

SOUTH AFRICA / JUDGMENT

Hendricks v Church of the Province of Southern Africa, Diocese of Free State (2886/2019) [2020] ZAFSHC 108 (17 June 2020) [2020] ZAFSHC 108

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo, Chesiwe

CASE / FILE NUMBER

2886/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No: 2886/2019

In

the matter between:

LLOYD
EUGENE
HENDRICKS Applicant
and
THE CHURCH OF THE
PROVINCE OF
SOUTHERN AFRICA,
DIOCESE OF FREE
STATE Respondent

JUDGMENT

CORAM: NAIDOO J et CHESIWE J

JUDGMENT

BY: NAIDOO J

HEARD ON: 25 MAY 2020

DELIVERED ON: 17 JUNE 2020

[1] This is an application in which the applicant seeks an order to review and set aside a decision by the respondent, in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively in terms of the common law. An order, inter alia in the following terms is sought:

“1. The Respondent’s decision to revoke the Applicant’s licence to act as a priest, thereby effectively relieving the Applicant of his duties as a priest in the Dioces (sic) of the Free State of the Church in the Province of the Free State (Anglican Church in South Africa) stationed at St Margarets (sic) Church in Bloemfontein;

2. That the applicant be reinstated as priest in the Dioces (sic) of the Free State of the Church of the Province of the Free State (Anglican Church in South Africa) stationed at St Margarets (sic) Church in Bloemfontein, alternatively that the matter be referred to the Respondent to begin de novo in order to undertake the prescribed process in terms of the Constitution and Canons of the Anglican Church of South Africa.

3. That the Respondent be ordered to pay the Applicants costs of the Application,”

Adv R Van der Merwe appeared for the applicant and Adv S Grobler SC appeared for the respondent.

[2] The applicant was an ordained priest, licensed to practice as such within the Anglican Church of South Africa, and was stationed at St Margaret’s Church (St Margaret’s) in Bloemfontein. In February 2018, all clergy (presumably in the Anglican Church)

received a letter from Bishop Dintoe (the Bishop), who was in charge of the Diocese of which St Margaret’s is a part. The letter informed the clergy that some of them would be approached to move parishes, whilst some may be asked to find themselves “ministry places” elsewhere. This could take place as early as Easter of 2018 or at the latest by the end of that year. In March 2018, the applicant attended a Clergy Retreat at which the Bishop, during one of the sessions, informed the clergy that he intended to move some of them from their church to other churches. On 28 June 2018, the applicant received a letter from the Bishop advising him that the Bishop intends moving him from St Margaret’s with effect from November/December 2018, and that he would be informed of his new placement by August/September 2018.

- [3] On 17 July 2018, the applicant responded to the Bishop's letter and requested reasons for his decision to place the applicant in a different parish. The Bishop replied on that same day and invited the applicant to meet with him, which the applicant did. The applicant alleges that the Bishop failed to give any reasons for his removal to a new parish, other than to say that some people were unhappy and that's the reason he was considering moving the applicant. Subsequently, the applicant received correspondence from the Bishop furnishing him with details of two churches, one in Welkom and one in Ladybrand in the Free State, seemingly with the intention that the applicant would visit the respective churches and decide which one he would prefer to be moved to.
- [4] The applicant was dissatisfied, as he held the view that the Bishop had not provided any reasons for his placement at another parish. He communicated to the Bishop, via an e-mail on 30 August 2018, that he felt that "proper procedures" were not followed and that the meeting with the two proposed churches be postponed until his concerns were resolved. The "paper war", by way of e-mail exchanges between the applicant and the Bishop, continued until 2 January 2019, when the applicant received notification that his licence had been revoked by the Diocese of the Free State, with effect from 1 January 2019. Between August and December 2018, the correspondence revealed that a new priest was installed at St Margaret's, that the appellant was informed that his refusal to move to one of the churches he was referred to had left the Bishop with no option but to invoke Canon 25(6) of the Church's Constitution and Canons. He was requested to state in writing, by 2 November 2018, that he refused to be moved from St Margaret's. The appellant responded that he does not agree with the Bishop's decision to invoke Canon 25(6), as proper procedure had not been followed in taking this decision. He was still awaiting reasons for his being moved to another parish. He was informed that there was no obligation on the Bishop to furnish him with reasons.
- [5] On 14 January 2019, the applicant lodged an appeal with the Archbishop of the Anglican Church against the Bishop's decision

and requested him to intervene in the decision to revoke the appellant's licence and to reinstate him as the Rector of St

Margaret's, pending the outcome of the appeal. The Archbishop responded on 10 April 2019, advising the applicant that the appeal is refused. The applicant thereafter launched the current application.

