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

CASE NO: AR250/2017

In the matter between:

MDUDUZI SHEMBE	FIRST APPELLANT
INKOSI MQOQI NGCOBO	SECOND APPELLANT
MBONGWA FRIEND NZAMA	THIRD APPELLANT

and

VELA SHEMBE	RESPONDENT

ORDER

On appeal from the KwaZulu-Natal Local Division, Durban (Jappie JP sitting as the court of first instance):

(a) The appeal succeeds to the limited extent that paragraph 4 of the order of the judgment of the court a quo is set aside and is replaced with the following order:

'The respondent is ordered to pay the costs of the application under Case Number 6259/2011, such costs to include those occasioned by the employment of two counsel.'

(b) Otherwise, the appeal is dismissed with costs, such costs to include those occasioned by the employment of two counsel.

APPEAL JUDGMENT

Madondo DJP

[1] The appellants appeal against the judgment of Jappie JP, handed down on 18 October 2016, in which he issued an order:

(a) giving effect to the Deed of Nomination wherein the late leader Mbusi Vimbeni Shembe nominates Vela Muhle Shembe as the appointed Titular head of the Nazareth Baptist Church at Ebuhleni;

(b) dismissing the counter relief sought by the first appellant in a notice of motion under case number 4256/2011;

(c) directing the first and second appellants to pay costs under case number 4256/2011 jointly and severally, the one paying the other to be absolved.

[2] The appellants further appeal against the following costs orders:

(a) the costs order granted under case number 6259/2011, that the application was dismissed with no order as to costs;

(b) the costs order granted under case number 4625/2011, that the rule *nisi* is discharged in respect of the four interlocutory applications with no order as to costs is made.

ISSUES

[3] Issues in this appeal are:

(a) Whether the late Vimbeni Shembe nominated Vela Shembe or Mduduzi Shembe, or both Vela Shembe and Mduduzi Shembe, as Titular Head of Nazareth Baptist Church;

(b) Whether the Trust Deed applies to the Nazareth Baptist Church, Ebuhleni; and

(c) Other ancillary issues stemming from the main issues in paragraph (a) and (b) above; these will become more apparent later in the discussion of the main issues.

APPLICATIONS FOR CONDONATION

[4] The applications for condonation for the late delivery of the appellant's practice note and the late lodging of the respondent's practice note and heads of argument were granted by consent. However, the appellants' application for condonation for the late filing of the appeal record and non-compliance with the time limits prescribed in Uniform rule 49(7)(a) was opposed. After hearing the argument by both parties this Court granted condonation on the grounds that the delay in filing the appeal record was not due to remissness on the part of the appellants but to the complexities involved in the compilation of a voluminous appeal record. Also considerations of fairness to both parties, the importance of the matter which requires that as a matter of public interest be finalised without delay, and prospects on appeal urged this court to grant the application for condonation. See *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as* amicus curiae*)* 2008 (2) SA 472 (CC) at 477A-B.

BACKGROUND

[5] Five applications were launched in the court *a quo* on an urgent basis under various case numbers as follows: 4256/2011; 4315/2011; 4625/2011; 6259/2011 and 7263/2011.

[6] The main application was under case number 4256/2011. Several interlocutory applications were also launched during the course of the hearing of the main application at the court *a quo*. The issue for determination in this application was whether the late Vimbeni Shembe nominated Vela Shembe or Mduduzi Shembe or both Vela Shembe and Mduduzi Shembe as Titular Head of the Nazareth Baptist Church. However, due to the fact that there were serious disputes of fact the matter was referred for the hearing of oral evidence on the main issue and on other ancillary issues in the matter.

[7] In the main application (case number 4256/2011), among other relief, the respondent, firstly, sought an order giving effect to the Deed of Nomination of Trustee and Titular Head of the Nazareth Baptist Church signed by Mbusi Vimbeni Shembe, the deceased leader (who was in the court *a quo* referred to as the late leader and, in order to avoid confusion, he shall also hereinafter be referred to as

'the late leader'), wherein he nominated the respondent (Vela Shembe) as his successor. Secondly, appointing him (the respondent) the sole trustee of the Church of the Nazareth Ecclesiastical Endowment Trust. Thirdly, interdicting and restraining the appellants (Mduduzi Shembe, Inkosi Mqoqi Ngcobo and Chancey Sibisi) from proceeding with the announcement, appointment, and anointment ceremony to nominate the first appellant as the sole trustee of the Church of the Nazareth Ecclesiastical Endowment Trust and Titular Head of the Nazareth Baptist Church.

[8] The first appellant opposed the main application by the respondent and in his counter-application he sought an order declaring him (the first appellant) to be the duly appointed titular head of the church alternatively, empowering the executive and advisory committee to elect and appoint him as the leader of the church.

[9] Under case number 4315/2011 the church and the third appellant brought an application for an order freezing the three banking accounts belonging to the church. The two banks (i.e First National Bank and ABSA Bank), Master of the High Court, Chancey Sibisi and the respondent were respondents in the application.

[10] The respondent was in agreement with the relief sought but only to the extent that it should not be pending the outcome of an application for substitution of the sole trustee but pending the outcome of the main application, (under case number 4256/2011).

[11] Under case number 4625/2011 the respondent sought and obtained an interdict against the first and second appellants and Chancey Sibisi (pending final determination of the main application) interdicting and restraining them from making further announcements that the first appellant was to be appointed titular head of the church and from appointing or anointing the first appellant as the head of the Church.

[12] Under case number 6259/2011 the respondent sought an order declaring the first appellant to be in wilful and *mala fide* contempt of the court in terms of the order granted by the Durban High Court on 15 April 2011, under case number 4625/2011. In addition, an order interdicting and restraining the first appellant from in any manner representing and conducting himself as the leader and the titular head of the church, and directing the first appellant to handover to the sheriff certain vehicles

and trailers. Such interdicts were granted *pendente lite* the outcome of the main application.

[13] Under case number 7263/2011 the Nazareth Baptist Church brought an application against the respondent (Vela Shembe), the sheriff, and the first appellant for the return of the vehicles that were the subject of an order granted in terms of case number 6259/2011. The church required the vehicles to provide food, clothing, shelter and transport to orphaned children, destitute persons, and members of the church and the community. The order was taken by consent.

[14] On the main application the court *a quo* accepted the evidence of the handwriting expert witnesses as to the authenticity of the Deed of Nomination and the signature thereon, as that of the late leader. It then rejected the evidence of the second appellant as to the oral nomination of the first appellant by the late leader. The court *a quo* then issued an order giving effect to the Deed of Nomination.

[15] Further, the court *a quo* held that the application of the Trust Deed, Protocol 293/1935, is only limited to the Ekuphakameni section of the church and it does not apply at the Ebuhleni section. The only document that applies at Ebuhleni section is the Constitution which the Ebuhleni section adopted in 1999.

CHURCH HISTORY and INSTRUMENTS GOVERNING the ADMINISTRATION of THE CHURCH and SUCCESSION to the OFFICE of the TITULAR HEAD and the SOLE TRUSTEE (The Trust Deed and The Constitution)

[16] Before getting to the questions this Court is called upon to decide in this matter, I propose to sketch out the brief history of the Church of Nazareth, and to make a full exposition of the instruments governing and regulating the administration of the church properties and succession to the office of the titular head and the sole trustee of the Trust.

[17] The church was founded in 1910 by the prophet Isaiah Shembe and having its headquarters at Ekuphakameni Mission, Inanda, Durban, an area falling under the jurisdiction of Amaqadi Traditional Council. Isaiah Shembe, affectionately dubbed as Umqali Wendlela and Mbombela by his followers, became the first titular head of the church and by virtue of that position he was in sole control of the church.

[18] The site on which Isaiah Shembe established Ekuphakameni Mission had been allotted to him by Inkosi Mandlakayise Ngcobo, a grandfather of Inkosi Mzonjani Ngcobo and a great grandfather to the second appellant. The Church of Nazareth is an African traditional church. In practice, in churches of this nature the application of the canon law is much blended with the application of traditional law and customs.

[19] Isaiah Shembe, the founder and the leader of the church, passed away on 2 May 1935 after having nominated and ordained his two sons, namely Johannes Galilee Shembe (JG Shembe), affectionately dubbed as Ilanga, and Amos Kula Shembe (AK Shembe) affectionately referred to as InyangaYezulu, as the future leaders of the church, one after another. JG Shembe would first take over from Isaiah Shembe, his father, as the titular head of the church and on his death AK Shembe would succeed him. The two sons acquired their nicknames, Ilanga and InyangaYezulu, respectively, from the fact that when the prophet ordained them as future leaders of the church he referred to JG Shembe as the sun that would shine during the day and AK Shembe as the moon that would shine during the night. The latter would nominate and appoint one of the stars to shine after him. On the death of the prophet, JG Shembe took over as the leader of the church and his appointment was announced by Mr D S Shepstone together with Dr J L Dube.

[20] JG Shembe held the positions of the titular head of the church and sole trustee of the trust until his death on 19 December 1976. However, on the death of JG Shembe a dispute arose as to who should succeed him notwithstanding the fact that Isaiah Shembe had nominated AK Shembe to succeed him (JG Shembe). A dispute to church leadership between Londa Shembe, the son of JG Shembe, and AK Shembe culminated into physical violence which resulted in a blood bath between their followers.

[21] This came as a result of the fact that at the funeral of JG Shembe on 2 January 1977 Dr. E Z Sikhakhane together with Reverend A A Ngcobo announced the name of AK Shembe as the then new leader of the church. Such announcement was in accordance with Isaiah Shembe's nomination of JG Shembe and thereafter AK Shembe respectively, as his successors. Londa Shembe then challenged the

leadership of AK Shembe, his paternal uncle. The latter and his followers were eventually displaced from Ekuphakameni Mission during 1978 and sought shelter in Mbeka, the homestead of Inkosi Mzonjani Ngcobo. Amongst the people that were in the company of AK Shembe on his departure from Ekuphakameni, were the late leader in this matter, Vimbeni Shembe (AK Shembe's son), some of the wives of JG Shembe and children including the respondent and his mother. In 1979 Inkosi Mzonjani Ngcobo allotted AK Shembe a plot site to build his own homestead, which he named Ebuhleni Bama Nazaretha, also used as a church for worship purposes.

[22] When the announcement of AK Shembe as a new leader was made, a few members of the church led by Londa Shembe did not agree with the appointment. Nevertheless, AK Shembe was anointed at Gospel during March 1977. However, the disgruntled church members under the leadership of some of the traditional leaders elevated Londa Shembe as their leader during October 1977. In terms of the Trust Deed, Protocol 293/1935, AK Shembe held the positions of a titular head and sole trustee of the church until his death in 1995. Before his death, he nominated his son as his successor in office. This was the first so-called star AK Shembe nominated and appointed to shine after him.

[23] At the funeral of AK Shembe, his son, Mbusi Vimbeni Shembe (the late leader), was announced as the new titular head of the Church of Nazareth and the sole trustee of the trust, in terms of Protocol 293/1935, which positions he held until his death on 28 March 2011. Londa Shembe had never been announced as the leader of the church but he was merely a leader of the splinter group. When Londa Shembe passed away nobody led the Ekuphakameni section until his son, Vukile Shembe, grew up and was appointed leader of the splinter church group at Ekuphakameni. Mbusi Vimbeni Shembe was therefore, the rightful successor to the titular head of the Church of Nazareth and the sole trustee of the trust.

