

SOUTH AFRICA / JUDGMENT

Wilge Hervormde Gemeente and Others v Nederduitsch Hervormde Kerk Van Afrika and Another (5167/2016) [2021] ZAGPPHC 329 (13 May 2021)

[2021] ZAGPPHC 329

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

5167/2016

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IN

THE HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Case

Number: 5167/2016

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE:

13 MAY 2021

In

the matter between:

DIE WILGE HERVORMDE
GEMEENTE
First
Plaintiff
DIE WILGE
VERENIGING
Second
Plaintiff
HERVORMDE GEMEENTE
GROOTVLEI
Third
Plaintiff
DIE GEMEENSAP VAN
GELOWIGES GROOTVLEI
Fourth
Plaintiff
HERVORMDE GEMEENTE
KOSTER
Fifth
Plaintiff
DIE DIAMANT
VERENIGING
Sixth
Plaintiff
HERVORMDE GEMEENTE
MEYERSPARK
Seventh
Plaintiff
MEYERSPARK
CHRISTELIKE VERENIGING
Eighth
Plaintiff
HERVORMDE GEMEENTE
NOORDELIKE PIETERSBURG
Ninth
Plaintiff
YSTERBERG
VERENIGING
Tenth
Plaintiff
HERVORMDE GEMEENTE
SCHWEIZER-RENEKE
Eleventh
Plaintiff
HERVORMDE KERK
VERENIGING SCHWEIZER-RENEKE
Twelfth
Plaintiff
HERVORMDE GEMEENTE
PREMIERMYN
Thirteenth

Plaintiff
HERVORMDE GEMEENTE
PRETORIA TUINE
Fourteenth
Plaintiff
SAAMSTAAN
VERENIGING
Fifteenth
Plaintiff
HERVORMDE GEMEENTE
THERESAPARK
Sixteenth
Plaintiff
THERESAPARK
VERENIGING
Seventeenth
Plaintiff
HERVORMDE GEMEENTE
RUSTENBURG
Eighteenth
Plaintiff
RUSTENBURG
CHRISTELIKE VERENIGING
Nineteenth
Plaintiff
HERVORMDE GEMEENTE
VREDE
Twentieth
Plaintiff
NH VREDE
EIENDOMSVERENIGING
Twenty-First
Plaintiff
HERVORMDE GEMEENTE
DENDRON/VIVO
Twenty-Second
Plaintiff
DE LOSKOP/BLOUBERG
VERENIGING
Twenty-Third
Plaintiff
HERVORMDE GEMEENTE
OOSTELIKE PIETERSBURG
Twenty-Fourth
Plaintiff
MOREGLOED
HULPVERENIGING
Twenty-Fifth
Plaintiff
And
NEDERDUITSCH

HERVORMDE KERK VAN AFRIKA

First

Defendant

DIE REGISTRATEUR

VAN AKTES, PRETORIA

Second

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] This matter pertains to the unfortunate rift between members of the Christian faith. It involves the Nederduitsch Hervormde Kerk van Afrika, one of the oldest Reformed Christian denomination churches in South Africa. The dispute pertains to the ownership of immovable property.
- [2] The dispute commenced in 2010, when certain congregations of the Nederduitsch Hervormde Kerk van Afrika (“NHKA”), being the plaintiffs, decided to break their ties with the NHKA. Following the aforesaid decision and during 2010 to 2014 the plaintiffs transferred their immovable properties to various separate voluntary associations.
- [3] The transfers led to a host of separate legal actions and the parties, in an effort to curtail the flood of litigation between them, agreed in 2016 that the plaintiffs would institute the present action.
- [4] The plaintiffs issued summons on 22 January 2016, in essence seeking an order that it may by majority vote decide to sell, donate or transfer its immovable property to an outside party.
- [5] The NHKA defended the claim and contends that the plaintiffs may not sell, donate or transfer immovable property to an outside third party if it is not in terms of the Church Order and Constitution.
- [6] The NHKA also instituted a counterclaim, claiming an order declaring that the transfer of the properties by the plaintiffs be declared unlawful and for the retransfer of the properties.
- [7] The matter was case managed by Fourie J who issued an order in terms of rule 33(4) on 11 June 2018. The following issue was separated from the remainder of the disputes:

