THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 726/13
Reportable / Not Reportable

In the matter between:

ECCLESIA DE LANGE **APPELLANT**

and

THE PRESIDING BISHOP OF THE METHODIST CHURCH OF SOUTHERN AFRICA FOR THE TIME BEING **FIRST RESPONDENT**

THE EXECUTIVE SECRETARY FOR THE TIME BEING OF THE METHODIST CHURCH OF SOUTHERN AFRICA **SECOND RESPONDENT**

Neutral citation: *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151 (29 September 2014)

Bench: Ponnan, Wallis, Pillay JJA and Fourie and Mathopo AJJA

Heard: **26 August 2014**

Delivered: **29 September 2014**

Summary: Voluntary association – internal disciplinary proceedings – arbitration prescribed by laws and discipline of the Church – whether good cause shown in terms of s 3(2) of the Arbitration Act 42 of 1965 for avoiding the arbitration – doctrine of entanglement.

ORDER

On appeal from: Western Cape High Court, Cape Town (Veldhuizen J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Ponnan JA (Wallis, Pillay JJA and Fourie and Mathopo AJJA concurring):

[1] *'People, as Kant said somewhere, are ungregariously gregarious. They may associate for some purpose and then may quarrel. The group, its majority or those in power, may want to expel the troublemaker; and he, in his turn, may complain of unfair treatment. Both sides may have their points, though an impartial observer may think the quarrel not worth the ado, nor the offence perhaps worth expulsion. But the observer may feel reluctant to take sides, where the dispute is between one and many. The many may seem too hasty or severe, but then they also represent, if anyone represents, the group's collective wish or purpose . . . .*'[1]

This is an appeal against the judgment and order of the Western Cape High Court (per Veldhuizen J) dismissing with costs an application by the Reverend Ecclesia de Lange (the appellant) against the Methodist Church of Southern Africa (the Church),

[1]S Stoljar 'The Internal Affairs of Associations' in *Legal Personality and Political Pluralism* (1958) at 66-67 cited in *Lakeside Colony of Hutterian Brethren v. Hofer* [1992] 3 S.C.R. 165 and *Coombes v. National Phoenix 1984 Firearms Information and Communication Association* 2009 ABQB 566.

represented by its Presiding Bishop, as the first respondent, and its Executive Secretary, as the second respondent,[2] in which the following relief was sought:

'1. Setting aside the arbitration agreement between the parties in terms of the First and Second Respondent's Laws and Disciplines, alternatively an order that such arbitration agreement shall cease to have effect with reference to any dispute as set out herein;

2. A declaratory order that the decision by the Methodist Church of Southern Africa to discontinue the Applicant as a minister of the Methodist Church of Southern Africa is unconstitutional and unfair discrimination based on sexual orientation;

3. Reviewing and setting aside the decision whereby the First Respondent's Cape of Good Hope District Disciplinary Committee's decision dated **12 January 2010**, whereby the Applicant was suspended as a minister, which was confirmed by the First Respondent's Connectional Disciplinary Committee, whereby the Applicant was discontinued as minister, dated 17 February 2010, and which discontinuation was sanctioned by the Presiding Bishop on **20 February 2010** as a minister of the Methodist Church of Southern Africa;

4. Reinstating the Applicant as a minister of the Methodist Church of Southern Africa with retrospective effect, which includes that the First and Second Respondents are ordered to pay to the Applicant all station and emoluments to which the Applicant would have been entitled had she not been suspended and discontinued;

5. Costs as follows:

5.1 of the application including the costs of two counsel.

5.2 declaring the costs of the arbitration and the assistance of Applicant's attorney as necessary costs preceding this application.'

[2] According to the appellant:

'13.2 During my late teens I came to the conclusion that I am a lesbian. I realised that this discovery would not be acceptable to my family or Church and so I concealed it, totally

[2] In terms of the rules and discipline of the Church all legal proceedings by or against the Church shall be instituted in the name of the Presiding Bishop and the Executive Secretary.

oblivious as to my human identity and rights. I tried to fit in by being in heterosexual relationships, appearing to be normal and acceptable to the community.

13.3 However, my ability to pretend to be heterosexual did not last and it wasn't long before others found out about my sexual orientation. I was told in no uncertain terms that I cannot be Christian and lesbian. My family relationships and support system were shattered. The Church's stance on homosexuality sent a clear message of rejection to me which forced me to leave the Church. The pain and loss was immense.

13.4 Several years later I had an encounter with God that made me return to the Church. I knew that God loved and accepted me and I renewed my commitment. I then set out to find a Church. It did not take me long to discover the "hidden or unspoken approach" of the Church was unchanged on same sex relationships. At the time the only way for me to be included in the community was either to deny my sexual orientation and live a life of secrecy or live a life of celibacy, contrary to my true and natural orientation.'

[3] Having decided to return to the fold and feeling called to the ordained ministry, the appellant commenced her training to become a Minister of the Church. On 15 June 2006 she acquired a Masters of Social Sciences degree in Religious Studies from the University of Cape Town. She was ordained as a Minister and received into the full Connexion of the Church during August 2006. With effect from 1 January 2007 the appellant served as a Minister of both the Brackenfell and Windsor Park Methodist Churches. During April 2004 the appellant commenced what she described as a love relationship with her then partner. During 2008, according to the appellant, she and her then partner first discussed the possibility of getting married and by the next year they had become firm in their resolve to do so. The date for the wedding having been fixed, the appellant decided to inform her congregants of her impending nuptials.

Accordingly on Sunday 6 December 2009 she read the following letter to both congregations served by her at a combined church service:

'Dear friends,

You have given me much joy in sharing your life with me and this morning is my turn to share some very exciting news with you. I am getting married on 15th Dec.

Some of you have met and know Amanda. We have a wonderful relationship of love respect and companionship. I would love for you to celebrate with me. However, I do understand that this might be controversial to you. What I do ask is that you respect our decision.

I have encountered many struggles to get to this place. I invite you to read and familiarize yourself with this, by taking a copy, which I have prepared for you. It will give you some insight into aspects of my journey. (There will be copies available at the door as you leave.)

By making this announcement we are moving into uncharted water in the life of our church. The Methodist Church of SA (MCSA) has not yet had to deal with the nature of these circumstances before. This leaves me extremely vulnerable and uncertain about my future in the MCSA.

I will keep you abreast of what is happening. It is likely that a pastoral commission will be set up to investigate my position and then make a recommendation.

My desire is to be a minister in the MCSA, to be true to God, to be true to myself and to be faithful to God and my calling as well as to be accepted for who I am. My hope is that I would continue as your minister.

I will give you some time to absorb my story and if you would like to connect with me (after you've gained some insight into my journey), I would make myself available. I thank you for your love and care for me and the church.'

[4] That same afternoon the appellant was informed by her Superintendent Minister that he had contacted the District Bishop of the Church to enquire as to how

they should proceed after the announcement of her intended marriage. The next day according to the appellant:

'I met with the District Bishop . . . in Rondebosch and gave him copies of a letter entitled "My Story", which expressed the attitude of the Church to be a community of love rather than rejection. The idea of the letter was to explain to the Church via my version of the events why I did not see any problem with my announcement to the congregations of my intended marriage.'

The response of the District Bishop was that he first wanted to peruse the information before he made his views known. On 8 December 2009 the appellant was informed by her Superintendent Minister that a charge had been laid against her. Two days later the appellant was suspended from the Ministry pending the outcome of a disciplinary hearing.

[5] The appellant was thereafter informed by e-mail that her disciplinary hearing was scheduled for 22 December. The e-mail continued:

'I am sure everyone understands that this will not include any discussion on the merits or otherwise of same-sex unions, but purely the application of the current MCSA policy to this charge.'

Prior to the disciplinary hearing and as foreshadowed in the letter to her congregation, the appellant and her partner married each other on 15 December 2009.

[6] The charge levelled against her in terms of the Laws and Discipline of the Church (the L&D) was:

'That you have acted in breach of paragraphs 4.82 and 11.3 in that contrary to Laws and Discipline and/or Policies, Decisions, Practices and Usages of the Methodist [Church] of Southern Africa. You have announced to the Brackenfell and Windsor Park societies your

intention to enter into a same sex civil union on the 15th December 2009, it being the Churches' policy, practice and usage to recognise only heterosexual marriages.'

