On or Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 4132/2011

In the matter between:

MAKHEHLENI MBEWANA	1st Applicant
DAVID PHAKAMILE	2nd Applicant
ZOLANI THADEUIS XAMLE	3rd Applicant
GEMJIKILE PENXE	4th Applicant
MALUSI MBOLA	5th Applicant
MPUMELELO QALAZIVE	6th Applicant

And

THE GOSPEL CHURCH OF POWER	1st Respondent
FARRINGTON MLOTYWA	2nd Respondent
FAKU PHELANI	3rd Respondent
ANDRIAS NZIMENI	4th Respondent
LUMNKILE GXAVU	5th Respondent

MORIS MONI 6th Respondent

PATRICK ROBALEMANE 7th Respondent

JUDGMENT DELIVERED : FRIDAY, 09 SEPTEMBER 2011

MANTAME, AJ:

[1] This is an application on an urgent basis brought by Applicants against Respondents that the Constitution signed and adopted in or about 2002 and written in the IsiXhosa language is the only valid and binding constitution of the Gospel Church of Power in Africa. They sought an order declaring that the removal of Applicants as evangelist and/or as members of the Gospel Church of Power in Africa to be invalid and to be of no force and effect; directing that Applicants be reinstated forthwith as members and evangelists of the Gospel Church of Power, and as leaders of the branches for which they were responsible prior to their suspension or removal or expulsion; directing that the Finance Committee of the Gospel Church of Power in Africa be re-instated forthwith; directing the Second Respondent to remove himself from all activities relating to and in connection with, the administration of the Church, and the pastors and evangelists jointly appoint a person who shall for the time being act in the position of the Bishop of the Church; directing the Second Respondent to cease and desist from all acts aimed at and which have the effect of intimidating, harassing, insulting and otherwise impugning the dignity of the Applicants within the Church,

and interfering with their entitlement as members of the Church to worship freely and peacefully in the Church.

[2] Applicants were represented by Ms Mayosi and Respondents other than Fourth Respondent were represented by Mr Van Niekerk and Ms Magona.

[3] At the start of the proceedings there were preliminary issues that were raised by the Respondents' counsel.

[4] Firstly, I will deal with such preliminary issues.

4.1 Late filing of Heads of Argument

It is common cause that this application first came before this court on the 21 March 2011 when it was postponed for hearing to the 15 June 2011. A timetable was agreed upon between the parties and was subsequently made an order of court. In terms of the order, Applicants had to file their heads of argument on or before 25 May 2011.

Mr. Van Nierkerk submitted that Applicants failed to file their heads of argument on or before 25 May 2011 as per the court order and apparently served it on Respondents' counsel on the 2 June 2011. Mr Van Nierkerk argued that there has been no application for condonation for such late filing.

Ms Mayosi, for the Applicant submitted that due to the absence of her instructing attorney, she could not proceed with drafting heads of argument as she was not properly instructed. Further on the date of the hearing of this matter, Ms Mayosi handed in an affidavit explaining the late filing of heads of argument, which Mr Van Niekerk referred to it as the "*clumsiest application for condonation that one has ever seen.*" The affidavit was deposed to by Ken Thando Potelwa, i.e, her instructing attorney. I cannot agree more with Mr Van Nierkerk's observation of this affidavit. To start with it was late and further not helpful to this court as it lacked particularity and detail.

I have taken cognisance of Respondents' preliminary point and noted that Applicants failed to comply with the Court order. Be that as it may, Respondents have not cited any prejudice on their side as a result of this late filing. Furthermore, I am of the view that Respondents had ample or reasonable time to file their heads of argument. Consequently, the application for condonation is granted.

4.2. Notice in terms of Rule 28

Respondents' Counsel submitted that Applicants filed two notices of amendment in terms of Rule 28. The first one was filed on the 31 March 2011 at 09h55 on the Respondents' attorneys of record. The proposed amendment was to insert a prayer for urgency to the Applicants' notice of motion. The second one was filed and served on the 25 May 2011 on the

Respondents' attorneys of record. The purpose of this amendment was as follows:-

a) Deleting paragraph 5 thereof;

b) Deleting paragraph 6 thereof and replacing it with the Following paragraph:

"*Directing the Second Respondent to step down from the position of Bishop of the Gospel Church of Power in Africa, and ordering that, pending the election and ordainment of a new bishop in accordance with the provisions of the IsiXhosa constitution, the pastors and evangelists jointly appoint a person who shall for the time being act in the position of the bishop of the Church.*"

c) Deleting paragraph 7 and replacing it with:

"*Directing the Second Respondent to remove himself from all activities relating to, and in connection with the administration of the Church.*"

d) Inserting the following new paragraphs numbered respectively 8 and 9 thereof:

"*8. Directing the Second Respondent to cease and desist from all acts aimed at and which have the effect of intimidating, harassing, insulting and otherwise impugning the dignity of the Applicants within the Church, and interfering with their entitlement as members of the Church to worship freely and peacefully in the Church.*

9. Granting the Applicants such further and/or alternative relief as may, in the circumstances be apposite."

There is no indication that Respondents opposed the two notices of amendment. Consequently, Applicants filed an amended notice of motion on the day of the hearing, on the 15th June 2011.

