



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

Case Number: 5330 / 2021

In the matter between:

ANDREW WESLEY RICHARDS
KINGS CHURCH INTERNATIONAL

First Applicant
Second Applicant

and

GHER RABIE

First Respondent

PHILIPPUS JAKUBUS LODEWIKUS SWART

Second Respondent

ELAINE PAULSEN

Third Respondent

Coram: Wille, J

Heard: 16th of September 2022

Delivered: 30th of September 2022

JUDGMENT

WILLE, J:***Introduction***

[1] This is the third judgment which I have delivered in this rather unfortunate matter and, I foreshadow that this will not be the last judgment, going forward. This is an opposed application ostensibly dealing with the ‘misunderstanding’ of an order which I granted in terms of a written judgment which I delivered on the 27th of October 2021.

[2] For ease of reference and to promote a full and proper understanding of the two prior judgments¹ that I delivered in this matter, the parties will be referred to as they were cited in the initial application. The first, second and third respondents shall be referred to as the ‘respondents’ unless otherwise indicated. When I refer to the church, I make reference to the second applicant, unless otherwise indicated.

[3] This application is at the instance of the respondents who were the successful parties in the initial litigation. This litigation was about certain interdictory relief to prevent the respondents, from in any manner or form, acting as members of the board of the second applicant. These respondents were all previously members of the board of the second applicant. The first applicant is the chairman of the board of the second applicant which is a religious organization which trades as a non-profit organization.

[4] The applicants averred that in terms of the constitutions of the second applicant, the tenure of the respondents as members of the board only endured for a period of (2) years and, thereafter

¹ The second judgment dealt with an application for leave to appeal.

had automatically lapsed. This was subject to them making themselves eligible for re-election and being duly re-elected. The first applicant contended for the legal position of no automatic renewal of the respondents' membership to the board of the second applicant. This was the core issue to be decided.

[5] The first application was originally piloted in the form of an urgent application in 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. The respondents countered by saying that they considered themselves as extant members of the board.

[6] This 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 *viva voce* evidence of a number of limited disputed issues (as agreed to between the parties).

[7] The applicants' case was that the respondents were obliged to cease and desist from performing any function or role as members of the board of the church for, *inter alia*, the following reasons: (a) that they had ceased to be members of the board of the church; (b) that they had not been re-elected and, (c) that they were constitutionally not members of the board of the church. In short, it was advanced that the respondents' membership in and to the board of the church had automatically terminated and lapsed.

[8] The respondents contended that historically there never ever existed any issue or dispute about them being members of the board of the church. However, certain disagreements and disputes arose (as a direct consequence of the first applicant's governance of the church) and, this ultimately became a cause for concern and for the unfortunate disagreements that followed.

[9] Prior to this, no issues were ever raised regarding the status of the respondents' positions as members of the church board. When these governance issues arose this became the subject of an unfortunate dispute for the first time.

[10] 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 was based in the United Kingdom. In order to preserve the integrity of the judicial process, I ordered that an independent observer from a discrete law firm in the United Kingdom, observe the entire virtual hearing process. A similar methodology was also followed in connection with the second witness for the applicants.

[11] In his testimony, 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 a pastoral visit by him to Robertson, the second applicant came into being in November 2014. He was unable to recall who scheduled the initial board meeting in November 2014.

[12] The scheduled agenda 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 pandemic.² According to him, after November 2020, he was the only board member left on the board of the church, without the respondents or any other board members.³ This was his pleaded case.

² The Covid-19 pandemic.

³ This is totally at odds with the position now adopted in opposition to this application.

[13] Eventually, after seeking legal assistance, a formal board meeting was scheduled for the 24th of February 2021. It was conceded that no board meeting was scheduled or held between the period of the 24th of November 2019 to the 24th of February 2021.⁴ Further, it was conceded that a board meeting could have and should have been convened and held during 2020.

[14] During cross-examination, Mr Richards conceded that the board members never formally made themselves available for re-election and that these matters historically progressed on the basis of 'consensus'. What is of significance 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 considered as current board members as of the 24th of February 2021.

[15] 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 2020. No communication of any nature was sent to them in this connection.ⁱ

[16] Subsequently, the first applicant's wife and son were allegedly appointed as board members (by him and with him) on the 24th of February 2021. This is despite the explicit provisions of the 'connection clauses' as set out in the two constitutions of the church and the fact that this latter meeting was irregular.⁵ 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 'couples' to be on the board.

⁴ The relevant period.

⁵ This was conceded by counsel for the first applicant.

[17] 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 conceded that the appointment of the board members to the board was never a contentious issue because this was always done on a consensual basis.