“Kan lidmate of ‘n gemeente van die NHKA wat probleme het binne of met die NHKA en/of wil wegbreek en/of weggebreek het uit die NHKA, by meerderheidsbesluit die bates van ‘n gemeente van die NHKA aan vrywillige verenigings of gemeentes wat buite die NHKA funksioneer vervreem.”

- [8] Loosely translated the separated issue pertains to the question whether members or a congregation of the NHKA who have problems within or with the NHKA and/or want to break away and/or has broken away from the NHKA may by a majority decision sell or donate its assets to a voluntary association or another congregation that does not form part of the NHKA.
- [9] The trial was initially set down for hearing from 26 October 2020 to 13 November 2020.
- [10] On the first day of the hearing, I was informed by Mr Du Plessis SC, counsel for the plaintiffs and Mr Vermeulen SC, then counsel for the NHKA, that by agreement between the parties, the trial will commence with a point in limine pertaining to the locus standi of the NHKA. The plaintiffs contended that the NHKA did not have the necessary authorisation to defend the action and institute a counterclaim.
- [11] Due to problems experienced by counsel for the NKHA, the trial could not proceed in October 2020 and was postponed to 29 March 2021.
- [12] Shortly before 29 March 2021, the plaintiffs brought an application to declare that the attorney acting on behalf of the NHKA does not have the necessary authority to act on behalf of the NKHA in the litigation. The plaintiffs further seek an order in terms of which the NHKA's plea and counterclaim be struck and that the NHKA be afforded a period of 30 days to deliver a plea and counterclaim, if properly authorised to do so. The NHKA opposes the application.
- [13] In view of the aforesaid, the hearing only proceeded in respect of the application and the point in limine.

Rule 7 application and point in limine

- [14] The rule 7(1) reads as follows:

“Subject to the provisions of subrule (2) and subrule (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

- [15] It is not clear from the papers when Mr Griffiths (“Griffiths”), the attorney acting on behalf of the NHKA served the notice of intention to defend. The plea and counterclaim was, however, served on the 30th of June 2016 and in the best-case scenario for the plaintiffs the rule 7(1) notice should have been served on Griffiths on or before the 14th of July 2016.
- [16] The notice was only served on Griffiths on 9 March 2021, some five years out of time. To cure this problem, the plaintiffs included a prayer in the notice of motion in terms of which leave is sought to dispute the authority Griffiths at this late stage.

- [17] It is apposite to mention that rule 7 is only concerned with the authority of an attorney to act in instituting or defending legal proceedings on behalf of a party. [See: Eskom v Soweto City Council 1992
- (2) SA 703 W]
- [18] In answer to the notice, the NHKA delivered an affidavit deposed to by Joël Daniël Fourie (“Fourie”) in his capacity as chairperson of the NHKA’s litigation committee. Fourie confirmed in the affidavit that he was properly mandated by the NHKA to appoint Griffiths.
- [19] I pause to mention that Griffiths has been representing the NHKA from the onset of the litigation between the parties.
- [20] The plaintiffs were not satisfied with Fourie’s authority to act on behalf of the NHKA and launched the present application.
- [21] It became clear from the founding affidavit filed on behalf of the plaintiffs that the plaintiffs in actual fact dispute the authority of the litigation committee to act on behalf of the NHKA. This is the same point that was raised as a point in limine. As set out supra, the parties agreed at the previous hearing that the authority/locus standi point will be adjudicated first.
- [22] Mr Du Plessis readily agreed that should the court find in favour of the NHKA on the authority point, the mandate of Griffiths is no longer in issue. In other words, it is not Griffith’s mandate that is in dispute, but rather the authority of the person who provided him with the mandate.

