drive, Central Western Jabavu, Kwa-Xuma, Soweto, Johannesburg.
- [5] The fourth respondent is the Presiding Bishop of the Evangelical Lutheran Church in Southern Africa, the Right Reverend A M Mnisi ("the Presiding Bishop"). The fourth respondent is cited in this application in his official capacity as an officer of the church, being the formal head and representative of the church as determined in Chapter 7 of Part X of the constitution. His office is situated at the 1st respondent's Head Offices.
- [6] The fifth respondent is the Bishop of the Central Diocese of the Evangelical Lutheran Church in Southern Africa, the Right Reverend Dr W M Rakuba cited in such capacity as provided for in Chapter 10 of Part IX of the constitution. The bishop, *inter alia* is the formal head and representative of the Central Diocese with his address at Diocesan Centre, 833 Diokane Drive, Central Western Jabavu, Kwa-Xuma, Soweto, 1868.

- [7] The Evangelical Lutheran Church of Southern Africa, characteristic of most churches, is an institution dedicated to the propagation and practice of the Christian religion. Like most other religious bodies in South Africa, it is a voluntary association of persons to which the rules of law applicable to such an association also apply.¹
- [8] The organisation of the Lutheran Church is set out in its constitution, which makes provision for the administration of its affairs and for the discipline as well as duties of its members. In terms of Part IV of the constitution, Chapter 1, membership of the church is, *inter alia* open to adults and children who have been received into the church through baptism. Part III read with Chapter 2 deals with the office of the ordained ministry. Clause 2.2 provides that: “[T]his office shall be given to and be undertaken and performed only by the one who has received a regular call by the Church and who has been ordained”. In terms of clause 2.3 before a person can be accepted into the ministry, “that person shall, during his or her time of training and probation convince the church of his or her fitness and suitability for the office.”
- [9] Those serving in the ministry should in terms of clause 2.7 admonish and reprove each other. The constitution provides in Chapter 3, clause 3.3 that those in self-supporting ministry are those who have gone through theological training and are ordained by the church to assist in an identified congregation, but do not receive remuneration from the church and they shall not appear in the election clergy roster.

¹ *De Waal and Others v Van der Horst and Others* 1918 TPD 277; see also *Bredeli v Pienaar* 1922 CPD 578; *De Vos v Die Ringskommissie van die Ring van die N. G. Kerk, Bloemfontein and Another* 1952 (2) SA 83 (O)

[10] Part V in Chapter 1 makes provision that a pastor is, *inter alia* duty-bound to observe the rules and regulations of the church. He or she shall be transferable to any place within the area of the church. In accordance with clause 7.4 in Part IX of Chapter 7 pastors are also *ex officio* members of the Congregational Council and congregational meetings in each congregation. The Congregational Council assists the pastor in charge of the congregation run the affairs of a particular congregation.

[11] Clause 1.1 in Part VII of Chapter 1 of the constitution of the church makes provision that a parish is a congregation or a group of congregations within a defined area headed by an ordained minister. Each parish has a parish council with certain duties, which include assisting congregational councils. The parish consist of at least 300 members. The parish is defined as such by the Diocesan Council upon recommendation by the Circuit Council. Significantly, clause 7.4 of Part IX in Chapter 7, of the church's constitution, which is uncontested, makes provision that *"It shall call, appoint, transfer, suspend and terminate services of church servants assigned to the and Diocese by the Church Council."*

[12] In terms of clause 5.1.5 of the Dossier of self-supporting ministries in the constitution however, pastors are placed and transferred according to necessity by their respective Diocesan Councils. It reads: *"[I]t follows that if a pastor out rightly refuses to be placed or transferred, he/she is virtually refusing to function as a pastor and forfeits his/her office"*. In addition, he or she is not entitled to free housing. Section 9 deals with ordination of pastors

including self-supporting pastors. It provides that: *“The right and duty to public preaching and administration of the sacraments is conferred by ordination. In general, the ordination implies that an employment relationship as Pastor is to be established.”*

[13] Section 10 deals with loss of rights conferred by ordination. It provides: *“The right to public preaching and to administer the sacraments is lost:-*

(a) when the service relationship of the Pastor with the Church is terminated in accordance with sections 57(5) to (11);

(b) when the Pastor leaves the service as a result of a breach of his obligation to teach in accordance with section 57(6);

(c) when the Pastor is removed from service as a result of a breach of his official duties in accordance with section 57(10); or

(d) when the Pastor waives this right.

