



Of interest to other judges/Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

CASE: C 512/2017

In the matter between:

GIDEON JOHANNES MAREE

First Applicant

and

THE BLOEMFONTEIN BAPTIST CHURCH

Respondent

Dates of Trial: 29 November -1 December 2020, 7 December 2020

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 3 February 2021.

Summary: (Automatically unfair dismissal – s 187(1)(f) and (h) – Alleged unfair disciplinary action and suspension owing to making a protected disclosure
- existence of protected disclosure considered – Alleged unfair discrimination pertaining to suspension of video from church's Facebook page and failure to permit employee to preach – Alleged substantively and

procedurally unfair dismissal – Claim of procedurally unfair dismissal upheld)

JUDGEMENT

Lagrange J

Introduction

- [1] The applicant in this matter, Mr G Maree ('Mr Maree'), claims that his dismissal by the respondent ('the church') on 19 April 2017 was automatically unfair in terms of section 187 [1] (h) or (f) of the Labour Relations Act, 66 of 1995 ['the LRA'], because he was dismissed for making protected disclosures or for expressing his firmly held views in respect of his religion, conscious or belief to representatives of the church on 24 February 2017. In the alternative, he claimed that his dismissal was substantively and procedurally unfair.
- [2] He also claimed that he was unfairly discriminated against when he was suspended on 24 February 2017 and, or alternatively, subjected to a disciplinary hearing on account of expressing his firmly held beliefs during a meeting on the same date. Although his statement of case made no specific reference to the Employment Equity Act, 55 of 1998 ('the EEA'), the latter claim resorts under section 6(1) of the EEA.
- [3] In addition, he claims he was unfairly discriminated against on grounds of religious belief when a video he had produced was removed from the church's Facebook platform and in denying him an opportunity to preach at the church.
- [4] Lastly, he claims that his subjection to a disciplinary inquiry and suspension amounted to an unfair labour practice in terms of section 186 [2] [d] of the LRA, on the basis that such action amounted to an occupational detriment imposed because he had made protected disclosures under the Protected Disclosures Act, 26 of 2000 ('the PDA').

- [5] Maree was dismissed after being found guilty of four acts of misconduct. The first two charges related to statements he made during a staff meeting on 24 February 2017, and the third and fourth charges related to removing work computers from the church's office on the same day without authority, or contrary to a direct instruction.
- [6] The parties submitted written arguments.

Summary narrative

Background and events of 24 February 2017

- [7] The senior pastor of the church is Ds J Maree ('Ds Maree'). The overall management of the church resides in a council of elders ('the council'). At the relevant time there were twelve members of this body. There was also a day-to-day management committee ('Manco') comprising Mr H Van Schalkwyk, Ds Maree, Mr G Van Zyl and Mr J Botes, to address issues which could not wait for the next council meeting. All the members were members of the council and Botes was also employed as the church's financial manager. Manco did not appear as a formal constitutional structure but Ds Maree testified that the council had agreed to establish it.
- [8] Maree was employed by the church in June 2009 to assist with management and counselling functions. Maree has a doctoral degree in theology and an honours degree in psychology. His job designation was that of Congregational Director and Pastoral Counselor. He reported to the senior pastor of the church, Pastor J Maree ('Ds Maree') who also happens to be his brother.
- [9] The main disciplinary charges against Maree arose from remarks allegedly made by him during a staff meeting on 24 February 2017, to the effect that:
- 9.1 Ds Maree manipulated the meetings of church elders;
 - 9.2 Ds Maree misled people in order to get money for paving to deal with a storm water issue;
 - 9.3 Ds Maree was abusing his authority;

9.4 Ds Maree and 'brainless' Mr J Botes had paid Mr G Van Zyl from the collection money in 2009;

9.5 God's name was being taken in vain under the cover of the gospel, and

9.6 Ds Maree needed to return to the path of religion ('tot bekering kom').

It was claimed these remarks which were false, unfounded and seriously impaired the relationship between himself and his employer, the church. The accusations against Rev J Maree and Botes mentioned under subparagraphs 7.1, 7.2, 7.4 and 7.5 above, also amounted to false and deliberately misleading accusations. During the course of the trial it did emerge that whichever of two alternative versions of the statement in subparagraph 7.6 was uttered by Maree, it was not made in the meeting, but shortly afterwards. Ds Maree also conceded that Maree might not have said that he had actually made false representations to obtain money for paving, but the tenor of the accusation was that there was something untoward about the proposal.

[10] Before going further, a brief digression on the alternative versions of what Maree allegedly said to Ds Maree after the meeting is necessary. Maree claims he said that Ds Maree 'moet tot inkering kom'. Ds Maree and Botes testified that the term used was 'moet tot bekering kom'. Though similar, 'inkering' and 'bekering' have different connotations. Both impute a moral deficiency to the person identified as requiring correction. However, the term 'inkering' implies that the person in question needs to do some serious reflection on their ways, whereas 'bekering' implies that the individual has sinned and needs to correct their ways and return to the faith.¹

¹ HAT, *Verklarende Woordeboek van die Afrikaanse Taal*, Odendaal et al contains the following definitions:

“bekering (- e, -s) **1** Verandering van hart, afkeer van die sonde: *Tot bekering kom, bring.* **2** Verandering van opvatting....

..

Inkeer s.nw. **1** Oordenking van eie handel en wandel; selfondersoek, inkering: *Inkeer tot to jouself is moeiliker as om jou naaste te kritiseer.* **2.** *Bekering: 'n Goddelose wat tot inkeer kom.. ww.(ingekeer) 1 (met tot) Eie handel en wandel oordenk: selfondersoek toepas: ...”*

- [11] On 23 February 2017, the day before the meeting, Maree discovered that a video, which was the second in a series of videos he had made on the theme of sexuality, had been removed from the church's Facebook page by Ds Maree, without his knowledge of any consultation or explanation being given. The subject matter of the video was that loose sexual relationships were a cause of trauma. Maree himself said it was the language he had used in the video and not the subject matter which had offended Ds Maree, but he denied that the video had expressly stated rhetorically: "Why do women open their legs for men?" He claimed he had put it more diplomatically that extra-marital and pre-marital sex led to trauma. However, according to Ms C Maree, Maree's spouse, Ds Maree had disapproved of the statement in the video that "...there are persons who would rather open their legs instead of their hearts". Botes confirmed that the video contained this statement. Maree declined to respond directly to the proposition that he simply refused to accept that Ds Maree and others had found the video distasteful. Ds Maree had learned of the video from Botes and the offensive words used. He did not want it disseminated on social media and instructed that it should not be accessible from the Facebook page. Pastor Petrie also told him he did not think the controversial words in the video sounded right. After the day to day management discussed it, it was not merely suspended but was removed from the site. Ds Maree's concern was that it would project an image of the church as being hostile to persons who engaged in casual sexual relationships. He would have taken issue with Maree if he had persisted in insisting he could say what he liked.
- [12] In the course of a conversation between Maree and Ds Maree after the staff meeting, which Maree had covertly recorded, Ds Maree had insisted that nothing was supposed to be posted on the Facebook page of the church without first being viewed by himself or Petrie. Maree claimed that if Ds Maree had been performing his duty properly he would have viewed the video before it was placed on the church's site. In accusing Ds Maree of neglecting his duties, Maree did not regard this as disrespectful but was a communication in the context of them both being elders of the church.