[18] Further, he agreed that no meetings were held during the course of 2020 due to the pandemic. For this, he also accepted responsibility. Significantly, he could not explain why full disclosure was not made to the respondents (prior to the irregular board meeting on the 24th of February 2021). This is in connection with their alleged non-status as members of the board of the church.

[19] Ms van Tonder testified on behalf of the respondents. She is an auditor by profession and volunteered to assist with the finances of the church. She thereafter became a salaried employee for the church, until she resigned in January 2020. The church was a non-profit organization but, was not officially registered despite her recommendation to the first applicant, in this connection.

[20] Further, as far as the two-year status period was concerned, it was generally accepted that a board member's tenure would continue beyond this two-year limitation, so imposed. Put in another way, no discussions about the re-appointment or re-election of the respondents were ever initiated during her tenure both as an employee and as a board member of the church. This evidence was not engaged with by the first applicant.

[21] I issued an order in this matter on the 27th of October 2021, in the following terms:

'...That the application for the interdictory relief is dismissed

That as of the 23rd of February 2021, the members of the board of the second applicant were the first applicant and the respondents

That as of the date of this order, the members of the board of the second applicant are the first applicant and the respondents

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... '

[22] Dissatisfied with this result the applicants sought leave to appeal. Their application for leave to appeal was dismissed. Thereafter, the applicants approached the Supreme Court of Appeal by way of application for leave to appeal. This application was also dismissed.

[23] The first applicant now contends that the order that I granted was ambiguous and is subject to a misunderstanding. He says that my order does not indicate whether the first applicant's wife and son were and are also now members of the board of the church. This position is adopted despite the fact that neither the first applicant's wife nor his son were ever parties to any of the applications and are also glaringly absent as parties in opposition to the present application.

Consideration

[24] The respondents say the affairs of the church are not progressing as the first applicant takes the position that my order does not make it clear that his wife and son, are not and were not, members of the board of the church. The respondents therefore out of caution seek clarity regarding the content and meaning of my order. For the avoidance of doubt, this application by the respondents is notionally only opposed by the first applicant and no other person.

[25] No confirmatory affidavits are filed either by the first applicant's wife or his son. No resolution on behalf of the second applicant to oppose the current application is before the court. In addition, no notice of opposition has been filed on behalf of either of the applicants.

[26] Notably, only an opposing affidavit by the first applicant has been filed. This affidavit does not comply with the court rules and accordingly very little probative weight (if any), falls to be attached to this opposing affidavit.⁶ In this affidavit, the first applicant asserts that he has taken legal advice to the effect that his wife and son are extant members of the board of the church. The nature of this alleged advice is absent from these papers and the legal reasoning underpinning this advice, also finds no place in these papers.

[26] Further, the issue as to whether or not the first applicant's wife and son were members of the board of the church featured as the sole issue that was piloted on appeal before me and was subsequently also dismissed by the Supreme Court of Appeal. I say this because, in the amended application for leave to appeal, the first applicant took the position that this was the only compelling reason warranting the granting of leave to appeal. So it was argued, that I should have found as a matter of fact that the first applicant's wife and his son were members of the board of the second applicant on the 24th of February 2021 and were also such members as of the date of my order. I dealt with this in my judgment on the first applicant's application for leave to appeal.

[27] As far as the meeting on the 24th of February 2021 was concerned, the evidence undoubtedly demonstrated that the respondents were specifically precluded from participating in this crucial meeting. They were incorrectly led to believe that the meeting had, or at least, would

⁶ The affidavit has not been attested to in accordance with the Uniform Rules of Court.

be postponed. This much was wisely conceded by the applicant's counsel. Moreover, according to the first applicant, at this meeting, only he was left as the sole remaining extant board member. This was the applicants' pleaded case. This is and was always the case piloted by the first applicant. What is now contended for in these opposing papers by the first applicant amounts to a chameleonic change to his initial stance and is at odds with his previously pleaded case.

[28] Put in another way, the first applicant contended in his application for leave to appeal, that I should have found as a matter of fact that Mr J Richards and Mrs A Richards were members of the board of the second applicant on the 24th of February 2021 (and, were also such members as at the date of my order). This in essence amounted to the introduction of a new factual issue for determination for the first time on appeal. In my view, to have allowed this would have demonstrably been to the irreparable prejudice of the respondents.

[29] I say this for, *inter alia*, the following reasons, namely: (a) that constitutionally, two-thirds of the board members had to be present to constitute a *quorum* for the meeting; (b) that on the first applicant's own version, the only member of the board of the church (on the 24th February 2021), was the first applicant and, (c) that the first applicant's son had resigned from the board of the second applicant.

