

SOUTH AFRICA / JUDGMENT

Maduna and Another v Moloi and Another (2199/2020) [2020] ZAFSHC 198 (16 October 2020) [2020] ZAFSHC 198

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

2199/2020

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THE
HIGH COURT OF SOUTH AFRICA
FREE
STATE PROVINCIAL DIVISION
Case
No: 2199/2020
In the matter

between:

EDWARD
EPHRIAM
MADUNA First
Applicant
THE
AFRICAN PRESBYTARIAN BAFOLOSI
CHURCH
OF SOUTH AFRICA
(Non-Profit

Organisation:	2015/163666/08) Second Applicant and SHADRACK NKOMENI MOLOI First Respondent JONAS MOSEBETSI MALEKA Second Respondent
Coram:	Opperman, J
Heard:	10 September 2010
Delivered:	16 October 2020
Judgment:	Opperman J
Summary:	Opposed motion – typification of the second applicant’s legal identity - locus standi – mismanagement of non-profit organisations and religious entities

JUDGMENT

- [1] It is common cause that the leadership and management of the second applicant; the African Presbyterian Bafolosi Church of South Africa (the Church), are in complete disarray; the result is perpetual litigation[1] in this court wherein the Church and the first applicant is entangled. The litigation is often ineffective to regain order and subsequent court orders became moot in the prevailing discord and chaos.
- [2] The litigation relates to power struggles in the leadership, splinter groups that have formed within the Church, violence and physical assaults that have occurred and property that were damaged and alienated. It is common cause that the constitution of the Church is disregarded and warped by some involved to serve their own interests.
- [3] The continuous litigation is also assured to deplete the financial resources of the Church that is sponsored by trusting and faithful worshippers. Worshippers that have a constitutional right to protection against exploitation.
- [4] The turmoil continues with the application in casu. The following legal aid is sought:

1. That the meeting allegedly held on behalf of the second applicant (the Church) at Paul Roux on 1 July 2018, be declared to be inconsistent

with the constitution of the Church and therefor unlawful and be set aside;

2. That the Synod allegedly held on behalf of the Church at Kroonstad on 8 December 2018, be declared to be inconsistent with the constitution

of the Church, and therefor unlawful, and be set aside;

3. That all decisions and resolutions taken at the said impugned meeting and Synod, on behalf of the Church, be declared invalid and of no force and effect;

4. That the alleged nominations and elections of the first respondent as the Presiding Bishop and the second respondent as the General Secretary of the Church, be declared invalid and of no force and effect;

5. That the respondents be ordered to pay the costs of the suit.

[5] Issues in limine were taken with the application by the respondents. These are locus standi, cause of action, jurisdiction, the electoral process, misjoinder/non-joinder and a foreseeable factual dispute.

[6] This case starts and stops with the issue of locus standi of the applicants.

[7] The Church is a non-profit organization duly incorporated in terms of the Company Laws of the Republic of South Africa with registration number 2015/163666/08 with its principle place of business at 121 Zim Street, Bethlehem, Free State. It is obliged to function as defined in the Non-profit Organisations Act 71 of 1997: “non-profit organisation” (NPO) to mean a trust, company or other association of persons - —

(a) established for a public purpose; and

(b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services

rendered.

[8] The NPO Act does not address permissible activities. Because a registered non-profit organisation will ordinarily be a trust or a non-profit company, the laws governing those legal entities and the tax laws provide for its activities. An NPO’s constitution will stipulate the activities specific to the core nature and purpose of the NPO.

[9] The constitution of the NPO in casu states in clause 6.1.10 (b) that the duties of the Presiding Bishop shall be:

“(v) To represent the church in all legal actions brought by or against the church.”

Clause 6.1.10(b)(v) does not authorise the Presiding Bishop to institute litigation; just to represent the Church.

[10] The ruling and reasons of this court by Van Zyl, J on 25 March 2020[2] on the locus standi of the applicants were correct. The circumstances remained exactly the same as on the date of judgment in casu. There is not any evidence on the founding papers that the first and second applicants had authority to have instituted the application

here.

