CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 08/20

In the matter between:

MDUDUZI SHEMBE	First Applicant
NKOSI MQOQI NGCOBO	Second Applicant
MBONGWA FRIEND NZAMA	Third Applicant
and	
NTOMBIFIKILE PRIMROSE SHEMBE N.O.	Respondent

Neutral citation:	*Shembe and Othersv Shembe N.O.* [2021] ZACC 17
Coram:	Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgments:	Theron J (unanimous)
Heard on:	2 February 2021
Decided on:	22 June 2021

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg), the following order is made:

1. Leave to appeal is refused.
2. The applicants must pay the respondent's costs, including the costs of two counsel.

JUDGMENT

THERON J (Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] The dispute between the parties in this matter relates to leadership succession in the Nazareth Baptist Church (Church). The Church was founded in 1910 by the Prophet Isaiah Shembe (first Titular Head of the Church) with its headquarters at Ekuphakameni Mission, Inanda, Durban, KwaZulu-Natal. Presently, the Church consists of branches at Ekuphakameni, Ebuhleni, Ginyezinye, Thembezinhle (all of which are located in KwaZulu-Natal) and Johannesburg, each operating under different leaders. The present dispute concerns leadership of the Nazareth Baptist Church at Ebuhleni (the Ebuhleni congregation or Ebuhleni Church).[1]

[1] There have been various other leadership succession battles in the Church, the details of which are not relevant for present purposes.

[2] Historically, the leader of the Ebuhleni congregation (Titular Head) has chosen his successor. The most recent Titular Head was the late Mr Vimbeni Shembe, and he passed away in 2011. At the time of his death, Mr Vimbeni Shembe was the sole trustee of the Nazareth Ecclesiastical Endowment Trust (Trust). The first applicant, Mr Mduduzi Shembe, initially claimed that the late leader had orally nominated him as his successor. That nomination was challenged by the now late Mr Vela Shembe, who alleged that he had been nominated by the late leader in terms of a written Deed of Nomination. The respondent, Ms Ntombifikile Shembe N.O., has stepped into the shoes of the late Mr Vela Shembe and now acts in her capacity as the executrix of his estate. The second applicant, Inkosi Mqoqi Ngcobo, is the great-grandson of Inkosi Mandlakayise Ngcobo, on whose homestead Mr Vimbeni Shembe's father, Mr Amos Shembe, established the Ebuhleni Church in 1979. The third applicant is the Reverend Mbongwa Friend Nzama, who at one stage was the chairperson of the Ebuhleni Church's executive committee.

[3] Mr Vela Shembe applied to the High Court of South Africa, KwaZulu-Natal Division, Durban (Trial Court), for an order that effect be given to the written Deed of Nomination in terms of which he was allegedly appointed by Mr Vimbeni Shembe as the sole trustee of the Trust and the Titular Head of the Ebuhleni Church. He later abandoned the relief seeking his appointment as sole trustee of the Trust. The matter before us concerns only the nomination and appointment of the Titular Head of the Ebuhleni Church.

[4] In the High Court, certain factual disputes were referred for the hearing of oral evidence by agreement between the parties. They related primarily to two issues, namely, who the late leader had nominated as his successor (nomination issue) and whether succession in the Ebuhleni Church was governed by Protocol 293 of 1935 (Trust Deed), which applied to the Trust, or by the Constitution that the Ebuhleni congregation had purported to adopt (succession issue). The applicants contended that the Trust Deed applied to the succession issue and, in relation to the nomination issue,

that the Deed of Nomination relied upon by Mr Vela Shembe was a forgery and that the oral nomination of the first applicant should be given effect to.

Background

[5] At this juncture, it is necessary to provide a brief history of the Church and, more specifically, the two instruments which purport to govern succession in the Ebuhleni Church. The founder of the Church, Mr Isaiah Shembe, passed away on 2 May 1935. Members of the Church had from time to time contributed amounts of money for the purpose of acquiring land, erecting houses of worship and funding church activities. In July 1935, and in order to give effect to the wishes of the late founder, Mr Isaiah Shembe's eldest son created the Trust and donated certain immovable properties registered in the name of the founder to the Trust. The Trust was to be governed by the Trust Deed, the purpose of which was to transfer property held by Mr Isaiah Shembe to the Trust so that it would be administered for the benefit of the Church. The Trust Deed also purported to govern the activities of the Church including issues relating to succession in leadership. When the Trust Deed was executed, the Church comprised only the branch with its headquarters at Ekuphakameni. Clause 4 of the Trust Deed stated that any references to the Nazareth Church in the Trust Deed "shall be interpreted to mean the mother church situated at Ekuphakameni and all branch churches acknowledging the same confession of faith and following the teachings of the founder".

