REPORTABLE

CASE NO.: SA 32/2009

IN SUPREME COURT OF NAMIBIA

In the matter between

FATHER GERT DOMINIC PETRUS **APPELLANT**

and

ROMAN CATHOLIC ARCHDIOCESE **RESPONDENT**

Coram: Mainga JA, Langa AJA *et* O'Regan AJA

Heard on: 07/04/2011

Delivered on: 09/06/2011

APPEAL JUDGMENT

O'REGAN AJA:

[1] The appellant, Father G D Petrus, seeks to appeal against a judgment of the High Court refusing to rescind a judgment of the High Court. As the appeal was launched more than eighteen months after the High Court judgment was handed down the appellant must first be granted condonation for his late filing of the appeal before the appeal itself can be considered.

[2] The appellant was ordained as a Catholic Priest in Namibia in 1986 and was appointed parish priest in Khomasdal in 1993. The respondent is the

Archdiocese of the Catholic Church in Namibia, represented in these proceedings by the Archbishop of Windhoek. The respondent initiated these proceedings in the High Court by notice of motion in April 2005. The respondent sought an order, amongst other things, declaring that the appellant had been excommunicated from the Roman Catholic Church, interdicting the appellant from conducting religious services at the respondent's premises situated at 4882 Borgward Street, Khomasdal, Windhoek and ejecting the appellant from the parish residence situated on the same property. The appellant opposed the application.

[3] The main application was set down for 31 May 2005 but the appellant did not file answering affidavits by that date. Before the hearing on 31 May, the parties agreed that the Court would grant an interim interdict pending the return date of a rule nisi. The appellant also agreed to vacate the parish residence and return the keys to the respondent. The appellant has thus not been residing in the premises since mid-2005. In the light of the agreement between the parties, Manyarara J made the order as agreed. 18 July 2005 was set as the return date and the appellant was ordered to file answering affidavits opposing the relief by 15 June 2005.

[4] Once again the appellant failed to file answering papers, although a draft unsigned affidavit was furnished to the respondent's representatives. When the matter was called on 18 July, in the absence of any opposition by the appellant, Heathcote AJ issued an order confirming the rule.

[5] Six months later, the appellant lodged an application seeking rescission of the order made on 18 July 2005. Pickering AJ heard the rescission application on 9 July 2007. Judgment was reserved and on 14 January 2008, the application was dismissed with costs. In his judgment, Pickering AJ concluded that the appellant should not be granted condonation for the late filing of the rescission application, as he had not provided a reasonable or satisfactory explanation for the delay in launching the rescission application. Pickering AJ also addressed the merits of the dispute between the parties, and after an analysis of canon law, concluded that the appellant had indeed been validly excommunicated. He accordingly found that the rescission application did not bear prospects of success.

[6] More than eighteen months later, on 3 August 2009 the appellant lodged a notice of appeal, subsequently amended on 15 November 2010, against the judgment of Pickering AJ. On the same date the appellant lodged an application for condonation for the late filing of the appeal. The condonation application was filed 2 years and 10 months after the judgment against which the appellant seeks to appeal was handed down. The respondent opposes the grant of condonation for the late filing of the appeal and the appeal itself.

[7] Argument in respect of the application for condonation and appeal was heard on 4 April 2011. The respondent raises two points in limine. The first is that the appellant has failed to tender security for costs in terms of rule 8(2) of the Supreme Court Rules and the second is based on rule 5(6)(b) of the same

rules which provides that if an appeal record is not lodged within three months of the date of the judgment appealed against (rule 5(5)), the appeal shall be deemed to be withdrawn. As will appear from the reasoning that follows, it is not necessary for the court to adjudicate these two preliminary issues.