Issue in dispute

- [23] Was the litigation committee of the NHKA authorised to instruct Griffiths to defend this action and to institute a counterclaim against the plaintiffs?

Relevant legal instruments

- [24] In order to ascertain whether the litigation committee had the necessary authority to act on behalf of the NHKA, the first instrument to consider is the Constitution of the NHKA. The following provisions are relevant and will be cited with a loose translation:

24.1 clause 6.2.20: “Die Algemene Kerkvergadering is ‘n vergadering wat bestaan uit afgevaardigde ampsdraers van al die gemeentes van die NHKA, asook predikante met besondere opdrag.”;

[The General Church Meeting (“GCM”) is a meeting consisting of delegated office bearers from all the congregations of the NHKA, as well as ministers who have a special mandate.]

24.2 clause 6.2.21: “Die Algemene Kerkvergadering se opdrag behels die orderlike toerusting, opbouing, versorging en beskerming van die ringsvergaderings, die gemeentelike vergaderings van die ampte en die gemeentes van die NHKA.”;

[The GCM's mandate to oversee the orderly equipping, construction, care and protection of the presbytery (ring) meetings, the congregational meetings of the office bearers and the congregations of the NHKA.]

24.3 clause 6.2.23: “Die Kommissie van die Algemene Kerkvergadering vergader minstens een maal per kwartaal en voer opdragte uit wat in die kerkorde en deur die Algemene Kerkvergadering aan hom opgedra word.”;

[The Commission of the General Church Meeting (“Commission”) meets at least once per quarter and executes orders that emanate from the church order and are referred to it by the GCM.]

24.4 clause 7.6: “Die Algemene Kerkvergadering is gemagtig om alle regshandelinge, van watter aard ookal, namens the NHKA te verrig, maar is nie bevoeg om met ringfondse en gemeentelike bates te handel nie.”;

[The GCM is authorised to conduct all legal acts, of whatever nature, on behalf of the NHKA but which authority does not include any matters concerning presbytery (ring) funds and the assets of the congregations.]

24.5 clause 7.7: “Die Kommissie van die Algemene Kerkvergadering gee leiding aan en hou opsig en toesig oor ringsvergaderings, rade en werkgroepe, gee uitleg aan die kerkorder, voer opdragte van die Algemene Kerkvergadering aan hom opgedra uit, en is slegs tot hierdie mate gemagtig om die NHKA regtens te verbind, maar is nie bevoeg om gemeentes regtens te verbind nie.”

[The Commission of the GCM provides guidance and supervises presbytery (ring) meetings, councils and workgroups, interprets the church order and executes orders received from the GCM. These powers are the only source of authority to bind the NHKA. The Commission does not have to the authority to legally bind the congregations.]

[25] In terms clause 3.10.2 of the Church Order the Commission has, inter alia, the following powers:

25.1 clause (x): “Voer opdragte wat die Algemene Kerkvergadering aan hom opdra uit.”

[To execute instructions received from the GCM.]

25.2 clause (xv): “Benoem na die sitting van die Algemene Kerkvergadering rade en komitees om spesifieke take te verrig.”

[To appoint, after a meeting of the GCM, councils and committees to execute specific tasks.]

25.3 clause (xvii): “Bepaal, koördineer en kontroleer opdragte vir die onderskeie rade en komitees.”

[Determines, coordinates and controls instructions for the various councils and committees.]

25.4 clause (xx): “Praat, getuig en tree namens die kerk op wanneer die Algemene Kerkvergadering nie in sitting is nie.”

[Speak, testify and act on behalf of the NHKA when the GCM is not in session.]

Facts

[26] Fourie explained in his affidavit that due to the array of litigation during 2011, the Commission appointed the Litigation Committee to represent the NHKA in the various legal proceedings it was involved in.

[27] The plaintiffs pointed out that the Litigation Committee that was appointed on 24 August 2011 was only mandated to deal with a case brought by the Hervormde Kerksvereniging at the time.

