IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 40819/17

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

LOUIS LAURENS BOTHA GAUM First Applicant

MICHELLE ROSE BOONZAAIER Second Applicant

JUDITH JOHANNA KOTZE Third Applicant

FREDERIK MALHERBE GAUM Fourth Applicant

and

NELIS JANSE VAN RENSBURG N.O. First Respondent

DEWYK UNGERER N.O. Second Respondent

GUSTAV CLAASEN N.O. Third Respondent

MATTHYS JOHANNES NICOLAAS VAN

DER MERWE N.O. Fourth

Respondent

GENERAL SYNOD OF THE DUTCH REFORMED

CHURCH Fifth Respondent

DUTCH REFORMED CHURCH Sixth Respondent

MINISTER OF HOME AFFAIRS Seventh Respondent

and

COMMISSION FOR GENDER EQUALITY *First Amicus curiae*

ALLIANCE DEFENDING THE AUTONOMY OF CHURCHES

IN SOUTH AFRICA *Second Amicus curiae*

JUDGMENT

RAULINGA J, POTTERILL J et MOLEFE J

Introduction and Background

[1] This matter flows from a decision taken and adopted by the General Synod of the Dutch Reformed Church [the Church] during 7-10 November 2016 [the 2016 decision]. Every Dutch Reformed congregation in the country must adhere to this decision as the General Synod is the body that in terms of article 42 of the *"Kerkorde"* [the Church Order] is entrusted with the competency to determine the Church's communal identity in terms of the Word, Creed, its Constitution, mission and policy.[1] The 2016 decision's effect was to reverse the 2015 adopted decision of the General Synod.

[2] The 2015 decision confirmed the 2004, 2007 and 2013 decisions of the General Synod that marriage is the union between one man and one woman. However, the 2015 decision reconfirmed the equality of all people irrespective of their sexual orientation and gave recognition to the status of civil unions between persons of the same-sex that are characterised by love and fidelity. It permitted Ministers to solemnise such unions, but placed no positive duty on a Minister of the Church to do so. This decision also removed the celibacy requirement for persons that are gay or lesbian to be ordained as a Minister or elder in the Church; such persons could thus be ordained as Ministers or elders in the Church.

[3] The result of the 2016 decision was to set aside the 2015 decision in that a gay or lesbian person can only be ordained as a Minister if they are celibate. Furthermore, Ministers are not permitted to solemnise same-sex civil unions. This reversal of the 2015 decision transpired pursuant to a four day meeting, prayer, much debate and fierce arguments.

[1] Article 43.1.1 of the Church Order

[4] The applicants [Gaum] "*pray*" the court to declare unlawful and invalid the 2016 decision. The court is to review, correct and set aside the 2016 decision in terms of the Promotion of Administrative Justice Act 3 of 2000 [PAJA]. The court is also requested to grant condonation for the 180-day period imposed by section 7(1) of PAJA. The Church did not oppose the condonation sought. Prayers 4 and 5 are unopposed; the respondents [the Church] conceded that the decision taken by the appeal body constituted by the General Task Team Legal Affairs upholding appeals against the 2015 decision was unlawful and invalid and requires no further address. Gaum abandoned prayers 6 and 7.

Application to be admitted as *amicus curiae*

[5] When this matter was called on 21 August 2018, the Commission for Gender Equality (CGE) applied to be admitted as *amicus curiae* in terms of Rule 16A of the Rules of Court. At the time, the Alliance Defending the Authority of Churches (ADACSA) was already admitted as *amicus curiae.*

[6] The application is supported by Gaum but opposed by the Minister of Home Affairs (the Minister) and ADACSA. It seems to us that initially the Minister of Home Affairs had consented to the admission of the CGE as *amicus curiae*, but retracted its consent on the basis that there was no compliance with Rule 16A. However, the Minister has filed a notice to abide by the Court's decision.

[7] The CGE contends that if admitted, it will furnish information or argument regarding questions of law, in particular the interpretation of section 5 (1) of the Civil Union Act 17 of 2006 [The Civil Union Act]. We note that the Civil Union Act has recently been amended in favour of the applicants' argument.

In essence the CGE submits that section 5 (1) of the Civil Union Act is unconstitutional and deserves expungement.

[8] The Church and ADACSA aver that the CGE's contentions fundamentally misconstrue the nature and scope of the application before Court and the relief sought by Gaum. As a consequence, the CGE is not entitled to make out the case and arguments it does and its participation in the proceedings must be refused.

[9] The Minister's contentions against the CGE's submissions are as follows:

9.1 The parties in this case do not take issue with the provisions of the Civil Union Act and therefore the constitutionality or otherwise of the Act is not an issue in the main application.

9.2 The CGE does not seek any order in its prayers against any of the provisions of the Act.

9.3 The CGE introduces an argument about the constitutionality of section 5 (1) of the Act for the first time in its affidavit in support of its admission as *amicus curiae*; and

9.4 The CGE's alternative argument advanced in its affidavit is that if section 5 (1) were to be interpreted by the Court as giving religious denominations a discretion as to whether or not to apply the Act, then the Court should find section 5 (1) is unconstitutional and should declare as such.

[10] The summation of the Minister's contention can be coined in the following words. The Minister contends that the CGE is not permitted to raise new contentions. He asserts that the CGE has inappropriately introduced the

constitutionality or otherwise of section 5 (1) of the Act where this is not raised by the litigants. In addition, the Minister contends that the CGE inappropriately seeks substantive relief from the Court. All these assertions are denied by the CGE or it tries to justify them.

The CGE asserts that the Constitutional Court has held that generally an *"amicus"* cannot introduce a new cause of action, and generally *"cannot request a remedy that none of the parties have sought."* The CGE, in support of its argument refers to a dictum of Yacoob J in *De Beer N.O. v North Central Local Council and South-Central Local Council*[2] which reads as follows:

> "*This cause of action was not referred to in the application to be allowed to be admitted into the case as amicus. An amicus is not entitled to raise a new cause of action. If an amicus wishes to raise a new cause of action in an appeal, that should be referred to in a Rule 9 application, and permission to do so should be sought. The President of the Court can then deal with the matter in terms of Rule 9 (3) and consider whether or not it would be appropriate to permit such an issue to be raised in the appeal. Such permission is unlikely to be given if it would involve the joining of additional parties to the litigation, or if there is a likelihood that one or more of the parties would be prejudiced. I do not consider it appropriate in the circumstances of the present case to permit the amicus to rely on the new cause of action, raised for the first time in the oral argument.*"

[2] 2002 (1) SA 429 (CC) at para 31

[11] One is in the least dumbfounded why the CGE would rely on this dictum to support their argument. It is glaringly clear from the reasoning of the Court in *De Beer N.O. (supra)* that an *amicus* is not entitled to raise a new cause of action. Although the applicants as well as the CGE pursue discrimination, it cannot be said that the interpretation of section 5 (1) falls squarely in the same category. This is made clear by Rule 16A sub-rules 6 (b) and (c) which read:

> "*An application contemplated in sub-rule (5) shall –*
>
> *(b) clearly and succinctly set out the submissions which will be advanced by the amicus curiae, the relevance thereof to proceedings and his or her reasons for believing that the submissions will assist the court and are different from those of the other parties; and*
>
> *(c) be served upon all parties to the proceedings."*

In *Phillips v South African Reserve Bank and others,*[3] the Court in the majority judgment stated the following:

> *"The use of the word 'succinct' in Rule 16A is in my view deliberate – it signifies the requirements of a brief and clear expression (as defined in the Concise Oxford Dictionary 12th edition [2011]) of the constitutional*

[3] 2013 (6) SA 450 SCA at para 72

issue concerned. A description can only be 'brief and clear' when it has some particularity that a terse regurgitation of the orders sought hardly leaves any room for such a brief and clear description."

[12] In our view, Gaum do not raise the constitutionality of section 5 (1). This is despite the fact that their contention is based on discrimination. However, the issue of unconstitutionality based on the interpretation of section 5 (1) is a new cause of action which is impermissible for the CGE to do.

