

**REPUBLIC OF NAMIBIA**



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

**RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE**

Case No.: I 3244/2014

In the matter between:

<b>THE BOARD OF INCORPORATORS OF THE AFRICAN EPISCOPAL CHURCH</b>	<b>1<sup>ST</sup> PLAINTIFF</b>
<b>THE BOARD OF TRUSTEES OF THE NAMIBIA ANNUALCONFERENCE OF THE FIFTEENTH DISTRICT OF THE AME CHURCH</b>	<b>2<sup>ND</sup> PLAINTIFF</b>
<b>DAVID RWHYNICA DANIELS, JR.</b>	<b>3<sup>RD</sup> PLAINTIFF</b>

and

<b>PETRUS SIMON MOSES KOOPER</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>TIMOTHEUS DAUSAB</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>ABRAHAN JAGGER</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>HENDRICK GARISED</b>	<b>4<sup>TH</sup> DEFENDANT</b>

**Neutral Citation:** *The Board of Incorporators of The African Episcopal Church v Kooper* (I 3244/2014) [2018] NAHCMD 5 (24 January 2018)

**Coram:** MASUKU J  
**Heard:** 18 – 20 July 2017 and 1 August 2017  
**Delivered:** 24 JANUARY 2018

**Flynote:** Civil Procedure – application for absolution from the instance – Rule 100 – principles governing the application discussed – Rules of Court – Rule 24 – the pre-trial order and whether a party may introduce issues not identified for determination in the pre-trial order at trial - Law of Property – ownership of immovable property – *bona fide* possession of property – eviction – whether the plaintiffs made out a case for ownership of the property in question and are as such entitled to an order for eviction at the close of their case.

**Summary:** The plaintiffs sued the defendants for eviction on the property described as Erf 140 Hoachanas, alleging they were the owners, alternatively, *bona fide* possessors of the said property. The defendants, at the close of the plaintiffs' case moved an application for absolution from the instance, claiming that the plaintiffs had not led any evidence to show that they owned the property and were as such, entitled to an order evicting the defendants. They also claimed that the plaintiffs had not shown that they had the requisite legal capacity to institute the proceedings for eviction.

*Held* - the courts should be extremely chary in granting applications for absolution from the instance unless the interests of justice so demanded.

*Held that* – the plaintiffs had alleged that they were the *bona fide* possessors of the property and that even if they may not have shown that they were the owners, it would be improper to grant the application for absolution from the instance.

*Held* – that the defendants were no entitled to raise the issue of the plaintiffs' capacity to bring the proceedings because the issue of capacity had not been raised in the pre-trial order and that in any event, the defendants had

unilaterally withdrawn the exception in which they had raised the issue of capacity to sue.

*Held further* – that the court does not lightly allow issues not raised in the pre-trial order to be ventilated at trial for the dislocation that occasions to the trial and preparation both for the parties and the court.

*Held* – that where it becomes necessary for any of the parties to have the pre-trial order varied, strong and cogent reasons must be advanced for same.

*Held that* – on the balance, the plaintiffs had at the least, made a case based on *bona fide* possession that would require the defendants to state their defence in the witness box.

In the premises, the court came to the conclusion that the application for absolution from the instance should be dismissed with costs and accordingly did so.

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### ORDER

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- a) The application for absolution from the instance is dismissed with costs.
- b) The matter is postponed to 1 February 2018 at 09h00 in chambers for allocating dates for the continuation of the trial.

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### RULING

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MASUKU J:

Introduction

[1] Mr. V. Jayaram writes on human relationships and opines as follows:

'The most challenging aspect of human life is how you cope with the impermanence of human relationships and how you deal with the unpredictability of human behaviour upon which the relationships rest. Both professionally and personally, managing relationships is the most challenging aspect of human life, unless one prefers to shun society and live in isolation. If you are a sensitive person looking for meaningful relationships in a world that is driven mostly by self-interest, you are bound to feel hurt and bruised and suffer from self-pity and self-doubt.'

[2] The above excerpt is testimony to the notorious fact that human relationships, whether at a personal, family or even communal level, tend, at some stage or the other, to succumb to serious challenges that even threaten the very survival, if not the existence of that relationship. In that wise, even relationships that involve senior members of the clergy, who are said to have attained a higher than normal level of spirituality, due to their accepted communion with God, do suffer from this human ailment from time to time, and at times, the bug threatening the very survival of that particular church or other organisation.

[3] Speaking about this apparently inevitable phenomenon, one writer says "We are like a choir in which each chorister sings from a different rhythm shared by no one. There may be occasional glimpses of a common melody. But most often, our music is discordant and out of tune."

[4] Serving before this court for determination, is one such case. The choristers, so to speak, originally from the AME Church, are singing in discordant voices and therefor, out of tune. At the centre of the discordance is the ownership of some landed property described as Erf. 140, Hoachanas and buildings erected thereon. The court is called upon to determine which group between the two 'choirs', is singing the correct tune, in sync with the law governing the ownership and possession of the property in question.

[5] The issue presently at hand, for immediate determination, is an application for absolution from the instance launched by the defendants. It is strenuously opposed by the plaintiffs.

The parties

[6] The 1<sup>st</sup> plaintiff is the Board of Incorporators of the African Methodist Episcopal Church, situate at 3801 Market Street, Suite 300, Philadelphia, United States of America. It is alleged that the AME Church is an incorporated legal entity in terms of the laws of the United States of America and its Board of Trustees is the legal representative of the Church, with the right to sue and be sued in matters relating to the property of the Church.