- [6] The applicant contends that from the record of proceedings relating to the decision he seeks to review, it is clear that the nature of the complaints against him related to financial and administrative mismanagement, and as such, the Bishop was obliged to proceed in terms of the latter part of Canon 25(6) and invoke disciplinary proceedings in terms Canon 37, read with Canon 39. He contends further that even if the Bishop is held to have acted in terms of Canon 25(6) read with Canon 25(7), he failed to follow the procedures prescribed therein prior to revoking his licence

[7] As indicated the applicant's grounds for review are, in essence, that the regulatory prescripts of the Church were not

adhered to, and due process was not followed before his licence was revoked. The applicant alleges that the nature of certain complaints

against him were not properly dealt with in terms of the provisions of the relevant Canons, resulting in unfair administrative action, in the form of revocation of his licence, being taken against him.

[8] The respondent, in opposing the application, asserted that the applicant was not denied the procedural rights he claims he was

entitled to. In addition, the respondent alleges that it was entitled to invoke the provisions of Canon 25(6), which it did and accorded the applicant his rights in terms thereof. The applicant failed or refused to avail himself of the procedural rights accorded to him and the respondent revoked his licence, as it was entitled to do. The respondent admits that no disciplinary procedure was followed and asserts, in essence, that while there is more than one way to revoke a priest's licence (the disciplinary proceedings being one), the procedure in terms of Canon 25(6), which it chose, was the correct one, in terms of which revocation of a priest's licence is permitted.

[9] With regard to the Bishop's decision to revoke his licence, the respondent asserts that the applicant impugns the decision on the ground of procedural irregularity, and on no other ground. Furthermore, the applicant assails only the Bishop's decision

to revoke his licence and not that of the Archbishop dismissing his internal appeal (and upholding the Bishop's decision). This in effect has the consequence that the court is requested to adjudicate an issue that has become academic. The respondent also asserts that the relationship between it and the applicant is such that it will be untenable for the applicant to continue working at St Margaret's.

[10] It is perhaps useful to set out the relevant provisions of Canon 25 that have been the subject matter of the appellant's attack upon the lawfulness of the Bishop's decision to revoke his licence:

"Change of Incumbent or assistant Clerk

6. If the Bishop of the Diocese considers that for pastoral reasons the work of God in a Pastoral Charge demands that there should be a change of Incumbent or other licensed cleric, or that for medical reasons the cleric concerned is unable to undertake adequately the functions or responsibilities of office, the Bishop shall (failing the consent of the said cleric to the change) take counsel with the Chapter of the Cathedral Church, or with the Senate, as the case may be, or if there be no Chapter or Senate, with three priests of the Diocese, and if the majority of them agree to such a course, after giving the said cleric an opportunity to be heard, the Bishop shall offer the cleric another ministry in the Diocese, stipendiary if the

ministry was stipendiary. Should there be none in the Diocese, then the Bishop shall seek in consultation with the cleric another suitable ministry within the Province. However, if it appears to the Bishop, either before embarking on this process or during the process itself, that the reason for the need for a change in fact relates mainly or substantially to matters which could constitute charges or accusations in terms of Canon 37.1, then in the absence of any charge under Canon 37.1, the Bishop shall proceed in terms of Canon 39, in respect of those matters and, in respect of any balance of issues that remain, may continue with the search should that be appropriate.”

[11] Canon 25(7) provides:

“Revocation of licence

7. If the said cleric refuses to accept another ministry so offered, the Bishop, upon being satisfied after pastoral ministration that no other course is possible, shall have the right upon notice to the cleric to revoke, upon the expiration of three months notice, the letters of institution, or the licence, as the case may be, subject to section 8 of this Canon.”

It seems there was an oversight in not numbering the following section “8”. I accept however that it is section 8, as it immediately follows section 7 and immediately precedes section 9.

It provides as follows:

“Revocation of licence without offering another ministry

If another ministry is not found in the Diocese or within the Province in terms section 6 of this section (sic), and if two thirds of the Chapter, Senate or priests agree that under all the circumstances no other ministry should be offered, then after giving the cleric an opportunity to be heard, the Bishop may, after explanation and pastoral ministration, upon the expiration of three months notice, revoke the cleric’s letters of institution, or licence, as the case may be, without offering another ministry. In this event and that set out in section 7 of this Canon, the said cleric, may, within two months of the date of such notice given, appeal to the Metropolitan (or, if the Metropolitan be the Bishop concerned, to the Dean of the Province), who shall then decide upon review whether or not the proposed revocation shall take effect.”

