NOT REPORTABLE

CASE NO: A 20/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DAVID KAKERO	**1ST APPLICANT**
GERSON UHUPAMUJE NDJAVERA	**2ND APPLICANT**

and

IMMANUEAL HEKEMO	**1ST RESPONDENT**
TJAHEYA MERORO	**2ND RESPONDENT**
FLACON TJIVASERA	**3RD RESPONDENT**
THE STATION COMMANDER OF THE KATUTURA POLICE STATION	**4TH RESPONDENT**

CORAM:	**SMUTS, J**
Heard on:	4 MARCH 2011
Delivered on:	1 APRIL 2011

JUDGMENT

SMUTS J: [1] This is the latest salvo in an ongoing dispute between two opposing factions within the St Stephan Romanna Apostolic Church of Africa in Katutura, Windhoek.

[2] The applicants approached this Court on an urgent basis on 18 February 2011 for spoliation orders and further relief against the first to third respondents on the basis of a rule *nisi*. The fourth respondent is the Station Commander of the Katutura Police Station. The applicants served the application upon some – and not all – of the respondents the previous evening. When the matter was called in Court, Mr Rukoro appeared on behalf of the first to third respondents and asked for a postponement so that his clients could answer to the allegations contained in the founding affidavit.

[3] In view of the nature of the allegations – primarily directed at the spoliation relief – and the fact that the application was set down on Friday afternoon (of 18 February 2011) with the spectre of Church services over the weekend, I was reluctant to grant any postponement for that purpose without undertakings being given. I indicated that those undertakings could be made on the basis of not admitting any of the allegations and entirely without prejudice to the first to third respondents' rights. The first to third respondents duly gave undertakings concerning access to the Church building – which was in issue. Those undertakings were on the basis of not making any admissions. I then granted a postponement of the application to Friday, 4 March 2011 subject to that undertaking with reference to the applicants' rights of access to the Church building in Katutura, Windhoek.

[4] The first to third respondents thereafter filed an answering affidavit on the date designated in the order of postponement and the applicants filed a replying affidavit shortly before the hearing on 4 March 2011.

[5] The exchange of these further affidavits has resulted in factual disputes on almost every issue. What did however emerge as common cause at the hearing on 4 March 2011 is that the applicants had access to the Church building and that they had enjoyed that access after the matter was first called in Court on 18 February 2011 when it was postponed and the undertaking was given. Mr Narib, who appears for the applicants, conceded that a spoliation order would accordingly no longer arise and be necessary. The only live issue then in respect of the relief sought in the first and second prayers of the notice of motion, directed at restoring access to the first and second applicants respectively, would be the question of costs. Surprisingly, the applicants did not file a supplementary affidavit after their access was restored in order to explain how this fact was achieved. Nor was this aspect even addressed in the replying affidavit. This was clearly relevant in view of the denials on the part of the first to third respondents of having deprived the applicants of access at any stage. With that key issue in dispute, I certainly would have thought that the restoration of access – especially in view of the strenuous denials of its deprivation – should have been squarely addressed either by way of a supplementary affidavit and most certainly in the replying affidavit.

[6] Mr Narib who appeared for the applicants, however invited me to draw an inference from the fact the applicants had access after approaching the Court and after an undertaking was given. Whilst an inference adverse to the first to third respondents may be reasonable with reference to the question of access, particularly in view of the refusal on behalf of the first respondent to receive the correspondence referred to in the papers, it would not be the only reasonable inference to be drawn in the circumstances, but is the more natural or plausible one by applying the test in *Govan v Skidmore,*[1] despite the failure on the part of the applicants to address this crucial aspect either in the form of a supplementary affidavit or even in reply. It would follow that the applicants should in the

[1] 1952 (1) SA 732 (N) at 734, see also Ocean & Accident Guarantee SA Corp Ltd v Koch 1963 (4) SA 147 (A)

exercise of my discretion, be entitled to their costs of bringing the application and up to and including the appearance on 18 February 2011.

