CASE NO.: FA 7/97

PINKSTER GEMEENTE VAN NAMIBIA (PREVIOUSLY SWA) versus NAVOLGERS VAN CHRISTUS KERK VAN SA AND ANOTHER

HANNAH. A.J.P.. £t MTAMBANENGWE, J., et GIBSON, J.

1998/03/23

CIVIL PROCEDURE

Authority to bring application. Lack of authority can be ratified retrospectively.

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CASE NO. FA 7/97

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PINKSTER GEMEENTE VAN NAMIBIA **APPELLANT**

(PREVIOUSLY SWA)

and

NAVOLGERS VAN CHRISTUS KERK VAN SA **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS WINDHOEK **SECOND RESPONDENT**

CORAM: HANNAH, A.J.P., et MTAMBANENGWE, J., et GIBSON, J.

Heard on: 1998.03.23

Delivered on: 1998.03.23

JUDGMENT:

HANNAH. A.J.P.: This is an appeal from a judgment of Teek, J in which he dismissed the appellant's application for an order to set aside a certain change of name made by the Deeds Office relating to Erf 116, Luiperdsheuwel, Extension No 1, Grootfontein. At the conclusion of argument we dismissed the appeal with costs. The following are our reasons for doing so.

The facts, as set out in the applicant's founding affidavit, are relatively straightforward. Both the applicant and the first respondent are churches. Since the early nineties, there have,

unfortunately, been disputes between them. However, in April, 1994 they entered into a settlement agreement. It is as well to set out this agreement in full. It reads as follows:

"Settlement agreement between Die Navolgers van Christus Kerk and Vrye Pinkster Kerk at Windhoek this the 23rd day of April 1994.

This agreement contains the following binding settlement terms for both parties:

1. The Vrye Pinkster Kerk proposes:

   i) That they are prepared to grant the property in Grootfontein unconditionally to the Navolgers van Christus Kerk.

   ii) That they keep the property in Walvis Bay with its present payment balance.

   iii) That each party pay its legal costs to date hereof.

   iv) They consider no further claims against the Navolgers Kerk.

2. The Navolgers van Chrisms Kerk undertakes:

i) To accept without amendment the above mentioned settlement agreements suggested by the Vrye Pinkster Kerk.

ii) That the civil, as well as the criminal court case against Pastor Willem van der Colff and against the Vrye Pinkster Kerk be withdrawn unconditionally."

I should mention that in its replying affidavit the applicant asks that its name, as given on the notice of motion, be amended to add "Vrye" before "Pinkster" as that is its correct name. Apparently this was not dealt with by the Court *a quo* but there can be no prejudice to the first respondent if that is done.

According to the deponent to the founding affidavit, van der Colff, it was implicit in the terms of the settlement agreement that when withdrawing the civil action which was pending against him the first respondent should tender payment of his, van der Colff s, costs; but this the first respondent refused to do. Accordingly, the applicant refused to transfer the Grootfontein property which was registered in the name of "Pinkster Gemeente van S.W.A." However, on 15th April, 1995 an application was made on behalf of the first respondent for that name to be changed to the first respondent's name and the name was changed. The applicant contends that that act was unlawful and seeks to have it set aside and the *status quo ante* restored.

In its answering affidavit the first respondent sets out its version of the dispute which led to the settlement agreement being made. The account given is essentially as follows. During 1964 the deponent to the affidavit, Peter Poole, founded a church in Cape Town called "Pinkster Gemeente van SA". A year or two later van der Colff became a member of the church. During 1969 van der Colff was transferred by his employer to Walvis Bay. With the

approval of Poole, van der Colff then established a congregation at Walvis Bay under the name "Pinkster Gemeente van SA en SWA". This was a branch of the first respondent. During 1976 or 1977 van der Colff became a pastor in the church and was "sworn in" by Poole. Congregations were subsequently established in other Namibian towns including Grootfontein. In 1979 the name of the church was changed to "Navolgers van Christus Kerk". However, members of the Walvis Bay congregation were not happy with this change. It was decided that they and the other congregations in Namibia could continue to use the name "Pinkster Gemeente van SWA".

On 2nd February, 1982 the Walvis Bay congregation, with the approval of the National Council based in Cape Town, purchased an erf at Walvis Bay with a view to building a church on it. In 1983 this erf was registered in the name of "Die Nasionale Raad van die Pinkster Gemeente van SWA". The only National Council was that which existed in Cape Town. The church building was inaugurated on 1st September, 1985 and the inauguration was attended by 100 or 200 members of the Cape Town congregation. On 8th October, 1987 the congregation at Grootfontein, again with the approval of the National Council, likewise acquired an erf for the purpose of building a church. This was the erf with which this appeal is concerned. The erf was also registered in the name of "Die Nasionale Raad van die Pinkster Gemeente van SWA".

