

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

Case No: 15/2021P

In the matter between:

FOUNTAIN IMPACTORS CHURCH

APPLICANT

and

HERE IS LIFE MINISTRIES

FIRST RESPONDENT

MSUNDUZI MUNICIPALITY

SECOND RESPONDENT

ORDER

The following order is granted:

1. The application is dismissed with costs.

JUDGMENT

MOSSOP J:

‘Discord and division become no Christian. For wolves to worry the lambs is no wonder, but for one lamb to worry another, this is unnatural and monstrous.’¹

[1] The applicant and the first respondent both style themselves as churches. The second respondent is the municipality in which the first respondent has a place of worship.² The deponent to the applicant’s founding affidavit, the presciently named Mr Mzwandile Mpendulo Goodlord Ntshela (Mr Ntshela), was previously employed by the first respondent as a pastor.³ He resigned his position with the first respondent on 1 May 2021 and immediately after so doing, he established the applicant. A month after doing so, he launched this application on behalf of the applicant in which a rule nisi in the following terms is sought:

‘1.1 Pending the outcome of an application by the Applicant to the Second Respondent for acquisition of rights in and to the land situated at 1200, N1 Street, Edendale BB, Pietermaritzburg, KwaZulu-Natal (“the property”):

1.1.1 The First Respondent is interdicted from accessing or using the property or the building on the property;

1.1.2 The First Respondent is interdicted from preventing the Applicant’s members from gaining access to the property and the building;

1.1.3 The First Respondent and its members are interdicted from harassing, intimidating, threatening or otherwise interfering with the Applicant and its members at the property;

1.1.4 The Applicant shall have the exclusive right to make use of the property;

1.1.5 The Applicant shall pay on a monthly basis and on or before the due date, all costs in respect of services to the property to the Second Respondent;

1.1.6 The First Respondent is directed to pay the costs of the application; and

¹ Thomas Brooks: ‘Farewell Sermon at the Great Ejection’, 1662.

² The first respondent actually has, in addition, five other branch churches. The applicant appears to have none.

³ The first respondent apparently had six pastors, of which Mr. Ntshela was one. Mr. Ntshela later denies that he performed his services in terms of an employment contract, but in the founding affidavit, he clearly and unequivocally states that ‘I was employed by the First Respondent as a pastor.’

1.1.7 Further and/or alternative relief.

2. Pending finalisation of this application, paragraphs 1.1.1 to 1.1.6 shall operate as interim orders with immediate effect.’

[2] The order sought identifies the central issue in this matter as certain land and a church building (the church) that has been constructed on it. As is stated in the rule nisi referred to above, the land is situated at 1200, N1 Street, Edendale BB, Pietermaritzburg, KwaZulu-Natal (the property). It is common cause that the first respondent currently occupies the property and the church. The applicant wants to occupy both to the exclusion of the first respondent. That is what this application is designed to achieve.

[3] It is common cause that the first respondent had humble beginnings. It was established 15 years ago, and its congregants initially used to meet in a tent to conduct religious services and ceremonies. According to Mr Ntshela, after he joined the first respondent, he became the driving force behind the acquisition by the first respondent of the property from the second respondent⁴ and the raising of funds for the construction of the church on it. In doing so, he can only have acted on behalf of the first respondent, as he was its employee. On his own version, the second respondent permitted the first respondent to use the property and to construct the church.⁵

[4] Eight days after he resigned from the first respondent, on Sunday, 9 May 2021, Mr Ntshela and his congregants went to the property and sought to hold a church service of his new church, the applicant, in the first respondent’s church. Understandably, there was some consternation about this, and some resistance, from the members of the first respondent and Mr Ntshela claims that he was attacked and threatened by its members. He does not name those members in the founding affidavit. He claims that the tumultuous events of which he complains were recorded on a video and asserts that he has put up a memory stick with his papers

⁴ The property was, and still is, registered in the name of the second respondent.

