



IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 9530 / 2021

In the matter between:

ANDREW WESLEY RICHARDS

First Applicant

KINGS CHURCH INTERNATIONAL

Second Applicant

and

GHER RABIE

First Respondent

PHILIPPUS JAKUBUS LODEWIKUS SWART

Second Respondent

ELAINE PAULSEN

Third Respondent

Coram: Wille, J

Heard: 7th of October 2021

Delivered: 27th of October 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed application which initially was about certain interdictory relief to prevent the respondents, from in any manner, acting as members of the board of the second applicant. The first, second and third respondents shall be referred to as the respondents, unless otherwise indicated. These respondents were all ‘previously’ members of the board of the second applicant.¹

[2] The first applicant is the chairman of the board of the second applicant. The second applicant is a religious organization which merely trades as a non-profit organization.

¹ The respondents say they are indeed presently board members of the second applicant.

Regrettably, the second applicant is not registered in terms of the Act². More about this later. The second applicant will be referred to as the ‘church’ unless otherwise indicated.

[3] The respondents were members on the board of the second applicant. The applicants say that in terms of the constitution of the second applicant, the tenure of the respondents as members of the board, only endures for a period of (2) years and, thereafter automatically lapses. Put in another way, that this is a guillotine clause in the constitution of the church. This, subject to them making themselves eligible for re-election and being duly re-elected. The first applicant contends for the position of no automatic renewal of the membership to the board of the respondents, at all.

THE FACTUAL MATRIX

[4] The first applicant and the respondents are all members of the church. The church is a voluntary association that initially came into being, styled as an entirely different entity, under a different name. The church amended its name during the course of 2009, to the ‘Kings Church International - Robertson’.

[5] In turn, the affairs of the church are governed by the initial ‘constitution’ which they adopted in 2014. It is further common cause that the spiritual principles of the ‘apostolic faith’ regulate the philosophy and governance of the church.

² The Non-Profit Organisations Act No. 71 of 1997 (‘NPOA’).

[6] The application was originally piloted in the form of an urgent application during March 2021. At this time, the first applicant contended for the position that the respondents were no longer members of the board of the church.

[7] The respondents, *inter alia*, say that their appointments, as members of the board, are in any event governed by the 'second' constitution of the church, that came into effect in September 2017. According to them, they are still duly appointed members of the board of the church. This, even if their membership only endured for (2) years at a time, because they were re-elected in September 2019. In addition, their membership in and to this board could not have expired, until a duly constituted board meeting took place, during this intervening period.

[8] Besides, the first applicant, by omission, failed in his duty to convene at least (2) meetings of the board (as constitutionally obligated), during 2020. Thereafter, during February of 2021, the first applicant, after having secured legal assistance, issued out an 'invitation' to the respondents to attend a meeting of the board (to be held virtually). This contentious meeting was scheduled for the 24th February 2021.

[9] The respondents countered by indicating, in writing, that they considered themselves as extant members of the board. Thereafter, a further board meeting was scheduled by the first applicant for the 5th of March 2021. Prior to the launch of the application, the respondents had requested that the financial institution of the church and its auditors, ignore any directions given to them from the '*newly appointed*' fresh board of the church. No doubt, this triggered the urgent application by the applicants.

[10] The ‘urgent’ application thereafter took on a life of its own and morphed into a full blown application for final relief, instead of interim relief, together with a referral to oral evidence of a number of limited issues of dispute, as agreed between the parties.

THE ‘CONSTITUTIONS’ OF THE CHURCH

[11] The church has (2) constitutions. This in itself makes this matter more complicated than necessary. The ‘first’ constitution of the church was signed on the 30th of November 2014. The first and second respondents were undoubtedly inaugural members of the board of the church in terms of this constitution. The ‘second’ constitution was adopted in September 2017. Again, first and second respondents were undoubtedly inaugural members of the board of the church in terms of this ‘second’ constitution.

[12] The applicants say that the second constitution merely amended certain of the terms of the first constitution and that the first constitution is the document that regulates their affairs and is the enabling document of the church which governs the management of the non-profit organization. I do not agree. It is unfortunate that the church was not registered as a non-profit organization under the NPOA. This, because had it so been registered, it would have rendered this application totally unnecessary.³ The ‘second’ constitution is a fully fledged document that consists of no less than (10) pages and it specifically records that it was adopted as such on the 10th of September 2017.

³ The ‘NPOA’ provides for a host of regulatory codes of good practice, including an arbitration process for disputes.

[13] Some of the important clauses of these ‘constitutions’ relevant to the adjudication of this matter, *inter alia*, are the following:

‘The Board, comprised of the leaders of the church, is the body that has overall responsibility for the management of the organization.