Condonation

[8] The above account of the course of this litigation makes plain that at every turn the appellant has failed to comply with the rules of the court. He failed to lodge answering affidavits in the High Court, both before the application was first heard on 31 May 2005, and before the return day of the rule nisi. Once the order had been confirmed, the appellant took six months to lodge an application for rescission. After that application was refused, the appellant took more than eighteen months to lodge an appeal, and a further 15 months to lodge a formal application for condonation for the late filing of the notice of appeal.

[9] It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent judgment of this Court, *Beukes and Another v SWABOU and Others* [2010] NASC 14 (5 November 2010), the principles governing condonation were once again set out. Langa AJA noted that “an application for condonation is not a mere formality” (at para 12) and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply with the rules (at para 12). The affidavit

accompanying the condonation application must set out a “full, detailed and accurate” (at para 13) explanation for the failure to comply with the rules.

[10] In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant’s prospects of success on the merits, save in cases of “flagrant” non-compliance with the rules which demonstrate a “glaring and inexplicable disregard” for the processes of the court (*Beukes,* at para 20).

[11] The appellant’s explanation for the dilatory filing of his notice of appeal is the following. He sought legal advice once his rescission application had been dismissed in January 2008. In February 2008, he was advised not to pursue an appeal as his explanation for the late filing of his rescission application was inadequate and, he was advised, the appeal court would accordingly dismiss any appeal.

[12] The appellant then pursued several other avenues to seek redress. In his affidavit, he states that he was uncertain which avenue he should pursue for relief. In his view, it had been improper for the respondent to seek relief against him in a civil court (this is a matter to which I return below). Accordingly, he wrote to the Ombudsman as well as to senior figures within the Roman Catholic Church to obtain redress. He also approached the South African High Commission. None of these avenues proved fruitful.

[13] In July 2009, the appellant was presented with a taxed bill of costs by the respondent's attorneys in an amount of N$143,763,24 and requested to effect payment of them. It was then that he decided to appeal the matter.

[14] The appellant argued that because it was his view that the respondent should not have approached a civil court for relief against him, he was confused as to what his remedies were when the court order was granted. Although the appellant is right to raise the question of the civil court's jurisdiction to investigate the question whether the appellant has been validly excommunicated, the appellant cannot have been in any doubt that if he wished to have the order made by the High Court refusing to grant rescission set aside, he would have to appeal to this Court. The High Court judgment was clear that the appellant's delay in launching the rescission application was fatal to that application. Moreover, his counsel advised him that the appeal court was unlikely to take a different view to the High Court on the effect of his delay in relation to the rescission application.

[15] Whatever else the appellant may have understood from both the High Court judgment, and counsel's advice, it must have been clear to him that if he wished to lodge an appeal, he needed to do so in good time, because a failure to do so would imperil the success of the appeal. Nevertheless, the appellant delayed once again, this time by eighteen months, and now, again, he is before a court seeking condonation for his non-compliance with the rules of court.

[16] The appellant's explanation for his delay in lodging the appeal is not sufficient to warrant the grant of condonation. Indeed, the appellant's disregard for the rules of this Court could be said to amount to a flagrant disregard for them. Although, as stated above, a court may in circumstances of flagrant violation of the rules, not even consider the prospects of success when deciding a condonation application (paragraph 10 above), we consider it appropriate to consider the appellant's prospects briefly.

Prospects of success

[17] The relief sought by the respondent in these proceedings is out of the ordinary. The respondent sought an order in the High Court declaring that the appellant had been excommunicated from the Catholic Church, as well as an order preventing the appellant from conducting services in the respondent's Church, and ejecting him from the parish residence.

[18] In the founding affidavit, deposed to by the Archbishop of the Archdiocese of Windhoek, Archbishop Nashenda states that from 2003 onwards he received reports that the appellant was abusing alcohol. In June 2004, the Archbishop thus wrote to the appellant affording him an opportunity to undertake a programme of physical and spiritual renewal, failing which he was asked to resign with effect from 31 July 2004. The appellant did not reply to this letter. The Archbishop wrote another letter to the appellant on 11 July 2004 in similar terms to which the appellant replied stating that he was aware of his responsibilities as a parish priest. According to the Archbishop, the appellant then left his parish for three months and only returned in October

2004 when the Archbishop again received reports that the appellant was abusing alcohol. A meeting was held between the archbishop and the appellant and his father but the difficulties were not resolved.

