

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 8100/2010

In the matter between:

THE PRESBYTERIAN CHURCH OF AFRICA

First Applicant

MZUYANDA ZOKUFA NO

Second Applicant

and

GEORGE MOFOKENG MOKABO NO

Respondent

JUDGMENT DELIVERED WEDNESDAY 16 MARCH 2011

SALDANHA, J

[1.] The first applicant, the Presbyterian Church of Africa (the Church) established more than a century ago in 1898 has in recent years been the subject of a number of court applications as a result of intractable internal divisions. This application is but one of such matters and it appears that because of the ongoing strife will unfortunately not be the last. The governance of the Church is codified in its written Constitution and which provides for a hierarchy of elders, ministers, Moderators and congregants and also deals with disciplinary measures and various other internal matters. The central issue in this application is the determination of who of the contending parties to the dispute has the legitimate authority to represent the Church and who may use and control its property. This also appears in part to have been the subject of other and ongoing litigation within the Church.

[2.] The subject matter over which the application was brought is the immovable property of the Church, its buildings and a manse situated at the corner of NY 50 and NY 1 Gugulethu, Cape Town.

[3.] The applicants had initially sought a rule *nisi* pending the final determination of the matter wherein the respondent and all those authorized by him be interdicted and restrained from using the immovable property. Further and pending the return date, that the respondent and all those in control of the property be directed to hand over the keys of the property to the Sheriff for safe keeping. The applicants also sought an order of costs against the respondent on a scale as between attorney and client.

[4.] On the 23rd of April 2010 in settlement of the interim relief the parties agreed that neither would use the immovable property for any purposes whatsoever and that the keys of the property were handed to the Sheriff for safe keeping.

[5.] The first applicant is represented by the deponent of the founding affidavit Mr. Amos Mongezi Ndazabantu Mpulu and the second applicant. Mpulu claimed that he was the duly elected and inducted Moderator of the Church and that he had been properly authorized to institute these proceedings on its behalf. Mpulu claimed that during 2008 he was elected by the General Assembly of the Church as Moderator of the Synod and Assembly and that his formal induction occurred at a subsequent meeting of the General Assembly on 23 September 2009 in Port Elizabeth. He attached to the founding affidavit a certificate which reflected such induction which had been officiated by the then Moderator, the Right Reverend Banile Bishop Nocanda (Nocanda) whose three year term expired at that meeting. Mpulu also attached a Certificate of Oath which had been administered to him by Nocanda and witnessed by three other persons. Mpulu, claimed as Moderator, the authority to depose to the founding affidavit and to launch the proceedings on the basis of clause 15 of Chapter 20 of the Constitution of the Church which provided under the heading "*The Moderator and Clerk of Our Jurisdictions May Defend the Interest of the Church,*" Mpulu claimed that besides such authority he had also been authorized by the Church to launch the proceedings on the strength of a resolution taken in terms of section 21 of Chapter 20 of the Constitution. The resolution

recorded that the body of the General Assembly of the Church had met in Cape Town on the 20th April 2010 and authorized Mpulu in his capacity as Moderator to take the necessary steps to bring the proceedings against the respondent.

[6.] The second applicant is the Secretary of the Deacons Court of the Gugulethu Circuit of the Church. He claimed that on the basis of clause 13 of Chapter 20 of the Constitution, headed "*One or More of the Trustees May Sue*" he obtained the power and the authority to institute the proceedings on behalf of the Church.

[7.] Mpulu claimed that the respondent had previously been a member of the Church but had been excommunicated in the year 2004. In support of such claim he attached a formal letter dated 28th June 2004 of the Church, which had been addressed to the respondent informing him of his ex-communication of all ministerial duties in the Church. The letter was signed by Mpulu who at that stage was the Stated Clerk of the Church and the Right Reverend EV John as its Moderator. Mpulu claimed that in terms of the clause 20 of Chapter 20 of the Constitution "*any deposed, ex-communicated or suspended minister*" was *inter alia* debarred from the use, enjoyment and occupation of Church property. He further claimed that the respondent had no authority to act on behalf of the Church or to seize control of any of its property.

