NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

APPEAL NO. AR 488/2009

In the matter between:

THE TWELVE APOSTLES CHURCH IN CHRIST **1ST APPELLANT**
NAPHTALI VUVUMUZI MLANGENI **2ND APPELLANT**

and

THE TWELVE APOSTLES' CHURCH IN CHRIST **1ST RESPONDENT**
CAESAR NONGQUNGA **2ND RESPONDENT**

JUDGMENT

GORVEN J

[1]This appeal lies against the judgment of K Pillay J where she granted, in essence, the relief sought by the respondents, who were the plaintiffs, against the appellants, who were the defendants. I shall refer to the parties as they were referred to in the court a quo. The defendants have appealed against the whole of the judgment.

[2]A church called The Twelve Apostles' Church in Christ (hereinafter the mother church) had as its Chief Apostle and President one Pakhathi (the deceased). The deceased died on 6 September 1994. This led to turmoil in the mother church. The

turmoil gave rise to an application launched by the second plaintiff against the second defendant and others. This application, in which the parties mentioned above were legally represented, gave rise to a settlement agreement. The agreement was signed by the four remaining Apostles of the mother church on 1 December 1995. These four Apostles had been anointed, along with one other, by the deceased during 1991 in front of members of the mother church at Kings Park stadium in Durban. The settlement agreement provided, in essence, for the dissolution of the mother church, the formation in its place of two churches led by the second plaintiff and the second defendant respectively and the distribution of the property owned by the mother church to the two new churches.

[3]In the court *a quo* the first plaintiff sought an order declaring the settlement agreement to be void and of no force and effect and relief consequent on that order. The second plaintiff sought an order declaring that he is the true successor to the deceased as Chief Apostle and President of the mother church. The relief relating to the settlement agreement was based on the contention that the mother church was not a party to it and had not either ratified or adopted it. The relief sought by the second plaintiff was based on the contention that he had been nominated by the deceased to be his successor and/or he was the most senior of the Apostles of the mother church and/or he had been recognized as the true successor to the deceased by the Central Council of the mother church at a meeting held at Umzumbe on 6 January 1996.

[4]These assertions were met with denials by the defendants. Their plea was to the effect that the mother church had been dissolved by the settlement agreement. They pleaded that the only four Apostles of the mother church were party to the agreement and, to the extent that ratification or adoption of the settlement agreement was required, the members of what was the mother church had done so by aligning themselves with and becoming members of the two successor churches. The mother church, accordingly, had been dissolved other than for the purpose of transferring its assets to the two new churches. They denied that the mother church was the first plaintiff and pleaded, further, that if it was held to be the first plaintiff, that it had not authorised the institution of the action. In the alternative, the defendants sought to estop the second plaintiff from asserting the existence of the mother church. There was a bare denial that the second plaintiff had succeeded the deceased as Chief Apostle and President.

[5]The issues in the trial were, accordingly, the following:

1. Whether the mother church had been dissolved by the settlement agreement or pursuant to the settlement agreement.
2. If not dissolved, whether the mother church had authorised the institution of the action in question.
3. If not dissolved, whether the second plaintiff succeeded the deceased as the Chief Apostle and President of the mother church.

[6]I shall deal with each of these three issues in turn.

DISSOLUTION OF THE MOTHER CHURCH

[7]The constitution of the mother church, prior to any amendments or purported amendments brought about after conclusion of the settlement agreement, formed annexure "A" to the particulars of claim. This provided for perpetual succession and that the mother church could sue and be sued in its own name. It is clear that the mother church was a voluntary association. In my view it was that form of voluntary association known as an *universitas*. This was described in the following terms in *Webb & Co Ltd v Northern Rifles*[1]:

> An *universitas personarum* in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a *persona* or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An *universitas* is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members.

And in *Wilken v Brebner & Others*[2] the court had the following to say:

> In the case of a *universitas* or *collegium*, a church or hospital, or what the German jurists call a "stifftung", the intention is that the association shall continue for ever and that it shall carry out the purposes of its founder or founders.

[8]The dissolution of such an entity requires the consent of all the members. This is so if there is no procedure set out in its constitution for its dissolution. Where a

[1] 1908 TS 462 at 464
[2] 1935 AD 175 at 184

procedure is set out in its constitution, the court in *Kahn v Louw NO & Another*[3] said the following:

> It is explicitly provided in the present Constitution - as in the Constitution dealt with in *Wilken v Brebner, supra* - that an amendment of the Constitution can only be effected in the particular way provided by the Constitution. And it is implicit in - and indeed so expressed in - the judgement in that case that the abrogation of the Constitution and the dissolution of the Party is effected in the same way; for the power to amend includes the power to dissolve…

Whilst it has been doubted that the power to amend includes the power to dissolve[4], I will assume for the purpose of this judgement that this is a correct statement of law. Absent such a power, every member of the mother church would have to agree to the dissolution.