Mr Van Niekerk contended that the proposed amendment has the effect

that no relief is sought against Third, Fifth, Sixth and Seventh Respondents, contrary to the initial notice of motion. As such Respondents are now entitled to their costs. Respondents further sought an order dismissing the said application with costs and such costs to be awarded on a punitive scale.

I cannot find any fault with the fact that Applicants have elected to amend their papers albeit two times. It is my view that Applicants had a case to present before this court. They have every right in terms of the uniform rules of this court to present their case in a proper way. It is so unfortunate at this point that no relief is sought against Third, Fifth, Sixth and Seventh Respondents, but when regard is had to the record before this court, there is reference to some of the said Respondents on certain allegations. Similarly, I am not convinced that, simply because there is no relief sought against them, I am at liberty to dismiss the amendment and order a punitive cost order. In any event, there was no formal application to oppose these two amendments. Therefore, the two amendments are granted.

4.3 <u>New facts introduced by Applicants in the Replying Affidavit and Application by Respondents to file a further affidavit as a consequence thereof</u>

Ms Magona, counsel for the Respondents argued that Applicants have introduced new issues in their Replying affidavit. It is trite law that Applicants should stand or fall by their founding affidavit. For instance

paragraphs 24 – 36 are totally new, they therefore stand to be strike out.

Applicants elected not to address this issue. I am mindful of the fact that no leave of the court has been requested by them to submit new facts. As a consequence thereof, Respondents made an application to file further affidavit in response thereof.

Similarly, I am alert to the fact that this is a procedural error made by the Applicants. I agree with Respondents that new facts were introduced in the Replying Affidavit. Applicants should have made an application to introduce new evidence, but they failed to do so. Once leave has been granted, they could then proceed to file a supplementary affidavit in the circumstances. Applicants failed to do so. I have not lost sight of the fact that this matter is a delicate and sensitive one. I will also take into account the level of sophistication of the litigants, but with full view that they were at all times legally represented. In turn Respondents themselves condoned this procedural error by responding to such new facts. Given the fact that I have discretion to exercise judicially, I will therefore allow the new evidence in Applicants Replying affidavit and grant an application to file further affidavit to the Respondents.

4.4 Tender to settle in terms of Rule 34

On, the day of the hearing, Respondents' counsel handed in a notice in terms of Rule 34 tendering to settle this matter.

Applicants' counsel advised that she had no opportunity to consult with her clients on the said document and as such had no instructions in as far as this tender for settlement is concerned. I will then leave it at that.

4.5 Other issues

a) On the same issue of non pagination and index of court file by the Applicants, Respondents argued that the start of the proceedings were delayed by the Applicants for not adhering to their obligation in terms of the rules of this court. As such they are seeking a cost order against the Applicants including the costs of two counsel. It is my view that indeed Applicants were tardy in their preparation of this application. Due to the reason I have stipulated in 4.3 above. I will not award any costs order.

b) On the issue of Applicants failure to pray for a cost order as argued by Respondents. I have noted that in Applicants' amended notice of motion, paragraph 9 reads as follows:

> "*Granting the applicants such further and/or alternative relief as may, in the circumstances be apposite.*"

It is my belief that this court has discretion to grant any order that might be just and equitable. The extract referred to above includes those orders that have not been prayed for.

[5] I will now turn to the main application. Firstly, Applicants submission is that the Gospel Church of Power in the Republic of South Africa, as it then was, was founded in or about 1972 by the late Honourable Reverend Bishop Sam Daphula. The said Honourable Bishop passed away in 1997. After his death, the Church governance resided in the hands of his wife, Mama Nolight Daphula who was assisted by a group of priests.

[6] On or about 10 May 1997, the Church had a meeting in order to decide as to who was to succeed Reverend Bishop Daphula. It so happened that the Church members and elders failed to reach an agreement as to who was going to be the successor. This caused some friction and schism in the Church with the result that Mama Daphula and her followers left the Church to form their own congregation. When she left, the priests who were the most senior at the time took over the reigns.

[7] Again in 1998, there was another split in the Church, as some members were not satisfied with the way the Church was run. This resulted in litigation before this court on the 6 July 1998 before Griesel J under case no 4755/98. Although the parties settled the matter and the settlement agreement was made an order of court, it became very much apparent that the split was officialised. The newly found splinter group was then referred to as The Gospel Church of Power in Africa and it was led by six priests. The headquarters of the new church was in Section 2 at B1805, White City, Nyanga East and this is the domicilium of this church to date.

[8] Although there were six priests that were tasked with the governance of the Church, it became not practical to convene such a number each and every time the Church issues had to be discussed. It was then decided by the evangelists and all the priests who formed the leadership of the Church that they should choose amongst themselves a leader who would act as a Bishop. Initially, this seemed to be a big task to handle as the evangelists could not agree amongst the leadership and a consultation process was embarked upon nationally including the members in Lesotho. A final meeting was then convened in Uitenhage in 2001 to consider the nominations nationally and across the borders. The name of the Second Respondent emerged as the most preferred. He was elected in Uitenhage as Bishop, and ordained as such on the 21 September 2001 in Nyanga East.