[8.] The respondent in opposing the relief, filed a counter application in which he sought the following relief;

"1. That the proceedings of the purported to 2009, 111 General Assembly meeting held at 26 Khoza Street, Zwide, Port Elizabeth from 22nd to 27th September 2009 in the name, description and auspices of Presbyterian Church of Africa be and are hereby declared unlawful, of no force and legal effect and should be set aside.

2. That the election of Reverend Mongezi Amos Mpulu as moderator of General Assembly of Presbyterian Church of Africa at a meeting held at 26 Khoza Street Zwide, Port

Elizabeth, from 22nd to 27th September 2009 in name, description and auspices of Presbyterian Church of Africa at 26 Khoza Street. Zwide. Port Elizabeth be and is hereby declared invalid and of no legal effect and should be set aside.

3. That the purported decision to ex-communicate the respondent taken 28^h June 2004 be and is hereby declared invalid and be set aside.

4. That the costs of the counter-application be paid to Reverend Mongezi Amos Mpulu."

Background to the application.

[9.] Mpulu claimed that in the year 2002 one Eric Nkosivumile Matomela had been the Moderator of the Church until he was interdicted by the High Court of South Africa in Bloemfontein from occupying such position. A copy of the court order reflected that on the 5th December 2002 in the matter between **Presbyterian Church of Africa** as applicant and **Eric Matomela** as respondent the Hon. Mr. Justice H M Musi ordered, *inter alia*, that the election of Matomela as Moderator elect at the General Assembly meeting of October 2001, at Qumbus, was declared invalid and contrary to the Constitution of the Church. It appeared that Matomela had thereafter lodged an appeal but was unsuccessful and that the order was confirmed by the Supreme Court of Appeal. Mpulu claimed that Matomela refused to accept the court's decision and broke away from the Church to form what Mpulu referred to as "a dissident group".

[10.] Mpulu claimed that notwithstanding the courts decision the dissident group continued to represent themselves to the public as being the recognized and legitimate authority over the Church. The Church he claimed was therefore forced to bring various applications in different jurisdictions in the country to prevent Matomela and the dissident group from portraying themselves as officials of the Church. By way of example he also referred to an order granted in this division by the Hon. Mrs. Justice Allie on the 6th April 2004 between Ernest Vuyisile John and the Church as the applicants against Matomela and a Mkuseli Godfrey Dukwana in which;

"1. First and Second Respondents are interdicted and restrained from conducting

- and/or attending any meetings under the name, description and auspices of the Presbyterian Church of Africa within the area of jurisdiction of the above honourable court;*
- 2. The First respondent is interdicted and restrained from exercising the powers and performing the duties of the Moderator of the Presbyterian Church of Africa;*
- 3. The Second Respondent is interdicted and restrained from exercising its powers and performing the duties of the Stated Clerk of the Presbyterian Church of Africa;"*
- 4. ... (relating to the cost order against the respondent". (Case no: 1379/2004)*

[11.] Mpulu also referred to another order which had been made by the Hon. Justice Van Der Byl in the High Court Eastern Cape Grahamstown on the 30th September 2009 between Mpulu and the Church as the applicants against Matomela, Mokabo and others where the following interim relief was granted;

- "1. That, in order to give effect to the order granted by agreement between the parties on 28th September 2009 by Pickering J, the Sheriff, assisted by members of the South African Police Service, be and are hereby directed to take all steps necessary to clear any venue or place utilized for any meeting conducted by the Respondents or any person under their auspices under the name of the Second Applicant (The Presbyterian Church of Africa) or any other entity of a similar name purporting to be the Second Respondent usurping the constitution of the Second Applicant as its own, and to ensure that such venues remain vacated, and that no such meeting proceeds until such time as the main application is finalized.*
- 2. That the costs of this application be and is hereby reserved for determination in the main application."*

It appeared though that this order was not made final as the application had

subsequently been struck from the roll. There is also no indication whether the main application was eventually determined.

The Gugulethu dispute.