[7] The 2<sup>nd</sup> plaintiff is the Board of Trustees of the Namibia Annual Conference of the Fifteenth District of the AME Church. It is described as a committee of 14 members chaired by a Presiding Bishop and is the highest decision-making authority of the AME Church in the 15 Episcopal District when the Annual Conference is not in session. It is further alleged that the said Board is represented by Bishop David R. Daniels Jr.

[8] The 3<sup>rd</sup> defendant is Bishop David R. Daniels, the Presiding Bishop of the 15<sup>th</sup> Episcopal District of the AME Church. He is cited in both a representative capacity on behalf of the Immanuel AME Congregation of the AME Church, Hoachanas, which cannot act on its own behalf and also as a member and in the interest of the AME Church.

[9] The 1<sup>st</sup> defendant is Mr. Petrus Simon Moses Kooper, an adult male resident at Erf. 232, Hoachanas Settlement, Hardap Region. He is a member of and officer of the New AME Church, whose further particulars are unknown to the plaintiffs. On the other hand, the 2<sup>nd</sup> defendant is Mr. Timotheus Dauseb, an adult male resident at Erf. 822, Hoachanas Settlement, Hardap Region. He is also described as an officer of the New AME Church, whose full and further particulars are unknown to the plaintiffs.

[10] The 3<sup>rd</sup> defendant is Mr. Abraham Jagger, an adult male resident at Erf. 822, Hoachanas Settlement, Hardap Region. He is described also as a member and officer of the aforesaid New AME Church. The 4<sup>th</sup> defendant Mr. Hendrick /Gariseb is described as an adult male residing at Erf. 11, Cnr of AMTF & Post Street, Maltahohe, Hardap Region. He is a Pastor of the New AME Church. His further particulars are however unknown to the plaintiffs.

#### The relief sought

[11] At the heart of this dispute is landed property described as Erf. 140, Hoachanas, together with some buildings that have, over time, been constructed thereon. The plaintiffs approached this court seeking the eviction of the defendants from the property described above. The plaintiffs aver that they are the owners, alternatively, the *bona fide* possessors of the aforesaid property. It is further alleged by the plaintiffs that the defendants are in unlawful occupation of the said property.

[12] Needless to say, the action was defended by the defendants, culminating in a fully blown trial, which has been interspersed with the present application for absolution from the instance, with which I proceed to deal below.

#### The law applicable to application from the instance

[13] From a reading of the heads of argument filed on behalf of the respective parties, it is clear that the principles governing such applications are not disputed. The only matter in contention is the application of those principles to the present case.

[14] For the sake of completeness, I intend to briefly outline the applicable principles as have metamorphosed over time, from case law. Applications for absolution from the instance, are governed by the provisions of rule 100 of

this court's rules. The specific rule, in relevant parts, makes the following provision:<sup>1</sup>

'At the close of the case for the plaintiff the defendant may apply for absolution from the instance in which case the –

- (a) the defendant or his legal practitioner may address the court;
- (b) plaintiff or his legal practitioner may reply; and
- (c) defendant or his legal practitioner may thereafter reply to any matter arising out of the address of the plaintiff or his legal practitioner.'

[15] It is apparent, from reading the relevant rule that the rule-maker did not set out in the rules the principles that apply to applications for absolution from the instance, to which I may from time to time refer to as 'absolution', for ease of reference. In this connection, the courts have had to interpret this procedure and certain principles appear to have firmed up in the approach to this subject.

[16] Absolution has received generous comment in a number of judgments in this jurisdiction, both at the level of the Supreme Court and this court as well. These include *Factcrown Limited v Namibia Broadcasting Corporation*;<sup>2</sup> *Stier v Henke*;<sup>3</sup> *Aluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd*;<sup>4</sup> *Lofty Eaton v Grey Security Services of Namibia (Pty) Ltd*;<sup>5</sup> and *Bidoli v Ellistron t/a Ellistron Truck and Plant*.<sup>6</sup>

[17] It is indisputable that two judgments from South Africa stand out whenever applications for absolution are discussed and decided in this jurisdiction. These are *Claude Neon Lights (SA) v Daniel*<sup>7</sup> and *Gordon Lloyd*

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<sup>1</sup> Rule 100(1) and (4).

<sup>2</sup> Case No. SA 35/2011.

<sup>3</sup> 2012 (1) NR 370 (SC) at 373.

<sup>4</sup> 2007 (2) NR 494 (HC).

<sup>5</sup> 2005 NR 297 (HC).

<sup>6</sup> 2002 NR 451 (HC) at 453D-F.

<sup>7</sup> 1976 (4) SA 403 (A).

*Page & Associates v Rivera and Another*.<sup>8</sup> In *Claude Neon*, the court expressed itself on the standard to be employed in applications for absolution in the following terms:

‘. . . when absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.’<sup>9</sup>

[18] In the *Gordon Lloyd Page* judgment, Harms JA, expressed himself as follows on this subject:<sup>10</sup>

‘This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff. . . . As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one.’

[19] In a recent judgment in *Uvanga v Steenkamp*,<sup>11</sup> this court referred to its judgment in *Ramirez v Frans and Five Others*, where the following exposition of the legal principles relating to absolution was undertaken by reference to previous cases. The court dealt with the principles in the following terms:

‘(a) this application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials i.e. in terms of s. 174 (4) of the Criminal Procedure Act – *General Francois Olenga v Spranger*;

(b) the standard to be applied, is whether the plaintiff, in the mind of the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff – *Stier and Another v Henke*;

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<sup>8</sup> 2001 (1) SA 88 (SCA).

<sup>9</sup> *Ibid* at 409G-H.

<sup>10</sup> *Ibid* at 92H-93A.

<sup>11</sup> (I1968/2015) [2017] NAHCMD 341 (29 November 2017).