[7] Rules 4.82 and 11.3 of the L&D provide:

'Ministers shall observe and implement the provisions of Laws and Discipline and all other policies, decisions, practices and usages of the Church.

. . .

Ministers who have an accusation against them in respect of character, doctrinal beliefs, fitness for the work of the ministry, or observance of Methodist Laws and Discipline may have a complaint laid against them by another Member with the DDR.'

[8] The disciplinary hearing proceeded as scheduled before the District Disciplinary Committee (DDC). The appellant appeared before the DDC together with her representative, the Reverend Tim Attwell. The DDC concluded:

'Verdict:

The Committee finds Rev de Lange guilty of failing to observe the provisions of the Laws & Disciplines and all other policies, decisions, practices and usages of the Church (L&D11th Edition 4.82 & 11.3) by announcing her intention to enter into a same-sex civil union, and especially by doing this without consultation with her Superintendent and the Bishop.

Sentence:

Time already served under suspension.

Recommendation:

As Rev. de Lange has subsequently entered into the civil union while the MCSA has specifically instructed that such action should not happen while the debate in the Church continues (Yearbook 2008 2.5.1 (vi)), the Committee recommends that she continue under suspension until such time as the MCSA makes a binding decision on ministers in same-sex

unions. Out of consideration for the needs of Circuit and Societies, this suspension should be without station or emoluments.'

[9] On 18 January 2010 the appellant filed a notice of appeal against the decision of the DDC to the Connexional Disciplinary Committee (CDC). She contended:

'1.2. . . . the verdict fails to take account of the fact that the church has not formulated any policy regarding same-sex civil unions. I therefore believe it is deeply unfair, and misdirected, for the DDC to have made a finding against me in that regard. As may be seen within the Record of the hearing, much of the debate centred on differing interpretations of various Conference discussions and debates. This serves to illustrate the lack of definitive policy or decision by the MCSA. Indeed the MCSA has previously decided not to make any decision, or enact any policy, regarding the rules and protocols regarding such unions.'

In respect of the recommendation by the DDC following upon its verdict, the appellant asserted:

'2. . . . I would like to strenuously argue that the L&D does not grant the DDC any powers to make such recommendations. L&D 11.21 clearly delineates the responsibilities, powers and duty of the DDC regarding sentencing. I contend that the DDC has exceeded its powers and therefore request that the Recommendation be stricken from the Record.

Furthermore, the Recommendation would have the effect of imposing a sentence that is not only beyond the DDC's verdict, but which is open-ended until such time as Conference may, or may not, decide to formulate policy in this regard. . . .'

[10] On 17 February 2010 the CDC confirmed the verdict of the DDC and in respect of the sentence it ordered that the appellant 'be discontinued from the ministry of the Methodist Church of Southern Africa'. The effect of the appellant's discontinuation was that she remains an ordained Minister but is precluded from exercising any ministerial functions, holding any station or receiving any emoluments.

[11] In terms of Rule 5.11 of the L&D if the appellant wished to challenge the decision of the CDC she was required to have that dispute referred to arbitration. Rule 5.11 provides:

'No legal proceedings shall be instituted by any formal or informal structure or grouping of the church or any minister or any member of the church, acting in their personal or official capacity, against the church or any formal or informal structure or grouping of the Church, Minister or member thereof for any matter which in any way arises from or relates to the mission work, activities or governance of the church. The mediation and arbitration processes and forums prescribed and provided for by the church for conflict dispute resolution (Appendix 14) must be used by all Ministers and members of the church. If a matter is referred to arbitration, the finding of the Arbitrator shall be final and binding on all Minsters and members of the church. . . .'

[12] On 31 March 2010 the appellant filed a formal request with the Convener of the Connexional Arbitration Panel of the Church (the convener) for the dispute to be referred to arbitration. The convener responded to her request thus:

'2 As I need to finalise an arbitration agreement that needs to be signed in terms of the paragraph 2.2 (ii) of appendix 14 of the L&D I attach a draft agreement containing the usual clauses that I insert in such agreements. In terms of the same paragraph I also need to "determine and clarify what the issues are from the party/ies", which I shall then set out in the agreement (paragraph 3).

3. The terms of your referral in your notice are very broad and the nature of the relief you wish to seek is not clear to me. I need to know specifically what aspects of the charges and the disciplinary process you wish to challenge, and what outcome you wish to achieve. At this stage I do not even know what you were charged with or on what grounds you were found guilty and sentenced. I am not requesting you to compile a full statement of claim at this stage, but I do need some more detail about your specific complaints. I shall be happy to have a

telephonic discussion with you and/or your attorney if that would help to clarify any of the issues that I have raised.'

[13] On 19 August 2010 the convener wrote in response to a letter from the appellant's attorney informing him that Advocate Gerald Bloem SC of the Grahamstown Bar had been appointed arbitrator. And in an attempt to address certain concerns that had been raised on behalf of the appellant, the convener's letter continued:

'2.3.1 Clearly if the arbitrator acts unlawfully or improperly in any manner the Complainant will have the right to take the decision on review. In any event it is recorded in paragraph 6 that the Complainant's right to object to any constitutional principles is reserved.

2.3.2 The manner of how the arbitration is to be conducted must be left to the arbitrator without being prescribed to in this agreement. He may wish to conduct a pre-arbitration meeting to determine the rules of the arbitration, but I shall leave that to his discretion. Should the arbitration be conducted unfairly or improperly in any way it shall of course be open to the Complainant to take the matter on review in an appropriate court.'

[14] However, there were difficulties in proceeding to arbitration immediately because of a difference of opinion on various issues between the parties. On 5 February 2011 the parties attended a preliminary meeting under the auspices of the arbitrator. After much negotiation as to the terms of the arbitration agreement, eventually in June 2011 the convener, acting in terms of Rule 5.11 read with Appendix 14 of the L&D, signed an agreement on behalf of the appellant, which fleshed out the terms of, and the process that would govern, the arbitration. The arbitrator then requested dates for the hearing and suggested that it take place during September 2011.

[15] According to the appellant '[i]t was at that point in time that I decided to take legal action'. The legal action in question was instituted some ten months later during June 2012. The high court concluded that the appellant's 'application is premature and that she should first submit to arbitration'. It accordingly dismissed the application with costs, but granted leave to the appellant to appeal to this court.

[16] In support of the relief sought the appellant stated in her founding affidavit:

'33.

'Thereafter followed a series of correspondence, the contents which are self explanatory and dealt herein in chronological order. Through all of this I made my position clear, namely a valid arbitration agreement existed and the parties should thus proceed with the arbitration.'

Later she added:

'34.

34.1 I submit that in view of the history of this matter good cause exists why the arbitration proceedings should not proceed on the basis of the revised arbitration agreement. Even if my view that a valid arbitration agreement came into being is not correct, I have lost all confidence in the arbitration proceedings and the Arbitrator. I am also of the view that the arbitration agreement forces me to wave my fundamental rights as protected in the Constitution and is therefore *contra bonis morae*.'

[17] In the answering affidavit filed on behalf of the Church, the Presiding Bishop stated:

'In the present case, there was considerable delay in finalising an arbitration agreement between the parties . . . Suffice to state that the applicant and the Convener . . . disagreed on three issues:

45.1. First, they disagreed on the characterisation of the dispute between the parties. The applicant has consistently sought to contend that she was discontinued on the basis of her

sexual orientation and the issue for determination was thus whether the Church was entitled to expel her for being gay. As I have made clear above, the Church discontinued the applicant for contravening the policies, decisions, practices and usages of the Church, by taking positive steps to enter into a union when the Church had determined to recognise only heterosexual marriages pending the outcome of an internal engagement process.

45.2. Second, the applicant sought to create a right of appeal to court in the event that she did not succeed in the arbitration proceedings. But clause 5.11 of the L&D provides that an arbitrator's decision is final and binding, subject to only judicial review to this Court in appropriate circumstances. The Convener was accordingly not entitled to agree to a term that created a right of appeal.

45.3. Third, the applicant has sought to include a term in the arbitration agreement that she be entitled to legal representation in the arbitration – notwithstanding clause 2.2(vii) of Appendix 14, which provides that legal representation is not generally allowed in arbitration.'

[18] The appellant's response in her replying affidavit was:

'4.

I accept for the purposes of this application that the Church is entitled to make a law forbidding members of the Church to enter into same sex marriages. I understand that freedom of religion and freedom of association are also basic human rights guaranteed in our constitution as is the right not to be discriminated against based on one`s sexual orientation. However what the Church cannot do is not have a clear and pre-announced law forbidding people to enter into same sex marriages and after the fact then try to create the impression that such a law exists.