[12.] In April 2009, the duly authorized minister in charge of the Gugulethu District under which the immovable property fell was a Reverend Xolani Kaiser

Ntliziywana. It appeared that the Church had decided to transfer Ntliziywana for various reasons from the Gugulethu District to the Tembuland Presbytery, where he was to have headed the Aiiwal North Circuit of the Church. Mpulu claimed that the transfer of Ntliziywana resulted in a schism within the Gugulethu congregation where some members supported Ntliziywana's transfer while others opposed it. In July 2009 the Moderator of the Cape Presbytery, a Reverend MG Qalase appointed Reverend Thabo Templeton Mlonyeni in place of Ntliziywana. The appointment was apparently not well received by supporters of Ntliziywana who disrupted the services lead by Mlonyeni and interfered with his work. Mpulu further claimed that as a result of this situation the Church on the 22nd of August 2009 (under case no 18251/09) launched an urgent application against Ntliziywana. The parties however entered into an interim agreement whereby Ntliziywana undertook, *inter alia*, and pending the final hearing of the matter on the 28th of August 2009 not to enter the buildings of the Church or any property at any of its satellite stations in the Gugulethu Circuit of the Church. Ntliziywana also undertook not to disrupt or to prevent church services or congregational meetings and not to encourage any persons from disrupting or preventing church services or threatening, insulting or harassing any members of the Gugulethu Congregation and not to execute any duties as a minister of the church within the Gugulethu Circuit.

[13.] On the 28th August 2009 the matter was postponed to the 16th of August 2010 for the hearing of *viva voce* evidence. The undertaking remained in place.

[14.] Notwithstanding the court order, the schism within the church remained. Threats and acts of violence ensued between the members of the Church and the police had to

be called in on various occasions to prevent violence from erupting. Discussions were also held between the police, community leaders and the elders of the Church in an unsuccessful attempt at to resolve the situation. Mpulu claimed that there was existed a real possibility that the property of the Church would have been destroyed should Mlonyeni have continued conducting services at the Church. It was therefore agreed between the parties that in order to protect the property of the Church and to calm the parishioners that the buildings of the Church would be locked and the keys handed to the Station Commander of the Gugulethu police station for safekeeping. It was also decided that in order to calm the situation that Mlonyeni would conduct church services at a neutral venue and so too, would the supporters of Ntliziywana. It was envisaged that this arrangement would have ensued until the determination of the application in August 2010.

[15] Mpulu claimed that during April 2010 the Gugulethu station commander informed the community of his imminent transfer to another area and that he wished to resolve the differences between the parties prior to his leaving. Mpulu claimed that as far as the supporters of Mlonyeni were concerned the court order as agreed to had to remain in place until the final determination of the application by the court. Mpulu claimed that on the 13th of April 2010 the respondent approached the police officials in Gugulethu under the guise of pretending to represent the Church in an attempt to persuade them to release the keys. The police officials declined to do so. Mpulu claimed that the respondent attempted to do so again on the 14th April 2010 but without success.

[16.] Mpulu claimed further that on Saturday the 16th of April 2010 the respondent, under the false pretence of representing the Church, launched an application in this court under case no. 7646//10 in which he sought an order that the station commander be directed to return the keys of the Church building to him. Notwithstanding that the matter had been set down for hearing for the 21st April 2010, the respondent obtained the keys from the police. Mpulu claimed that the respondent had made arrangements for

meetings to be conducted on the property during the weekend of the 17th to the April 2010, which resulted in anger amongst the parishioners of the Church. Moreover, Mpulu claimed, the respondent was not known in the Gugulethu community and that he had no right or authority to represent the Church by using its facilities. He claimed that in order to avert the risk of a violent backlash against the respondent and his supporters this application was launched. Mpulu claimed that the respondent's actions had also re-awakened the schism amongst the congregants which created the risk of violence and would have resulted in damage to the property of the Church. Mpulu claimed that the respondent had installed unknown persons into the manse who had also used the property without any right or authority to do so. This had further incensed parishioners with the heightened risk of violence and for that reason Mpulu claimed that it was necessary for the keys to be handed to the Sheriff pending the final determination of this application.

[17.] Since October 2009 Mlonyeni and Ntliziywana's followers had conducted services peacefully at separate venues which had dissipated the risk of violence between them. It also appeared that the respondent had withdrawn his application under case no: 7646/10. Mpulu claimed that he had instructed his attorneys to approach the respondent's attorneys with a request to amicably resolve the present dispute but that the respondent was not prepared to entertain any form of discussion and he, Mpulu, therefore feared for the real possibility of violence breaking out. The parties had subsequently agreed to the interim relief. The applicants now seek a final order.

The respondent's version.