(c) the evidence adduced by the plaintiff should relate to all the elements of the claim, because in the absence of such evidence, no court could find for the plaintiff – *Factcrown Limited v Namibia Broadcasting Corporation*;

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is however hopelessly poor, vacillating or of so romancing a character, the court may, in those circumstances, grant the application – *General Olenga v Erwin Spranger (supra)* and the cases cited therein;

(e) the application for absolution from the instance should be granted sparingly. The court must generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant his application – *Stier and General Olenga (supra)*.’

[20] I find these principles useful and will employ them or such number of them as may be applicable or relevant in the current case.

#### House-keeping matters

[21] Before the commencement of the trial, there were a few matters that were drawn to the court’s attention by the parties’ representatives. First, it was disclosed that the 3<sup>rd</sup> defendant had since proceeded to the celestial jurisdiction and therefor had no longer any role to play in this jurisdiction, and particularly in the case at hand.

[22] The court was also advised that the case against the 4<sup>th</sup> defendant had been withdrawn and that consequently, there was no order sought against him. In this regard, the court was informed that there would be no order as to costs applied for in respect of the withdrawal of the case against the said defendant. Regarding the 4<sup>th</sup> defendant, the court was informed that he would

no longer be called as a witness. That said, we now proceed to deal with the evidence adduced on the plaintiffs' behalf.

Outline of the evidence led by the plaintiff

[23] The plaintiffs called four witnesses to testify on their behalf. These were Reverends Johannes !Nakom, Willem Simon Hanse, Andreas Biwa and Adam /Gariseb. In essence, the version placed before court by their evidence, will be stated in very broad strokes. I chronicle same below.

*Rev. Johannes !Nakom*

[24] Mr. !Nakom, testified that he is a 60 years old resident of Hoachanas, a resettlement in the Hardap Region. He became the chairperson of the Trustee Board of the Immanuel AME church in Hoachanas, after his re-assignment to the church in August 2005. However, despite his re-assignment to pastor the said church, he had been deprived access to the church by the defendants.

[25] It was further his evidence that after 5 March 2005, a delegation led by Mr. Biwa was sent to the Immanuel AME church to inform the congregation that the first defendant had been relieved of his pastoral assignment. The second and third defendants then informed the delegation, that the first defendant had already briefed them. They further informed the delegation that they were not in possession of the church keys.

[26] Shortly after his re-assignment, Rev. !Nakom requested by letters dated 12 September 2005 and 25 October 2005, that the church keys as well as the administrative documents of the church be delivered to him within fourteen days, by the defendants. This request, however was not met.

[27] On 11 December 2005, the defendants established and incorporated the New AME church, under registration number 21/2006/279. To date, the defendants have been using the premises of Immanuel AME church at erf 140, Hoachanas as if it was their property. The rightful members of the

Immanuel AME church, are denied access and enjoyment of the said property.

*Rev. Willem Simon Hanse*

[28] Rev. Willem Simon Hanse, is a 51 years old pastor of the St. Mark AME church and he also holds the position of presiding elder of the Hoachanas district. The relevant portions of his evidence is based on the conference room paper no.: VI/10 archived at the national library archive accession no.: 9471.

[29] It was his evidence that the Immanuel AME church was founded by amongst others, the late referend Markus Kooper, after the inhabitants of Hoachanas petitioned the territorial government for land to construct the church.

[30] On 13 March 1952, by virtue of the Native Proclamation Act, 31 of 1933 and regulations issued under Government notice no.: 133 of 1933, the territorial government granted the AME church permission to occupy erf 140. This was subject to the condition that a church be erected on the said piece of land. In 1957, the church was completely erected.

[31] According to Mr. Hanse, one of the rights enjoyed by the holder of the permission to occupy was the right of pre-emption of land whenever it was possible to own property in that area. To date, the AME church has never been evicted from these premises and is therefore the owner of the building and or alternatively is the bona fide possessor thereof.

[32] It was further his evidence, that the defendants have now denounced their membership in the AME church and claim that the AME church building does not belong to the AME church. Further, that as the pastor of Immanuel AME church during the period 1985-2005, the first defendant was in charge of the Immanuel AME church property at erf 140.

[33] The first defendant was relieved of his pastoral assignment to the Immanuel AME church on 5 March 2018. On 12 March 2005, a delegation was sent to the church to inform the congregation, that the first defendant was relieved from his pastoral assignment. The second and third defendants informed the delegation that the first defendant already briefed them and that they were not in possession of the church keys.

[34] Further, that by a letter dated 4 April 2005, Mr. Biwa again requested the keys of the church from the first to the third defendants. He also invited the first and fourth defendants to a disciplinary hearing. Both requests fell on deaf ears.

[35] Rev. Hanse further testified, that Mr. !Nakom had requested administrative documents and the church keys from the defendants, which request was not met.

#### *Andreas Biwa*

[36] Rev. Biwa is a 70 years old pastor the AME church. He is currently assigned to pastor the Zacheus Thomas Trinity AME church in Keetmanshoop.

[37] It was his evidence, that he drafted a letter to the first three defendants. In terms of this letter, he inter alia requested the said defendants to hand over the keys of the Immanuel AME church within 14 days to the remaining members of the church.

[38] Further, that on 25 September 2006, he and Mr. Hanse in his capacity as elder of the Hoachanas district, were mandated to assist the Trust Board to institute this action in the this court.

[39] It was furthermore his evidence, that the rightful members of the Immanuel AME church are denied access and enjoyment of the property by the defendants, who are no longer members of the church.

