



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2019/00073

In the matter between:

WELFRIED LEYDEN !NAIBAB
SETH !GAEB

1ST APPLICANT
2ND APPLICANT

and

**EVANGELICAL LUTHERAN CHURCH
IN THE REPUBLIC OF NAMIBIA**

1ST RESPONDENT

BISHOP ERNST ABRAHAM //GAMXAMUB

2ND RESPONDENT

PAUL HATANI KISTING

3RD RESPONDENT

JAN BEUKES

4TH RESPONDENT

GEORGE DAX

5TH RESPONDENT

JAKOB FREDERICK

6TH RESPONDENT

ANZUNETTE GOAGOSES

7TH RESPONDENT

JOHN BEUKES

8TH RESPONDENT

CHRISTOPHINE UTALE

9TH RESPONDENT

BARTHOLOMEUS !AIBEB

10TH RESPONDENT

MAUREEN ISAAKS

11TH RESPONDENT

HERMINA APOLLUS

12TH RESPONDENT

GERDA KAYAMBU

13TH RESPONDENT

JOHANNES DE KLERK

14TH RESPONDENT

GEORGE DU TOIT

15TH RESPONDENT

JOSEPHAT FREDERICK

16TH RESPONDENT

SAGEUS /KEIB	17TH RESPONDENT
LORENST KUZATJIKE	18TH RESPONDENT
ADRIES VILANDER	19TH RESPONDENT
ABEL VRIES	20TH RESPONDENT
ANDREAS !NOWASEB	21ST RESPONDENT
PETRUS KHARISEB	22ND RESPONDENT
ABRAHAM KHEIBEB	23RD RESPONDENT
SIMON TIBOTH	24TH RESPONDENT

Neutral citation: *!Naibab v Evangelical Lutheran Church in the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2019/00073) [2019] NAHCMD 119 (15 April 2019)

Coram: ANGULA DJP

Heard: 26 March 2019

Delivered: 15 April 2019

Flynote: Applications and Motions – Urgent Application – Declaratory Orders – *Locus standi* – Applicants are members of the Evangelical Lutheran Church, for that reason state that they have *locus standi* – First respondent raise point *in limine* that applicants lacks locus to bring this application – Court held; applicant bears the *onus* to prove that he or she has the standing to bring the application – The factual basis for the *locus standi* must appear from the founding papers – That the applicant must show that there is a legal connection between them and the subject matter for the relief sought, that he or she has a direct and substantial interest in the relief claimed – Applicants have failed to prove that they have the necessary *locus standi* or that that they have established a clear right.

Summary: The applicants are members of the Evangelical Lutheran Church of Namibia, who are unhappy with the manner in which the nomination process for elections of the bishop of the Church was conducted – They brought an urgent application before this court seeking certain declaratory orders against the respondents – Application was opposed by the first respondent, the church which

raised few points *in limine*, one being that the applicants lacks standing to bring this application.

Court held: In terms of common law, a person is not allowed to bring an application on behalf of the public in other words to institute an *action popularis*.

Held further: The applicant bears the *onus* to prove that he or she has the standing to bring the application and that the factual basis for the *locus standi* must appear from the founding papers; and that the applicant must show that he or she has a direct and substantial interest in the subject matter of litigation at hand, and that such interest is not abstract, academic, hypothetical or simply too remote.

Held further: The applicants are not candidates for the position of the bishop. For that reason their interest in the outcome of the elections are too remote. In my view, the applicants are mere busybodies with no real legal interest in the outcome of the elections. Moreover, none of their civil rights have been infringed and as a result, they have failed to prove that they have the necessary *locus standi* or that that they have established a clear right, entitling them to be granted the relief they seek.

ORDER

1. The application is dismissed with costs, such cost to include the costs of one instructed and one instructing counsel.
2. The matter is removed from the roll and is regarded as finalized.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This application has been brought on an urgent basis by two members of the first respondent, the Evangelical Lutheran Church in Namibia ('the Church'), who claim to be unhappy with the manner in which the nomination process for elections of the bishop of the Church was conducted. They, *inter alia*, seek an order declaring as null and void the final candidates list, compiled by an electoral commission appointed by the Church from which list a bishop of the Church would be elected. The applicants further seek an order directing the Church's electoral commission to compile a new list of candidates for bishop elections and to release the final short list of three candidates not later than 14 April 2019.

[2] The Church's constitution stipulates that the consecration of the bishop-elect shall take place within a period of not more than three months from the expiry of the term of office of the bishop. The bishop's term of office is six years.