In about 1990 certain differences arose between van der Colff and certain members of both the Walvis Bay and Grootfontein congregation. This led to a decision by the National Council to terminate his services. On 20th August, 1991 van der Colff was informed of the decision and was requested to vacate the church's property at Walvis Bay. However, he refused to vacate and also refused to refrain from involving himself in church matters. The first respondent thereupon brought an action in the Supreme Court of South Africa for his ejectment. Van der Colff

entered a plea denying that the first respondent was the owner of the property in question and denying that it was in his possession. Van der Colff remained in possession of the first respondent's property at Walvis Bay and ran a church under the

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name "die Vrye Pinkster Gemeente van SWA" which, according to the first respondent, was a different church from its own. It was in these circumstances that the settlement agreement was made and on 22nd August, 1994 the first respondent withdrew its action against van der Colff in terms of that agreement.

Shortly after the settlement agreement was concluded the National Council, after consultation with the Grootfontein Congregation, decided to change the name of the church to "Navolgers van Christus Kerk". As erf 116 Luiperdsheuwel was registered under the name "Pinkster Gemeente van SWA" it was also decided that application to the Registrar of Deeds be made for the name of the owner to be changed. And so it came about that the Registrar changed the name.

What the first respondent's case comes to is this. It has always been the owner of the properties purchased in Namibia and denies that prior to 20th August, 1991 when van der Colff s services were terminated there was a separate church in Namibia with the name "Pinkster Gemeente van SWA". That church, it contends, was part of the first respondent church but continuing to use the original name. All property registered in the name of "Pinkster Gemeente van SWA" belonged to the first respondent. Quite apart from the settlement agreement it was, as owner, entitled to register any change of name. But because van der Colff took a different view and regarded the appellant as a distinct and separate church from the time it was established it became desirable to settle their differences. And so it was agreed between the parties that in future the appellant should go its own way with the Walvis Bay property while the first respondent should continue to have the Grootfontein property.

I now come to the appeal itself. Van der Colff failed to state in the founding affidavit that he was authorised by the appellant to bring the application and to depose to the affidavit. This point was taken in the answering affidavit and it was only in the replying affidavit that van der Colff averred that he had the requisite authority and annexed a resolution passed by the appellant ratifying his previous acts. At the hearing before Teek, J. the first respondent successfully took the point *in limine* that lack of authority at the time when an application is brought cannot be ratified retrospectively. This was one ground for dismissing the application.

When upholding the first point *in limine* Teek, J. followed *S.A. Milling Co. (Pty) Ltd v Reddy* 1989 (3) S.A. 431 (E); *United Methodist Church of S.A.* v *Sokitfundumala* 1989 (4) S.A. 1055 (O) and *Interboard S.A. (Pty) Ltd* v *Van der Berg* 1989 (4) S.A. 166 (0). But Mr Coetzee, for the first respondent, conceded before us that there are two lines of conflicting authority on the point in question and it does not appear from his judgment that Teek, J. considered the other line. The principal source for the other line is *Baeck & Co. S.A. (Pty) Ltd*
v Van Zummeren and Another 1982 (2) S.A. 112 (W).

In the *South African Milling* case *(supra)* Kannemeyer J. held that an objection by the opposing litigant precludes ratification of the unauthorised institution of proceedings by the purported agent because the opposing party, by objecting, acquires a right to move for the dismissal of the application on the ground of *locus standi*. The opposing party cannot, by ratification, be deprived to his prejudice of such right. In the *Baeck* case *(supra)* Goldstone J., having noted that in reaching his conclusion Kannemeyer J. had relied on authorities to the effect that ratification cannot affect vested rights previously acquired by third parties, said the following at 119 H:

"However, in the case before him, as in the case now before me, no change in the legal position between the parties had occurred between the time that the application was launched and the time when the unauthorised act was ratified. The 'right to move for the dismissal of the application on the ground of lack of *locus standi'* is, with respect, hardly what one would envisage as constituting a 'vested right'. Indeed, there is high authority to the contrary."

Then, having referred to *Garment Workers' Union of the Cape and Another* 1946 AD 370, the learned judge concluded that ratification of the unauthorised act of bringing application proceedings does retrospectively operate to cure the original lack of authority.

I had occasion to consider these two conflicting lines of authority in *Commercial Bank of Namibia v Myburgh and Another* (Case A 171/96)(unreported) and I concluded that the correct approach was that adopted in the *Baeck* case *(supra).* I stated that I agreed with the analysis of the position by Conradie J. in *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd and Another* 1994 (1) S.A. 659 (C) and I see no reason to change my view.