[13] As enunciated in *Hoffman v South African Airways*[4] that:

"*An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decisions may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins the proceedings, as its name suggests, as a friend of the Court. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.*"

[14] It is trite law that in motion proceedings, an applicant must make out his or her case in the founding affidavit.[5]. *In casu*, although Gaim raise a constitutional

[4] 2001 (1) SA 1 (CC) at 27H-28B

issue, it is not their case that the interpretation of section 5 (1) should be invoked nor that it should be declared unconstitutional and therefore invalid. As a consequence the alternative order proposed by the CGE is irrelevant for the purpose of these proceedings.

[15] The Constitutional Court stated in *In re Certain Amicus Curiae Application: Minister of Health and others v Treatment Action Campaign and others*[6] that:

> "*The role of amicus curiae is to draw the attention of the Court to the relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made out but, must raise new contentions; and generally those new contentions must be on the data already before the Court. Ordinarily it is inappropriate for an amicus to try and introduce new contentions based on fresh evidence.*"

[16] Our understanding of these dicta is that the relevant matters of law and fact raised by an *amicus* should be those to which attention of the Court would not otherwise be drawn. In our view, the CGE raises new contentions based on fresh evidence, which is impermissible.

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[5] Moloi and others v Vogers N.O 2016 (30 SA 370 (CC)
[6] 2002 (5) SA 719 (CC)

[17] Regarding the interpretation of section 5 (1) of the Act, and reference to foreign and international law, section 39 of the Constitution is apposite to these aspects.

[18] Section 39 of the Constitution enjoins the judiciary whilst interpreting the Bill of Rights:

> "*(a) to promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) Must consider international law and*
>
> *(c) May consider foreign law.*
>
> *(2) When interpreting the legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*
>
> *(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."*

[19] On the proper application of section 39 of the Constitution, it simply means that the Court may *mero muto* consider issues of interpretation referred to by the CGE without resorting to their assistance.

[20] To the extent that the CGE might have raised new contentions, such contentions are not made on the data already before the Court. In the premises, the CGE's application to be admitted in the proceedings is also

dismissed on the basis that no exceptional circumstances exist warranting their admission.

The Doctrine of Entanglement

[21] Religion is a world of power that requires a certain measure of respect and deference. The nature of religion's relationship with the law is often a matter of controversy and it is in constant flux.[7] All modern liberal democracies are struggling to determine the extent to which a court of law, faced with petitions of a breach of religious freedom, should accept determinations of the faithful and of religious associations.[8] There are a number of reasons why the religious question continues to resonate with the courts.[9] The first would be the difficulty of evaluating beliefs as they are largely subjective.[10] Allied to this point is the expertise required of courts in evaluating claims of religious freedom.[11]

[22] The Constitutional Court has held that the right and accordingly, constitutional protection extends to beliefs that are *"bizarre, illogical or irrational."*[12] In this

[7] See Stephen Ellis and Gerrie ter Haar, Worlds of Power: Religious Thought and Political Practice in Africa (Hurst and Company, 2003)

[8]See Sachs J in *Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)* at paragraph 35: *"The underlying problem in any open and democratic society based on human dignity, equality and freedom and in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."*

[9] E Nwauche 'The Religious Question and the South African Constitutional Court: Justice Ngcobo in *Prince* and *De Lange'* South African Public Law https://upjournals.co.za/index.php/SAPL/index Volume 32, number 1 and 2, 2017, pages 4.

[10] Supra 8

[11] Supra 8

[12] *Prince* (supra)

regard, the constitutions of religious associations bust themselves with moral questions unlike many other types of associations, such as sports clubs, trade unions and charitable organisations. Religious associations in many instances take things such as divorce, adultery, the use of demeaning or blasphemous language, the consumption of alcohol, daily dietary laws, pornographic material, etc. seriously. In the words of Professor Iain Benson, *"These rules do not and are not intended to 'make sense' to those outside of the particular traditions that uphold them and it is their very peculiarity to outsiders that ought to and does make us chary about trying to judge such beliefs from outside."*[13]

[23] It is also plausible that a legal system would consider certain rights of such crucial importance that it is willing to render them immune from government interference, including judicial deference.[14] On the other hand, a legal system, which conceives that rights are not absolute and that compelling public interest require a limitation of rights, could not embrace the religious question wholeheartedly.[15] The issue in this matter, being the recognition and acceptance of same-sex unions within religious associations raises controversial and sensitive points. On the one hand it's the conflict between

[13] De Freitas *"Doctrinal Sanction and the Protection of the Rights of Religious Associations: Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 15*" Potchefstroom Electronic Law Journal PELJ* 2016(19) – 1-22 at 14

[14] Supra 8

[15] *Supra.* E Nwauche suggests that there are two types of deference one being simple and substantial that allow the courts to engage with issues of religious freedom and the other being exclusive or total deference which comes down to immunity from judicial scrutiny in which a court would not even engage in a rights based enquire

the right of freedom of religion[16] and the right not to be discriminated against based on sexual orientation.[17]

[24] In 2017 the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities ("the CRL") released a report of the Hearings on the Commercialisation of Religion and Abuse of People's Belief Systems.

[25] In its report, the CRL among others recommended the need to protect religious freedom without attempting to regulate it from the side of the state. However, as specific current practices in the religious sector infringe on constitutional rights of congregants and violate existing legislation, it recommended religious communities to regulate themselves more diligently to be in line with the Constitution and the law. Communities should exercise their religious freedom with due regard to their legal, ethical and community responsibilities.

[26] On the other hand there is the doctrine of entanglement (as discussed herein below) and the nature of religious associations being based on voluntary association. In other words, joining a religious association is a voluntary decision and constitutes an acceptance of the policies of the religious association and entails submitting to the internal procedures and bodies/tribunals dealing with issues relating to the religious association and its policies.

[16] 11 Section 15 of the Constitution of the Republic of South Africa, 1996
[17] Section 9 (3) of the Constitution of the Republic of South Africa, 1996

[27] The doctrine of entanglement entails a reluctance of the court to become involved in doctrinal disputes of a religious character.[18] The reason underlying this rule has been expressed by Woolman and Zeffert as follows:

> *"[I]n a radically heterogeneous society governed by a Constitution committed to pluralism and private ordering, a polity in which both the state and members of a variety of religious communities must constantly negotiate between the sacred and the profane, courts ought to avoid enmeshment in internecine quarrels within communities regarding the content or the truth of particular beliefs."*[19] The doctrine also draws from the widely accepted principle that a state (and its organs) should be a-religious to ensure religious freedom and equality.[20]

[28] The majority of the judgments of our Courts are in favour of following the doctrine of entanglement:

In *Ryland v Edros*[21], Farlam J considered the applicability of the doctrine of entanglement and held:

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[18] See *Taylor v Kurtstag and Others 2005 (1) SA 362 (W)* and *Wittman v Deutsche Schulverein, Pretoria 1998 (4) SA 423 (T)* in which the court accepts that individuals who voluntarily commit themselves to a religious association's rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies

[19] S Woolman & D Zeffertt 'Judging Jews: Court interrogation of rule-making and decision-taking by Jewish ecclesiastical bodies' (2012) SAJHR 196 at 205.

[20] NI Moleya 'Equality for all religions and culture in the South African Legal System, 1 July 2018, De Rebus DR 30 in which the author raises his concern in regard to the courts scrutiny of cultural practices as well as other not well known religious practices whilst widely accepted / well-known religious practices are elevated to be above the law due to the acceptance of the doctrine of entanglement. The author rightly points out that certain cultural practices are based on religious practices however, cultural practices are not shielded from constitutional permeation as in the case of religious associations and related practices.

[21] 1997 (2) SA 690 (C). See also *Allen and Others NNO v Gibbs and Others 1977 (3) SA 212 (SE)* where the religious question was recognised and held that it was inappropriate to adjudicate on doctrinal issues.

> *"… as to the first preliminary matter, that prior to the coming into force of the [Interim] Constitution of the Republic of South Africa Act 200 of 1993 our Courts 'would not adjudicate upon a doctrinal dispute between two schisms of a sect unless some proprietary or other legally recognised right had been involved, and that it seemed that s 14 of the Constitution might well have changed the position and that the doctrine of entanglement now be part of our law."*[22]

Farlam J went as far as stating that had the parties not decided that there were no issues of doctrinal entanglement, section 14[23] and the doctrine of entanglement would have prevented the court from adjudicating the rights and duties of the Muslim marriages in issue. [24]

[29] In *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* [25]*(De Lange),* the Supreme Court of Appeal had to deal with a dispute that concerned the internal rules adopted by the church. The Supreme Court of Appeal referred to foreign jurisdictions and confirmed the position in South Africa that the courts should as far as possible, refrain from interfering in these types of disputes.