[24] The factions started to arise from the time of the leadership struggle as to who the rightful successor was to JG Shembe between Londa Shembe and AK Shembe. During January 1978, AK Shembe led his followers on pilgrimage to holy Mount Nhlangakazi. Thereafter, he went to Zululand also on pilgrimage. On his return, the disgruntled church group being assisted by the police prevented him (AK Shembe) from entering Ekuphakameni Mission. As a result, AK Shembe went and sought

shelter from Inkosi Mzonjani Ngcobo's homestead. The church is now divided into various branches under their respective leadership, namely Ekuphakameni, Ebuhleni, Ginyezinye, Thembezinhle and Johannesburg. The church has, since 1977, been plagued by numerous court proceedings relating to the dispute to church leadership. Presently, at Ebuhleni section there are two competing claims to church leadership. The respondent claims that he is a rightful leader through the Deed of Nomination and the first appellant Mduduzi Shembe also claims to be a rightful leader through an oral nomination by the late leader.

TRUST DEED PROTOCOL 293/1935

[25] The Trust Deed Protocol 293/1935 (the Trust Deed) a document governing and regulating the affairs of the church came into existence through the prophet Isaiah Shembe in 1935. Members of the Church of Nazareth had from time to time contributed sums of money for the purpose of acquiring land, the erection of houses of worship and the provision of funds for the maintenance of all church activities. Isaiah Shembe obtained land on behalf of the congregation and transferred same in his own name. His intention was to make a trust in order to transfer certain of the immovable properties, held by him on behalf of his congregation, to the trust to be administered.

[26] The prophet died on 2 May 1935 and in order to give effect to his wishes, Isaac Shembe, his oldest son, on 30 July 1935, executed a Notarial Deed of Trust and Donation whereby he created the Church of Ecclesiastical Endowment Trust (the trust) and he donated to the trust certain immovable properties registered in the name of Isaiah Shembe. I propose only to refer to certain provisions of the Trust Deed which are relevant and essential for the determination of the present matter.

[27] In terms of clause 1 of the Trust Deed, Johannes Galilee Shembe (JG Shembe), the second son of the prophet Isaiah Shembe, the then recognised Titular Head of the Church, together with his successors in office as titular heads of the church, were to be appointed as the sole trustee to carry out the terms of the trust.

[28] The Trust Deed further provides in clause 4 that the property of the trust should be held by the trustee as the ecclesiastical charity for the benefit of the Church of Nazareth. This was to be interpreted to mean the mother church situated

at Ekuphakameni and all branch churches acknowledging the same confession of faith and following the teaching of the founder Isaiah Shembe.

[29] Clause 6 provides that the trustee shall appoint an executive and advisory committee consisting of ten members; five of whom shall be pastors of the church and five of whom shall be lay members. The executive and advisory committee appointed by the trustee in terms of clause 6 shall take control of the religious observances of the Church of Nazareth, the discipline and control of the individual members thereof, and carry out generally the provisions of the trust; but that all the acts of whatever nature would be subject to the approval and confirmation of the trustee.

[30] In clause 7, the Trust Deed provides that the titular head shall continue in office during his life time so long as he continues to observe and follow the tenets of the Church of Nazareth, although he may be removed from office on the happening of certain contingencies.

[31] Clause 8 provides as follows:

'Upon the office of the Titular Head of the Church of Nazareth becomes 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.'

[32] The Trust Deed was designed, among other things, to hold certain immovable properties to be administered by the trust for the benefit of the church. In addition, it makes provision for the nomination and appointment of a successor to the late titular head of the church, who is also a sole trustee of the trust. However, the Trust Deed does not contain the clause providing for the termination of the trust.

The CONSTITUTION of the NAZARETH BAPTIST CHURCH

[33] After the death of AK Shembe during 1995, his successor, Mbusi Vimbeni Shembe, the late leader, and his followers, caused a constitution to be drafted and adopted by the church members, which he approved on 19 February 1999 (the

Constitution) under the name Nazareth Baptist Church with its headquarters at Ebuhleni home, Matabetulu Ward, Indwedwe.

[34] Upon the commencement of the Constitution the trust embodied in Protocol 293/1935 would be dissolved, and a new church known as Ibandla Lamanazaretha/Nazareth Baptist Church would emerge on the approval and adoption of the Constitution. The Constitution having been approved and signed by the late leader, would become the authoritative document of the church.

[35] I, once again, propose to confine my discussion of the Constitution to the provisions relevant to the determination of this matter. The Constitution makes provision for the automatic dissolution of the trust and incorporation of the church under the Constitution on the date the late leader approved the Constitution and its amendments. The Constitution also provides that all movable and immovable property which at the commencement of the Constitution vested in the trust or vested in the name of the trustee shall, upon the commencement vest in the church, and be deemed to be registered in its name. It further makes provision for the creation of a trust at the discretion of the titular head to be used as a vehicle for receiving movable and immovable property of the church.

[36] The Nazareth Baptist Church shall "be interpreted to mean the mother church whose headquarters is on the Mount Matabetulu and all branch churches acknowledging the same confession and following the teachings of the founder Isaiah Shembe as perpetuated by Johannes Galilee Shembe and being adherents of Amos Kula Shembe and his successors thereof."

[37] Clause 10 of the Constitution empowers and authorises the Head and Leadership of the Church during his life time to nominate and appoint his successor in office.

[38] Clause 12 authorises the Head of the Church to appoint an executive committee, comprising of ten members, from members of the church irrespective of whatever other position they may hold. The executive committee shall deal with any matter assigned to it, and the chairperson shall be appointed to deal specifically with the matters so referred to in clause 12.4.

[39] Although the Constitution is modelled on the provisions of the Trust Deed, it purports to sanction a breakaway from the original Church of Nazareth and build a new church under the new name Nazareth Baptist Church which purportedly is not governed by the Trust Deed but only by the Constitution.

[40] The main issue for determination is whether the late Vimbeni Shembe nominated Vela Shembe or Mduduzi Shembe or both Vela Shembe and Mduduzi Shembe as Titular Head of the Nazareth Baptist Church: The church is led by a titular head who is in overall control of the affairs of the church and the trust. The practice of the church is that each incumbent titular head during his life time nominates and appoints a successor.

[41] At the funeral of the late leader, on 3 April 2011, the name of Vela Shembe, the respondent, was announced by the attorney Buthelezi, and the name of Mduduzi Shembe by Inkosi Ngcobo (the second appellant), as the successor to the late leader. Since then, there have been two competing claims to the leadership of the church. The respondent claims to be the rightful leader through the Deed of Nomination wherein the late leader nominated and appointed him as the titular head of the church and sole trustee of the trust. The late leader, according to the respondent, signed such document on 11 February 2000 and the letter confirming such nomination and appointment, which allegedly was delivered to Buthelezi Attorneys by Mr. Sibisi, the Secretary-General of the church, on 16 March 2011.

[42] Mduduzi Shembe, the first appellant, claims to be the rightful church leader through an oral nomination by the late leader which was communicated to the second appellant on four different occasions, and on one of those occasions, the late leader apparently did so in the presence of Inkosi Qwabe.

DEED OF NOMINATION

[43] The first appellant caused the handwriting experts to be appointed in order to ascertain whether or not the signature appearing on the Deed of Nomination was that of the late leader. The respondent also instructed a handwriting expert to consider the letter delivered to Buthelezi attorneys with a view to determining whether the late leader wrote and signed such letter.

[44] Michael John Irving, a forensic handwriting expert, testified that on 29 May 2011 he received instructions from Ms Simi Attorneys, who are the first appellant's attorneys of record, to authenticate the signature of the late Bishop M V Shembe. He, Irving, stated his qualifications and his experience in the field.

[45] For this purpose, Irving received the original disputed signature, the Deed of Nomination of a Titular Head and the Trustee of the Church dated 11 February 2000. He was also provided access to an original handwritten letter addressed to Buthelezi Attorneys by Bishop M V Shembe, which was received by their offices on 16 March 2011. He was also furnished with comparative signatures; namely original ABSA Provider Plan Application Form bearing two original signatures of M V Shembe dated 30 May 2006 and 1 June 2006; stock theft identification documents dated 30 November 2009 and 17 November 2006, respectively; and an original handwritten letter, undated and written on blue lined letter pad paper. These documents were confirmed as featuring authentic signatures of M V Shembe.

[46] Generally, the comparative signatures must be of a contemporaneous nature authored round about the same time as the disputed signature. However, there was a time difference between the disputed document, which was dated 2000, and the closest document to that, dated 2006. Therefore, there was a period of six years between the disputed signature authorship and the closest comparative standard. A search for more contemporaneous documents was unsuccessful.

[47] Irving explained that the signature stems from our habitual pen control and writing ability. However, it should be noted that at no stage will a person be able to write or author a one hundred per cent replica of their own signature. This is caused by the muscular adjustment and movement within the hand, the fingers, the wrist and arm whilst writing signatures. These are also influencing features which create what appear to be variations in our signatures. These could be caused by illness, medication, the surface that we are writing on or due to other circumstances that may affect the way we actually sign the signature. These are called natural variations. At the time of examination the examiner is required to identify the characteristics not only of the disputed signature but also of the comparative standards. These characteristics determine whether the disputed signature is a

forgery, written by someone else or by the original author. In the examination process, the examiner looks for natural variations, comparisons and differences.

[48] During the examination each signature was identified under magnification, magnified circumstances or microscopic circumstances. The disputed signature was subjected to oblique lighting process to determine that it was in fact original. Irving did not find any indication of tracing or computer cut and paste or mechanical cut and paste processes. The characteristics were identified as to whether they were comparative, natural variations or differences.

[49] In comparing the disputed signature on the Deed of Nomination dated 11 February 2000, to the six standard signatures or undisputed signatures, Irving found 27 points of similarity. In our signatures we all have involuntary hesitations and particular stops and speed variations, pressure variations which create a pattern. All 27 similarities indicated hesitation, pen movement characteristics, speed and pressure variations. There were 27 similarities which a forger could not reproduce. There were also natural variations within that range of signature, but were identified with those numbers as well.

[50] Irving's findings were that the disputed signature found on the original Deed of Nomination of the Trustee and Titular Head of the Nazareth Baptist Church dated 11 February 2000, and the standard signatures submitted, contain characteristics which can be associated with the signature authorship of a single individual, M V Shembe. The usual characteristics associated with forgery of a signature were not present in the disputed signature. This signature reflects natural line quality, rhythm, pen lines and movement of an established signature model pattern.

[51] After this examination, the respondent's attorney, Mr Trevor Nkosi, invited Irving to carry out a further examination. The investigation involved the examination of handwritten documents as opposed to signatures. The slight differences of erratic pen movement and less care or attention noted in the writing of the letter indicated as received on 16 March 2011 could be attributed to the conditions, circumstances at the time of writing, disability, illness or writing surface and posture conditions. Irving found three dissimilarities in pen lifting and deviation of construction, and he explained this as natural variations.

[52] Irving's evidence finds support in the evidence of Janie Viljoen Bester, a forensic handwriting expert, who was also requested to examine the disputed signature on the Deed of Nomination of the Trustee and the Titular Head of Nazareth Baptist Church. He did not find any fundamental handwriting differences between the collected specimen signatures of M V Shembe and the disputed signature. He examined the signature for any characteristics of forgery, but none were identified. He was using a magnifying glass and a hand held device that resembles a computer mouse which has *inter alia* a function of distinguishing between different writing instruments.

[53] Bester marked out 15 similarities which he felt sufficient within the context of 21 discriminating elements of handwriting and the fact that there were no fundamental handwriting differences but natural variations, which could be expected in handwriting. The 15 points of similarities that he found led him to the conclusion that the disputed signature was the signature of the late leader.