. . .

6.

The Church has not determined that same sex partners should not take positive steps to enter into civil union. This is a slant put on the decision taken by the Executive Committee by the

First Respondent. If regard is had to the context in which the decision was taken it is clear that the decision meant to indicate that the Church are not taking any positive steps in deciding the issue whether they should recognise same sex marriages or not. There is simply no room for the interpretation given by the First Respondent when the rule is considered.

. . .

8.2 The fact that the Church does not recognise same sex marriages or civil unions does not necessarily mean that they do not allow same and if one enters into a same sex marriage that you are now suddenly contravening the Laws and Discipline of the Church.

10.

I deny that my actions were in direct contravention of the Churches` policies and decisions on same sex unions. I have also never said that I was unaware that I contravened the Churches` policies and decisions in relation to same sex unions. All I said and I reiterate was that *if the Rule is read within the context that it was made there is simply no law forbidding a Minister to enter into a same sex union*. I did not pre-empt the decision of the conference and accept the Churches` constitutional right to practice religion in association with others and in conformity with the dictates precepts and ethical standards and moral discipline that the faith exacts and to which the Church adheres. I simply argue that the Church is also bound by their own Rules and cannot fabricate Rules after the fact for their own purpose.

11.

I submit that in terms of the Doctrinal Prescript as described above the policy and the practice of the Church there is *de facto* and *de iure* no impediment to same sex unions. The decision taken by the First Respondent is not based on non-compliance with the policies and practices of the Church but based on his personal view of my sexual orientation which is not excluded by the Laws and Disciplines nor the Doctrine of the Church.'

[19] Despite having sought a declaratory order to the effect that the decision by the Church to discontinue her as a minister constituted 'unconstitutional and unfair discrimination based on sexual orientation', the appellant in her replying affidavit tellingly stated:

'I am not seeking to advance a claim of unfair discrimination based on sexual orientation. I am advancing a case based on the administrative common law namely that I am entitled to fair administrative action and that the decision by the First Respondent does not comply with the common law prescripts in this regard.'

That notwithstanding, in her heads of argument and from the bar in this court, counsel for the appellant sought to advance a case that the Church's 'decision to discontinue the appellant as minister of the church was unconstitutional and unfair discrimination based upon the Appellant's sexual orientation'. The fundamental problem with that is twofold: First, such a case lacks any factual foundation. And, as held in *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28, in motion proceedings the affidavits constitute both the pleadings and the evidence. Second, as emerges from her replying affidavit, the appellant had unequivocally disavowed 'a claim of unfair discrimination based on sexual orientation'. What is worse is that this case, which it seems was not pursued before the high court, is sought to be advanced for the first time before this court on appeal (*Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) para 43). However much the appellant may believe that the church's failure to recognise same-sex marriages is a product of discriminatory attitudes she deliberately chose, with legal advice, not to pursue this case on that ground. We cannot therefore decide it on a basis that she disavowed.

[20] I proceed to decide the case on the basis it was presented in which a claim based on discrimination on grounds of sexual orientation was disavowed. This means

that it is unnecessary to engage with the collision between the rights to freedom of association and religious freedom on the one hand, and the right to equality on the other, or to enter into the very enlightening and thought-provoking debate on that score.[3] We can thus avoid what de Freitas describes as the 'journey between the shoals of strongly held religious beliefs and the affirmation of otherness whose marginalisation has been justified by those very beliefs'.[4]

[21] In arriving at its conclusion that the appellant had to submit to arbitration, the high court found it unnecessary to engage with the merits of the review. Despite the fact that the high court had refrained from entering into the merits of the review, counsel for the appellant made so bold as to suggest that we should do so. We were thus invited to determine on the papers as they stood whether there was indeed a rule in place as contended by the Church. According to the Church, the testimonies of painful experiences of exclusion by some of its members and ministers have 'given it pause to consider whether its attitudes and practices towards homosexual people have been consistent with the message of Christ, and whether its use of Scripture in this matter has been faithful to the biblical witness as a whole'. But, marriage, the Church maintains, is an institution of central importance to it. Historically, the Church has only recognised marriage as between one man and one woman. That is still its policy and practice. And, because it has a number of gay members and ministers, none of whom, it says, are excluded on the basis of their sexual orientation, the recognition of same-sex unions has become an issue of importance within the Church.

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[3] For the scope of this debate see inter alia D Bilchitz 'Why Courts should not sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 *SAJHR* 296; S de Freitas 'Freedom of Association as a foundational right: Religious associations and *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park*' (2012) *SAJHR* 258 at 262; P Lenta 'In defence of the right of religious associations to discriminate: A reply to Bilchitz and De Freitas' (2013) SAJHR 429.

[4] De Freitas at 271.

It has therefore been facilitating debate and engagement around the issue, which it asserts is a deeply divisive one, with factions of members and ministers holding starkly divergent doctrinal views. It has thus sought to avoid conflict and schism within the Church in its approach to the issue.

[22] According to the Presiding Bishop:

'At the 2007 Conference, the issue of same-sex unions remained fraught. In response to the heated debate it triggered, the Conference issued the following statement and resolution:

". . . *Conference recognises that any decision and subsequent action on the issue of civil unions between same-sex partners must await the outcome of the ongoing process of engagement as specified by Conference 2005 (Yearbook 2006, 8.3, p.75) and, in the interim, expects Methodist ministers to continue to offer pastoral care to homosexual individuals."*

. . .

By 2010, it was clear that the recognition of same-sex unions generated passionately and sincerely held but divergent views among both ministers and members of the Connexion. The Church determined not to permit these differing viewpoints to divide its congregation and adopted an approach that sought to accommodate the opposing doctrinal views of its members. At the 2010 Conference, the Church again called on its members to engage with the complexities and emotions around homosexual relationships and, in the interim, to "*allow this divergence of conviction to be held without the freedom for such divergence of conviction to be exercised"*. Simply put, the Church continued to embrace its gay members and did not interfere with their relationships, but did not recognise or allow same-sex marriage.'

That notwithstanding, it was submitted that any such dispute as may have existed in relation to whether or not there was a rule in existence, could be resolved by this court in the appellant's favour on the papers as they stood. To determine a profoundly important doctrinal issue, in line with the well-settled approach to be adopted in matters where final relief is sought on application (as to which see *Plascon-Evans*

Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)), is wholly undesirable. It would thus be imprudent to accede to counsel's invitation.

[23] The high court ruled that the dispute between the parties was subject to arbitration. That a court has a discretion whether to enforce an arbitration agreement is evident from s 3(2) of the Arbitration Act 42 of 1965 which provides that:

'(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-

(a) set aside the arbitration agreement; or

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.'

The question therefore is whether the appellant has shown good cause within the meaning of the subsection for avoiding arbitration. Such an onus is not easily discharged (per Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E-F). It has been said that the discretion of the court is to be exercised judicially, and only when a very strong case has been made out (*Universitiet van Stellenbosch v JA Louw* 1983 (4) SA 321 (AD) at 334A). As Nugent JA pointed out (*South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 (SCA) para 14) 'good cause' is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.

[24] I shall endeavour to consider with such brevity as will suffice for the purposes of this judgment the various reasons advanced by the appellant for wanting to avoid the

arbitration: First, she contends that there is no valid arbitration agreement. In that she is not entirely consistent having initially maintained in her founding affidavit that there was in place a valid agreement and that she was intent on arbitration. We do not have to enter upon the question whether the relationship between the church and its ministers is contractual as would be the case with a member of a voluntary association, because it was agreed that the agreement signed by the Presiding Bishop on behalf of the Church and the convener on behalf of Ms de Lange brought the matter within the ambit of the Arbitration Act.[5] That, the convener was entitled to do in terms of Rule 5.11 read with Appendix 14. The relevant portion of Appendix 14 reads:

[T]he Convener shall determine and clarify what the issues are from the party/ies. The Convener shall hereafter decide what the correct forum or process is for the matter. The Convener`s decision in this regard shall be binding on all members of the church.

. . . If arbitration is the correct forum, the Convener shall finalise a written arbitration agreement which both parties shall sign. If either party refuses to sign the said agreement, the Convener shall have the power to sign on their behalf. If the Convener is [not] to be the arbitrator in the particular matter, the said Convener shall designate another arbitrator to this responsibility.'