[9] Ms Mayosi submitted that, at the time Second Respondent became the Bishop, there was no constitution in place for the Church, as there was only a draft constitution. At least the process of drafting the constitution had already begun in 2000. A committee was set up to draft the constitution and it was finalised, signed and adopted in 2002. This is the constitution that is the center for the dispute in these proceedings. It was of utmost and paramount importance that the adopted constitution was in IsiXhosa, for the reason that it was the language chosen and spoken by the majority of the Church members. It was, similarly significant that the constitution be understood by all members of the Church as the Church had emerged from a divisive period that was characterised by conflict caused by the absence of the constitution governing the affairs of the Church. It has to be borne

in mind that this IsiXhosa constitution was adopted after a lengthy period of consultation nationally and otherwise. The aim was to make the process to be inclusive and democratic as possible.

[10] Mr Van Niekerk argued that, for Applicants' argument to succeed, this court must find on the applicability of the IsiXhosa and or English constitution of this congregation. He confirmed the process as laid down by Applicants from the drafting of the IsiXhosa constitution, up until it was signed. Notably, he submitted that it was significant that the IsiXhosa constitution was called "*Temporal Constitution*" i.e. "*Umgaqo-Siseko (wethutyana)*".[1]

[11] Subsequent to the coming into effect of this constitution, the members felt that it should be translated into English in order to "*legitimise*" the document and enable the Church to register marriage officers at the Department of Home Affairs.

[12] In turn, Mr Van Niekerk confirmed Applicant's submission that the English version of the constitution came into effect when it was decided that the IsiXhosa constitution needs to be translated into English in order to register the latter with the Department of Home Affairs, with the intention of affording legitimacy to the Church and to enable the Church to conduct and perform wedding ceremonies. It is his submission that the English constitution was finalised in 2002 and was taken to the National Church Leadership Summit that was held in Queenstown during February 2002. This constitution was read out to the Pastors, Evangelists, Elders

---

1 Record page 40

and members who attended. Applicants attended such summit and they never objected to the English constitution after it was approved. It was later signed at a Special General meeting that was held at B1805, White City, Nyanga East on 22 August 2002. He never hesitated to agree that the English constitution was never a translation but a standalone constitution.

[13] Ms. Mayosi further stated that simply because that was in the best interest of the Church, the translation committee was formed. The committee was tasked with the translation of the constitution and was completed in 2002. It was then immediately evident that the constitution that was presented and read to the members of the congregation was not a translation of the IsiXhosa constitution, it was rather a standalone English constitution. That was confirmed by the contents in the affidavit of Happiness Thoko Mdoda[2]. Applicants submitted further that even Second Respondent admits in his answering affidavit that the English version of the constitution is not the translation of the IsiXhosa constitution[3]. Mr Van Niekerk even referred to it as the "*purported English translation*"[4]. According to Applicants, it seems it is not known as to who mandated the signatories of the English constitution to approve and sign same. Notably when it is convenient for the Respondents to use the isiXhosa Constitution, they do not hesitate using it[5].

[14] Mr Van Niekerk submitted that in 2007 it was recognised, identified, accepted that the English constitution was not a translation. In order to address

2 Annexure MM6, record page 87
3 Answering affidavit, record page 177, par 105.3
4 Answering affidavit, record page 148

that error, a constitution committee was established, in order to look at this constitution. He made reference to the minutes of the National Leadership Summit held in Cape Town at Luntu Centre on 7 April 2007[6]. He denied that the Second Respondent's conduct was autocratic as all decisions taken in that meeting were taken by a collective. The Second Respondent has never refused to meet with the Applicants. The aforesaid meeting bears testimony to the consultative procedure that he embarked on. In as far as Respondents are concerned, all issues raised by Applicants are the issues that were discussed in the meeting of 7 April 2007 in Luntu Centre, Gugulethu. The affidavit by Happiness Thoko Mdoda confirms the differences between the two constitutions. It is therefore evident from this affidavit that the decision taken at a meeting in Queenstown "*was to translate again the English version into IsiXhosa*"[7]. That has never happened, hence the dispute before this court.

[15] According to Mr Van Niekerk, the reason for this exercise to be done was to replace all previous constitutions of The Gospel Church of Power in Africa, and for the English constitution to become the valid constitution. The English constitution remains in place until such time it is amended or replaced by a new IsiXhosa constitution or amended constitution. As a result, this court is not at liberty to revive an IsiXhosa constitution which has been duly revoked by a subsequently signed constitution.

---

5 Record page 154 par 58
6 Record page 248 par 9
7 Record page 87

[16] To me, it is evident that the members of congregation tolerated the administration of the English constitution, out of sheer respect of Second Respondent who is their leader. This is not a problem that came overnight. It seems members of the congregation have been discontent for a long period of time. This is evident from the fact that Applicants are Evangelists from different branches, and this stands to reason that this is not a complaint form one branch that happened to be aggrieved and or malicious.