[54] Bester testified that similarities and differences of writing is the heart of a comparison analysis. A characteristic that occurs in the writing of one individual and does not occur in the writing of any other is classified as an unexplained difference. There should be significant similarities and explainable differences between two writings before the examiner can positively conclude that they were written by the same hand.

[55] Bester stated that the correct interpretation of natural handwriting variation nullifies any fundamental differences that might exist and the signature is therefore authentic.

[56] The evidence of Irving and Bester also finds support in the evidence of Leon Anton Esterhuyse, a forensic document examiner, who was also instructed to authenticate the disputed signature. In the final evaluation of all the scientifically determined aspects of importance, based upon theoretical knowledge and extensive practical experience, he concluded that the disputed signature on the nomination document was in all probability made by the person, M V Shembe, the late leader. The disputed signature would be a very difficult one to forge because of its

inconspicuous characteristics. The forger would need to maintain fully a good line quality, rhythm and fluency in line movements. He concluded that the disputed signature is indeed authentic. He found 18 points of similarities between the disputed signature and the specimen signature.

[57] Irving identified 27 points of similarities and three points of dissimilarity, Bester found 15 points of similarities and Esterhuyse 18 points of similarities. However, they all agree on the authenticity of the disputed signature.

[58] Karel Frederick Conraad Landman, a handwriting expert, was also instructed by the appellants' attorneys to authenticate the disputed signature. In order to execute the task given to him he was also placed in possession of the disputed signature, and the undisputed specimen signatures of the late leader.

[59] After thorough investigation and comparison, he arrived at the following conclusions:

(a) The pictorial look of the disputed signature does not resemble that of the five specimen signatures;

(b) The rhythm and the line quality of the disputed signature is not bad but definitely not as good as that of the specimen signatures; and

(c) Between the disputed signature and the five specimens, he detected 24 divergences.

[60] Landman found 24 points of divergences; he concluded that the disputed signature had been created by simulating two of the signatures in the set of comparative standards. He concluded by finding that the disputed signature is a forgery. Regarding the findings by Landman of 24 points of inherent handwriting divergences between the disputed signature and seven specimens, Irving states that he did not believe that Landman did a proper examination. To Irving, he, Landman, seemed to have placed much attention on the dissimilarities.

[61] Esterhuyse testified that the points of difference Landman allegedly found were minor in nature, insignificant, superficial and were all reasonably explainable. They all fall within the expected range of natural variation by the signatory, Bishop Shembe, the late leader.

[62] Bester, like Irving and Esterhuyse, referred to the 24 points of dissimilarities, which had led Landman to the conclusion that the disputed signature is not that of the person who made the signature on the specimen documents, not as fundamental handwriting differences but as natural variations which could be expected in handwriting.

[63] The testimony of Mr Z E Buthelezi, a practising attorney, is that during 2000 the late leader came to his office and indicated that he intended to nominate a person who would succeed him as the leader of the church and requested Buthelezi to note this down. Buthelezi, in turn, requested the late leader to bring with him an identity document of the person he wished to nominate.

[64] The identity document was brought to Buthelezi for that purpose and he prepared the document for signature by the late leader. The document was taken away for signature by the late leader and when it came back, Buthelezi kept it in the safe. The late leader and Buthelezi never discussed the matter again until Buthelezi received a letter on 16 March 2011.

[65] On 16 March 2011, Buthelezi had been out of his office and on his return his receptionist gave him a letter and told him that the letter had been brought to the office by a certain Mr Sibisi; with the request that Buthelezi should phone him immediately after reading it.

[66] On 28 March 2011, Buthelezi received a telephone call notifying him that the church leader had passed away. He then proceeded to the late leader's homestead with a view to announcing a successor to the late leader. He met the third appellant, the chairman of the Executive Committee, Reverend Mnyandu, and uBabomncane, Gqibokubi, also known as Babu Nhlangakazi.

[67] Sibisi testified that he was not present when the late leader signed the Deed of Nomination and nor was he present when Mr Zwane counter-signed it. Sibisi stated that he was simply called by the late leader and directed him to sign the document. Sibisi then signed the document without questioning his master. On 16

March 2011 the late leader called him, gave him an envelope and instructed him to take it to the offices of Buthelezi Attorneys. Sibisi took the letter to Buthelezi's offices without question.

[68] Dr Roberts, the late leader's physician, testified that during March 2011, on enquiring from the late leader, as he was then suffering from a terminal illness, whether his affairs with regard to succession to church leadership were in order, the late leader told him that the matter was in the hands of his lawyers.

[69] Inkosi Ngcobo and Inkosi Qwabe testified that on 16 March 2011 the late leader was critically ill and shaking to such an extent that he could not turn or write on the bed. The widow of the late leader, Mrs Joyce Shembe, testified that she did not know anything about Sibisi coming to collect a letter from the late leader on the 16 March 2011. She did not see Sibisi on that day. She went on to state that the late leader's health condition could be described as having been serious during the last days of his life.

[70] The court *a quo* preferred the handwriting expert evidence of Irving, Esterhuyse and Bester, pointing to the genuineness of the Deed of Nomination, to that of Landman mainly on the ground that Irving and Esterhuyse had been instructed by the attorneys of the appellants to authenticate the signature on the Deed of Nomination. The court *a quo* found the evidence of the three expert witnesses credible and trustworthy. The court was of the view that the evidence of Landman was not aimed at establishing the genuineness of the disputed Deed of Nomination but at proving Irving, Bester and Esterhuyse wrong. The court *a quo* found the evidence of Landman not worthy of consideration and rejected it.

[71] The court also accepted the oral evidence of Sibisi, and Buthelezi of Buthelezi Attorneys, as to the drafting of the Deed of Nomination and the delivery of the confirmation letter on 16 March 2011. The court rejected the evidence of Mrs Joyce Shembe, Inkosi Ngcobo and Inkosi Qwabe as to the critical health condition of the late leader on the day in question.

[72] Mr *Choudree SC* for the appellants has argued that, as the time span between the disputed signature and the authentic signature is six years, it cannot be

said that the disputed signature and authentic signatures were authored around the same time. Irving testified that the signature in dispute appeared to have been written with a bit more care than the other signatures. In Mr *Choudree's* submission, Irving argued under cross-examination that the gaps between the initial and the surname are nowhere near what appears in the disputed signature.

[73] Mr *Choudree* has argued that Bester agreed that there was a pen stop at the summit of the letter "V" in disputed signature. Bester clarified that end stops is one of the indications of forgeries but it is not always an indication of forgery. However, Bester testified that the writer of the specimen signatures had a pen stop as part of his handwriting characteristics. Nevertheless, Mr *Choudree* submits that this court cannot rule out and it must take cognisance of the fact that, as testified by Bester himself, end stops are an indication of forgeries.

[74] It has also been contended on behalf of the appellants that in the light of the fact that Bester conceded that there are variations between the disputed signature and the specimen signatures, it can only be concluded that the disputed signature had to have been a forgery.

[75] Further, it has been contended that if the disputed signature was in fact signed in the year 2000, it is extremely strange that the line quality in the specimen signatures which were signed six to nine years later were better. According to the evidence of Landman the signature on the Deed of Nomination does not display the same flamboyant movements and continuation of line as does the specimen signatures. Mr *Choudree* has accordingly submitted that given all the conflicts between the other three experts called by the respondent, and Landman, called by the first appellant, the court *a quo* ought to have preferred the evidence of Landman to that of the other three handwriting experts, for the simple reason that it is logical and well founded. It has been argued that the court *a quo* ought to have found that it could not possibly arrive at a conclusion that the signature on the Deed of Nomination was indeed that of the late leader, Vimbeni Shembe, and that effect should not have been given to the Deed of Nomination.

[76] With regard to the oral evidence relating to the authenticity of the Deed of Nomination, Mr *Choudree* has argued that in the light of the testimony of Sibisi

regarding the affixing of the signatures by the late leader and Zwane, and the fact that he had not witnessed the signatures being placed on the document when he signed the document, the authenticity of the Deed of Nomination must be seriously questioned. It was argued further that, in the event of this Court finding that the Deed of Nomination is not a genuine document, it cannot be stated that the letter received by Buthelezi Attorneys on 16 March 2011 supports and confirms it (the Deed of Nomination).

[77] With regard to the admissibility of the expert evidence, the true and practical test of the admissibility of the opinion of a skilled witness is whether or not the court can receive 'appreciable help' from the expert witness on the particular issue. See *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616G-H. The help of an expert must be useful. See *Visagie v Gerryts en 'n ander* 2000 (3) SA 670 (C) at 681A-B.

[78] The court must be satisfied that the witness possesses sufficient skill, training or experience to assist. See *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569B; *Mahomed v Shaik* 1978 (4) SA 523 (N). His or her qualifications have to be measured against evidence he or she has to give in order to determine whether they are sufficient to enable him or her to give the relevant evidence. An expert witness' opinion may only assist the court if the witness is better qualified to form an opinion than the court.

[79] While a handwriting expert is entitled to give evidence on the similarities or differences between specimens,it is the court's responsibility to make the final decision. *S v Boesak* 2000 (3) SA 381 (SCA) para 58.

[80] Guidance offered by the expert must be sufficiently relevant to the matter in issue. However, the opinion must not usurp the function of the court in deciding questions the court has to decide, for it is the court's responsibility to draw inferences. See *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 775A.

[81] But the weight to be attached to such evidence must be assessed in the light of all evidence before the court. In the present case, the three handwriting experts, namely Irving, Bester and Esterhuyse have without difficulty communicated to the

court the data upon which their inferences were based. It cannot, therefore, be said that the evidence of the three handwriting expert witnesses was only a conjecture and uncertain to such an extent that it did not offer any reasonable inferences. See also *Holzhauzen* at 776H.

[82] As a result, the court *a quo* cannot be faulted for holding that it was satisfied that the authenticity of the Deed of Nomination had on the balance of probabilities been proved. The testimony of the hand writing experts as to the authenticity of the Deed of Nomination is conclusive and definitive of the issue between the parties. As a consequence, it is not necessary to consider any other evidence extrinsic to the document, as background information or surrounding circumstances or a corroborative factor to the findings of the handwriting experts. See also *Johnson v Lead* 1980 (3) SA 927 (AD) at 943B. The evidence of the three expert witnesses is cogent, logical and consistent with the evidence tendered before the court *a quo*.

[83] This Court has no reason to conclude that Irving lacked sufficient skill, training or experience to assist the court *a quo* as it had been alleged on behalf of the appellants. The two of the three experts had initially been instructed by the appellants and after discovering that their findings were against the appellants, the appellants discarded them.

ORAL NOMINATION

[84] Mduduzi Shembe, the first appellant, claims to be a rightful leader of the church and the sole trustee of the trust on the basis of an oral nomination, the late leader allegedly made to Inkosi Ngcobo, the second appellant, on four different occasions, on one occasion in the presence of Inkosi Qwabe.

[85] Vela Shembe, the respondent, contends that the nomination of the first appellant was opportunistic and unlawful. The second appellant created confusion at the funeral of the late leader which enabled the first appellant to seize an opportunity and claim succession to the late titular head of the church.

[86] The testimony of the second appellant in this regard is that the late leader had on four different occasions communicated to him that on his (late leader's) death the first appellant should succeed him as the titular head of the church. On a

commemoration day, 2 September 2010, at Ladysmith the late leader confided in the second appellant that it was his last wish that the first appellant should succeed him as the titular head of the church. On 10 January 2011, the second appellant was en route to the holy Mount Nhlangakazi on pilgrimage and he walked past the late leaders' homestead with the intention to enquire about the late leader's failure to join the pilgrimage. At the late leader's homestead, Ebuhleni, the second appellant met up with Inkosi Qwabe at the gate and they entered the homestead together. The late leader told them that he would not join the pilgrimage due to ill health. The late leader went on to tell the second appellant about his impending death. When the second appellant expressed much concern about the late leader's health condition, the late leader allayed his fears by saying that he should not worry because Mduduzi Shembe, the first appellant, was available to take over the reins as the church leader, as he had previously told him about it. The second appellant and Inkosi Qwabe left the late leader's homestead for the pilgrimage at the holy Mount Nhlangakazi.