The appellant accepts that the convener was entitled to sign on her behalf, thereby bringing a binding agreement into force. It follows that a valid arbitration agreement was concluded between the parties and that the appellant should be bound by its terms.

[25] Second, the appellant complains of the delay in concluding the arbitration agreement. The delay for the most part is explicable. There were significant disputes between the appellant and the convener as to the proper delineation of the issues for

[5] See *Yiba v African Gospel Church* 1999 (2) SA 949 (C).

referral. The appellant sought to have issues referred that were not encompassed by the charge or the findings against her. She also sought to create a right of appeal to the high court and a right to legal representation while the convener considered that the L&D did not provide for those rights. The delay is explained on the papers and is attributable, at least in part, to the appellant and her attorney – the latter having adopted an increasingly emotive and argumentative stance in the exchange of correspondence. In the event different versions of a written agreement came to be signed by each of the parties. The matter was then wrongly referred to the appointed arbitrator without an agreement having been concluded and signed by the parties. Absent an agreement the arbitrator correctly declined to assume jurisdiction in respect of the dispute. Following the abortive pre-arbitration meeting and at the arbitrator's suggestion, the parties were offered a further opportunity to conclude an agreement. The appellant then refused to engage further with the convener and did not make any further representations. The convener thereupon formulated an agreement that defined the issues with regard to the charges and the findings of the DDC and CDC, which was then signed by the Presiding Bishop and by the convener on behalf of the appellant.

[26] Third, the appellant complains that the arbitration agreement signed on her behalf by the convener is weighted heavily against her inasmuch as it: (a) requires her to waive her constitutional rights; (b) ousts the power of the courts; and (c) denies her the right to legal representation. As to (a): Not only can the appellant not be taken to have waived her constitutional rights, but the agreement specifically preserves her rights by providing:

‘The parties, by signing this agreement, do not waive any legal rights they may have to raise any objections in the statement of claim or other pleading allowed, or at the arbitration hearing, in relation to the proceedings or any actions taken or omitted in the disciplinary or appeal proceedings of the Claimant, be it on merits or procedural in nature. . . . ’

As to (b): Clause 7.2 of the agreement permits ‘an application to a competent court to review the findings of the arbitrator’. In any event the Church has always accepted that the arbitrator’s decision may be amenable to review on the grounds of legality. This the Presiding Bishop made plain in the answering affidavit in these terms:

‘The applicant contends that the arbitration provisions of the L&D contain an unenforceable ouster of the Court`s jurisdiction. I deny that contention. The Church has always accepted that the arbitrator`s decision may be amenable to review on grounds of legality – as the decisions of all domestic tribunals are. It is neither unconstitutional nor unlawful for a body like the Church to require its members to resolve disputes primarily through internal processes, including arbitration.’

As to (c): The agreement is silent on the right to legal representation, having left that to the discretion of the arbitrator. In the exercise of that discretion, the arbitrator made the following ruling:

‘I have thought of when this matter came up, I thought hard about whether I should allow legal representation in these proceedings. I am not convinced that I have heard any reasons why I should deviate from the L&D and I in the absence of such reasons I, the ruling that I make, in these procedures – no legal representation would be allowed for either Rev de Lange or the church. Both parties I find or rule would be represented by lay representatives. That is the question of legal representation being dealt with.’

In any event our courts have consistently denied any entitlement to legal representation as of right in *fora* other than courts of law (*Commission for Conciliation, Mediation and Arbitration v Law Society of the Northern Provinces* 2014 (2) SA 321

(SCA) para 19; *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) para 5).

[27] Fourth, the appellant complains that the arbitrator, as a member of the Church, acts at the behest of the Church and is thus biased or is reasonably perceived to be biased. The Church's appointment of members to its arbitration panel from which arbitrators are appointed is entirely understandable. It is to ensure that only those persons who are familiar with the rules, procedures and practices are appointed to the rather sensitive task of adjudicating disciplinary disputes. In *Lakeside Colony of Hutterian Brethren v Hofer* it was stated:

'There is no doubt that an unbiased tribunal is one of the central requirements of natural justice. However, given the close relationship amongst members of voluntary associations, it seems rather likely that members of the relevant tribunal will have had some previous contact with the issue in question, and given the structure of a voluntary association, it is almost inevitable that the decision makers will have at least an indirect interest in the question. Furthermore, the procedures set out in the rules of the association may often require that certain persons make certain kinds of decisions without allowing for an alternate procedure in the case of bias.'

There is nothing objectionable in private associations seeking to exclude outsiders from disciplinary processes and to ensure that those proceedings are kept 'within the family' (*Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* paras 18 and 20). To ensure that the arbitrator is conversant with both the Church's doctrine and processes and the legal requirements of a fair process, the Church only appoints senior counsel to preside at arbitrations. The arbitrator in this case is a senior counsel at the Grahamstown Bar. It must be assumed, in the absence of evidence to the contrary, that he can disabuse his mind of irrelevant personal beliefs and

predispositions. Importantly, one finds no support for the complaint of bias in the papers. Quite the contrary, when the arbitrator expressed his willingness to step down if the appellant was not comfortable with him acting as arbitrator, she responded:

'Secondly, I deny the negative assumptions that you have read into my email concerning your competence as an arbitrator. Your impression with respect, is a creation of your own – nowhere in any correspondence have I created any impression whatsoever of that nature in the least. Really, this is totally a silly argument and [with] respect to you, such an assumption is totally ridiculous. I did not mention a single word about your competence. To the contrary I would not have signed the agreement document if I had any doubts about you being the appointed arbitrator for the case. In particular now that you have been appointed as judge, I have even got more faith and confidence that you will deal with my arbitration in a fair and even handed manner. **My complaint concerns the delay of the arbitration and not in the least in your competence.**'

The appellant reiterated her confidence in the arbitrator towards the end of the abortive preliminary meeting held on 5 February 2011, when she stated:

'I have said it more than once in my correspondence to you – I am more than happy for you to be the arbitrator in this case. I have full confidence in you, in your ability and I think you are the right person to be the arbitrator in this case and if I have offended you with what I have written then I apologise and then I ask you to forgive me.'

[28] Fifth, the appellant contends that she should not be required to submit to the arbitration because it would be a futile process. As she puts it:

'[t]he arbitration proceedings will in any event be pointless in view of the fact that the Arbitrator has already expressed his attitude namely that he cannot interfere with the merits of the decision taken but only look at the processes that were applied'.

That claim is similarly unfounded. At the heart of this matter is the question whether the Church had adopted a rule that precluded the appellant from announcing her

intention to marry her partner from the pulpit. The Church contends that such a rule was in place, while the appellant contends that it was not. That is a factual dispute which can be determined in arbitration proceedings. It goes to the question of whether the DDC and the CDC misdirected themselves in finding the appellant guilty of breaching the Church`s policies, decisions, practices and usages. The written agreement delineates the issues between the parties to accommodate that very dispute. It identifies one of the issues for determination as whether the DDC and the CDC "have the jurisdictional authority to deal with the charges that were laid against the Complainant". Put differently, the arbitrator is called upon to determine whether the CDC and the DDC acted correctly in finding that the appellant had breached the Church`s policies, decisions, practices and usages.

[29] In the result none of the grounds advanced by the appellant for seeking to avoid the arbitration pass muster.

[30] Moreover, in addition to certain advantages, such as expedition, finality and cost-effectiveness which a party to an arbitration is likely to enjoy over one who has to pursue their rights in the courts, the nature of the dispute is important. That dispute, according to the Church, is quintessentially the kind of dispute that a secular court should avoid becoming entangled in, because as the Presiding Bishop sought to emphasise:

'The issues in dispute in these proceedings go to sensitive matters of Church doctrine and governance. I am advised that these are issues that the Church should be left to determine domestically, as far as is possible, without interference from the Court. The Court should only become involved in the dispute where it is strictly necessary to do so. Even then, I am advised

and submit that it will refrain from determining doctrinal issues, in order to avoid religious entanglement.

. . .

. . . As I have already explained, marriage is a sacrosanct institution within the Church. The question of who can enter into marriage and when marriages will be solemnized and recognised by the Church are issues of religious doctrine, and are at the heart of ecclesiastical concern.