- [13] In his affidavit, Maree set out how he had placed his video on the Facebook page on 23 February and during the course of the day he and his personal assistant, Ms L Myburgh ('Myburgh') started receiving calls that the video had been removed. He summonsed the clerical employee responsible for placing the video on the site, and was told that Ds Maree had instructed him to remove it. He was angered that Ds Maree had done this without consulting him. He felt that all the things that were going wrong in the church had got too much for him. He mentioned it to Myburgh and discussed it with his wife that night. He decided he must start speaking about all the improprieties and he prepared notes for the staff meeting the following day.
- [14] There is some question whether the meeting was a prayer meeting of staff or a staff meeting, but it seemed to have features of both. Not much turns on this. Maree said it was towards the end of the meeting that he saw the opportunity to raise his concerns. This occurred when Ds Maree had just remarked how it was interesting that sometimes when he was preparing a religious message, he would find that the youth pastor of the church was going to preach on similar issues, without either of them knowing what the other was doing. Maree saw this as an ideal time to make the point that Ds Maree did not know what the youth leader was going to preach about, yet did not stop him doing so, whereas in his case Ds Maree had seen fit to remove his video which dealt with the subject of sexuality, which was a topic he admitted knowing nothing about and preferred not to preach about either.
- [15] Ds Maree agreed that Maree made the allegations right at the end of the meeting and said Maree was very emotional. It was traumatic and some of the women present began to cry. He felt Maree had lost control. Botes escorted Ds Maree from the meeting and Maree followed him to his office and continued his tirade. Ds Maree testified it was one of the most emotional days of his life. He never expected to be personally attacked in the way he was, let alone in front of junior staff after a prayer meeting.
- [16] The persons present in the meeting were Maree, Ds Maree, pastors J Killian and P Spies, Ms N Victor (a receptionist), Ms D Brink (music co-

ordinator), Ms L Myburgh (Maree's secretary), Ms M Diedericks (an administrator), Ms T Van Solms (facilities manager) and Ms Maree (Ds Maree's spouse and personal assistant). Botes was there but left at one stage and had returned during Maree's address to the meeting, after being alerted to what was happening.

- [17] Botes testified that he had initially left the meeting to make a phone call and did not return because he thought the meeting was over. However, he was phoned by the receptionist, Ms Victor, to say that he should go to the meeting because Maree was 'having a serious go' at Ds Maree. When he entered the meeting he heard Maree alleging that Ds Maree and he were making payments to Van Zyl from the collection money and heard Maree calling him 'brainless'. He found this humiliating as it was uttered in front of more junior staff and it also suggested he and Ds Maree were doing something unlawful. He testified that he told both Ds Maree and Maree that the meeting was not the place to discuss those matters and they both left and went together into an office. Later he heard Maree going upstairs and talking to Ds Maree on the landing. This is where he heard Maree telling Ds Maree he needed to repent. It was said within hearing of himself, Ds Maree's wife and another female staff member. Botes confirmed that he had testified that what Maree said to Ds Maree was 'jy moet nog tot bekering kom' and not 'jy moet tot inkering kom'. Ds Maree conceded it was possible that the remark was not heard by more than three persons.
- [18] Maree testified that he said Ds Maree 'moet tot inkeering kom', but denied saying this in the meeting. According to him it was uttered when he and Ds Maree were alone in the office after the meeting. In his view there was nothing untoward about saying this to Ds Maree. He denied using the term 'tot bekering moet kom'. He also denied saying Botes was 'brainless', and that his witnesses had confirmed this in his disciplinary enquiry, though none of them testified at the trial.
- [19] Maree was suspended after the staff meeting in which he made his utterances and was issued with a notice of a disciplinary inquiry, initially scheduled for 14 March 2017.

- [20] The other charges against Maree stemmed from him taking his computer and that of his secretary home without permission on the day of his suspension, and despite an instruction from the Congregation Manager, Botes, to leave his own computer at the church office when he was suspended.
- [21] Maree did not dispute taking his computer home, but claimed he had to remove data concerning his consultations with individuals he had counselled, as he had to protect the privacy of those communications. When it was put to him that the information in question belonged to the church and was not his personal property, he claimed that his personal assistant maintained a written record of the consultations, but his computer held private details of the counselling. Botes testified that Maree had removed all correspondence and data from the computers when they were returned by him. His understanding was that the persons Maree consulted were 'clients' of the church, not Maree's personal 'clients'. Maree emphasised that Maree had conducted his counselling work under the umbrella of the church.
- [22] The enquiry was postponed until 6 April but did not conclude on that day and was set to continue on 13 April. On 12 April, in support of a request to postpone the inquiry, Maree submitted a medical certificate booking him off work from 10 until 21 April. Although he received the certificate on 11 April he only submitted it the day before the enquiry because he had initially intended to appear at it. The church did not accept the medical certificate as a basis for postponing the inquiry, which then proceeded in his absence. It was put to Maree that the church did not accept it because the consultation with the doctor had been telephonic and no affidavit of the doctor confirming Maree's condition was received. Maree claimed he was simply told that he was trying to delay the enquiry and was never asked for further substantiation.
- [23] He was summarily dismissed on 19 April 2017 after being found guilty of all charges.
- [24] A barrage of litigious activity between the parties ensued arising from Maree's suspension and dismissal, but a settlement was concluded on 21

May 2018 in terms of which both parties agreed to withdraw various proceedings in the CCMA and the labour court, and Maree agreed he would only proceed with his claim in this case of the amending it by June 2018.

The alleged protected disclosures

- [25] Maree claimed that at the meeting he had made five protected disclosures.
- [26] Firstly, he disclosed that Ds Maree had allegedly installed a concealed camera in the ceiling of his office which recorded many discussions between Ds Maree and visitors church members that took place in his office, some of which would have concerned intimate personal issues. According to him the financial manager Mr J Botes ('Botes') could observe the footage on his own computer in his office, which adjoined that of Ds Maree. Secondly, he disclosed that Ds Maree had fabricated a restructuring exercise in the church in order to get rid of two female personnel, allegedly stating he did not want them at the church any longer. Thirdly, he had questioned payments made to Mr G Van Zyl ('Van Zyl'), a church elder, for advice he had given to Ds Maree. Maree was of the view that, as an elder, Van Zyl should have provided his services to the church without receiving any remuneration. Fourthly, he informed the meeting that during a meeting of church elders R 500,000 rand had been authorised for the paving of the church property, whilst there were many poor persons and more important causes that could have benefitted from such a large sum of money.
- [27] Under cross-examination, Maree conceded he could not dispute that, during the council meeting in 2015 when the paving issue was discussed, a decision was taken not to incur the expenditure on the paving, and that subsequently members of the church had independently donated the funds required. Botes confirmed that the proposal had been made by Ds Maree to pave a ring road around the church, but the council had rejected it because of the cost. At the meeting of elders, Maree had opposed the proposal. Botes confirmed that only half the paving was to be used for the ring road and that there was a storm water problem caused by a steep

slope on the premises. Further, he testified that although the donor's identity was kept confidential, everyone knew about the donation. Maree declined to explain why he had waited since 2015 to bring this issue forward.