The issues to be decided

[30] There are no material disputes of fact in this matter. The matter raised two questions; the first is whether the 2016 decision was taken in terms of the procedure set out in the Church Order. The second relates to the substantive

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[22] At 703D-E–E-F.
[23] Right to privacy in terms of the Constitution of the Republic of South Africa, 1996.
[24] See also *Mnkatshu v Old Apostolic Church of Africa and Others 1994 (2) SA 458 (TkA)* where it was similarly concluded that the court will not interfere in religious questions.
[25] 726/13) [2014] ZASCA 151 (29 September 2014). The matter went on appeal to the Constitutional Court and was subsequently dismissed, see *De Lange v Methodist Church and Another 2016 (2) SA 1 (CC).*

constitutional debate. However, the Church raised two points *in limine* that need to be addressed first.

Does this court have jurisdiction to entertain claims of unfair discrimination not sitting as an Equity court?

[31] The Church countered the argument of Gaum that jurisdiction was in fact admitted in the papers, with jurisdiction by its very nature, need not be attacked in the papers. This argument was fortified by the fact that a Court must raise issues of jurisdiction *mero motu*. Although the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 [Equality Act] does not exclude a High Court to deal with matters of unfair discrimination, a Judge trained as an Equality Judge will be better equipped to deal with the matter. In terms of s21 (4) of the Equality Act such Judge could have referred this matter to during, or after an enquiry, to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation. The argument was also that although there were issues raised in this matter that the Equality Court could not deal with, it should have been a parallel process; i.e. the unfair discrimination before an Equality court and the other issues before a High Court. Alternatively the process should have been consolidated before a court compromising of an Equality Court and a High Court, not just as a High Court as we were constituted.

[32] The Supreme Court of Appeal has found the Equality Court to be a special animal; a *"special-purpose vehicle"*[26] with the intent of the Legislature to

[26] *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape and Others, Eastern Cape (no 2)* 2009 (6) SA 589 (SCA) par 57

expedite, for also the most disadvantaged persons, to approach an Equity Court with an informal process[27] to redress unfair discrimination. In terms of the regulations, an Equality Court must first hold an enquiry to determine whether unfair discrimination took place and whether an alternative forum is not better suited to the dispute.

[33] Only judges who have been trained for this purpose can sit as an Equality court. The irony pointed out by Justice Navsa is not lost to this Court: *"It is to be noted that judges who preside in the High Court and who hear matters in that court implicating s9 of the Constitution are not required to have completed a specific training course. It is, of course, ironic that Equality Court matters cannot be heard by all High Court judges*."[28] *In casu*, all three judges received the required training, but are not sitting as an Equality court.

[34] The Supreme Court of Appeal and the Constitutional Court have endorsed that there can be consolidation of disparate claims before the High Court sitting as an Equity Court and a High Court, or that there can be parallel processes.[29]

[35] The question is whether in this matter the principle of constitutional subsidiary, although not labelled as such by the Church, is a bar to this court entertaining the unfair discrimination issue before court. This principle flows from the Constitution[30] foreseeing a single system of law which is shaped by the Constitution. This implies that where the Legislator has enacted legislation to

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[27] *Minister of Environmental Affairs and Tourism v George and Another* 2007 (3) SA 62 (SCA) par [17] and *Manong supra* par [53]
[28] *Manong* matter *supra* par 67.
[29] *George* matter *supra* par [17] and *Qwelane v Minister of Justice and Constitutional Development and Others* 2015 (2) SA 493 (GJ)
[30] Constitution of the Republic of South Africa, Act No 108 of 1996

give effect to the Constitution, a party cannot circumvent the Legislation enacted to give effect to a constitutional right by relying directly on the constitutional right. If the principle is ignored then the legislation enacted is ignored, whereas the Courts and Legislature must act in partnership to give life to constitutional rights.[31] In *De Lange,* the Court found that Ms de Lange's refusal to institute her claim for unfair discrimination in the Equity Court was fatal to her application for leave to appeal to the Constitutional Court.

[36] In this matter the Equity court would have to pronounce on the issues piecemeal, as it had no jurisdiction to address the other issues. To institute parallel proceedings in the High Court to address the other issues would not serve justice; expecting of the parties to draft two sets of papers, brief senior counsel twice and argue twice before different courts at a tremendous cost to all. It could also lead to two judgments that, in their outcome, could be conflicting.

[37] To circumvent such result the only solution would be to consolidate the unfair discrimination matter before an Equality Court and the other issues before a High Court to a High Court sitting as High and Equality Court. Naturally such consolidation does not circumvent the duplicity of the issuing of the papers and an application to consolidate. It is true that the lack of jurisdiction can be raised without it having been raised on the papers, but in this instance, admitting jurisdiction in the papers and then raising it at the hearing, in view of the possible parallel processes, should be frowned upon.

[38] However, this matter was allocated by the DJP of this division to a Full Court exactly because of the intricacies of the matter. The three judges are trained

[31] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 96

as Equality judges, granted not constituted as an Equality Court, but as a Full Court. No argument could be made that an Equity Court could have solved these disputes by referral to another forum for mediation, conciliation or negotiation. Within the Church itself, despite much prayer and serious debate, no consensus could be reached, leaving any consensus reaching between the Church and Gaum a far-fetched impossibility. This mechanism of the Equality Court would be futile, besides which no other forum would have been suitable to adjudicate this matter. The Church, with these considerations at play, is thus not denied any protection offered by the Equity Act.

[39] Although the Equity Act is not utilised herein, this is not a matter where the Equity Act and thereby the Legislator is flaunted, but where the six constitutional rights straddled herein, cannot be decided within the four corners of the Equity Act and the mechanisms of the Equity Act are non-suited. A Full Court can entertain all the issues and has jurisdiction to pronounce on all of them. In the *De Lange* matter, the unfair discrimination claim had not properly ripened, whereas, before us, it was fully ventilated. Justice will most definitely not be served if after argument of all the parties, and the amici, this matter is dismissed to start afresh in the Equity court. It will further defeat all logic and purpose to uphold this point *in limine* when the Church and Gaum requested this court to pronounce on the substantive issue even if it found that the Church acted procedurally irregularly rendering the decision to be set aside.

[40] In any event, besides all the other hurdles Ms de Lange had to overcome with her application for leave to appeal, Moseneke DCJ also considered the following fact: *"'[if] … this court were to decide the unfair-discrimination claim,*

it would do so as a court of first and last instance in a dispute of considerable complexity and vast public repercussions arising from competing constitutional claims. This is not a run-of-the mill claim for equal worth and regard in which this court may, without more, dispense with the views of the High Court and the Supreme Court of Appeal."[32] This Court, constituted as it is, is not dispensing of the matter without the probable wisdom of the Supreme Court of Appeal or the Constitutional Court. Furthermore, three trained equity judges versus one Equality Court Judge will hopefully have more chance at judicial wisdom, if not Solomonic wisdom, necessary for this complex matter.[33] This point *in limine* is dismissed.

Is PAJA the applicable review vehicle herein?

[41] PAJA defines "administrative action" as:

"any decision taken … by-

(a) an organ of state, when -

(i) Exercising a power in terms of the Constitution or a provincial constitution; or

(ii) Exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect."

[32] Par [65]
[33] *De Lange CC* par [65]

[42] The Church contended that the decisions of the Church do not constitute *"administrative action"* and can thus not be reviewed in terms of PAJA. The 2016 decision is not of a public nature flowing from a statute. The decisions of the Church are also not exercises of public power subject to legality review powers because the Church does not exercise coercive powers or has a monopoly in its sphere of influence. The 2016 decision is not administrative, but an interpretative, theological decision and therefore cannot fall under s1 of PAJA. Its stance was that the 2016 decision could only be reviewed for being contrary to the Church's Order in terms of the law of contract. Alternatively, it could be attacked in that the decision contravened the rights in the Bill of Rights. If PAJA is not applicable then Gaum could not invoke the review grounds under PAJA and was limited to the decision being *ultra vires* the Church's Order, procedurally unfair under the principles of natural justice or that the decision was irrational. Gaum could thus not rely on a general requirement of fairness or reasonableness.