[87] On 17 February 2011, the late leader presented the second appellant with a cow and a goat. On the following day, the second appellant proceeded to the late leader's home in order to personally thank the late leader for the present. Once again the late leader expressed his last wish that the first appellant should succeed him as the titular head of the church. On 5 March 2011, the second appellant slaughtered a beast and offered the late leader a piece (chunk) of meat, a hind leg, which the late leader, in turn, gave to his paternal uncle, Nhlangakazi. When the second appellant expressed his gratitude for the gift the late leader once again repeated his last wish that the first appellant should succeed him as the leader of the church. According to the second appellant, the late leader shared this succession information with him in his capacity, first, as an Inkosi of the area where the late leader was resident and, second, as his confidante.

[88] The evidence of the second appellant finds corroboration in the evidence of Inkosi Makhosini Wellington Qwabe, specifically with regard to what transpired between the late leader and the second appellant on 10 January 2011. Inkosi Qwabe coincidentally visited the late leader's homestead with the second appellant. When the second appellant expressed concern about the late leader's state of

health, the latter told him not to worry about that because the first appellant was available to take over as a church leader.

[89] The court *a quo* rejected the evidence of the second appellant, as to the existence of the oral nomination by the late leader of the first appellant as the church leader, purely on the grounds, firstly, that when, at the funeral of the late leader on 3 April 2011, the second appellant announced who the new leader would be, the second appellant omitted to expressly state that he was thereby giving effect to the last wishes of the late leader. Instead, the second appellant relied on his status as an Inkosi of the area where the church is situated. Secondly, that if the late leader had in fact nominated his son, Mduduzi Shembe, as his successor, why did he not expressly mandate the second appellant to announce this? Thirdly, that the court could not obtain from the second appellant what the late leader in fact had actually said to him. It was for that reason the court *a quo* concluded that the first appellant had failed to discharge the onus which rested on him to show on the balance of probabilities that there had in fact been an oral nomination.

[90] The evidence of Inkosi Qwabe was only considered in determining the exactness of what the late leader had said to the second appellant, but not on the existence of the oral nomination as such. In my judgment, I find the evidence on the existence of an oral nomination to have much probative value. The evidence of Inkosi Qwabe was also rejected on the basis that 'both the second appellant and Inkosi Qwabe could not tell either directly and indirectly what in fact the late leader had actually said to them.'(See the Record at Volume 39 at page 3676 lines 22-25.)

[91] In my view, the testimony of the second appellant and Inkosi Qwabe, both with regard to the existence of the oral nomination and exactness of what the late leader had actually said to them, warranted a careful and proper assessment, evaluation and weighing against the totality of the evidence tendered and probabilities in the case, before rejection on such grounds. This will become more apparent in my treatment of such testimony below.

[92] For the purposes of accuracy and precision, I propose to quote verbatim the reasoning of the court *a quo* in this regard:

'I find it inexplicable that if the late leader had indeed said to Inkosi Ngcobo that he wished and he desired that Mduduzi Shembe, his son, should succeed him, then why did Inkosi

Ngcobo not expressly say so at the funeral and why did the late leader not ask the Inkosi to announce this. Instead, why did Inkosi Ngcobo refer to the fact that he is making the announcement as to who should succeed the late leader on the basis that he is the Inkosi of the predominant tribe which dominates the area where the church is situated. Moreover, we do not have from Inkosi Ngcobo as to what the late leader in fact had actually said to him. It is for these reasons that I conclude that the respondent had failed to discharge the onus which rests upon him to show on a balance of probabilities that there had in fact been an oral nomination,'

See the Record at Volume 39, p 3679 lines 5-17 of the judgment.

[93] A trial judge must weigh the evidence of the witness and consider its merits and demerits and, having done so, he or she must decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he or she is satisfied that the truth has been told. See *S v Sauls & others* 1981 (3) SA 172 (A) at 180E-G.

[94] The credibility of a witness is determined mainly by measuring the probability of his statements against the known facts of the case. *Falsum in uno falsum in omnibus*, the fact that he has lied once does not mean that everything he says is untrue.

[95] In a civil matter, in order to determine whether or not the onus has been discharged, the question of proof required is a preponderance or balance of probabilities. The probability of the truth of a particular averment is measured or balanced against the probability of its being untrue.

[96] A quantum of proof in a civil matter should not be equated with a quantum of proof required in a criminal matter, being proof beyond all reasonable doubt. Reasonable doubt is a doubt based upon reason and common sense. It is a doubt, which a reasonable person would have after carefully weighing all the evidence ... a reasonable doubt is not a caprice or a whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty, and it is not sympathy: s4.01 of The Modern Federal Jury Instructions (1989) by L Sand, J Siffert, W Loughlin and S Reiss. See also *S v Glegg* 1973 (1) SA 34 (A) at 38H-39A.

[97] In *S v Glegg*, the Appellate Division held that proof beyond reasonable doubt can well be that it is a doubt which exists because of the probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt because the onus of adducing proof as high as that would in practice lead to defeating the ends of criminal justice.

[98] Likewise, an analogy can be drawn from this decision that pushing the quantum of proof in civil matters beyond the balance of probability is more likely than not to result in injustice to a litigant required to adduce proof more than the quantum of proof required in civil matters.

[99] Facts, it was said in *R v Mpanza* 1915 AD 348 at 352-353 are '. . . relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue'.

[100] The evidence must be assessed in the light of all other evidence for purposes of determining sufficiency, that is, whether the required and applicable standard of proof has been attained.

[101] The factual basis is determined by evaluating all the probative material admitted during the course of the trial. The court *a quo* did not fully analyse, evaluate and assess the weight or cogency of the evidence of the second appellant and of Inkosi Qwabe both as to the existence, intelligibility or otherwise of the oral nomination in question.

[102] In *Stellenbosch Farmers' Winery Group Ltd & another v Martell Et Cie & others* 2003 (1) SA 11 (SCA) para 5 Nienaber JA provided the following informative guidelines and principles in resolving factual disputes:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. . . . As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. . .the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it'.

[103] The court has a duty to evaluate the probative material. When evaluating evidence of probative value, the credibility is determined, inferences are drawn, and probabilities and improbabilities are considered. In the present case, the court *a quo* did not come this far. It merely measured the credibility of the second appellant against his omission to expressly state at the funeral that he was mandated by the late leader to make an announcement as to who the new leader was. The court *a quo* limited the assessment of Inkosi Qwabe's testimony only to the determination of what the late leader had exactly said to the second appellant and Inkosi Qwabe. In my judgment, the court *a quo* ought not to have left off Inkosi Qwabe's evidence there, but it ought to have given it further consideration since it is of such probative value as to the existence or otherwise of an oral nomination.

[104] In my view, the court *a quo,* in order to discover the truth as to the existence of an oral nomination or otherwise, ought to have taken its inquiry and assessment further by making a finding on whether or not the late leader communicated to the witnesses what they alleged he had, or whether they were merely failing to put it crisply or clearly.

[105] In evaluating evidence there are two basic principles; first, evidence must be weighed in its totality, and secondly probabilities and inferences must be distinguished from conjecture or speculation. In *S v Trainor* 2003 (1) SACR 35 (SCA) para 9 Navsa JA said:

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach . . . is illogical and wrong.'

It is of paramount importance that the court should eschew a piecemeal process of reasoning. Evidence must be weighed as a whole, taking account of the probabilities, the reliability, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, and consistencies or contradictions, corroboration and all other relevant factors.

[106] Inferences and probabilities, however, must be distinguished from conjecture or speculation. In *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 ALL ER 722 at 723, it was said that 'there can be no proper inference unless there are objective facts from which to infer the other facts which it is sought to establish' and '...if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere conjecture or speculation'.

[107] The court must stay 'within the four corners of the proved facts. . . . the court is not entitled to speculate as to the possible existence of other facts': *S v Ndlovu* 1987 (1) PHH 37 (A) 68 at 69.

[108] Probabilities must also be considered in the light of proved facts. It is, for example, possible to accept direct credible evidence even though this evidence conflicts with probabilities arising from human experience or opinion. *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E) at 436H.

[109] The court *a quo* did not reject the evidence of the second appellant as to the existence of an oral nomination of the first appellant by the late leader as his successor on empirical evidence, but rather on the deductions the court *a quo* made on the second appellant's conduct at the funeral of the late leader on 3 April 2011, i.e. his omission, when announcing the first appellant as the new leader, to specify that he was thereby giving effect to the last wishes of the late leader, that the first appellant should succeed him as the church leader.

[110] The undisputed evidence by the second appellant is that on four different occasions he had had casual meetings with the late leader and that during such meetings the late leader expressed his last wishes to him that in the event of him dying, the first appellant should succeed him as the church leader. Nor has any evidence been tendered gainsaying that such informal meetings between the late leader and second appellant took place and that succession to the church leadership had also been a subject for discussion at such meetings.

[111] The evidence of Inkosi Qwabe was materially relevant to the outcome of the hearing. It has provided corroboration to the second appellant's version that the second appellant met the late leader on 10 January 2011 at the late leader's

homestead and that during such meeting the late leader expressed his last wishes to the second appellant that on his death the first appellant should take over the reins as a church leader. The second appellant had co-incidentally joined Inkosi Qwabe at the gate leading to the homestead of the late leader when visiting the late leader on the day in question. No evidence was tendered to show that the two witnesses had colluded with each other on the point or that Inkosi Qwabe had been rehearsed to state the views expressed by the second appellant regarding who would lead the church on the late leader's death.

[112] It is inconceivable to conclude that the second appellant including Inkosi Qwabe, with regard to the incident of 10 January 2011, invented and fabricated the dates on which the late leader allegedly shared with the second appellant the succession secret, that the first appellant should succeed him, and that the incidents occurred on such dates. No allegation of invention or fabrication of such dates and incidents' associated thereto, has been imputed to either of the two witnesses.

[113] The next question for decision is why the second appellant did not state that he was giving effect to the last wishes of the late leader when announcing the name of the first appellant as a successor; instead, he claimed to make the announcement in his capacity as an Inkosi of the predominant tribe where the church is situated. The second appellant testified that the late leader entrusted him with the succession secret because he trusted him as an Inkosi of Ngcobo (AmaQadi) clan and it was for that reason that he, the second appellant, wanted to address the congregants on the subject in that capacity (see the Record at Volume 22 page 290 lines 8-10).

[114] One may find that the second appellant acted disingenuously, but his conduct may be said to be analogous to a situation where a person may put up a false story because he or she thinks that the truth is unlikely to be sufficiently plausible. See *Maharaj v Parandaya* 1939 NPD 239. It appears, therefore, that the conduct of the second appellant was not due to untruthfulness but to poor judgment on his part that announcing the successor to the late leader in his capacity as an Inkosi of Ngcobo Clan, as opposed to stating categorically that he was then fulfilling the last wishes of the late leader, would accord him more recognition. In the premises, the conduct of the second appellant cannot detract from the veracity of the existence of an oral nomination.