*Rev. Adam /Gariseb*

[40] Rev. /Gariseb is a venerable retired priest who at the time he adduced his evidence, had clocked 90 years of age. He testified on a wide range of issues connected to the instant matter. I shall try, for purposes of this ruling, to confine his evidence to the core and disputed issued, not an easy fit though.

[41] It was his evidence that he became a member of the Church from 1947 and served as a Pastor of the Church and a retired Presiding Elder since 2002. He testified that Rev. Markus Kooper, the father of the 1<sup>st</sup> defendant, was one of the founding members of the Church. He testified that in 1952, due to petitions by inhabitants of Hoachanas, the Colonial Administration granted a site for the construction of the AME Church. Rev. Kooper was forced into exile in 1960 and soon thereafter, the church was inaugurated, and it has been in operation ever since.

[42] It was his further evidence that Rev. Kooper left for exile, Rev. Jonas ! Nakom (Snr) took over the leadership of the Church and served as Pastor until his death in 1975. In 1976, Pastor Kooper, who had returned from exile, was re-appointed as Pastor of the Church Hoachanas. His son, the 1<sup>st</sup> defendant, was ordained as a Pastor in 1985.

[43] Rev. /Gariseb also testified about the granting of the P.T.O. to the Church in February 1952. Chief, of the conditions for the grant was that a church structure was to be erected on the land. This was duly done in 1956 and the church was dedicated by Rev. Petrus Andreas Jod as an AME Church Building. In this regard, he testified that the funeral of the late Rev. Jonas !Nakom was held at the said church. He produced pictures of the said event in evidence.

[44] It was Rev. /Gariseb's further evidence that the church building hosted all momentous events of the AME Church over the years. These included baptisms, weddings, funerals and daily sermons. Some pictures depicting

some of the ceremonies in question were handed in evidence by the witness. The Reverend also testified that after the dedication of the church building, he was appointed as one of the first Stewards of the Church and formed an integral part of the ceremonies he has just testified about.

[45] Rev. /Gariseb further testified that the Church has been resident and using the plot demarcated as Erf. 140 Hoachanas Settlement since 1952. It was his evidence that the church was self-sufficient and between 1952 and 1957, most of the men who were members of the Church, were skilled shearers of the Karakul sheep and secured jobs as shearers and farm hands. From those meagre resources, these men contributed to the construction of the Church building in Hoachanas.

[46] He testified further that the 1<sup>st</sup> defendant was elected by the Namibia Annual Conference to be ordained as Itinerant Bishop in 1984. It was his evidence that the 1<sup>st</sup> and 3<sup>rd</sup> defendants were members of the Board of Trustees of the AME Church. Their duties included overseeing the building they now claim does not belong to the AME Church. He conceded that the Church does not have a cornerstone and that the presence of a cornerstone is not a pre-condition of the AME Church's property to be declared as such. He testified further that there are many buildings that belong to the Church without cornerstones and there are different modes of ownership, including title deeds, P.T.O.s and Acknowledgement Notes.

[47] I digress and deal briefly with the importance of a cornerstone in the AME Church, for the benefit of the reader. At p. 559 of the Book of the Church, it deals with the laying of a cornerstone, which is a ceremony that is preceded or followed by singing. At p.561, it is recorded that, 'By laying the cornerstone of a house of worship, you perform a decisive act; you publicly announce that a commencement is made to build the house, and that it is your determination by the help of God to complete it.' It is a ceremony that lays the symbol as an edifice, which is to be reared to the honour and glory and to be dedicated to the exclusive worship of the true and living God.<sup>12</sup>

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<sup>12</sup> P560 The Doctrine and Discipline of the African Methodist Episcopal Church.

[48] Rev. /Gariseb further denied that defendants' allegation that the Church never contributed to the construction of the school and hostel. It was his evidence that the Church received donations from individual members of the Church and also from the Namibia Annual Conference as a collective. Further financial assistance, he testified further, came from Glad Bach Neuss Circuit in Butgen, Germany of the Rhenish Church. He also testified that in 1949, the Church started its private school, which was later merged with the State school in 1963/64. The Church, he further informed the court, erected the hostel, with the assistance of the German partnership of the Rhenish Church.

#### Bases for application for absolution

[49] The defendants raised a number of grounds upon which the court was urged to find that the application should succeed. The first issue related to the plaintiffs' authority to institute the current proceedings. This challenge, although based on different propositions, was raised in relation to all the three plaintiffs.

[50] Second, the defendants argued that the plaintiffs aver in their particulars of claim that they are the owners, alternatively, the *bona fide* possessors of the property in question. That notwithstanding, the plaintiffs had not, in evidence, established a *prima facie* right to the property from which they seek the eviction of the defendants. In this regard, a number of arguments were raised pointing to the conclusion, so the defendants submitted, that there was no evidence that the plaintiffs were the owners of the property in question. These issues shall be dealt with in detail as the ruling unfolds.

[51] Lastly, the defendants claim that the evidence adduced points in the direction that the buildings erected on the property in question in the

proceedings, namely, the church, school and hostel, belong to the community and not to the plaintiffs. I proceed to deal with these issues below.

Lack of capacity to institute the proceedings

*The first plaintiff*

[52] Mr. Corbett, for the defendants, in his submissions, argued that from the pleadings, the 1<sup>st</sup> plaintiff, the Board of Incorporators of the AME Church is a body that has its address in the United States of America, ('U.S.A.'). In this regard, it is alleged in the particulars of claim to be a legal entity that is incorporated in line with the laws of the U.S.A. and that the Incorporators have duly authorised the institution of the current proceedings. There are certain insuperable difficulties with the 1<sup>st</sup> plaintiff, which affect its capacity to institute the current proceedings, Mr. Corbett, forcefully submitted.