[28] The only explanation Maree could offer for raising the 2009 payments to Van Zyl, eight years later in the staff meeting, was that it was something which had 'stuck in his head'. Botes testified that when Ds Maree was newly appointed at the church, he needed assistance with management. The council agreed that from March 2009 Van Zyl, who was a businessman, could assist in this regard, and be paid for his services. He worked at the church office two days a week. All payments to him were made on receipt of his invoices and effected by ETF. No payments were made to him in cash. The arrangement was a transitional one to assist Ds Maree and came to an end in January 2010, once Maree had found his feet. Ds Maree confirmed this. According to Botes, Maree was fully aware of the payments because expenses were discussed with him after he was appointed in a managerial capacity in June 2009. He had also received spreadsheets of expenditure. As Maree was blind, he had a programme which converted the spreadsheets into speech, so he had access to them. He confirmed that Maree had never once raised the payments to Van Zyl with him. Maree testified he no longer had access to the financial statements after he no longer performed a managerial role in 2012, and therefore could not be sure if the payments had continued, but did not challenge Botes' evidence that the payments had ceased in 2010.

[29] Maree conceded that no retrenchments had actually occurred, but he attributed this to his disclosure of the plan. Though he did not deny that Ds Maree had told him that there was a possibility of retrenchment in confidence, Maree insisted that Ds Maree had said he did not want the two staff members at the church. Ds Maree testified that he had confided in Maree that if a retrenchment exercise took place the posts of the two individuals would be affected, but never planned to embark on a simulated retrenchment exercise. He said he could not recall stating that he did not want the two staff members in question, but denied that anything had been decided on the question of a possible restructuring. Because he had

discussed the issue with Maree, it was not an issue the church had included in the charges against him.

[30] Lastly, Maree made it known to the meeting that a video he had made had been removed from the church's Facebook page by Ds Maree, without consulting him and without his permission, solely because Ds Maree did not agree with the religious opinions expressed by Maree in the video. Maree had made the video in his capacity as a qualified and registered pastoral counsellor. He claimed this was the reason he had accused Ds Maree of abusing his authority. Maree also believed it amounted to an act of unfair discrimination against him on account of his belief.

[31] In Maree's view, the installation of the camera and the fabricated retrenchments were actions which were not compatible with an institution dedicated to God and it conflicted with their responsibilities as church personnel towards members of the congregation. This had prompted him to make the comment to the effect that God's name was being taken in vain under the cover of the gospel. Maree expressed it thus in his lengthy affidavit submitted as part of his evidence, which might be roughly translated as:

"...(T)hese actions by the senior pastor and J Botes were disrespectful of God. To declare the gospel of God to church members and visitors on a Sunday, but to work in a deceptive manner during the week by recording the same members and visitors on a concealed camera in your office when they called for help, was conduct which disrespected God."²

Botes agreed that the accusation made by Maree that God's name was being disrespected, was an expression of an opinion, but it was still a very serious allegation to make.

[32] Evidence from Maree's secret recording of a conversation with Ds Maree was that the latter said the camera was not concealed and everyone was aware of it. Ds Maree did not dispute that Maree mentioned the 'secret cameras' in the staff meeting, but denies this was a disclosure of anything

² "... (H)ierdie optrede van die senior leraar en J Botes Godslasterlik van aard [was]. Om op 'n Sondag die evangelie van God aan kerlidmate and besoekers te verkondig, maar gedurende die week gaan jy bedrieglik te werk om dieselfde lidmate en besoekers met 'n versteekte kamera in jou kantoor af te neem wanner hulle vir hulp kom aanklop, is Godslasterlike gedrag."

that was not already known and, in any event, there was nothing secret about them. Maree could not dispute that the installation of the cameras had been authorised and had been considered necessary to deal with theft because the office contained valuable documents. He denied that he simply did not accept the decision to install the camera and that this was another instance of him challenging Ds Maree's authority to do things. Botes confirmed that eight cameras had been installed in February 2016 as a result of a number of cases of missing items, such as tape cassettes, of which there was a huge number. The cameras were not concealed. He agreed he could view the footage on his computer, but claimed the cameras did not record sound, though this was not put to Maree. Ds Maree said they were installed for insurance purposes and also because someone had stolen items from the information desk and had fiddled in office drawers. Under cross-examination, Ds Maree claimed Maree had asked if the cameras recorded sound and was told they did not.

- [33] Maree's complaint that he had been denied an opportunity to preach dated back to at least 2012. As church elder he believed he was entitled to such an opportunity in terms of clause 7.2.3 of the church's constitution, viz:

“Die amp van ouderlinge word as besonder hoog geag en sal byvoorbeeld toegelaat word om te preek en/of die ordinansies te bedien.”³

- [34] Maree found it strange that during his first three years at the church certain employees and elders of the church were given an opportunity to preach but he was not. Ds Maree had asked him to attend a meeting of the church elders on 24 July 2012 and address them on the question of being given an opportunity to preach. Maree could not understand why this was necessary because he was more than qualified to do so and in any event the church's constitution regarded it as an important function of an elder. The issue was the last matter on the agenda of the meeting. Elders who were also employees of the church left the meeting before the discussion. Botes, who was one of them, excused himself saying 'In the morning I have to work with Deon'. In his evidence, Botes explained that

³ The office of an elder is held in high regard and, for example, [an elder] shall be permitted to preach and, or alternatively, serve in proceedings of the church.”

he was involved in the day to day management of the church and did not want to be present when the matter was discussed. In his understanding, clause 7.2.3 meant that an elder could preach but subject to the council's approval. He did not have any direct knowledge of the reason Maree's request to preach had been rejected.

- [35] Maree told the council of his deep desire to preach and motivated why he should be allowed to, based on his academic qualifications and status as an elder. He claims that, after his presentation, he was met with a barrage of hostile questions. He explained that the issue of preaching was a matter concerning his calling, skills and his right to preach, and that he wanted to perform this function just like others did from time to time. Remarks were made by the elders at the meeting suggesting that his desire to preach was a result of a 'mid-life crisis' or because he was not sure whether he was a pastoral counsellor or just a 'frustrated' clergyman. The chairperson allegedly concluded the discussion on the basis that the *status quo* should remain unchanged. Maree felt the council had treated him as worthless. This experience made him think he could not trust the elders to deal properly with other issues if they could reject his request to preach a couple of times a year, in the way they had. Ds Maree insisted that he had made at least three requests to the council for Maree to be permitted to preach, but each time they had declined to agree. Ds Maree refused to be drawn on the reasons why other individual members of the council were opposed to Ds Maree preaching.

Maree's lack of faith in the council of elders

- [36] In Maree's view, the interaction with the meeting of elders concerning him preaching and other interactions he had with them undermined his faith in them as a suitable forum to which he could make protected disclosures. During the discussion about him being permitted to preach, the senior elder, Dominee Jacob, stated 'out the blue' that Maree would no longer perform his management functions, which would be assumed by Botes. The other elders all agreed and Maree had no chance to question or react

to this alteration of his duties. Ds Maree denied the two issues had been linked to each other.

