REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: A 293/2013

NEW AFRICAN METHODIST EPISCOPAL CHURCH
IN THE REPUBLIC OF NAMIBIA **1ST APPLICANT**
HENDRIK GARISEB **2ND APPLICANT**

and

PETRUS SIMON MOSES KOOPER **1ST RESPONDENT**
FRANCIS JOSEPHAT KOOPER **2ND RESPONDENT**
SAGARIAS HAKSKEEN **3RD RESPONDENT**
HILTRAUT MARIANNA HELIENNE GARIGUB **4TH RESPONDENT**

Neutral citation: *New African Methodist Episcopal Church in the Republic of Namibia v Kooper (*A 293/2013*) [2015] NAHCMD 105 (29 April 2015)*

CORAM: MASUKU, AJ

Heard: 12 March 2015

Delivered: 29 April 2015

Flynote:

Practice – application for a declarator. Requirements to be met. Jurisdiction of the courts to deal with ecumenical matters, not involving determination of civil rights. Authority to bring application proceedings and applicable considerations. Disputes of fact and the court's discretion in deciding whether to refer disputes to oral evidence, conversion to a trial or to dismiss same if foreseeable.

Summary - This is an application for the declaration of the 2nd applicant as the leader of the New AME Church and the expulsion of the respondents from the church was lawful. Held that the court did not have jurisdiction to hear the matter as it involved ecumenical issues falling outside the court's jurisdiction. Held further that there was insufficient evidence that the proceedings had been properly authorized as there were serious disputes about the 2nd applicant's authority and power to launch the proceedings. Held further that there were serious disputes of fact which were foreseeable and that the applicants ought not to have brought the matter on motion proceedings in the light of the foreseeable disputes of fact. The application was dismissed with costs.

JUDGMENT

MASUKU, A.J.,

Introduction

[1] Human relationships tend not infrequently, at one stage or another, to reach a nadir. It is no different even in relationships connected to ecumenical organisations, as shall be seen from the instant case and others to which reference is made. The present case is about the souring of relationships among certain individuals who are in authority

in a church known as the New African Methodist Episcopal Church of the Republic of Namibia, ('the Church'). The court is invited to pronounce upon matters relating to the leadership and continued membership of the respondents in church structures in this judgment.

[2] It would appear that the church was born out of the members cited in these proceedings as the 2nd applicant and the respondents defecting from a church known as the African Methodists Episcopal. They formed the 1st applicant in or about March 2005. In the course of time, it would appear that the relationship amongst the above cited parties deteriorated to intolerable levels. It seems that the second applicant did not see eye to eye with the respondents, thus affecting the unity of the church, according to the 1st applicant. The breakdown in these relationships has resulted in the present application where the applicants seek the following relief:

(a) 'A declarator by the court that Hendrik Gariseb is the leader of the 1st applicant;
(b) That the respondents have withdrawn themselves from the church and its activities and be expelled and thus no longer be members of the 1st applicant;
(c) The respondents should desist from any conduct which purports to cast them as if they are members and/or leaders of the New AME Church (the first applicant); and
(d) Further and/alternative relief.'

[3] The case appears to be riddled with disputes at every turn. What can fairly represent uncontested facts leading to the present case are that the 1st applicant and all the respondents were members of the African Methodist Episcopal Church. On 5 March 2005, they broke away from the A.M.E. church and formed the church. It would appear that the church was registered as a company in terms of the Companies Act,[1] as well. The latter is evidenced by a certificate of incorporation as a section 21 company, i.e. a company not for gain. It was registered as the New African Methodist Episcopal Church in the Republic of Namibia (Incorporated Association Not For Gain). There is also a constitution of the church, whose status appears to be in dispute.

[1] Act No. 61 of 1973.

[4] It is not in dispute that the 2nd applicant and the respondents were registered as subscribers to the company. It is also not in dispute that the said members became the directors of the company and this can be seen from the memorandum of association and the related company documents filed of record.