[18.] The respondent in opposition to the application and in support of the counter application claimed that he had been duly appointed as the Moderator of the Cape Presbytery of the Church at a meeting in Port Elizabeth. He claimed that he was therefore lawfully in charge of the Church buildings in Gugulethu. He also claimed that he had been authorized by the Church to depose to the affidavit and to institute the

counter application on its behalf. In this regard he annexed a certificate which he claimed was in terms of the provisions of section 16 chapter 20 of the Constitution. The certificate reflected that a Reverend Mongezi Mantlana and Reverend Mzukisi W Faleni had authorized the respondent to defend the Church against Mpulu and the second applicant *"....who are no longer members of the aforementioned church but of the LTD (Section 21 Company)"*. The certificate was signed on the 2nd May 2010 by both Faleni and Mantlana. An extract of the minutes of a meeting held on 1st May 2010 of the General Assembly of the Church at Humansdorp, Albert Mashonyani Circuit, was also attached to the respondent's affidavit that recorded that he had been authorized to oppose the application.

[19.] The respondent claimed that *"It can safely be mentioned that there has been a division within the Presbyterian Church of Africa at least for more than (5) five years."* He further confirmed that the division has lead to numerous court applications that had been brought in various divisions of the courts throughout the country. He also claimed that *"There is a group of people within the church who have been misled by one Reverend Banile Bishop Nocanda as its Moderator. He is being replaced by Reverend Amos Mongezi Mpulu the deponent to the main application."* The respondent further claimed that, *"There was also another group of congregants and priest who had been led by Reverend Eric Matomela as a moderator He has been replaced by Reverend Mzukisi W Faleni."* The respondent claimed that Mpulu was the leader of a "dissident group" which had initially been led by Nocanda, who had broken away from the Church and established a company in terms of Section 21 of the Companies Act No 51 of 1973. The respondent claimed that because of divisions within the Church during 2007 Nocanda together with the Mpulu and Mr. Vuyisile

Ngoza had bought a Section 21, shelf company named Biz Africa 1185, with the specific intention of breaking away from the Church. He claimed that the name of the company Biz Africa was subsequently changed to "Presbyterian Church of Africa" and that Mpulu was one of its founding directors.

[20.] The respondent claimed though that the Church itself had remained in existence and that there was never any resolution taken for the Church to be converted into a Section 21 company. He claimed that because of Mpulu's directorship of the Section 21 company Mpulu had *"no direct and substantial interest in the affairs of the Church"* but rather *"a direct and substantial interest"* in the Section 21 company. The respondent further claimed that *"by virtue of that fact that he (Mpulu) is a Director of a company he has no authority or locus standi to bring the main application against me on behalf of the Church"*. The respondent also claimed that Ntliziywana had initially been part of the Nocanda dissident group but had changed sides and had rejoined *"the Church"*.

[21.] The respondent further claimed that *"With the knowledge of the existence of the Section 21 company Reverend Nocanda had issued an invitation to all moderators, commissioners and delegates to attend a 2009 111 General Assembly meeting to be held at the Cape Presbytery in 26 Khoza Street, Zwide, Port Elizabeth from the 22nd to the 27th September 2009"*. The invitation, dated the 12th July 2009 was issued by *"the office of the moderator namely, Nocanda. Rev B.B Nocanda as he was then."* The respondent claimed that at that stage neither Nocanda nor Mpulu, in particular, officially belonged to the Church who *"because of their own conduct they excommunicated themselves from membership of the church by establishing a Section 21 company."* On the 24th August 2009 a letter was written to Nocanda protesting his decision to convene a General Assembly under the auspices of the Church and he was requested to withdraw the notice. There being no response the respondent on the 21 September 2009 instituted in the Mthatha High Court proceedings against Nocanda and the Section 21 company to interdict them from holding the meeting and using the name of the Church. A rule *nisi* was granted by Luthuli AJ in the following terms;

"2.1 That the decision of the 1st respondent authorizing the holding of a 2009 111 General Assembly Meeting in the premises of the 2nd applicant situate at 26 Khoza Street, Zwide, Port Elizabeth, from 22nd to 27th September 2009 in the

name, description and auspices of Presbyterian Church of Africa is declared;

2.1.1. wrongful, of no force and legal effect; and

2.1.2. be set aside."