[14] Significantly, section 10(2) provides that: *“A member of the Ecclesiastical Council shall confer with the affected person about the loss of the right to public preaching and to administering the sacraments. The affected person is entitled to be assisted by an ordained confidant from within UELCSA and to a fair and proper disciplinary hearing.”* (My underlining)

[15] It is clear and not in issue therefore, that the relationship between the Lutheran church and its members is contractual and that that relationship is governed: (a) by the constitution of the Church, the contents of which form the terms of the contract between the parties, and (b) by the relevant principles of

the common law.² The rights which such a relationship gives rise depend, *inter alia*, on the contents of the Church's constitution, to which the applicant has subjected himself and to which each and every member of the Church has acknowledged himself or herself to be bound.

CHRONOLOGY

- [16] The events that resulted in the present application are briefly the following: On 7 December 2016, the third respondent appointed Reverend Molebatsi, as both the full-time pastor and the pastor in charge for all the congregations under the Tembisa West Parish of the church. On the same day the applicants accordingly received a letter from the office of the Central Diocese advising them that Rev. Molebatsi has been appointed for the Tembisa West Parish and would commence duties on 15 January 2017. The appointment of Rev. Molebatsi was not well received by the applicants and the affected parish.
- [17] On 10 January 2017, the Tembisa West Parish Council addressed a letter to the Central Diocese advising the latter that the Tembisa West Parish "*does not consider it prudent to welcome the fourth pastor*", Rev Molebatsi, as pastor in charge. The reason for their unhappiness was that there was no consultation with the Tembisa West Parish in the appointment. The timing and planning of the transfer was questioned. The applicants also suggest in their founding papers that the appointment of Rev Molebatsi was precipitated by allegations that R40, 000 000-00 of church funds could not be accounted for.

² *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (AD) at 645B - C

[18] According to the applicants, attempts to meet with the office of the Central Diocese in 2017 did not yield the desired results. Subsequently on 13 January 2017, the third respondent responded by way of a letter to the Tembisa West Parish in which it was pointed out *“the deployment and/or placement of pastors is not a mere paper exercise that disregard the interest of the church or individual. The Diocesan Council is well aware of the situation at Tembisa parish council, the pastors being there at present; and the opportunities for growth and service delivery”*. It was pointed out that the parish does not have a full-time resident pastor. With this appointment (of Rev Molebatsi), it was pointed out that the parish will have the benefit and enjoyment that comes with it. It was further pointed out that the prevailing situation at the parish was “unusual”, which necessitated the appointment.

[19] In a letter dated 21 February 2018 addressed to all Tembisa West Parish congregants/parishes, the applicants were informed of a resolution taken by the Diocesan Council meeting, No. 199 of 24 January 2018 wherein *inter alia*, it was resolved to remove them from the Tembisa West Parish immediately and assigning other responsibilities to them in line with the dossier of the church pertaining to self-supporting ministry.

[20] The applicants allege that the decision by the Central Diocese was taken unlawfully and not in accordance with the principles of natural justice. They allege they were denied the right to be heard before the impugned decision was taken (*audi alteram partem*). These principles are, according to the applicants, firmly entrenched in the constitution of the church. They allege that

the church in all its structures makes provision for the establishment of disciplinary/appeal/dispute and mediation committees.

[21] On the applicants' version, attempts between the Tembisa West Parish and the office of the Central Diocese to resolve the matter failed. On 12 March 2018, they instructed their current attorneys of record to forward a letter ("annexure MAM6") to the third respondent questioning their removal and the processes that were followed. On 15 March 2018, their attorneys of record received a letter ("annexure MAM7") from the Central Diocese by which they were informed that the Central Diocese will not communicate with them through their lawyers, and that they have to avail themselves to the internal procedures provided for in the constitution of the church.