Background facts

[3] I think it is fair and reasonable for this court to take judicial recognition of the fact that the Church is one of the oldest and mainstream churches in Namibia. The Church's membership spreads over the central and southern area of Namibia. It is a notorious fact which this Court is entitled to take judicial notice that the Church has a substantial number of followers in Namibia.

[4] It is common cause between the parties that by the time the application was launched, the process to elect the bishop has commenced. In compliance with its constitution, the Church appointed an electoral commission to conduct the election of the new bishop. In compliance with its mandate, the commission submitted its list of candidates on 13 November 2018.

[5] The applicants were not satisfied with the list of candidates compiled by the Electoral Commission. Accordingly, on 15 December 2018 the first applicant addressed a letter to the chairperson of the Electoral Commission in which he expressed his concern and unhappiness with regard to lack of compliance with the constitution of the Church with regard to the eligibility of the candidates on the list. He did not receive a reply whereupon the applicants approached their legal representative. Thereafter a series of correspondences were exchanged between

the legal representatives for the parties until March 2019 when the applicants launched the first application set down for hearing on 1 March 2019. That application was however withdrawn due to technical reason, which as the Court was made to understand, was caused by the E-justice system. A fresh application was filed on 15 March 2019, set down for hearing on 26 March 2019. It is common knowledge that frequently there are problems experienced by legal practitioners with the E-justice system when they issue urgent applications.

The applicants' case

[6] The main complaints by the applicants are that the process and the list of candidates are riddled with irregularities which nullify the outcome. In support of these allegations, the applicants point out that the Church's constitution specifically exclude a person who has not yet attained the age of 45 and those who have attained the age of 60 from being a candidate for the election as a bishop. In this connection the applicants allege that the third respondent to 24th respondents are over the ages of 60 years and are thus, for that reason not eligible as candidates.

[7] The applicants point out further that the Church's constitution provides that a candidate must have served a period of ten years of active and uninterrupted pastoral service from the date of ordination. However on the information available to the applicant they allege that, the fourteenth respondent has not served ten years active and uninterrupted service. Furthermore, the twenty second respondent currently serves no parish and has been bedridden for a long period.

[8] The applicants allege further that a number of candidates on the list are known to have been either suspended as pastors or been ill for lengthy periods; and others have been out of the country for purposes of studies.

[9] It is further the applicants case that the irregularities they complain of in the process of compiling the list of candidates, is further compounded by the fact that at least two of the members of the electoral commission are related to some of the candidates on the list but failed to disclose or declare such relationship nor did they recuse themselves from the deliberations that took place concerning the candidates.

[10] As regards the issue of urgency, the applicants point out that the calendar for the 2019 election process commenced on 24 February 2019 and would be concluded with the holding of the elective Synod due to take place on 24 to 26 August 2019. Having regard to the said timeline, the applicants reckoned that if the application is not heard on an urgent basis, they would suffer prejudice as the electoral commission would proceed with the elections and the consecration of the new bishop, and hold the elective Church Synod scheduled to take place in August 2019.

Opposition by the first respondent

[11] Only the first respondent, the Church opposed the application. It deposes the merits and in addition raised a number of points *in limine* in the opposing affidavit deposed to on its behalf by the current bishop in office. The points *in limine* are amongst others that: non-joinder, in that the applicants failed to join the electoral commission; the application is not urgent; and that the applicants lack *locus standi* to bring the application.

[12] At the hearing of the application, Mr Muhongo who appeared on behalf of the Church indicated to the Court that the Church was no longer persisting with the points *in limine* regarding urgency and non-joinder but persisted forcefully with the point *in limine* that the applicants lacked *locus standi*. Counsel also raised a point in his heads of argument, that the Court should decline jurisdiction because of the legal principle that a Court's jurisdiction or lack thereof is a necessary consideration when deciding whether a party aggrieved by his church decision can take such dispute to a civil court. This is because, so counsel submitted, the legal authorities say that when there is an absence of civil rights or interests prejudicially affected by a decision of a Church which is governed by Canonical law, the civil courts have no jurisdiction¹.

[13] In the view, I take with regard to the issue of *locus standi*, it is unnecessary to delve in detail with regard to the point *in limine* relating to whether this court should decline jurisdiction. It would be sufficient to state that based on the facts of this matter and in particular the dispute at issue, this Court takes the view that it has

¹ *New African Methodists Episcopal Church in the Republic of Namibia v Kooper* (A 293/2013) [2015] NAHCMD 105 (29 April 2015).

jurisdiction for the reason that the dispute at hand does not involve the adjudication of Canonical law or issues. As regard the issue of urgency, I accepted, without deciding, that the matter was urgent.