[19] Finally, during October 2004 the Archbishop received a report stating that the appellant was engaged in the practice of witchcraft. The Archbishop investigated the matter and apparently his investigations confirmed that the appellant had done so. According to the Archbishop, he then held a meeting with the appellant and his father, which again produced no satisfactory result. According to the Archbishop, he then sought the advice of canon lawyers who advised him that the practice of witchcraft constitutes "a defection from the Catholic Church" with the result that the appellant was, according to canon law, deemed "to have excommunicated himself". The Archbishop wrote to the appellant informing him that he had been excommunicated and instructing him to desist from conducting services in Khomasdal.

[20] In February 2005, according to the Archbishop, he was informed that the appellant was continuing to conduct services and it was in order to prevent him doing so that the respondent approached the court for relief.

[21] As set out above, the appellant never lodged answering affidavits opposing the relief sought by the respondent and so the relief was granted, effectively unopposed. In his application for rescission, the appellant argued that the respondent was not entitled to request civil courts to provide relief based on canon law, as according to both canon law and civil law, that is a

matter that does not fall within the jurisdiction of the civil courts. As mentioned at para 5 above, the High Court found that the appellant had not provided sufficient explanation for his late filing of the rescission application and could have dismissed the application on that basis alone. Instead, the High Court considered the merits of the matter, investigated the canon law rules and concluded that the appellant had indeed been validly excommunicated from the Church and should be interdicted from conducting services at Khomasdal.

[22] It is not clear on what basis the High Court considered that the question of whether or not the appellant was excommunicated was an issue that could be determined as a matter of law by a civil court. In argument before this Court, respondent's counsel conceded that the question of whether a priest had been excommunicated according to canon law was not a question of law that falls within the jurisdiction of a civil court.

[23] As Dumbutshena JA stated in a judgment he delivered as a judge of appeal in the Transkei, *Mankatshu v Old Apostolic Church of Africa and Others* 1994 (2) SA 458 (TkA) at 460 H:

> "Jursidiction or the lack of it is an important issue when considering whether a party aggrieved by his church can take the dispute to a civil court. The authorities say that, when there is an absence of civil rights or interests prejudicially affected by a decision of a voluntary association, the civil courts have no jurisdiction."[1]

[1]See also *Allen and Others, NNO v Gibbs and Others* 1977 (3) SA 212 (SE) at 218A-B; *Rylands v Edros* 1997 (2) SA 690 (C) at 703 G – H.

The same principle must apply when a church seeks relief from a civil court. Is the relief sought, relief based on civil rights and civil law or is it, in effect, an attempt to ask a civil court to apply or determine ecclesiastical rules? If the relief, properly construed, is the latter, a civil court will not have jurisdiction over the matter.

[24] A court has jurisdiction over legal questions that arise within its jurisdiction. Ordinarily, the question whether a priest has breached the rules of ecclesiastical or canon law are not legal questions within the jurisdiction of the court. They may be factual questions that may be proved by expert evidence, but a court will only have jurisdiction in respect of them if the underlying causa is one within the jurisdiction of the court.