[5] Also attached to the application is a copy of a constitution of the church, which it is claimed by the applicants the respondents breached and hence the application to have them regarded as expelled. I must pertinently state that the respondents hold a contrary view regarding the status of the church constitution. It is their case that the said document is a proposed constitution and was never formally adopted as the constitution of the church. I shall deal with this contention at the appropriate juncture.

[6] The applicants claim in the main that the respondents behaved in a manner that was harmful to the unity of the church and that their behavior, which included not attending church meetings; failing to engage in activities of the church, including church conferences and meetings was inimical to the interests of the church. It was alleged that even when notices of key church meetings were communicated to the respondents, they refused to heed the call to attend meetings.

[7] It is further claimed that the respondents, by their actions engaged in disruptive behavior by refusing to adhere to decisions of the governing council; held ordination services against the resolutions of the church and that at one of the conferences held in 2010, the respondents disregarded and disrespected the leadership of the church, including instigating other members of the church not to recognize and respect the church leadership. Another allegation in the litany of these, was that the respondents also mismanaged church assets.

[8] The applicants further allege that the respondents absented themselves from the church activities for a period in the excess of 6 months and are liable to be considered to have resigned from the church in line with the church's constitution. It is these alleged

actions that the applicants claim, entitle them to the relief they seek which is set out in the notice of motion.

[9] The respondents' case is a horse of a different colour. They by and large contest all the allegations by the applicants and deny the applicants' entitlement to the orders they seek. They do so primarily on legal grounds that I will presently advert to and they include the following:

(a) That there are serious disputes of fact that render this matter unsuitable to have been initiated on motion proceedings;
(b) That the proceedings have not been properly authorized by the 1st applicant and should be dismissed therefor:
(c) The requirements for the grant of a declarator have not been met by the applicants; and
(d) A case for the grant of a final interdict has not been made out by the applicants.

In consequence, the respondents prayed for the application to be dismissed with costs. I presently proceed to consider which of the protagonists is entitled to a favourable order in the circumstances. I must, however, mention that on preparing the judgment, an even more fundamental issue was tortured my mind and I asked the parties' counsel to address it by filing a further set of heads of argument, hence the postponement of the judgment. This is the issue of whether this court has jurisdiction to hear this case, it appearing to deal with ecumenical issues.

Jurisdiction

During my reading, I came across a judgment from the Court of Appeal of the Republic of Botswana in *Manzini And Others v Guta Ra Mwari Church*[2] which I requested the parties to address as it had a bearing on the relief sought by the applicants, in particular prayer 1 of the relief sought. In that case, there was dispute regarding who are the leaders of the appellant church and interdicts were sought to prevent some members from

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[2] (CACLB-098-07) [BWCA 48 (25 July 2008.

participating in some of the activities of the church. The Appeal Court held that 'It is not for us to decide who is right and who is wrong in this theological/administrative dispute between the church members.'[3]

[10] The Botswana Court of Appeal, relying on a judgment by M.T. Steyn J in *Motaung v Makubela and Another NNO; Motaung v Mothiba NO*[4] held that, 'A court of law, will however, not interfere, even when there has been a clear infringement of the constitutional rules of a voluntary association, unless such interference is necessary to protect some civil right or interest.' The appeal was thus dismissed with costs. It was my view that some of the relief sought by the applicants seem to draw the court into making decisions on matters that are essentially ecumenical or ecclesiastical in nature and which it is not desirable or proper province for the court to embroil itself in.

[11] Counsel for the respondents drew the court's attention to a judgment of our Supreme Court directly in point on this issue. It is *Father Gert Dominic Petrus v Roman Catholic Archdiocese*[5].Crucially, in that case, this court granted an order declaring that the appellant had been properly excommunicated from the respondent church. In dealing with the case, O'Regan AJA referred to the judgment of Dumbutshena JA in *Mankatshu v Old Apostolic Church of Africa and Others*[6] where the learned judge said:

> 'Jurisdiction or the lack of it is an important issue when considering whether a party aggrieved by his church can take the dispute to a civil court. The authorities say that, when there is an absence of civil rights or interests prejudicially affected by a decision of a voluntary association, the civil courts have no jurisdiction.'