[30] Most significantly, there was not an iota of evidence placed before me that supported or underpinned the appointment of Mrs Richards to the board of the second applicant. Despite this, the first applicant now argues that my order is unclear and ambiguous in that the first applicant's wife and son were also members of the board of the second applicant during this time. By contrast, the respondents argue that the first applicant, acting alone, was not subsequently authorized to appoint his wife and son as board members of the church. This must be so. Also, the purported

appointment of the first applicant's son and wife was and is in direct violation of the connected-persons clause in both the constitutions of the church as canvassed in my initial judgment on the merits.

[31] Besides, the respondents factually continued as board members with the assent of all parties⁷. In addition, the meeting at which their tenure was ostensibly terminated was an irregular meeting for which they were not given proper notice and they were undoubtedly ambushed by the first applicant. This was contrary to the requirements of both the constitutions of the church and absent any form of procedural fairness. It was uncontested 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.

[32] Moreover, according to the first applicant, at this meeting, only the chairman was left as the remaining extant board member. Constitutionally, two-thirds of the board members had to be present to constitute a *quorum* for a valid board meeting to have been held. The respondents argue that the first applicant, acting alone, was not authorized to appoint his wife and son as board members of the church. On this, I must agree.

[33] The first applicant applied to the Supreme Court of Appeal for leave to appeal. He asserted that this court had erred in not finding that James Richards and Adriana Richards were members of the board of the church. The Supreme Court of Appeal dismissed the application for leave to appeal, on the grounds that there was no reasonable prospect of success in an appeal and there was no other compelling reason why an appeal should be heard.

⁷ *Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (AA) 694.

[34] It is now argued for the first time that the Supreme Court of Appeal did not precisely say if there was no reasonable prospect of success in connection with the issue of an impermissible attempt to raise a new issue on appeal and, accordingly this latter issue remains a live issue and is open for determination.

[35] By way of elaboration, the first applicant says that James Richards and Adriana Richards were not parties to the main application with the result that they are not bound by any decision of the main application in this matter. As a matter of pure logic, this cannot be so because the first applicant's entire pleaded case was that James Richards and Adriana Richards were appointed as members of the board at the meeting on the 24th of February 2021 and, at no other time. Most importantly, the first applicant conceded that this meeting was fatally flawed and irregular.

[36] Besides, the first applicant testified that James Richards and Adriana Richards were appointed on the 24th of February 2021 only as a 'stage-post' measure. The question of whether James Richards and Adriana Richards were members of the board of the church during the main application may have been an issue (in terms of the agreed order), but it can never be seriously suggested that it was a dispute for determination between the parties. Accordingly, the unfortunate position now taken by the first applicant amounts to an exercise in obfuscation and an argument couched in 'reverse-engineering'.

[37] I say this because James Richards testified that he was not a member of the board of the church and not an iota of evidence was presented in any form or manner in support of the now belated contention that Adriana Richards was an extant member of the board of the church. This is after all why they were ostensibly appointed at the flawed meeting on the 24th of February 2021. The first

applicant's case was that James and Adriana Richards were not members of the board of the church and he is now engaged in a complete summersault⁸ in this connection.

[38] As a general proposition court orders must be practical by way of their implementation. The respondents approached the court for relief as to the identity of the members of the board of the church. This was because the disputes that existed as to the identity of the members rendered the board of the church dysfunctional. Now the first applicant (precisely for the reason that the orders from the court in the main application, coupled with the orders in the Supreme Court of Appeal are not to his liking), is once again seeking to render the board of the church dysfunctional by impermissibly attempting to persuade the court not to clarify the extent of its orders so that they are not capable of practical implementation.

Conclusion and costs

[39] Regrettably, it is apparent that the first applicant's opposition to this application is premised upon his misguided attempt to prevent the second applicant from carrying on its church business and to frustrate the respondents in their efforts as members of the board. The first applicant simply refuses to accept the terms of the court orders granted in this matter going forward. The first applicant is continuing to proceed in an irregular and questionable manner so as to impermissibly exclude the respondents from the decision-making process of the second applicant.

[40] The first applicant is desperately seeking defences and shields against the various court orders issued against him. As indicated in my initial judgment, the second applicant was not validly authorized to launch the initial application (nor the appeal) and, is also not properly before

⁸ The Afrikaans word is most descriptive namely - 'Hy het heeltemal bollemakiesie omgeslaan'.

this court. The first applicant is also not properly before this court as he has not filed any notice opposing this application and his affidavit does not comply with the prescribed court rules in connection with the proper and valid authentication thereof. Accordingly, I attach very little weight to his opposing affidavit. Most significantly, absent from the papers are any confirmatory affidavits by either James or Adriana Richards. In the result, the following order is granted, namely:

1. That the application is granted.
2. That as of the 24th of February 2021, the members of the board of the second applicant were the first applicant and the respondents *and no other person or persons*.
3. That as of the 27th of October 2021, the members of the board of the second applicant were the first applicant and the respondents *and no other person or persons*.
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