As I have described above, the question of whether the Church should recognise same-sex unions is an intensely contested issue within the Church. Both those in favour of, and those against, the recognition of same-sex marriage believe that their position is doctrinally correct and justified by the scriptures. Because of the importance of the issue and its potential to create divisions within the Church, the Conference has called for a process of engagement whereby the Church and its adherents seek to determine this doctrinal issue together, through discussion. That process is designed to accommodate diversity, insofar as possible within the constraints of the Church's doctrine and its need for proper governance. I refer to what I have stated above.

. . . It is also inappropriate for this Court to require the Church to recognise same-sex unions as religiously ordained – particularly when the Church is itself involved in a complex and lengthy process to determine that doctrinal issue itself. To do so would be to prescribe religious tenets to the members and ministers of the Church, in violation of the rights to freedom of religion and religious association. Indeed, the doctrine of entanglement militates strongly against the Court becoming involved in religious doctrinal disputes.'

[31] It is so that our Constitution protects an individual's rights to practise his or her religion as well as the rights of members of a particular religion to practise that religion in association with others and in conformity with the dictates, precepts, ethical

standards and moral discipline which that faith exacts.[6] Protecting the autonomy of religious associations is considered a central aspect of protecting religious rights. Indeed such protection has been described as 'vital to a conscience-honouring social order'.[7] As the Constitutional Court held in *Minister of Home Affairs v Fourie (Doctors for Life International & others, amici curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) para 94:

'In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular 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.'

[32] Witte states that:

[A]ctive religious rights require that individuals be allowed to exercise their religious beliefs privately and groups be allowed to engage in private worship assembly. More fully conceived, active religious rights embrace an individual's ability to engage in religious assembly, religious speech, religious worship, observance of religious laws and ritual, payment of religious taxes, and the like. They also embrace a religious institution's power to promulgate and enforce internal religious laws of order, organisation, and orthodoxy, to train, select, and discipline religious officials, to establish and maintain institutions of worship, charity, and education, to acquire, use, and dispose of property and literature used in worship and rituals, to communicate with co-believers and proselytes, and many other affirmative acts in manifestation of the beliefs of the institution.' [8]

Furthermore, the determination of who is morally and religiously fit to conduct pastoral duties or who should be excluded for non-conformity with the dictates of the religion, fall within the core of religious functions. For, as Gerhard van der Schyff puts it:

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[6] See sections 15 and 31 of the Constitution. *Taylor v Kurstag NO* 2005 (1) SA 362 (W) para 37.
[7] De Freitas above at 262. For a narrower reading of the right see Lenta above.
[8] J Witte 'The South African Experiment in Religious Human Rights' (1993) *Journal for Juridical Science* 1 at 24-25.

'The right to admit members and clergy would also imply the right to discipline such people in order to enforce conformity and encourage conduct in harmony with religious precepts and teaching.'[9]

[33] Prior to the coming into force of the Constitution, the court refused to 'adjudicate upon a doctrinal dispute between two schisms of a sect unless some proprietary or other legally recognised right was involved' (*Allen & others NNO v Gibbs & others* 1977 (3) SA 212 (SE) at 218A-B). Subsequently, Farlam J observed in *Ryland v Edros* 1997 (2) SA 690 (C) at 703E: 'It seemed to me that s 14 of the [Interim] Constitution might well have changed the position and that the doctrine of doctrinal entanglement may now be part of our law'. This doctrine entails a reluctance of the courts to become involved in doctrinal disputes of a religious character (*Taylor v Kurstag* para 39). The reason underlying the 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.'[10]

This approach is consistent with that taken in comparative foreign jurisdictions.

[34] In the United States the establishment clause prevents courts from determining doctrinal disputes. As it was put in *United States v Ballard* 322 US 78 (1944):

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[9] G van der Schyff *The Right to Freedom of Religion in South Africa* (2001) Dissertation Rand Afrikaans University at 102.

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

‘The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect . . . The First Amendment has a dual aspect. It not only “forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship” but also “safeguards the free exercise of the chosen form of religion.’

As a result, American courts will not entertain religious disputes at all. Decisions of religious tribunals are subject only to such appeals as the religious body itself allows. In *Presbyterian Church v Hull Church* 393 US 440 (1969) it was stated:

‘But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.’

[35] Further, the United States Supreme Court has cautioned against reviews that challenge the rationality of an ecclesiastical body’s decision. The approach was expressed thus in *Serbian Orthodox Diocese v Milivojevich* 426 US 696 (1976):

‘The fallacy fatal to the judgement of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes. Consistently with the First and Fourteenth Amendments “civil courts do not inquire whether the relevant [hierarchical] church governing body has power under religious law [to decide such disputes] . . . .

Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage . . . To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious

doctrine . . . For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

. . .

For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that cannon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.'

[36] Similarly, in the United Kingdom the decisions of ecclesiastical courts are generally not amenable to correction or challenge in the secular courts. That rule, as *R v St Edmundsbury and Ipswich Diocese (Chancellor):* Ex parte *White and Another* [1946] 2 All ER 604 at 605 emphasises in the following excerpt, is of long standing:

'I think that the reason is to be found in this. There has always been in England more than one system of law. I will not say that the canon and civil law is as old as the common law, but it is, at any rate, of antiquity approaching the common law, and was very vigorous and had great effect in the days of the Plantagenets. The common law existed side by side with the civil law, and there were the two sets of courts, the courts spiritual and the common law courts.'

Thus in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249 at 255 the court held:

‘That consideration apart, the court is hardly in a position to regulate what is essentially a religious function – the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state.

One cannot, therefore, escape the conclusion that, if judicial review lies here then one way or another this secular court must inevitably be drawn into adjudicating upon matters intimate to a religious community.’

More recently *Shergill v Khaira* [2014] UKSC 33 para 45 held:

‘This distinction between a religious belief or practice and its civil consequences underlies the way that the English and Scottish courts have always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust.’

[37] Australian law also prohibits courts from determining questions of religious doctrine, practice or procedure. In *Attorney-General (NSW) v Grant* [1976] HCA 38 it was put thus*:*

‘Many of the appellant`s submissions would require this Court to inquire into and decide controversial questions of doctrine (or departure from doctrine) or practice or procedure in ecclesiastical government. In my opinion, however forceful these arguments appear to be, they are outside the judicial sphere.’

[38] Canadian Courts are generally reluctant to interfere in the internal management of voluntary associations, because, as it has been put, they have no interest in the day-to-day activities of those associations. However, as was noted in *Lakeside Colony of Hutterian Brethren v Hofer and Street v. B.C. School Sports*, 2005 BCSC 958 para 45, there are certain basic principles that govern relationships between people, which all people are bound by, and which cannot be contracted out of. The courts have always retained the jurisdiction to govern those basic principles, and so long as the jurisdiction remains restricted and limited to those rarest of cases, the courts have jealously guarded it. The courts have thus traditionally maintained a real and important interest in the processes by which those organizations govern themselves. In *Lakeside Colony of Hutterian Brethren v Hofer*, Gonthier J said of the complex issues involved in reviewing the decisions of a religious tribunal in Canadian law:

'It is not incumbent on the court to review the merits of the decision to expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without *mala fides*. This standard goes back at least to this statement by Stirling J. in *Baird v. Wells* (1890), 44 Ch.D at p. 670:

"The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*. "

. . . The content of the principles of natural justice is flexible and depends on the circumstances in which the question arises. However, the most basic requirements are that of notice, opportunity to make representations, and an unbiased tribunal.

. . .

Hence the root-dilemma of legal intervention: on the one hand, you do not wish to intervene because you cannot specify, often cannot understand, the parties' respective merits; on the other hand, the courts are open to everyone, and can thus be called upon to intervene, which means they must either grant or deny the "right" of expulsion. But whether the courts recognize or resist that right, their task is difficult and delicate. For theirs is not a political task of shielding the "greatest number" or of protecting one's right to be different. The legal task is to formulate rules which will be neutral and equal in relation to all parties.'

[39] As the main dispute in the instant matter concerns the internal rules adopted by the Church, such a dispute, as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.

[40] High court judgments such as *Taylor v Kurtstag* and *Wittmann v Deutsche Schulverein, Pretoria* 1998 (4) SA 423 (T) appear to accept 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. Here, on discovering that the CDC had found against her, the appellant invoked the arbitration provision of the L&D and referred the matter to the convener so that he could take the necessary steps to convene the arbitration. The appellant has never challenged the relevant provisions of the L&D. What is more is that, having initiated the arbitration process and having participated in it for almost a year, the

appellant thereafter seeks to avoid the arbitration by having the matter determined by a court.