At paragraph 23] the Supreme Court proceeded, in agreement with the statement of law quoted immediately above, and stated:

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[3] Paragraph 12 of the judgment.
[4] 1975 (1) SA 618 (O) at 628.
[5] Case No. 32/2009 (per O' Regan A.J.A.
[6] 1994 (2) SA 458 (TkA) at 460 H.

> 'The same principle must apply when a church seeks relief from a civil court. Is the relief sought, relief based on civil rights and civil law or is it, in effect an attempt to ask a civil court to apply or determine ecclesiastical rules? If the relief, properly construed is the latter, a civil court will have not have jurisdiction over the matter.'

[12] This then calls upon the court to closely examine the relief sought in this case. The relief, as foreshadowed earlier, is the following as recorded in the notice of motion:

1. 'A declaration by the Honourable Court that Hendrick Gariseb is the leader of the First Applicant herein;
2. That PSM Kooper, Francis Kooper, Sagaris Hakseen and Hiltraut Karigub have withdrawn themselves from the church and its activities and be expelled and thus no longer be members of the First Applicant; and that
3. The Respondents should desist from any conduct which purports to cast them as if they are members and/or leaders of the New AME Church (the First Applicant).'

It is in my view very clear on first principles that the relief sought in this case is unlike in the *Father Petrus* case, where it was a mixture of ecclesiastical issues and issues based on civil rights. In the instant case, the relief sought is clearly and exclusively ecumenical in nature. To declare who is the leader of the church is a matter that involves ecumenical standards of which the court is not fit to pronounce upon. Furthermore, the expulsion of the respondents, is, as was found in the *Father Petrus* case, a question that is beyond the jurisdiction of the court. Membership of the respondents in the church, it would seem to me, is not, for present purposes based on the company documents but clearly on the disputed constitution of the church. When one has regard to it, it particularly in the preamble, it is clear that the church is based on Biblical teachings and the finality of scripture as the infallible and inerrant Word of God. The scriptures, quoted by the respondents in their heads of argument[7] preclude the bringing of disputes to court and it would therefore seem that the applicants have acted contrary to the provisions of the constitution which they brandish as the final authority on their matters.

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[7] I Corinthians 6:1-8.

[13] Article IV on Government of the Church, for instance provides, "The government of this church shall be under the lordship of Jesus Christ and under the leadership of the Holy Spirit as exercised through the Board of Elders comprised of those whom the Lord has gifted to rule as Elders." It is clear that the position of Leader, sought to be declared by this court, is not provided therein for save the 'leadership of the Holy Spirit'. The respondent's counsel submitted that for that reason, the jurisdiction of the court is clearly ousted on the matters on which relief is sought in the instant case. I agree with that submission. Should I, however, be wrong in this regard in respect of prayers 2 and 3 recorded above, I am however, confident that the relief sought in prayer 1, unmistakably falls beyond this court's jurisdictional precincts as discussed above. I accordingly have no hesitation in finding and holding that even on this score, the application ought to fail. These are ecclesiastical matters which should not be submitted to the court's jurisdiction as the *Father Petrus* case (*supra),* which has binding effect on this court, authoritatively states. I am accordingly of the view that the applicants are barking the wrong tree as it were in this matter. They have, in my view, failed on the second leg of the two-pronged enquiry.