[17] Secondly, Ms Mayosi argued further that the Second Respondent suspended and or expelled the Applicants. According to her argument, the disciplining of errant evangelists is the domain of the pastors in the Church. Reference was made to the IsiXhosa constitution. The relevant excerpt form the isiXhosa constitution reads as follows:

> *"UKUZIPHATHA KWABAZALWANE NOOTATA:*
> *(KumaHebere12:11; Imizekeliso 29:17)*
>
> *16. (i) Xa uthe waziphatha kakubi umangalelwa kumvangeli, ibe nguye ojongana naloo ngxaki. Umntu ululekwa ngabantu abakweso sigaba akuso: Umzalwane wolulekwa ngumvangeli kodwa ukuba ngaba ingxaki leyo ingaphezulu kumvangeli; uyidlulisela kubefundisi. Umvangeli wolulekwa ngabefundisi; Umfundisi wolulekwa ngumongameli, okanye ke, ngabanye abefundisi bebandla. Ilungu elo malolulekwe kakuhle ukwenzela ukuba lingemki ebandleni.*
> *(ii) ...*
> *(iii) Xa kukho into engonelisiyo ngomvangeli kufuneka ootata abakhulu besebe ("Branch") elo akulo loo mvangeli, bahlale phantsi babonisane naye. Kodwa ukuba ngaba ayisombululeki loo ngxaki, mayidluliselwe kootata abefundisi.*
> *(iv) Umvangeli xa athe wanesiphoso anaso, ootata abefundisi bayaya kuye babonisane naye. Uxoleleko luyavumeleka xa ootata beyisombulula ingxaki leyo, naxa umntu lowo*

ezithoba.

(v) ..."

The above excerpt basically lays down the procedure of a dispute resolution mechanism. According to the submission by Ms Mayosi the said dispute resolution process was not followed in the suspension of the Applicants, neither was it followed in their expulsion as members of the Church.

[18] On the other hand, counsel for the Respondents argue that the letter dated 20 July 2010[8], addressed to "*Sihlalo nebandla*", is a notice of the disciplinary enquiry to the Applicants. Applicants' argument is that, the letter is addressed to the congregation and not to the Applicants. Besides its contents do not have anything to do with the notice of the disciplinary inquiry, and therefore maintained that no prior charges have been served on the Applicants and therefore the disciplinary procedure has not taken place. On reading the letter, it was thanking the evangelists and the congregation about the success of the Youth meeting in Cape Town on the 10 – 11 July 2010. It further advised them about the special meeting to be held in Virginia on the 7 August 2010, and the arrangements thereof. Furthermore, it stated that those monies that were not handed in at the Youth meeting should be deposited at the bank. Apologies were further made about the short notice.

[19] Further argument by Ms Mayosi was that, Respondents have tried to explain themselves on this issue of suspension, but their letter of explanation could

not be acceptable[9]. Further the spirit of this letter does not suggest that Respondents are keen to resolve the impasse. Applicants have constantly requested meetings with the Bishop and Pastors and they refused to honour such requests. As such, Applicants regard their suspension and ultimate expulsion as members of the Church contradicting the provisions of the IsiXhosa constitution. So the whole process was contrary to rules of natural justice.

[20] On the issue of Applicants suspension, Mr Van Niekerk submitted that it appears the decision to suspend was taken at Virginia meeting on 7 August 2010[10] and at George on the 23 October 2010 respectively. It does not appear that these were proper procedures that were taken. Applicants were given an opportunity to repent. He described this as a quasi disciplinary inquiry. It is Respondent's contention that Applicants formed an Evangelists Committee. Applicants avoided meetings that the "Church" attempted to call, they refused to discuss any issues with the Pastors and that any communication from the "Church" should be in writing. A notice of the meeting of the 7 August 2010 was sent to all branches on 20 July 2010. Further all Evangelists were requested to attend to address the complaints received and afford Applicants an opportunity to repent. Consequently, Mr. Van Niekerk argued that the decision to expel was reached in February 2011. "See **Odendaal v Kerkraad Van die NG Kerk**[11] and **Garment Workers Union v De Vries and Others**[12]; where the court held, in considering questions concerning the administration of a lay society governed by rules, it seems to one that a Court

---

8 Record page 263
9 Record page 102
10 Record page 274

must look at the matter broadly and benevolently and not in a carping, critical and narrow way. A court should not lay down a standard of observance that would make it always unnecessarily difficult – and sometimes impossible to carry out the constitution. I think that one should approach such inquiries as the present in a reasonable commonsense way, and not in the fault finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary, of the constitution. If such narrow and close attentions to the rules of the constitution are demanded, a very large number of administrative acts done by the lay bodies could be upset by the Courts. Such a state of affairs would be in the highest degree calamitous- for every disappointed member would be encouraged to drag his society into Court for every trifling failure to observe the exact letter of every regulation. There is no reason why the same benevolent rules should not be applied to the interpreting of the conduct of governing bodies of societies as one applies to the interpretation of by-laws. See also **Motaung v Makubela and Another** [13], where it was held that the Ethiopian Church of South Africa is an institution dedicated to the propaganda and practice of the Christian religion. Like most other religious bodies in South Africa, it is a voluntary association of persons to which the rules of law applicable to such an association also apply.