[43] Gaum contended that whether PAJA is applicable or not is academic because in terms of the common law the Church's decision could be reviewed. But, in any event, PAJA is applicable because the empowering provision is the Church's Order. The 2016 decision is of public nature affecting 1.3 million people. The function of executing a civil union is performed by the Church based on the Civil Union Act 17 of 2006 (Civil Union Act); a state function.

[44] The Church is not an organ of state. The question is whether the Church when making this decision was exercising a public power or performing a public function. There is no single litmus test to apply in answering this

question, but courts have consistently applied *"the governmental test."*[34] We cannot find that the decision pertains to the public or people as a whole. In terms of this test the Church's decision may be of interest to the church, its members and the public, but is in no sense governmental. The decision does not entail public accountability; the decision is based on an interpretative theological decision. Ministers of the Church can formalise a marriage in terms of Section 5(1) of the Civil Union Act whereby any religious denomination may apply to the Minister of Home Affairs to be designated as a religious organisation that may solemnise marriages in terms of the Act. However, this does not render the decision governmental in nature. The decision was not based on the Act, but in terms of theological debate and voting in terms of the Church's Order. The Civil Union Act is solely concerned with marriage as a secular institution whereas the Church gives marriage a religious dimension. The decision of the Church was not a public power exercised for a class of the public as a whole, which is pre-eminently the terrain of government.[35] The review grounds of PAJA is thus not available to Gaum.

[45] The decision is however still subject to judicial review. Pre-Constitution, the Courts had the authority to interpret a Church decision or order and act accordingly[36] with the judicial review being restricted to the rules of natural justice and/or whether a decision was inconsistent with the Constitution. In the papers, Gaum, sufficiently sets out causes of action for the decision to be

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[34] *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA)

[35] *Calibre* par [39]

[36] *De Vos v Ringskommissie die van die Ring van die NG Kerk, Bloemfontein … and Odendaal v Kerkraad van die Gemeente Bloemfontein-Wes van die NG Kerk in OVS; Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A)

reviewed – the 2016 decision violates the constitutional rights to equality, dignity, privacy and freedom of religion, belief and opinion, association and participation in cultural and religious communities. The irregularity of the decision is pleaded. The application also seeks the relief sought because the 2016 decision infringed *inter alia* Regulations 18, 22, 1 and 23 of the Church Order.

Was the procedure followed by the Church in getting to the 2016 decision inconsistent with the Church Order?

[46] Pursuant to the 2015 decision various appeals, objections and *gravamen* [a serious objection to a decision of the General Synod relating to Creed] were received against the 2015 decision. *"Reglement"* [Regulation] 19 of the Church Order provides for these objections, appeals and *gravamen*. If appeals, objections or *gravamen* are accepted as correct, the decision which was objected to can be amended, substituted or withdrawn.[37] In terms of Regulation 3, para 8, revision of decisions may occur. There must however be notice given of such revision and each notice of revision must be sent to the Temporary Task Team. The Legal Temporary Task Team makes a recommendation. If at the meeting the majority decides that a matter must be

[37] *"19.1.1 Besluite van kerklike vergaderings is bindend, maar dit kan herroep, gewysig of vervang word by wyse van revisie, appèl, beswaar of gravamen.*

19.1.1.1 Revisie/hersiening behels die hersiening van 'n besluit tydens dieselfde of 'n volgende vergadering op versoek van 'n lid van die vergadering.

19.1.1.2 Appèl en beswaar behels 'n beroep op 'n meerdere vergadering wanneer 'n lidmaat en/of kerkvergadering verontreg voel oor 'n mindere kerkvergadering se besluit.

19.1.1.3 Gravamen word gebruik om op die Algemene Sinode 'n ernstige beroep te maak om 'n beslissing in sake die leer van die Kerk."

revised [revisie], the matter is reopened for discussion and the meeting can take a new decision or confirm the previous decision.

[47] On legal advice, the Moderadum, the executive committee of the General Synod, accepted that the appeals received suspended the 2015 decision. Further legal advice contradicted the earlier advise received and the Moderadum, accepting this advice, decided that the appeals did in fact not suspend the 2015 decision. It called an extraordinary General Synod meeting for November 2016 ["the meeting"]. The purpose of the meeting was expressed in the *"Moderamen 205-2017 Notule Derde Vergadering"*[38] with the Consensus suggestion to revoke the decision of the ATR pertaining to the appeals and to "*om 'n buitengewone Algemene Sinode voor 10 November 2016 te belê om besware, appelle, graviman en ander voorleggings te hanteer.*" This minute reflects that the objections and *gravamen* to the 2015 decision would be discussed at this meeting. The Agenda would *inter alia* include discussions on the 2015 decision and the report of the Temporary Task Team on the *gravamina* received.[39]

[48] The Appeals Commission had in the meantime found that the appeals against the 2015 decision be upheld and that the 2015 decision be set aside. The

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[38] LLBG1

[39] *"8. REVISIE*

8.1 Besluite wat geneem is, mag alleen na voorafgaande kennisgewing en met die toestemming van die vergadering op 'n tyd deur die Moderatuur bepaal, in revisie geneem word.

8.2 Kennisgewing van revisie:

8.2.1 Revisie kan toegestaan word indien oortuigend aangevoer word dat

8.2.1.1 in die bespreking van die saak waarom dit gaan in die vergadering aan sekere aspekte daarvan glad nie of nie voldoende aandag gegee is nie; en/of

8.2.1.2 daar later inligting na vore gekom het wat hersiening van die besluit noodsaaklik maak.

8.2.2 Elke kennisgewing van revisie word na die Tydelike Taakspan Regte verwys.

8.2.3 Die aansoeker stel die rede(s) vir die aansoek om revisie aan die Tydelike Taakspan Regte.

8.2.4 Die Tydelike Taakspan Regte doen 'n aanbeveling aan die vergadering ten opsigte van elke kennisgewing van revisie.

8.2.5 Die vergadering bslis met meerderheidstem of die revisie toegestaan word. Indien toegestaan, word die saak weer oopgestel vir bespreking en kan die vergadering tot 'n ander besluit kom of die vorige besluit gehandhaaf word."

chairman of the meeting ruled, as a fact, that the decision of the appeals commission would not be discussed at the meeting as the meeting did not have the competence to deal with it.[40] The Church conceded that the decision of this Appeal Commission was *ultra vires,* invalid and a nullity. The 2015 decision was thus still in existence and not set aside or rescinded.

[49] The General Synod decided that the matter of same sex relationships be revisited on theological grounds. Members who submitted objections, discussion points and *gravamen* could address the meeting. This then led to the 2016 decision being taken.

[50] On behalf of Gaum, it was submitted that the procedure utilised by the General Synod is irregular and fatally flawed because the principle of legality was flaunted.[41] Simply put, the 2015 decision was never unambiguously set aside or rescinded by means of revision in terms of paragraph 8 of Regulation 3. The appeals correctly could not have been upheld and therefore the 2015 decision was still on the table. The *"re-visitation"* the Church relies on, is contrary to its Order. Furthermore the re-visitation was impervious to the invalid appeals.

[51] The Church contended that there were two parallel processes pertaining to the 2015 decision: the one was to consider the appeals and the other was to revisit the 2015 decision. The church submitted that the decisions of the General Synod is binding until it takes a new decision, but a decision is open to *gravamina* and to re-visitation.

[52] The question thus is, did the General Synod at the meeting, in terms of the Church order, first have to unambiguously set aside the 2015 decision and if

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[40] *"Die voorsitter reël dat daar nie oor die Appèlliggaam se besluit gepraat word nie. Dit is 'n gegewe. Dit is buite die vergadering se bevoegdheid om dit te hanteer"* – Minute of the meeting (p74 of the application)
[41] *Kruger v The President of the Republic of South Africa* 2009 (1) SA 417 (CC)

the 2015 decision was not unambiguously set aside, does this render the 2016 decision procedurally flawed and a nullity.