[22] On 27 March 2018, their attorney forwarded a letter ("annexure MAM8") to the fifth respondent *inter alia* enquiring what those internal procedures they were required to follow are. There was no response to this letter. According to the applicants, they immediately stopped their pastoral duties in the area, attended church as ordinary members but resumed duties upon request by church elders with effect from 24 March 2018.

[23] Subsequently, the applicants received annexures "MAM9" and "MAM10" respectively advising them of a decision by the church council, No 141 of 27-30 May 2018 resolving to withdraw their ordination rights as pastors of the church. They complain that this was done irregularly and therefore unlawful, unconstitutional and invalid for non-compliance with the constitution of the church. They contend the decision to take away their ordination rights is in

breach of their rights to natural justice, is arbitrary and therefore unreasonable and irrational. They contend that none of the provisions of section 10(1) (a) to (d) of the law on their removal, have been met. Finally, they allege clause 7.4 in Part IX of Chapter 7, of the constitution, relied on by second respondent to withdraw their ordination rights, does not entitle or empower the second respondent to do so.

[24] The deponent to the respondents' answering papers, the Diocesan Executive Secretary of the third respondent, Reverend Prins alleges that during 2017, the 3rd respondent addressed numerous letters to the Tembisa West Parish Council, (i.e. "DJP 13", "DJP 14", "DJP 15") in which the Tembisa Parish Council executive members were invited to a meeting with the third respondent. The purpose was to resolve any issue of disagreement with the decision of the Council. At a convened meeting, the issues were discussed but not resolved. Thereafter all the members of the Tembisa West Parish Council, including the applicants failed to attend any further meetings, without any valid reason or excuse for non-attendance to date.

[25] Subsequently, the fifth respondent addressed numerous letters and emails ("DJP18", "DJP 19", "DJP 20", "DJP 21", "DJP 22", "DJP 23", "DJP 24", "DJP 25", "DJP 26" and "DJP 27") to the applicants. The correspondences were aimed at discussing the re-allocating and re-assigning of roles of the applicants in the usual manner and as at previous instances, to different assignments and at different parishes of the church, which the applicants defied, as well as the authority of the third respondent in particular. In response, the applicants always gave vague or unreasonable excuses.

[26] The respondents contend that this was clearly in flagrant disregard and disrespect of the third respondent's leadership and authority granted to the latter by the church's constitution, more specifically at Part IX of Chapter 7 thereof. According to the respondents, the continued defiance by the applicants was clearly a manifestation of a commitment to sabotage all attempts to restore any form of governance by the first and third respondents over them. Whilst they continued to perform activities in the name of the first and third respondents, they were not only defiant but also acting outside of the constitution, laws, rules and regulations of the church.

[27] On 20 January 2018, the fifth respondent for example, issued a letter addressed to the second applicant in the following terms:

"Rev Dr MA Masoga

RE: REQUEST TO MEET WITH YOU

Earlier in January 2018 the Executive Secretary communicated the request for a meeting and up to so far this meeting has not taken place. I acknowledge the fact that we had a telephonic conversation about it. I am therefore making a follow up of this request. Kindly look at your schedule and let me know which day is suitable for you. Yours in His service (signed the Right Rev. Dr. WM Rakuba)".

This letter apparently, went unanswered.

[28] On 21 February 2018, the first respondent issued the impugned letters ("DJP 19" and "DJP 20"), addressed to the applicants. Except for personal particulars, the letters are worded the same way. The letters, in relevant parts read:

"Lenten greetings to you in the powerful name of our Lord and Savior, Jesus Christ. At a meeting of DC-EXCO (ELCSA-CD) last night, it was decided to

call you for a meeting to discuss your pastoral assignment in Central Diocese (ELCSA). Meeting details are:

Date: Thursday, 22 February 2018

Time: 17:30 Diocesan Centre

Apologies for the short notice of the meeting. (Signed: Rev. Prins)”

It is common cause that the applicants did not attend the proposed meeting. In an email dated 26 February 2018, the first applicant (Masoga) wrote to the fifth respondent. The letter in relevant parts reads:

“I will appreciate that your remarks about our failure to meet should not be blame on my side (sic). I have a trail of papers indicating how I clearly responded to your request for us to meet. In fact recently when I called... I explained to you that I do not work for you and the diocesan executive secretary based on the fact that I am a self-supporting pastor. The latter does not change the fact that I am a servant of God. I even requested your office to respect this very much. I cannot be called upon anytime your office feels so. There should be some level of decorum from both sides in determining how we organise our meetings. I would understand if my situation was that of a full-time pastor. I still request that I be respected in this regard... I... Should not be treated like one of your full time pastors and changed anytime and anyhow when councils feel so”.