[9]The Constitution of the mother church provides that it "shall not be amended save by the affirmative votes of three-fourths of the members of the Central Council present and voting at its meeting". It further provides that notice in writing by prepaid registered post shall be given to all members of the Central Council of any proposed amendment to the Constitution 90 days prior to the date of the meeting. Assuming the correctness of the *dictum* in *Kahn's* case, therefore, the Constitutional power to dissolve the mother church lies with the Central Council and must be done at a meeting where the requisite notice of the proposed dissolution had been given.

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[3] 1951 (2) SA 194 (C) at 211E-F

[4] *NGK in Afrika (OVS) en 'n Ander v Verenigende Gereformeerde Kerk in Suider-Afrika* 1999 (2) SA 156 (SCA) at 172B-C

[10]It was common cause at the trial that no meeting of the Central Council was ever convened, either before or after the conclusion of the settlement agreement, where the requisite notice was given of the proposed dissolution or of any proposed amendment to the Constitution. The defendants attempted to contend that the four Apostles were authorised to dissolve the mother church and that, because they all signed the settlement agreement, the mother church was dissolved. The only evidence which might have supported this contention was the formation, by the Central Council at a meeting on 17 September 1994 of what was referred to as the Apostle Board comprising the four Apostles. This was not a body recognised in the Constitution. The Central Council did not purport at any time to delegate to this body its power to amend the Constitution. To have done so would have required amendments to the Constitution; first to form this body as a constitutional entity and secondly to give the Central Council power to delegate its power to amend. Even if it had purported to delegate its powers, such a resolution would have been *ultra vires* its powers. This means, quite simply, that the mother church was not dissolved in accordance with the provisions of the Constitution.

[11]No evidence was led that a unanimous vote of all the members of the mother church to dissolve the mother church took place. This further means, therefore, that the only other basis on which the mother church could be dissolved did not occur.

[12]There was much evidence and discussion relating to the meeting of the Central Council of 6 January 1996 and, in particular, whether this meeting was properly

convened. As mentioned above, it was certainly not convened in the manner required for an amendment to the Constitution. There is no evidence, however, that it was not properly convened for the purpose of conducting other business. The only relevance any evidence may have about whether the meeting was properly convened relates to whether or not it can be said that the Central Council in any way ratified or adopted the settlement agreement. The evidence strongly discloses that no such ratification took place at the meeting. The minute of the meeting, and the evidence of the second plaintiff and Ntonga as to the meeting, was to the effect that the Central Council rejected the settlement agreement and, in particular, the dissolution of the mother church and accepted the apology of the second plaintiff for having signed the settlement agreement. It went further and required legal action to be instituted to set aside the settlement agreement. Even if it can be said that the meeting was not properly convened, this shows a significant number of members of the mother church rejecting dissolution. Ratification, other than by a meeting of the Central Council with the requisite notice of the proposed dissolution, would have required the attendance and consent of all members of the mother church. It cannot therefore be said that all the members of the mother church ratified the settlement. As mentioned above, the meeting in question was not given the requisite notice of any proposed dissolution and, even if it had been in favour of the settlement agreement, this would not have been sufficient for the dissolution of the mother church by the Central Council under the Constitution. After argument on appeal, Mr Dilizo, who appeared for the defendants at the trial and on appeal, conceded before us, correctly in my view, that the mother church has not been dissolved.

[13]As regards the estoppel point, it was taken and can operate only against the second plaintiff. This aspect of the relief sought was sought only by the first plaintiff, not the second plaintiff. No estoppel can lie against the first plaintiff on the evidence led before the court *a quo*. Even if a case had been made out for an estoppel to operate against the second plaintiff, and this was not the case, it could not affect the relief sought by the first plaintiff.

[14]It is therefore clear that Pillay J was correct in finding that no dissolution of the mother church took place by virtue of or pursuant to the settlement agreement. This formed the basis for the declaration, based on the averments in paragraph 7.1 of the particulars of claim, that the settlement agreement was void and of no force and effect. The settlement agreement provided, in paragraph 1, that the application and counter-application were settled and withdrawn with no order as to costs. Apart from this paragraph and paragraph 8, providing for arbitration in the event of a dispute, the balance of the settlement agreement provides for the dissolution of the mother church, the founding of new churches and the distribution of assets between the new churches pursuant to dissolution. It may be that the relief sought and granted was couched too widely and that paragraphs 1 and 8 of the settlement agreement can survive a finding that the first plaintiff could not be dissolved in that fashion. However, the balance of the agreement was clearly premised on the dissolution. It is probably competent, therefore, to declare the entire settlement agreement void. This point was

not raised at the trial or on appeal so I will say no more about it. There is therefore no basis to interfere with the finding of Pillay J on the first issue set out above.