[14] I am acutely aware that it has been submitted on behalf of the applicants that the issue of the expulsion of the respondents is a matter that should be amenable to the jurisdiction of the court. Cases were cited in support of this contention, including *Yiba And Others v African Gospel Church*[8]*.* The court was also referred to *McLoud Junior NO And Others v Didloff And* Others[9]. In the latter case, the court would appear to have granted relief in a matter that otherwise impacted on ecumenical issues. I consider it very pertinent that the issue of the court's jurisdiction was never raised and hence never decided in that case. It would thus be precipitous and actually erroneous to follow a decision outside the jurisdiction of this court which is not only on all fours but stands contrary to the *ratio decidendi* of a decision of the highest court in Namibia, namely, the *Father Petrus* case. Similar considerations, in my view, apply to the case of *Dutch Reformed Church Vergesig And Another v* Sooknunan[10]. It also appears to me that in that case, the disputes, although

[8] 1999 (2) SA 949 (C).
[9] (22817/2011) [2012] ZACWC 119 (8 March 2012).
[10] 2012 (6) SA 201 (GSJ).

primarily emanating from a church matter, had resonance in civil rights, the law of defamation to be precise, and certainly not in conflict with the *ratio decidendi* in the *Father Petrus* case. The latter case has binding authority on this court. It would appear to me that if the respondents are correct that the instant case falls within the jurisdiction of the court that could only be in relation to prayers 2 and 3 as intimated above.

[15] Even in that event, the insuperable difficulty facing the applicants, however, is that the issue of the expulsion and removal of the various members of the 1st applicant is so riddled with disputes of fact that it is impossible to decide on that matter in these proceedings, as stated below in this judgment. For that reason, the disputes of fact in that regard, as earlier held, constitute a formidable barrier to resolving them, foreseeable as they were from the onset as I have find below. Should I be wrong in my conclusions in this regard, I proceed to determine the balance of the legal issues raised by the respondents herein.

Authority

[16] I think it is important to point out quite early that although reference is made to the provisions of the church's constitution, there is no doubt that the launch of the proceedings was done in terms only of the church's status as a voluntary association in terms of the Companies Act. This is very clear for the resolution filed by the applicants, which was signed by the 2nd applicant. I should also point out that in the very description, the 1st applicant is again described as a voluntary association in terms of the Company laws of Namibia as aforesaid. I find it important to point this out in order to exclude the application of the church's constitution in the launching of the proceedings. For that reason, in order to deal decisively with this issue, the court must for the most part, not look beyond the confines of the memorandum and the articles of association.

[17] The issue of whether this application was duly authorized, appears to me to be fundamental and it would be proper to deal with it first. The legal position is that a legal person acts through the instrumentality of its officials. The officials are literally its hands

and feet. For that reason, when the authority of a legal person has been challenged, some evidence must be placed before court to the effect that it is the said legal person that is litigating and not some impostor or other person masquerading as the applicant that does so. What evidence suffices in such cases to indicate that it is the legal person that is litigating and not some other person?

[18] The leading case on this issue is *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*[11] where Watermeyer J said the following:

> 'In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorized would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be decided on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant that is litigating and not some other person on its behalf. Where, as in the present, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then, I consider that a minimum of evidence will be required from the applicant.'

[19] In the instant case, it is clear that the respondent has put the issue of the authority to institute these proceedings in issue and has proceeded to place evidence suggesting that the 2nd applicant was not properly authorized and that the present proceedings are not being initiated by the applicant but they are a creation of the 2nd applicant and are self-serving attempts by the 2nd applicant to have himself anointed as it were by this court as the leader of the church.

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[11] 1957 (2) SA 347 (C) at 351 H.

[20] According to the resolution dated 6 June 2013, attached to the founding affidavit, the 1st applicant's board authorized the 2nd applicant to "act on behalf of the New African Methodist Episcopal Church in the Republic of Namibia, in connection with any and all legal actions and/or applications to be instituted or defended/opposed by the New African Methodist Episcopal Church in the Republic of Namibia, and is authorized to sign all documents on behalf of the New African Methodist Episcopal Church in the Republic of Namibia to enable the New African Episcopal Church in the Republic of Namibia to institute, defend and/or oppose any action or any application, and to finalise such action and/or application, including in respect of any appeal that may be prosecuted by or against the New African Episcopal Church in the Republic of Namibia." The resolution further appointed the applicant's attorneys of record to bring an application to this court. Four directors have in addition to the 2nd applicant signed the resolution.

