Reportable:	YES/ **NO**
Circulate to Judges:	YES/ **NO**
Circulate to Magistrates:	YES/ **NO**
Circulate to Regional Magistrates:	YES/ **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

CASE NO: M461/21

In the matter between:-

THE UNITING REFORMED CHURCH
OF SOUTHERN AFRICA- MABODISA
CONGREGATION **APPLICANT**

And-

AARON DWANYA SIBANDA **FIRST RESPONDENT**

HARRY MASEGE **SECOND RESPONDENT**

ZIPPORAH MODIBEDI **THIRD RESPONDENT**

LUCAS LETSHOLO **FOURTH RESPONDENT**

N.C SIBANDA **FIFTH RESPONDENT**

PEARLY KGOSI **SIXTH RESPONDENT**

REVEREND W.L MALEBYE **SEVENTH RESPONDENT**

PROFESSOR C. LANDMAN **EIGHTH RESPONDENT**

PEARL PITSE **NINTH RESPONDENT**

KABELO MOGARI **TENTH RESPONDENT**

TSHEPO MOLEFE **ELEVENTH RESPONDENT**

ANY OTHER PERSON OR STRUCTURE
BELIEVES TO BE OR BEHAVES HIMSELF
OR HERSELF AS A MEMBER OF THE
UNITING REFORMED CHURCH IN
SOUTHERN AFRICA"
MOGWASE CONGREGATION" **TWELFTH RESPONDENT**

ANY OTHER PERSON OR STRUCTURE
WHICH IDENTIFIES
ITSELF AS A MEMBER OF WHICH
PURPORT TO REPRESENT DEFUNCT
"SAULS PRESBYTERY " **THIRTEENTH RESPONDENT**

JOHNSON MAOKA **FOURTEENTH RESPONDENT**

SIMON NCUBE **FIFTEENTH RESPONDENT**

LUCKY SEFORA **SIXTEENTH RESPONDENT**

UNITING REFORMED CHURCH
IN SOUTHERN AFRICA: NORTHERN
REGIONAL SYNOD **SEVENTEENTH RESPONDENT**

ORDER

In the premises the following order is made, the first to sixteenth respondents are interdicted from:

(i) Occupying the applicant's premises at Erf 401, Mogwase Unit Township without the written consent of the church council of the applicant.

(ii) Entering the applicant's premises at Erf 401, Mogwase Unit 1, Township without the written consent of the church council of the applicant.

(iii) Preventing the applicant from utilizing its premises at Erf 401 Mogwase Unit 1 in any manner whatsoever.

(iv) Preventing Reverent Raky Simon Kwape from rendering spiritual services and any other lawful duty assigned to him by the applicant in Erf 401 Mogwase Unit 1 Township.

(v) From committing any acts of violence or disruption to any of the activities of the applicant at Erf 401, Mogwase Unit1, Township.

(vi) Interdicting and restraining Reverent William Lekoba Malebye (Seventh Respondent) and emeritus (retired) Professor Landman (Eighth Respondent) from rendering any services on the premises at Erf 401, Mogwase Unit 1 without the necessary consent.

(vii) The first to the sixteenth respondents are to pay the costs jointly and severally, the one paying the other to be absolved.

JUDGMENT

REDDY AJ

Introduction

[1] The following relief is sought by the applicant on an opposed basis.

> "1.Interdicting and restraining the first to sixteenth respondents from
>
> 1.1 Occupying the applicant's premises at Erf 401, Mogwase Unit 1 Township without the written consent of the church council of the applicant.
>
> 1.2 Entering the applicant's premises at Erf 401, Mogwase Unit 1 Township without the written consent of the church council of the applicant.
>
> 1.3 Preventing the applicant from utilizing its premises at Erf 401 Mogwase Unit 1 Township in any manner whatsoever.
>
> 1.4 Preventing Reverend Raky Simon Kwape from rendering spiritual services and any other lawful duty assigned to him by the applicant in Erf 401 Mogwase Unit 1 Township.
>
> 1.5 From committing any acts of violence or disruption to any of the activities of the applicant at Erf 401, Mogwase1 Township.
>
> 2. Interdicting and restraining Reverend William Lekoba Malebye (Seventh Respondent) and emeritus (retired) Professor (Eighth Respondent) from rendering any services on the premises at Erf 401, Mogwase Unit 1.

3. Costs on an attorney and client scale, for which the respondents are jointly and severally liable in that one paying the others to be absolved.