[53] First, he contended, the Board of Incorporators of the AME Church no longer exists but rather the African Methodist Episcopal Church Incorporated. The latter entity, he submitted, has not brought the current proceedings and for that reason, it is plain, he further submitted, having regard to the Book of Discipline of the Church, (the 'Book'), and the various definitions, that the African Methodist Episcopal Church has not brought the current proceedings. For that reason, Mr. Corbett argued, the 1<sup>st</sup> plaintiff must, without further ado, be non-suited.

[54] Second, even if the court were to be liberal in its interpretation, and hold that the incorporated entity is the one that instituted the current proceedings, there was no evidence adduced by the plaintiffs to the effect that the AME Church has been incorporated in the State of Pennsylvania as peremptorily required by Part III of the Book, section 1 at paragraph 1.

[55] Third, Mr. Corbett submitted that even if the court were to find that the entity that brought the action is the incorporated entity, the question that looms large and requires the court's determination, is whether the said entity



is recognised in terms of the Laws of this Republic. To do so, this court will be required to interpret and apply the laws of the State of Pennsylvania in the USA. This, it was submitted, being an issue of foreign law, has to be proved as a fact and that no expert evidence regarding the juristic personality of the 1<sup>st</sup> plaintiff, was tendered by the plaintiffs. On this ground, it is submitted that the application for absolution must be granted.

[56] Fourth, it was Mr. Corbett's further contention no resolution of the AME Church Incorporated was produced in proof of the allegation that the current proceedings were appropriately authorised. The court was accordingly moved, on the defendants' behalf, to hold that the proceedings should be set aside as they have not been properly authorised as required by law.

#### *The second plaintiff*

[57] Regarding the second plaintiff, Mr. Corbett argued that the very name of the 2<sup>nd</sup> plaintiff does not suggest incorporation at all. It was his further argument that the plaintiffs pleaded that the Board of Trustees is not a formal trust but a committee of 14 members chaired by David R. Daniels, Jr, as the Presiding Bishop. In this connection, it was argued that in the law of this Republic, a committee does not, and cannot have the pedigree of an incorporated legal entity or have legal personality and only acts through its committee.

[58] He also adopted the argument raised above regarding the law of Pennsylvania or the USA having to be proved by expert evidence, which the plaintiffs did not do. It was accordingly argued that that failure resulted in the plaintiffs failing to establish the authority of the 2<sup>nd</sup> plaintiff in this regard.

[59] The next prong of attack was that the resolution relied upon by the Namibia Annual Conference, dated 25 September 2006 in which it was

alleged that Dr. Rev. Andreas Biwa, in his capacity as the Coordinator of the Annual Conference, and Rev. Willem Simon Hanse, in his capacity as the Presiding Elder of the Hoachanas District will join and assist the Trustee Board of the Namibian Annual Conference in approaching and praying that this court grants the eviction orders against the defendants at the AME Complex in Hoachanas. It was argued that Bishop Samuel L. Green Snr. And Rev. Phineas Topnaar did not testify in the proceedings to confirm the authority allegedly given.

[60] It was also argued that from the resolution filed, although there were prayers for the eviction of the other defendants, there was no prayer for the eviction of the 5<sup>th</sup> defendant and that to that extent, the plaintiffs were not entitled to such an order against the said defendant.<sup>13</sup>

[61] A further basis for attacking the proceedings is based on the resolution passed by the Namibia Annual Conference on 25 April 2014. This resolution deals with the authority to evict and interdict unlawful occupants from the properties of the African Methodist Episcopal Church. It is the defendants' argument that the defendants sought to be evicted from the said property have not been properly identified and further that the properties have not been identified as belonging to the AME Church in Namibia. Furthermore, Bishop Daniels was not called to testify in relation to the authority allegedly extended to him to institute such proceedings.

#### *The third plaintiff*

[62] Regarding the 3<sup>rd</sup> plaintiff, it is contended that there is no evidence that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs have the capacity or were properly authorised to bring the eviction proceedings. Furthermore, so the argument ran, there was no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs properly authorised the 3<sup>rd</sup> plaintiff to institute the proceedings in question. To make matters worse in this regard, the 3<sup>rd</sup> plaintiff did not testify in order to confirm the facts alleged. It was accordingly argued that the plaintiffs failed to make out a *prima facie* case that

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<sup>13</sup> Para 29 of the Defendants' heads of argument.

they have the capacity and have been properly authorised to institute the proceedings. It was accordingly urged upon the court to find that the grant of the application for absolution was appropriate and called for in the circumstances.

[63] In his heads of argument, Mr. Kauta asked the court to throw away the argument based on lack of capacity to sue, with both hands as it were. The basis of his submission was the pre-trial order issued by this court dated 24 May 2015, which outlined the issues that were to be resolved during the trial. Mr. Kauta argued quite strenuously too, that if the defendants were to be allowed to now raise new issues that had not been identified for determination at the appropriate juncture, the whole edifice of judicial case management may be well rendered a farce. I will deal with this issue presently.

[64] His further argument was that whereas the defendants had previously raised the issue of the plaintiffs' capacity to bring the proceedings via an exception, that exception was eventually withdrawn by the defendants themselves. It was his argument that they should not be allowed to blow hot and cold on this issue; to approbate and reprobate at the same time, as it were.

[65] I now revert to Mr. Kauta's first argument, namely, are the defendants at large, at this advanced juncture of the trial, namely after the close of the plaintiffs' case, to raise the issue of lack of capacity to sue, seeing that it is not an issue that the parties raised in the pre-trial order for the court's determination?

[66] In argument, Mr. Kauta, helpfully referred the court to the judgment of Smuts J in *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC*,<sup>14</sup> in dealing with the critical role pre-trial orders play in propping up the useful edifice called judicial case management, particularly at the stage of trial.