- [37] A third issue contributing to his lack of confidence in the council, was that after his suspension on 24 February 2017, he obtained the minutes of the 24 July 2012 meeting which showed that the decision that his duties be changed was unanimous, whereas two of the signatories to the minute had already left the meeting by the time this issue was discussed. Further, the church misrepresented that he had agreed with the decision. This unilateral variation of his contract was cited by Maree as a fourth factor undermining his faith in the board of elders. His distrust prompted him to start secretly recording discussions with others for the purpose of obtaining evidence to demonstrate the unjust treatment he was suffering.
- [38] One of the conversations Maree clandestinely recorded was a conversation he had with his brother April 2013 about alleged comments by Mr G Van Zyl, another elder, to the effect that in view of Maree no longer performing management functions his salary should be reduced. The extract of the conversation cited by Maree indicates that Ds Maree was of the view that Maree had merely raised the matter as a query. This too is cited by Maree as another reason why he felt he could not trust the board of elders. In addition, Ds Maree conceded in another conversation that Maree might be correct that the board had not been entitled to unilaterally vary his contract.
- [39] Maree also could not get Ds Maree to tell him, which elders might have been opposing him being permitted to preach. Despite pursuing the issue of the unilateral variation of his contract with the chairperson of the council, Mr Van Schalkwyk, and Botes, Maree could make no progress and they distanced themselves from him. Further, when he signed an amended contract later in 2013, which reflected that he no longer performed management functions, the contract he was presented with, inaccurately recorded that he and the church both accepted his current functions and no disputes existed between them in that regard. He signed the new contract despite grave misgivings and despite this misrepresentation.

- [40] Another factor which troubled Maree about the council, was that it was recorded in a minute of a council meeting in October 2013 on the question of whether another elder, Mr J Coetzee, could be permitted to preach, that the council had previously decided that only Ds Maree, Petrie and Van Zyl could preach. Maree contended this was a misrepresentation because other elders and non-elders had been permitted to preach. To make matters worse, none of the latter trio had any educational qualifications to justify their competence to preach, by contrast with himself who had a doctoral degree in theology. This was a tragic irony and also undermined his confidence in the council. He agreed that in his statement of claim he had suggested that it was possibly because they felt inadequate by comparison with himself, but he could only speculate about that. Ds Maree insisted that the council did not see the need at the time for additional preachers and argued that clause 7.2.3 did not create an automatic entitlement of every elder to preach.
- [41] In Maree's eyes, to make matters worse, Ds Maree had tried to persuade him to resign as an elder in 2012, but was reluctant to debate the merits of this request with Maree. Maree perceived this as a form of harassment, and interpreted a reduction in the number of council meetings per year after 2013 as a way of minimising his participation in the council. Ds Maree conceded he had tried to persuade his brother to step down as an elder, because their personal relationship had deteriorated to such an extent, and he felt that if Maree was not an elder they could have maintained a more 'arm's length' relationship.
- [42] The disclosures which Maree made implicated Ds Maree, Botes and Van Zyl, who were all members of the Council, which also made the council an inappropriate body to which the disclosures could be made, in his view.
- [43] In Maree's view, the staff meeting was a far more appropriate forum in which to ventilate his disclosures because:
- 43.1 the staff meeting was not prejudiced against him;
 - 43.2 it was still a forum internal to the church, and
 - 43.3 it comprised more diverse interest groups, including the three pastors (Ds Maree, Killian and Spies), four other elders, senior and other

employees, and the two employees whose jobs were threatened by the planned restructuring.

- [44] Under cross-examination, it was suggested to Maree that the real reason he levelled accusations against Ds Maree at the staff meeting was because of the removal of his video and because he was barred from preaching, which were personal grievances concerning his own self interest. Maree insisted that he had raised the matters because of their importance. He did not mention the bar on his preaching in the staff meeting, and defended raising the removal of the video because he was free to express his opinion on the subject matter dealt with in the video. He did not feel it was necessary, or that it would have been preferable, to raise his concerns with a representative of the Baptist Union of churches to which the church was affiliated.
- [45] Lastly, after his suspension a number of other incidents confirmed his belief that it would not have been appropriate to approach the council with his disclosures.

Evaluation

Claim of automatically unfair dismissal under s 187(1)(h) of the LRA

Legal principles governing automatically unfair dismissal on account of an employee making a protected disclosure

- [46] S 187 of the Labour Relations Act, 66 of 1995 ('the LRA') defines a dismissal of an employee as an automatically unfair dismissal if the employer, in contravention of the PDA, dismisses the employer for making a protected disclosure:

"187 Automatically unfair dismissals

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 549 or, if the reason for the dismissal is-

...

(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.”

[47] Accordingly, a dismissed employee must establish that they made one or more disclosures which were protected. If they did, and it was one or more of those disclosures which were most probably the reason for their dismissal⁴ then their claim under s 187(1)(h) would succeed. The content of what the employee articulated determines whether it amounted to a disclosure⁵ and where it was reported by the employee will determine if it is a protected⁶ one. It is also a statutory requirement that all disclosures,

⁴ *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at para [90].

⁵ S 1 of the PDA defines the subject matter of a disclosure, thus:

“‘disclosure’ means any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998 (Act 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;...”

⁶ S 1 of the PDA defines a protected disclosure:

“‘protected disclosure’ means a disclosure made to-

- (a) a legal adviser in accordance with section 5;
 - (b) an employer in accordance with section 6;
 - (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
 - (d) a person or body in accordance with section 8; or
 - (e) any other person or body in accordance with section 9,
- but does not, subject to section 9A, include a disclosure-

- (i) in respect of which the employee or worker concerned commits a criminal offence by making that disclosure; or
- (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;..”

except those made within the ambit of attorney client privilege under s 5 of the PDA, must be made in good faith.

LABOUR COURT

[48] In this instance Maree, claims that he made five disclosures and that these amounted to protected ones in terms of s 9 of the PDA. Since section 9⁷ essentially grants protection to an employee making a disclosure in a forum other than the specific forums or channels the PDA deems normally

⁷ Section 9 states:

9 General protected disclosure

(1) Any *disclosure* made in good faith by an *employee* or *worker*-

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the *disclosure* for purposes of personal gain, excluding any reward payable in terms of any law;

is a *protected disclosure* if-

(i) one or more of the conditions referred to in subsection (2) apply; and

(ii) in all the circumstances of the case, it is reasonable to make the *disclosure*.

(2) The conditions referred to in subsection (1) (i) are-

(a) that at the time the *employee* or *worker* who makes the *disclosure* has reason to believe that he or she will be subjected to an *occupational detriment* if he or she makes a *disclosure* to his or her *employer* in accordance with section 6;

(b) that, in a case where no person or body is *prescribed* for the purposes of section 8 in relation to the relevant *impropriety*, the *employee* or *worker* making the *disclosure* has reason to believe that it is likely that evidence relating to the *impropriety* will be concealed or destroyed if he or she makes the *disclosure* to his or her *employer*;

(c) that the *employee* or *worker* making the *disclosure* has previously made a *disclosure* of substantially the same information to-

(i) his or her *employer*; or

(ii) a person or body referred to in section 8,

in respect of which no action was taken within a reasonable period after the *disclosure*; or

(d) that the *impropriety* is of an exceptionally serious nature.

(3) In determining for the purposes of subsection (1) (ii) whether it is reasonable for the *employee* or *worker* to make the *disclosure*, consideration must be given to-

(a) the identity of the person to whom the *disclosure* is made;

(b) the seriousness of the *impropriety*;

(c) whether the *impropriety* is continuing or is likely to occur in the future;

(d) whether the *disclosure* is made in breach of a duty of confidentiality of the *employer* towards any other person;

(e) in a case falling within subsection (2) (c), any action which the *employer* or the person or body to whom the *disclosure* was made, has taken, or might reasonably be expected to have taken, as a result of the previous *disclosure*;

(f) in a case falling within subsection (2) (c) (i), whether in making the disclosure to the *employer* the *employee* or *worker* complied with any procedure which was authorised by the *employer*; and

(g) the public interest.