⁵ Mr. Ntshela, to be accurate, does later state when making his application to the second respondent, more of which later, that the decision to build the church was ‘a mistake’. Why it was a mistake is not disclosed.

on which the video is fixed. He did not do so, and I have consequently not seen any video.

[5] Mr Ntshela states at paragraph 29 of the founding affidavit that:

‘The First Respondent has the attitude that it has exclusive rights to the building and as a result of this, the Applicant and its members are left without a building to worship from.’

[6] Mr Ntshela goes on to state that the first respondent is incorrect in taking this view of matters. In this regard, he states the following:

‘The Applicant disagrees with the First Respondent’s [sic] that it has exclusive rights to the property for the following reasons:

30.1 The First Respondent is not the owner of the land on which the church building was erected;

30.2 The erection of the building was solely the result of my efforts;

30.3 90% of all the funds that were used for the erection of the building were contributed by members who are now members of the Applicant;

30.4 The First Respondent has never been granted any formal rights to the property;

30.5 I, on behalf of the Applicant has [sic] applied to the Second Respondent for acquisition of rights to property. I attach hereto, marked annexure “**MGN 3**” a copy of the application which was submitted to the Second Respondent; and

30.6 The local ward counsellor, T. W. Sithole, issued a permit to occupy to the Applicant on 10 May 2021. A copy of the same is attached hereto marked annexure “**MGN 4**”. This is the only formal document granting any rights to any party which is in existence.’

[7] The two extracts referred to above are the high-water mark of the applicant’s case. Based on those allegations, it wants the first respondent to surrender its rights to occupy the property and the church to it. There is no question of the church being shared: the applicant requires the first respondent to vacate the property and the church. The applicant is, thereafter, to have exclusive rights to the church. What should become of the first respondent and its members thereafter is never

addressed by Mr. Ntshale. The veracity of each of the allegations made by Mr Ntshale must be examined to determine whether there is any merit in what he claims.

[8] It seems to me, the position is not that because of the first respondent's attitude, the applicant has been 'left without a building to worship from', as stated by Mr Ntshale: the applicant has never had a building. The applicant was brought into existence fourteen years after the first respondent was established. It was also brought into existence after the first respondent had secured the use of the property from the second respondent and after it had constructed the church. The first respondent, initially, as already stated, also did not have a church, and held its services in a tent. The applicant is accordingly not being prejudiced by an unreasonable attitude taken by the first respondent. There is an unfortunate expression of entitlement in the view taken by the applicant of the matter. At paragraph 72 of the replying affidavit, Mr. Ntshale states that

'The Applicant is entitled to the premises which were acquired through the effort and money from its members.'

As will appear hereafter, that sense of entitlement is entirely misplaced, and the remainder of the statement is legally incorrect.

[9] Mr. Ntshale states that the first respondent is not the owner of the property. On

a formal level, that would appear to be correct. As noted earlier, the property remains registered in the name of the second respondent. However, in a letter dated 26 January 2012 from the second respondent addressed to Mr Ntshale while he was still employed by the first respondent, the manager of housing administration for the second respondent methodically set out the history of the property. The second respondent's representative:

(a) acknowledged receipt of a payment made by the first respondent to the second respondent for the acquisition of the property.⁶ According to the second respondent, the property was registered in the Deeds Office as a site of worship.

⁶ The amount referred to in the letter was the sum of R3 208,70.

- (b) acknowledged that the property did not form part of a housing project known as the 'Deorista 500 Limited Housing Project' and indicated that the second respondent's housing administration section was at the time of the letter apparently in negotiations with the Department of Human Settlements and the State Attorney for the transfer of erven, which included Edendale BB, within which the property is located, 'whereafter titles will be issued'; and
- (c) taking all the facts into consideration, stated that:

'I therefore give you permission to fence off the wor ship [sic] site viz Erf 1200, Edendale BB.'

[10] From the contents of this letter, it is evident that whilst the property at that stage was not registered in the first respondent's name, its entitlement to receive transfer in due course was not disputed by the second respondent.

