THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 11159/2013

In the matter between:

ECCLESIA DE LANGE Applicant

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

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JUDGMENT: 26 JUNE 2013

VELDHUIZEN J:

[1] The applicant applies for an order:

'1. Setting aside the arbitration agreement between the parties in terms of the First and Second Respondent's Laws and

Discipline, alternatively and 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 of the First Respondent's Cape of Good Hope District 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 discontinuance 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'

The applicant also seeks an appropriate costs order

BACKGROUND

[2] On 28 August 2001 the applicant was accepted as a probation minister by the Connexional Executive of the Methodist Church ('the church'). She was thereafter stationed and served as probation minister in various towns. In December 2003 the applicant obtained her diploma in theology whilst undergoing training as a probation minister. In April 2005

she received an honours degree in theology and on 15 June 2006 she obtained the degree Master of Social Sciences in religious studies from the University of Cape Town.

[3] In August 2006 she was ordained as a minister of the church. She thereafter, for a period of 5 years from 1 January 2007 until December 2011, served the Brackenfell and Windsor Park congregations. From the end of 2003 the applicant also resided in the manse of the church at Grassy Park, Cape Town.

[4] In her late teens the applicant came to the realisation that she was a lesbian. After a long, tortuous and at times painful journey she accepted her sexual orientation.

[5] During April 2004 she met her same sex life partner and commenced a love relationship. During December 2004 her life partner move in with her in the official manse of the church and they proceeded to reside together. She states that this fact was well known to the church and its office bearers.

[6] During 2008 she and her life partner discussed the possibility of marriage and during 2009 they decided to get married. On Sunday 6 December 2009 after the formal service she announced her intended marriage to a combined congregation at Windsor Park Church.

[7] On the same afternoon of her announcement the applicant was informed by her superintendent that he had contacted the district bishop of the church to inquire how the church should proceed from thereon. The applicant met with the district bishop and explained her version of events and why she held the view that the church should not have a problem with her intended marriage and the announcement thereof.

[8] On 8 December 2009 the applicant was informed that a charge had been laid against her and on 10 December 2009 she was suspended

pending the outcome of a disciplinary hearing. The date for the hearing was finally set for 22 December 2009.

[9] The charge against the applicant reads as follows:

> '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 15th December 2009, it being the Church's policy, practice and usage to recognise only heterosexual marriages.'

[10] The applicant and her lay representative, the Reverend Tim Atwell, appeared at the hearing. After reserving judgment the disciplinary committee, on 13 January 2010 announced:

> 'The Disciplinary Committee returned the following
>
> Verdict:
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> The committee finds Rev de Lange guilty of failing to observe the provisions of the Laws & Discipline and all other policies, decisions, practices and usages of the Church (L&D 11th 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
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> Time already served under suspension.
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> Recommendation
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> 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.'

[11] On 18 January 2010 the applicant filed a Notice of Appeal. On 20 February 2010 she was informed by letter from the presiding bishop that:

'Verdict

The verdict of guilty by the DDC is hereby confirmed.'

Sentence

The Applicant, Reverend De Lange shall be discontinued from the Ministry of the Methodist Church of Southern Africa.'

[12] The applicant thereafter and in terms of rule 5.11 of the Laws and Discipline ('L&D') of the church proceeded to put the process of arbitration in motion. However before the arbitration hearing could take place the applicant launched the present application.

[13] The respondents *in limine* contend that the applicant is bound by the L&D and more particularly rule 5.11 and that the dispute should accordingly be referred to arbitration. The applicant countered this contention and submitted that it would not only be unrealistic but also grossly unfair to expect of the applicant to take part in 'an arbitration process that would clearly be futile, unfair and serve no purpose.'

DISCUSSION

[14] Rule 5.11 of the L&D provides as follows:

'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 Ministers and members of the church. Notwithstanding anything to the contrary contained in this paragraph, the provisions thereof do not apply to the Presiding Bishop in conjunction with the Executive Secretary when acting in their official capacity in the interests of the Church.'

Clause 2 of Appendix 14 provides:

'The Arbitration Act, 1965 shall apply to all arbitrations in the MCSA.'

[15] It is now accepted law that the Arbitration Act, No 42 of 1965 ('the Arbitration Act') and the Constitution can exist side by side. [1] The applicant is accordingly bound to submit to arbitration unless, as the applicant requests, I rule to the contrary in terms of s 3(2) of the Arbitration Act. Section 3(2) of the Arbitration Act reads:

'(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.'

[16] In *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) Galgut AJA stated at 333H:

'(T)he discretion of the Court to refuse arbitration, where such an agreement exists, was to be exercised judicially, and only when a "very strong case" had been made out.'

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[1] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 44; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC)

He went on to state at 334A that:

> 'It is not possible to define, and certainly it is undesirable for any Court to attempt to define with any degree of precision, what circumstances would constitute a "very strong case".'