Quite apart from legal principle, the question of authority to bring an application concerns, ultimately, the question of costs. Once it is shown that the person who brings an application on behalf of another has the authority to do so then that other will be bound by an order for costs against him. If he had no authority at the outset then ratification of the steps he has taken must be obtained in order to bind that other party who, at least in name, is the applicant. To use the words of Conradie J. in the *Merlin Gerin* case *(supra)* at 660:

"In this way, ratification would not harm but benefit the respondent..."

Both on a legal and pragmatic level the approach adopted in the *Baeck* case *(supra)* is, in my opinion, to be

preferred.

In the *Commercial Bank of Namibia* case it was also argued that a litigant should not be permitted to raise the question of ratification in a replying affidavit. That, of course, is another matter. However, it was decided that as it resolved the matter in a simple, straightforward manner there could be no objection to allowing the applicant the opportunity of putting his case in order. In the present case I can likewise see no real objection.

However, this should not be seen as a relaxation of the general rule that an applicant must make his case in the founding affidavit. It is only in very limited circumstances that the introduction of a new matter will be permitted in a replying affidavit when it should have been included in the founding affidavit.

In the present case no change in the legal position between the parties occurred between the time when the application was launched and the time when van der Colff s unauthorised act was ratified and, in these circumstances, I am of the opinion that the first ground of appeal should succeed.

The other point *in limine* taken by the first respondent before Teek, J. was that the application should be dismissed on the basis that the appellant knew that material disputes of fact would arise and should have instituted proceedings by way of action. This point was also upheld by the learned judge and Mr Vaatz, for the appellant, submitted to us that it was wrongly upheld.

In his submission Mr Vaatz said that the application only raised two issues of fact. One was whether the appellant was the registered owner of Erf 116, Luiperdsheuwel. The other was whether the appellant had ever changed its

name to that of the first respondent. Counsel argued that the answers to these two questions are clear. One only has to look at the title deed to see that prior to the amendment of the name by the Registrar the property was registered in the name of the appellant. And one only has to look at the settlement agreement to see that the appellant and the first respondent are two separate and distinct legal entities.

The appellant, which was and is the registered owner, did not change its name. What was required for the Grootfontein property to be "granted" to the first respondent, the word used in the settlement agreement, was an act of transfer. Mr Vaatz also relied heavily on the fact that the application to amend the name appears to be tainted with irregularity; but, even accepting this to be the case the argument begs the real question in the case, namely who was the owner?

Mr Coetzee submitted that the two questions posed by Mr Vaatz miss the real point in the case. The real issue in the case, he submitted, is whether, prior to 20th August, 1991 when van der Colff was dismissed from his position in the first respondent church, the appellant and the first respondent were two separate legal entities or not. If they were not, as is contended by Poole, then the properties at Walvis Bay and Grootfontein belonged to the first respondent. That, of course, was disputed by van der Colff and that, of course, led to the settlement agreement. But if Poole's contention is right the first respondent, not the appellant, was at all times the registered owner of the properties and, as such, could effect the amendment of name at the Deeds Office. The dispute as to whether the appellant and the first respondent were two separate legal entities prior to the dismissal of van der Colff and the question whether there even was a genuine dismissal is a dispute which cannot be resolved on the papers. And having regard to the history of the matter, including the prior litigation, the appellant must have known of the dispute and should never have instituted proceedings by way of notice of motion.

In my judgment, Mr Coetzee's analysis of the issues is the correct one. The first question posed by Mr Vaatz is far too simplistic. In order to ascertain whether the appellant is entitled to the relief sought in the application it is necessary to ascertain whether there was one church albeit having a different name in Namibia as alleged by the first respondent or whether since its formation in Namibia die Pinkster Gemeente van SWA was a separate legal entity. That dispute cannot, in my view, properly be resolved on the papers and the appellant should have realised not only that the dispute would arise but that it would be incapable of resolution on affidavit evidence.

Mr Vaatz, in anticipation of such a conclusion, advanced the further argument that the Court *a quo* should nonetheless have ordered the parties to trial so that the issues of fact could be determined. That was a course open to the learned judge but in the exercise of his discretion he chose not to take it. Having regard to the fact that the appellant should have known of the probability of a potentially protracted enquiry into disputed facts when it commenced the proceedings by motion and having regard to the fact that in its founding affidavit the appellant alleged that the first respondent acted dishonestly and fraudulently in effecting the change of name, I am of the view that the learned judge in the Court *a quo* correctly exercised his discretion when dismissing the application rather than ordering the parties to trial.

For the foregoing reasons the appeal was dismissed with costs.

ON BEHALF OF THE APPELLANT: MR A VAATZ

Instructed by: **A VAATZ & PARTNERS**

ON BEHALF OF THE 1ST RESPONDENT: **ADV G S COETZEE**

Instructed by: **DR WEDER, KRUGER & HARTMANN**