[41] All things considered I am not persuaded that the appellant has discharged the onus of establishing good cause within the meaning of s 3(2) of the Arbitration Act. I therefore conclude that the dispute between the parties is best determined by arbitration. It follows that the appeal must fail. The Church commendably agreed to forego the costs of the appeal.

[42] In the result the appeal is dismissed.

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V PONNAN

JUDGE OF APPEAL

Wallis JA (Fourie AJA concurring)

[43] I have had the privilege of reading the judgment prepared by Ponnan JA. I agree with him that in view of Ms de Lange's express disavowal of any contention that she was discriminated against on the grounds of her sexual orientation, we do not have to explore the relationship between her equality rights and the rights of freedom of religion enjoyed by the church and all people in this country. The case is therefore about an alleged arbitration agreement and whether it should be set aside or avoided.

The case both here and below was argued on the footing that there was a binding arbitration agreement concluded by the parties. That is accepted in Ponnan JA's judgment and he proceeds to hold that the application by Ms de Lange to set aside or avoid that agreement was ill-founded. On that footing I agree with him and the conclusion he reaches. I write separately because I have considerable reservations about the correctness of the proposition that there is a binding arbitration agreement between the parties that can be the subject of the order sought by the appellant, Ms de Lange. If my doubts were justified, they would not affect the outcome of the appeal. It would still fall to be dismissed but for different reasons. But my areas of concern relate to fundamental questions relating to the nature of the relationship between a minister ordained in the Methodist Church of Southern Africa and the church, as well as to the application of the Arbitration Act 42 of 1965 (the Act) in this case. In those circumstances I think it appropriate to deal with them.

[44] The Act deals with arbitration agreements. These are defined in s 1 as meaning:

'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not; …'

Section 2 provides that a reference to arbitration is not permissible in respect of any dispute over any matrimonial cause or any matter incidental to such a cause or any matter relating to status. Apart from those restrictions any dispute can be the subject of arbitration, but there must be a dispute not a mere expression of dissatisfaction over the conduct of the other party. The dispute must be capable of formulation in a manner where opposing contentions are or can be advanced so that the arbitrator may make a decision on those contentions.[11]

[45] My first and lesser concern is whether the present dispute relating to the decision by the church to discontinue Ms de Lange as an ordained minister is a dispute over her status and therefore one that it is impermissible to subject to arbitration. The answer to that depends on the meaning to be given to the word 'status' in the context of s 2*(b)* of the Act. It does not appear that this has ever been the subject of judicial decision in this country. Plainly it includes questions of a

[11] *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) paras 10-12.

person's matrimonial status; whether they are a minor or have been tacitly emancipated; whether they have for any reason, such as physical or mental disability, become incapable of managing their affairs; their domicile and similar matters.[12] But it is conceivable that the right of persons to hold an office, which could include a person in the position of a minister of religion ordained to serve within a particular faith or denomination, is also a matter of status that cannot be the subject of an arbitration agreement.[13] If that is the case, and I mention it only as a possibility, the deprivation of the right to perform the duties of that office (in the case of a minister of religion the rites and rituals of that faith) would affect their status and thus preclude resolution by way of arbitration. However, my second concern is more important and I deal with it without further ado.

[46] The requirement that an arbitration agreement be in writing does not mean that it has to be signed or otherwise executed by both parties to the arbitration. All that is required is that the parties have agreed that the dispute in question, or all disputes of a particular character, be submitted to arbitration and that agreement has been reduced to writing. Thus it matters not that the agreement is concluded orally, provided that a written memorial thereof is produced.[14] The important requirement is, however, that there has been an agreement to arbitrate the dispute that is in issue between the parties. That agreement arises contractually.[15] In the absence of such an agreement the Act has no purchase. It does not apply in relation to other dispute resolution procedures, however closely they may resemble arbitration under an arbitration agreement. An oral agreement to arbitrate not reduced to writing is therefore not subject to the provisions of the Act and nor are other forms of dispute resolution proceeding, however similar they may appear to be in the manner in which they are conducted to an arbitration agreement in terms of the Act.

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[12] See *Ampthill Peerage Case* [1976] 2 All ER 411 (HL) at 424 per Lord Simon of Glaisdale: 'Status means the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities.'

[13] In the United Kingdom, until recently, a priest in the Church of England held an office. See *Preston v President of the Methodist Conference* [2013] UKSC 29; [2013] 4 All ER 477 (SC) para 4.

[14] *Mervis Brothers v Interior Acoustics and Another* 1999 (3) SA 607 (W) at 610

[15] D W Butler (original text by C Smith) Joubert 'Arbitration' in Joubert *LAWSA* (Vol 1, 2 ed) para 555. This is no longer the position in English law as a result of s 6(1) of the Arbitration Act 1996 (c 23).

[47] The point is relevant because the application brought by Ms de Lange is one in terms of s 3(2) of the Act. She sought an order that an arbitration agreement between her and the Presiding Bishop of the Methodist Church be set aside, or alternatively declaring that the arbitration agreement between them cease to have effect to any dispute between them. In order for that relief to be granted it was essential that there was in existence an arbitration agreement as defined in the Act. Ms de Lange claimed that there was such an agreement in the form of a document that she signed and made available to the convener of the arbitration panel on 1 November 2010, which she was led to believe had been signed on behalf of the Presiding Bishop on 9 November 2010. The Presiding Bishop for his part contended that the agreement is in the form of a document signed on behalf of Ms de Lange by the convener in June 2011. Her response to this document was that she had no role in it and that it excluded her voice from the process. Notwithstanding this difference of views that emerges from the affidavits the parties have proceeded as if there is an arbitration agreement in place and addressed their arguments on that assumption. In case Ms de Lange chooses to pursue further her grievances in relation to the church's treatment of her, it is as well that the problems in regard to that assumption be identified.

[48] Counsel for the church advanced the following argument. Paragraph 5.11 in the Laws & Development (L & D) of the church provides:

'No legal proceedings shall be instituted by any formal or informal structure or grouping of the church or any minister or any member of the church, acting in their personal or official capacity, against the church or any formal or informal structure or grouping of the Church, Minister or member thereof for any matter which in any way arises from or relates to the mission work, activities or governance of the church. The mediation and arbitration processes and forums prescribed and provided for by the church for conflict dispute resolution (Appendix 14) must be used by all Ministers and members of the church. If a matter is referred to arbitration, the finding of the Arbitrator shall be final and binding on all Minsters and members of the church. . . .'

They contended that this paragraph obliged Ms de Lange to raise her grievances about the disciplinary processes to which she had been subjected by way of arbitration under Appendix 14 of the L & D. The further elements of the arbitration agreement, so the argument proceeded, were to be found in the application of the procedures laid down in Appendix 14.

[49] Appendix 14 provides for an aggrieved party to refer the dispute to the convener of the connexional arbitration panel. In dealing with the role and functions of the convener the material portion of Appendix 14 reads as follows:

'[T]he Convener shall determine and clarify what the issues are from the party/ies. The Convener shall hereafter decide what the correct forum or process is for the matter. The Convener`s decision in this regard shall be binding on all members of the church.

… If arbitration is the correct forum, the Convener shall finalise a written arbitration agreement which both parties shall sign. If either party refuses to sign the said agreement, the Convener shall have the power to sign on their behalf. If the Convener is [not] to be the arbitrator in the particular matter, the said Convener shall designate another arbitrator to this responsibility.'

[50] There is an immediate oddity about this provision. Whilst paragraph 5.11 suggests that there is an obligation to arbitrate disputes rather than resort to secular courts, Appendix 14 suggests that it is for the convener to determine whether the dispute in question should be resolved by arbitration. That interposes the convener between the aggrieved church member, structure or institution and the other party, who may be, as here, the Presiding Bishop, representing the church (bearing in mind that paragraph 5.11 does not bind the Presiding Bishop when acting in his or her official capacity in the interests of the church). It is the convener who decides whether arbitration will occur in relation to any dispute and the convener's decision is final. Whilst I have no doubt that the convener for the time being, as did the convener in this case, would discharge their functions openly and with integrity, if the convener has the power to determine whether or not an arbitration will take place at all, it is hard to see on what basis it can be said that paragraph 5.11 creates a binding arbitration agreement. Put simply a reference to the convener made under it may not result in an arbitration governed by the Act.