[53] The fact that the Appeals process was irregular and unlawful did not *per se* taint the 2016 decision. The result of the irregular and unlawful process was that the appeal's process did not set aside the 2015 decision and the 2015 decision was thus still *"alive"* when the 2016 decision was made. The Chairman of the General Synod was thus wrong in law and fact when he ruled at the meeting that the 2015 decision was set aside.[42]

[54] The Church Order provides for 3 ways of withdrawing, amending or replacing a decision of a church meeting. Appeals and objections are utilised when there is an appeal from one meeting to another meeting.[43] This, *inter alia,* rendered the appeal process against the decision of the General Synod null and void; there was no further meeting to appeal to. The appeal process and the appeal decision is thus to be declared unlawful and invalid.

[55] The second means of withdrawing, amending or replacing a decision of a church meeting is by means of *"revisie/hersiening."*[44] Not to get lost in translation, in the *Verklarende Handwoordeboek van die Afrikaanse Taal,* F.F. Odendal & R.H. Gouws 5th edition [HAT] *"revisie"* is explained as being *"hersiening"*. *"Hersiening"* is defined as *"nagaan en verbeter, werk wat reeds gedoen is, weer noukeurig deurgaan,herhaal."* In terms of the *Bilingual Dictionary,* Bosman Van der Merwe & Hiemstra 8th edition [Bilingual Dictionary] *"hersiening"* in English is to *"revise, review, overhaul, reconsider ..."* The Church, in terms of its Church Order, lawfully can reconsider, review

[42] p74
[43] Regulation 19.1.1.2 *"'n beroep op 'n meerdere vergadering wanneer 'n lidmaat en/of kerkvergadering verontreg voel oor 'n mindere kervergadering se besluit"*
[44] Regulation 19.1.1.1 *supra*

or overhaul the 2015 decision. The 2015 decision need not be set aside, but can be reconsidered or reviewed.

[56] Is this what the meeting was called to do and was this process utilised? In the answering affidavit the process is described as a *"… full reconsideration of the question of same-sex relationships. The 2015 decision was, of course discussed, but in the context of principled re-visitation of what the Bible commands in relation to same-sex relationships."*[45] In terms of regulation 19.1.1.1, there could be a reconsideration, but it had to be a reconsideration of the 2015 decision based on principled *"re-visitation"* versus *"revisiting"*, but the word revisiting exists and semantics in this matter, with translation of the Church Order paramount, is not going to play a significant role where a correct noun has been incorrectly converted. The Church is however not relying on this means of reconsidering the 2015 decision. In oral argument it was stressed that the 2015 decision was not being discussed at the time. The only reference to the 2015 decision was that same-sex relationships were discussed again. There was thus not a revisit or overhaul or re-consideration of the 2015 decision.

[57] The third means by which a decision of the General Synod can be amended, withdrawn or substituted is by means of *gravamen*. *Gravamen* against the 2015 decision of the General Synod were received. There is no doubt that the General Synod is the "body" of the Church that has the authority to deal with issues and decisions set out in the 2015 and 2016 decisions. Some of the *gravamen* were converted to appeals and some not. *Gravamen* required a different process to the appeal process and therefore the unlawfulness of the

[45] Paragraph 61.4

appeals process did not *per se* render the *gravamen* means of dealing with a decision unlawful. *Gravamen* is the means by which a member of the church, or a meeting of church members can raise an objection to a decision of the General Synod based on the Church Order, Creed, or the Church's articles of Faith. If the *Gravamen* is admissible or susceptible, it is submitted to the General Synod for consideration.[46] At the meeting the *gravamen* were considered and debated and the *gravamen* were thus susceptible for discussion. It is thus clear that *gravamen* is a means to amend the 2015 decision, but once again the problem is that the Church is not relying on this process in coming to the 2016 decision.

[58] The oral argument of the Church was based on a Church practice. The 2015 decision being substituted with the 2016 decision because a decision of the General Synod is binding until the General Synod takes another decision. The 2016 decision thus replaces the 2015 decision. This is so because the 2015 and 2016 decisions relate to policy, in this instance Creed, which evolves with time. This replacement or confirmation of one decision upon another decision happened in accordance with Church practice. In 2004 the General Synod considered its stance on sexual orientation. It took a decision and this 2004 decision replaced the previous decision on this issue. In 2007 a decision was taken to affirm the 2004 decision. In 2013 the General Synod confirmed the 2007 decision and also ordered the Moderadum to conduct a study on homosexuality regarding the status of same-sex relationships in the light of Scripture and the Reformed tradition. The 2015 decision reconfirms the 2004, 2007 and 2013 decisions that marriage can only be between one man and one woman, but then recognised a same-sex union with the conditions

[46] Paragraph 9 Regulation 19 *supra*

precedent. In essence thus there was a clear table; the 2015 decision need not to be set aside before a new decision is taken because the new decision sets aside the 2015 decision. In oral argument it was submitted that the 2016 decision amended the 2015 decision because the 2015 decision did not bind the General Synod to an amendment procedure. The 2016 decision is consistent with paragraph 8 of the 2015 decision.[47]

[59] The Church's argument is unconvincing. When the Church Order provides for mechanisms to amend, review or substitute decisions, these methods must be used. If processes outside of the Church Order is utilised it shall constitute an irregular process. None of these processes were used in coming to the 2016 decision. Even if one, for argument's sake, accepts that there is a well-known, established Church practise pertaining to decisions of the General Synod; one decision *"automatically"* sets aside or confirms the previous decision, the facts do not support this submission. In 2004 a new decision was taken on same-sex marriages. This decision was pertinently affirmed in 2007; the 2004 decision was referred to; it was on the table. In 2013 the 2007 decision on same-sex marriages was confirmed; the 2013 decision was expressly dealt with. The 2015 decision reconfirms the 2004, 2007 and 2013 decisions that marriage can only be between one man and one woman, but then recognised a same-sex union with the conditions precedent. The 2004, 2007 and 2013 decisions are not just swept off the table, or ignored. Yet, with the 2016 decision the 2015 decision was ignored. Contrary to all the other

[47] *"Die Algemene Sinode bied hierdie besluite oor selfdegeslagverhoudings aan met nederigheid na 'n ernstige soektog en as die beste toepassing van die boodskap van die Bybel soos ons dit tans verstaan. Die Algemene Sinode versoek lidmate, gemeentes en kerkvergaderings om weereens op 'n selfstandige soekproses na die toepassing van die boodskap van die Bybel hieroor te gaan. In die soektog kan studiestukke van die Algemene Sinoge (sic) van 2007, 2011, 2013 en 2015 ernstig gelees word. In ooreenstemming met die NGB Art 2 behoort die besondere en algemene openbaring gebruik te word, dws die beste huidige menswetenskaplike bevindings"* (par 8 on p447 of the application)

decisions, the 2016 decision does not refer to the 2015 decision of same-sex unions, it does not set it aside, affirm it, or confirm it. Simply put, the 2015 decision was just side-stepped as if the Appeal Process had set it aside. The problem is, the 2015 decision did exist. The decision could be amended, substituted or overhauled and reviewed; this was not done, contrary to previous Church practise.

[60] The Church Order allows for a previous decision to be substituted, amended or reviewed, but then that decision must be on the agenda and be discussed. *Gravamen* to a decision would similarly require that the decision must be on the agenda. The 2015 decision was not a nullity, if the General Synod decided that the 2015 decision had no role to play in this meeting because this meeting was going to discuss same-sex relationships from a clean slate, then it had to set the 2015 decision aside. The 2016 decision at the very least had to set aside the 2015 decision. Procedurally the 2016 decision of the Church is to be reviewed and set aside.[48]

[61] Although the matter should end herewith, the parties requested the court to decide the substantive issue.

Substantive review grounds

[62] Gaum submitted that the Church's 2016 decision is demonstrably discriminatory in that it differentiates on the grounds of sexual orientation. Section 9(3) of the Constitution as well as section 1 of the Equality Act prohibit discrimination based on sexual orientation casting the duty to justify the

[48] *Corruption Watch NPC v President of the Republic of South Africa* [2018] ZACC (13 August 2018) at paragraph 33

discrimination on the Church. The decision also violates the equality of Gaum. This differentiation results in the diminished dignity[49] of the members of the LGBTIQA+ because their relationships are disqualified from being solemnised in the Church. This discrimination leads to further infringement of the Constitution in that this community is excluded from participating in a crucial social ceremony; their rights of freedom of association[50] and their right to freedom of religion[51] is infringed. Section 31 of the Constitution is also infringed because persons belonging to a religious community may not practise their religion. The decision is contrary to the Charter of Religious Rights and Freedoms.