[22.] Respondent claimed that despite the order having been served on Nocanda the meeting went ahead. Contempt of court proceedings was therefore brought against Nocanda. On the 25th September 2009 an order was granted by Pakade J in the Mthatha High Court (under case number 1691/09) against Nocanda to show cause on the return date why he should not be committed to prison for contempt of court. On the return date both the main and contempt of court applications were argued before Nhlangulela J. On the 15th of April 2010 judgment was handed down in the following terms;

1. The respondents are interdicted and restrained from using the name

"Presbyterian Church of Africa"

2. The respondents are ordered to pay the costs of the application jointly and severely the one paying the other to be absolved, including the cost occasioned by the employment of two counsel."

[23.] It appears from the judgment that the court had found that no deliberate intention on the part of Nocanda had been proved to constitute contempt of court. The court nonetheless also made an order of costs against Nocanda in respect of the contempt of court application.

[24.] The respondent claimed that although the judgment of Nhlangulela J referred to Nocanda and not to Mpulu that, "....[It] *does not authorize him to use the name of the church when he is a Director of a company. It is my submission with respect that what applies to Reverend Nocanda also applies to any Director of a company insofar as the use of the name is concerned.*" The respondent also claimed that the meeting of the

2009 111 General Assembly meeting held on the 22nd and 27th of September 2009 was unlawful because at the time at which it had taken place the interim order of Luthuli J had prohibited it. The respondent claimed that the election of Mpulu at the said General Assembly was therefore unlawful and his election should be set aside. For this reason he also claimed that the certificate and resolutions relied upon by Mpulu for his authority to depose to the founding affidavit should be regarded as *pro non scripto*.

[25.] The respondent further claimed that the decision to excommunicate him from the Church should be declared unconstitutional and be set aside. In support of his claim he referred to the letter of excommunication which he claimed was signed by "one *of the break-away people and a member/director of the section 21 company*". He also claimed that his excommunication had not taken place in accordance with the provisions of the Constitution of the Church and its internal processes. He claimed that he had seen the letter of excommunication for the first time as an attachment to the founding affidavit in these proceedings and claimed that it was "*manufactured by Mpulu and the second applicant*"

[26.] The respondent also contended that the order made by Allie J (referred to above) was merely a "Draft Order" and should carry no weight before this court. He also disputed that during July 2009 the Reverend Qalase was the Moderator of the Cape Presbytery and claimed that he (the respondent) was its lawful Moderator. Qalase he claimed was also a member of the Section 21 company and could therefore not be a Moderator of the Church.

[27.] The respondent also disputed that there was any likelihood of violence within the Church and denied that there were any congregants who were upset or angered and claimed that it was rather the members of the Section 21 company that had caused the disruption within the Church.

[28.] In opposing the counter application, Mpulu on behalf of the applicants disputed that the respondent had been appointed as a Moderator or that he was lawfully in charge of any of the Church's property. He further claimed that in as far as the respondent purported to have obtained authority from certificates and resolutions signed by Faleni that Faleni had no authority nor any right to represent the Church. Faleni, he repeated, had been the subject of numerous court applications in other jurisdictions in which he had been interdicted and restrained from exercising the powers and performing the duties of Moderator of the Church.

[29.] At the hearing of the application **Mr. Torrington** who appeared on behalf of the applicants handed in a bundle of documents comprising various court orders some of which related to Matomela and Faleni. It appears, inter alia that final orders were granted against both Faleni and Matomela under case number 4405/2003 in the High Court at Bisho on the 19th of September 2003 by Kirk AJ and in the High Court of South Africa Free State Division Bloemfontein under case no. 5958/07 on 28th August by Cillie J in which they were inter alia restrained from professing to represent the Church.

[30.] If anything, the list of the various court applications in which the Church was involved in reflected the extent of the disputes between it and its officials.