[28] At a meeting of the Commission on 5 and 6 September 2012, the following decision was taken:

“Die Kommissie van die AKV besluit soos volg:

(1) Om in alle opsigte voort te gaan met litigasie.

[To proceed with litigation in all respects.]

(2) Gee opdrag aan die litigasiekomitee om te doen wat nodig is om gemeentelike eiendomme terug te transporteer.

[The Litigation Committee is instructed to do all that is necessary to ensure the retransfer of the congregational properties.]

(3) Die samestelling van die litigasiekomitee ter wille van kontinuïteit te kontinueer totdat die 70ste AKV of the Kommissie van die AKV daarna anders besluit.”

[In order to ensure continuity, the present Litigation Committee will continue in its present form until the 70th GCM or the Commission decides otherwise.]

[29] Fourie was from the outset the chairperson of the Litigation Committee.

[30] The 70th GCM took place during 2013 and the decision of the Commission to litigate was recorded as follows:

“Vir sovêr dit regtens moontlik mag wees, bekragtig die Algemene Kerkvergadering die handelinge van die Kommissie van die Algemene

Kerkvergadering en individue wat in opdrag van die Kommissie van die Algemene Kerkvergadering opgetree het en gee aan die nuwe Kommissie die opdrag en mandaat, vir sovêr dit regtens nodig mag wees, om hierdie proses en litigasie voort te sit of by te lê en in die algemeen sodanige stappe te neem as wat nodig mag wees om die regte en belange van die Nederduitsch Hervormde Kerk van Afrika, die ringe, gemeentes en lidmate te beskerm.”

[Insofar as it is legally possible, the GCM ratify the actions of the Commission and individuals that acted on instructions of the GCM and herewith give to the new Commission the instruction and mandate, insofar, as it may be legally necessary, to proceed with the litigation or to settle the matter and to take in general, all steps as may be necessary to protect the rights and interests of the Nederduitsch Hervormde Church of Africa, its presbyteries (rings), congregations and members.]

[31] According to Fourie, the Litigation Committee reported regularly to the Commission and the GCM in respect of the steps that were taken in the pending legal proceedings.

[32] Fourie explained that Judge Fourie was appointed between the 70th sitting of the GCM in 2013 and the 71st sitting in 2016 to manage the various legal proceedings between the plaintiffs and the NHKA. Under the guidance of Judge Fourie the parties agreed that the plaintiffs would issue this action. The Litigation Committee mandated its legal representatives to conclude the agreement with the plaintiffs and to defend the action to be instituted. The summons was issued on 22 January 2016.

[33] At the next meeting of the GCM after summons was issued, which meeting was held from 2 to 6 October 2016, Fourie addressed the meeting on the status of the litigation between the plaintiffs and the NHKA. Subsequent to a discussion in respect of the litigation, the following motion was accepted:

“Die Algemene Kerkvergadering neem kennis van die litigasieproses tot dusver, en bekragtig die optrede van die Litigasiekomitee. Die Algemene Kerkvergadering magtig die Komissie en die Litigasiekomitee om verder in belang van die Kerk die nodige stappe te neem.”

[The General Church Meeting takes notice of the litigation process thus far and ratifies the conduct of the Litigation Committee. The General Church Meeting authorises the Commission and the Litigation Committee to take the necessary steps to protect the interests of the Church.]

Submissions on behalf of plaintiffs

[34] The plaintiffs contend that the provision of clause 7.7 of the Constitution, which provides that the Commission may only act in terms of the authority given by the GCM is relevant. This clause read together with clause 3.10.2 (xx) of the Church Order, which provides that the Commission may act on behalf of the NHKA when the GCM is not sitting must, according to the plaintiffs, be interpreted to entail that the Commission may only act when the GCM is not sitting, in matters that it was authorised to act in.

[35] The interpretation contended for by the plaintiffs does not take cognisance of the provisions of clause 3.10.2 (x) which authorises the Commission to execute instructions received from the GCM.