[6] The Trust Deed provides for a mechanism to elect a successor should the incumbent Titular Head not nominate a successor or nominate more than one successor. It contains a proviso that if the Titular Head nominates more than one successor, the choice of successor, which is to be made by an Executive and Advisory Committee, shall be limited to the persons so nominated. Clause 8 of the Trust Deed reads:

> "Upon the office of the Titular Head of the Church of Nazareth becoming vacant the Executive and Advisory Committee should elect a successor from amongst the pastors of the Church of Nazareth and such successor may be one of the members of the said

> Executive and Advisory Committee, provided if the office should be rendered vacant by death and the late Titular Head shall have recommended certain names from whom his successor is to be appointed then the choice of a successor shall be confined to the choice of one of those persons whose names have been recommended by the late Titular Head."

[7] Mr Isaiah Shembe's successor and the Trust's first sole trustee was his son Mr Johannes Shembe. In the wake of Johannes' death on 19 December 1976, a dispute arose as to whether his brother, Mr Amos Shembe, or his son, Mr Londa Shembe, was Johannes' rightful successor. The dispute caused the Church to splinter into two factions: the Ekuphakameni faction (led by Mr Londa Shembe) and the Ebuhleni faction (led by Mr Amos Shembe). Mr Amos Shembe's followers eventually left the Ekuphakameni Mission and in 1979 he established the Ebuhleni Church at his new homestead. Notwithstanding the fact that the Trust Deed first applied at Ekuphakameni, Mr Amos Shembe, now the leader of the Ebuhleni Church, was appointed as the sole trustee of the Trust.

[8] The Ebuhleni Church purported to adopt a Constitution in 1999 (Constitution). The Constitution deals with various matters, including leadership of the Ebuhleni Church, and provides that the church from then on would be a "corporate body with perpetual succession". In this latter respect, the Constitution was apparently aimed at facilitating the Ebuhleni Church's dealings with, among others, entities like the South African Revenue Service, the National Register of South African Churches and financial institutions. Both the Trust Deed and the Constitution deal with succession in leadership. Unlike the Trust Deed, which anticipates a situation where there is more than one nominee or no nominee whatsoever, the Constitution provides for a single nominee only.

Litigation history

[9] The Trial Court made two factual findings in respect of the nomination issue. It found that the late leader, Mr Vimbeni Shembe, had nominated Mr Vela Shembe as his

successor in terms of a written Deed of Nomination and that he had not orally nominated the first applicant as his successor. In this Court, the applicants do not seek to overturn either factual finding.

[10] In relation to the succession issue, the Trial Court made three findings, which it appeared to regard as factual. First, that clause 4 of the Trust Deed limits the Trust Deed's application to the church at Ekuphakameni[2] so that, after the schism, it would apply to the Ebuhleni Church only if it had been "adopted" or "applied". Secondly, that the Trust Deed was not adopted, used or applied by the Ebuhleni Church. Thirdly, that the Constitution applies to the church that has its headquarters at Ebuhleni.

[11] On appeal, the majority of the Full Court held, on the evidence, that the Trial Court's finding that the Deed of Nomination in terms of which Mr Vela Shembe had been nominated was authentic, could not be faulted. The majority also agreed with the finding of the Trial Court that the oral nomination of the first applicant was a fabrication. The minority of the Full Court held, also on the facts, that the Deed of Nomination was authentic and that the oral nomination of the first applicant was not a fabrication. In relation to the succession issue, both the majority and the minority agreed that the Trust Deed was applicable. On this score, they differed with the Trial Court.

[12] The applicants' appeal to the Supreme Court of Appeal failed. The Court unanimously held that there was no material misdirection by the Trial Court and that its findings were unassailable. It also accepted that "the trial court found *as a fact* that

[2] Clause 4 of the Trust Deed provides as follows:

> "The property of the Trust shall be held by the Trustee as an ecclesiastical charity for the benefit of the Church of Nazareth referred to in the recital hereof. The Church of Nazareth shall be interpreted to mean the mother church situated at Ekuphakameni and all branch churches acknowledging the same confession of faith and following the teachings of the founder Isaiah Shembe but in case any dispute shall arise as to whether any congregation claiming to be a branch of the Church of Nazareth is in fact such a branch, such dispute shall be decided by the Trustee and such decision shall be final."

succession and other administrative issues in the church had been solely regulated by the constitution" and that the "factual position is as was found by the trial court".[3]

[13] According to the Supreme Court of Appeal, the minority judgment of the Full Court had misconstrued the judgment of the Trial Court. Gorven AJA, writing for the Court, explained that the Trial Court had not found that the Trust Deed did not apply at all at Ebuhleni. Instead, it found that the Trust Deed did not apply to leadership succession in the Ebuhleni Church. It held that the Trust Deed's provisions dealing with the duties of the trustee would still apply at Ebuhleni since those were not dealt with in the Constitution. The judgment went on to find that the Trust Deed, insofar as it regulated succession to the position of Titular Head, had been varied by the Constitution and that this was sanctioned by the interpretive principle that "where a later document is adopted, the parts of an earlier document that are inconsistent with it are regarded as having been varied".[4] Relying on this latter statement, the applicants now contend that the Supreme Court of Appeal effectively allowed a variation of the Trust Deed in breach of the Trust Property Control Act.[5] This is the heart of their application in this Court.