[21] Mr Van Niekerk argued that a court of law should be slow in interfering with the affairs of the Church. He made reference to **Mankatshu v Old Apostolic**

---

11 1960 (1) SA 160 at 169 H
12 1949 (1) SA 1110 (W)
13 1975 (1) SA 618 at 628 B

Church of South Africa and Others[14], where it was held that in order for the Court to interfere there must be a civil right or interest involved justifying interference by a civil court. Further comment was made referring to **Motaung (supra) and Motaung v Mothiba NO**[15]:

> *"A court of law will, however, not interfere, even when there has been a clear infringement of the constitutional rules of a voluntary association, unless such interference is necessary to protect some civil or temporal right or interest."*

He then re-iterated that this court should be slow to grant an order that the Second Respondent should be released from his duties.

[22] He argued further that jurisdiction is something that the court has to consider in hearing matters of this nature. But not implying that this court has no jurisdiction. Further reference was made to **Mankatshu (supra) at 460 H** it was held that jurisdiction or the lack thereof is an important issue when considering whether a party aggrieved by his church can take the dispute to a civil court. The authorities say that, when there is an absence of civil rights or interests prejudicially affected by a decision of a voluntary association, the civil courts have no jurisdiction. See also **Yiba and Others v African Gospel Church**[16] *"A court will not normally intervene in the internal domestic affairs of a voluntary association duly constituted and operating in terms of its rules."*

[23] Further, Mr Van Niekerk confirmed that indeed the Applicants were

---

14 1994 (2) SA 458
15 1975 (1) SA 618 at 628 (C)
16 1999 (2) SA 949 CTD at 961 D

suspended. It was Respondents submission that when one is suspended he/she can only sit at the back and not participate in the proceedings until he/she has repented. The time frame for the suspension was not known. Though Applicants were suspended, it so unfortunately happened that they were in breach of peace in the Church as they continued to attend. They were then later on expelled permanently as members of the congregation. Even though they were expelled they continued to be in breach of peace every Sunday when the Bishop was preaching, hence the peace order that was obtained at Wynberg Magistrate's Court in March 2011. This order was never obtained in an unlawful manner.

[24] Respondents counsel argued that, the Church is an institution that has rights. He referred to the relationship that exist in that institution to the one in **Taylor v Kurtstag NO and Others**[17], that "*the associational right of freedom of religion of section 31 is a manifestation of the right of freedom of association guaranteed under section 18 of the Constitution. The right articulated in Section 18 of the Constitution is "freedom of association" a guarantee of a choice, not an absolute right. The guarantee applies to "everyone" and in the context of this matter, as I will show, it applies to both parties. Thus, Section 18 of the Constitution guarantees both an individual the right to choose his or her associates.*"

[25] Consequently, there should be no limitations on the Second Respondent.

17 2004 4 ALL SA 317 (W) at 334 (d)

The fact that the Bishop was autocratic in his conduct and dealings with Applicants is clearly unfounded.

[26] I cannot agree more with the principles espoused in **Odendaal v Kerkraad Van die NG Kerk** and **Garment Workers Union v De Vries and Others** *(supra).* It is trite law that failure to deal with some issues that formed part of the proceedings do not necessary mean that such issues have not been considered. Due to the nature of the litigants before this court, I am inclined to relax some stringent rules governing the conduct of proceedings and give them some latitude.

[27] Thirdly, Ms Mayosi argued that in terms of the IsiXhosa constitution, the Bishop's term for service is two (2) years. Second Respondent, the current Bishop was ordained in 2001. He failed over a number of years to implement the IsiXhosa constitution, more especially the portion dealing with his governance in Church and his term of office. He has continued to conduct himself in a manner that sows conflict and mistrust in the Church. Counsel made reference to clause 9(iv) of the IsiXhosa constitution that reads as follows:

> *"U Bishophu makafikeleleke, azimamele izimvo zabantwana be Nkosi, kodwa ibe nguye oba nesigqibo (esixolisa izimvu zakhe) nanjengenkokheli yebandla"*

[28] Applicants' submission is that the Bishop's conduct is totally against this excerpt, instead he is very much autocratic. Counsel went on to quote clause 10, 15(i) and 17 of the IsiXhosa constitution that basically deals with the governance of the Church and its congregation from all levels. She further quoted clause 17 (xi) which read as follows:

> *"Makungaliwa enkonzweni: ukugxeka, ukuhleba, ukrutha-kruthwano, iimfazwe,intetho ezingakhiyo, ukukwesa, umona, umoya wempakamo, ukungevani, umbulo, nokukrexeza, zikhokhelela kwimilo, iingxabano, ukungevani nokreqo."*

[29] It was Applicants' submission that, if the Bishop is respecting the provisions of the IsiXhosa constitution, he would have prevented conflict from occurring in his Church, but instead, he is the perpetrator and instigator of the said conflict. The Bishop steadfastly refuses to vacate his office, though the IsiXhosa constitution is very clear on that the Bishop is elected for a period of two (2) years[18]. The fact that he has been in that position since 2001 is a function, not of his having been elected repeatedly, but he refuses to vacate the position.

[30] Mr Van Niekerk submitted that the tenure of the Bishop was discussed in that meeting of the 7 April 2007. It was therefore decided that the tenure of the Bishop would be unlimited and continuous. Only the Bishop, who will be appointed after Bishop V.F. Mlotywa will be limited to a two year period of Bishophood. This argument could not be taken further than that as Applicants never even a single time called the Bishop to step down and the Bishop refused. The Bishop was duly elected and this court is not at liberty to direct that the Second Respondent stand down or vacate his post as the Bishop.