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<sup>14</sup> (I 3499/2011) [2014] NAHCMD 57 (19 February 2014).

[67] At para [26], the learned Judge Smuts, propounded the applicable principles with clarity and devastating candour as follows:

'This approach has now been trenchantly reinforced by rule 37(14) when a matter is the subject of case management and for good reason. The parties have after all agreed upon the issues of fact and law to be resolved during the trial and which facts are not to be disputed. That agreement, as occurred in this matter, is then made an order of court. Plainly, litigants are bound by the elections they make when agreeing upon which issues of fact and law are to be resolved during the trial and which relevant facts are not in dispute when preparing their draft pre-trial order. It is, after all an agreement to confine the issues which is binding upon them and from which they cannot resile unless upon good cause shown. It is for this reason that the rule-giver included rule 37(14). To permit parties without a compelling and persuasive explanation to undo their concurrence to confine issues would fundamentally undermine the objectives of case management. It would cause delays and the unnecessary expense of an application and compromises the efficient use of available judicial resources and unduly lengthen proceedings with the consequent cost implications for the parties and the administration of justice.' (Emphasis added).

[68] What are the undeniable facts in this case? It is not in dispute that this case was subjected to the prescribed rigours of judicial case management. In this regard, there is neither doubting nor argument that this case, before trial, went through the pre-trial stage of case management. What is important to mention in this regard is that it was the parties, which on their own, identified the issues, both factual and legal, that stood to be determined at the trial and requested the court to resolve those. These issues certainly did not include the issue of the capacity of the plaintiffs to sue.

[69] At the next stage, after the parties agreed on the live issued the court would be requested to determine, the joint pre-trial report submitted by the parties was made an order of court, thus giving it the imprimatur of the court, and rendering it a document with the force of law that may not be departed from easily without negative consequences attaching and without good reason being advanced to the court's satisfaction.

[70] In this case, I am of the firm view that there is no reason proffered as to why the issue of capacity to sue, should now fall for determination when the parties did not agree on it as an issue for determination in the first instance. Secondly, these issues were not submitted to court for a variation of the court order. Such an application, in my firm view, should be accompanied with sound and compelling reasons why it is necessary for the parties, who are already in the field of play, with the length and breadth of the issues identified well in advance, at the behest of the defendants, should, at the twelfth hour, (not even the eleventh, in the context of this case), so to speak, seek to change the goal posts and the nature and dimensions of the issues for determination.

[71] This approach is, in my respectful view, the very one Smuts J had in mind in the judgment referred to above. This attempt to reconfigure the issues for determination at this late hour is pernicious to the proper and timely finalisation of cases before the courts. A party to proceedings must, before committing themselves to signing the pre-trial report, soberly and with painstaking care, ensure that all legal and factual issues that might loom large, are fully included in the pre-trial report. In this regard, full and proper instructions and proper legal consideration must be brought to bear before the signature is appended on the pre-trial report.

[72] In this regard, parties should be made aware that once the pre-trial report is endorsed, they have themselves limited the issues that the court will be called upon to determine and that they, in a sense, nail themselves to the cross, as it were, of the issues identified for determination. This is an exercise that they may not easily wiggle out of, seeing as it carries the court's stamp of approval by being made an order of court.

[73] To depart therefrom, it is clear that a full, proper and convincing explanatory application should be timeously made to the court for the shifting of the goalposts as it were. At the same time, especial care should be taken in making doubly sure that the other party, not initiating the variation, is not negatively affected thereby, as in this case, when it is suddenly faced with an

issue in argument, which it had no idea would, at any stage, loom large for determination. To this extent, even the court is ambushed and is called upon to deal with issues it had no inkling would become live for determination. Such a scenario must be avoided at all costs.

[74] A party to a trial should not blow hot and cold regarding the issues for determination. If the issues are finally committed to writing and have been made on order of court, it hardly lies in the mouth of a party to start approbating and reprobating at the same time. Certainty in this regard is needed, as the identity of the witnesses that may be required to be called or subpoenaed, together with the determination of the days required for trial rest to a large extent, on the nature and extent of the factual and legal issues identified as falling for determination.

[75] For the foregoing reasons, namely that the issues raised in relation the capacity to sue, were not part of the pre-trial order and that there is no explanation, let alone a convincing one, whatsoever as to why these issues should now be considered, I come to the ineluctable conclusion that the application in relation to the issue of capacity to sue should fail.

[76] The next counter-argument raised by Mr. Kauta, relates to the previous exception that was abandoned by the defendants and which squarely raised the issue of capacity to sue. By notice of exception dated 12 February 2014, the defendants raised the issue of the plaintiffs' capacity to sue as canvassed in the earlier paragraphs of this ruling. They, and it must be assumed, upon advice and proper and full consideration, decided to abandon those issues. In this regard, the court made an order dated 4 June 2015 as follows:

- '1. The exception is withdrawn by agreement and costs will be in the cause.
2. The defendants (*sic*) to file their plea to the counterclaim not later than (*sic*) the 15 June 2015.
3. The plaintiff (*sic*) to file a replication or plea to the counterclaim not later than the (*sic*) 2 July 2015.'

[77] There is no indication or allegation that the defendants were subjected to any threats or intimidation or other factor that puts the voluntariness of their decision in question. This is a decision that the defendants made I assume, with their eyes wide open and I am of the view that they should, in the circumstances, be held to their election, painful as the consequences may be.

[78] The defendants should not be allowed to send conflicting signals both to the plaintiffs and the court in relation to such important matters that affect the nature of the issues raised; the direction the case should assume; the duration of the trial; the time needed for trial and the time required for preparation therefor.