4. Granting the applicant further and/or alternative relied(sic) relief."

[2] The applicant is the Uniting Reformed Church in Southern Africa ("the URCSA) Mabodisa Congregation, a Church Council in Southern Africa with its offices situated at 41 Kgabo Street, Mogwase Unit 1, duly recognized as such in terms of stipulation 11.11 of the Constitution of the URCSA, with the right to own property, collect funds and having the right to legal action in civil law. The applicant is represented by Reverent Simon Raky Kwape ("Kwape") in his capacity as the Chairperson of the applicant, duly authorized by resolution of the applicant.

[3] The first respondent is Aaron Dwanya Sibanda, an adult male person of Unit 2 Mogwase, the first respondent was the Chairperson of the Mogwase Ward Council of the applicant, until the expiration of his term of office in 2016. The first respondent identifies himself as the Deputy Chairperson of the purported Mogwase Congregation of URCSA.

[4] The second respondent is Harry Masege, an adult male person of Unit 1 Mogwase. The second respondent was a member of the Mogwase Ward Council of the applicant, until the expiration of his term of office in the year 2016. The second respondent identifies himself as the Chairperson of the purported Mogwase Congregation of URCSA.

[5] The third respondent is Zipporah Modibedi, an adult female person of Unit 5, South, Mogwase. The third respondent was a member of the Mogwase Ward Council of the applicant, until the expiration of her term of office in 2016.

[6] The fourth respondent is Lucas Lesholo, an adult male person of Unit 2 Mogwase, a former member of the Mogwase Ward Council of the applicant until the expiration of his term of office in 2016.

[7] The fifth respondent is N.C. Sibanda, an adult female person of Unit 2 Mogwase, a former member of the Mogwase Ward Council of the applicant until the expiration of her term of office in 2016. The fifth respondent identifies herself as the Secretary of the Mogwase Congregation of URCSA.

[8] The sixth respondent is Pearly Kgosi, an adult female person of Unit 1 Mogwase, who identifies herself as the Deputy Secretary of the Mogwase Congregation.

[9] The seventh respondent is William Lekoba Malebye, a Minister of the Word.

[10] The eighth respondent is Professor Christinah Landman, an emeritus Minister of the Word and who was previously the Minister of the Word URCSA Karlien Park Rustenburg.

[11] The ninth respondent is Pearl Pitse, who identifies herself as the treasurer of the Mogwase Congregation.

[12] The tenth respondent is Kabelo Mogari, an adult male person of Lerome South, Saulspoort.

[13] The eleventh respondent is Tshepo Molefe, a former member of the Mogwase Church Council of the applicant, until his expiration of his term of office in 2016.

[14] The twelfth respondent is any other person, who identifies himself or herself as a member of the Mogwase Congregation of the Uniting Reformed Church operation or congregation at Erf 401 Mogwase Unit 1, Township.

[15] The thirteenth respondent is any other person, who identifies itself as a member of or which purports to represent the defunct “Saulspoort Presbytery”, with its last known address at Karlien Park, Rustenburg.

[16] The fourteenth respondent is Johnson Maoka, an adult male person of Unit 1 Mogwase.

[17] The fifteenth respondent is Simon Ncube, an adult male person of Unit 5 Mogwase.

[18] The sixteenth respondent is Lucky Sefora, an adult male person of Unit 1, Mogwase.

[19] The seventeen respondent is the Northern Regional Synod of URCSA, and is only cited as it has an interest in the compliance with its Church Order. No relief is sought against it.

Overview

[20] The URCSA has embarked on a religious mission which is predicated on unifying all Dutch Reformed Churches in Southern Africa. At present the former Dutch Reformed Church in Africa ("the DRCA") and the previous Dutch Reformed Mission Church ("the DRMC") constitute URCSA. The URCSA is a church based in the reformed tradition, resultedly it is structured into three meetings, namely, Congregations, Presbyteries and Synods. The latter are further delineated into Regional and General Synods. What finds relevance, is the Church Order of the Northern Regional Synod as adopted at the Regional Synod at Olifant's River Lodge in Middelburg between 30 September to 5 October 2018, that forms the fulcrum of the applicant's relief.

[21] URCSA functions by its own constitution called the Church Order. Analogous to the Church Order, each Regional Synod adopts its own Regional Synod Church Order. It axiomatically stands to reason that every Regional Synod has two coexisting Church Orders which evinces the ecclesiastical structuring of the URCSA.

[22] The Mabodisa Congregation is a legal persona as defined by Article 11.11 of the Northern Regional Synod Church Order. It is constituted by several wards. The main seat of the applicant is Erf

401, Unit 1 Mogwase, a property registered in the name of the applicant as per Mogwase Ward of the Mabodisa Congregation.