[31] I will not deal with issues of conflict, verbal attacks and or intimidation, as same were never spelt out by the Applicants. But, at the same time, I am inclined

---

18 Record page 47 par 6 (a)

to believe that there were such instances, given the nature of the evidence before this court. There is no doubt that a great deal of animosity has brewed over time and the source of this dispute could be traced back to two constitutions. In my view, this court is better equipped to deal with this matter. At the same time, I am not convinced that a meeting like that one of the 7 April 2007, could just willy nilly decide on the relaxation of the rule governing the tenure of office of the Second Respondent, and governance issues that affect the entire members of the congregation nationally and across the border, without the leadership consulting with the general membership. What is striking, is the fact this two year tenure will once more apply to the Second Respondent's successor. In my view, there is no reason or merit to this suspensive condition.

[32] Fourthly, Ms Mayosi made submissions on the allegations of harassment by the Second Respondent. She futher made mention that Second Respondent had a tendency of making decisions at leadership conferences whether favourable or unfavourable. Applicants have been very much disturbed by the Bishop making announcements during the Church services on Sunday on which verbal attacks were mounted on them. The making of such attacks impugns their dignity in the presence of their families, children and community/communities that they live in and serve, delivering of identical letters expelling them from the Church and forbidding them from attending any further Church services. Further the service of "*protection orders*" by the sheriff dated 29 March 2011 was the last straw. Applicants argue that this order in terms of Section 384 of Act 56 of 1955 was obtained on allegations that were not true.

[33] Applicants contends that as is currently is, they are not able to worship freely and peacefully because of these acts of harassment. They fear that this might be another tactic of pushing them away from this Church in order to form a new Church, and those are not their intentions. It is their strong view that some of them have been members of this Church since its inception in 1987. As a result, they have no intention of worshipping somewhere. They feel that they have a constitutional right to freedom of conscience, religion, thought, belief and opinion. As such their freedom of religion has been violated.

[34] The congregation has endorsed the principle that the rules and regulations of a religious body are binding and enforceable. It is Applicants firm view that if they had done wrong, proper disciplinary measures should have taken place other than the treatment they have endured from the Honourable Bishop.

[35] Respondent's Counsel argued that the allegations that the Bishop is autocratic and divisive are complaints without substance or merit. For instance the elevation of Bishop and three pastors necessitated the appointment of four pastors. The other pastors were appointed due to the growth of the Church. Even if regard is had to the defunct IsiXhosa constitution, in any event the process of appointment rests with the Bishop, and there are no restrictions on the number of pastors to be appointed. On the salary to be paid to pastors, by the nature of the office they hold, they travel to attend meetings and so on. It was fair that they are paid an allowance. That was discussed at summits and with the leadership of the

Church and was supported by the entire membership.. Also this complaint has no merit and substance and clearly frivolous. The decision to establish regions was not of the Second Respondent's making. They were created purely for proper communication channels and ease of logistics to address the growth of the Church. Further, the decision to establish advisory committee was agreed upon at a National Leadership Summit held in Queenstown in 2007, and was further raised at the National Leadership Summit held at the Luntu Centre, Gugulethu on 7 April 2007. It was established solely for the purpose of receiving an alternative input from other sources. As such this complaint is unfounded. On the disbandment of the Finance Committee, this was discussed at a meeting of the Bishop and Pastors of the Church at a meeting on the 7 August 2010. The suspension was as a result of a robbery that took place at the premises of the Church on 3 July 2010. The decision was made in order to provide sufficient protection to the Church and funds.

[36] It is my view that whatever decision that is taken by the leadership, it has to be canvassed to the general membership. Even if such decisions mentioned above were taken in good faith by the Respondents, and the purpose thereof was to enhance the functioning of the First Respondent, if that decision was not endorsed by the entire membership of the congregation, it is as good as not being taken from the onset. Lay societies need information sharing and transparency to function optimally.

[37] Emphasis was made by Respondents on the fact that the IsiXhosa

constitution, that is regarded by Applicants as the proper constitution is defunct, the legitimate constitution is the English constitution. Even Mr Mzimeni, the Fourth Respondent, who now supports the Applicants was the signatory to the English constitution. He does not make mention that he signed same under duress.

[38] Mr Van Niekerk argued therefore that in deciding this matter, this court is bound by the rule in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**, that Respondent's factual averments cannot be said to be far-fetched or clearly untenable that it should be rejected. It is apparent that the Applicants have failed miserably in making a case for the relief sought.

[39] Mr Van Niekerk made a submission that no relief has been sought against Third, Fifth, Sixth and Seventh Respondents. As a consequence thereof of being cited, they had to be involved in consultation and preparing papers with their legal representatives, as such, they suffered prejudice. Due to their involvement in these proceedings, they have incurred costs. No tender for wasted costs has been made by Applicants as a result thereof.

[40] It is common cause that First Respondent has been in existence for a considerable period of some 39 years. There is no doubt that over years, the congregation has grown significantly. This has been evidenced by the number of people that were present in court during the two days of the hearing.