In this Court

[14] The applicants contend that this matter engages this Court's constitutional jurisdiction in terms of section 167(3)(b)(i) of the Constitution on the basis that the Supreme Court of Appeal, by purporting to vary the Trust Deed, has infringed on and usurped the powers of the Legislature. This submission is unsustainable. If every case in which a court has misapplied a legislative provision amounted to a breach of the separation of powers, courts would be stripped of their prerogative to perform their constitutionally permissible function of interpreting and applying legislation in cases that come before them (within the bounds of the Constitution).

---

[3] *Shembe v Shembe (Shembe Amicus Curiae)* [2019] ZASCA 172; 2019 JDR 2366 (SCA) (Supreme Court of Appeal judgment) at para 18.

[4] Id.

[5] 57 of 1988.

[15] The applicants also submit that this Court's general jurisdiction under section 167(3)(b)(ii) of the Constitution is engaged because leave to appeal should be granted on the basis that the matter raises an arguable point of law of general public importance that ought to be considered by this Court. The applicants argue that the matter raises the following points of law:

(a) whether an extraneous document can amend the provisions of a trust deed contrary to its prescripts and the formalities as contemplated by the Trust Property Control Act;

(b) whether the provisions of a trust deed are optional; and

(c) whether a court has the discretion to ignore section 13 of the Trust Property Control Act.

[16] There is an argument to be made that the applicants' case is, and always has been, an appeal against factual findings made by the Trial Court and the Supreme Court of Appeal. This Court has refused to hear matters that only concern factual disputes[6] and on this basis alone the applicants' case arguably does not engage this Court's jurisdiction. That said, I am willing to assume, for present purposes, that the matter concerns questions of law of general public importance for the reasons advanced by the applicants. However, for reasons that follow, this is not a matter that "ought to be heard" by this Court.

[17] In determiming whether a point of law ought to be entertained by this Court pursuant to section 167(3)(b)(ii), regard must be had to factors relevant to the interests of justice criterion that is considered when granting leave to appeal in constitutional matters.[7] In *Paulsen*, this Court said:

---

[6] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 35.

[7] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 30. See also *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC) at para 12, and at para 17, where this Court said:

> "But these questions, intriguing and consequential as they are, were not before the High Court or the Supreme Court of Appeal. And they are not before this Court. They arise for decision

> "[A] holding that a matter raises an arguable point of law of general public importance does not inexorably lead to a conclusion that the matter must be entertained. Whether the matter will, in fact, receive our attention will depend on the interests of justice".[8]

[18] The principal reason why this is not a matter which ought to be heard by this Court is that the issues it raises are academic, of no practical effect as between the parties, and of no jurisprudential value.

[19] The mainstay of the applicants' case is that the Supreme Court of Appeal's decision created precedent that courts have a discretion to ignore section 13 of the Trust Property Control Act and vary trust deeds without regard to that Act. They say this application warrants the attention of this Court because there is a need to correct this precedent, which runs roughshod over our law of trusts. But the Supreme Court of Appeal created no such precedent. The applicants have always accepted that the question of succession was to be resolved by a factual determination of whether the Trust Deed or the Constitution applies at Ebuhleni. The central question at the heart of this matter has always been a factual one. And the judgments of the Trial Court, Full Court and Supreme Court of Appeal bear testimony to this. It is even expressly stated, early in the judgment of the Supreme Court of Appeal, that the appeal turned "purely on the facts" and, later, that the Trial Court "was asked to resolve factual disputes".[9] That the Supreme Court of Appeal regarded the issue before it as being factual in nature is evident from the following passage of its judgment:

> "As has been mentioned, the trial court found as a fact that succession and other administrative issues in the church had been solely regulated by the constitution. This was partly based on the evidence of Sibisi, who testified that the constitution 'became the operating document of the Church'. It was not challenged that the constitution was

---

here only if this Court grants leave to appeal on them. In other words, unless Tiekiedraai passes the interests of justice test, meaning that this Court 'ought' to consider these issues, they cannot and should not be decided in this litigation."

[8] *Paulsen* above n 7 at para 18.

[9] Supreme Court of Appeal judgment above n 3 at paras 10 and 18.