[23] During 2018, a group of the Mogwase Ward, primarily comprising of the first to twelfth, fourteenth, fifteenth and sixteenth respondents chose to secede from Mabodisa Congregation to form a new congregation styled URCSA Mogwase Congregation. This process is regulated by Stipulation 45 of the Church Order. The said application was lodged with the former Saulspoort Presbytery (ostensibly the thirteenth respondent), which ceased to exist on 20 July 2020, pursuant to a decision of the Northern Regional Synod that two new Presbyteries were formed, the one being titled Bojanala Presbytery, the second still to be titled. Mabodisa Congregation is a member of the Bojanala Presbytery.

[24] On receipt of this application, the Saulspoort Presbytery (as it then was) granted the application by seceding the Mogwase ward from the applicant. Aggrieved by the ruling of the Saulspoort Presbytery, the applicant appealed this decision. Ultimately, the Support Ministry for Judicial Matters after its own deliberations, recommended that all parties to the secession must comply with Stipulation 45 of the Church Order before the secession could take place.

[25] Between the time of the declared secession by the Saulspoort Presbytery and the consideration by the Northern Regional Synod of the appeal by the Mabodisa Congregation against the secession, specifically the “respondents”, behaved in a manner which was disruptive to services that were being rendered. The

respondents acting in the furtherance of a common purpose violently disrupted services of the offer of holy communion. In one instance, the eleventh respondent kicked to the ground the holy communion in full view of the congregation. These violent outbursts were constantly disturbing the normal rendering of spiritual services to the congregation. To this end, members of Mogwase Ward decided to congregate on an open land described as Unit 4 Mogwase with the respondents remaining at Erf 401 Mogwase Unit 1. The conduct of the respondents made it impossible for the Reverent of Mabodisa Congregation to render services at Erf 401 Mogwase Unit 1, Township.

[26] In September 2019, the group that supported the secession, specifically the thirteenth and fourteenth respondents issued out notices which drew attention to the launching of a new congregation, the Mogwase Congregation on the applicant's property Erf 401, Mogwase Unit 1. This conduct impelled the Northern Synod to address correspondence to the now defunct Saulspoort Presbytery to halt the launch and to comply with the directive of the Support Ministry for Judicial Matters. This proved to be ineffective, and the group defied the Northern Regional Synod and proceeded with the arrangements for the launching.

[27] Given the stance of the group in favour of the secession, the applicant, was successful in securing final interdictory relief, against the defunct Saulspoort Presbytery and the thirteenth respondent from launching the new congregation without compliance with Stipulation 45.

[28] Notwithstanding, the order of court dated 04 October 2019, the applicant contends that the respondents have:

"(i) Disregarded the authority by Mobodisa Congregation by refusing access the duly called Reverend Kwape to render services in the ward.

(ii) Invited the seventh and eight respondents to render spiritual and pastoral services in the premises at Erf 401, Unit 1, a right that can only be exercised by the congregation in terms of the church order.

(iii) In June 2020, the respondents wrongfully and intentionally locked the duly called Reverend Kwape and his family out of the mission house which is physically situated in Erf 401 Kgabo Street Mogwase Unit 1, resulting in Reverent Kwape obtaining a final Protection Order.

(iv) On 21 June 2021 the respondents wrongfully, intentionally and violently prevented Reverend Kwape from rendering the pastoral and spiritual services in the church hall situated in Erf 401, Kgabo Street Unit 1 Mogwase. At the time the eighth respondent was rendering the pastoral and spiritual services in the applicant's premises, without the authorization of the applicant. The third respondent caused Reverend Kwape to be insulted openly, which was visually captured and shared on social media platforms. A final Protection Order had to be secured.

(v) The respondents are identifying themselves as members of the non-existent Mogwase Congregation and are in unlawful occupation of the property of Mogwase Ward of the Mobodisa Congregation.

(vi) On 15 June 2022, the fourteenth and fifteenth respondents locked Reverend Kwape out of his official residence, which caused a contempt of court of the order dated 26 October 2020 to be pursued.

[29] The applicant, unpacks the final interdictory relief pursued in the following fashion:

Clear Right

[30] The applicant contends that it has a clear constitutional right to enjoy its property ownership rights without interference from private or public entities and individuals, except in terms of legislation of general application. The applicant therefore asserts that it is the sole arbiter of determining who may access and utilize its property.