[41] I have taken note of the fact that as I have said earlier on that this is quiet a

delicate and a sensitive matter as it involves the leadership of a Church,that is currently in dispute. A Church by its own nature represents unity, holiness and apostolicity. Hence I agree with Mr Van Niekerk's submission in **Garment Workers Union (supra)** that this court should look at this matter broadly and benevolently and not in a carping, critical and narrow way. I truly believe that this matter should be approached with simplicity, as it could be gleaned in its governance.

[42] I have no doubt in my mind that this matter is of utmost importance to the congregation as a whole as it involves issues of governance of the Church.

42.1 Firstly, the legitimacy of the English constitution that is currently in use is the one that is being challenged by the Applicants. I have noted that the uncertainty and discussions thereto on whether to use the initial IsiXhosa constitution or the standalone English constitution have been in place for the past 10 years. Although it has existed for quite some time evidence points out that it is frowned at by some members of the congregation including the leadership. It is also clear that the IsiXhosa constitution was the approved and endorsed constitution, and both Applicants and Respondents acknowledge that point, although Respondent's counsel argued that same was marked *"temporal."* The dispute started when the agreement was reached to translate IsiXhosa to the English version. It is evident from the evidence given by both parties that there has been some *"discord"* ever since the membership noted that when the constitution was

read out at the Queenstown meeting, it was not a translated version, but rather a standalone constitution. I am therefore inclined to trace the footsteps back to the constitution that received a nod after the whole consultation process was finalised.

At the same time it would have been expected of the Second Respondent to take this court into confidence as the leader of First Respondent by explaining as to how this English version came into being other than the need for the Department of Home Affairs registration. Argument only comes into play after the constitution has been finalised and signed. It is also clear that at a meeting in Queenstown in 2007, as per Mdoda's affidavit, a compromise position was reached whereby it was decided that this English constitution should be translated into IsiXhosa version. Even that decision never took off the ground. I cannot agree more with the Applicants that the greater percentage of the congregation speaks IsiXhosa. Therefore, it makes no practical sense to have a guiding document written in English. In my view, the constitution encompasses the rules and regulations of the Church and therefore, it is of paramount importance that it should be understandable to those it applies to, given the primary foundation of the Church.

42.2 Secondly, Applicants submitted that they were suspended unceremoniously and later on expelled. This was done by the Second Respondent without taking into account Applicants stead, integrity and dignity. Applicants came

to know about this through announcements by Second Respondent in the Church, which is a public gathering. Applicants' understanding is that the discipline of the Evangelists rests with the Pastors and not the Bishop. Respondents argued that Applicants received a notice of the disciplinary inquiry through the letter dated 20 July 2010. Even on that day no disciplinary inquiry took place, they were advised to repent, as Respondents followed the so-called quasi-disciplinary inquiry.

After reading that letter, I can only conclude that if Mr Van Niekerk did not understand the contents of the letter, he was misled by his clients who understood the meaning of the letter very well. But would expect any legal representative to be aware and know what he is arguing, more especially that he was sitting with Ms Magona who has a good command of the isiXhosa language. The said letter was not addressed to any of the Applicants, but rather to the "*sihlalo nebandla*" i.e. to the leader and the congregation. The contents have nothing to do with the disciplinary inquiry but congratulating them about the previous Youth meeting that was a success on the 10 – 11 July 2010 and advising them about the Special Meeting to be held in Virginia on the 7 August 2010. Further that outstanding money from the Youth meeting should be paid directly on the Church's bank account. It is therefore clear that no disciplinary inquiry took place. Applicants' suspension and expulsion was not done in accordance with any of the constitutions, and therefore one would draw the conclusion that the said act was malicious and meant to frustrate the Applicants in the

absence of a legitimate reason.

42.3. Thirdly, Applicants contends that the Honourable Bishop, that is Second Respondent has occupied this position in perpetuity though the IsiXhosa constitution is clear that it should be two years. Respondents counter-argued that the English version of the constitution has no timeframe on which a Bishop should step down. Besides, Applicants have never requested the Bishop to step down and the Bishop refused. Be that as it may, in a meeting held on the 7 April 2007 at Luntu Centre, Gugulethu, it was decided that the Bishop tenure should be unlimited and continuous and the two year tenure will only apply to the Bishop appointed after Second Respondent. It is inconceivable that a fraction of the leadership could make a decision that affects the congregation in its totality. Respondents never argued further whether such drastic change found a way to any of the constitution by way of amendment as this decision had a direct effect to the congregation. I have no doubt in my mind that such decision is unreasonable, taking into account the two constitutions that are in the heart of this dispute.

42.4 Fourthly, Applicants further submission was that Second Respondent is autocratic in his approach. He is ruling from top to bottom without consulting the leadership of the Church and or the congregation as a whole. Respondents disputed such allegations as unfounded instead argued that whatever was done or introduced by the Second Respondent, was to

improve the standard of the Church, as the congregation was growing. Besides, such decisions were taken as a collective at the National Leadership Summit. Such allegations were unfounded and lack merit. In my view Applicants, as they formed part of the leadership in the Church had a reason to complain. At the same time, Second Respondents out of ignorance and without assessing the situation, he failed to notice that as a shepherd some of the flock is no longer following him. Why I say so, is because there is a number of letters that were written to him by Applicants requesting to meet with them. All these correspondences were met with complete silence.