[14] During my preparation for the hearing, it occurred to me that there was a striking similarity of the facts of the present matter with the facts in the *Mungendje v Kavari*² matter over which I presided and wrote a judgment with regard to the applicants' *locus standi* in that matter. As a result, through my office, I alerted Counsel for the parties about the *Mungendje* judgment. As it turned out, Mr Muhongo for the Church in this matter, was involved in the *Mungendje* matter. At the hearing of the matter Ms Gebhardt for the applicants, indicated to the Court that she had not been aware of the judgment but while expressing her appreciation to the Court for the alert, she however argued that the facts of the present matter are distinguishable from the facts in the *Mungendje* matter. I informed Ms Gebhardt that I would require a forceful and persuasive argument to deviate from my view in the *Mungendje* matter.

[15] In the *Mungendje* matter, the applicants brought an application claiming to be acting on behalf of their fellow political party members whom the applicants claimed had been 'disenfranchised' during the political party's district and regional elections. The applicants in that matter sought to interdict their political party from allowing the delegates who had been nominated and elected, during the election process, from attending the political party's Congress and further interdicting the political party from allowing the delegates to attend the party's Congress. They further contended that they had the constitutional right to approach the court to assert the right of their fellow political party's members. The court held that the applicants' rights to bring the application had to be determined in accordance with the common law. In applying the common law, the court found that the applicants had failed to discharge the onus that they had the *locus standi* to bring the application. The application was accordingly dismissed.

[16] In the present matter, the applicants in asserting that they have the *locus standi* state that they are members of the Church and as such they are bound by the provisions of the constitution and by-law of the Church. They point out that the

² (HC-MD-CIV-MOT-GEN-2017/00399 [2018] NAHCMD 153 (22 November 2017)).

constitution specifically exclude persons who have not attained the age of 45 and those who have attained the age of 60 years from being eligible for the candidacy of a bishop. Despite those constitutional provisions and the Electoral Commission having been alerted to the fact that the candidates' list contained names of persons who do not qualify on the basis of their ages and years of service, the Electoral Commission persists with the election process which is flawed.

[17] As earlier indicated, Ms Gebhardt undertook to argue and to persuade the Court that facts in the *Mungendje* matter are distinguishable from the facts of the present matter.

[18] Before dealing with counsel's submissions, it is necessary to briefly set out the applicable legal principles. I will endeavour to do so without referring to the legal principles in detail because they are well-known and are not in dispute. Counsel were *ad idem* as to the applicable legal principles.

[19] In terms of our common law, as I understand it, a person is not allowed to bring an application on behalf of the public in other words to institute an *action popularis*. In the *Mungendje* matter, this Court summarised the applicable principle at paragraph 75 of the judgment that: the applicant bears the *onus* to prove that he or she has the standing to bring the application; the factual basis for the *locus standi* must appear from the founding papers; and that the applicant must show that there is a legal connection between him or her and the subject matter for the relief sought in the sense that he or she has a direct and substantial interest in the relief claimed. In its assessment whether a party has a standing, the Court must keep in mind that 'meddlesome crank and busybody' with no legal interest in the subject matter for adjudication but simply driven by mischievous intent to gain access to the court in order to satisfy some personal caprice or obsession, exist³. Furthermore, in order to establish *locus standi*, the litigant must show that he or she has a direct and substantial interest in the subject matter of litigation at hand; and that such interest is not abstract, academic, hypothetical or simply too remote⁴.

³ *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 (3) SA 1095 (Tk) at 1106G-H.

⁴ *Uffindel t/a Aloe Hunting Safaris v Government of Namibia and Others* 2009 (2) NR 670 (HC).

[20] I now turn to consider Ms Gebhardt's submission that the facts of this matter are distinguishable from the facts in the *Mungendje* matter.

[21] Ms Gebhardt submitted that the facts of this matter are distinguishable from the facts in the *Mungendje* matter in two with respect; firstly, the applicants in the *Mungendje* matter asserted that they were acting on behalf of disenfranchised fellow members of the political party whereas the applicants in the present matter do not profess to be acting on behalf of anybody; and secondly in the *Mungendje* matter, there was a re-run of the election following the complaints whereas in the present matter there has not been a re-run of the election, and in fact the Church's constitution does not make provisions for a re-run of the election.