Actual or reasonable apprehension of harm

[31] The applicant asseverates that the respondents have been actively violating the applicant's property rights persistently and continuously, by denying the congregants in the Mogwase Ward as well as the Minister of the Word of the applicant undisturbed use and enjoyment of its property.

No Other remedy

[32] The applicant contends that the Regional Synod does not have any procedures in its Church Order to deal with the unlawful actions of the respondents. The absence of an alternative remedy is exacerbated by the respondents' failure to recognise or adhere to the rules as displayed in the Church Order of the Regional Synod. Accordingly, there are no internal remedies available to address the conduct of the respondents.

The respondents' version

[33] The respondents categorically dispute that a proper case has been made out for the relief that is sought. The contention ran that most of the individuals cited act in their capacity as representatives of the Mogwase Congregation, not in their personal capacity. Added to this claim the respondents aver that the Kwape makes bald and vague allegations that the remainder of the respondents are individuals who "**actively associate with the unlawful activities of the Respondent.**" More appositely, the specifics as to the identity of the respondents and the nature of the unlawful activities coupled with the date and place of where these unlawful practices had been perpetuated was not aerated.

[34] The ineptitude of the applicant's case is further embodied by the citing of the thirteenth and fourteenth respondents as "**any other person who identifies itself as a member of or which purport to represent"** the Mogwase Congregation and the Saulspoort Presbytery respectively. The failure to cite the latter two bodies is telling and fatal to the relief that the applicant pursues so the respondents avers.

[35] The respondents aver that the required forms for the secession were completed in accordance with Stipulation 45 of the Northern Synod Stipulations. The Presbytery of Saulspoort approved the Mogwase Congregation application at its full sitting and instructed its commission to launch the congregation. As the normal Northern Synod was scheduled for the sitting at the same time as the launching of the Mogwase Congregation, the launching was postponed to October 2018 after the synod sitting.

[36] During 2018 the Synod held at Middelburg from 30 September to 5 October 2018, an appeal was made against the secession of the Mogwase Congregation. This appeal was not served before the Mabodisa Congregation or Saulspoort Presbytery as per the peremptory stipulation provided for in Stipulation 52.1. The 2018 Synod referred the alleged appeal to the Prestbury of Saulspoort as it was aware of this appeal. The respondents aver that Kwape and the members of the 2018 leadership colluded and changed the Synod decisions. The latter misconduct resulted in the forfeiture of status of certain of the leadership as ministers of the Word and their position as Moderamen of the Northern Regional Synod. A new leadership of Moderamen were elected on 12 November 2021. The Synod of 12 November 2021 took a decision for the establishment of the Mogwase ward as a full congregation. The launching of the Mogwase Congregation was after the court order in **Case Number** **UM167/2019** was perused and a detailed report by the Presbytery Commission was submitted to the Saulspoort Presbytery at Karlien Park on 26 October 2019 where the approval of the secession of Mogwase Congregation was reaffirmed.

[37] The respondents dispute disrupting the services of Kwape. Kwape, the respondents contend is in denial of the Mogwase Congregation. Kwape, voluntarily vacated the official residence to a private domain without notifying the church council. From Kwape's new residential address, he orchestrated unlawful and prejudicial conduct centred on the main church building. This included the removal of furniture and the ransacking of the church building. Further thereto, Kwape barricaded the church building by

wielding it shut. The church house which was unceremoniously abandoned by Kwape resulted in it becoming a soft target for vandalism. When the church council attempted to safeguard its property, it was met with violence and aggression by Kwape. On being called to order for his conduct, Kwape fraudulently applied for a protection order. Allied to this, the respondents contend that Kwape had to establish the unlawfulness of the respondents' occupation in respect of property Erf 401 Mogwase Unit 1 Township. The apposite is what rings true, that is the respondents are in lawful occupation of the church hall on Erf 401 Mogwase Unit 1 Township.

[38] Finally, the respondents submit that the URCSA has internal remedies, such as pastoral care and engagement, where such matters can be dealt with.

In reply

[39] At the outset Kwape alludes to the fact that aside from the first respondent, none of the other cited respondents' filed answering or confirmatory affidavits. That being so, the applicant's facts remain undisturbed and therefore would constitute the only factual evidence before this Court. This is a misnomer, as the respondents who oppose the relief have filed confirmatory affidavits, notwithstanding the absence of primary facts in same.

[40] The existence of a congregation, URCSA Mogwase, is no more than a fallacy for want of the failure to strictly comply with the court order issued on 4 October 2019, under **Case Number**

UM167/2019. In the unlikely event that a new congregation was brought into existence, it fell afoul of the compliance with Stipulation 45.