[115] The second appellant stated that though the late leader had not expressly requested him to announce the successor to him (the late leader), he found himself duty bound to make it known to the congregation whom the late leader, the kings of kings (Inkosi ya Makhosi), had nominated as his successor (see the Record at Volume 22 page 290 lines 20-22). At the funeral the opportunity presented itself for him to make the wishes of the late leader known to the congregation (see the Record at Volume page 2130 lines 22-23).The second appellant found it imperative for him to honour the wishes of the late leader since, in the African society, the wishes of a dead person are generally respected. This is in accordance with an African adage that 'the word of a dead person is not transgressed'.

[116] Buthelezi testified that the second appellant stated that he would appoint the church leader as his father did. Buthelezi went on to state that according to the second appellant, his father had appointed, AK Shembe as the church leader. Buthelezi testified that the second appellant said that as an Inkosi of the area he had a right to appoint a leader. When announcing the first appellant as the successor to the late leader the second appellant was recorded as saying:

'Your leader comes from the house or branch of Inyanga YeZulu, not from outside thereof. Do not be confused. I have all the rights as Inkosi of the tribe. I am in charge, your leader, Ma Nazaretha, is Mduduzi Shembe!'

[117] That the father of the second appellant appointed AK Shembe as the church leader is devoid of truth since, firstly, it is common cause between the parties that AK Shembe was appointed by his father, the prophet Isaiah, as the successor to JG Shembe, his brother. Secondly, the evidence establishes that the appointment of AK Shembe was announced by Dr E Z Sikhakhane and Reverend A A Ngcobo. According to the second appellant his father only urged AK Shembe during a dispute to church leadership to take his staff and lead the congregants to the holy Mount Nhlangakazi on pilgrimage. Lastly, such an alleged appointment by the second appellant's father of AK Shembe, the spiritual leader of the Church of Nazareth, would be in direct conflict with the standard church procedure which is being followed when a new leader is appointed. According to the Reverend M F Nzama, no ordinary human being is in a position to nominate or suggest who the next Shembe shall be, save the incumbent titular head himself.

[118] The evidence that the second appellant said as an Inkosi of the area that he had the right to appoint a leader, does not find corroboration in the evidence of Gumede who testified that the second appellant said that as an Inkosi of the area (Amaqadi Tribe) he had a right to announce a leader. See the Record at Volume 12 page 1044 lines 21-22. In his testimony, the second appellant, when asked what he meant by 'I have all the rights as Inkosi of the tribe, I am in charge', he said 'when I say that I have all the rights as Inkosi of the area, I am in charge, this emanated from the fact that when the late leader addressed me with regards to this matter, he would start by saying, 'I am confiding in you as Inkosi of the tribe,' and in turn I would respond, in acknowledgment saying, 'you Inkosi, Yamakhosi, the king of kings' see the Record at Volume 23 page 2104 lines 17-22. He also emphasised that as a confidante of the late leader, 'I took it that I had all the authority to make known who the future leader is according to the late leader's wishes.' See the Record: Vol 23 p 2104 lines 22-24.

[119] Can it be said that the second appellant appointed the first appellant as the successor to the late leader by the mere fact that he took it upon himself, in his capacity as an Inkosi of the area, to announce a new church leader? The second appellant said, 'I have no powers to install UShembe as is the God of the Nazareth. I was announcing or making known the wishes of Uthingolwenkosazana, i.e. the late leader.' (See the Record at Volume 22 page 2090 lines 20-24). There is no direct evidence that the second appellant appointed the first appellant as a new church leader. Whether or not the second appellant was appointing the first appellant as the new church leader can only be established from the ordinary meaning of the words, 'appoint' and 'announce', used in the evidence.

[120] The *Oxford South African Concise Dictionary* 2 ed (2016) defines the word 'appoint' as 'assign[ing] a job or role to' someone, and it defines the word 'announce' as 'mak[ing] a formal public declaration about a fact. . .'.

[121] When addressing the congregation the second appellant said, 'Ma Nazaretha your leader is Mduduzi Shembe'. The words the second appellant uttered, in my view, are not necessary to explain the nature of his act as that of assigning the first appellant a role of being the church leader but rather as that of making a formal public declaration about the fact that he, the first appellant, was the new leader of the

congregation, a state of affairs. His utterances are, therefore, far too inadequate to conclude that the second appellant was in fact appointing the first appellant as the new church leader.

[122] The following statement by the second appellant in his speech at the funeral of the late leader on 3 April 2011 negates the conclusion that he appointed the first appellant as the new church leader (see the Record at Volume 22 page 2068 lines 7-9):

'. . . .whoever will pronounce is not the sole king maker according to his pronunciation, not mine neither nor of any other person.'

The *Oxford Dictionary* defines the word 'pronounce' as to 'declare or announce' something. As the confidante of the late leader, the second appellant felt that he had all the authority to make known to the broader church community who, according to the late leader, the future leader was. (See the Record at Volume 22 page 2104 lines 23-24 and Volume 24 page 2269). His words can therefore be said to be in keeping with his deeds.

[123] The next question to decide is, had the late leader indeed told the second appellant that in the event of him dying his son, Mduduzi Shembe, should succeed him as a spiritual leader, if so, why did he not expressly ask the second appellant to announce this? It is common cause between the parties that it is the church practice that the name of the new leader is announced at the funeral of the deceased leader. Apart from that, the second appellant is an Inkosi of the area in which the late leader was resident; he is a seasoned and ardent member of the church, well-versed in the church doctrines and practices as opposed to attorney Buthelezi, a mere legal practitioner who was only rendering professional services to the late leader and was not a church member. In the circumstances, it can reasonably be inferred therefrom that as the second appellant was *au fait* with the church practices it was not necessary for the late leader to specifically mandate him to announce the successor on the day of the funeral. However, from the late leader's conduct of sharing the succession secret with the second appellant, it can reasonably be inferred that the late leader intended the second appellant to act upon it and make it known to the entire congregation at his funeral.

[124] The court *a quo* rejected the evidence of both the second appellant and Inkosi Qwabe, relating to the oral nomination, on the grounds that they could not tell the

court as to what the late leader actually said to them when making the alleged oral nomination. Mr. Findlay, for the respondent, has also contended that both witnesses could not distinguish between succession to the household and the church leadership position.

[125] The second appellant in his testimony, on what the late leader said to him in this regard, said (see the Record at Volume 23 page 2100 lines 12-13):

'. . ., he said should he pass away he wishes his son, MD, to take over the reins, the leadership of the church.'

Inkosi Qwabe who was seated next to the second appellant during the latter's discussion with the late leader said (see the Record at Volume 25 page 2302 line 7-12):

'He proceeded addressing himself to Iqadi saying he is aware that his father and forefathers are moving around him now they are wishing to have him joining them on the other side. He proceeded saying that may be the case, however, you do not have to bother, he is addressing himself to iQadi, my son, in his words he was referring to MD, is there to takeover."

[126] It is not in dispute that MD referred to in both quotations is Mduduzi Shembe. To me the gist of what the late leader conveyed to the two witnesses is clear that on his death he wanted his son to succeed him. With regard to the confusion as to whether the late leader was referring to succession to household or church leadership position cannot arise on the reading of the passages referred to above. The second appellant qualified the taking over of the reins by the late leader's son as the leadership of the church. Also, under cross-examination Inkosi Qwabe put it beyond doubt that the late leader, when he talked to the second appellant in his presence, was referring to the church leadership position; when he said that the late leader was referring to 'God's service'. (See the Record at Volume 25 page 2326 lines 1-2).

[127] Whereas the second appellant does not regard Ebuhleni as the church property but rather a private property which his father specifically allotted to AK Shembe, his evidence has been that the late leader was referring to succession to the church leadership position. Ebuhleni is used both as a homestead and the church; confusion on the part of the counsel for the respondent and ultimately the court *a quo* might have arisen therefrom.

[128] In my view, what the late leader conveyed to both witnesses, was clear and sufficient to convey his last wishes regarding his successor to the church leadership and for one to clearly understand what the last wishes of the late leader were. An oral nomination need not be set out with the precision required in drafting a testamentary document. Mr Findlay argued that the only nomination which should be accepted is the Deed of Nomination because it is in writing. Further, that the confirmation of the Deed of Nomination by the letter of 16 March 2011, shortly before his death, is indicative of the fact that the late leader intended to make only one nomination. The nomination of the first appellant by the late leader should not be discarded simply because it is not in writing. It is not a requirement in the Trust Deed that a nomination of the successor to the church leadership should only be in writing. In terms of the Trust Deed the titular head may make more than one nomination. Therefore, it does not necessarily follow that simply because the nomination of the respondent is in writing; it automatically excludes any other nomination. The evidence does not establish as to when the letter Buthelezi Attorneys allegedly received on 16 March 2011 was written, as it does not bear any date; it cannot therefore provide sufficient proof that the late leader intended the Deed of Nomination to be the only nomination. Such a letter could well have been written even before the drafting of the Deed of Nomination in confirmation of the discussion the late leader and Attorney Buthelezi had in preparation for the drafting of the Deed of Nomination. Otherwise, there would be no need for it. Nor can Dr Roberts' evidence, that the late leader told him that the matter was in the hands of his lawyers, provide proof that the late leader intended the Deed of Nomination to be the only nomination since it is incomplete for one to conclude that the late leader was thereby referring to the Deed of Nomination, and if he did, he, the late leader, intended the Deed of Nomination to be the only nomination of a successor to him.

.

[129] The oral nomination of the first appellant, which the late leader made to the second appellant, should not be treated, assessed and construed as if it is a formal written nomination, made at a pre-arranged meeting for that purpose. The nomination in question was made during casual or informal talks or discussions between the late leader and the second appellant. It is not an unusual phenomenon amongst Africans or in the traditional set up for elderly and people of poor health, in particular, to convey their last wishes to their trusted people, relatives and friends during casual discussions or informal talks. It would therefore not be fair and just to

equate such nomination with a formal written nomination and expect it to be as precise, and detailed as a written one.

[130] It has been contended on behalf of the respondent that the church practice is that the church leader nominates a successor during his life time and for the protection of the nominee he keeps the identity of the nominee secret and that, therefore, the late leader could not have divulged the succession secret to the second appellant. However, to the contrary, the evidence establishes that the late leader had on three previous occasions confided the succession secret in Cebekhulu, Gideon Mncube and in the respondent himself on 12 January 2000, that the respondent would be his successor. When the late leader communicated the successor information to the second appellant it had already lost the required confidentiality and protection. In the premises, there was nothing which could and would have prevented the late leader from disclosing the alleged succession secret to the second appellant, his boyhood friend, brother and confidante.

[131] The question has also been raised as to why the late leader divulged the succession secret in the presence of Inkosi Qwabe? The evidence has established that Inkosi Qwabe was not a mere ordinary member of the church but an Inkosi. Amakhosi at the Church of Nazareth enjoy a special status. In terms of protocol they rank immediately after the titular head of the church.

[132] It has been contended on behalf of the respondent that if the late leader had indeed confided in the second appellant who was to succeed him, he would not have, on the Friday before the funeral, telephoned Buthelezi and asked him whom the late leader had nominated as his successor. The second appellant's explanation is that he wanted to ascertain if it was the same person whose name the late leader had communicated to him. If it was a different name to the one the late leader had given to him, he wanted to devise a means to avoid a conflict which might arise when more than one name was to be announced. The second appellant had feared that the announcement of more than one name might cause a split in the church, and result in violence. However, Buthelezi refused to disclose the name to him and said that he (the second appellant) would hear at the funeral with all the others. The explanation by the second appellant for making an enquiry from Buthelezi, in my opinion, is reasonable and plausible, regard being had to the fact that a split had

opinion, is reasonable and plausible, regard being had to the fact that a split had occurred in 1976 through an announcement of this nature, which resulted in a blood bath between the followers of the two sections of the church.