(4) For the purposes of this section a subsequent *disclosure* may be regarded as a *disclosure* of substantially the same information referred to in subsection

(2) (c) where such subsequent *disclosure* extends to information concerning an action taken or not taken by any person as a result of the previous *disclosure*.

appropriate, the employee must satisfy some additional and onerous requirements in order for the disclosures to obtain protected status. These requirements aim to ensure that the entity receiving the disclosure is an appropriate alternative to the preferred ones set out in sections 6,7 and 8, and that the alternative is only used because none of the other preferred channels can realistically be used.

[49] As in the case of disclosures made to public bodies under section 8, the employee must 'reasonably believe' any allegations and the information contained in the disclosure 'are substantially true'. Further, the disclosure must not be made for personal gain, except if a reward is payable, and 'in all the circumstances of the case', it must be 'reasonable to make the disclosure'. In addition, at least one of the conditions set out in s 9(2) must be met, namely if:

49.1 The employee believes at the time they will be victimised if they disclose the information to their employer under s 6;

49.2 where there is no public institution identified in s 8 that can deal with the alleged impropriety, and the employee also has reason to believe evidence of the impropriety will be destroyed or concealed;

49.3 the employee has already disclosed substantially the same information to their employer or s 8 institution and no action was taken within a reasonable time, or

49.4 the impropriety is a very serious one.

[50] To decide if it was reasonable to make the disclosure to the alternative body in question, s 9(3) stipulates no less than six factors which must be taken into account, though this is not a closed list.

[51] Maree acknowledges that he did not make his alleged protected disclosures to his employer, as represented by the most superior structure of the church, the council. He defends not doing so largely on the basis that he had well grounded reasons for believing the council was prejudiced against him and would not deal in good faith with the issues he raised.

Did Maree's utterances in the staff meeting amount to disclosures?

- [52] Maree never claimed that any of the information he disclosed was evidence of any crime, as such, but clearly believed that some of the conduct mentioned might have been unlawful, including a breach of lawful duties. Alternatively he believed it was being deliberately concealed.
- [53] In relation to the existence of the alleged 'secret' camera (first disclosure), Maree could not dispute that the installation of cameras for security reasons had been approved. In relation to the camera in Ds Maree's office is concerned, it seems it was more his own suspicions that persuaded him it was a concealed one and he had no evidence that it recorded conversations, and did not challenge evidence led by the church that it did not record anything more than camera footage, albeit that this should have been put to him under cross-examination. His motivation why this information constituted a disclosure was that the installation of a secret camera which could record the details of discussions church members had with Ds Maree in confidence was an infringement of those members' rights to privacy.
- [54] In relation to the alleged scheme to retrench two staff members (second disclosure), Ds Maree did not dispute that the possibility had been raised with Maree in confidence, but denied anything had been decided. However, he could not deny that he might have told Maree he wanted the two employees out of the church. It is not implausible that such a statement of intent, prior to any retrenchment exercise being initiated might be evidence that any ensuing consultation would be a sham undertaken in bad faith. As such it can be construed as evidence that Maree might not comply with the legal obligations on an employer in any retrenchment exercise which occurred, and can be construed as a disclosure under paragraph [b] of the definition.
- [55] In respect of the alleged irregular payments to Van Zyl (third disclosure), the nature of the impropriety implied by the allegation appeared to be that firstly, he was not entitled to any payment as an elder and non-employee of the church, and secondly, that payments to him using collection moneys might have been undocumented and in cash. To the extent that it would

have been irregular in terms of the church policy for an elder to be remunerated unless they were an employee and to the extent that the practice of making such payments from collection moneys might have been off the books and unrecorded for tax purposes, that obviously would be something which would fall within the ambit of a disclosure under section (a) or (b) of the definition of disclosure.

- [56] The actual alleged disclosure made regarding the paving was essentially that a large sum of money which could have been better spent on more deserving causes in the context of a church was approved for paving (fourth disclosure). In fact, on the evidence, Maree knew that this was not true because he had been instrumental in the proposal being rejected by the council. Accordingly, it could not be considered to be a disclosure because it was not made in good faith and he could not reasonably have believed it was substantially true.
- [57] The related disciplinary charge, which was canvassed in the trial, was the allegation Maree had made that Ds Maree had misled the elders to get money for the paving. This was one of the false accusations Maree was charged with. His explanation for this was that he claimed that when the proposal was under discussion in the council meeting, Ds Maree had changed his motivation for the expenditure by saying that it was not so much a matter of paving a ring driveway in the church premises as addressing a storm-water problem. This amounted to a misleading attempt to obtain the money for the paving. While the merits of this claim are obviously relevant to the charge against Maree, he did not claim this utterance was one of the disclosures he made. In any event, the evidence showed the stated disclosure was false and Maree could not have believed otherwise at the time he made it.
- [58] The disclosure concerning the removal of his video from the church's Facebook page, or its blocking, was allegedly for the purpose of making known an act of unfair discrimination based on belief (fifth disclosure), which took place without Maree being given any opportunity to be heard beforehand. Insofar as the subject matter of the claim goes this could

conceivably amount to a disclosure of a breach of a right not to be subject to unfair discrimination.

The application of s 9(1)(b)(i) read with s 9(2) of the PDA

- [59] In respect of the four disclosures which still warrant consideration, did any of the conditions set out in s 9(1)(b)(i) read with s 9(2)⁸ apply?
- [60] In his statement of case, Maree did not specifically allege which of the factors in s 9(2) was applicable in his case. As he claims he was dismissed because he made the disclosure, Maree might perhaps have felt that it was a reasonable inference that the church would have taken retaliatory action if he had made the disclosures to the council of elders. What the court is concerned with in relation s 9(2)(a), is not whether the cause of his dismissal was the disclosures he made, but if there was reason to believe at the time he made his disclosures that he would suffer retaliation if he had referred them to the council in confidence rather than making the disclosure in a staff meeting. Insofar as he addressed this in his lengthy affidavit, he did mention that he had previously raised the matters he disclosed with Ds Maree and Botes, but details of this claim were lacking except in respect of the camera issue.
- [61] The only matter on which Maree did tackle Ds Maree previously was the issue of the camera in his office. In that discussion, which Maree had surreptitiously recorded, Ds Maree insisted there was nothing secretive about the camera and everyone knew it was there. Maree did not dispute this claim made by Ds Maree in the course of that conversation. Maree's complaint about the paving had been raised and discussed and decided upon in a council meeting two years' prior to the staff meeting. There was no evidence it had been raised subsequently with either Ds Maree or Botes as an ongoing problem. Because the proposal had been already quashed when it was originally raised in the council, there would have been no obvious reason why it needed to be rehashed later. Similarly, DM did not give any evidence of when he had previously queried alleged

⁸ See fn 7 above.

improper payments to Van Zyl, which dated back to 2009 and 2010. It is also evident from the sequence of events that the first time he raised the issue of his pastoral video being barred was at the staff meeting. In short, save for the camera there was no evidence adduced by Maree that he had attempted to raise the matters with Ds Maree, Botes, Manco or the council before his utterances to the staff meeting on 24 February 2017.