[41] The existence of a Presbytery Saulspoort is explained as follows. This Presbytery was delimited into two Presbyteries: one the Bojanala Presbytery which has supervision over the applicant's congregation and Presbytery without name. This lawful delimitation within the provisions of the Church Order and a lawfully constituted synod meeting of the seventeenth respondent has never been overturned by any court of law or the subsequent formal synod sitting of the seventeenth respondent.

[42] In addressing the so-called election of a Regional Synod Moderamen on 12 November 2021, the applicant contends that the elections of Regional Synod Moderamen, can only take place during the normal quadrennial sitting of the Regional Synod. The last sitting was in 2018. The next sitting will be scheduled for September or October 2023.The factual position so the applicant submits is that the moderamen which were elected in 2018 are still the moderamen of the URCSA Northern Synod, until the new elections later this year. It matters not, according to the applicant what Kwape thinks occurred on 12 November 2021. What is unassailable so the applicant retorts is that there is no congregation called URCSA Mogwase or a Saulspoort Presbytery in the URCSA Northern Synod.

[43] There is no such bodies as the Mogwase Congregation, and consequently no body as the Mogwase Church Council, what exists is the Mogwase Ward of the Mabodisa Congregation of the URCSA. Furthermore, Kwape is not member of the Mogwase Ward Church Council of the Mabodisa of the URCSA which is elected biannually. Therefore, the decisions as reflected in the so-called minutes of a church council meeting are not decisions taken in compliance with the Church Order of the seventeenth respondent. It axiomatically follows so the applicant replies that these decisions are of no force and effect. URCSA Mogwase has never been approved by the seventeenth respondent. Annex **ADS02** is simply no documentary evidence corroborating that a congregation called URCSA Mogwase came into existence.

[44] The applicant contends that its church operates within its own constitution called The Church Order. This binds all congregants. For any election to have any legitimacy, such election must take place within the four corners of The Church Order. In, instances where there has been no strict compliance with The Church Order, no legal ramifications can follow from such an unauthorised decision. It follows, that the letter from the current and lawfully elected moderamen, so the applicant avers, is the last word on this matter and first respondent and his cohorts are unlawfully depriving the applicant from the peaceful utilization of its property.

[45] In dealing with guest Ministers, the applicant contends that every guest minister is invited by the Church Council of URCSA Mabodisa and not by a ward of the congregation. A ward simply

does not possess the authority to do so and to the extent that the Mogwase ward invited any other minister they act contrary to The Church Order. Ministers who redounded positively to an unauthorized invitation, acted outside The Church Order.

[46] There can be no transfer of ownership of the property in question due to the following:

(i) The church council of the applicant, being the legal owner of the property as per the title deed, has taken no decision to in any manner whatsoever alienate the property of the congregation.

(ii) There is no such congregation such as Mogwase congregation because the provisions of Stipulation 45 have not been followed post the court order of 2019.

(iii) Any registration in the name of a non-existent entity without the proper signed authorization by the church council will simply be theft and the initiation of a prosecution will follow.

(iv) The property in question is in ownership of the Mabodisa Congregation, Mogwase Ward, which is still in existence and has not been alienated to anyone to enable any registration of transfer.

[47] The applicant concedes that there was a 2018 Synod sitting on 30 September to 5 October 2018 and that the hearing of the appeal by applicant against the decision of the Saulspoort Presbytery did take place. The duly completed minutes of the seventeenth respondent makes no reference to fact that the appeal was referred to the now defunct Saulspoort Presbytery. No such decision was communicated to anyone at the Synodical sitting. No formal communication of the Church ever presented this information to anyone in the Church. The respondents did not

present this information to anyone including their application for a *mandment van spolie* . The respondents' inaction thereafter is telling.

[48] Kwape disputes ever altering the minutes of the meeting of the seventeenth respondent.

Points *in limine*

[49] The respondents raise several points *in limine*. I turn to deal with each.

The *locus standi* of Reverent Kwape

[50] The respondents admit that the Mabodisa Congregation may be an independent legal body capable of suing and being sued as per Article 11.11 of the URCSA Orders and the Northern Supplementary Stipulation of 2019, there exists no evidence that the Mabodisa Church Council itself has taken a decision to institute this application. To this end, there is no evidence that the Mabodisa Congregation has nominated and authorised Kwape to be able to bestow a power of attorney to the attorneys of record.