[29] Consequently, the fifth respondent empowered by the constitution of the church, more specifically Part IX of Chapter 9 thereof, compiled a report on the recommendation of the ministerial council of the third Respondent, which the fifth respondent tabled and filed with the same ministerial council. As a result, it was recommended that the applicants be removed from their positions as self-supporting pastors of the church with immediate effect.

[30] Subsequent to this development, on 20 February 2018 at a meeting of the executive of the third respondent it was resolved to dissolve the Tembisa West Parish Council with immediate effect, which decision was ratified by the

third respondent on the 23th to 24th of March 2018. This resolution was conveyed to the applicants but they did not vacate their positions. That being the position, the fifth respondent tabled a report on the recommendation of the ministerial council. Flowing from the said report, the third respondent resolved that the applicants' ordination rights be withdrawn with immediate effect. According to the respondents, the applicants were advised in writing to their attorneys to exhaust internal processes before engaging external role players. The respondents noted with concern that the applicants never followed any internal process provided for in the church's constitution, laws, rules and regulations in challenging the decisions before launching this application.

[31] According to the respondents, only full time pastors can be pastors in charge in any congregation, and can be *ex-officio* members of the congregational council in accordance with the first respondent's dossier on self-supporting pastors' ministry as provided for in paragraph 7 and 8 thereof, more specifically at sub paragraphs 7.1 to 8.4. The respondents contend that the applicants have failed to comply with the pledge of office "*to perform all duties of the Pastoral Office with diligence, loyalty and trustworthiness*" as required by church laws.

[32] As to the allegations of misappropriation of church funds, Rev. Prins stated that there was never any complaint levelled regarding the disappearance of R40 million from the books of the church. In fact, following a resolution of the General Assembly of the first respondent, the R40 million was invested in an offshore account on behalf of the church. According to Rev. Prins, all the leaders of the church were aware of the resolution, which was clearly reflected

in the books of the church. The books of the church are annually audited. Therefore, the allegations by the applicants in this regard are without basis.

[33] Rev. Molebatsi deposed to an affidavit and confirmed the allegations made by Rev. Prins to the extent he was affected thereby and so did other church officials. In addition, he stated that during January 2017, he arrived at one of the congregations under the Tembisa West Parish in order to assume his duties. He was informed by members of the Tembisa West Parish Council that he was only a visitor there, not a full-time pastor and not their pastor in charge as they were in a dispute with the third respondent in that regard. From January 2017 until March 2017, he tried to assume his duties in his newly allocated role, but was chased away by the members of the Tembisa West Parish Council during March 2017. He has since been appointed Dean of the Pretoria circuit as of October 2018.

[34] In reply, the applicants make it clear that, the rights and authority of the third respondent as stipulated in the first respondent's constitution in clause 7.4 of Part IX in Chapter 7 is not contested. In issue however, is the right and authority to do so in contravention of the law of natural justice, particularly the *audi alteram partem* rule.

[35] According to the first applicant, he received a call on 21 February 2018 from the fifth respondent's office informing him of the meeting. He informed the fifth respondent's assistant that he was attending block classes and for that reason, he was unavailable. She promised to come back to him but never did. He was surprised and shocked when he received the letter informing him of

his removal. He recorded this in an email address to Rev. Prins on 22 February 2018 (“MAM13”).

- [36] According to the second applicant, he was informed by way of a telephone call on 21 February 2018 of the meeting scheduled for 22 February 2018. He was working in Hendrina, and it was, on his version impossible to attend on 22 February 2018. He requested that the meeting be postponed and timeous notice of the postponement be given. He understood that the meeting would be postponed. He only later learned that the meeting went ahead and that it was decided to remove him from Tembisa West Parish. He was not re-assigned a position, which he believed was the purpose of the meeting. The gist of the applicants’ complaint being that they were tried in their absence without being charged and without being given a fair hearing as is required in terms of the provisions of the law.