- [62] Maree inferred that he would be exposed to retaliation, based on Ds Maree's attempt to persuade him to resign as an elder and saying he was not 'part of the church'. Other than raising his distrust of, and lack of faith in, the council for various reasons outlined above, Maree adduced no evidence that the council would refuse to entertain his complaints about payments to Van Zyl, the removal of his video, the anticipated dismissal of staff disguised as retrenchment, or the alleged surveillance of staff and congregation members by means of the camera. Nor was there any evidentiary basis for assuming the council would embark on, or threaten, punitive measures if he did raise them.
- [63] Maree's lack of faith in the council, as outlined in the narrative above, did not relate to a fear of suffering an occupational detriment if he raised the issues with the council, but simply to a lack of confidence that the council would deal with his allegations in an unbiased fashion, because of how it had dealt with him in the past.
- [64] It is true the council was not in favour of him preaching and the council had curtailed his managerial duties and confined him to pastoral counselling. However, that took place some years before the staff meeting on 24 February 2017. Other than to state his belief that evidence of the improprieties might be hidden or destroyed, he provided no evidence on which he based such belief and accordingly section 9(2)(b) is not applicable. At best for Maree, he had previously queried the camera with Ds Maree and thereby satisfied section 9(2)(c) of the PDA in respect of that disclosure, though it assumes that the camera was indeed secret and did record audio signals and that corrective action was necessary, which was not taken.

[65] If there had been secret recordings made in Ds Maree's office, that would also justifiably be regarded as a serious infringement of privacy rights and thereby S 9(2)(d) would also be met in respect of that issue. Improper payment to Van Zyl would have been serious matter raising issues of managerial integrity and the like, but did not obviously entail a threatened breach of fundamental rights. On the other hand, the allegation of planned abuse of retrenchment law to get rid of staff, does raise a prospect of the infringement of the affected employees rights to fair labour practices, and could be construed as potentially very serious, but there was no evidence that Ds Maree had gone beyond sharing this with Maree. He had not taken any steps to translate his thoughts into action and there was no reason to suppose a sham retrenchment exercise was imminent and therefore an exceptionally serious impropriety.

[66] In summary:

66.1 On the most favourable reading of the evidence and s 9(2)(d) of the PDA, the requirements of that provision were only met in respect of the alleged disclosures about a secret video camera and the suspension of the pastoral video.

66.2 Section 9(2)(b) was not applicable.

66.3 Though doubtful, section 9(2)(c) might have been satisfied in relation to the video camera.

66.4 There is no basis for concluding section 9(2)(a) has application in this case.

Were any of the disclosures reasonable under s 9(i)(b)(ii) and 9(3)?

[67] For the following reasons, Maree strenuously argued that the staff meeting was a more suitable forum to make disclosures to than to make them to Ds Maree or the council, because most of the complaints related to Ds Maree and the staff meeting comprised more diverse interest groups, than council, namely:

67.1 all three pastors of the church (Ds Maree, Killian and Spies);

67.2 five elders including himself;

67.3 senior employees of the church;

67.4 other employees, and

67.5 in particular, the two employees whom Ds Maree had identified as candidates for retrenchment.

[68] Apart from the fact that the staff meeting was a more diverse forum than the council, Maree did not articulate what he expected this forum to do with the allegations he raised in the meeting. It was not an executive body and did not constitute one of the formal church structures, nor like Manco was it set up by the council to perform a function. As it could not act on the information received, the only rationale for raising the issues in the meeting, which might have been plausible was that the information about alleged improprieties might be concealed or destroyed. As mentioned above, no evidence was advanced as a basis for such a belief. If one has regard to his own reasons for speaking out on that particular occasion, what prompted Maree to use that forum was a personal need to air his perception that too much was going wrong in the church, and that he could not suffer to remain silent any longer.

[69] Were any of the alleged improprieties continuing, or likely to occur in the future? Even if it did qualify as a disclosure under s 9(1) of the PDA, there was no basis for Maree to have a belief that Van Zyl was still receiving payments, or that they might be resumed in the future. There was also no reason to believe that any restructuring was imminent. The paving allegation should not even have been mentioned as it was false and Maree knew that. Maree could not dispute that other staff knew about the cameras, and there had been no further developments in that regard in the months prior to the staff meeting. It is true that the blocking of his video was something which had just happened and might occur in the future, but Maree had not even approached Ds Maree, or any member of Manco or the Council before venting his feelings about it in the staff meeting. It is significant that the video incident happened the day before the meeting and, on Maree's own version, it was the event that precipitated his utterances at the meeting. Had it not happened, it is highly improbable he

would have felt the need to unburden himself about any of the other four issues, bearing in mind also that the Van Zyl payments and paving expenditure were issues dating back a few years. Likewise, after he had discussed the issue of the camera in Ds Maree's office with him, he did not follow up the issue.

[70] Was the staff meeting a suitable alternative forum to other management bodies? Maree clearly knew that one of the problems in trying to frame his allegations as disclosures made in good faith was the forum in which his utterances were made. However, as discussed above, his reasons for not raising them with the most senior governance forum merely because he distrusted it was not a good enough reason to avoid doing so. It is noteworthy in this regard that the council had agreed with Maree that the proposed spending of church funds on paving should not be approved, so it could not be assumed that the council would not support him if he raised legitimate concerns. Even if most of his concerns involved alleged improprieties committed by his brother, which made it awkward to raise them with him, Maree did not even give the council an opportunity to consider the issues he raised. The staff meeting was comprised of a variety of persons who happened to be present on the day in question. It had no deliberative role and was not part of the management hierarchy of the church.

[71] Considering the circumstances in which he raised his allegations, it seems more probable that what really caused Maree to raise them at the staff meeting was that he was seriously piqued by Ds Maree's instruction to remove the video link from the church's Facebook page, without consulting him, and he decided to vent his anger about this, to which he added his frustration on other issues which had caused him unhappiness in the past, irrespective of how long those matters had arisen. Other than uncorking his bottled up resentment towards his brother, and embarrassing him in front of other staff and elders, it is difficult to see what Maree reasonably believed his intervention at the meeting would achieve. In this regard it must be remembered that a major ongoing frustration of Maree was the refusal of the council to give him permission to preach, whereas he believed his impressive academic qualifications more than

justified him doing so. The video incident he naturally interpreted as another humiliating slight on his competence. Another telling factor about his true motivation that day, was the fact all the other matters he claimed were disclosures, did not concern complaints which had been raised but never dealt with. To the extent they had been 'live' issues, in most instances that was a considerable time before 24 February 2017.

[72] In conclusion, I am not satisfied his statements made in the staff meeting, which he claimed were disclosures, were reasonable to make in all the circumstances of the case, having regard, in particular, to the identity of the forum, and whether the alleged improprieties were continuing or likely to occur in the future. They were also not made with the expectation that forum would be able to remedy any of his complaints, but rather as an open attack on Ds Maree's integrity as senior pastor of the church and were primarily activated by his anger over the suspension of his pastoral video the previous day.