[133] It has been submitted on behalf of the respondent that the second appellant wanted to prevent Buthelezi from announcing the successor. Buthelezi repeatedly said that at the funeral the second appellant did not want him to make the announcement. But Gumede, who was the Programme Director, indicated to Buthelezi that the second appellant was not objecting to him making an announcement.

[134] The second appellant has demonstrated to be a frank, candid and trustworthy witness. He never claimed that he had expressly been mandated by the late leader to announce the first appellant as his successor at the funeral. Had he invented or fabricated a story that the late leader had confided in him his nomination of the first appellant as his successor, in order to bolster his version and make it more credible, one would have reasonably expected the second appellant to claim that he was acting on an express mandate of the late leader.

[135] Inkosi Qwabe also confirmed that the late leader had not specifically mandated the second appellant to announce the successor at his funeral; that both witnesses corroborated each other on something negative to their version shows that they had not colluded with each other. This is also evident from the fact that when stating what the late leader conveyed to them they do not use exactly the same words although the meaning and interpretation thereof could be the same.

[136] It is common cause that between the parties, the evidence in the present case, looked in its totality, does not exclude the possibility of the existence of an oral nomination. This is evident from the following: Firstly, there is no direct evidence gainsaying the evidence of the second appellant that the late leader had on four different occasions communicated to him that Mduduzi Shembe, the first appellant, should succeed him as the church leader. It is not in dispute that when the second appellant brought the late leader a hind leg of the beast he had slaughtered, the late leader's paternal uncle, Nhlangakazi, was present but he was never called as a witness to gainsay this. Nor has any evidence been tendered to show that Inkosi

of the second appellant, and that on the day in question no discussion relating to succession regarding the church leadership took place. The probabilities are such that communications between the late leader and second appellant regarding succession of the church leadership did take place. As a consequence, the existence of an oral nomination cannot on the balance of probabilities be ruled out.

[137] Secondly, the undisputed evidence by the widow of the late leader, Mrs Joyce Shembe, demonstrates that apart from the fact that the late leader accorded the second appellant much respect as an Inkosi of the area in which he was resident, the late leader regarded the second appellant as his brother. This finds corroboration in the evidence of the second appellant that whilst the late leader was still residing at the Mbeka homestead, he and the late leader were sharing a bed. The evidence of a close and trusting relationship between the second appellant and the late leader also finds support in the evidence of the respondent, that when he was accused of plotting to unseat the late leader, he, the respondent, appealed to the second appellant to intercede with the late leader on his behalf, which the second appellant did with success.

[138] In the light of the undisputed longstanding close relationship of trust and mutual respect that existed between the late leader and second appellant, it is more probable than not that the late leader confided in the second appellant who should succeed him as the church leader. It cannot therefore safely be concluded that the second appellant is untruthful when he says that the late leader shared a succession secret with him.

[139] Thirdly, when Sibisi whispered into the ear of the second appellant that the late leader had nominated the respondent as his successor, the reaction of the second appellant to such information demonstrated to Sibisi that the second appellant was amazed. He then rhetorically enquired from Sibisi whether the late leader had even overlooked his youngest son, Simangaliso. The reaction and inquiry by the second appellant, in my judgment, indicated that the second appellant was astonished to hear from Sibisi something different from what the late leader had communicated to him. This serves to show that there is a ring of truth in that the late leader had confided in the second appellant that the first appellant would succeed him in his position as the church leader.

[140] Fourthly, nomination of the first appellant as the successor to the late leader would according to the evidence of both Buthelezi and Sibisi be appropriate and 'one hundred percent acceptable'. It therefore, follows that it would not be impossible, improbable or anomalous for the late leader to nominate and recommend the first appellant for appointment as his successor. In the premises, it could not be a far-fetched thing that the late leader had orally nominated the first appellant as his successor. The evidence considered in its entirety in this matter does not exclude the possibility of the existence of an oral nomination. Nor can it be said that such nomination is improbable in the light of the evidence of Buthelezi, the attorney, and Sibisi, the Church Secretary-General, as to the possibility and appropriateness of the appointment of the first appellant as the successor to the late leader. Both such witnesses had been called by the respondent to testify in his favour. As a consequence, I can safely conclude that, in the present matter, the probabilities are such that the late leader also orally nominated the first appellant as his successor regard being had to the sufficiency of the evidence presented in this matter relating to the making of such oral nomination and to the fact that the Deed of Nomination was drafted in the year 2000. Although it has been argued that the letter allegedly delivered to Buthelezi on 16 March 2011 served to confirm the Nomination Deed, such letter does not bear any date and nor has any evidence been tendered to show when it was drafted. This, therefore, creates a space for various possibilities as to when the letter was or could have been drafted. Accordingly, in the circumstances of this case, it cannot be said that the appellants have failed to prove the existence of the oral nomination of the first appellant by the late leader on the balance of probabilities. Pushing the quantum of proof required in civil matters beyond this point, will be unfair, unjust and prejudicial to the appellants.

[141] It has been contended that the possibility exists that the late leader was expressing 'a mere wish' that the first appellant should succeed him as the church leader. The *Oxford Dictionary* defines the word 'wish' as a desire of something that cannot or probably would not happen. The further meanings as set out in the *Oxford Dictionary* are as follows: wanting to do something or asking someone to do something or that something be done. It is always said that a person has expressed his or her last wishes if he or she orders that something should be done at or after his or her death. The latter meaning of the word 'wish' or 'wishes' is apropos to the

present case as, according to the second appellant as well as Inkosi Qwabe, the late leader had previously expressed his last wishes to the second appellant on three isolated occasions and to both the second appellant and Inkosi Qwabe on the fourth occasion. In terms of clause 8 of the Trust Deed, the late leader was entitled and authorised to nominate and recommend one or more persons for appointment as the titular head after his death. Since the late leader could give effect to his last wishes by nominating the first appellant as his successor, his utterances to the second appellant and to both the second appellant and Inkosi Qwabe regarding succession, could not be said to be the expression of a 'mere wish', but, in my judgment, it was a valid nomination which should be given effect to. In the premises, the mere fact that the second appellant might not have expressly or crisply put it at the funeral of the late leader, when announcing the first appellant as a new leader, alone, could not in my view be a ground for concluding that the oral nomination does not exist.

[142] Allowing the conduct of the second appellant at the funeral of the late leader to cloud or nullify the existence of the oral nomination of the first appellant, by the late leader, in my opinion, will only serve to defeat the last wishes of the late leader and deprive the executive committee, as the church leadership, an opportunity to elect and appoint the titular head of the church who shall *ipso facto* also become the sole trustee of the trust, as the Trust Deed directs. Such an exercise by the executive committee of the church will not only be consonant with the provisions of s19(3) of the Constitution of the Republic of South Africa, Act 108 of 1996, governing all the citizens of this country, but it will make it possible for the broader church community (congregation) to have a church leader of its own choice. This will, in my view, also help to bring about peace and stability in the entire congregation, by bringing to finality the dispute to church leadership.

[143] It has been argued on behalf of the respondent that the late leader could not have nominated the first appellant as his successor since he had nominated and recommended the respondent for appointment as the titular head of the church and sole trustee of the trust. In this regard, the evidence of Buthelezi establishes that the conduct of the late leader was at sometimes unpredictable. Buthelezi testified that at a certain stage the late leader signed an agreement with Vukile Shembe the leader of the Ekuphakameni section, in terms of which he, the late leader, was to resign as the trustee of the Nazareth Ecclesiastical Endowment Trust (the trust) and allow

Vukile Shembe to take over as the trustee thereof, without consulting or informing Buthelezi, his attorney. This demonstrates that at some stage the conduct of the late leader was somewhat unpredictable. The argument that the late leader could not have orally nominated the first appellant as his successor after signing the Deed of Nomination in which he nominated and recommended the respondent as his successor therefore does not hold any water. The evidence and the circumstances in the present matter leave no other reasonable inference to be drawn than that the late leader, by sharing succession information with the second appellant, tacitly mandated the latter to make it known to the congregation and to give effect thereto.

APPLICATION of the TRUST DEED

[144] The court *a quo* held that the Trust Deed only finds application to the church situated at Ekuphakameni. Further, that only the Constitution of Ebuhleni Church adopted in 1999 applies with regard to the appointment of the titular head of the Nazareth Baptist Church, Ebuhleni. I assume that the court *a quo* based its decision on the fact that the Nazareth Baptist Church is a breakaway church from the Church of Nazareth (Shembe Religion), which has adopted its own constitution. While it is true and correct that the Constitution only finds application to the Nazareth Baptist Church, Ebuhleni, the same cannot be said for the Trust Deed, for it is applicable to both Ekuphakameni and Ebuhleni sections. However, for the new leader to become sole trustee of the trust he must first be the titular head of the Church of Nazareth.

[145] The Trust Deed was designed, among other things, to hold certain immovable properties to be administered by the trust for the benefit of the church (Church of Nazareth). In fact, the trust was specifically designed to benefit the members of the Church of Nazareth and orphaned children. In addition, it makes provision for the nomination and appointment of a successor to the titular head of the church, who also automatically becomes a sole trustee of the trust.

[146] On the death of his father, AK Shembe in 1995, the late leader was appointed titular head of the church and the sole trustee in terms of the Trust Deed, which positions he held until his death. It was against that backdrop that Vukile Shembe, the leader of Ekuphakameni section, at a certain stage accused the late leader of mismanaging church funds in that he had a lavish style of living, using church funds.

This provides sufficient proof that the late leader was the sole trustee of the trust in which the members of Ekuphakameni section are also beneficiaries.

[147] The constitution was drafted and adopted by the church membership and approved by the titular head of the Nazareth Baptist Church in 1999, as it was needed by the church in its dealings with various institutions. In order to apply for tax exemption from SARS and to register as a church, the church needed a Constitution. However, the Constitution also makes provision for the nomination and appointment of a titular head as the successor to the late titular head.

[148] In 1999 the late leader and his followers purported to break away from the Church of Nazareth and formed the Nazareth Baptist Church. However, they continued acknowledging the same confession of faith and following the teachings of the founder Isaiah Shembe. The late leader as the purported titular head of the new church also continued to observe and follow the tenets of the Church of Nazareth.

[149] The trust does not contain a clause providing for its termination in which event the trust should be terminated by operation of law. However, the Constitution makes provision for the dissolution of the trust embodied in Protocol 293/1935 and the incorporation of the church under the Constitution upon the commencement of the Constitution at the date of its approval by the leader of the church.

[150] It is common cause between the parties that the trust could not be dissolved by means of a Constitution but by an order of court. Section 13 of the Trust Property Control Act 57 of 1988 authorises a court to terminate the trust on application by the trustee or any person who in the opinion of the court has sufficient interest in the trust property. See *Ex Parte Grice & another NNO: In re Edward Saunders Employees' Trust; Ex Parte Grice & others NNO: In re Estate E G A Saunders Will Trust* 1984 (3) SA 84 (N) at 96D; *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal & others* 2010 (6) SA 518 (SCA) paras 24 and 25; *Gowar & another v Gowar & others* 2016 (5) SA 225 (SCA) para 34.

[151] Nor has any evidence been tendered that either the late leader, as the sole trustee, or any other interested person in the property of the trust has ever approached the court for an order terminating the trust. In the premises, the

purported termination and replacement of the Trust Deed by the adoption and approval of the church Constitution and transfer of movable and immovable property of the Church of Nazareth, governed by the provisions of the Trust Deed, to a newly established church, namely the Nazareth Baptist Church, purported to be governed by the Constitution, was fundamentally flawed and invalid. As a consequence, it could not produce any force and effect.