[11] Mr Ntshale asserts, further, that the church was constructed solely because of his efforts. This is not admitted by the first respondent. The approach in motion proceedings where a dispute of fact arises is regulated by the approach laid out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.⁷ The first respondent's version must therefore be accepted.

[12] But even if *Plascon-Evans* is shifted to one side and ignored momentarily and if it is accepted that Mr Ntshale, to the exclusion of all other members of the first respondent, was responsible for the construction of the church, it does not avail the applicant. This is because the first respondent has all the characteristics of a universitas.

[13] One of the documents put up by the applicant is the constitution of the first respondent. Paragraph 1.2 thereof reads as follows:

'Body Corporate:

The organization shall:

- ❖ Exist in its own right, separately from its members.

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

- ❖ Continue to exist even when its membership changes and there are different office bearers.
- ❖ Be able to sue and be sued in its own name.'

[14] The constitution is a relatively lengthy document, being some seven pages long. It sets out structures through which the first respondent is to be administered and the powers of the office bearers who occupy those structures. It provides for a banking account to be held in the first respondent's name and for branch churches to open their own bank accounts. Significantly, clause 6.2 thereof states: 'All properties acquired shall be registered under the name of the organization.'

[15] In the matter of *Webb and Co Ltd v Northern Rifles, Hobson and Sons v Northern Rifles*,⁸ the court had occasion to consider the difference between a universitas and an unincorporated association and stated as follows:

'An *universitas personarum* in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a *persona* or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. A universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members.' [Footnotes omitted].

[16] A universitas exists as an entity with rights and duties separate from the rights and duties of its individual members and it has perpetual succession. It also has the capacity to own assets independently of its members. Thus, the property of a universitas vests in the universitas as legal person.⁹ The separate legal personality that a universitas enjoys has its origin in Roman Dutch law.¹⁰ It is accordingly not necessary for a universitas to be brought into existence by way of a statute or to be registered in terms of a statute to possess the attributes of a legal person.¹¹

⁸ *Webb and Co Ltd v Northern Rifles, Hobson and Sons v Northern Rifles* 1908 TS 462 464-465.

⁹ *Dutch Reformed Church, van Wijk's Vlei v Registrar of Deeds* 1918 CPD 375; *Morrison v Standard Building Society* 1932 AD 229 238.

¹⁰ *Ex parte Johannesburg Congregation of the Apostolic Church* 1968 (3) SA 377 (W).

¹¹ Joubert: '*The Law of South Africa*', 2nd edition, volume 1, page 464, para 618.

[17] The constitution of the first respondent demonstrates that it is a universitas. If there was any question of this fact, this is erased by the disclosure in the answering affidavit that the first respondent is, in fact, registered as a non-profit organisation and holds NPO registration number 038512NPO. While this fact is denied by Mr Ntshale, no basis for the denial has been disclosed. Based on *Plascon-Evans*, I must accept that it is registered. Such registration can only be in terms of the Nonprofit Organisations Act 71 of 1997 (the Act). Section 12 of the Act deals with the requirements for registration and reads as follows:

‘(1) Any nonprofit organisation that is not an organ of state may apply to the director for registration.

(2) Unless the laws in terms of which a nonprofit organisation is established or incorporated make provision for the matters in this subsection, the constitution of a nonprofit organisation that intends to register must—

(a) state the organisation’s name;

(b) state the organisation’s main and ancillary objectives;

(c) state that the organisation’s income and property are not distributable to its members or office bearers, except as reasonable compensation for services rendered;

(d) make provision for the organisation to be a body corporate and have an identity and existence distinct from its members or office-bearers;

(e) make provision for the organisation’s continued existence notwithstanding changes in the composition of its membership or office-bearers;

(f) ensure that the members or office-bearers have no rights in the property or other assets of the organisation solely by virtue of their being members or office-bearers;

- (g) specify the powers of the organisation;
 - (h) specify the organisational structures and mechanisms for its governance;
 - (i) set out the rules for convening and conducting meetings, including quorums required
- for and the minutes to be kept of those meetings;
- (j) determine the manner in which decisions are to be made;
 - (k) provide that the organisation's financial transactions must be conducted by means of a banking account;
 - (l) determine a date for the end of the organisation's financial year;
 - (m) set out a procedure for changing the constitution;
 - (n) set out a procedure by which the organisation may be wound up or dissolved; and
 - (o) provide that, when the organisation is being wound up or dissolved, any asset remaining after all its liabilities have been met, must be transferred to another nonprofit organisation having similar objectives.'