[73] To state what he did in a staff meeting was seriously disruptive and unpleasant for those present. In front of peers and other staff, Maree falsely alleged Ds Maree had hoodwinked the church into paying for paving by Ds Maree and that Ds Maree was sullying God's name by his underhand conduct in managing church affairs. On the evidence, I am satisfied he probably did refer to Botes as 'brainless', which was an uncalled for personal insult. In the same breath he imputed a conspiratorial and unlawful intent to Ds Maree and Botes in relation to the payments made to Van Zyl, without ever checking his suspicions beforehand. Although he did not say that Ds Maree had to amend his ways in front of the meeting, he had said it within earshot of others after continuing his confrontation of Ds Maree. It is clear that his address to the meeting was impassioned and attacked Ds Maree's character, in particular, his integrity as the senior spiritual leader of the church. Maree's outburst was such that it visibly upset some of the staff present. Ds Maree was flabbergasted to be attacked so publicly in this way. Botes had felt it necessary to escort Ds Maree from the meeting to avoid Maree's confrontational attack. Given this context, I am not satisfied that most of the allegations were made in good faith, save perhaps for the one relating

to possible restructuring. However, even in that respect, if Maree really wished to alert the two staff members to their vulnerability to retrenchment, he did not have to do that in the meeting in front of others.

- [74] Given that most of the allegations were not made in good faith and that it was not reasonable for Maree to make them in the staff meeting, he has failed to establish that he made protected disclosures. Consequently, he could not have been dismissed on account of making one or more protected disclosures and his claim of automatically unfair dismissal under s 187(1)(h) of the LRA.

Claim of automatically unfair dismissal in terms of S 187(1)(f) of the LRA

- [1] From Maree's evidence it appears that he spoke out about the perceived improprieties which he suspected had taken place or would take place on the basis of firmly rooted religious belief that the improprieties were morally indefensible actions in the context of running a church, rather than the ordinary dictates of his conscience to speak out about perceived wrongs. In either event, Maree had to establish on a preponderance of probabilities that the reason for his dismissal was the that he had acted on the basis of his religious belief or conscience.⁹
- [2] Assuming it was his religious belief or conscience that motivated him to speak at the staff meeting, the allegations made were all based on factual assumptions about Ds Maree's conduct. Even Maree's statement expressing a moral or religious judgement to the effect that God's name was being disrespected in the practices of the church under Ds Maree's guidance, this accusation nonetheless relied on certain factual assertions about what Ds Maree had supposedly done. Likewise, his statement that his brother 'moet tot inkering kom' was not a matter of judging how Ds Maree's doctrinal views were incorrect, but was based on the same acts of misconduct Maree believed he was guilty of.
- [3] Maree was not charged for making any of the accusations he claims were protected disclosures, which the church also did not entirely dispute.

⁹ *National Union of Metalworkers of SA & others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another* (2021) 42 ILJ 67 (CC) at paragraph [119]

However, as the discussion above and below demonstrates, the charges focussed on what the church believed were the misrepresentations he had made. A major factor in the church's rationale for Maree's dismissal was not just the seriousness of the allegations made about improprieties and the lack of substance behind those allegations, but the impact of making them in the inappropriate forum of a staff gathering, which had a significant negative impact on the integrity of the employment relationship between Maree and the church. There was no reason to believe if he had simply raised with Manco or the council his concerns with the suspension of his video, the existence of the camera in Ds Maree's office and the possibility of a simulated retrenchment being planned, that any disciplinary action would have been taken against him. However accusing Ds Maree, in front of an informal gathering of staff and peers, of abusing his authority, manipulating church leaders and falsely, or without reasonable grounds, misrepresenting that Ds Maree had tried by deceptive means to secure funds to purchase paving and had contrived to make illegitimate payments to a church elder, was sufficient reason to take disciplinary action against him, even if his beliefs had motivated him to say those things. Moreover, as mentioned, it was not his beliefs which were under attack, but the fact he had made some of his accusations on flimsy or non-existent bases. To the extent his beliefs or conscience prompted his utterances at the staff meeting, that was not even incidental the substance of the charges he faced.

- [4] In the circumstances, it is more likely on the evidence that the real reason for his dismissal was not on account of Maree saying what he did because of his firmly held beliefs or his conscience, or because he held certain views. Accordingly, his claim under s 187(1)(f) must fail. Whether he was fairly dismissed is discussed below.

Alleged unfair suspension and the substantive and procedural unfairness of Maree's dismissal

- [5] Ordinarily, this is a dispute which ought to be determined by an arbitrator. However, the parties were both content to deal with this in the course of the trial and addressed argument to court on the merits of this dispute. In terms of s 158(2) of the LRA, it was expedient for the court to deal with this claim as part of the proceedings before it.
- [6] Maree was suspended after the incident on 24 February 2021. He was not given an opportunity to make representations prior to his suspension. In *Long v SA Breweries (Pty) Ltd & others* (2019) 40 ILJ 965 (CC) at paragraph [24], the Constitutional Court confirmed that in cases of precautionary suspension there is no obligation on an employer to allow an employee to make representations before suspending them. The principle applies equally to Maree's suspension, which was not unfair.
- [7] The main charges against Maree arose from his conduct in the staff meeting. As mentioned earlier, his remarks to the effect that Ds Maree 'moet tot inkering/bekering kom' were made after he and Ds Maree had left the meeting, but were within earshot of at least two other staff, and therefore not confidentially mentioned to Ds Maree.
- [8] The thrust of the charges were that Maree's accusations were false and thus dishonest and seriously undermined his employment relationship with the church. As previously described, Maree had unleashed a torrent of accusations directed against Ds Maree, in front of other staff and elders, in a meeting which was an inappropriate forum to deal with the substance of any of his allegations, even if they had been true.
- [9] Moreover, he did not dispute accusing Ds Maree of abusing his authority, manipulating and deceiving the elders and effectively accusing him of religious hypocrisy. His behaviour was disruptive and upsetting for other staff. He had belittled Botes in front of peers and subordinates, and his complaints plainly seriously impugned Ds Maree's integrity as someone in a senior management role as well as directly attacking his religious integrity as a spiritual leader of the church. Whatever the specific words he used at the staff meeting, the thrust of his offensive utterances was clear:

Ds Maree was running the church in a way which discredited the name of God, was involved in dubious financial practices involving church funds, and was manipulating the church leaders in a dishonest fashion. He was not charged with complaining about the suspended video or disclosing the potential retrenchment of staff, but the fact these did not form part of the charges does not detract from the destructive and insulting character of the other allegations he made.

- [10] Maree was not content to stop his attack when Ds Maree left the meeting but he followed him and accused him, within earshot of others, of needing to critically reflect on his conduct. Even if it is assumed in Maree's favour that he used the less condemnatory term 'inkering', he was effectively saying Ds Maree, the spiritual leader of the church, was in need of some self-examination implying he had some moral shortcomings. Assuming in Maree's favour that this accusation reflected a deeply held religious judgment on Maree's part, it was nevertheless a demeaning comment to make and was undermining of Ds Maree's moral authority in the church. It is apparent that the two brothers had held many private discussions over the years during which they had aired their personal differences, but Maree decided to ventilate his suspicions and distrust indiscriminately in front of any staff who happened to be present at the meeting. Moreover, he disingenuously misrepresented the paving discussion in the council and portrayed the payments to Van Zyl as underhand and unlawful, without having attempted to verify if his suspicions were well-founded.
- [11] As discussed above, it is most likely his outburst was really caused by his anger over the suspension of the video, and his belief that this was another demonstration of how he was undervalued in the church as an authority on spiritual matters, despite his extensive theological qualifications which were unmatched by other elders.
- [12] To aggravate matters, after the incident Maree never showed any interest in apologising, nor did he accept that his behaviour on that day had been completely out of line. He also removed material from his computer which was not his personal material, because his pastoral counselling was performed in the course of his duties as an employee, and the church

could ultimately have been held accountable for what transpired in his counselling practice. If he had concerns about preserving the confidentiality of the records he should have raised these with the church.