[51] More pertinently Kwape has failed to submit a duly signed resolution by 50 + 1 (quorum) of Mabodisa Church Council that consists of about 63 members. The attached resolution has only five signatories, three elders and the secretary of the church.

[52] It is settled law, that the procedure to be followed by a party disputing the authority of a person to act on behalf of another party in litigation as in the present application is set out in Rule 7 of the Uniform Rules of Court ("the Rules"). See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705 E-706 C, *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624, *Unlawful Occupiers, School Site v City of Johannesburg 2005(4) SA 199 at 206 G-207H and ANC Umvoti Council Caucus v Umvoti Municipality* 2010 (3) SA 31(KZND HC) paragraphs [13]- [29].

[53] In *North Global Properties (Pty) Ltd v Body Corporate of Sunrise Beach Scheme* (2012) ZAKZNDHC 47 the following is said at paragraph [6] about the purpose of Rule 7:

"*The purpose of the rule is, on the one hand, to avoid cluttering the pleadings unnecessarily with resolutions and powers of attorneys. On the other hand, it provides a safeguard to prevent a cited person from repudiating the process and denying his or her authority for issuing the process."*

[54] The import of the remedy provided in Rule 7(1), of the Rules requires of a respondent who wishes to challenge the authority for a person acting on behalf of the applicant is clear. In *casu*, the respondents' elected not to use the procedural mechanism predicated in Rule 7(1) of the Rules. However, this does not obviate the need of this Court to ensure that proper motion protocol is adhered to namely: *locus standi.* This requires a determination that a deponent who purports to act on behalf of an artificial person such as companies and co-operatives has the necessary *locus standi*. In *Eskom*, *Ganes and Unlawful Occupiers*,

the courts, while decrying the fact that the Rule 7(1) of the Rules procedure had not been followed to challenge the authority of a particular person, the court still had to satisfy itself that there was in fact sufficient authority for such person so to act.

[55] In essence the point in *limine* under this rubric has no merit and falls to be dismissed.

Events of 2020 and 2021

[56] The present application is relevant to events which allegedly occurred during 2020 and 2021. The interdictory relief was pursued more than a year after the events had occurred. Given this impasse there is plausible explanation from the applicant justifying the delay in the institution of the present relief. As a result of the inordinate delay in the launching of the present relief, the application should be dismissed on this basis alone.

[57] This legal point need not detain this Court. The dispute has a tortuous history. Dismissing an application simply due to the passage of time, is not a *bona fide* reason to limit the applicant's access to the court. Everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum. (Section 34 of the Constitution of the Republic of South Africa Act, 108 of 1996). Significantly, the respondents oppose the application, which is a lawful avenue that may be perused. The opposition is indicative of

a live controversy that necessitates the intervention of a court. Thus, this point also falls to be dismissed.

Referral to Oral Evidence

[58] Noting that the litigants are part of a church which is a voluntary association founded on Constitutions and Regulations, contractual relationships come into being. The applicant would have foreseen that the application process would not have been appropriate given the several factual disputes that arise. The need for a referral to oral evidence is compounded by what the respondents contend is incorrect interpretations of the Rules, Regulations, and the Constitution but also the practice of the Church in resolving disputes. All of which was within the implicit knowledge of the applicant. Notwithstanding same, the applicant persisted on affidavit evidence.

[59] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA) paragraph [26].

[60] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), Heher JA reminded us of the legal process that is employed in determining whether there exists a real, genuine, and *bona fide* dispute of fact. The following was postulated:

'[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E - 635C...”

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.'

[61] To my mind, there exists no genuine and *bona fide* dispute of fact. It stands to reason that this point in *limine* must be dismissed.

Non-joinder

[62] The respondents asserts that the applicant has merely made vague and bald allegations that the “*respondents are individuals*

who actively associate with the unlawful activities of the respondent". Put differently, the identity of the respondents and the precise nature of the averred unlawful activities is not laid bear with sufficient peculiarity. Further thereto, the applicant cites the thirteenth and fourteenth respondents as "**any other person who identifies itself as a member of or which purport to represent**" the Mogwase Congregation and the Saulspoort Presbytery. Both the latter have not been cited and not given an opportunity to oppose the relief. Consequently, this constitutes a non-joinder.

[63] The test for non- joinder is set out by the Supreme Court of Appeal in *Absa Bank Ltd v Naude NO*, (20264/2014) [2015] ZASCA 97

(1 June 2015) in the following terms:

"[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In Gordon v Department of Health, Kwazulu-Natal it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."

[64] In *Judicial Service Commission and Another v Cape Bar Council* and another 2013 (1) SA 170 (SCA) at par [12] the Court held that:

"[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation

does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."