[25] It is not necessary for the purposes of this case to consider the precise relationship between this rule and article 21(1)(c) of the Constitution, which provides that "all persons shall have the right to practise any religion and to manifest such practice." But it is worth noting, that courts in other jurisdictions consider that the right to freedom of religion requires courts to abstain from interfering with the practice of religion. In *Attorney-General for New South Wales (at the relation of Neil MacLeod and Another) v Grant and Another* (1977) 51 ALR 10 (HC) at 20, for example, the Australian High Court stated:

> "…courts may properly determine church property disputes on neutral principles, and also interfere where decisions of ecclesiastical government are based on fraud, collusion or arbitrariness. Otherwise, only marginal enquiry into church government is permissible. … [T]he decisions of the

> governing body of the church should be accepted on issues of practice and procedure of ecclesiastical government, as well as issues of doctrine…..
>
> Many of the appellant's submissions would require this Court to inquire into and decide controversial questions of doctrine (or departure from doctrine) or practice or procedure in ecclesiastical government. In my opinion, however forceful these arguments appear to be, they are outside the judicial sphere, and I do not entertain them."[2]

[26] Nor is it necessary to consider whether a civil court will require church authorities to follow fair processes in making decisions that affect members of the church. It has long been established that churches are considered to be voluntary associations and are subject to the common-law review jurisdiction of the courts on review grounds only.[3] It may be that the adoption of the Namibian Constitution, and in particular chapter 3 of the Constitution which entrenches fundamental human rights and freedoms, including article 21(c) mentioned above, may have some influence on the principles that govern the grounds on which courts will review the decisions of religious associations. However, these are not issues that arise crisply for decision in this case and I say nothing further concerning them.

[27] The High Court apparently did not consider the question whether it had jurisdiction to determine whether the appellant had been validly excommunicated in terms of canon law either when the original rule was

[2] The approach in the United States is clear. Courts may not interfere with decisions of ecclesiastical law. See, for example, *United States v Ballard* 322 US 78 (1944). The issue has not yet arisen sharply for determination in Namibia or by the Constitutional Court in South Africa, but see *Taylor v Kurtstag NO and Others* 2005 (1) SA 362 (W) at para 61 and *Rylands v Edros*, cited above n 1, at 703.

[3] See, for example, *Du Plessis v Synod of the Dutch Reformed Church* 1930 CPD 403 at 420; *Odendaal v Loggerenberg en andere NNO (1)* 1961 (1) SA 712 (O) at 719 C – E; *Theron en andere v Ring van Wellington van die NG Sendingkerk in SA en andere* 1976 (2) SA 1 (A) at 13H.

confirmed in July 2005 or in January 2008 when the application for rescission was refused.

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

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

[30] This brief examination of the merits of the case makes plain that there are good prospects that the first prayer granted by the High Court may be overturned on appeal. Even were the appellant to succeed to this extent,

however, the appellant's status as a member of the Church would not be affected. As the appellant admitted in argument in this Court, ultimately his status as a member of the Church is a matter that can only be determined by canon law, not by the civil courts.

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

Should condonation be granted?

[32] The appellant has failed to provide a sufficient or reasonable explanation for his failure to prosecute his appeal timeously and he has also failed to comply with the time limits imposed for the lodging of the appeal record. These are flagrant lapses that cannot be overlooked, particularly because during the entire course of this litigation, the appellant has shown no respect at all for the rules of the courts. Although the appellant has some prospects of success upon appeal, those prospects are not sufficient to outweigh his repeated and substantial non-compliance with the rules of this Court and the absence of any detailed or convincing explanation therefor. In the circumstances, condonation for the late filing of the appeal cannot be granted to the appellant and his appeal must therefore be struck from the roll.

Costs

[33] The ordinary rule in this Court is that costs follow the result. The appellant is therefore ordered to pay the respondent's costs, such costs to include the costs of one instructed and one instructing counsel.

Order

[34] The following order is made:

1. The application for condonation for the late filing of the appeal is refused.

2. The appeal is struck from the roll.

3. The appellant is ordered to pay the costs of the respondent, such costs to include the costs of one instructed and one instructing counsel.

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O'REGAN AJA

I agree.

_____
MAINGA, AJA

I agree.

LANGA AJA

COUNSEL ON BEHALF OF THE APPELLANT:	In Person
COUNSEL ON BEHALF OF THE RESPONDENT:	Mr. G. Dicks
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