[7] I turn now to the other relief sought. The applicants also seek an interdict against the first to third respondents from interfering with their rights of access to and use of the Church building and for an order committing the first to third respondents for contempt of Court for violating orders of this Court of 29 October 2009 and 17 November 2010. The other relief sought by the applicants is a mandatory order against the Station Commander of the Katutura Police Station to direct members of the Namibian Police under his command to give effect to the order sought by the applicants. The Station Commander has not opposed the application and has not placed any factual matter before me with reference to the order sought against him. The applicants have in any event not placed sufficient material before me to justify an order of that nature. I would be disinclined to give such an order, even if the requisites for the other interdictory relief sought were to be established.

[8] Mr Narib moved for a rule *nisi* and that the interdict to operate as interim relief pending the return date. This was presumably in view of the fact that the application sought a rule *nisi* when the matter was originally called on 18 February 2011 because of the very short service at the time – and indeed non-service on one of the respondents. As the parties have since had a full opportunity to file answering and replying affidavits, it would not in my view serve any purpose to grant a rule *nisi* at this stage and the matter should be approached on the basis of final relief being sought. When I put this to Mr Narib, he accepted this and moved for final relief in the form of the interdict and committing the first to third respondents for contempt of Court and the order sought against the Station Commander. In the alternative he applied for these issues to be referred to trial in view of the factual disputes on the papers.

[9] Ms Bassingthwaighte, who appeared for the first to third respondents when the matter was agued on 4 March 2011, opposed the interim order and submitted that on the basis of the well established approach to contested facts in motion proceedings articulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [2] that the applicants were not entitled to any final relief at this stage. I agree with that submission. In view of the factual disputes which affected almost every element for the interdictory relief as well as establishing contempt of Court, it is clear to me there can be no question of final relief at this stage. The only question is whether the application for an interdict and to commit the first to third respondents for contempt of Court, should be referred to trial as applied for by Mr Narib on behalf of the applicants or dismissed by reason of the fact that the applicants should have anticipated a dispute of fact on these issues, as was submitted by Ms Bassingthwaighte.

[10] Before addressing this issue, I refer briefly to the position of the second applicant with regard to the interdict he seeks against first to third respondents. It was pointed out by Ms Bassingthwaighte that even on the papers at this stage, it serve no purpose to refer that dispute to trial or to oral evidence, given the fact that his right to occupy the Church building for the purpose of teaching had expired pursuant to the earlier settlement agreement reached between the parties. He would thus not be able to establish an entitlement in the form of a clear right to continue with those teaching activities at the premises in the absence of permission given by the executive committee pursuant to the settlement agreement after the expiry of his right to do so on 10 February 2011. Mr Narib in reply conceded that this right in these circumstances was of a precarious nature after the expiry of the period referred to in the settlement agreement. This concession is in my view correctly made. It would follow that the second applicant would not be able to establish a clear right for the purpose of teaching at the Church building in the absence of an extension to his right to

[2] 1984 (3) SA 623 (A)

do so. It would further follow that he would not be able to establish this important requisite for a final interdict and would fail in his application for the interdict for this reason alone.

[11] As to the two remaining issues upon which the applicants seek a referral to trial, Ms Bassingthwaighte submitted that in view of the history of the matter, the applicants should have anticipated a factual dispute with reference to that relief and should not have approached the Court on an urgent basis for such far reaching relief and should have either sought that relief separately or, as I understood her submissions, by way of action. She went so far as to contend that the seeking of this relief on such short notice amounted to an abuse of process.

[12] Whilst it is not clear to me that the application for these forms of relief on an urgent basis constituted an abuse of process, given the relationship between that relief to the spoliation relief sought, it would certainly seem to me that the applicants should have anticipated that there would be disputes of fact with reference to is further relief sought – over and above the spoliation relief, given the history of disputes between the parties. It would furthermore seem to me that the spoliation order was the principal and primary relief sought when the application was launched. The need for that relief has since fallen away.