[18] To become registered in terms of the Act, the first respondent would have to comply with the prescripts of section 12. That it was so registered is determinative of the fact that it holds its assets and its rights to assets separately from its membership. This, together with the fact that Mr Ntshela was an employee of the first respondent at the relevant time, means that notwithstanding that he may arguably be responsible for the construction of the church, that does not give him, let alone the applicant, any right to the church. Mr Ntshela did not become the owner of the

church, nor did he acquire any right superior to that of the first respondent through being responsible for its construction. Mr Ntshela's resignation from his employment with the first respondent, and any resultant change in membership of the first respondent because of his resignation, did not alter that fact.

[19] It may well also be so that 90 percent of the funds used to construct the building came from members of the first respondent who are now members of the applicant, although I hasten to add that this is disputed by the first respondent. Mr. Ntshela states further that:

'The members of the Applicant have through the last two years donated all their excess funds towards the costs of building the structure on the property.'

I need not determine whether either of these submissions are correct. When the funds were raised for the construction of the church, there can be little doubt that some of those funds were donated to the first respondent by, inter alia, its members. In doing so, the donors could not have been members of the applicant, which did not exist at that time. The fact that the donors now prefer to worship under the aegis of the applicant does not endow them with any right to the brick and mortar of the church. A donation is just that: it is a gift or contribution, made without conditions, designed to assist the party to whom the gift is given.¹²

[20] The further statement by Mr Ntshela that the first respondent has never been granted any formal rights to the property is incorrect. The letter of 26 January 2012 from the second respondent confirms the first respondent's right to continue to occupy the property and to fence it.

[21] The fact that Mr Ntshela has applied for the acquisition of the property from the second respondent is factually correct. But it is of no significance in this dispute. Indeed, the contents of the application made by Mr. Ntshela, which exists only in the form of a letter, are, in part, false and, it seems, were designed to mislead the second respondent. The letter is dated 1 June 2021, one month exactly after Mr

¹² <https://www.merriam-webster.com/dictionary/donation>. The word 'donation' has a Middle English origin from the English word *donatyowne*, from Latin *donation-*, *donatio*, from *donare* to present, from *donum* gift; akin to Latin *dare* to give. The word 'donation' is used in s 3(3)(c) of Estate Duty Act 45 of 1955. In the matter of *Commissioner for Inland Revenue v Estate Hulett* 1990 (2) SA 786 (A), that word was interpreted to mean a donation prompted by sheer liberality or disinterested benevolence.

Ntshеле resigned from the first respondent. Mr Ntshеле is the signatory to the letter. He states the following:

‘As I have mentioned that we used to be Here is Life Ministries before; on this piece of land we are requesting to buy or be donate [sic] for there is a building that is built on. First of all we would like to rectify the mistake of building on that piece of land which was not a good thing to do. Due to the desperation of wanting to have a building structure we ended up building. In order to rectify this mistake I am writing this letter asking for an opportunity to buy or having this piece of land donated to us.’

[22] It must be remembered that at the date of this letter, Mr Ntshеле was no longer employed by the first respondent. The first inaccuracy in the extract referred to above is that Mr Ntshеле suggests that the applicant used to be the first respondent. It did not. They are two distinct entities. If the applicant was merely the first respondent with a different name, there would only be one entity seeking to occupy the church. The fact that there are two entities claiming this entitlement demonstrates the inaccuracy of what is stated. Mr Ntshеле indicates, further, that ‘we’ would like to rectify the mistake of building on the land: who is the ‘we’ that he refers to? It cannot be the first respondent as he has severed ties with it and has no authority to speak on its behalf. If he refers to ‘we’ as being the applicant, how would the applicant remedy a mistake allegedly made by the first respondent? The act of occupying the church could not achieve this. In any event, the applicant itself could not have made the mistake as it did not exist at the time the church was constructed. It would appear that this portion of the extract is intended to reinforce the initial comment that the applicant used to be the first respondent.