[17] The applicant complains that there has been a long delay in finalising the arbitration agreement and submits that '*De facto* the position was (and still is) that there exists no arbitration agreement signed by both parties.' Appendix 14 rule 2.2(i) provides that 'any member or minister may refer a matter to the Convener of the Arbitration Panel.' The convener is then obliged to 'determine and clarify what the issues are from the party/ies.' The next step is for the convener to decide the correct forum for the dispute. Should he decide that arbitration is the correct forum, he is obliged to finalise a written arbitration agreement which both parties are required to sign and if either party refuses to sign, he is empowered to sign on his or her behalf. (Appendix 14 rule 2.2(ii)).

[18] Under cover of a letter dated 29 April 2010 the convener sent the applicant a draft agreement which contained the clauses usually inserted by him in arbitration agreements. He stated that the applicant's notice was very broad and the nature of the relief which she sought was not clear to him. He invited the applicant or her attorney to discuss the matter with him.

[19] A number of draft agreements were thereafter exchanged between the applicant and the convener. Eventually on 28 October 2010 the convener sent what he described as the final agreement to the applicant. This she signed under protest. The church, however, did not sign this agreement but an amended one which omitted certain of the clauses from the convener's 'final agreement.' When the matter came before the arbitrator, adv Gerald Bloem SC, a member of the Grahamstown Bar, he refused to hear it on the ground that there was no agreement before him. He accordingly referred the matter back to the convener. The parties

could not agree on the terms of the arbitration agreement and eventually the arbitration agreement was signed by the first respondent and the convener who, in terms of Appendix 14 rule 2.2(ii), signed on behalf of the applicant.

[20] The applicant contends that the conduct of the convener and the church exhibits a clear bias against her. She bases her apprehension on the deletion of clause 7 from the agreement which she signed and the inclusion of the church's clause 7 as well as clause 12 in the final agreement signed on her behalf by the convener.

[21] I deal first with clause 12. It reads: 'The award of the arbitrator shall be final and binding on all parties.' I find it difficult to see how the inclusion of this clause can found a valid complaint by the applicant. Rule 5.11 of the L&D, to which the parties are bound, clearly state 'If the matter is referred to arbitration, the finding of the Arbitrator shall be final and binding on all Ministers and members of the church.' Furthermore s 28 of the Arbitration Act provides:

> '**28 Award to be binding**
> Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.'

The original agreement which the applicant signed did not contain any clause providing for an appeal against the arbitrator's award. That being the case the award would in any event in terms of s 28 of the Arbitration Act have been final and not subject to appeal.

[22] The applicant's next complaint concerns the wording of clause 7 of the arbitration agreement. Clause 7 of the agreement signed by the applicant read:

> 'The parties, by signing this agreement, do not waive any rights they may have to raise any objections in terms of the law, to the cause of action in the disciplinary, appeal or arbitration procedures or the proceedings with regard to any of same, be it on merits or

procedural of nature, in the statement of claim or any other pleading allowed thereafter and at the hearing.'

In the final arbitration agreement this clause was replaced with the following one:

'The arbitrator shall have the power to make whatever award he may deem appropriate and just.'

[23] Clause 7 of the final agreement contains nothing objectionable. In my view it simply states the arbitator's power as being what one would expect it to be. Clause 7 of the agreement signed by the applicant only stated that she does not 'waive any rights' which she may have. Again, in my view, the final agreement does not take away or impinge on any of those rights.

[24] The applicant also objects to the arbitrator as someone appointed by the church as 'one of its own'. I take this to mean that the arbitrator is not independent and will simply make an award which will suit the respondents. The mere fact that the arbitrator is a member of the church is not sufficient cause for complaint and it does not warrant the inference that he will side with the church's point of view or that he will not be objective. It certainly does not warrant the imputation that he is biased in favour of the respondents.

[25] The issues referred to the arbitrator for decision are contained in clause 3 of the arbitration agreement. It reads:

'The issues to be decided are:

3.1 Did the District Disciplinary Committee and/or the Connexional Disciplinary Committee have the jurisdictional authority to deal with the charges that were laid against the Complainant, namely that she acted in breach of paragraphs 4.82 and 11.3 in that contrary to the Laws and Discipline and/or policies, decisions, practices and usage of the

Methodist Church of Southern Africa she announced to the Brackenfell and Windsor Park Societies her intention to enter into a same sex civil union on the 15th December 2009, it being the church's policy, practice and usage to recognise only heterosexual marriages.

3.2 Does the arbitrator have the jurisdictional authority to deal with this dispute?

3.3 Should the:

3.3.1 the verdict and sentence of the Second Respondent; and

3.3.2 the decision of the First Respondent to discontinue the Complainant;

be reviewed and set aside?'

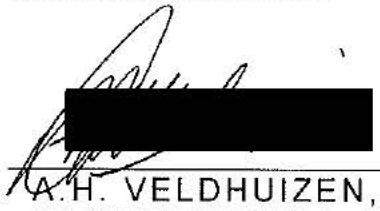
These issues are, in my view, wide enough to address all of the applicant's concerns.

[26] In my view it cannot be said that arbitration of the issues will be futile or unfair or that it will serve no purpose as was submitted by the applicant.

CONCLUSION

[27] In the result I conclude that the applicant's application is premature and that she should first submit to arbitration.

[28] The applicant's application is accordingly dismissed with costs.



A.H. VELDHUIZEN, J
JUDGE OF THE HIGH COURT