[21] The respondents contend that the resolution quoted above was signed by persons who are not directors of the applicant. They further contend that the resolution does not authorize the applicant to institute the present application. The respondents contend further that they are the directors of the applicant, representing the majority of the directors. It is their contention that the 2nd applicant is no longer a director of the 1st applicant, he having been duly removed in terms of the articles of association as a director. A notice and minutes of meetings to this effect are attached to the respondents' papers, which it is alleged were hand-delivered to the 2nd applicant.

[22] In particular, a letter dated 7 October 2014 is attached and it is under the applicant's letterheads and it quotes article 5 of the 1st applicant's articles of association and states further:

> 'The majority of the Directors, being the undersigned, herewith call upon you, Hendrik/Gariseb, to resign in writing as a director and particularly as a member of the New African Methodist Episcopal Church in the Republic of Namibia. Your resignation should reach us by no later than 15th October 2014.'

Reasons for calling upon the 2nd applicant are set out in the letter, including his alleged non- compliance with the articles of association; premature court action against the registered directors; election of directors and publication of such in the electronic and print media, in contravention of the law and without the consent of the majority of directors.

[23] The valedictory paragraph ends on an ominous note and states:

> 'Should your resignation not follow on the set date you are notified of a Board Meeting to be held on **29 October 2014** being not less than 21 days from the date of this notice, for the passing of the proposed special resolution. You may wish to make a presentation in a prescribed manner or to attend this very important meeting and state why you should not resign as proposed by the majority.'

It is plain that the 2nd applicant did not attend this meeting nor did he make written representations as stated in the said letter. Minutes of the meeting held on 29 October 2014 are also attached and in which meeting a unanimous decision to remove the 2nd applicant as a director was taken. It was resolved that the resolution would also be sent to the registrar of companies.

[24] In reply to the allegation referred to immediately above, the 1st respondent records a bare denial and claims that the board of directors of the 'second respondent was never an active body." It is not clear which second respondent is being referred to. He submits further that that at an extra-ordinary conference held on 29 May and 01 May 2011 it was resolved that a vote of no confidence in the entire board was made and all the directors were removed from office with immediate effect.

[25] I have gone into details of these matters deliberately. There are a few matters to note in this regard. First, there is no resolution passed specifically by the board to institute the present application. What was relied upon was a general resolution which does not accurately capture the nature of the present proceedings, including the relief sought in order to show that there was at the time of making the resolution a deliberate decision to move a particular application to seek specified relief.

[26] The respondents' counsel referred the court to a decision delivered by this court in *Royal House of Chief Kambazembi v Kavari and Others*[12]. In that case, an application had been launched on the basis of a resolution that authorized the Chairperson to act on behalf of the chief and council and senior councilor in his absence. The said resolution was as bare as can be. Geier J. in considering the resolution held that the resolution was silent regarding what the chairperson was authorized to do. At paragraphs 11 and 12, the court said the following:

> 'Nowhere is it stated or apparent from the discussion or resolution that an application for a stay of execution was considered at that stage or that Council was informed of the need for such application or that Council was informed that-given the need to bring such an application – that a person would have to be nominated to depose to the necessary affidavits and thus would also have to be authorized to bring an urgent application for the staying of the arbitration award. What is more, there is also no express resolution for the authorization for the bringing of any application at all.'