[36] The Commission's power to act on behalf of the GCM, has therefore, in terms of the Church Order, two sources. The Commission may:

[36.1] in terms of clause 3.10.2 (x) execute instructions received from the GCM; and

[36.2] in terms of clause 3.10.2 (xx) represent the NHKA when the GCM is not sitting.

[37] The plaintiffs further contend that, in terms of clause 7.9 of the Constitution, the Council of Finance is authorised to manage the funds of the NHKA. The Council of Finance may, however, only create liabilities on behalf of the NHKA with the permission of the GCM. The Commission may, therefore, not create liabilities by instituting or defending legal proceedings, without the permission of the GCM, which it did not obtain prior to the decision by the Commission to defend the present action.

[38] This submission, in my opinion, suffers the same fate as the submission in respect of the powers of the Commission when the GCM is not sitting. If the Commission could for a three year period not spend money on litigation, the NHKA would be in the invidious position that it could not defend or institute any legal proceedings that might crop up in the three-year period between sittings.

[39] Lastly, the plaintiffs submit that, although the Commission may act on behalf of the NHKA when the GCM is not sitting and may appoint committees, there is no express provision in the Constitution or Church Order that allows the Commission to delegate its power to act on behalf of the NHKA to any such appointed committee.

[40] In the result, the Commission did not have the necessary power to delegate all of its discretionary powers pertaining to the litigation to the Litigation Committee and the Litigation Committee, in turn, did not have the necessary authority to defend the action and institute a counterclaim.

[41] The plaintiffs then proceed to consider the question of sub-delegation i.e. whether the Constitution and Church Order provides implied powers of sub-delegation.

[42] The submissions in respect of the delegation of authority are discussed *infra*.

Submissions on behalf of NHKA

[43] Mr Raath SC, counsel for the NHKA, submitted that, having regard to the lengthy history of the litigation between the parties, the lateness of the rule 7 application is fatal.

[44] I tend to agree. A huge amount of costs has been incurred from the outset of the various legal proceedings between the parties over the past ten years. Griffiths has at all relevant times during the lengthy litigation been the attorney of record for the NHKA. It is hugely prejudicial to the interests of the NHKA to raise the point that Griffiths was never authorised to act on the NHKA at this late stage.

[45] That is, however, not the end of the matter.

- [46] As set out supra, the parties agreed at the previous hearing that the locus standi point will be dealt with in limine. The issue that arises from the point in limine is the same issue raised by the rule 7 application, to wit, did the Litigation Committee have the necessary authority to represent the NHKA and instruct Griffiths to act on behalf of the NHKA.
- [47] The point, therefore, has to be determined, whether it is in terms of the provisions of the rule 7 or the point in limine.
- [48] The NHKA firstly, contends that all steps taken by the Litigation Committee were ratified by both the Commission and the GCM. The Commission had at all relevant times the authority to act on behalf of the NHKA and therefore the ratification removes the plaintiffs attack on the authority of the Litigation Committee to act on behalf of the NHKA in this matter.
- [49] Secondly, the history of the litigation between the parties, provides proof that Griffiths had the necessary authority to act on behalf of the NHKA in the present action.
- [50] In respect of the point that the Litigation Committee exercised all the discretionary powers of the Commission, Mr Raath submitted as follows:
- 50.1 it is common cause that the Commission may act on behalf of the NHKA in the litigation;
- 50.2 due to the Commission's composition and operations it is impossible to control the litigation directly; and
- 50.3 the Commission has in terms of clause 3.10.2 (xv) the power to appoint the Litigation Committee to attend to the litigation and as envisaged in clause 3.10.2 (xvii) the Commission may determine, coordinate and control the tasks assigned to the Litigation Committee.
- [51] In the result the Litigation Committee has the authority to represent the NHKA and to instruct attorneys on its behalf. Consequently, the rule 7 application and the point in limine should be dismissed with costs.