[79] In this regard, the plaintiffs have been criticised by the defendants for not calling witnesses to testify in relation to the issue of capacity of the plaintiffs. In the light of the conclusion I have reached on the issue of capacity, I take the view that such criticism is unjust and uncalled for. The plaintiffs were entitled to think that the issue of capacity was abandoned and therefore could not have been expected, in the circumstances, to line up and parade witnesses to testify to what is in essence a non-issue, confirmed by the order of court referred to above.

[80] I shall therefor say nothing more of this issue, save to mention that the application for absolution from the instance in relation to the issue of capacity should fail and I so order. It is accordingly unnecessary for me to decide whether or not there would have been any merit to the defendants' contentions in the circumstances. I hope that Mr, Kauta will not feel aggrieved that his scholarship and studiousness in dealing head-on with that issue, has been laid to waste. The court has to deal with what are, according to the court order, the live issues and not to expend time and effort on what may later turn out to be interesting issues from an academic and scholarly prism, but which are unnecessary in the circumstances, particular regard had to the pre-trial order, to determine.

Ownership of the property

[81] In this leg of the argument, it was the defendants' case that the plaintiffs' claim for ejectment is based on the *rei vindicatio*, which is a possessory claim. In this regard, it is contended on the defendants' behalf that for a plaintiff to succeed in such a claim, he, she or it must allege and prove title to the property in question. It is accordingly argued on the defendants' behalf that having regard to the evidence led on behalf of the plaintiffs, there is no *prima facie* right of ownership that has been established by the plaintiffs. In this regard, it is alleged that the plaintiffs' title to the property is based on a document known as the Permission To Occupy (P.O.T.), which according to the defendants, does not support the plaintiffs' claim to title of the property. I will revisit the respects in which it is argued the POT does not support the plaintiffs' claim.

[82] In contradistinction, the plaintiffs argue that there is no merit to the defendants' contention. It is their case that the property in question was allocated to the A.M.E. Church by the colonial government. It is their further contention that in this regard, the plaintiffs have continuously occupied the property in question from 1 July 1956 until March 2005 when they were illegally despoiled by the defendants.

[83] The defendants argue that for a party in the place of the plaintiff, to succeed in a claim for eviction, it must allege and prove the title to property from which the eviction is sought and that the defendant is in occupation of same. It was the defendants' contention that the plaintiffs failed in meeting the above requirements for the following reasons:

- (a) Exhibit 5, the P.T.O., does not show that the plaintiffs have title to the property in question. All the said document shows is that the AME Church was granted the right to occupy a site in Hoachanas for the purpose of erecting a church subject to certain conditions.
- (b) In terms of the provisions of Proclamation 31 of 1932, the Administrator-General, in terms of section 3 thereof, made regulations



in respect to occupation of the site. Conditions for the occupation were stipulated and bar conveyance of ownership to the occupier;

- (c) The plaintiffs' witnesses testified that the P.T.O. conferred a right of pre-emption of the property. They further contended, without more, that the AME Church was the owner of the property in question as it had never been evicted from the premises and therefor became the owner of the property. It is the defendants' position that the P.T.O. never provided for the right of pre-emption, that being a late phenomenon ushered in around 1969. In this regard, it was urged upon the court to find that there was no evidence that the initial P.T.O. granted in February 1952 was converted into a P.T.O. under the Regulations of 1969, or that a further P.T.O. was granted to the AME Church after 1969.
- (d) That the property in question resorted under the Ministry of Regional and Local Government and Housing and that the erven was reserved for the State to be utilised for educational purposes. This development, it is argued, puts to rest any of the plaintiffs' argument that the AME Church is the owner of the property in question, i.e. Erf 140.
- (e) The property which was subject to the P.T.O. in 1952 had the dimensions 30 X 30 yards. It is contended that the property in question in the proceedings, is far bigger in size than the property reflected in the P.T.O. It was therefore contended that the plaintiffs had failed to tender any evidence that the area referred to in the 1952 P.T.O. was inclusive of the area where the community private school and hostel are presently situate.
- (f) Lastly, it was argued that the plaintiffs rely on what is referred to in the Book as the 'connectional mode of ownership', a concept that is foreign to our law. It is accordingly urged upon the court to have no regard to this concept of ownership, in view of the absence of any expert evidence as to how this mode of ownership applies and is to be interpreted. It is argued that such a mode of ownership cannot properly

ground the plaintiffs' claim therefor. It is, in the circumstances, argued that the plaintiffs have no right to seek the eviction of the defendants from the property but only the State, which has not sought any order in this regard.

[84] Mr. Kauta, for his part, argued contrariwise. His first submission was that the Administrator, in 1952, granted permission to the AME Church *vide s. I of Proclamation no. 31 of 1932* to occupy the land in Hoachanas. This was on 13 March 1932. The land was allotted to the Church for the purpose of erecting a church building. It was his contention, in this regard, that the defendants do not have a genuine or *bona fide* dispute regarding who the rightful holder of the P.T.O. in question is.

[85] It was his further contention that the defendants were asking themselves the wrong question and predictably returned a wrong answer. It was his argument that the question that should be asked in the circumstances is not who constructed the church at Hoachanas but for whom it was constructed. This was in answer to Mr. Corbett's argument that the church was built by the ordinary members of the community, some of whom were not even members of the AME Church. The buildings, he contended, belonged to the community therefor.

[86] Mr. Kauta also drew the court's attention to what he referred to as incontrovertible evidence that the AME Church had been in possession of the property in question from July 1956 until they were ousted from such possession by the defendants in March 2006. In this regard, he also pointed out that up to the defendants despoiling the plaintiffs of the property, there is uncontroverted evidence that the Church was conducting services thereat together with some other church rituals, including baptism of members and weddings.