- [12] The applicant alleges that the Bishop should have proceeded in terms of Canon 25(6), read with Canons 37 and 39, alternatively in terms of Canon 25(6) read with Canon 25(7) and 25(8). He pertinently alleges that Canon 37(1)(h) to (p) are specifically applicable in this case, as the allegations against him by certain members of the Church were of a serious nature and fell within the purview of Canon 37(1), which, under the heading “Offences” lists numerous charges or accusations which may be presented for trial. Canon 39 sets out details of what steps are to be taken in initiating and conducting disciplinary procedures.

- [13] Section 33 of the Constitution of South Africa (the Constitution). provides as follows:

“(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

- (1) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

The Promotion of Administrative Justice Act, 2000 Act 3 of 2000 (PAJA) is the empowering national legislation that gives effect to section 33 of the Constitution. Section 1 of PAJA defines administrative action as follows:

“ ‘administrative action’ means any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect....”

[14] The applicant seeks administrative justice and contends that the respondent’s failure to comply with the prescripts of its own Canons, which I have mentioned above, is a failure which renders the respondent’s actions reviewable and fall to be set aside in terms of section 6(2)(b) of PAJA. In addition, its failure to provide the applicant with reasons for moving him to another parish and failing to afford him the opportunity to be heard, renders the respondent’s actions procedurally unfair, which actions fall to be reviewed and set aside in terms of section 6(2)(c) of PAJA.

[15] The issue to be considered is whether the respondent’s actions are administrative actions as defined in PAJA. Can it be said that the respondent exercised a public power or performed a public action which adversely affected the rights of the applicant and which had a direct, external legal effect? It has been generally accepted that there must be a “governmental element” to the impugned action or decision. In the case of *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA), the Appeal Court considered the notion of “administrative action” in relation to the type of entity whose decision or action was sought to be impugned. The court undertook a comprehensive examination of cases from various foreign jurisdictions, such as the United States

of America, the United Kingdom and Canada, in which the “governmental element” in the impugned decision was discussed and considered. It seems that the common thread running through the various cases examined is that, in determining whether conduct is of a public nature for the purposes of the relevant legislation, courts interrogate the presence or absence of features in the impugned conduct, which are “governmental” in nature.

[16] The SCA referred to the English case of *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank and Another*

[2003] UKHL 37; [2004] 1 AC 546, where the court said, inter alia at paragraph 12 that “...Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.” Coming closer to home, the SCA remarked that the High Courts (in South Africa) have considered whether the conduct of various entities, such as political parties, sports bodies and the like were susceptible to judicial review in a number of matters, but the decisions have not been consistent. One matter which the SCA referred to and which encapsulates, in my view, the position with regard to the respondent in the matter before us, is that of *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) at 1375 D-E, where the court expressed itself thus:

“The respondent is not a public body. It is a voluntary association wholly unconnected to the State. It has its origin in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded. The applicant, indeed, makes the point that it has no statutory recognition or any 'official' responsibility for the game of cricket in South Africa”

[17] The respondent in the present matter is a religious body on the same footing as a sports body, as referred to in *Cronje*. It is a voluntary association, unconnected to the State, privately funded and does not enjoy statutory recognition. Its actions and decisions lack the necessary “governmental” element. Therefore, its conduct and decisions do not fall within the purview of section 6 of PAJA. The applicant’s reliance on PAJA is therefore misplaced and cannot be sustained. However, that does not mean that the conduct of the respondent can simply be accepted where such conduct is procedurally flawed and results in unfairness and prejudice being visited upon the applicant. The common law and the precepts of natural justice come into play in such an instance. The courts are, however, generally hesitant to involve themselves in church-related matters, and where they do, such intervention is limited to the process and procedures governing or relevant to the process. The courts are accordingly very reluctant to become involved in disputes regarding internal rules or doctrines of the church. [See *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* 2015(1) SA 106 (SCA) at p126-127]. In the present matter, however, the applicant’s complaint is that the process by which his licence was revoked was flawed and contrary to the respondent’s own Canons and Constitution. It deprived him of his right to be heard and resulted in procedural unfairness, entitling this court to interfere in such a decision.

[18] Before considering whether it is necessary for this court to pronounce upon the fairness or otherwise of the revocation process

undertaken by the respondent, it is necessary to consider the point raised by the respondent, in its opposition to this application,

regarding the decision of the Archbishop, in which he refused the applicant's appeal and upheld the decision of the Bishop to revoke the applicant's licence. This point may well be dispositive of this application.

[19] The respondent asserts that the applicant has failed to impugn the decision of the Archbishop. The furthest he goes is to criticise the decision in his Founding Affidavit, asserting that he does not agree with the Archbishop's decision and his opinion that he (the applicant) did not advance reasons why the Bishop's decision to remove him from St Margaret's is irrational. He also disagrees with the Archbishop's opinion that the Bishop had given him sufficient reasons for his removal. Mr Grobler argued that the effect of the applicant's failure to impugn the Archbishop's decision is that such decision stands, as it is not the subject of the review before us. The effect of this is that the outcome of these proceedings will be academic, with no practical effect. Mr Van Der Merwe, however, argues that this is not so. Prayer 1 of the Notice of Motion (which is set out in paragraph 1 above), is wide enough to cover the Archbishop's refusal of the appeal, as he merely confirmed the Bishop's (unlawful) decision.