- [13] I am satisfied in the circumstances that Maree's conduct on 24 February 2017 was destructive of the employment relationship, and that dismissal was an appropriate sanction. It is telling in regard to the issue of trust, that Maree had started to covertly record some of his conversations at work, which in and of itself is indicative of a deeply distrustful attitude on his part. It is also somewhat ironic he should have done this when he expressed great concern about the privacy of communications with parishioners.
- [14] Was the dismissal procedurally unfair? The central issue here is whether it was fair for the church to proceed with the enquiry in his absence because it did not accept the validity of a medical certificate forwarded just before the enquiry was due to commence.
- [15] The enquiry was postponed initially by two days to give Maree more time to prepare at his request, though his requests for additional information was refused. The enquiry was then scheduled to take place on 17 March 2017. However, he was then booked off on account of his psychological condition by a psychiatrist from 15 to 31 March 2017. The hearing was rescheduled for 6 April 2017, and he attended but applied for the recusal of the chairperson an attorney. He also raised a claim that he was entitled to protection under the PDA. Both these interlocutory issues were dismissed by the chairperson. The hearing did not conclude and was adjourned to 12 April 2017. However, another letter from Maree's psychiatrist dated 11 April 2017 was submitted booking him off work from 10 to 21 April and stating that he was in no condition to be subject to a disciplinary enquiry. The psychiatrist's letter invited the reader to contact him with any enquiries.
- [16] Maree was advised that the latest certificate was seen to be an attempt to delay the proceedings and that he should attend the enquiry nevertheless. The chairperson of the enquiry found the psychiatrist's letter unacceptable because it was hearsay evidence and could not be accepted without an affidavit from the psychiatrist. The chairperson noted that the psychiatrist

was based in Stellenbosch, whereas Maree had not left Bloemfontein and concluded that no consultation could have taken place.

- [17] While the staggered pace of the inquiry and the numerous interlocutory and preparatory issues raised by Maree, might reasonably give rise to an inference that he was employing various tactics to avoid the enquiry getting underway, the decision of the chairperson to disregard the psychiatrist's letter out of hand was somewhat high handed, without giving Maree an opportunity to get the opinion confirmed on affidavit and for the psychiatrist to explain how he and Maree consulted. If his medical incapacity had continued, it might have reached the stage where his continued employment might have been jeopardised by incapacity, but the chairperson ought at least to have taken the opportunity to obtain more clarity on the certificate. In the circumstances, I am satisfied that the peremptory conclusion of the enquiry in Maree's absence was premature and procedurally unfair.

- [18] As such some compensation is an appropriate recompense for this.

The other unfair discrimination claims.

Was Maree unfairly discriminated against on the ground of religious belief when his pastoral video was de-linked from the church's Facebook page?

- [19] Maree asserted that removing the video was an infringement of his right to understand and interpret the bible according to the dictates of his own conscience, which is contrary to the doctrine of the church which states in its constitution that:

"The right to personal beliefs must be respected. It means that every believer has the right to interpret the Scriptures responsibly and to act in accordance with their own belief."¹⁰

¹⁰ Paraphrasing of:

"Die reg om persoonlike gewete moet gerespekteer word. Dit beteken date elke gelowige die reg het om die Skrifte verantwoordelik te interpreteer en in die lig van sy eie gewete op te tree."

- [20] He argued that when he complained about this he was dismissed. Consequently, in the alternative to the claim that his dismissal was on account of making protected disclosure, he contends that his dismissal and, or alternatively, his suspension and the disciplinary enquiry were unlawfully based on unfair discrimination based on his religious belief.
- [21] The first point that needs to be made is that it was common cause that Maree had not been barred from dealing with the theme of sexuality in relation to religion. His first video in the series on sexuality, which he had produced, had not been suspended or removed from the church's Facebook page. On the evidence, the sole reason which materialised for suspending the viewing of the second video was the language used to convey the injunction that persons should open their minds to God's word, rather than engage in loose sexual relations. The objection was not to the substance of the message discouraging extra-marital sex but to its mode of expression, which was seen as uncouth, and which would not reflect well on the church.
- [22] This did not concern differences of religious doctrinal belief. It was a question of style and presentation. In his heads of argument, Maree himself characterised this as concerning "the clarity of his message against extra-marital sex" (emphasis added). In my view, there was nothing inappropriate about Ds Maree, as the senior pastor, deciding that the video should be provisionally withdrawn from circulation because of concerns about the mode of expression used to convey the uncontroversial substance of the message on sexual mores.
- [23] Consequently, I am satisfied Maree has failed to establish that the suspension of access to his video was probably owing to his religious beliefs and the subsequent actions taken against him in the form of his suspension, subjection to a disciplinary enquiry and dismissal can be causally linked to his religious belief.

Failure to allow Maree to preach

- [24] Maree claimed that the refusal of the council to grant him permission to preach was another instance of unfair discrimination. His claim is that in

terms of clause 7.2.3 of the church's constitution he ought to have been permitted to preach. The clause has been cited earlier in the judgment. It uses the permission of elders to preach as an illustration of the high regard in which the office of elder is held. Maree argues that the clause means that, as an elder, he was entitled as of right to preach and that the council had no right to refuse him permission to do so.

- [25] Whether the clause should be read as conferring an automatic right to preach on an elder or whether it merely meant that one of the things an elder could be permitted to perform, is not an issue that is necessary to decide. The reason for this is that irrespective of the extent of a right to preach the clause conferred, the right did not arise from Maree's employment relationship but from a provision in the church's constitution. Accordingly, the entitlement to the right to preach is a matter of interpretation of the church's constitution as a document governing a voluntary organisation. The right to preach arises from a church member's status as an elder. Maree's status as an elder, was legally quite separate from his employment as a pastoral councillor. Accordingly, I agree with the church that this court has no jurisdiction to determine Maree's rights to preach arising from his capacity as an elder of the church.

Order

For the reasons above, the following order is made

- [1] The Applicant's claims that he was automatically unfairly dismissed under either sections section 187 [1] (f) or (h) of the Labour Relations Act, 66 of 1995 ('the LRA'), are dismissed.
- [2] The Applicant's claim his suspension and the institution of disciplinary action against him by the Respondent amounted to an unfair labour practice under s 186(2)(d) of the LRA, read with s 4(2)(b) of the Protected Disclosure Act, is dismissed.
- [3] The Applicant's claim that he was unfairly discriminated on grounds of religious belief because he was not permitted to preach in terms of his

interpretation of the constitution of the Respondent is struck off the roll for lack of jurisdiction.

- [4] The Applicant's dismissal for misconduct was substantively fair, but procedurally unfair.
- [5] Within 15 days of this judgment, the Respondent must pay the Applicant two (2) months' remuneration as compensation, amounting to R 77,033.78, for his procedurally unfair dismissal.
- [6] The no order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant: L Myburgh instructed by Greenberg & Associates

For the Respondent: T Du Preez instructed by Kramer & Weihmann
Attorneys