[63] The Church denied that the 2016 decision prevents the participation of the LGBTQIA+ community in the church community, or that it impedes their private lives, or that the decision violates their constitutional rights. It denied that grounds existed whereupon the decision could be reviewed. The Church denied that the 2016 decision is irregular, unconstitutional, or that it falls foul of the Charter of Religious Rights. On behalf of the Church it was submitted that the 2016 decision did not restrict Gaum's right to freedom of association; Gaum is free to join another Church that interprets the Bible in the way that Gaum does. The 2016 decision is unimpeachable.

The necessary enquiry when there is an averred infringement of s9.

[49] Section 10 of the Constitution
[50] Section 18 of the Constitution
[51] Section 15 of the Constitution

[64] As a starting point, it was argued on behalf of Gaum that, in the answering affidavit of the Church, the infringed rights set out in the application[52] were never denied as being infringed. This lack of denial established that the rights were infringed. In the heads of argument the Church accepted that the 2016 decision constituted discrimination on the basis of sexual orientation.[53] The Church has an onus to prove that the discrimination is fair, but put up no facts in the papers to discharge this onus. The enquiry then shifts to whether the Church can justify the infringement in terms of section 36 of the Constitution, but the Church pleaded no case of justification at all. Only, for the first time in the Church's heads of argument, the fairness is addressed as the Church exercising freedom of religion. The Church was thus invoking a *"trump"* right; religious freedom, trumping or ousting the rights of Gaum which is the incorrect test.

[65] In the answering affidavit there are just bold denials of violation of constitutional rights; of falling foul of the Charter of Religious Rights; and of irregularity of the 2016 decision. In para 103,[54] there is the following denial: *"I deny that the constitutional rights to equality and human dignity require the 2015 decision or prohibit the 2016 decision."* Reliance was placed on this single sentence that the infringement of rights was in fact denied. The argument was further that the Church need not plead justification, because justification does not come into the debate. Section 9 deals with unfair discrimination, versus discrimination, implying a weighing up of two competing rights - sexual orientation versus the right to religious freedom.

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[52] Paragraph 20 of founding affidavit
[53] Paragraph 102 of respondent's heads
[54] Of the answering affidavit p254

[66] The argument and the approach of the Church to the constitutional debate is wrong. In *Prinsloo v van der Linde and Another* 1997 (3) SA 1012 (CC) p554 and *Harkson v Lane NO* 1998 (1) SA 300 (CC) para 53, the Constitutional Court found the stages of an enquiry into the violation of the equality clause as starting with whether the conduct differentiates between people or classes of people. Even if the differentiation does bear a rational connection it might nevertheless amount to discrimination. The rational connection enquiry need not be done first because if a court finds that the discrimination is unfair and unjustifiable the rational connection inquiry would be unnecessary.[55] The next question is whether the differentiation amounts to unfair discrimination. If the discrimination is on a specified ground in s9 (3) then discrimination is established. If discrimination is established then the enquiry is whether the discrimination is unfair. If the discrimination is found on a specified ground then the unfairness is presumed. If the discrimination is found to be unfair a determination is necessary to find whether the conduct can be justified under the limitation clause.

Does the differentiation amount to discrimination?

[67] Section 9 of the Constitution reads as follows:

> *"9. Equality*
>
> *(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

[55] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC)

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other

measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[68] Accepting that there is a scant denial of infringement of Gaum's rights in the opposition, we move onto whether the differentiation amounts to discrimination. The Church is differentiating between members of the Church that are heterosexual and members of the LGBTIQA+ community [s9 (4)]. This differentiation is on one of the grounds listed in s9 (3) - sexual orientation. This differentiation constitutes discrimination that is presumed to be unfair in terms of s9 (5).

Is the discrimination, notwithstanding the presumption under s 9(3), fair?

[69] Gaum is correct that in the opposition to the application the Church has set out no facts as to why the discrimination is fair. This of course defeats the purpose of opposition, especially in view of the presumption of unfairness. Facts setting out why the discrimination is fair must be set out in the opposition, not for the first time in the heads of argument. Gaum obviously contended that due to this vacuum in the opposition, the gauntlet has run and the court must accept that the 2016 decision did unfairly discriminate. Parties must not have a *laisse fair* attitude to opposition in these matters, trusting argument will save them. Although no party before us has thus asserted that the discrimination is fair, the Church is rescued with the finding by the Constitutional Court that even though no party had submitted that the discrimination was fair, *"the Court must still be satisfied, on a consideration of all the circumstances, that fairness has not been established."*[56]

[70] To determine the unfairness of discrimination, the determining factor is the impact on the members of the affected group. Another factor is whether the discrimination is on a specified ground.[57] Dignity is an underlying consideration in the determination of fairness. The nature of the action and the purpose sought to be achieved by it must be considered. If the aim and purpose is a worthy and important societal goal, depending on the facts, it

[56] *National Coalition for Gay and Lesbian supra* para 18
[57] *Harkson supra* para 41

may have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

[71] The constitutional guarantee of equality must be interpreted contextually; the society South Africa was, against the type of society the Constitution has set itself. Sensitivity to the nature of history and a refined dignity-centred analysis of unfair discrimination will help to eradicate discrimination in our society and will allow courts to utilise the constitutional value of equality as a process towards the goal of an equal society.

[72] In five judgments of the Constitutional Court, four unambiguous features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed were set out:

> *"… The first is that South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one. The second is the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual. The third is that although a number of breakthroughs have been made in particular areas, there is no comprehensive legal regulation of the family law rights of gays and lesbians. Finally, our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to*

the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough. In the memorable words of Mahomed J:

> *'In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.'"*[58]

[73] In this matter the question to be answered is did the LGBTIQA+ community suffer inequality in the pre-constitutional South Africa and still today. The answer is an overwhelming *"yes"* and best expressed in the judgment of Cameron JA: *The sting of the past and continuing discrimination against both gays and lesbians lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This denies to gays and lesbians that*

[58] *Minister of Home Affairs v Fourie supra* para 59

which is foundational to our Constitution and the concepts of equality and dignity, namely that all persons have the same inherent worth and dignity, whatever their other differences may be."[59] The discrimination complained about is furthermore a specified ground in s9 (3). This part of the enquiry renders the discrimination unfair.

[74] The differentiation caused by the 2016 decision does inherently diminish the dignity of Gaum because same-sex relationships are tainted as being unworthy of mainstream church ceremonies and persons in a same-sex relationship cannot be a Minister in the Church. The impairment of the fundamental dignity of Gaum as human beings is a given, but need not be proven by Gaum due to the discrimination being founded on a listed ground.

[75] The nature of the action and the purpose sought to be achieved by it must be considered. The Church was split on its interpretation of the Bible pertaining to same-sex marriages and leadership in the Church based on sexual orientation. There are thus two mainstreams in the Church pertaining to this question of same-sex marriages and leadership. Many members of the Church could live with its 2015 decision and many members could not. It is obviously not asked of this Court to decide whether the 2015 or 2016 decision is correct. What the court can take cognisance of is that not only Gaum *"accepted"* the 2015 decision, but also many members of the Church. This is not a matter where Gaum is the outcast community that differ on doctrine and expect the majority to fall in with their exclusive view on sexual orientation. It can be accepted that the Church honestly and sincerely hold certain religious views, but from the split in the vote it is clear it is not an umbrella view. From the *gravamen*, without resorting to the content, the submissions against the

[59] *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) par [13]

2015 decision and the submissions in support thereof and the 2015 decision itself, it is clear there can be an argument made out for and against the 2016 decision. Practically the Church is allowing the LGBTIQA+ Community to be members of the Church, but excluding them from leadership positions and from a marriage ceremony.

[76] The purpose of the meeting was to discuss sexual orientation in the Church pertaining to marriage and the position of a Minister. The result of the 2016 decision was to exclude the LGBTIQA+ community from marrying in the Church and that no member of the community could become a Minister of the Church. The purpose is thus exclusion, not from the Church, but from a leadership position in Church and a Church wedding ceremony.