Discussion

- [52] The first question to be answered is whether the Commission did delegate its powers to litigate to the Litigation Committee. If so, I agree with Mr Du Plessis that neither the Constitution nor the Church Order of the NHKA expressly provides for the delegation of the Commission's power to litigate to a sub-committee.
- [53] Once the aforesaid finding is made, it will be necessary to consider the plaintiffs further point on sub-delegation.
- [54] If one has regard to the minutes of the Commission's meeting during September 2012, it is clear that the Commission decided to proceed with all litigation, including the institution of proceedings to claim the retransfer of the property of the congregations, to wit:
- (1) Om in alle opsigte voort te gaan met litigasie.

- (2) Gee opdrag aan die litigasiekomitee om te doen wat nodig is om gemeentelike eiendomme terug te transporteer.”

- [55] This decision was endorsed at the 70th sitting of the GCM in 2013 and a mandate was provided to proceed with the litigation, namely:

“.....en gee aan die nuwe Kommissie die opdrag en mandaat, vir sover dit regtens nodig mag wees, om hierdie prosesse en litigasie voort te sit of by te lê en in die algemeen sodanige stappe te neem as wat nodig mag wees om die regte en belange van die Nederduitsch Hervormde Kerk van Afrika, die ringe, gemeentes en lidmate te beskerm.”

[.....and herewith give to the new Commission the instruction and mandate, insofar, as it may be legally necessary, to proceed with the litigation or to settle the matter and to take in general all steps as may be necessary to protect the rights and interests of the Nederduitsch Hervormde Church of Africa, its presbyteries (rings), congregations and members.]

- [56] The litigation was once again discussed and the Litigation Committee was mandated to proceed with litigation at the 71st sitting of the GCM in 2016, to wit:

- [57] One should bear in mind that the various litigation processes that commenced in 2012, culminated in the present action being instituted. The Commission took the decision in 2012 to litigate. The decision was not delegated to the Litigation Committee.

- [58] The Litigation Committee was merely tasked with the day to day running of the litigation. Once a decision to litigate has been taken, the necessary procedural steps are prescribed by law. This would include consultations to provide the necessary background information for the purposes of a plea and counterclaim, the provision of documents for discovery, the answering of a request for further particulars or pre-trial conference questions.

- [59] It does not appear from the facts that the Litigation Committee did anything else than to provide the NHKA's legal team with the necessary information to execute the decision taken by the Commission and the GCM to litigate.

- [60] The Commission and the GCM were kept abreast of the litigation process, monitored the process and provided further instructions to the Litigation Committee. From the moment that the Commission decided to defend the claims against the NHKA and to claim the retransfer of the properties of the congregations, the litigation that followed was authorised. The fact that it was agreed to combine the different legal processes did not change the initial decision to litigate. The agreement was a mere continuation of the pending litigation.

- [61] In the premises, the decision by the Commission in 2012 to litigate culminated in the plea and counter-claim filed herein and the NHKA has the necessary locus standi to litigate in this matter.

- [62] Mr Griffiths, similarly, has the necessary authority to represent the NHKA in these proceedings.

Reserved costs

[63] As stated supra, the trial that commenced in October 2020 was postponed due to the unavailability of counsel for the NHKA. It follows that any wasted costs occasioned by the postponement should be borne by the NHKA.

Order

[64] In the premises, I grant the following order:

1. The application and point in limine is dismissed with costs.
2. The first defendant is ordered to pay the wasted costs occasioned by the postponement of the trial in October 2020.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 29 March 2021 to 1 April 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 13 May 2021

APPEARANCES

Counsel for the Plaintiffs

Advocate R. du Plessis SC and

Advocate N. Smit

Instructed by:

Ross & Jacobsz

Mr A van Eck and Ms M Smith

Counsel for the First Defendant:

Advocate R.J. Raath SC and

Advocate L. Miller

Instructed by:

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Mr E. Griffiths

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Prepared on 12 October 2026 · Esheria