AUTHORISATION OF INSTITUTION OF ACTION ON BEHALF OF THE MOTHER CHURCH

[15]The evidence disclosed that, after the conclusion of the settlement agreement, the second defendant formed the first defendant church. He had nothing further to do with the mother church. This is true, also, of members of the first defendant. All the actions taken by these persons related to the first defendant's affairs. At no stage was it claimed by the second defendant that he had attempted to involve himself in matters relating to the mother church. Indeed, to have made such a claim would have run contrary to his evidence which was to the effect that the mother church had ceased to exist save for the purpose of transferring its assets.

[16]Evidence was led, and not contradicted, that notice of the Central Council meeting scheduled for 6 January 1996 was sent to all Central Council members of the mother church, including the second defendant and his followers. It is also clear that, at the meeting of 6 January 1996 of the Central Council, there was a rejection of the settlement agreement and a decision to continue the affairs of the mother church. The evidence likewise disclosed that the mother church continued to function, albeit on the mistaken belief that certain amendments had been effected to the Constitution.

[17]The Executive Committee of the mother church is empowered by clause 7.3.1 of the Constitution to institute action. The evidence is that it resolved to do so on 24 January 2000 and the resultant resolution was signed on 5 February 2000. The oral evidence to this effect was supported by a copy of the notice of meeting, the minutes of the meeting of the Executive Committee and the resultant resolution. The resolution complies with the provisions of clause 7.3 of the Constitution. The summons was signed by the plaintiffs' attorneys on 8 February 2000. After the authority point was raised and on 30 May 2005, Ntonga, who was empowered to do so by the resolution, executed a power of attorney in favour of the plaintiffs' attorneys on behalf of the first plaintiff. The second plaintiff did so on his own behalf on that day. These powers of attorney also ratified all actions taken by the attorneys prior to that date.

[18]It appears that the authority to act need only be in existence at the time the attorney is called upon to satisfy the court. It does not require him or her to satisfy the court that he or she had authority to act at any particular time in the past.[5] Even if this is not the case, such ratification is competent since it gave effect to the resolution of the Executive Committee taken prior to institution of action and it cannot be said that all acts prior thereto were a nullity.[6] It is arguable that all that was necessary was the production of powers of attorney executed by the plaintiffs. Indeed, when it was indicated that the attorney for the plaintiffs was prepared to give evidence of his authorisation, the defendants indicated on the record that this would not be necessary. It had been agreed that this issue would be decided after evidence had been led at

[5] *Johannesburg City Council v Elesander Investments (Pty) Ltd & Others* 1979 (3) SA 1273 (T) at 1280A-B; *Marais v City of Cape Town* 1997 (3) SA 1097 (C) at 1101D
[6] *Nampak Products Ltd v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T) at 924G-925A

the trial. This rendered unnecessary any further evidence in respect of the defendants' Rule 7(1) Notice or challenge on the pleadings. Mr Dilizo submitted that, since the minute of the meeting of 24 January 2000 recorded, by way of a preamble to the resolution passed that day that the resolution was taken in pursuance of the Central Council resolutions of 6 January 1996, it was necessary to prove that the Central Council meeting of 6 January 1996 had been properly convened. I disagree. This is a mere preamble. The Executive Committee was empowered to make the decision. Whether it gave effect to a resolution of the Central Council or not is irrelevant. In any event, as I have said above, there was no evidence to gainsay that of the plaintiffs that the Central Council meeting of 6 January 1996 was properly convened for the conduct of business other than amendments to the Constitution.

[19]I can therefore see no basis for finding that the attorneys in question were not properly authorised by the first plaintiff to institute action. Once again, in argument Mr Dilizo, correctly in my view, conceded that the authorisation of the attorneys to act on behalf of the plaintiffs was valid. The finding by the trial court on this issue must also therefore be upheld.

WHETHER THE SECOND PLAINTIFF IS THE CHIEF APOSTLE AND PRESIDENT OF THE MOTHER CHURCH

[20]It should be noted that no counterclaim was instituted for a declaration that the second defendant was the Chief Apostle and President of the mother church. As

indicated earlier, any such counterclaim or contention would be entirely inconsistent with the case and attitude of the second defendant that the mother church has been dissolved. The only claimant, accordingly, is the second plaintiff and the only issue in the appeal is whether or not this case was made out on the evidence.