[87] There may be a lot of merit in the issues that Mr. Corbett has raised and which may need to be dealt with. The question is whether it is at this juncture that such issues should be decided. I intend to adopt a practical

approach to this matter and deal with the general tenor of the evidence in deciding this particular issue and I do so presently.

[88] It is not disputed that the property in question was given by the colonial government to the AME Church in the 1950s. This was done via a P.T.O. I am of the considered view that whatever discrepancies may be evident, e.g. the size of the property as described in the P.T.O. and what the actual property dealt with is, the property was given to the AME Church and the issue of the discrepancies may not be properly settled at this juncture. There is need for the defendants to place their version before court to enable a full and incisive enquiry into all the relevant issues, both of fact and law that may arise.

[89] I am also of the considered opinion that having regard to the entire evidence, it is not seriously disputed that the plaintiffs were in possession of the property in question until the defendants took the keys of same in 2005. It is also not seriously contested that the plaintiff, through its functionaries, including Rev. Biwa came to the defendants to demand the keys to the buildings in question, which was effectively denied them. This was some indication and there is no serious dispute that the plaintiffs were in possession of the property from the 1950s.

[90] It must be borne in mind that if Mr. Corbett is correct in his submissions that the plaintiffs have failed to prove ownership of the property, that theirs is a double-barrelled claim, so to speak. They alleged ownership of the property and in the alternative, they alleged *bona fide* possession of the property and the latter of which their witnesses testified. With the foregoing in mind, I cannot, in good conscience, grant the application for absolution in a case like this where an alternative claim is raised and in any event, this would be if Mr. Corbett is correct in his submissions, a matter that deserves further examination as it may need the version of both sides to come to a firm and final answer.

[91] In this regard, the learned author Harms,<sup>15</sup> states in relation to a possessory claim that a plaintiff need not allege and prove any title to the property from which the eviction is sought in the cause of action. This is what I understand the plaintiffs' claim, in the main, to be, in the instant case.

[92] Mr. Corbett argued that in the construction of the building, the local community took an active part and that they contributed not only by becoming physically involved in the construction, but they also contributed their 'tickeys and sixpences' in the construction. That may well be true. I, however, agree with Mr. Kauta that that notwithstanding, this did not detract from the fact that the land was allocated to the AME Church and whatever construction took place thereon, particularly the church building, was for the AME Church, to whom the land had in any event, been allocated by the colonial administration.

[93] Mr. Corbett also argued that the proper party which has a right at law to seek the prayers sought by the plaintiffs is the State as in 1996 the Township of Hoachanas was established by the Ministry of Regional and Local Government and Housing. In this regard, he further argued, the Permanent Secretary made reservation of Erf. 140 for the State, for educational purposes.

[94] I am of the considered view that it was incumbent upon the defendants, if this was to be their argument, to join the relevant Government Ministry or Department and at the appropriate time. It would seem to be a self-serving argument to raise this argument at this inopportune time and seek to hide behind it when the plaintiffs' claim has remained the same for such a long time.

[95] Another argument advanced by Mr. Corbett relates to the admission by Pastor Adam /Gariseb to the effect that the AME Church in Hoachanas does not have a cornerstone, which appears to be a pre-condition to indicate that that church belongs to the AME Church. It may well be true that the said

<sup>15</sup> L.T.C. Harms, *Amler's Precedents of Pleadings*, 7<sup>th</sup> ed, 2009, at p.199.

structure does not have a cornerstone, as should have been the case in terms of the prescriptions in the Book.

[96] The question however, is whether the absence of a cornerstone, standing alone, in the face of a tall mountain of evidence that this site was allocated to the plaintiff to occupy and use as a sanctum of worship and that the defendants indeed used the property for that purpose for over a period of 40 years, including other church rituals, would then serve to indicate that the property was then not allocated to the 1<sup>st</sup> plaintiff?

[97] I think not. The erection of a cornerstone would apparently be a formality that was, for some reason, not followed but which does not detract from the fact that the property was allocated to the 1<sup>st</sup> plaintiff and that the said plaintiff used same for religious purposes. It may well be that the 1<sup>st</sup> plaintiff did not follow the prescriptions in the Book to the letter, but to say because there is no cornerstone then the property was not allocated to the 1<sup>st</sup> plaintiff and not occupied by it would fly in the face of the objective facts. Furthermore, it would be at odds with logic and common sense in my view. I accordingly do not agree with Mr. Corbett on this score.

### Conclusion

[98] From the authorities quoted earlier, it was stated that applications for absolution must not be lightly granted and that courts must be frigid or shy, to lightly grant same. On a conspectus of all the issues, both of fact and law that are at play in this matter, I am of the considered view that it would be precipitate to grant the application. The defendants must have their day in court and advance their defence as well in order to place the court in a position where it would be appropriately placed to cut the Gordian Knot at hand.

### Disposal

[99] In the premises, having considered the argument by both sides, the applicable legal principles and the evidence available at this stage, I am of the considered view that the following order is condign:

- a) The application for absolution from the instance is dismissed with costs.
- b) The matter is postponed to 1 February 2018 at 09h00 in chambers for allocating dates for the continuation of the trial.

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TS Masuku

Judge

APPEARANCE:

PLAINTIFFS: P Kauta (with him E Shigwedha and J McLeod)  
Of Dr Weder, Kauta & Hoveka Inc, Windhoek

DEFENDANTS: A Corbett, SC (with him S Mbudje)  
Instructed by ENSAfrica | Namibia, Windhoek