The Chair of the Board, the Apostolic Leader of the church, is responsible for setting the agendas for Board meetings and for chairing those meetings.

In matters of appointment and removal the Board will always attempt to reach a consensus. Only where a consensus does not seem possible, may decisions be made on the basis of the majorities’ indicated below.

The Board shall consist of at least three Board members. At least two Board members must be Spiritual Leaders of Kings Church International in the UK.

At least three Board members will not be connected persons in relation to each other and no single person controls the decision making powers relating to such organization.

Any subsequent members are appointed by a resolution of the Board: a two third majority of those participating in the meeting is required.

Board members are appointed for a period of two years after which they may offer themselves for re-appointment...’

THE APPLICANTS’ CASE

[14] The applicants’ case is that the respondents are obliged to cease and desist from performing any function or role as members of the board of the church, for the following reasons: that they have ceased to be members of the board of the church: that they were not re-elected and that they are ‘constitutionally’ not members of the board of the church. In short, that their membership of the board in and to the church had automatically lapsed.

[15] The applicants advance that the first and second respondents were appointed on the 30th of November 2014. They continued in office upon their re-appointment to the board until the 30th of November 2016, thereafter until the 30th of November 2018 and, finally until the 30th of November 2020.

THE RESPONDENTS' CASE

[16] The respondents contend that there never ever existed any issue or dispute about them being members of the board of the church. However, certain disagreements and disputes arose and as a direct consequence, the first applicant's governance of the church became a cause for concern. Prior to this, no issues were ever raised regarding the status of the respondents positions as members on the board of the church. When these governance issues arose, the respondents membership of and to the board of the church, became the subject of an unfortunate dispute for the first time.

[17] The respondents contend, *inter alia*, for the following: that at no time has any member of the board ever expressly been re-appointed or re-elected: that the respondents simply continued in office, both consensually and unanimously as members of the board: that the constitution makes it clear that as far as the appointment of board members is concerned, a clear attempt must be made to reach consensus: that in the past, board members were simply re-appointed by consensus and their terms of office were merely tacitly or impliedly extended: that when the February 2021 board meeting was scheduled (and which they requested, be postponed), they

were precluded from the meeting and in addition, were led to believe that the meeting would be postponed.⁴

THE VIVA VOCE EVIDENCE

THE APPLICANTS' WITNESSES

[18] The first applicant testified in connection with certain of the issues in dispute. This evidence was presented via the medium of a 'virtual hearing' as this witness is based in the United Kingdom. In order to preserve the integrity of the system, I ordered that an independent observer from a discrete law firm in the United Kingdom, observe the entire virtual hearing process. This process was also followed in connection with the second witness for the applicant,

[19] The first applicant confirmed the correctness of his founding affidavit, his confirmatory and replying affidavit. His late father started the 'main church' in the United Kingdom. Following upon a pastoral visit by him to Robertson, the second applicant came into being during November 2014. He was unable to recall who scheduled the initial board meeting during November 2014.

[20] The scheduled agenda's for the board meetings would be set by him in his capacity as the chairman. He conceded that no board meetings were scheduled or held during 2020. This, he said was due to the effects of the pandemic.⁵ According to him, after November 2020, he was

⁴ It was at this meeting that the first applicant elected his wife and son as members of the board of the church.

⁵ The Covid-19 pandemic.

the only board member left on the board of the church, without the respondents or any other board members.

[21] Eventually, after seeking legal assistance, a formal board meeting was scheduled for the 24th of February 2021. It is conceded that no board meeting was scheduled or held between the period 24 November 2019 to the 24 February 2021.⁶ Further, it was conceded that a board meeting could have and should have been scheduled and held during 2020.

[22] During cross-examination, Mr Richards conceded that the board members never formally made themselves available for re-election and that matters were historically progressed on the basis of 'consensus'. What is of significance however, is that the first applicant was driven to concede that he never in any manner whatsoever informed the respondents that they would not be appointed as board members and that they were not board members as at the 24th February 2021. Put in another way, the first applicant could not explain why he did not tell the respondents they were no longer board members after November of 2020. No communication of any nature was sent to them in this connection.

[23] Subsequently, the first applicant's wife and son were appointed as board members by him and with him on the 24th of February 2021. This, despite the explicit provisions of the 'connection clauses' as set out in the constitutions of the church. Prior to this, the only indication of any change to the composition of the board at the instance of the first applicant, was that he suggested that a 're-shuffle' of the board was necessary, as he no longer wanted

⁶ The relevant period.

‘couples’ to be on the board. However, this notwithstanding, he could not explain the subsequent appointment of his wife to the board on the 24th of February 2021.