THE LAW

- [37] As indicated above, the Lutheran Church, like all other religious societies in South Africa is a voluntary association. The law to be applied is the law applicable to such associations. It is a well-settled principle that courts of law have no power to determine disputes amongst members of such an association except for the enforcement of some civil or temporal right. People are at liberty to form themselves into any association as long as its objects are not against the law and good morals. They may within the framework of the law agree to any constitution and frame any rules they choose for the good

governance and discipline of the association. They are at liberty to establish any tribunal they wish to decide questions that may arise within the association. The only remedy, which a member of a voluntary association has, when he or she is dissatisfied with the proceedings of the body with which he or she is connected, is to withdraw from it.

[38] It is our law that where any religious or any other lawful association has not only agreed on the terms of its union but has constituted a tribunal to determine when its rules have been violated by any member and the consequences of such violation, the decision of such tribunal will be binding when it acts within the scope of its authority, observes such forms as the rules require, and if not, the association has otherwise proceeded in a manner consonant with the principles of justice. In *Jockey Club of South Africa v Feldman*³Tindall JA said: '*The exclusion of the jurisdiction of the Courts of law on the merits is not contrary to public policy, and our courts have recognised that the decisions of such tribunals on the merits are final; but if the tribunal has disregarded its own rules or the fundamental principles of fairness, the court can interfere.*'

[39] In *Fisher v S.A. Bookmakers Association*⁴ Malan J held as follows: "*I am of opinion that in construing the constitution and the bylaws of an association, the same principle should be applied as in the construction of any other written instrument, in terms of which parties have contracted. The constitution and bylaws embody the terms and conditions upon which the members have agreed to become bound and to remain associated.*"

³ 1942 AD 340 at 351

⁴ 1940 WLD 88 at 92

[40] However, as Price J stated in *Garment Workers' Union v De Vries and Others*.⁵

'In considering questions concerning the administration of a lay society governed by rules, it seems to me that a Court must look at the matter broadly and benevolently and not in a carping, critical and a narrow way. A court should not lay down a standard of observance that would make it always unnecessarily difficult - and sometimes impossible to carry out the constitution. I think that one should approach such enquiries as the present in a reasonable commonsense way, and not in the fault-finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary, of the constitution. If such a narrow and close attention to the rules of the constitution is demanded, a very large number of administrative acts done by lay bodies could be upset by the Courts. Such a state of affairs would be in the highest degree calamitous - for every disappointed member would be encouraged to drag his society into Court for every trifling failure to observe the exact letter of every regulation. There is no reason why the same benevolent rules should not be applied to the interpreting of the conduct of governing bodies of societies as one applies to the interpretation of bye-laws [sic]'

EVALUATION

[41] There is no disputing that the impugned decision number 141 (taken during on or about 27 to 30 May 2018) of the second respondent withdrawing the ordination rights of the applicants with effect from 24 March 2018 was taken in circumstances where the applicants were not informed of the nature of the charges they were to face. This court has the authority to determine the true construction of the rules and regulations of the church. In order to justify its actions the church must show that the processes followed in dealing with a

⁵ 1949 (1) SA 1110 (W) at 1129

complaint, as well the decision taken on the merits of the complaint, the complainant has had substantial justice according to general legal principles.

[42] It is of particular concern to this court that the purpose of the meeting that led to the withdrawal of the applicants' ordination rights was to discuss the assignment for other pastoral duties to them. What then followed were proceedings of a disciplinary nature that were inherently unfair to the applicants. The steps taken by the church in this ultimate regard is not supported by section 10 (2) of the constitution of the church referred to above which is worth repeating: "*The affected person is entitled to be assisted by an ordained confidant from within UELCSA and to a fair and proper disciplinary hearing.*" However, in the instant case, the time allocated for that purpose was unreasonable in that they were given hardly 24 hours' notice to present themselves. The applicants were unable to attend, as stated above.