[21]The relevant part of clause 6.6 of the Constitution of the mother church provides as follows:

> The successor to the Chief Apostle shall be the next most senior Apostle after the Chief Apostle, provided that the then current Chief Apostle did not nominate his successor ….

[22]There were three bases relied on by the second plaintiff for his claim. The first was that, at Kings Park stadium in 1991 where the five Apostles were anointed, the deceased stated that the youngest of the Apostles anointed that day would succeed him and that this referred to the second plaintiff. The second was that, on that occasion, the second plaintiff was the first to be anointed as an Apostle by the deceased and, accordingly, that he was the next most senior Apostle after the deceased. The third was that the deceased prepared a certificate dated 1January 1993 stating that the second plaintiff was ordained as "most senior Apostle and appointed as President's nominee in terms of clause 6.6 of the church Constitution" and handed this certificate to the second plaintiff in private some two weeks before his death.

[23]The first and third bases accordingly rely on the proviso set out above in clause 6.6. Mr Dilizo sought to argue that any such nomination had, on construction of this clause, to be of the next most senior Apostle and that the Chief Apostle had no power to nominate anyone else. This interpretation neither accords with the plain language of the clause nor with the principle that every word of a contract must be taken to have been included for a purpose. If the only person that the Chief Apostle could nominate was the person who was, in any event, the successor, the proviso is entirely superfluous. This basis for succession referred to in the proviso clearly takes precedence over the basis that the successor was the next most senior Apostle after the deceased. This being so, if the second plaintiff proved that he was nominated by the deceased, there is no need to enquire into who was the next most senior Apostle.

[24]The evidence relating to the first of these bases is common cause. All agreed that the deceased had made the statement to this effect at the Kings Park occasion. The second plaintiff said in evidence that the deceased said on that occasion that “the youngest will be the chief apostle”. The second defendant said in evidence that the deceased had "stated that the youngest of the apostles might take his position". It was further not contested that the second plaintiff was the youngest of the Apostles. The defendants attempted to argue that the physical youth of the Apostles was not being referred to. The second defendant testified that the deceased "was making specific reference to the youngest apostle at heart". When pressed on this interpretation, he was understandably unable to explain what was meant by this. It is quite clear that the second defendant was simply attempting to place a gloss on these words which

would defeat the claim of the second plaintiff. He could also not explain why, after taking specific instructions on the form of the utterance, his counsel had put a different set of words to the witness for the plaintiffs, Ntonga, on his behalf. This was to the effect that the “youngest one of them all, the youngest one like a child would be the one that will be the senior one. He will be the leader after me”. The second defendant was evasive and contradictory on this point. The trial court correctly rejected his evidence and the other evidence led by the defendants on the interpretation of this utterance as contradictory and untenable.

[25]The plaintiffs led evidence that the second plaintiff was the first person to be anointed as an Apostle on the occasion at Kings Park. No evidence contradicting that evidence was led by the defendants. Neither was this evidence challenged in cross-examination. This evidence must therefore be accepted. The witness Khumalo attempted to say that the second defendant was the most senior Apostle because he had joined a church, not even the mother church, well before the second plaintiff did. But the clause clearly refers to seniority as an Apostle, not as a member or in any other capacity. Absent any evidence that there was a different manner set out in the Constitution to determine seniority, the person who was anointed Apostle before the others were anointed must be held to be the senior Apostle among them. This means that if it was not proved that the deceased nominated a successor, clause 6.6 of the Constitution supports the claim of the second plaintiff that this qualifies him for the position.

[26]As regards the third basis, the second plaintiff produced in evidence a certificate which is dated 1 January 1993 and purports to have been signed by the deceased and the chairman of the Apostle Board. As mentioned above, the certificate stated that he was the “most senior Apostle and appointed as President’s nominee in terms of clause 6.6 of the church Constitution”. There was debate as to whether or not there was an Apostle Board, referred to in the certificate, prior to the demise of the deceased. The plaintiffs submitted a further document as exhibit "X" which is a certificate relating to the ordination of one Mabola as an overseer. This also referred to the Apostle Board and is also dated in 1993. Whilst it is not necessary to decide the succession point on this basis, the document in question was an original document and certainly appears to have a similar signature to that on exhibit “X”. Mr Dilizo strongly challenged the authenticity of the certificate, saying that the signatures of the deceased and the other person were not proved. He submitted that, before the certificate could be received in evidence, the second signatory should have been called. However, the second plaintiff gave evidence that the certificate was handed to him by the deceased. If this is accepted, the probabilities are that the deceased must have meant by that to endorse what was contained in the document. It can be accepted in evidence, not to prove that it was signed by the deceased and the other signatory, but to prove that the deceased accepted its contents as expressing his will.