[24] Much was made about the request for a postponement of the board meeting scheduled for the 24th of February 2021. Indeed, there are some features of the failure to agree to postpone this meeting which bear scrutiny, which are *inter alia*, the following: that this was the first scheduled board meeting to be held in over (14) months: that it was at this meeting that the first applicant appointed his wife and son to the board of the church and most importantly, the first applicant never made it clear, to the respondents, as to whether or not, the meeting would be postponed.⁷

[25] Mr James Richards is the first applicant’s son. He grew up in a church environment. He married one of the church pastor’s daughters from Robertson. The persons involved in the church in Robertson initially all enjoyed a very close relationship. He was driven to concede that the appointment of the board members to the board was never a ‘big issue’ because, this was always done on a consensual basis. Further, he conceded that no meetings were held during the course of 2020 due to a ‘blind-spot’ caused by the pandemic. For this, he also accepted responsibility. Significantly, he could not explain why a full disclosure was not made to the respondents, prior to the board meeting on the 24th of February 2021, as to their alleged non-status as members of the board of the church.

THE RESPONDENT’S WITNESS

⁷ The postponement was not refused, but the respondents were ‘left in the air’ on this score.

[26] Ms van Tonder testified on behalf of the respondents. She is an auditor (CA(SA)), by profession and works for PWC⁸, in Robertson. She volunteered to assist with the finances of the church. She thereafter became a salaried employee for the church, this until she resigned in January 2020. The church was a non-profit organization but, was not registered in terms of NPOA, despite her recommendation to the first applicant, in this connection. The church purchased a property during the course of 2018. A new church was going to be built on the property so purchased. Funds were raised to the extent of R13.8 million in support of this project.

[27] She confirmed that no formal nomination process was followed for the appointment of any board members of the church. Further, that as far as the (2) year status period and process was concerned, it was generally accepted that a board members tenure would continue beyond the (2) year limitation, so imposed. Put in another way, no discussions about the re-appointment or re-election were ever initiated during her tenure both as an employee and as a board member of the church.

[28] She endeavoured to register the church as a non-profit organization in terms of NPOA. Indeed, an application was submitted for this registration, but same was rejected with certain queries. These queries were never attended to by the first applicant, despite her request. The church remained un-registered as a non-profit organization in terms of NPOA.

DISCUSSION

⁸ Price Waterhouse Coopers Limited.

[29] The first respondent's membership in and to the board of the church (in terms of its previous incarnation), goes back even further⁹, prior to the involvement of the first applicant. His status as such became contentious, prior to the first applicant appointing his wife and son as board members, on the 24th of February 2021.

[30] Put in another way, only when issues emerged regarding the alleged questionable governance of the second applicant, by the first applicant, did the status of all the respondents on the board of the church, become an issue and contentious. Until this time, it was accepted by all that the respondents were fully fledged board members of the church.

[31] Undoubtedly, at no time were any members of the board expressly re-nominated, re-appointed or re-elected. The respondents simply continued in office consensually and unanimously, without any complaint or resistance. This was also in accordance with the 'consensus' provisions in the 'constitutions' of the church.

[32] The minutes of the meeting of the 28th of November 2018, reflect, *inter alia*, as follows: that the first and second respondents would simply continue as members of the board: that the then board 'considered' that a structure be put in place for members only serving (2) years and that no such structure was formally adopted.

⁹ The first respondent initially became a board member in 2003.

[33] Of equal importance, is that when the board meeting was called on the 24th of February 2021, the respondents were precluded from participating in this meeting and, they were led to believe that the meeting had, or at least, would be postponed. Moreover, according to the applicants, at this meeting, only the chairman was left as the remaining extant board member.

[34] Constitutionally, two-thirds of the board members have to be present to constitute a quorum for a valid board meeting to be held. The respondent argues that the first applicant, acting alone, was not authorized to appoint his wife and son as board members of the church. On this, I agree because, the appointment of the first applicant's son and wife, was in any event, in direct violation of the 'connected persons' clauses in the 'constitutions' of the church.

[35] Besides, at all material times after November 2020, the respondents continued with their functions of office as board members openly and with the full knowledge and acquiescence of the first applicant. Significantly, the respondents were also issued with an invitation to attend the board meeting scheduled for the 24th of February 2021. The argument is made that in these peculiar circumstances, the board had, in its entirety, assented to and acquiesced in the continued membership of the respondents as board members of the church. Again, on this, I agree.

[36] As I have said, all the board members were acutely aware of the continued tenure of the respondents as board members of the church. Ultimately, the respondents clearly continued as board members with the assent of all parties.¹⁰ Besides, the meeting at which their tenure was

¹⁰ *Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (AA) 694.