[51] The argument that clause 5.11 imposes an obligation to arbitrate disputes is dependent upon the proposition that it, and indeed the entire contents of the L & D of the church, constitutes a contract between church and member and church and minister. It is here that the principal difficulty arises. In order to understand that difficulty it is necessary to examine the structure of the church and the L & D in somewhat greater detail.

[52] The church consists of members who become such after a profession of faith at a public service, also called Confirmation, which is described as a 'solemn service of recognition, commitment, prayer and blessing' in which the member accepts responsibility as a member of the church to live in accordance with the Methodist Rule of Life.[16] The L & D is adopted by the Conference, which clause 5.1 identifies as the governing authority of the church. Its function is to provide direction and inspiration for the Church and it is the sole legislative body of the church. It is also the sole and final authority in respect of the doctrines of the church and their interpretation. Unlike a club, the church's members and clergy do not become such by subscribing to a constitution and the Conference is not established by democratic election among the membership. The Conference draws its membership from the different organisations of the church. Neither the ordinary members nor the body of ministers have any right to attend or vote in its deliberations or any direct role to play in the formulation or contents of the L & D. That serves to distinguish the church from clubs and other similar voluntary associations, where membership affords a right of participation in all the affairs of the organisation, or a company, where the articles of association define the voting rights of all members. The constitutions of voluntary associations and the articles of association of a company are commonly seen to give rise to contractual relationships between the member and the association or company.[17] As the reported decisions show there are churches and other religious organisations that have constitutions adopted and approved by members but the Methodist Church of Southern Africa is not one of them. The L & D is not the same as the constitution of a voluntary association and fulfils a different purpose.

[53] That purpose emerges from the foreword to the 11th edition written by the then Presiding Bishop. He expressed the desire that it would be ' a useful mission tool' in the task of proclaiming 'the gospel of Jesus Christ for healing and transformation'. He

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[16] Chapter 3 of L & D.

[17] As to voluntary associations see the authorities in *Jacobs v Old Apostolic Church of Africa and Another* 1992 (4) SA 172 (Tk GD) at 173B-F and *Yiba and Others v African gospel Church* 1999 (2) SA 949 (C) at 960-1.. As to companies see *De Villiers v Jacobsdal Saltworks (Michaelis and de Villiers) (Pty) Ltd* 1959 (3) SA 873 (O) at 876-7; *Gohlke & Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 692F-G; *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2009 (4) SA 89 (SCA) para 22. The authors of *Henochsberg on the Companies Act 71 of 2008* Vol 1, 74 (looseleaf, Issue 8) express the view that this situation has not been altered by the 2008 Companies Act.

said that its purpose is to facilitate the work of the church. Chapter 1 describes the nature of the church and the role of Methodism within the church universal. Its objects and purposes are exclusively in the religious realm. The primary vocation and responsibility of every member of the church is to declare 'the universality of the grace of God by preaching the gospel'. To that end it reaffirms the 'New Testament truth of the universal priesthood of believers'. Chapter 1 proceeds to explain the origins of Methodism, to describe the sacraments of baptism and the Lord's Supper and their administration, and to set out the basic doctrines of the church. It suffices for my purposes to say that it reflects the faith and beliefs of Methodists and the Methodist church in South Africa.

[54] Chapter 1 sets out the basic principles that govern ministers of the church such as Ms de Lange. The following clauses in the L & D are relevant to this:

'1.19 Christ's ministers in the Church are stewards in the household of God, and shepherds of His flock. Some are called and ordained to this sole occupation, and have a principal and directing part in these great duties.

1.20 It is the universal conviction of the Methodist people that the office of the Christian Ministry depends upon the call of God, who bestows the gifts of the Spirit, the grace and the fruit of which indicate those whom God has chosen.

1.21 Those whom the Church recognises as called of God, and therefore receives into its Ministry, shall be ordained by the imposition of hands with prayer to the Holy Spirit for authority for the office and work of a Minister in the Church of Christ, thus expressing the Church's recognition of the Minister's personal call.'

On this basis the Ministers of the church 'are set apart by ordination to the Ministry of the Word and Sacraments'.[18]

[55] Chapter 4 of the L & D deals with the process by which a person can become an ordained minister in the church. It encourages 'those who are called of God and who have the qualities of Christian character, evangelical zeal and preaching ability to offer for the Ministry' identifying the primary qualifications as being 'the sense of a divine call, spiritual and intellectual gifts, the graces of Christian character, and the fruits of Christian service'.[19] It spells out the training that the candidate for the ministry

[18] Clauses 1.22 and 1.23.5
[19] Clause 4.2 of L & D.

must undergo leading eventually to ordination 'by the solemn imposition of hands'.[20] The minister is then received into full connexion, which includes the authority to perform the work of a minister and to administer the sacraments.[21]

[56] It is difficult to discern in this any intention to create a contractual relationship between the minister and the church, anymore than it is possible to discern an intention by a member or the church to enter into contractual relations when the member is confirmed. The nature of the process, its origin in the ordinand's sense of divine call, the manner in which ordination occurs and the description of the task undertaken by the minister once admitted to full connexion, is wholly inconsistent with the minister and the church, at the point of ordination, separately having an intention to enter into a contractual relationship (the *animus contrahendi*). It is no surprise therefore to find that such a relationship is expressly disavowed in clause 4.3 which provides that:

'The Church recognises its pastoral responsibility to care for the welfare of its Ministers. Nevertheless, notwithstanding any provision contained in the Laws and Discipline or the decisions of Conference or of the Connexional Executive which seem to indicate the contrary, no legally enforceable contract shall exist at any time between the Church or any of its circuits on one hand and a Minister on the other hand, in respect of the payment of stipends, allowances or any other material benefit, in cash or kind, the provision of a station or any benefit of any kind which may have at any stage accrued to a minister.'

[57] Apart from her ordination Ms de Lange did not point to any other occasion upon which the provisions of the L & D could have become the record of a contractual relationship between her and the church. Her approach was simply that as a minister of the church she was bound by the L & D. Whilst it is true that this is accepted by all ministers in the Methodist church, that does not mean that they have concluded a contract to that effect. It seems more likely that their acceptance of the L & D is an obligation and discipline flowing from their calling to be a minister and the acceptance of that call by going through the process of ordination.

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[20] Clause 4.49 of L & D.
[21] Clause 4.48 of L & D.

[58] Apart from her ordination Ms de Lange did not point to any other occasion on which the provisions of clause 5.11, read with Appendix 14, of the L & D were accepted by her, acting with the intention to bring about a contractual relationship at least in regard to arbitration. Indeed in her replying affidavit she expressly said that she was not bound by clause 5.11. Had she signed the arbitration agreement prepared by the convener, that document would then have reflected a binding arbitration agreement, but she declined to do so and it was signed on her behalf by the convener. His authority to do that was derived from clause 5.11, read with clause 2.2.ii of Appendix 14, and, if that lacked contractual status, then he lacked the necessary authority to bind Ms de Lange.

[59] These issues are not novel. They have arisen in various denominations within the broad Christian community when disciplinary steps have been taken against ministers and they have sought to invoke the jurisdiction of tribunals set up to resolve disputes arising in the field of employment. On three occasions the question has come before the Labour Court in this country.[22] The first case dealt with a minister of the Dutch Reformed Church who had been given a letter of appointment by a particular congregation of the church setting out his duties and salary and other benefits that would be due to him in return for the performance of those duties. That was held to constitute a contract of employment. By contrast the second case dealt with the dismissal of an Anglican priest who sought to challenge his dismissal before the CCMA. The priest had been ordained in accordance with the rites and canons of the Anglican Church, which were similar in nature and effect to those in the L & D, and said that this gave rise to a contract of employment. The Labour Court rejected this contention holding that there was no intention to enter into a contractually binding relationship. The basis of the entire process was religious. Similarly in the third case it was held that officers in the Salvation Army did not enter into a contract of employment with the Salvation Army, because their position flowed from their understanding that they were called of God to a spiritual ministry and the relationship between them and the Army was a spiritual one governed by religious conscience.[23]

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[22] *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit* (1999) 20 *ILJ* 1936 (LC); *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration and others* (2001) 22 *ILJ* 2274 (LC) and *Salvation Army (South African Territory) v Minister of Labour* (2005) 26 *ILJ* 126 (LC).

[23] See also *Rogers v Booth* [1937] 2 All ER 751.