[43] The applicant were also not informed of their right to be assisted by an ordained confidant from within the ranks of the church. It is noted that some of the correspondences addressed to the applicants had a seven-day notice period as opposed to 24-hour notice in this regard. This was not only irregular, but also prejudicial to the applicants. The applicants were entitled to know the nature of the accusation against them to be in a position to bring the necessary evidence of rebuttal⁶. The onus is on the respondents to show that the applicants were not prejudiced. In this regard however, the respondents failed to discharge the onus. It is of no moment that the applicants at the time were not employees of the church. Importantly, it is from supporting ministries

⁶ Bredell v Pienaar supra at 585

that full-term pastors are drawn. The withdrawal of the ordination rights is for this reason *prima facie* prejudicial to the applicants. Under the circumstances, it was unnecessary for the applicants to exhaust the internal remedies within the church structures before approaching this court⁷. Accordingly, it follows that this court is entitled to interfere with the decision to withdraw the ordination rights of the applicants for the reason that the church failed to follow its own internal processes, in addition to the common law ordinary principles of justice.

[44] Brink J refers in *De Vos v Die Ringskommissie van die Ring van die N. G. Kerk, Bloemfontein and Another*⁸ to what was aptly put in *Long v Lord Bishop of Cape Town*: "*It may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice*" (footnote omitted)

[45] As Watermeyer J (as he then was) stated in *Bredell v Pienaar and Others*⁹:

'Now it seems to me that a failure to give the applicant notice of the charge against him with reasonable particulars of time and place is not only a breach of the Church rules, but also opposed to ordinary Ideas of justice, and the Courts have Interfered in a number of cases in which this has not been done'.

⁷ *De Vos v Die Ringskommissie van die Ring van die N. G. Kerk, Bloemfontein and Another* at 84

⁸ *Supra* at page 94

⁹ 1922 CPD 578 at 585.

[46] It follows, accordingly, that the decision to withdraw the ordination rights of the applicants did not follow due processes as provided for in the constitution of the church and falls to be set aside for the simple reason that the applicants were never cited, and no proper hearing took place. Consequently, I conclude that the withdrawal of ordination rights was procedurally unfair to the applicants. This however, does not imperil the earlier decision of the church to have the applicant removed from their respective positions at Tembisa West Parish, which in my view, properly construed, was nothing more than a suspension pending re-assignment of duties. To my mind, the applicants were not prejudiced by the earlier decision as they were yet to be engaged on the subject of the assignment of duties.

[47] For practical considerations and in the interest of the smooth operation of church activities, there is no reason why the applicants cannot be properly cited and given notices of not less than two weeks to appear at an identifiable venue, on specified disciplinary charges if the church is so inclined. In order to function meaningfully, the church needs disciplined members and pastors. It is very unacceptable that the impasse has dragged this long. The attitude of the applicants and their role in this regard obviously did not help matters. The applicants could and should have done better to have the matter resolved, particularly, the re-assignment of their pastoral duties.

[48] Ordinarily, a successful litigant is entitled to costs. In this instance, the applicants were partly successful but for paragraph (a) of the relief sought (their removal from the Tembisa West Parish). Prayer (c) of the applicants'

notice of motion is essentially a combination of the relief sought in prayer (a) and (b). However, the question of costs is a discretionary matter. The church was evidently frustrated regarding the Tembisa West Parish impasse by the attitude of some of the role players including the applicants when it resolved to withdraw their ordination rights. The role of the applicants in this regard did not help matters. I am therefore inclined to make no order as to costs.

[49] ORDER

49.1 The application for an order reviewing and setting aside decision number 199 of 24 January 2018 of the third respondent removing the applicants as pastors of the Tembisa West Parish is dismissed.

49.2 Decision number 141 taken during on or about 27 to 30 May 2018 of the second respondent withdrawing the ordination rights of the applicants with effect from 24 March 2018 is reviewed and set aside.

49.3 The applicants' ordination rights are restored.

49.4 There shall be no order as to costs.

T P MUDAU
[Judge of the High Court]

Date of Hearing: 19 October 2020

Date of Judgment: 18 January 2021

APPEARANCES

For the Applicant: Adv. G L Van der Westhuizen

Instructed by: Griesel Breytenbach Attorneys

For the Respondent: Adv. R T Ntshwane

Instructed by: LLV Marele Attorneys