



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: A 127/2005

In the matter between:

**FATHER GERT DOMINIC PETRUS**

**APPLICANT**

and

**ROMAN CATHOLIC CHURCH**

**1<sup>ST</sup> RESPONDENT**

**ARCHBISHOP LIBORIUS NASHENDA**

**2<sup>ND</sup> RESPONDENT**

**Neutral citation:** *Petrus v Roman Catholic Church* ( A 127/2005) [2012] NAHCMD  
66 (14 November 2012)

**Coram:** MILLER AJ

**Heard:** 01 November 2012

**Delivered:** 14 November 2012

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**ORDER**

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The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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## JUDGMENT

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### MILLER AJ:

[1] In this matter the applicant, who appeared before me in person seeks the following relief:

- “1. Declaring rule nisi issued under case no. A 127/2005 by this Honourable Court on 31 May 2006 to be void.
2. Declaring confirmation of rule nisi under case no. (P) A 127/2005 by this Honourable Court on 18 July 2005 to be void; and
3. Declaring judgment granted by this Honourable Court on 14 January 2008 under case no. A 30/2005 (12/2006) to be void.
4. Uplifting the declared penalty of excommunication which has been going on indefinitely.
5. Reinstatement of applicant in his office as parish priest and residence in Khomasdal.”

This matter is opposed by the respondents who were represented by Mr. Dicks.

### **Background**

[2] The matter dates back to the year 2005. On 31 May 2005 the first respondent in case no. A 127/2005 obtained the following interim relief against the present applicant. The rule nisi was issued by Manyarara AJ.

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#### **IT IS ORDERED:**

1. That a rule nisi is hereby issued, calling upon the respondent to show cause, if any, on Monday 18<sup>th</sup> July 2005 at 09h30 why an order in the following terms should not be made final:
  - 1.1 Declaring that the respondent be excommunicated from the applicant.

1.2 Interdicting and restraining the respondent from conducting services on the premises of the applicant situated at 4882 Borgward Street, Khomasdal, Windhoek.

1.3 Ejecting the respondent from the parish residence and the premises of the applicant situated at 4882 Borgward Street, Khomasdal, Windhoek.

1.4 That the respondent be ordered to pay the costs of the application.

1.5 Further and or alternative relief.

2. That the relief as set out under 1.1, 1.2 and 1.3 supra shall become operative with immediate effect and that it shall serve as an interdict, pending the return date of this application.

3. That the respondent shall vacate the parish residence and the premises of the applicant situated at 4882 Borgward Street, Khomasdal, Windhoek, in terms of the interim order under 1.3, as read with 2, by not later than 15 June 2005, failing which the applicant may execute the interim order by ejecting the respondent in terms of this court order.

4. That the respondent is ordered to file its answering affidavit by not later than 15<sup>th</sup> June 2005.

5. That the applicant shall be given time until 4<sup>th</sup> of July 2005 to reply to such answering affidavit.”

[3] The applicant then failed to file any opposing affidavits with the result that the matter was placed on the unopposed motion court roll on 18 July 2005. Heathcote AJ then confirmed this rule issued by Manyarara J.

[4] After a lapse of six months the applicant in case A 30/2005 and by way of application sought an order rescinding the orders made in case A 127/2005. The matter was heard by Pickering AJ on 9 July 2007. Pickering AJ reserved his judgment which he ultimately pronounced on 14 January 2008 and in which the application was dismissed with costs.

[5] A further period of more than 18 months elapsed until the applicant filed a notice of appeal to the Supreme Court against the judgment of Pickering AJ. The appeal was heard by Mainga JA, Langa AJA and O'Regan AJA on 07 April 2011.

On 9 June 2011 in a judgment written by O'Regan AJA the following orders were made:

- “1. The application for condonation for the late filing of the appeal is refused.
2. The appeal is struck from the roll.
3. The appellant is ordered to pay the costs of the respondent, such costs to include the costs of one instructed and one instructing counsel.”

[6] The present proceedings were launched on 17 November 2011.

### **The present application**

[7] Inasmuch as the applicant seeks firstly that I set aside the rule nisi issued on 31 May 2005, it remains only to state that such relief is not well founded. Once the rule nisi was confirmed it ceased to exist as a rule nisi. Instead the orders were made final orders when Heathcote AJ confirmed the rule nisi on 18 July 2005. I pause to mention in any event that the rule nisi was granted by consent between the parties.

[8] The confirmation of the rule nisi and the unsuccessful application to have the orders rescinded can conveniently be dealt with together.

[9] These were in essence the subject of the appeal to the Supreme Court. In the course of her judgment O'Regan AJA dealt with the order declaring that the applicant was validly excommunicated in the following way:

“[27] The High Court apparently did not consider the question whether it had jurisdiction to determine whether the appellant had been validly excommunicated in terms of canon law either when the original rule was confirmed in July 2005 or in January 2008 when the application for rescission was refused.

[28] Yet it is clear that the relief sought by the respondent declaring that the appellant has been excommunicated from the church is relief based entirely on ecclesiastical or canon law, matters over which neither the High Court, nor this court has jurisdiction. On the other hand, the relief sought in the other two prayers (the eviction of the appellant from the parish residence, and the interdict preventing the appellant from performing services in the parish church) are at least forms of relief which are based on civil law, in particular the rights of the respondent as owner of the property to exclude the appellant from that property. These two latter prayers do involve an assertion by the respondent of its “civil rights” (in the words of Dumbutshena JA in the Mankatshu case, cited above).

[29] At common law, all the respondent needed to do to entitle it to an order of eviction was to assert its right of ownership and the fact that it did not consent to the respondent continuing to reside on the premises or to conduct services at the church. However, instead the respondent sought an order declaring that the appellant had been excommunicated, relief beyond the jurisdiction of the High Court.

[30] This brief examination of the merits of the case makes plain that there are good prospects that the first prayer granted by the High Court may be overturned on appeal. Even were the appellant to succeed to this extent, however, the appellant’s status as a member of the church would not be affected. As the appellant admitted in argument in this court, ultimately his status as a member of the church is a matter that can only be determined by canon law, not by the civil courts.”

[10] As far as the eviction order and interdict are concerned O’Regan AJA stated the following:

“The appellant’s prospects of success in relation to the eviction order and interdict are less promising as they involve the adjudication of civil rights. It is clear that the respondent has withdrawn its consent to the appellant residing in the parish house and to the appellant’s conducting services in the parish church. Accordingly, although the appellant may have prospects of success in relation to the first order made by the High Court, his prospects of success in relation to the other two orders are less pronounced.”

[11] I agree with Mr. Dicks that there is no need or reason to revisit the excommunication order. It was void ab initio and does not require to be set aside.

[12] As far as the remainder of the order are concerned those were issues over which the court had jurisdiction. The legal processes available to the applicant were all exhausted by him culminating in his appeal to the Supreme Court. The orders are now res judicata and it is not open to the applicant to revisit them.

[13] The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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P J Miller  
Acting Judge

## APPEARANCES

APPLICANT : In person

FOR THE RESPONDENTS: G DICKS  
Instructed by Lorentz Angula Inc.