[13] As far as the application for a final interdict was concerned, Ms Bassingthwaighte also submitted that the applicants had not discharged the onus of showing the absence of an alternative remedy. The parties had after all agreed upon an executive committee to manage the affairs of the Church in settlement of the previous round of litigation. She pointed out that the applicants had not properly sought to resolve the regulation of access to the Church before that committee. There had only been an attempted meeting on short notice, attended by only one of the factions. Whilst the applicants should have exhausted the possibilities of resolving the dispute in that forum before

approaching the Court, I must also point out that this requirement for an interdict is the absence of an adequate alternative remedy. In view of the conclusion I reach, it is not necessary to determine whether sufficient facts were placed before me to establish that the adequacy of the alternative remedy. But it would seem to me that the parties should clearly ensure that this committee becomes properly functional so that the affairs of the Church can be properly regulated by that body.

[14] As to whether these remaining issues in dispute should be referred to trial, I asked Mr Narib whether he could rather delineate the issues in dispute so that any further proceeding could be confined to those. He had difficulty in doing so and persisted with his application that the interdict and application for committal for contempt should merely be referred for trial in terms of Rule 6 (5) (g).

[15] Having carefully considered the submissions by both counsel, I found myself reluctant to do so and decline that application. In exercising my discretion not to do so, I have taken the following factors into account. Most importantly, the applicants would and could have anticipated serious disputes of fact on these issues in the contests of the long history of disputes between the parties.[3] Instead they proceeded with an urgent application at very short notice against the respondents seeking these forms of relief, including that the interdict operate as an interim interdict pending the finalization of the application, even in the absence of service on one of the respondents. I further take into account that the primary relief sought was of spoliation and that the need for that relief has fallen away. I also take into account that one of the applicants' witnesses, Ms Vindeline Tjihenda made a false statement to the police concerning an aspect of some importance to the application, namely whether she had her key in her possession at a relevant point in time, this was common cause and there was an attempt to explain this way in reply.

[3] Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) 1155 (T) at 1162

[16] I accordingly decline the application for referral to trial, and dismiss the application for the relief in prayers 2.3 and 2.5 of the notice of motion. The relief sought against the Station Commander (in paragraph 2.4) is also dismissed.

[17] The question which now arises is one of costs. Mr Narib has pointed out that it was only after the applicants approached this Court that their access was restored and that they thus needed to approach the Court and, as a consequence, should be awarded costs. I have already addressed this issue and I am prepared to make such an order, but limiting costs to18 February 2011. I do so despite the failure on the part of the applicants to have explained how their possession was restored in the face of the vehement denials of deprivation. I also take into account that that was the primary relief sought and that the need for a spoliation order fell away after the bringing of the application. The respondents may consider that they have obtained a measure of success in their defense of this application, as I decline to refer the further relief to trial. I have carefully considered the factual matter raised in the application and the conduct of the respective parties. I was especially not impressed with the first respondent's refusal to even accept correspondence emanating from the applicants. Had he done so and had the correspondence been properly addressed and lawyers been engaged on both sides at that stage, the need for the application may not even have been arisen. But he has been mulcted with the costs up to 18 February 2011. As the respondents succeeded in dismissing the application for further relief, they would be entitled to the costs following 18 February and including the hearing on 4 March 2011. In the exercise of my discretion, I accordingly make those orders as to costs.

[18] Given the fact that the relief sought in prayers 2.1 and 2.2 has fallen away. I make no order in that regard. I further decline to refer the relief sought in prayers 2.3 and 2.5 to trial and dismiss the application for the relief sought in these prayers. I would furthermore not grant the relief sought in prayer 2.4. The

first to third respondents are directed to pay the applicants' costs up to and including 18 February 2011. The applicants are directed to pay the first to third respondents' costs incurred after 18 February 2011. Both costs orders include the costs of one instructing and one instructed counsel, where engaged.

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SMUTS, J

ON BEHALF OF THE APPLICANTS	ADV. G NARIB
Instructed by:	VAN DER MERWE-GREEFF INC
ON BEHALF OF DEFENDANT	ADV. N. BASSINGTHWAIGHTE
Instructed by:	LORENTZANGULA INC