[31.] Mpulu also explained that during 2007 the Church had acquired the Section 21 shelf company and changed its name to Presbyterian Church of Africa for the purposes of fund raising. He claimed that the Church had sought to benefit from the Taxation Laws Amendment Act which had been passed in June 2000 which allowed for tax concessions to persons who made donations to Section 21 companies and which would have encouraged donations to the Church. Mpulu, specifically denied that he and the other directors had established the Section 21 company for the purpose of breaking-away from the Church. He claimed that although he was a director of the Section 21 company he was also the duly elected Moderator of the Church. He claimed that the respondent's contention that his directorship of the company precluded his authority to deal with the

affairs of the Church was "*ridiculous*". Mpulu also claimed that there was no provision in the Constitution that prohibited any person who was a director of a company from holding any position including that of Moderator within the Church. He claimed that the respondent's claims about an alternative church were simply a figment of his own imagination. Mpulu confirmed the contention by the respondent that the Church had never been disbanded or converted into a Section 21 company and claimed that any insinuation to the contrary had simply been derived from the respondent himself.

[32.] With regard to the applications brought in the Bisho High Court (under case number 1691/09 and 1757/09) against the Nocanda and the Section 21 company, Mpulu pointed out that Nhlangulela J in his judgment had stated the following;

"It is necessary to state that at this early stage Mr Dukada SC had appeared with Mr. Mtshabe on behalf of the applicants informed the court that the applicants will not persist with the interim relief in paragraph 2.2.2, the interdict concerning the holding of the General Meeting because such relief has been overtaken by the events." Further; "In similar vain the court was informed that the applicants will abandon the interdictory relief in paragraph 2 of the Notice of Motion under case number 1757/2009 that the respondents be compelled to stop the meeting."

Mpulu claimed therefore that there was no order by Nhlangulela J concerning the proceedings conducted at the meeting and moreover neither did the applicants (in that matter) seek such relief. Mpulu further contended that in the circumstances it was unclear on what basis this court was being asked to assist the respondent in the relief it sought in paragraph 1 of its counter claim. He further claimed that the respondent had not set out any factual basis justifying any such relief.

[33] Mpulu also emphasized that the respondent had incorrectly claimed that he, (Mpulu) had been elected at the General Meeting held in 2009. He referred to the founding affidavit where he had stated that he was elected as Moderator during 2008, a year

before the meeting of September 2009 and that he had only been inducted into the position of Moderator in the 2009 meeting.

[34.] With regard to the ex-communication of the respondent Mpulu referred to the letter sent to the respondent in which he had been informed of his excommunication and that three letters had been sent to him where he had been invited to attend meetings which he had simply ignored. Mpulu disputed that there were any other procedures which the Church was required to have complied with in regard to the respondent's ex-communication.

[35.] At the commencement of the hearing Mr. Torrington moved for an amendment to the citation of the first applicant by the removal of the word "*The*". The application was not opposed and was granted. The amendment effectively removed the respondent's complaint that the Church had not been properly cited in accordance with the Constitution of the Church.

The requisites for the interdictory relief.

[36.] The applicants are required to satisfy three requirements for a final interdict. They have to establish a clear right, an injury actually committed or reasonably apprehended and the absence of any other ordinary remedy. Mr. Torrington argued that the crisp issue to be decided by the court was which of the parties, could lawfully represent the Church. He submitted that such a finding would determine which party had the clear right to possess the keys of the Church.

[37.] The approach used by the courts in determining final relief in motion proceedings is set out in the oft quoted decision of **Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623A at 6431** where it was held that in appropriate cases a court may grant a final order if the facts alleged by the respondent together with those alleged

by the applicant and which are admitted by the respondent justify the making of such an order.

[38.] The respondent himself claimed that he was part of the group of congregants that were led by Matomela. He further claimed that Matomela had been replaced by Faleni and that his own moderatorship had been authorized by Faleni. The respondent did not dispute that Matomela had been interdicted by the Bloemfontein High Court from, *inter alia*, representing the Church. In fact he simply noted such claim made by Mpulu. He did not provide any explanation as to how Faleni could lawfully have conducted any of the affairs of the Church in the face of the court order. Further his claim that the order made by Allie J as merely been a "Draft Order" was patently wrong as appeared from the reading of the order itself.

[39.] Mpulu, in opposing the relief sought in the counter application referred to the various applications made in various courts which included both interim and final orders against both Matomela and Faleni where they were interdicted and restrained from representing the Church. The respondent does not challenge or correct any of these allegations by filing a replying affidavit to the counter application. The respondent for his part had clearly associated himself with the Matomela group of which Faleni was part of. There is no claim by the respondent that at anytime subsequent to the granting of the orders that either Matomela or Faleni had obtained legitimate authority to represent the Church or the right to exercise the power of Moderator.