[22] Upon considering the arguments advanced by counsel, I have been persuaded that the facts of this matter can be distinguished from the facts in the *Mungendje* matter in the two instances identified by Ms Gebhardt.

[23] I am, however of the considered view that, quite apart from Ms Gebhardt's argument that the two matters are distinguishable, the applicants have not placed sufficient facts before Court to discharge the onus upon them that they have the *locus standi* to bring this application. I set out my reasons below.

[24] The factual basis for *locus standi* must appear from the founding papers. The only allegations made by the applicants in this regard is that they are members of the Church. In my view, that is not sufficient to sustain *locus standi*. In order to have *locus standi* a party must show that he or she has sustained or immediately in danger of sustaining some direct injury and not merely that he or she will suffer in some indefinite way in common with other people in general. It has been held that in general and in a wide sense, every individual has some interest in every suit pending before court for he or she may be placed tomorrow, in the position of litigant in a case in which the same principle may be involved⁵.

[25] The applicants are not candidates for the position of the bishop. For that reason their interest in the outcome of the elections are too remote. In my view, the applicants are mere busybodies with no real legal interest in the outcome of the

⁵ *Wood and Others v Ondangwa Tribunal Authority and Another* at 306 E-F.

elections. It is common knowledge, which this Court is justified to take judicial notice of, that the Church has a huge membership running into thousands, if not hundreds of thousands of members spread over the breadth and width of this country. In my view, it is a telling fact that out of those hundreds of thousands members, only two members of the Church feel aggrieved by the election process. It is not the applicants' case that they consulted widely with other members of the Church and that such members are also aggrieved by the manner in which the elections were conducted and that the members support or endorse the applicants' action. In my view this is a relevant consideration in the assessment of the applicants' *locus standi*.

[26] The conclusion that the applicants have no *locus standi* and that they are mere busybodies is further demonstrated by the fact that not even one of the candidates on the list joined the applicants to claim the relief prayed for by the applicants. I think it is fair to say that the candidates are persons with direct and substantial interest in the election process and its outcome. If the candidates were aggrieved by the election process or its result, they would have joined the applicants in their application. In fact I would have expected the candidates to be at the forefront of the application. The candidates did not file any papers to support the relief sought by the applicants.

[27] Ms Gebhardt, in her heads of argument refers the Court to *Nowases v Evangelical Lutheran Church*⁶ where it was held that persons who join an unincorporated voluntary association and subscribed to its constitution and other rules should be taken to intend to be bound by the constitution and such rules should be entitled to invoke the courts in appropriate circumstances to have their dispute adjudicated upon. I have no qualms with the general statement of the law. The facts in that matter differed from the facts in the current matter. In that matter all the applicants were newly elected members of the Church Council so elected at the Church Synod. Subsequent to the elections, the bishop addressed a letter to the applicants as Church Council members that their elections had been irregular and not in terms of the provisions of the constitution. The bishop then called upon the applicants, as elected members not to take up their positions until the out-come of an Extra-Ordinary Synod to be convened. The applicants, as members of the Church

⁶ (HC-MD-CIV-MOT-GEN-2016/00221) [2016] NAHCMD 231 (9 August 2016).

Council, then approached the court for a declarator that they had been duly elected members of the new Church Council.

[28] It is to be noted immediately that the applicants in the *Nowases* matter had a direct and substantial interest in the outcome of the matter. Each applicant's right was personally affected by the bishop's decision. Their rights as elected members of the Church Council were in jeopardy. The court was entitled to hold that under those circumstances, it was appropriate for the court to adjudicate on the applicants contractual rights, which were their civil rights. In my view, the *Nowases* matter does not assist the applicants in the present matter. They failed to prove that any of their civil rights have been infringed.

[29] I have therefore arrived at the conclusion that the the applicants have failed to prove that they have the necessary *locus standi* or that they have established a clear right, entitling them to be granted the relief they prayed for.

[30] In the result, I make the following order:

1. The application is dismissed with costs, such cost to include the costs of one instructed and one instructing counsel.
2. The matter is removed from the roll and is regarded as finalized.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANTS:

I GEBHARDT

Of Ileni Gebhardt & Co. Inc., Okahandja

FIRST RESPONDENT:

T MUHONGO (with him A SHIMAKELANI)

Instructed by Appolos Shimakeleni Lawyers, Windhoek