THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Die Nederduitsch Hervormde Kerk van Afrika and Others v Die Wilge Hervormde Gemeente and Others (1089/2022) [2024] ZASCA 128 (30 September 2024)

Today the Supreme Court of Appeal (SCA) made an order granting leave to intervene and joining The Nederduitsch Hervormde Kerk van Afrika Gemeente Meyerspark, the Nederduitsch Hervormde Kerk van Afrika Gemeente Pretoria Tuine, the Nederduitsch Hervormde Kerk van Afrika Gemeente Die Wilge Potchefstroom, and the Nederduitsch Hervormde Kerk van Afrika Gemeente Koster (the intervening parties) as applicants in the application for leave to appeal. The SCA further made an order granting leave to appeal, thereafter, upholding the appeal and setting aside and replacing the order of the Gauteng Division of the High Court, Pretoria (the high court). In the last instance, the SCA ordered the respondents to pay the costs of the intervention applications, the costs of the application for leave to appeal, and the costs of appeal, jointly and severally, one respondent paying the others to be absolved, including the costs of two counsel where so employed.

The applicant, the Nederduitsch Hervormde Kerk van Afrika (the NHKA), sought leave to appeal against the judgment and order of the trial judge in the high court, in an action instituted by the respondents in that court. The respondents are former congregations of the NHKA and entities to which they transferred properties previously registered in the names of congregations affiliated to the NHKA. In addition, there were intervention applications by the intervening parties who sought an order to be joined in the application for leave to appeal to the SCA and, if successful, in the appeal.

The legal dispute giving rise to the appeal concerned certain immovable properties and the property rights attached to them, in particular, the professed right of certain of the respondents to transfer the properties to entities falling outside of the NHKA. Until the decisive rift between the parties, the properties were registered in the names of various congregations of the NHKA which were all juristic entities with legal personality separate from that of the NHKA itself, and with the capacity to own property. The intervening parties (original congregations), as cited above, were four of the congregations in whom ownership of the affected properties originally vested.

In approximately 2010 and 2011, some members of the original congregations expressed dissatisfaction over the formal stance adopted by the NHKA on apartheid and its purported theological justification, ultimately leading to a breakdown in the relationship between the dissatisfied members and the NHKA. By majority vote within the intervening parties, the dissatisfied members donated and transferred the affected properties from the original congregations to new juristic entities. The new

entities were established and controlled by the dissatisfied members with the express purpose of taking transfer of the properties. The dissatisfied congregants broke completely from the NHKA and formed new congregations outside the NHKA, while retaining possession and use of the transferred properties for their own religious purposes.

Against this background, the respondents instituted proceedings in the high court against the NHKA as defendant seeking certain declaratory relief which, in essence, would confirm that they had the authority to transfer the properties to the new owners. Except for the NHKA, none of the original congregations were cited in the high court action. After summons were issued, the NHKA filed its plea and instituted a counterclaim. The original congregations then applied to intervene as co-defendants in the action and as co-plaintiffs in the NHKA's counterclaim. After being assigned to manage the litigation between the parties, Fourie J, by agreement between the parties, formulated a separated issue for determination prior to the hearing of further disputes (the separated issue). The parties agreed that the intervention applications by the original congregations would be held over until the separated issue had been determined.

The separated issue, which related to 'Whether members or a congregation of the NHKA who have problems within or with the NHKA and/or want to break away and/or has broken away from the NHKA by a majority decision sell or donate its assets to a voluntary association or another congregation that does not form part of the NHKA' was set down for hearing on 25 January 2022, before the trial judge, however, the trial judge, of her own accord, raised and directed the parties to address her on an issue of 'privity of contract' (whether the NHKA, which was not the registered owner of the affected properties, could legally challenge the validity of the contracts of donation in terms of which the new congregations had alienated the properties to the new owners), holding the view that a determination of this issue would obviate the necessity of making a finding on the separated issue and bring the matter to finality.

The trial judge expressed that only the parties to a contract of donation are bound by it, and a third party, like the NHKA, cannot sue or be sued on it, concluding that its finding on the privity of contract issue meant that the NHKA had no legal standing to challenge the relief sought by the respondents and that, consequently, the dispute between the parties was moot.

In coming to a conclusion on the intervention applications, the SCA held that there were difficulties with the respondents' opposition to the intervention application as, firstly, the SCA was not called upon to resolve any factual dispute about whether the intervening parties exist as congregations or not – it was not an issue that called for purely factual determination. Secondly, the respondents' argument disregarded the agreement in the trial to place the joinder applications on hold until the separated issue was decided – the only question for the SCA was whether the intervening parties had a legal interest in the application for leave to appeal, and the appeal against the high court's order. On this point, the SCA concluded that the intervening parties, as the original titleholders of the properties forming the objects of the dispute, had a legal interest in the application for leave to appeal and the appeal, and, therefore, must be joined as parties.

With regard to the merits and the issue of whether the high court misdirected itself in raising the privity of contract issue *mero motu* and concluding, on that basis, that the dispute between the NHKA and the respondents was moot, the SCA held that the high court raised an entirely new question of law, not in issue in the pleadings and failed to heed the caution for judicial restraint, and instead, directed the parties to deal with an issue that was not pleaded. This prejudiced the NHKA as it was denied its right, as a cited defendant, to properly oppose the relief sought by the respondents.

In the result, the SCA granted the intervening parties leave to intervene and be joined as co-applicants in the application for leave to appeal and granted the leave to appeal, further upholding the appeal and setting aside and substituting the order of the high court.

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