[152] Accordingly, all the positions of the Church of Nazareth created by and held in terms of the Trust Deed are governed and regulated by its provisions to the exclusion of the Constitution of the Nazareth Baptist Church adopted in 1999. No trust has ever been created by the Nazareth Baptist Church in respect of which the late leader could in terms of the Constitution be entitled and authorised to nominate and appoint a sole trustee.

APPOINTMENT of the SUCCESSOR in LEADERSHIP

[153] In the Deed of Nomination, the late leader in his capacity as the titular head of the Nazareth Baptist Church and sole trustee of the Church of Nazareth Ecclesiastical Endowment Trust, nominates and recommends Vela Muhle Shembe, the respondent, for appointment as the Titular Head of the Church and the sole trustee of the trust after his death. The question that arises is whether such nomination can be given effect to in terms of the Trust Deed or the Constitution, which the Nazareth Baptist Church adopted in 1999.

[154] In terms of the Constitution, the late leader, in his capacity as the titular head of the Nazareth Baptist Church, could only nominate and appoint the respondent, or anybody else, as his successor in office, but the same cannot be said for the nomination and appointment of the respondent to the position of the sole trusteeship of the Church of Nazareth Ecclesiastical Endowment Trust, since the latter is governed by the Trust Deed. No trust has ever been created by the Nazareth Baptist Church, other than the trust in question, to which the late leader in his capacity as the titular head of the Nazareth Baptist Church could in terms of the Constitution have legitimately been entitled and authorised to nominate and appoint the respondent or anybody else as a sole trustee.

[155] Since no valid act could flow from the conduct of the late leader and church membership when purported to dissolve the trust and to have all the property of the Church of Nazareth transferred to the newly established Nazareth Baptist Church, the late leader did not cease to be the titular head of the Church of Nazareth and the sole trustee of the trust and the Nazareth Baptist Church to be the beneficiary of the trust. See *Police & Prisons Civil Rights Union v Minister of Correctional Services & others* [2006] 2 All SA 175 (E) para 75. It follows, therefore, that the positions the late leader held at the time of his death, i.e. of the church leadership and sole trusteeship, were held by him under the Trust Deed. In the circumstances, the reading of the Trust Deed and the Constitution together, as parties have submitted, will be of no use.

[156] Notwithstanding the purported change of the church name from Church of Nazareth as it is known in the Trust Deed, to Nazareth Baptist Church and the adoption and approval of the Constitution, the Trust Deed was, after 1999, and still is, applicable to Nazareth Baptist Church, Ebuhleni. The following provides the corroborative facts: Firstly, the parties in the present proceedings, in support of their respective claims, seek reliance on the provisions of the Trust Deed. This is indicative of the fact that the congregants of Nazareth Baptist Church, Ebuhleni, still recognise and follow the Trust Deed as an authoritative document of their church; regard being had to the fact that all the disputants in these proceedings are the congregants of Ebuhleni section.

[157] Secondly, Reverend Nzama testified that, after his appointment in 2010 as the chairman of the executive committee, he approached the late leader and asked him for a document he would use as a guide in the performance of his duties and functions as a chairman; the late leader gave him the Trust Deed. This also finds corroboration in the evidence of attorney Buthelezi that, since 1995, and until three years before the institution of these proceedings he was only aware of the Trust Deed as an authoritative document of the church. It was only three years before these proceedings began that he became aware of the existence of the Constitution, when there was an application against Sizwe Shembe. Prior to that, the only relevant document which had been used in the proceedings was the Protocol 293/1935 (Trust Deed).

[158] The second impediment to giving effect to the order the respondent seeks under the provisions of the Constitution is the manner in which the Deed of Nomination is couched. In terms of this document, the late leader nominates and recommends the respondent for appointment to the positions of titular head of the Nazareth Baptist Church and of sole trusteeship of the trust in question. The Constitution does not make provision for the nomination, recommendation and appointment of a successor to the deceased titular head whereas the Trust Deed does.

[159] Clause 10.1 of the constitution provides:

'The Head and Leadership of the church shall during his lifetime nominate and appoint his successor in office.'

This clause simply nominates and appoints a successor and it does not make any provision for recommendation, which is suggestive of the fact that someone else is seized with the power or authority to make such an appointment; whereas clause 8 of the Trust Deed entitles the titular head of the church to nominate and recommend any person, amongst the pastors or lay church members of the executive committee, for appointment as the titular head of the church, who shall upon his appointment automatically become the sole trustee of the trust. The Deed of Nomination is modelled on the Trust Deed.

[160] Although the Constitution makes provision for the nomination and appointment of the successor to the titular head of the church the Trust Deed is best placed to give guidance and direction in the determination of the question relating to the late leader in this matter.

[161] In my judgment, it therefore stands to reason, that in order to give effect to the 'nomination' and 'recommendation' of the respondent for the appointment as the titular head and sole trustee of the trust, this Court must have recourse to the Trust Deed, which empowers and authorises the executive and advisory committee to elect a titular head of the church in the event of the vacancy occurring at the office of the titular head.

[162] In interpreting the words used in the Deed of Nomination this Court should draw analogy from the fundamental tenet of statutory interpretation as contained in *Cool Ideas 1186 CC v Hubbard & another* 2014 (4) SA 474 (CC) para 28; which was

cited in *Premier Foods (Pty) Ltd v Manoim & others* 2016 (1) SA 445 (SCA) para 42. The court in *Hubbard* held that:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity . . .'

Similarly, in my view, the Trust Deed in question or any other instrument must be interpreted purposively so to achieve equitable results.

[163] The emphasis should be placed on the use of the words, 'nominate' and 'recommend', Vela Muhle Shembe for 'appointment'. In order to have better understanding and application of such words in the present matter they should be given their ordinary grammatical meaning.

[164] The *Oxford Dictionary* defines the word 'nominate' as to 'put forward as a candidate for election or for an honour or award'. It defines the word, 'recommend' as to 'put forward with approval as being suitable for a purpose or role'. The *Dictionary of Contemporary English* (1982) defines it as, 'suggest someone.' The *Oxford Dictionary* defines the word 'appointment' as a process of appointing someone. The *Dictionary of Contemporary English* defines it as, 'put in or choose for a position, job.'

[165] If the words, 'nominate', 'recommend' and 'appointment', are given their ordinary grammatical meaning, it becomes more apparent that the late leader did not actually appoint the respondent as the titular head and the sole trustee of the trust but he merely put him forward for election and appointment, by the relevant executive committee as an approved suitable candidate.

AUTHORITY OF THE EXECUTIVE COMMITTEE

[166] The Executive Committee derives its power or authority to elect the next leader from clause 8 of the Trust Deed. The clause requires the Executive Committee, upon the office of the titular head becoming vacant, to elect a successor

to that office, as outlined above. If the deceased titular head has recommended certain names from whom his successor is to be appointed, the Committee's choice is limited to the persons whose names have been recommended by the deceased titular head for appointment. However, if only one person is recommended, the Committee must elect such person as the titular head of the Church.

[167] The Executive Committee must elect a person best suited to occupy the position of the titular head of the church. In the performance of such function it is required to act fairly, honestly and impartially. However, Mr Findlay for the respondent has argued that, as the present Executive Committee was appointed in terms of the Constitution, it does not have power to appoint the successor to a titular head.

[168] Since the conduct of the late leader and the church membership purporting to transfer the assets of the Church of Nazareth to their newly established church, the Nazareth Baptist Church, and to dissolve the trust by mere adoption of the Constitution was invalid, the Trust Deed is still valid and binding on the church and on the late leader as the titular head of the Church of Nazareth and the sole trustee of the trust, respectively.

[169] As a consequence, the provisions of the Trust Deed apply to all the actions of the late leader, which he performed both in his capacity as the church's titular head and as the sole trustee of the trust, and to the results of those actions. See also M I Madondo *The Role of Traditional Courts in the Justice System* (2017) at p 49 para 100. In which event, when the late leader purported to appoint the Executive Committee under the constitution in 2010, in particular; his conduct must be deemed to have taken place under the provisions of clause 6 of the Trust Deed instead. Therefore, it follows that the executive committee the late leader purported to appoint under the provisions of the constitution in 2010, has in terms of clause 8 of the Trust Deed, power and authority to elect and appoint the church's titular head and the sole trustee of the trust, as the clause directs.

[170] The respondent contends that the late leader nominated him in writing as his successor, whereas the first appellant contends that the late leader orally nominated him as his successor. Both nominations were in accordance with the church practice

officially announced at the funeral of the late leader on 3 April 2011. Since then the first appellant, Unyazilwezulu, became the titular head of Ebuhleni, and likewise the respondent, Imisebeyelanga, assumed the position of being the titular head of Thembezinhle which did not exist before. Both are performing duties assigned to them in terms of the announcement.

[171] The handwriting experts have advanced detailed reasons for their conclusion that the signature on the Deed of Nomination was that of the late leader. On the other hand, the evidence, considered in its entirety, does not exclude both the possibility and probability of the existence of the oral nomination of the first appellant by the late leader as his successor. On the balance of probabilities it can, therefore, safely be concluded that the late leader also orally nominated the first appellant as his successor in the church leadership. As a result, the two contestants for the positions of the church's titular head and sole trusteeship of the trust are the respondent, Vela Muhle Shembe, and the first appellant, Mduduzi Shembe

[172] In terms of clause 8 of the Trust Deed the present Executive Committee, appointed in 2010, has the duty to elect and appoint the church's titular head and the sole trustee of the trust from the two contestants. In order to ensure impartiality and fairness in the execution of such duty the vote must be by secret ballot and be supervised by the delegation of the Independent Electoral Commission (IEC) or by a delegation from any other independent and impartial body the parties may agree upon.

COSTS OF APPEAL

[173] Since in these proceedings both parties have been seeking clarity on the matter, in pursuit of the last wishes of the late leader, and intending to reach finality on the appointment of a person best suited to occupy the positions of the church's titular head and sole trusteeship of the trust, in all fairness, in my view, each party must be ordered to pay its own costs of appeal.

APPEAL AGAINST COST ORDERS

[174] With regard to the appeal against the costs order granted under case number 6259/2011, that the application was dismissed without an order as to costs, the respondent sought an order declaring the first appellant to be in wilful and *mala fide*

contempt of court with regards to the order that had been granted on 15 April 2011 under case number 4265/2011. The court dismissed this application on the ground that the respondent had failed to discharge the onus of showing that the first appellant had acted contemptuously of such court order. It follows that the first appellant was the successful party and it is trite that the costs must follow the results. However, the court *a quo* did not advance any reasons for not awarding the first appellant the costs order. In our judgment, the first appellant has made out a case for the upholding of the appeal against such order and for awarding of a costs order in his favour.

[175] In respect of the appeal against the costs order granted under case number 4625/2011, that the rule *nisi* is discharged in respect of the four interlocutory applications where no order as to costs was made, it is not clear on what grounds the appellants rely for their claim that the court *a quo* erred in not awarding the costs in their favour. Nor have they shown that in so doing the court *a quo* did not judiciously or properly exercise its discretion. We are therefore not satisfied, in this regard, that the appellants have made a case for the award of costs in their favour.