[27] Admittedly, the resolution filed in support of the present application is much more possessed of information than the one in the case discussed. What is apparent though is that in such matters, there must be express authority apparent from the resolution that authorizes the taking of particular actions. In that case, it was held that launching of an urgent application and a stay of execution should have become apparent. Unless a body deals with legal suits on a regular basis e.g. a bank in recovering monies lent and advanced, I am of the view that it is important that the particular application or action authorized to be undertaken should be disclosed. This is so that the general blanket of wide resolutions is not abused. In the instant case, there is attached a special resolution[13] which specifically authorizes the launching of the present proceedings, including the relief to be sought. This would appear to remove this case from the application of the principle enunciated in the *Royal House of Chief Kambazembi* case (*supra*).

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[12] (LC 132/2012) [2012] NALC 35 (20 September 2012).
[13] Page 37 of the Record.

[28] Another issue is the resolution taken by the respondents to remove the 2nd applicant as a director of the 1st applicant. The respondents claim in argument that they complied with the provisions of section 228 of the Companies Act in effecting the removal. I have indicated that this is an issue that is not satisfactorily answered by the 2nd applicant in his reply. He appears to lay much store on the provisions of the constitution of the church yet this is a matter, as I pointed out, that should be dealt with in terms of the articles of association. This is what the respondents set out to do. They made a resolution and afforded the 2nd applicant an opportunity to attend the meeting and make representations on his status as a board member which they had taken a decision to terminate for grounds that were disclosed to him. He does not appear to have answered this issue at all and does not say how he dealt with that aspect of the matter, which appears, on first indications, to have been done in terms of the articles of association.

[29] This particular issue, is, to my mind very significant for the reason that it casts a tall shadow of doubt as to whether the 2nd applicant remains a member of the board and could still act in the manner he did, especially in view of the process undertaken by the majority of the board members to remove him as a director. This may also call into question the legitimacy of the resolution made because the respondents claim that the persons who signed the resolution to launch these proceedings are not legally in office. On the other hand, the 2nd applicant claims that he removed the respondents from the board, a contention met with a firm answer that the provisions of the articles were not followed in the attempt to do so. Whether that removal process was in line with the articles of association is very much moot and it does not appear that they were afforded any opportunity to make representations before the purported removal.

[30] I am not making any factual findings in relation to these issues. What I hope to underscore, is that even in relation to the very issue of who are board members, there is a very hot dispute of fact. That being the case, the court entertains a doubt as to whether these proceedings were in fact properly authorised and more importantly, whether the 2nd applicant, whose status as a member of the board of the 1st applicant has been put in doubt and controversy, on the one hand and his centrality to the matter and the relief

sought on the other hand, it is actually the 1st applicant which has launched these proceedings.

[31] These lingering doubts in my view go some way in questioning whether it is actually the applicant who is litigating and not the 2nd applicant who has used the name of the 1st applicant to wage the present proceedings for his benefit and to the detriment of the respondents. In my view, the version put up by the respondents, considered together with the 2nd applicant's case, raise the legitimate question whether it is actually the 1st applicant that is litigating before court. The evidence put up by the respondents, which I need not resolve in proceedings such as the present, is not vacillating or of so romancing a character. It points to the serious questions as to whether it is the 1st applicant that is litigating.

[32] In cases where questions of the applicant's authority to initiate proceedings remain precariously hanging in the mind of the court like the sword of Damocles, without a clear, satisfactory and definitive answer, and which answer can only be arrived at by invoking oral evidence, I am of the view that the doubt created thereby should enure to the benefit of the respondents. I cannot be satisfied, viewing the matter as a whole, that it is the 1st applicant which is litigating and not the 2nd applicant in this case, using the name of the 1st applicant. The evidence put up by the respondents suggests the contrary. I am of the view that the applicant's authority to bring these proceedings has not been sufficiently proved and I uphold this point *in limine* and this matter should fail on this score.

Disputes of Fact

[33] Another issue pertinently raised by the respondents relates to the question of disputes of fact, it being contended that the application is so riddled with disputes which cannot be resolved on motion proceedings such that the application should be dismissed therefor. Is this contention supportable?