[60] Similar conclusions have been reached in cases elsewhere. Waglay J in *Church of the Province*, supra,[24] referred to judgments in Australia and New Zealand to the same effect. Most of these cases in turn refer to judgments in the United Kingdom where there is a fairly substantial body of case law on the topic. It is helpful to refer to the most important of these. Their effect, which is I believe equally applicable in this country, is that in each case one must examine the rules and practices of the particular church and any special arrangements that have been made with the minister or priest to determine whether their actions were intended in any respect to give rise to contractual rights and obligations. In making that assessment one cannot disregard either the religious background to the relationship or the fact that for doctrinal reasons the church and the minister do not regard contractual arrangements as necessary and organise their relationship accordingly.

[61] In *President of the Methodist Conference v Parfitt*,[25] a Methodist minister was dismissed by the governing body of the church in England and sought to challenge his dismissal in the industrial tribunal. The church contended that he fell outside the jurisdiction of the tribunal because there was no contract of employment between him and the church. This contention was upheld and Dillon LJ said:[26]

'… [I]n my judgment, the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination by the imposition of hands and the doctrinal standards of the Methodist Church which are so fundamental to that Church and to the position of every minister in it make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church when the minister was received into full connection. The nature of the stipend supports this view. In the spiritual sense, the minister sets out to serve God as his master; I do not think that it is right to say that in the legal sense he is at the point of ordination undertaking by contract to serve the Church or the Conference as his master throughout the years of his ministry.'

[62] That judgment was followed in *Davies v Presbyterian Church of Wales*.[27] Again the case involved a minister dismissed from his pastorate and seeking relief before the

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[24] Paras 22 and 23.
[25] *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747 (CA).
[26] At 751j-752b.
[27] *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705 (HL).

industrial tribunal. In rejecting the claim on behalf of the House, Lord Templeman said:[28]

'My Lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. But in the present case the pastor of the Church cannot point to any contract between himself and the Church. The book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. The duties owed by the pastor to the Church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the Church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the Church, then his pastorate can be brought to an end by the Church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable Church would sever the link between minister and congregation.'

[63] The subsequent decision of the House of Lords in *Percy v Board of National Mission of the Church of Scotland*[29] suggested that some of this reasoning might be questionable. *Percy* involved a minister who resigned in the face of disciplinary proceedings and then sought to challenge her treatment by the church on the grounds of sex discrimination. She accepted that she was not employed under a contract of employment, but claimed that the circumstances in which she had been offered and had taken up her appointment amounted to a contract to execute work and she therefore fell within the definition of an employee in the relevant legislation.

[64] That contention was upheld. It appeared that the post had been advertised and applications invited on the basis that the successful candidate would be appointed on certain terms and conditions relating to the duties attaching to the post, stipend, accommodation, leave and the like. When the post was offered to Ms Percy these conditions were set out in full and she accepted them. In those circumstances the majority speech by Lord Nicholls of Birkenhead rejected the proposition that the holding of an office is inconsistent with a contractual relationship and concluded in

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[28] At 709g-j.

[29] *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73; [2006] 4 All ER 1354 (HL).

regard to the question of an intention to give rise to a legally-binding relationship that:[30]

'… [T]his principle should not be carried too far. It cannot be carried into arrangements which on their face are to be expected to give rise to legally-binding obligations. The offer and acceptance of a church post for a specific period, with specific provision for the appointee's duties and remuneration and travelling expenses and holidays and accommodation, seems to me to fall firmly within this latter category.

… Further, in this regard there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the church where this is not so. In *President of the Methodist Conference v Parfitt* … Dillon LJ noted that a binding contract of service can be made between a minister and his church. This was echoed by Lord Templeman in your Lordships' House in *Davies v Presbyterian Church of Wales* … Lord Templeman said it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual.'

[65] *Percy* was decided on the footing that although Ms Percy's ordination did not create a contract between her and the church, the circumstances of her appointment to the particular charge were such as to give rise to a contract under which she performed her duties, albeit not a contract of employment.[31] It did not invalidate the earlier decisions that held that the nature of a minister's relationship with the church flowing from ordination was not intended by the parties to be of a contractual nature. This is clear from the summary of the legal position in the majority judgment of Lord Sumption in the recent decision in *Preston v President of the Methodist Conference*,[32] where he said:

'It is clear from the judgments of the majority in *Percy*'s case that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally … The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions

[30] Paras 24 and 25.
[31] See also in this regard Lord Hope of Craighead paras 112-115.
[32] *Preston v President of the Methodist Conference* [2013] UKSC 29; [2013] 4 All ER 477 (SC) para 10.

fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.'

[66] That case was also one in which a minister who had been dismissed sought to challenge her dismissal before an employment tribunal because she claimed her dismissal was unfair. Lord Sumption reviewed the structure of the Methodist Church in the United Kingdom, which shares many of the features of its sister church in this country, and concluded:[33]

'If the arrangements governing the ministry described in the Deed of Union and the standing orders are a contract between the minister in that capacity and the Methodist Church, then it seems to me inevitable that they must be classified as a contract of employment. But that only increases the difficulty of regarding them as a contract at all. Three points seem to me to be cumulatively decisive. First, the manner in which a minister is engaged is incapable of being analysed in terms of contractual formation. Neither the admission of a minister to full connexion nor his or her ordination are themselves contracts. Thereafter, the minister's duties are not consensual. They depend on the unilateral decisions of the Conference. Secondly, the stipend and the manse are due to the minister by virtue only of his or her admission into full connexion and ordination. While he or she remains in full connexion and in the active life, these benefits continue even in the event of sickness or injury, unless he or she is given leave of absence or retires. In addition to the stipend and the manse, the minister has certain procedural rights derived from the disciplinary scheme of the Deed of Union and the standing orders, which determine the manner in which he or she may be suspended or removed from ministerial duties. But the disciplinary scheme is the same for all members of the Church whether they are ministers or ordinary lay members. Third, the relationship between the minister and the Church is not terminable except by the decision of the Conference or its stationing committee or a disciplinary committee. There is no unilateral right to resign, even on notice. I conclude that the ministry described in these instruments is a vocation, by which candidates submit themselves to the discipline of the Church for life. Unless some special arrangement is made with a particular minister, the rights and duties of ministers arise, as it seems to me, entirely from their status in the constitution of the Church and not from any contract.'

One difference between that description and the position in the Methodist church in South Africa is that a minister may resign, but, beyond that, the considerations mentioned by Lord Sumption are equally applicable to Ms de Lange's situation. For

[33] Paragraph 20.

the same reasons it seems to me that her relationship with the church is not a contractual relationship but an expression of her vocation to ministry exercised under the discipline of the church.

[67] I appreciate that the cases I have been discussing are cases where the issue has been whether ordination in accordance with the prescripts of a particular church gives rise to a contract of employment between the minister and the church. But if on her ordination there was no intention by Ms de Lange and the church to enter into a contract in relation to her employment in terms of the L & D, there was likewise no intention to enter into any other contract embodied in that document. And if that is so then in this case there is no arbitration agreement between the parties and no agreement that can be the subject of an application under s 3(2) of the Act. As I have mentioned there would have been a valid arbitration agreement had Ms de Lange and the Presiding Bishop been able to agree upon the terms of such an agreement, but they did not.

[68] For those reasons I have the reservations I have mentioned about the basis upon which the application was argued before us. On the face of matters it was misconceived. If I am correct in that view then the appeal was in any event doomed to fail, but I have expressed these views as they may influence the course of events hereafter. I add, as did Baroness Hale in *Percy*, that I hope that the parties will now seek to settle their differences outside the secular courts, as is clearly the intention of clause 5.11 of the L & D, an intention that I understand to have scriptural support.[34]

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M J D WALLIS

JUDGE OF APPEAL

[34] 1 Corinthians 6 vs 1-6. It is the practice and preference of both Islam and Judaism, and may well be the practice of other faiths, to prefer that religious, and even commercial, disputes between members of the faith be resolved internally and not by the secular courts.

APPEARANCES:

For Appellant:	A de Vos SC (with her A F Schmidt) Instructed by: Pieter van R. Coetzee Attorneys Centurion Webbers Attorneys Bloemfontein
For Respondents:	W Trengove SC (with him I Goodman) Instructed by: Malherbe Rigg & Ranwell Inc Boksburg Symington & De Kok Bloemfontein