[20] Mr Grobler referred, in this connection, to the case of *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG). In this matter the applicant applied for and was denied environmental authorisation to build and operate an airfield by the Department of Environmental Affairs (the Department). It launched an internal appeal to the MEC Environmental Affairs, Eastern Cape, who dismissed

the appeal. The applicant took the decision of the Department on review and made it clear that it was not the decision of the MEC that was to be reviewed. The MEC argued that even if the decision (at first instance) of the Department was set aside, the appellate

decision of the MEC would still stand. Therefore the review of the Department's decision was academic. The court applied these principles and found that the setting aside of the Department's decision would be academic and of no practical effect. It dismissed the application for review on this basis.

[21] Mr Van Der Merwe argued that *Wings Park*, and specifically para 34 of that judgment cannot be relied upon as the court in *Wings Park* relied on the case of *MEC for Health v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014

(3) SA 219 (SCA) paras 20 – 21, which was taken on appeal to the Constitutional Court (CC) where a different view was held. On a proper reading of the *Wings Park*

matter, it is clear that *Plasket J* in *Wings Park* relied on specific paragraphs of the *Kirland* matter in both the SCA (paras 20 and 21) and the CC (paras 66 and 90) decisions as authority for the proposition that as a general rule, administrative action is valid until it is set aside. In this regard the court cited the SCA decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004

- (6) SA 222 (SCA); ([2004] 3 All SA 1; [2004] ZASCA 48) in para 31 of the Wings Park matter as the case where this principle was followed by the SCA. Plasket J's reasoning was that in order to answer the question whether the applicant (Wings Park) should have attacked the appellate decision of the MEC, it was prudent to start with the general principle established in the Oudekraal matter. Mr Van der Merwe's reference to paras 28, 38, 43, 46 and 50 of the CC decision in Kirland are misplaced as they deal with issues other than the issues in paras 66 and 90. It appears that this may be due to a misunderstanding of the reference in Wings Park to the SCA and CC decisions.
- [22] The applicant also argued that the decision in Wings Park is that of a single judge and this court is not bound by that decision. That is indeed so, but as pointed out by Mr Grobler it can be persuasive. A reading of the Wings Park decision shows that the court undertook a comprehensive examination and analysis of our case law dealing with internal appeals. The remarks of the court in para 34 of that judgment pertain to different scenarios relating to when the decision at first instance only or the appellate decision only is taken on review and when both the decisions have to be reviewed. These remarks must be read in context from para 32, where the court said "Furthermore, the analysis that follows of cases dealing with internal appeals indicates that the appellate decision must, invariably, be attacked in review proceedings, even when the initial decision is also taken on review. A number of different scenarios illustrate the point."
- [23] The analysis of the court included the decisions of the SCA on the issue of internal appeals, and led to its finding in para 46 of the judgment, where the court said:
- "My conclusion from the cases I have discussed is that, as a general rule, when an administrative action is subject to an internal appeal, review proceedings must, at least, be directed at the appellate decision. Whether it is only the appellate decision that may be challenged may depend on the nature of the decision at first instance and the remedy sought by the applicant. In most instances, however, both decisions will have to be challenged. In the light of the Oudekraal principle, I am by no means convinced that even where failures of procedural fairness cannot be cured on appeal, it is only the first decision that must be set aside. The appellate decision will be invalid as a result of being tainted by the illegality of the first decision but will still have to be set aside to terminate its factual effect."*
- [24] Apart from criticising and disagreeing with the decision of the Archbishop, the applicant did not deal at all with the reasons for his disagreement, neither did he place on record how or why the Archbishop erred, and most importantly did not ask for that decision to also be reviewed and set aside. In my view, it was a valiant but futile attempt to argue that prayer 1 of the Notice of Motion was wide enough to also refer to the decision of the Archbishop. In the circumstances, I find myself more than persuaded by the finding of the court in Wings Park, based as it is on a thorough and comprehensive analysis of our case law and sound legal principles. Therefore, I find that it would be futile to review the decision of the Bishop in this matter as it would indeed be moot, given that the decision of the Archbishop in dismissing the applicant's appeal, still stands. I also see no reason why costs should not follow the result.

[25] In the circumstances, I make the following order:

The application is dismissed with costs.

S. NAIDOO J

I agree

S CHESIWE J

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