‘terminated’ was, a meeting for which they were not given proper notice. This, contrary to the requirements of the ‘constitutions’ of the church and, absent any form of procedural fairness¹¹.

[37] The respondents in the main and strongly contend for an application of the doctrine of unanimous assent in so far as this is connected to the continued membership of the respondents in and to the board of the church. The minutes of the various board meetings as presented to me in the papers, do not in any manner exhibit any ‘issue’ discussed or raised pursuant to the termination of any (2) year period of any of the members of the board of the church.

[38] The first applicant concedes a split between himself and the respondents regarding certain of the affairs of the second respondent and accordingly they undoubtedly embarked on taking steps to unseat the respondents. Until these differences of opinion reared themselves, the status of the respondents remained unquestioned. Absent the papers, is any communication to the effect that the respondents’ status was in any manner, in jeopardy, prior to the meeting scheduled for the 24th of February 2021.

[39] The first applicant added into the agenda for the scheduled meeting on the 24th of February 2021, the issue of the respondents’ membership in and to the board. This is precisely why the respondents requested that the meeting be postponed to obtain legal assistance. Regrettably, it is apparent that the respondents were somewhat ‘ambushed’ in this connection.

¹¹ *Premier, Mpumalanga v Association of State-Aided Schools* 1999 (2) SA 91 (CC) at para [39].

[40] Notably, the request for refusal was not met with an ‘*out and out*’ refusal. Moreover, the first applicant agreed that his stance in connection with the request for a postponement, was ambiguous. The inevitable result was that the respondents were ‘ostensibly’ removed from the board of the church. This, in less than ideal and transparent circumstances.

[41] In answer to this, the applicants say that this was merely a ‘holding-pattern’. This in view of the fact that the board (in accordance with the advice they received), only consisted of the first applicant, as the chairman of the board of the church. The problem with this argument is that despite the election of a further new fresh board since, the first applicant’s wife and son currently still ‘purportedly’ remain members on the board of the church.

[42] Moreover, both the first applicant’s son and the respondent’s witness without hesitation, conceded that if the re-appointment of a board member, after his or her (2) year term, was not raised at a meeting of the board members, these board members would simply continue as before on the basis of unanimous assent.

CONCLUSION AND COSTS

[43] Regrettably, it is apparent that this entire application was premised on the notion that the respondents had voiced their displeasure and expressed their concerns about the first applicant’s governance of the second applicant¹². To make matters worse, the first applicant proceeded in an irregular and questionable manner so as to impermissibly exclude the respondents from the

¹² That is why the meeting was called for the 24th of February 2021, followed by the meeting on the 5th of March 2021.

decision-making process of the second applicant. The evidence offered up by the applicant's witnesses was not satisfactory and was at times, extremely evasive. I am rather persuaded by the evidence presented by the respondent's witness. For these reasons and, mostly on the commonsense facts, I also find favour with the doctrine of 'unanimous assent' as contended for on behalf of the respondents.

[44] Even if I am wrong in this connection, I hold the view that the provisions, time-lines and time-periods of the 'second' constitution of the second applicant, find application. What this really means is that when this application was launched the respondents were extant members of the board, at the very least, until the 9th of September 2021. The second applicant was, in these circumstances, not validly authorized to launch this application by way of the resolution upon which it purportedly relied for this authority.

[45] In addition, there is also no plausible or cogent reason why, in these peculiar circumstances, the applicants should not have approached the court for a declarator. This, instead of the interdictory relief which was chartered. This brings me to the court order which governed the introduction of viva voce evidence and which regulated the further conduct of the application proceedings.

[46] From the content of the agreed order in this connection, it seems clear to me that at least, in part and, by agreement, the parties are now seeking a declarator from the court. I say this because the agreed order requests a 'determination' of the question of the identity of the persons who made up the board of the church, as at the 23rd of February 2021. Further, a declarator is

sought as to the identity of the persons who comprised the board of the church as at the date of the determination of this opposed application.

[47] For the reasons mentioned in this judgment, I hold the view that the first applicant should never have embarked on this litigation and that the second applicant was not properly authorized to launch this application. Accordingly, neither the second applicant, nor the respondents should have to bear the costs of and incidental to this application.

[48] In the result, the following order is granted, namely:

1. That the application for the interdictory relief is dismissed.
2. That as at the 23rd of February 2021, the members of the board of the second applicant were the *first applicant and the respondents*.
3. That as at the date of this order, the members of the board of the second applicant are the *first applicant and the respondents*.
4. That the first applicant is liable to pay the costs of and incidental to this application on the scale as between party and party, as taxed or agreed.

E. D. WILLE

Judge of the High Court

Cape Town