> proposed by the late leader, accepted by the church and never questioned. The factual position is as was found by the trial court. On the question of succession, its provisions differ from those of the trust deed as demonstrated above. Where a later document is adopted, the parts of an earlier document that are inconsistent with it are regarded as having been varied. This applies to the present dispute."[10]

[20] The Supreme Court of Appeal accepted that the matter turned on a dispute of fact and that the factual findings of the Trial Court were unassailable. This led it to uphold the factual findings made by the Trial Court. It follows that the remarks made by the Supreme Court of Appeal regarding variation of the Trust Deed, which was a finding of law as to the effect of two legal documents, was *obiter dicta* (comments made in passing). Having accepted that the matter turned on factual findings that could not be disturbed, these remarks about variation were simply "by the way" and not part of the *ratio decidendi* (the rationale or reason) of its judgment. It follows that the appeal is an abstract and academic exercise at best, which this Court ought not determine.

[21] Is the question of which governing document (the Trust Deed or the Constitution) applies to succession at the Ebuhleni Church really a question of fact? Implicit in the applicants' appeal against the Supreme Court of Appeal's finding that the Constitution varied the Trust Deed is the suggestion that this matter ought to have turned on the legal question of whether an extraneous document (in this case, the Constitution) can vary the terms of a trust deed.

[22] It is by no means self-evident that when an extraneous document conflicts with a Trust Deed, that conflict can be resolved merely by asking which document the parties adhered to as a matter of fact. This is because the resolution of the conflict may involve an inquiry as to which document takes precedence and on what legal basis, which is a legal question. That legal question may turn on the nature of the documents in issue, their interpretation and the interpretation of any relevant statutory prescripts (such as those contained in the Trust Property Control Act). Indeed, it is notable that the

[10] Id at para 18.

Trial Court made its "factual finding" that the Trust Deed does not apply at Ebuhleni by interpreting clause 4 of the Trust Deed.

[23] But at no stage in this case, until now, have the applicants argued that the succession issue turns on questions of law, namely: which of two legal documents that apply to the same subject matter takes precedence over the other; and the implications of the Trust Property Control Act. Even in this Court, they complain that the Trial Court's finding on the succession issue was "contradicted by the evidence" and they allege that the Court "failed to consider this evidence and consequently made a material error in respect of the application of the Trust and its application to the Church beyond Ekuphakameni".

[24] It is significant that the applicants do not challenge the findings of the Trial Court that the Deed of Nomination signed by the late Mr Vimbeni Shembe, nominating Mr Vela Shembe as his successor, was authentic and that the alleged oral nomination of the first applicant did not take place. At the hearing, it was explored whether the order sought by the applicants would have any practical effect. In particular, would the first applicant benefit from an order of this Court, given that he does not (and cannot) disturb the Trial Court's factual finding that he was not nominated by the late leader? Both the Trust Deed and the Constitution provide that if the incumbent Titular Head makes a single nomination then that person must be the successor. The position under either would be the same.

[25] Counsel for the applicants argued that the applicants seek to have the correct legal position prevail – that is, that the Trust Deed cannot be varied by the Constitution and that the Trust Deed applies to the appointment of the Titular Head of the Ebuhleni Church. The applicants' goal, so the aurgument went, is to obtain a judgment of this Court reversing the Supreme Court of Appeal's conclusion that the Trust Deed does not apply to Mr Vela Shembe's appointment as Titular Head. Counsel intimated that the applicants would then, in further litigation, seek to invalidate his appointment on the basis that it was "inchoate" in that the formalities prescribed in clause 10 of the

Trust Deed have not been complied with. In this Court, the applicants therefore seek to pre-empt a dispute concerning the implementation of the Trial Court's order. A dispute as to whether Mr Vela Shembe should have been appointed in terms of the Constitution or Trust Deed may well arise, but that question is not the subject of this application for leave to appeal.

[26] There was also a suggestion that a possible leadership vacuum in the Ebuhleni Church arising from the death of Mr Vela Shembe should tip the scales in favour of entertaining this appeal. Not so. This Court is called upon to determine whether the applicants' application for leave to appeal against the Supreme Court of Appeal's judgment and order should be granted. If there are impediments to implementing the Full Court's order giving effect to the Deed of Nomination, that is a question for a different court.

Conclusion

[27] In sum, the application does not raise arguable points of law of general public importance which ought to be considered by this Court and the application for leave to appeal must accordingly fail. There is no reason why costs should not follow the result.

Order

1. Leave to appeal is refused.
2. The applicants must pay the respondent's costs, including the costs of two counsel.

For the Applicants:	R Choudree SC and N Xulu instructed by Govender, Mchunu and Associates Incorporated
For the Respondent:	A Findlay SC and R Ungerer instructed by Nkosi Trevort Attorneys