1. Rule 67 (1)[14] provides as follows:

> 'Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may –
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> (a) Direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to appear personally or grant him leave for him or her or any other person to be subpoenaed to appear and to be cross-examined as a witness; or
> (b) Refer the matter to trial with appropriate directions as to pleadings, definition of issues or any other relevant matter'.

[34] It is fair to say, on a proper reading of the above rule that the court retains a discretion in such matters as to the best option should it find that there are disputes of fact that cannot be resolved in application proceedings. The rule states that the overriding principle should be to ensure a just and speedy resolution of the dispute. Options at the court's disposal include dismissing the application; referring it or certain portions of it to oral evidence or referring the entire matter to trial.

[35] In the instant case, the respondents have submitted that this is a proper case in which the court should dismiss the application as it raises disputes of fact which are irresoluble on the present papers. I am of the view that it is correct that there are some disputes of fact that arise in this matter. It can already be seen that the issue of who are the directors of the applicant is one such matter and whether the 2nd applicant was removed as a director of the 1st applicant. Another issue which is a live dispute relates to the question whether the respondents were removed as members of the 1st applicant and if so, whether that removal was in keeping with the provisions of the articles of association.

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[14] Of the Rules of the High Court of Namibia which came into operation 0n 14 April, 2014.

[36] Another issue in serious dispute relates to the 1st applicant's constitution. The applicants claim that the constitution is the document that binds and delineates powers, rights, duties and responsibilities of various parties within the 1st applicant's structures, including the litigants themselves. The respondents, on the other hand deny this and state that the said document is in draft form and has not had the force of law to bind the applicant's structures. They point to the very first page of the document filed by the applicants, which refers to the said document as the "Proposed Constitution"[15]. This is an issue in my view that cannot be resolved on these proceedings as presently stands, especially when it is plain that some of the relief sought is alleged to be predicated on the constitution.

[37] The other issue, which the respondents claim raises a dispute of fact is whether the respondents were properly removed by the 2nd applicant as he claims. In this regard, a question looms as to whether the provisions of the constitution, (whose validity and binding power is placed in issue) were followed in the removal. More importantly, evidence would need to be led to show that as claimed by the applicants, the respondents did not attend the meetings and activities of the 1st applicant, thus causing the relevant provisions to be invoked. In this regard, the respondents make a different claim, namely that they are active members but serve in separate congregations of the 1st applicant.

[38] In *Lynnette Groening v Standard Bank of Swaziland Ltd*[16] the Industrial Court of Appeal for Swaziland stated the following about the proper approach to be adopted by an applicant regarding disputes of fact in application proceedings:

> '22. In this regard, the applicant must fully consider the matter on the information available; its merits and demerits and cast his eyes ahead on the probabilities whether a dispute is likely, given all the facts at hand, to arise.
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> 23. In this regard, a reasoned, sober and mature assessment must be brought to bear on the entire conspectus of available facts and documentation then at the applicant's

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[15] See page 39 of the Record.
[16] (02/11) [2011] SZICA7 (23 March 2011).

> disposal. . . It is then, in my considered opinion, that an informed decision can properly be made as to whether in all the circumstances, a dispute of fact is likely to arise. In this regard, the applicant must, using reasonable foresight, act as a *diligens paterfamilias* would. An applicant should not, at that stage shoot from the hip as it were and institute proceedings, resting on the forlorn hope and deep intercessory prayer that a dispute of fact, though foreseeable, does not actually arise.'

[39] In *Mahe Construction (Pty) Ltd v Seasonaire*[17] the Supreme Court, after reviewing the relevant authorities, expressed itself in not dissimilar language on this point. There Strydom CJ (as he then was), said:

> 'Obviously the cases stress the fact that an applicant must be so aware at the launching of the application because that is a factor which the Court would consider in the exercise of its discretion in regard to what further steps should be taken and could also possibly influence the order of costs made by the Court. If an applicant was not so aware at the launching of the application and could also not reasonably foresee that a dispute would develop then an applicant cannot be blamed for proceeding by way of motion and the Court, instead of dismissing the application, may take other steps.'