The counter application.

[40.] The respondent claimed that the meeting of the 2009 111 General Assembly held in Port Elizabeth had been declared unlawful and of no force and effect by the order of the Bisho High court. In this regard reliance was placed specifically on the interim order granted on the 21 September 2009 by Luthuli AJ.

[41.] However the interim relief obtained under paragraph 2 of the *rule nisi* had not been made final by the order of Nhlangulela J. Furthermore the respondents in that application are different from the parties in the counter-application before this court. So too is the very relief sought in the counter application different from that obtained in the Mthatha High Court. During the course of argument I pertinently raised with Mr. Mtshabe who appeared on behalf of the respondent the question with regard to whether this court had the jurisdiction to deal with the relief sought in the counter application and whether the necessary parties had been joined to such counter application. I had also raised with Mr. Mtshabe that there appeared to be no record of any proceedings with regard to the ex-communication to enable this court to consider its lawfulness. In response, Mr. Mtshabe requested a postponement to enable the respondent to consider its position. At the resumption of the hearing some two months later Mr. Mtshabe informed the court that the respondents had requested a copy of the record of the proceedings which had led to the ex-communication of the respondent. The applicant's attorneys had replied by letter that there was none and that reliance was placed on the provisions of section 76(9) of Chapter 21 of the Constitution. In respect of the question of jurisdiction it is apparent that the proceedings of the meeting held 22nd through to the 27th of September 2009 took place outside the jurisdiction of this courts. Mr. Mtshabe however submitted that the court did enjoy jurisdiction to consider the counter claim. However, given the findings that I make with regard to the counter counter-claim it was not necessary to determine this issue. Of greater concern to this court was the fact that Mpulu against whom the relief sought in prayer 2 of the counter claim was not joined as a party to the proceedings and neither was Nocanda or the Section 21 company in respect of the relief claimed under prayer 1.

[42.] With regard to the judgment of Nhlangulela J, Mpulu claimed in response to the counter application that an application for leave to appeal had been noted. The transcript of the proceedings of the application for leave to appeal was subsequently handed in as

it appeared that there was some confusion between the parties as to exactly what relief was sought to be appealed against and by which of the respondents. The order made by Nhlangulela J on the 15th April 2010 in the application for leave to appeal was in the following terms; *"(i) The application for leave to appeal to the full court of the division is hereby granted, (ii) Costs to be costs in the appeal."* There is no substantial judgment or reasons for the order to indicate what relief may be appealed against. It therefore, is not clear to me to the extent of the appeal which is to take place. That issue will however more appropriately be dealt with and considered by a court of appeal in that matter. The matter, however bears little relevance to the relief sought in the counter-application and my findings in this regard thereto.

[43.] The applicants claimed and correctly so that the respondent had not set out any other factual basis other than the proceedings before Nhlangulela J as a basis for setting aside the proceedings of the meeting of the 22nd to 27th September. The respondent claimed that because Mpulu was a director of the section 21 company he could not have any authority and interest in the Church. I am of the view that such claim is entirely without any basis and is simply untenable. There is no provision in the constitution which disallows any member of the Church from being the director in a Section 21 company or any corporate entity for that matter. Moreover, Mpulu in the answering affidavit to the counter application explained the purpose of the Section 21 company as been that of fund raising and was an entity of the Church itself. Such averments were not challenged by the respondent in any replying affidavit.

I am therefore of the view that there is no basis for the relief sought in paragraph 1 of the counter application.

[44.] Mpulu had also made it clear in the founding affidavit that he had been elected as the Moderator of the Church in a General Assembly held during 2008 but that he had only been inducted into that position at the meeting of the General Assembly in September 2009. In addition to what has already been stated there is no basis to set

aside the election of Mpulu which took place at a meeting a year earlier to that claimed by respondent. Insofar as Mpulu had been inducted at the meeting of the General Assembly of 2009 there is also no basis for this court to set aside such induction and moreover since neither Nocanda nor Mpulu were joined as parties to the counter application.