1. Reading of the papers and the constitution of the Church points to the real fact that there does not exist a functioning Synod or council in the Church in terms of the constitution of the Church to authorise the first applicant to represent the Church in litigation.
2. To add insult to injury, there exist a real and clear dispute on the papers in the words of the first applicant himself in his founding

affidavit from paragraphs 3 to 4.34, on the issue whether he is the Acting Bishop or not.

3. The whole Church is dysfunctional to the point that litigation and the right of access of citizens to court in terms of section 34 of the Constitution of the Republic of South Africa, 1996 cannot follow on the terms and in the manner demanded by the applicants. The parties cannot be referred to the internal remedies

in terms of the constitution of the Church and in terms of section 7 of PAJA which stipulates that no court or tribunal shall review an administrative action in terms of the Act unless any internal remedy provided for in any other law has first been exhausted.

[11] On 6 November 2018 Gastrow[3] wrote about the predicament when an entity such as the Church has fallen into dysfunction ex lege.

“South Africa has a burgeoning non-profit sector, close to 200,000 organisations are now registered with the NPO Directorate in the

Department of Social Development. The primary role of the directorate is to administer the register of non-profit organisations and it does provide guidelines on how to register.

Unfortunately, it does not carefully review the founding documents of organisations in any critical way and as a result South Africa has thousands of organisations with inadequate founding documents that do not clearly provide clarity around purpose and governance systems. As a result, the issue of accountability becomes extremely difficult.

Who then are the constituencies that have an interest in the non-profit sector and to whom are boards accountable? These could include the intended beneficiaries/partners; employees; the South African Revenue Service if the organisation has the privilege of tax exemption status; members of the organisation if it is a voluntary association; other organisations working in the same sector with whom partnerships may exist; the Department of Social Development where many non-profits are formally registered; and finally donors to the organisation who have

contributed financially to its existence.

In the absence of any oversight provided by special legislation, the question then is how are the above different interest groups represented? Currently there should be some oversight by the NPO Directorate in the Department of Social Development, but it is under-resourced and barely able to cope with the hundreds of registrations and other standard reporting requirements set down in the legislation such as annual reports and financial statements.

Increasingly, donors are questioning the lack of oversight of the sector with questions about how to prevent financial abuse in particular, although other issues have emerged such as the poor levels of governance when it comes to sexual harassment, nepotism and conflicts of interest. In addition, a non-profit that breaks the public trust, has an effect on other organisations in the whole sector and reduces the capacity of other organisations to raise money, for example.”

[12] In 2015[4] controversial news reports and articles in the media about pastors have left a large portion of society questioning whether religion has become a commercial institution or commodity to enrich a few. An investigative study (commission inquiry) regarding the commercialisation of religion and abuse of people’s belief systems in South Africa was undertaken as per the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002. The CRL Rights Commission was of the view that there are several reasons for the Religious Sector to be regulated. Therefore, after this extensive investigation, an amendment to the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 (CRL Act) legislation was recommended.

[13] Du Plessis[5] wrote in 2019 on the constitutionality of the regulation of religion in South Africa and pondered whether it would cause untoward restrictions of the right to religious freedom? Her conclusion was:

“According to Durham, unduly restrictive laws governing the structuring of religious organisations result in significant loss of the social benefits of religions. Although the impact of religion can be positive and negative, ‘it is socially wasteful to regulate religion in ways that unnecessarily curtail its positive effects’. The broad trend is to assure religious communities at least as much legal flexibility as secular NPOs are allowed.[6] I have argued in this article that the structures proposed by the Commission will, in an attempt to curb the negative effects of

religion (in the way that any ideology could have negative effects), unnecessarily curtail the positive effects of religion and the positive contributions of religious institutions in society (such as inculcating altruism, the enhancement of social stability,

productivity, increased volunteerism, social commitment, integrity and general creativity).”

[14] The predicament is when charity involves business. In Council for Medical Schemes and Others v Liberty Medical Scheme and Another (35254/2012)

[2013] ZAGPPHC 542 (28 May 2013) in paragraph 28 the dictum of the Australian High Court, Williams Breen v Williams (1996) 186 CLR 71 (HCA) were relied upon and which is also relevant in this case:

“The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that '[n]o man can serve two masters' (Matt 6:24). Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful.”