[40] Having regard to all the foregoing, and particularly the history of the dispute and the previous litigation between the parties, it should have been obvious to the applicant that disputes of fact, which were clearly foreseeable would arise. In point of fact these, as pointed out above, were foreseeable and did in fact arise. It would seem to me that the applicant did not act in accordance with the standards pointed out in the judgment above but simply decided to shoot from the hip, when disputes were not only extant but were are many and were foreseeably bound to arise. A party that goes headlong and launches application proceedings in such circumstances should not expect the court to open its bowels of mercy and compassion and refer the matter to trial because as pointed out, the disputes of fact, which are many in this case were clearly foreseeable. I am of the considered view that this point is well made and ought to be sustained as I hereby do.

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[17] 2002 NR 398 (SC) at 408 A.

Propriety of the Issuance of a Declarator

[41] The respondents contended that the court should decline to make a declaration of rights in favour of the applicants in the instant matter. The main question to be determined is the nature of a declarator and the circumstances in which the court exercises its jurisdiction to grant same. In *J T Publishing (Pty) Ltd v Minister of Safety and Security*[18] Didcott J said the following:

> 'I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary of judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.'

[42] In *Peter v Attorney-General*[19] Geier J stated the following:

> 'The court approaches the question of a *declarator* in two stages. "First, is the applicant a person 'interested' in any 'existing, future or contingent right or obligation'. Secondly, and only if satisfied at the first stage, the court decides whether the case is a proper one in which to exercise its discretion.'

In the instant case, the first question is whether the applicants have met the first hurdle i.e. showing that they have an existing future or contingent right or obligation. The applicants, it must be recalled, apply for the court to declare the 2nd applicant the 'leader' of the 1st applicant. The respondents have pointed out that the constitution of the 1st applicant does not have any title or position called "leader" and that for that reason, this part of the application should fail. It must be specifically noted that the status of the constitution as a binding document has been placed in issue by the respondents. If one

[18] 1997 (3) SA 541 (CC) at 525 A-B.
[19] 2011 (1) NR 330 at 337.

may, for a moment, put that argument aside and assume that the applicants are correct in that regard, and that the constitution is valid and binding, a reading of the constitution does not make mention of the position of 'leader' that the applicants wish the court to declare should be awarded to the 2nd applicant. Furthermore, there is no criteria set out in the constitution, or any other document of the 1st applicant, including its articles of association, which the court could consider and exercise in determining whether the 2nd applicant is suitable or meets same. Should the court accede to the applicants' entreaties? Would the court not be venturing in creating a position that does not exist in the founding and other instruments of the applicant? I think it would be a dangerous exercise of judicial power and discretion to do so when no legal basis therefore exists. For this reason, I am of the opinion that the court should, in this case decline to issue the declarator asked of it.

[43] There are other reasons for this decision as well. The second leg of the enquiry relates to whether the case is a proper one, in any event, in which the court should exercise its discretion. In this case, the question extends beyond just the question of the court's discretion *per se* but also its jurisdiction. I have on this aspect of the enquiry decided to hinge this aspect to the issue of jurisdiction discussed earlier in the judgment and have decided for the reasons stated therein that this would not be a proper case in which to grant a declarator.

[44] Finally, I would like to express the court's gratitude to the respective set of legal practitioners, who assiduously performed their duty to court, and went beyond the call of duty to ensure that the court was duly assisted in performing its duty. Theirs is an example worth emulating.

[45] In view of the above issues, and I shall not address any that may more arise, I am of the view that the application ought to fail. I issue the following order:

[45.1] The application is hereby dismissed with costs.

TS Masuku, AJ

APPEARANCES

APPLICANTS:	KNG Kangueehi Instructed by Kangueehi & Kavendjii Inc.
RESPONDENTS:	R Philander Instructed by LorentzAngula Inc.