[65] The first to the sixteenth respondents opposed the application. The seventeenth respondent filed a Notice to Abide. The fact that certain respondents may not be implicated would be fatal to the relief sought by the applicant. It is a seminal principle of motion proceedings that an applicant must make his/her case in the founding affidavit. This principle is also based on the procedural requirement of motion proceedings which requires that the applicant should set out the cause of action in both the Notice of Motion and the supporting affidavit. Collectively, the latter form part of the "*pleadings*" and the evidence. This basic requirement makes it peremptory that the relief sought must originate in the evidence supported by the facts as set out in the founding affidavit. See *Kleynhans v Van Der Weshuizen*: NO 1970 (1) SA 565(O) at 568E, *Director of Hospital Services v Mistry* 1979(1) SA 626(A) at 645 H.

[66] When trite legal principles of non-joinder are juxtaposed to the present matter, this point raised by the respondents bears no merit. Consequently, it suffers the fate of the two preceding legal points.

<u>The failure to utilize internal remedies</u>

[67] A clear chronological pattern emerges from the applicant's annexures that the applicant turned to the seventeenth respondent to appeal the incorrect process that was embarked on in the creation of a new congregation. It therefore does not hold water

that the applicant failed to utilize internal remedies. Consequently, this point is devoid of any merit and must be dismissed.

The Merits

[68] The elephant in the room that needs addressing is simply, was a congregation called URCSA Mogwase created in accordance with Stipulation 45 of the Church Order? It serves no purpose to regurgitate the facts. The seventeenth respondent held that the secession of the Mogwase ward had to be held in abeyance until the Presbytery and the Support Ministry for Judicial Matters had investigated the secession and made the appropriate recommendations.

[69] Stipulation 45 provides as follows:

> 45.1 Preparatory steps with the view to secession will be taken when
>
> 45.1.1 members of one or more congregations feel the need for the establishment of a new congregation and they approach their church council or church councils on this matter; or
>
> 45.1.2 when the church council itself realises the necessity of the secession of a new congregation; or
>
> 45.1.3 when the Presbytery deems secession expedient.
>
> 45.2 on the one hand, when the Presbytery shall guard against congregations that are too large, and on the other, guard against the unnecessary fragmentation of congregations.
>
> 45.3 once a church council has given to the member who presented the request for secession to the council the permission to have the required form

of secession completed by all the members concerned, or when the church council itself has given instructions to have this done, a secession will be prepared.

45.4 If it appears that the new congregation will consist of sections of more than one existing congregation, the church council, to whom the matter was originally addressed shall approach the church councils concerned directly to request their co-operation.

45.5 if, after receiving the form of secession, it appears to the church councils concerned that there is sufficient support for the establishment of a new congregation, and where adequate financial guarantees have been presented for the maintenance of the congregation as well as for the livelihood and accommodation of a minister for the new congregation, the church council shall then formulate recommendations in connection with the establishment of a new congregation for example regarding the proposed boundaries; conditions for secession; name of the new congregation and any other matter of importance, for example, an arrangement about existing workers. The church council shall then submit these documents to the Presbytery.

45.6 when application is made to the Presbytery for the secession of a congregation, the Presbytery shall adjudicate the documents received, and, if the Presbytery is convinced that the new congregation would be financially viable, either with or without external aid, permission to secede shall be granted.

45.7 in cases where all the required documents could not be made available to the Presbytery at the time of its meeting the Presbytery shall mandate the Presbytery Commission to finalise the secession of the congregation concerned.

45.8 if the congregation to be established is to consist of sections of other congregations falling under one or more Presbyteries, the documents concerned shall be submitted to all the Presbyteries, concerned. The

Presbyteries shall decide among themselves which Presbytery shall be responsible for leading the secession, and the other Presbyteries shall be responsible for the grant of written permission to the Scribe of that Presbytery for the secession of the new congregation.

45.9 The Presbytery Commission shall accurately determine the boundaries of the new congregation on the basis of the recommendations of the church council or church councils concerned.

45.10 Changes to the boundaries of existing congregation shall be carried out by the Presbytery Commission on preparation of these changes by the church councils concerned, with notification to the Scribe of the Regional Synod.

45.11 Disputes between church councils regarding the changing of boundaries shall be settled by the Presbytery Commission.

45.12 The establishment of a new congregation shall be done by the Presbytery Commission by order of the Presbytery at a meeting of which two weeks advance notice was given in the official mouthpiece and to which all interested parties from the various congregation were invited.