[27]The weight to attach to that evidence depends on an assessment of the credibility of the second plaintiff. In the light of the challenge to authenticity as well as the fact that this document was given to the second plaintiff in private, this evidence, had it

stood alone, may not have been sufficient to discharge the onus. Mr Dilizo submitted that the trial court should have rejected the evidence of the second plaintiff since he had submitted an affidavit, in an application launched in 1997, which starkly contradicted his evidence at the trial. Whilst the entire affidavit was not put to the second plaintiff, since it had been discovered after his evidence was complete, aspects of it were put to him. He candidly accepted that much of it was untrue but that his then attorneys had prepared the affidavit to set out to prove a particular case and told him that this was what he had to say. Due to their position, he accepted their advice even though he knew some of it to be untrue. It is also so that, on analysis, much of what is incorrect relates to legal conclusions derived from what took place around the time of the settlement agreement. On my understanding of the situation, these legal conclusions were incorrect but the fact that they were the attorneys who had advised in negotiating the settlement agreement might have clouded their judgment. It was because neither the first nor the second plaintiff was satisfied with the application in question, that they resolved to pursue the present action. This dissatisfaction is expressed in the minute of the meeting of the Executive Committee of 24 January 2000. The trial court dealt with this criticism of the second plaintiff as a witness and found that he was a satisfactory witness and that his explanations as to his previous affidavits were acceptable. I agree with this finding.

[28]The evidence was sufficiently clear, on the first two bases relied on by the second plaintiff which do not require the acceptance of his evidence alone, that he should succeed the deceased as the Chief Apostle and President of the mother church. The

first of these is, of course decisive on its own. Even if this was not found to have been proved, no evidence was led to gainsay the second basis, neither was the factual evidence as to who was ordained first challenged. The evidence of the certificate simply lends further weight to a case already made out for his succession. I can therefore find no basis for interfering with the finding of Pillay J. that the second plaintiff was entitled to the order sought in this regard.

ORDER GRANTED BY THE COURT *A QUO*

[29]Mr Dilizo attacked the grant of paragraph (ii) of the order requiring the return of possession of the listed assets to the first plaintiff. He submitted that the plaintiffs' counsel, in the opening address, indicated that this relief would be held in abeyance. This is not so. The record discloses, and Mr Dilizo conceded this after it was pointed out, that counsel for the plaintiffs had indicated that the debatement of the account sought would be held in abeyance. This is usually the case since it may be that there is no dispute over the account, once it has been rendered. The order granted this relief and is, to that extent, incorrect. However, this does not constitute any kind of success on appeal such as to warrant any costs order in favour of the defendants.

[30]As regards the prayer for the return of the assets, the only defence raised to the first plaintiff's claim to possession of the assets was that the assets are not those of the first plaintiff. This was on the basis of the defendants' case that the first plaintiff was not the mother church, but was the new church founded pursuant to the

settlement agreement by the second plaintiff. As mentioned above, the trial court found correctly that the first plaintiff is the mother church. Mr Dilizo submitted that this aspect was not canvassed in evidence due to his belief that it would be held in abeyance. He submitted that there was no evidence before the trial court as to which of the assets in annexures “C” to “F” to the particulars of claim were in the possession of the first defendant. However, the plea admitted that the first defendant is in possession of those assets, save for a bank account, and pleaded that it had obtained possession of these assets pursuant to the settlement agreement. There was therefore no need for evidence to be led on the issue and the relief to be restored to possession follows as a matter of law. Once this had been pointed out to Mr Dilizo in argument, he did not press the submission any further.

[31]The first plaintiff has abandoned the judgment in its favour in respect of the Isuzu light delivery vehicle with registration NX 24643. No adjustment to the prayers needs to be made in this regard.

[32]In the result:

1. The appeal succeeds in respect of paragraph (v) of the order which is amended to read as follows:
   (v) The first plaintiff is given leave to set the account down for debatement on notice to the defendants.
2. Save for paragraph 1. hereof, the appeal is dismissed with costs.

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GORVEN J

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GOVINDASAMY AJ

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LUTHULI AJ

DATE OF HEARING:	5 February 2010
DATE OF JUDGMENT:	15 February 2010
FOR THE APPELLANT:	Adv Dilizo, instructed by Ngubo & Co.
FOR THE RESPONDENT:	Adv Lennard, instructed by Bhamjee Attorney