[23] Finally, Mr Ntshеле claims that the applicant has a ‘permit to occupy’ the property issued to it on 10 May 2021 by a ward councillor, Mr T. W. Sithole (Councillor Sithole). In the document referred to by Mr Ntshеле, Councillor Sithole states, *inter alia*, that:

‘... I have no objection in the [sic] utilizing this piece of land, provided they are in agreement with the Msunduzi Municipality.’

The document, however, contains a by now familiar error. Councillor Sithole defines the church that he refers to as being 'Fountain Impactors Church', the applicant. He then goes on to state that:

'Moreover the church is [sic] started to operate in the previously mentioned address a decade ago ...'

That is untrue. The applicant could not have operated at the property for a decade as it had only been formed after Mr Ntshole resigned from the first respondent on 1 May 2021. Indeed, it could only have been in existence for, at most, a mere 9 days when Councillor Dlamini signed his letter. What is stated in that letter is simply a variation of the untruth advanced by Mr Ntshole that the applicant used to be the first respondent.

[24] Mr Ntshole claims that the document that he refers to as a 'permit to occupy': '... is the only formal document granting any rights to any party which is in existence.'

That is also untrue. The first respondent has put up a similar document, although it predates the applicant's 'permit to occupy' by nearly 15 years. On 11 October 2007, a Councillor T. I. Dlamini signed a letter stating that he had no objection to the first respondent building a church on the property.

[25] The 'permit to occupy' relied upon by Mr Ntshole is not that. It is simply a letter authored by Councillor Sithole in which he expresses his views on the applicant's aim of acquiring the property and the church. It is clearly intended to assist in this regard. In any event, it is to be doubted whether a ward councillor, acting on his own, has the power to bind the second respondent and to authorise anyone to occupy property registered in the name of the second respondent. The second respondent has internal departments that deal with such issues. No proof of such a power vesting in Councillor Sithole has been put up.

[26] The requirements for an interim interdict are well known and need not be repeated. Interdicts are granted based upon rights which are sufficient to sustain a cause of action.¹³ An applicant seeking an interim interdict, as in this case, must

¹³ *Albert v Windsor Hotel (East London) (Pty) Ltd (in liquidation)* 1963 (2) SA 237 (E) at 240E-241G.

establish a prima facie right that may be open to doubt. That applicant must establish that a right that it possesses is being infringed or which it anticipates will be infringed imminently. If the applicant cannot establish this, the application must fail.¹⁴

[27] The primary consideration when assessing an application for an interdict is thus the identification of the existence of a right. Counsel for the applicant suggests in her heads of argument that the prima facie right to occupy the property arises from the 'permit to occupy' signed by Councillor Sithole. I have already dealt with that document. It does not constitute a 'permit to occupy' the property: it merely expresses Councillor Dlamini's opinion on the proposed acquisition of the property by the applicant. It does not permit the applicant to occupy the property to the exclusion of the first respondent.

[28] Despite my best endeavours, I am unable to discern the existence of a right of any nature and of any strength that the applicant may lay claim to. When the matter is distilled to its base elements, it seems to me that what the applicant is attempting to do is to claim the church and property of another religious body without paying for it. It matters not that some, a few, or all the members of the first respondent now wish to worship through the applicant. The first respondent is a universitas that holds its assets and its rights to assets separately from its members. The comment by Mr. Ntshale, referred to earlier, that the First Respondent has the attitude that it has exclusive rights to the church, must be affirmed by this court.

[29] Being unable to establish the existence of a right, the application must perish. I accordingly grant the following order:

The application is dismissed with costs.

MOSSOP J

¹⁴ *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and another* 1967 (1) SA 686 (W).

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