42.5 Fifthly, Applicants argued that Second Respondent had a tendency of harassing them when preaching on a Sunday service in front of the whole congregation including their family members. Applicants felt that their dignity has been impugned. The last straw, was the suspension and later on expulsion, in front of everyone in the Church. I would imagine that Second Respondent should have handled the conflict differently as he is not disputing that it existed. Second Respondent should have taken note of the rules of natural justice, that is, the one that says both sides should be heard. Without complicating issues, this is a long standing practice. If there is a dispute, even in the African cultural sense, one who has authority over the others will call a meeting in order to sort out the issues between the parties who are in dispute. If the one in authority is part of the dispute, he will designate an elder or trusted person to preside over that meeting. I

cannot agree more that the way Second Respondent dealt with this matter is a "*divide and rule*" type of a scenario. Evangelists, as explained in both constitutions, for that matter fulfil a significant role in the Church as they are heading the branches and therefore giving guidance to the congregation in the absence of the Bishop. They therefore give support to the Bishop for the Bishop's congregation to run optimally. Evangelists as they occupy such important and strategic positions in Church were treated unfairly, inhumane and their integrity was impugned by the Second Respondent. The freedom of religion is entrenched in our constitution and no one is entitled in whatever manner to threaten that right.

[43] A Church in its discipline symbolises the Body of Christ. Church discipline is a difficult doctrine and the most hard to practice and perhaps that is why at times they stray and are requested to repent when they come back. Its leadership should therefore lead by example. For the leaders and congregation to master this doctrine, the success lies on the divine authority of Scripture (Bible). The scripture is vital to the purity, power, progress and purpose of the Church. That is where the values of the church resides. It is the responsibility of the leadership to make sure that the word of God is preached, followed and practiced in the Church and not power and greed. By so doing, they will not lose focus as to why they exist as the Body of Christ. These I gathered in the First Respondents constitution as the founding principles. It is therefore vital that this congregation should focus on exercising discipline which is very much important to the purity of the entire body and protection from moral decay and impure doctrinal influence.

[44] It is clear that a rift has occurred in the leadership due to the long term that has been served by the Bishop. I do not intend to cast doubt on the way he has led the congregation, but it is clearly from the submissions presented herein that this congregation is now divided into factions.

Mr Van Niekerk contended that due to the fact that a church is a voluntary organisation led by lay people and further that due to the sensitive nature of this matter, this court should be slow in pronouncing to the allegations that have been made by Applicants in casu as the legal rules and procedures are not followed to the dot. I agree.

[45] Surely, it would be in the best interest of the First Respondent to start on a clean slate. Without deciding on the issue, Second Respondent has made a remarkable contribution in this Church for the past ten years. I am of the view, that the task he has undertaken through the years is a difficult one. To ensure continuity and unity in this congregation, the baton should be passed to the next and capable person. It is therefore time for the Second Respondent to retire as a Bishop.

[46] Similarly, I will not deal with the issue of the disbandment of the Finance Committee as this issue has not been contested. In any event, the Church needs to be transparent when dealing with the revenue of the Church. It seems from the Respondents' argument, the reason for its disbandment was to protect the Church

itself as there was a burglary in the church. As to how, it was not explained. I would imagine that if there was once a need for this committee to exist, there is still a need for it to exist.

[47] I therefore make the following order:-

47.1 That the Temporal IsiXhosa Constitution is the constitution governing the affairs of First Respondent until a final constitution has been agreed upon by the congregation;

47.2 That Second Respondent should retire from the position of a Bishop of the Gospel Church of Power in Africa by Sunday 30 October 2011;

47.3 That the Pastors and Evangelists jointly shall appoint a person who shall for the time being act in the vacant position of the Bishop of the Gospel Church of Power in Africa, meanwhile the successor who is capable of unifying the congregation is canvassed;

47.4 That the Second Respondent shall prepare a hand over report including the audited financial statement to be presented to the person or persons mentioned in 47.3 above on or before the 30 October 2011;

47.5 That Second Respondent should always make himself available to advise his successors on governance matters as and when he is requested to do so;

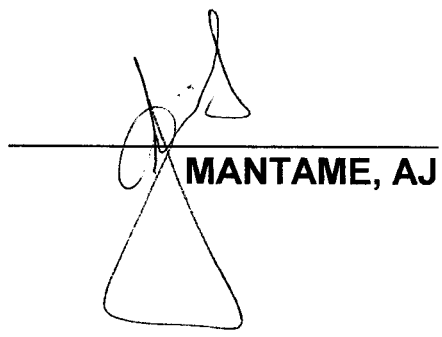
47.6 That Applicants and any other person who has been suspended and

or expelled from First Respondent is hereby re-instated to his/her previous position with no less status and or benefit;

47.7 That Second Respondent shall cease and or desist from all acts aimed at and which have the effect of intimidating, harassing, insulting and otherwise impugning the dignity of the Applicants and interfering with their entitlement as members of the Church to worship freely and peacefully in the Church;

47.8 That the Finance Committee is re-instated forthwith and Second Respondent to account in the form of a report for all revenue that was received and utilised during the period of disbandment of this committee;

47.9 That due to the tardiness on which this application has been conducted by the Applicants, there shall be no order as to costs.



MANTAME, AJ