[77] Both Gaum and the Church relied on the matter of *Minister of Home Affairs v Fourie and Another* 2006 (1) SA 524 (CC) in support of their views. The Church conceded that the paragraphs relied on are *obiter*, but should be persuasive to this Court. It is necessary to quote the passages relied on. The Church relied on:

> *"For many believers, their religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-*

worth and human dignity that form the cornerstone of human rights. Such belief affects the believer's view of society and founds a distinction between right and wrong …"[60]

And:

"*Religious organisations constitute important sectors of notional life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied."*[61]

And:

"Furthermore, in relation to the extensive notional debates concerning rights for homosexuals, it needs to be acknowledged that though religious strife may have produced its own form of intolerance, and religion may have been used in this country to justify the most egregious forms of racial discrimination, it would be wrong and unhelpful to dismiss opposition to homosexuality on religious grounds simply as an expression of bigotry to be equated to racism."[62]

And:

When considering section 31 of the Marriage Act 25 of 1961 in para 97 of the judgment, the following was stated: *"The effect of this provision is that no minister of religion could be compelled to solemnise a same-sex marriage if such marriage would not conform to the doctrines of the religion concerned."*

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[60] Paragraph 89
[61] *Fourie* matter *supra* para 90
[62] Para 91

Gaum relied on:

> *"It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take side on issues which have caused deep schisms within religious bodies."*[63]
>
> *"… whether or not the Biblical texts support his beliefs would certainly not be a question which this Court could entertain. From a constitutional point of view, what matters is for the Court to ensure that he be protected in his right to regard marriage as sacramental, to belong to a religious community that celebrated its marriages according to its own doctrinal tenets and to be free to express his views in an appropriate manner both in public and in Court. Further than that the Court could not be expected to go."*[64]
>
> *In an open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular*

[63] Para 92
[64] Para 93

and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strong-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom."[65]

[All the footnotes in the passages have been omitted].

[78] Churches and religion play an important role in public life as Sachs J eloquently expressed in paragraphs 89 and 90 of *Fourie supra*. Our Constitution protects an individual's rights to practise religion of choice in association with others and in conformity of the Creed of that religion. Furthermore, a Court must recognise the sphere in which the sacred exists and respect the co-existence between the secular and the sacred, not forcing the one into the other. The determination of who is morally and religiously fit to be a Minister or who should be excluded for non-conformity with the dictates of the religion, falls within the core religious functions.[66] This Court is

[65] Para 94

[66] *De Lange* Supreme Court of Appeal matter par 31

not asked to decide doctrine. The problem is that the moment a Church steps into a Court, Court rules and the application of the law of the land is to be applied by the courts. In this matter the Bill of Rights is invoked and it is wrong to then employ the religious sentiments of some as a guide to the constitutional rights of others. The sacred is forced into the secular when there is prejudice to basic rights contained in the Bill of Rights; unfair discrimination with no supportive evidence of fairness renders the supreme law, the Constitution to be upheld. When courts need to address issues of discrimination, Courts do not weigh up the right to sexual orientation to that of religious freedom.

[79] A further factor to consider is whether the primary purpose of the Church's action is to achieve a worthy and important societal goal. The Church did not put up any facts as to why the 2016 decision was a worthy and important societal goal. The decision sustained the views of the majority of the Church, but not the minority or the greater society in any way.

[80] It is important to take into consideration that our Constitution supports a substantive concept of equality as expressed in s9 (2) that *"equality includes the full and equal enjoyment of all rights and freedom."* The 2016 decision denies Gaum the full and equal enjoyment of all the rights and freedom of the Church.

[81] Constitutional interpretation of s9 also requires a substantive conception of equality. A Court must thus develop: *"a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough*

understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."[67] The Church presented no argument or facts setting out that the overall impact does further the constitutional goal of equality or that in this context the exclusion is fair. Gaum is a minority that has suffered severely. In the context, a majority decision pursuant to differences of opinion pertaining to the Church's Creed on this matter does not further the constitutional goal of equality and is unfair. It is unfair to exclude members of the Church of their full and equal enjoyment of all rights and freedom the Church offers.

[82] This Court has decided the unfair or fairness of the discrimination in terms of the Constitution. In the heads of argument the Church relied on s14 (2) and 14(3) of the Equity Act. This Court was however not sitting as an Equality Court. However if this Court must look to section 14(2) and 14(3) of the Equity Act, without any facts set out in the Church's opposition as to why in terms of the factors listed the discrimination is fair, then the Church has not proven that the discrimination is fair. In considering the factors, the impairment of dignity of Gaum speaks for itself. The impact is clear, members of a congregation cannot marry in their congregation. The answer to this in the opposition is that Gaum can go to another Church to get married, i.e. become a member of another denomination, which amounts to unfair discrimination. Gaum individually, and as a group, did suffer patterns of disadvantage. The 2016 decision does not accommodate diversity. The discrimination is on the prohibitive grounds of equality and sexual orientation impacting on the nature

[67] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41

and extent of the discrimination. The 2015 decision is an example of a less restrictive and less disadvantageous means to achieve the Church's purpose. The Church submitted that the legitimate purpose of the decision was to balance rights. Nothing in our jurisprudence requires rights to be offset against each other. The Church relied on no facts or factors rendering the discrimination reasonable and justifiable. The only fairness referred to is the balancing of the rights and reliance on the quoted passages of *Fourie*. At the risk of repetition, there is no balancing of rights.

Amicus Submissions

[83] Before turning to the question of justification we find it pragmatic to entertain the argument of the admitted *amicus*, The Alliance defending the Autonomy of Churches in South Africa [ADACSA][68] herein. ADACSA raised submissions in defence of the established autonomy of churches and religious groupings to set their own doctrine and govern in accordance with their interpretation of their religious texts. It was submitted that sections 15, 18 and 31 of the Constitution guarantees religious institutions a certain degree of institutional autonomy, vital to a conscience-honouring society. Religious institutions thus have the right to decide doctrine and matters of governance internally. State

[68] *"The Second amicus curiae is the Alliance Defending the Autonomy of Churches in South Africa ("ADACSA") or "the Alliance"), a universitas personarum and separate legal entity with perpetual succession and rights and duties separate and independent from the rights and duties of its members in terms of its Constitution. In terms of its Constitution, ADACSA was established, inter alia, to achieve the following objectives: (1) defending and protecting the autonomy of churches in South Africa, including specifically the ability of each denomination, church and religious grouping to set their own doctrine and to govern their internal affairs according to their interpretation of their religious texts; and (2) to intervene in, oppose and if necessary institute, legal proceedings against any authorised or unauthorized activity that may pose a threat to the interests of the area of concern and the Alliance. The majority of organisations making up the Alliance, are denominations and churches. The remaining organisations (who are not denominations or churches) in the Alliance, equally support – and are actively engaged in – defending and protecting the autonomy of churches in South Africa. The (growing number of) organisations making up the Alliance, stand to be directly affected by a decision on the substantive review grounds"* – footnote 3 of ADACSA's heads of argument (p146 of heads of argument bundle)

inference should only be to protect vulnerable members from serious harm, not from moral claims that the political community rejects. Because the Constitution does not recognise a hierarchy of rights the starting point is to not see the rights as contradicting one another, but harmonising the rights and with proper interpretation to reconcile them with one another. This is specially so because religion itself is an equality right; in this matter two competing conceptions of equality; sexual orientation and religious freedom. Where the central issue is that of doctrine of the Church to strike an appropriate balance between these two rights is allowing the Church to discriminate. The right to religious freedom must protect more strenuously those doctrines that lie at the heart of ecclesiastical concern.

[84] To balance the rights the Court must recognize that the institution of marriage is sacred to the Church. To alter the Church's understanding of marriage is compelling the Church and its members to accept a definition of marriage that is contrary to their religious beliefs. When balancing the Court must dismiss Gaum's application because the 2016 decision is constitutionally protected under s15 of the Constitution. Ministers are responsible for the protecting and teaching of the Church's doctrines. Gaum cannot demand a position of spiritual leadership whilst refusing to conform to the tenets of its religion. Gaum are still members of the Church leaving their associational rights in place. The only restriction is that they adhere to the Church's doctrinal tenets; a reasonable restriction.