[15] Since the applicants do not have locus standi the matter may not be entertained by the court. In an endeavour to address the calamity the case will be referred to the NPO Directorate

in the Department of Social Development: Free State and the Director of Public Prosecutions: Free State to ensure that the Church

functions in accordance with the law.

[16] The first applicant has for years realised the situation in the Church and the result of the perpetual litigation as well as the fact that the case is one of severe factual disputes. He must carry the costs for the litigation. I will refrain from a punitive costs order as a last indulgence to give the leadership of the African Presbyterian Bafolosi Church of South Africa the opportunity to mend their ways.

[17] ORDER

The application is dismissed with costs; costs to include the travelling and similar expenses of the legal representatives.

M. OPPERMAN, J

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- [1] SN Moloi and others v EE Maduna and others, case number 2140/2018, 28 November 2019, The African Presbyterian Bafolosi Church of South Africa v SK Mkwanaasi and 13 others, case number 5833/2015, 31 March 2016.
- [2] EE Maduna and another v SN Moloi and another, Case number 1445/20 dated 25 March 2020.
- [3] Ensuring accountability and vigilance in the non-profit sector, <https://www.dailymaverick.co.za/opinionista/2018-11-06-ensuring-accountability-and-vigilance-in-the-non-profit-sector/> .
- [4] 2017, Report on the hearings on the commercialisation of religion and abuse of people's belief systems, CRL-report-commecializationofreligionandabuseofpeoplesbelievesystems, Foreword, 2 September 2020.
- [5] The constitutionality of the regulation of religion in South Africa — Untoward restrictions of the right to religious freedom?, 2019 SALJ 131. URL:[http://jutastat.juta.co.za/nxt/gateway.dll/jelj/salj/3/34/35/42/46?f=templates\\$fn=default.htm](http://jutastat.juta.co.za/nxt/gateway.dll/jelj/salj/3/34/35/42/46?f=templates$fn=default.htm) sourced on 2 September 2020.
- [5] The constitutionality of the regulation of religion in South Africa — Untoward restrictions of the right to religious freedom?, 2019 SALJ 131.
- URL:[http://jutastat.juta.co.za/nxt/gateway.dll/jelj/salj/3/34/35/42/46?f=templates\\$fn=default.htm](http://jutastat.juta.co.za/nxt/gateway.dll/jelj/salj/3/34/35/42/46?f=templates$fn=default.htm) sourced on 2 September 2020.
- [6] Fodor and Radebe, Principia Charitable Organisations in South Africa: Overview, summarise the system in which charity organisations operates under the law with reference to “The Law of South Africa” (LAWSA), second edition (2011), volume 31, page 4 to 5 and 86 to 97. (Also see the White Paper on Social Welfare Government Gazette 18166 GN 1108, 8 August 1997), pertinently. “South Africa's legal system is affected by the Roman Dutch and English legislative regimes' historic impact on its development. However, the spirit of Ubuntu (a Zulu word that denotes the essential human virtues including compassion and humanity) with which the South African Constitution is infused is pervasive in post-Apartheid legislation. “Charity law in South Africa is broadly classed under the heading of “welfare”. As such, the Constitution places welfare within the ambit of co-operative government (part 2, Volume 31, LAWSA), with national and provincial government enjoying concurrent jurisdiction. Each province can promulgate its own welfare statutes in addition to the nationally applicable statutes like the Non-Profit Organisations Act 1997 and the Companies Act 2008.” [https://uk.practicallaw.thomsonreuters.com/9-632-4485?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-632-4485?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) sourced on 15 June 2019.

- [6] Fodor and Radebe, *Principia Charitable Organisations in South Africa: Overview*, summarise the system in which charity organisations operates under the law with reference to “The Law of South Africa” (LAWSA), second edition (2011), volume 31, page 4 to 5 and 86 to 97. (Also see the White Paper on Social Welfare Government Gazette 18166 GN 1108, 8 August 1997), pertinently.

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[https://uk.practicallaw.thomsonreuters.com/9-632-4485?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-632-4485?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) sourced on 15 June 2019.

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