[45.] During the course of argument the respondent through his counsel abandoned the relief sought under prayer 3 of the counter application with regard to his ex-communication. In this regard the respondent placed before the court what he referred to as an "Explanatory Affidavit" by the Rev. EV John. John claimed that on the 28th June 2004 he was the Moderator of the Church that had "*broken away*" from the main Church. He claimed that there was no disciplinary hearing that preceded the ex-communication of the respondent and also claimed that the respondent was one of a number of priests that were ex-communicated without the provisions of the constitution of the Church being observed. He claimed that the ex-communication should not have taken place. He also claimed that although he had been a member of the Nocanda dissident group he had since come back to the legitimate Church. He also claimed that at a General Assembly of the Church which was held on the 27th to the 3rd of October 2010 at Mount Frere it was resolved that the purported ex-communication of the respondent should be withdrawn and set aside as being unlawful and unconstitutional and because it was taken by the dissidents in the Church. He also claimed that it was resolved that the letter would be written to the respondent informing him of the withdrawal of his ex-communication.

[46.] It appears that the respondent's abandonment of the relief sought in prayer 3 was based on the affidavit of John and the resolution taken at the proceedings of the meeting of the 27th - 3rd October 2010. During the course of argument it was brought to the courts attention that an urgent application had been brought in the Eastern Cape High Court in Mthatha on Sunday 26th September 2010 by a Boloa Jacob Dhlamini, with the

Church as the second applicant against Mpulu in which *inter alia* the following relief was sought:

"(2.1) That the respondent or any person acting for or on his behalf or on his instruction or on his followers be hereby interdicted and restrained from interfering, disturbing and/or disrupting the General Assembly Meeting of the second applicant to be held at Badibanise Locality. Mt Frere.

2.2) That the respondent or any person acting for or on his behalf or on any of his instructions or his follower be and is hereby interdicted from misleading the Sheriff and members of the South African Police Services about Annexure "B.J.D.6" to disrupt the General Assembly Meeting aforementioned.

3.) That the respondent pay the cost in the event of opposition

(4.) That 2.1 and 2.2 shall operate as an interim relief pending finalization

*(5.) Further alternative relief. **

[47.] It is not necessary for the purpose of this application to deal with the details of that application save to note that Mpulu has subsequently filed his opposition to such application, anticipated the rule *nisi* and had also filed a counter application. The matter is pending. It's relevance though relates to the claim by John with regard to the resolution that was taken in respect of the excommunication of the respondent. However, nothing further need be considered with regard to the issue of the excommunication as the respondent himself abandoned such relief. Moreover such relief would have suffered the same fate as the other relief claimed in the counter application because of the respondent's failure to have at the very least joined Mpulu in the proceedings.

[48.] The respondent also challenged the authority of the second applicant to represent

the first in these proceedings on the basis that he was also a member of the section 21 company. As already stated there is no basis for such challenge. There is no other challenge to the appointment of the second respondent as secretary of the deacon's court of the Gugulethu Church of South Africa. The second applicant has relied on his authority from an extract of the minutes of a meeting of the 19th April 2010 of the Deacons Court of the Gugulethu Circuit.

[49.] I am of the view that both Mpulu and the second applicant had the necessary *locus standi* to have brought the application to protect the interests of the first applicant, in particular, its immovable property situated in Gugulethu.

The injury.

[50.] The respondent denied that there was a threat of violence and the risk of damage to the Church's property. It is clear from Mpulu's affidavit that it was necessary for the police to have been approached because of the threats of violence and that the keys of the property had to be handed to the police for safekeeping. Furthermore an application had to be brought in order to stop Ntliziywana and his followers from interfering with the affairs of the applicant. It is apparent that there existed the real risk of violence and or damage to the property of the Church. I am of the view that the applicants had in the circumstances no other option but to bring the application for relief. I am however, not persuaded that in the circumstances of the dispute, that a punitive order of costs on an attorney client scale should be visited on the respondent in his personal capacity.

In the result I make the following order;

(1) That respondent and those authorized by him be interdicted and restrained from utilizing the Immovable Property of the Church inclusive of the Church buildings and the Manse situated at corner of NY 50 and NY1 Gugulethu ('the property') for any purposes whatsoever.

(2) The keys of the Church which are presently being held by the Sheriff in terms of the Interim Order granted on Friday 13 April 2010 be handed over to the applicants.

(3) The costs of this application and the counter application be paid by the respondent in his personal capacity.

SALDANHA, J