[85] ADACSA emphasises that section 15 (1) of the Constitution guarantees freedom of conscience, thought, belief and opinion, as fundamental human rights. Further, that freedom of religion includes the right to entertain religious

beliefs of one's choice, to declare those beliefs openly and without fear of hindrance, and to manifest those beliefs through worship, practice, teaching and discrimination – both individually and in association with a community of others.[69] It also requires that religious observers are not forced to act, or refrain from acting in a manner contrary to their beliefs.[70]

[86] The communal aspect of freedom of religion is expressly recognised by section 31 of the Constitution which protects the rights of persons belonging to, inter alia, a religious community, practice their religion and form, join and maintain religious association without interference by the State.[71] The right to "maintain" religious institutions includes the right to exclude non-adherents from membership or leadership of those institutions.[72]

[87] One other important submission by the ADACSA is that section 18 of the Constitution guarantees an individual the right to choose his or her associates, and a group of individuals their rights to choose their associates. The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform. The right to freedom of association implies that individuals, who voluntarily commit themselves to a religious institution's rules and decision-making bodies, should be prepared to accept the outcome and doctrinal decisions made by those bodies in accordance with their internal regulations and procedures.[73] One must also emphasise that the decisions of these bodies must also

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[69] See *S v Lawrence; S v Nagel; S v Solberg* 1997 (4) SA 1176 (CC) para 92, citing Canadian case of R v Big in Brug Mart [1995] 1 SCR 295 at 336. See also *Prince v President, Cape Law Society and others* 2001 (2) SA 388 (CC) para 38.

[70] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) paras 19-24

[71] *Prince* (supra) at para 39

[72] T*aylor v Kurstug* 2005 (1) SA 363 (W)

[73] *De Lange* (supra) para 40

comply with the constitutional principle of legality and procedural fairness as espoused in PAJA.

[88] This *amicus* relied heavily on international law and foreign law. The decision of the European Court of Human Rights in *Hasan and Chaush v Bulgaria* no 30985/96 dated 26 October 2000 at para 62 developed the complimentary principles of State neutrality and church autonomy. This principle was upheld in the seminal case of *Nagy v Hungary* 5666/09. In Canadian jurisprudence the reasonable restriction as proffered by ADACSA is ascribed. The European Court of Human Rights has emphasised the State's role is that of neutral and impartial organiser of the practice of religions and that this neutral role is conducive to public order, religious harmony and tolerance in a democratic society, particularly between opposing groups.[74] The European Court of Human Rights has made it clear that it is not the task of the State to act as arbitrator between religious communities and the various dissident factions that exist nor can it justify State action imposing unity by force in a deeply divided religious community.[75] In the USA the Supreme Court upholds the ministerial exception doctrine that is grounded in the First Amendment of the US Constitution. The purpose of this exception ensures that the authority to select and control who will minister to the faithful is a matter strictly ecclesiastical.

[89] There is duty upon a Court to consider international law when interpreting the Bill of Rights. Although not all the foreign law referred to is discussed herein, the matters were considered. Although international law and foreign law are helpful to interpret the Bill of Rights, the South African context is paramount.

[74] *Sindacatul "Pastoral Cel Bun" v Romania* at para 165

[75] *Holy Synod of the Bulgarian Orthodox Church and Others (Metropolitan Inokentiy v Bulgaria* 412/03 and 35677/04 dated 22 January 2009 para 119

In the matter of *Nagy v Hungary*[76] Hungary had an Act, Act no. IV of 1990 on the Freedom of Conscience and Religion and on Churches. Section 60(3) of the Hungary Constitution prohibited State interference with religious issues and the internal affairs of churches. This already renders any comparison untenable.

[90] The submission that the correct approach and sound analysis to this matter requires the Court to attempt to reconcile the rights in issue, but with a presumption in favour of diversity, is not supported by South African case-law. There is a plea that a legal presumption in favour of associational diversity be used in the adjudication of rights conflicts rendering a fairer treatment of diversity and difference in Constitutional democracies. An approach to rights adjudication based on this presumption and informed by this attitude will promote greater diversity and better fit in religious disputes. There is criticism that equality, victimhood and vulnerable minority have laid the groundwork for the totalist use of the law, thereby marginalizing religion. Associational diversity requires various viewpoints to co-exist in the state. Courts must resist the temptation to prescribe a set of views and in so doing reduce the diversity of beliefs. Equality is not uniformity but an acceptance of difference.[77]

[91] There is an argument to be made that a Court cannot prescribe who must be appointed as a Minister in a Church. But, if a member of the Church is permitted to study to become a Minister in that Church, but disallowed to engage in his or her profession only due to the fact that he or she would be in same sex relationship there is an inherent contradiction in the conduct of the

[76] Paragraph [60] of the judgment
[77] Ian T Benson *An associated Framework for the Reconciliation of Competing Rights Claims involving the Freedom of Religion* p79 (PhD thesis)

Church. This is just an observation because this Court cannot apply the test suggested by this amicus to decide this matter. The test in Harkson[78] has consistently been applied and is to be applied by this Court. The submissions, although well-presented, well-reasoned and well-supported by international law is to be dismissed.

Can the Church's decision be justified under the limitation clause?

[92] In the opposition no facts were set out justifying the decision in terms of section 36 of the Church. In argument for the Church it was submitted that justification does not come into play. The threshold requirement in section 36 of the Constitution is that any limitation of a fundamental right must be *"law of general application …"* Where a church discriminates, it constitutes private discrimination, with the law of general application not likely to apply. Justification is not applicable and no decision has to be made if there was justification for the unfair discrimination. In terms of section 14 of the Equity Act only fairness, not justification, is considered.

Costs

[93] On behalf of Gaum the Court was requested to apply the principle set out in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) ["*Biowatch*"] which would result in this matter that if the application is granted costs of suit should follow the event, including the costs of three counsel (where incurred). Conversely, if the application is dismissed there ought to be

[78] Paragraph [40] of the judgment

no order as to costs. It was argued that the Church was dealing with a function of the State; performing marriages and therefore *Biowatch* is applicable. Although *Biowatch* did not deal with Constitutional issues, but these are important fundamental human rights issues and the *Biowatch* principle is a useful guide when exercising the Court's discretion. The delay caused by the Church in the litigation is a further factor as to why Gaum would be entitled to costs.

[94] The Church submitted that the *Biowatch* principle was not applicable because the litigation is between private parties, one party not being the State. It was argued that the costs should follow the result. As for conceding prayers 4 and 5, the Court's discretion can be exercised to pursuant to concession awarding the costs thereafter on an unopposed scale.

[95] For the purposes of this judgment it is not necessary to entertain the *Biowatch* principle, distinguish it or by analogy apply it. Gaum requests the costs if the application is granted and the Church submitted the costs should follow the result. In this instance it boils down to the same request; Gaum must be awarded the costs. Gaum abandoned prayers 6 and 7 and the Church did not oppose the granting of prayers 4 and 5. In view thereof no special orders of costs on opposed scale up to a certain date is to be made. As for the admitted *amicus* no cost order is made.

[96] The following order is made:

1. The decision on same-sex relationships adopted during the extraordinary meeting of the General Synod of the Dutch Reformed Church during 7-10 November 2016 is declared unlawful and invalid.

2. *This decision is reviewed and set aside.*

3. *The decision by the appeal body constituted by the General Task Team Legal Affairs of the Dutch Reformed Church upholding appeals against the decision on same-sex relationships of the General Synod of the Dutch Reformed Church adopted on 30 October 2015 is declared unlawful and invalid.*

4. *This decision is reviewed and set aside.*

5. *The first, second, third, fourth, fifth and sixth respondents are to carry the costs, jointly and severally the one to pay the other to be absolved.*

6. *The costs ordered include the costs of three counsel, (where occurred).*

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T.J. RAULINGA

JUDGE OF THE HIGH COURT

I agree

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S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

_____

D.S. MOLEFE

JUDGE OF THE HIGH COURT

CASE NO: 40819/17

HEARD ON: 21 August 2018

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DATE OF JUDGMENT: 8 March 2019