45.13 The Presbytery Commission shall nominate the konsulent, announce the name of the new congregation and announce under which Presbytery it will fall.

45.14 if there is no objection to the secession, the Scribe of the Presbytery shall notify the Scribe of the Regional Synod of the secession of the new congregation, mentioning its boundaries, with a view to publication of the notice in URCSA News.

45.15 The Scribe of the Presbytery shall provide the church council of the new congregation with an excerpt of the minutes of the Presbytery commission giving all the details with regard to the secession.

45.16 The name of the new congregation shall be registered as follows: Uniting Reformed Church in Southern Africa……established on……”

[70] The issue that falls for determination on the merits falls within the narrow compass of Stipulation 45. I have adopted a straight jacket approach in this regard. An assessment of the conspectus of the affidavit evidence leads to the ineluctable conclusion that the respondents have not complied with Stipulation 45. It is irrefutable that members of applicant should act lawfully with strict compliance with the provisions of its own order. See: *Turner v Jockey Club of South Africa* 1974(3) SA 633 (A) at 645B-C, *Ramakatsa and Others v Magashule and Others* (2012) ZACC 31 at para [16].

[71] There is no underscoring, that the respondents must comply with Stipulation 45 for separate congregation to come into being. The court order of 4 October 2019 by **Gura J** interdicted the launch of URCSA Mogwase and the order *inter alia* states that the Stipulation 45 procedure must be followed when new congregations are to be established. This order is extant. It has not been displaced by an appeal or review process. The respondents' have not complied with Stipulation 45. This is destructive to the respondents' version.

[72] The requirements for final interdictory relief are well established. See :*Setlogelo v Setlogelo* 1914 AD 221, *Free State Gold Areas Ltd v Merriespruit Gold Mining Co* 1961 (2) SA 505 (W). The applicant must establish a clear right, an injury actually committed or reasonably apprehended and that there is no other satisfactory remedy available to the applicant. The *Setlogelo* requirements has

pass constitutional muster and has been found be good law in a democratic epoch.

[73] There should be a factual causal connection between the respondents and the unlawful conduct complained of. Put differently, the applicant must prove on a balance of probabilities a rational, factual connection between the actual or threatened unlawful conduct and the persons against whom the interdict is sought. Within the prism of the applicant's version, it was necessary to identify the respondents responsible for the injury actually committed. Put simply, there must be a clear link between the respondents and the injury actually committed. Generically, this must be in the foundational facts. Whilst at first blush this may appear to be a general rule, it is subject to exceptions. See *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7. To my mind, the applicant has met this requirement for final relief. There is no satisfactory remedy available to the applicant.

Costs

[74] It is trite that the issue of costs is within the discretion of the court. There is no basis to deviate from the usual order that costs follow the result. The applicant opines that this cost order should be on an attorney client scale. The scale of an attorney client is an extra ordinary one which should be reserved for cases where it can be found that the litigant conducted itself in a clear, indubitably vexatious and reprehensible manner. Such an award is exceptional

and is intended to be very punitive and indicative of extreme opprobrium. See: *Public Protector v South African Reserve Bank* ZACC 2019 (6) SA 253 at paragraph [8], *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* 2016 ZALCA 37 IJL 2815 (LCA).

[75] In the premises, the following order is made:

The first to sixteenth respondents are interdicted from:

(i) Occupying the applicant's premises at Erf 401, Mogwase Unit Township without the written consent of the church council of the applicant.

(ii) Entering the applicant's premises at Erf 401, Mogwase Unit 1, Township without the written consent of the church council of the applicant.

(iii) Preventing the applicant from utilizing its premises at Erf 401 Mogwase Unit 1 in any manner whatsoever.

(iv) Preventing Reverent Raky Simon Kwape from rendering spiritual services and any other lawful duty assigned to him by the applicant in Erf 401 Mogwase Unit 1 Township.

(v) From committing any acts of violence or disruption to any of the activities of the applicant at Erf 401, Mogwase Unit1, Township.

(vi) Interdicting and restraining Reverent William Lekoba Malebye (Seventh Respondent) and emeritus (retired) Professor Landman (Eighth Respondent) from rendering any services on the premises at Erf 401, Mogwase Unit 1 without the necessary consent.

(vii) The first to the sixteenth respondents are to pay the costs jointly and severally, the one paying the other to be absolved.

_____

A REDDY
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA.
NORTH WEST DIVISION, MAHIKENG

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Date of Hearing:	**24 October 2023**
Date of Judgment:	**14 February 2024**