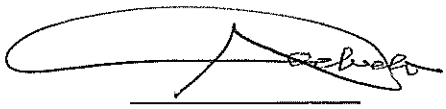
[176] Had it not been for the majority decision I would have upheld the appeal and ordered that

(a) The Executive Committee of the Nazareth Baptist Church, Ebuhleni, is directed to elect and appoint a titular head of the church and the sole trustee of the trust from the two contestants, namely Vela Muhle Shembe, the respondent, and Mduduzi Shembe, the first appellant, within sixty (60) days of the date of this judgment. Such election shall be by a secret ballot and be supervised by the delegation of the Independent Electoral Committee (the IEC) or by a delegation from any other independent and impartial body the parties may agree upon, such agreement shall be tendered to this Court within five (5) days from the date of the agreement;

(b) Each part to pay its own costs;

(c) The appeal against the costs order granted under case number 6259/2011 is upheld and the respondent is ordered to pay the costs of the application, and such costs to include the costs of two counsel;

(d) The appeal against the costs order granted under case number 4625/2011 is dismissed.



MADONDO DJP

Mnguni et Poyo Dlwati JJ:

[177] We have had the benefit of reading the judgment prepared by the Deputy Judge President, Madondo. We are in agreement with his exposition of the background to this appeal, an order granting condonation, his narration of the church history and the instruments governing the administration of the church and the succession to the office of the Titular Head and the sole trustee of the Trust. We, however, express our reservations in his assertion that the Church of Nazareth is an African traditional church and therefore that in churches of this nature the application of the cannon law is much blended with the application of traditional law and customs. Our reservations stem from the fact that this assertion is not supported by the evidence adduced in the court a quo.

[178] We are in agreement with the interpretation of the provisions of both the Trust Deed Protocol 293/1935 and the Constitution of the Nazareth Baptist Church and their applicability in these proceedings. We are also in agreement with his reasoning and ultimately the conclusion he reached with regards to the existence of the Deed of Nomination, wherein Mbusi Vimbeni Shembe (the late leader) nominated Vela Muhle Shembe (the respondent) as Titular Head of the Nazareth Baptist Church at Ebuhleni. We regret that we are constrained to differ with his reasoning and conclusion on the existence of the oral nomination of the first appellant. In our view the court a quo was correct in concluding that the late leader nominated the respondent as Titular Head of the Nazareth Baptist Church as appears on the Deed of Nomination and supported by the letter received by Buthelezi Attorneys on 16 March 2011 for the reasons which follow.

[179] The salient facts of this appeal are set forth in the judgment of Madondo DJP. We shall therefore refrain from repeating them except in so far as it may be necessary to do so in order to give completeness to our reasoning. At the outset it is

necessary to set out the test applicable when evaluating evidence in a civil trial. In *Gates v Gates*[1] Watermeyer JA said:

'Now in a civil case the party, on whom the burden of proof ...lies, is required to satisfy the Court that the balance of probabilities is in his favour, but the law does not attempt to lay down a standard by which to measure the degree of certainty of conviction which must exist in the Court's mind in order to be satisfied'.

Ponnan JA in *Pather & another v Financial Services Board & others*[2] quoted with approval from *Davidson & Tatham v Financial Services Authority*[3] where it was stated:

'We next ask how we should apply the civil standard of proof. In the light of all the authorities we conclude that there is a single civil standard of proof on the balance of probabilities but that it is flexible in its application. The more serious the allegation, or the more serious the consequences if the allegation is proved, the stronger must be the evidence before we should find the allegation proved on the balance of probabilities'.

[180] At para 29 of the same judgment the learned Judge of Appeal emphasised that:

'The civil standard of proof does not necessarily mean a bare balance of probability. The inherent probability or improbability of an event is a matter to be taken into account when the evidence is assessed. When assessing the probabilities a court will have in mind that the more serious the allegation, the more cogent will be the evidence required'.

Finally in *African Eagle Life Assurance Co Ltd v Cainer*[4] the court held that where there are probabilities, the finding of fact is made on a balance of probabilities. It is only where there are no probabilities either way that the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false; See *African Eagle supra* at p237F-H.

[181] As has been correctly observed by Madondo DJP, it has become the practice of the church from inception that each incumbent leader would nominate a successor during his lifetime but keeping the identity of the successor a secret to avoid being killed by other contenders. This has become more important in order to avoid the bloodbath that occurred when J G Shembe died and his son, Londa Shembe, did not accept that Isaiah Shembe had nominated A K Shembe to succeed J G Shembe as

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[1] *Gates v Gates* 1939 AD 150 at 154-155.
[2] *Pather & another v Financial Services Board & others* 2018 (1) SA 161 (SCA) para 31.
[3] *Davidson & Tatham v Financial Services Authority* [2006] UKFSM 31 para 198.
[4] *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W).

the Titular Head of the church and the sole trustee. It is also apparent from the history of the church that this nomination need not be in writing.

[182] The evidence of Dr Charles Roberts who treated the late leader since September 2007 until his death was that on three different occasions he had raised the issue of succession within the church with the late leader. On all three occasions the late leader assured him that he should not worry because the matter was in the hands of his lawyer and everything was under control. On 8 March 2011 the late leader had said the following to him when he asked about the issue of succession: 'My lawyer will announce what's appropriate at the right time.'[5]
He conceded that the late leader did not tell him who his successor would be nor did he tell him the name of his lawyer. Dr Roberts' impression was that the late leader had put in place all the necessary arrangements in relation to the issue of succession.

[183] Mr Buthelezi, an attorney practising in Durban and, who was the legal representative of the late leader and the church since 1995, testified that the late leader had instructed him personally to prepare the Deed of Nomination. On the day of receipt of the instructions to prepare the Deed of Nomination, the late leader told him that he was doing that to avoid a succession struggle such as he had witnessed involving his late father, A K Shembe. The late leader told him that for that reason he wanted to nominate his successor in writing. He then requested the late leader to provide him with a copy of the identity document of the person that the late leader was going to nominate as his successor. At that time the copy of the identity document of that individual was not at hand and it was sent to his office after some time. He prepared the Deed of Nomination which was then taken to the late leader for his signature. The Deed of Nomination was returned to his office within a couple of days after having been signed by the late leader and two witnesses. He kept it in his safe until after the death of the late leader. As already stated, the signature on the Deed of Nomination has been found by the court a quo and correctly endorsed in Madondo DJP's judgment to be that of the late leader. He testified that if the late leader had changed his mind about the person he had nominated, he would have told him during his consultations with him, the last of which was during July 2010.

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[5] Vol. 6 pg460 lines 15 to 19.

[184] In the second paragraph of the Deed of Nomination the late leader specifically directed that his successor should be publicly announced at his funeral to avoid any dispute regarding the leadership of the church. He did not discuss the issue of nomination with the late leader again until he received a letter written by the late leader which was delivered by Mr Sibisi to his office on 16 March 2011. During the course of the trial the appellants' counsel made much of the fact that as this letter was undated, it remained unclear as to the date on which it was written. In our view, this assertion has no merit. We say this because it is safe to accept, as the evidence demonstrates, that even though it might not have been written on 16 March 2011, the late leader sent Mr Sibisi to Mr Buthelezi's office to deliver the letter on the date in question. The evidence at the trial was that the late leader was in control of the church affairs until his demise and was *compos mentis.* There is no reason therefore why he could not have sent Mr Sibisi to Mr Buthelezi's office on 16 March 2011 to deliver the letter.

[185] Mr Buthelezi testified that he kept the signed Deed of Nomination in the safe after it was returned to him in 2000. He thereafter did not deal with it. He testified that he repeatedly assured the members of the church, who were worried about what would happen to the leadership of the church should the late leader die before the issue relating to the settlement was resolved, that the late leader had made a written nomination. His evidence was that the second appellant attended some of these meetings.

[186] Mr Sibisi testified that on 16 March 2011 the late leader gave him an envelope and ordered him to deliver it to Attorney Buthelezi. The appellants' counsel in cross-examination put it to him that the late leader's wife would say that this did not happen, because during that period the late leader was incapacitated, ill and lying on his bed almost prone to trembling. In his response Mr Sibisi stated that the late leader's wife would be lying when she said that. It is common cause that this letter is a self-standing letter accepted by all handwriting experts as having been written and signed by the late leader. Importantly, the letter reinforced the late leader's nomination of the respondent as his successor and also reminded Mr Buthelezi to announce the respondent as the successor on the date of his funeral.

[187] Mr Cebekhulu's evidence was that the late leader asked him to act as a go-between him and the respondent. Importantly, he testified that the late leader asked him to be the respondent's babysitter because the respondent was going to take over from him. The late leader asked him to deliver the respondent's identity document to Attorney Buthelezi. He testified further that he told the second appellant's father that the respondent was to succeed the late leader.

[188] From an analysis of evidence adduced before the court a quo, it is clear that the only lawyer that dealt with the late leader's personal issues and those relating to succession was Mr Buthelezi.

[189] Having given careful consideration to the evidence of Mr Buthelezi that the late leader had instructed him personally to prepare the Deed of Nomination and had sent the respondent's identity document to him for that purpose; the evidence of Dr Roberts to the effect that the late leader told him that his lawyer would make the announcement at the appropriate time; and the evidence of Mr Sibisi that he delivered the letter to Mr Buthelezi's office on 16 March 2011, we are satisfied that all this evidence leads to the ineluctable conclusion that it would be highly improbable for the late leader to have made another nomination other than the one contained in the Deed of Nomination.

[190] Turning to the evidence of Mrs Joyce Shembe, the wife of the late leader, it is common cause that she did not play any role in the church matters. On her own version, when her late husband was critically ill she could not register much in her mind as to what was taking place. She could not recall the sequence of the dates and a visit by a group of men from Umlazi that came to see the late leader on 16 March 2011 to give him the offerings. She could not say with certainty that the late leader was critically ill on 16 March 2011. She conceded that she and the late leader were living in separate structures within the same yard. She conceded that the only time that she started spending more time in the house of the late leader was when the late leader became critically ill. The evidence demonstrates that she was not a conduit that conveyed messages to and from the late leader. Her evidence that she did not see Mr Sibisi collecting a letter from the late leader on 16 March 2011 does not displace the direct evidence of Mr Sibisi in this regard. She was not mentioned as being present when the second appellant and Inkosi Qwabe visited the late leader

on 15 March 2011. Although she recalled an incident when the second appellant came in the company of Inkosi Qwabe to visit the late leader shortly before the late leader died, she testified that she was not aware of what was discussed by the three men. She also testified that the late leader was in charge of the church affairs and made the final decisions pertaining to the church until he died.

[191] With regard to the evidence of the second appellant, the starting point would be to capture what he said at the funeral of the late leader. He said the following: '...say I will do what my father, inkosi Amaqadi, did during iNyanga Yezulu's era in 1976 when he had descended from the top of Nhlangakazi, the holy mountain, iNkosi said take this staff..... and lead these people, which he did, that is iNyanga Yezulu in other words, he was installed or appointed by the iNkosi aMaQadi Mzonjani, my father, as the titular head of the church....'[6]

He continued later and said:

'Your leader comes from the house or branch of iNyanga Yezulu, not from outside thereof, do not be confused, I have all the rights as iNkosi of the tribe, I am in charge, your leader MaNazaretha, is Mduduzi Shembe.'[7]

[192] It is common cause that at no stage was the second appellant asked by the late leader to make an announcement at the late leader's funeral that the first appellant was to succeed the late leader. Instead the second appellant testified that he took it upon himself to make the wishes of the late leader known to the congregation.

[193] In fact the second appellant made two speeches on the day of the funeral. The first speech was at a service before the funeral program began on a site adjacent to the place where the funeral service was to take place. The second speech was at the podium of the funeral service. It is common cause that during both speeches the second appellant did not make any mention that the late leader made an oral nomination to him to the effect that the first appellant was to be his successor. He confirmed this in his evidence. It is apparent that in both speeches he made it clear that as the traditional leader of the area he had all the rights to announce the successor and that he will appoint the new leader.

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[6] Vol. 22 pg 2067 lines 14 to 21.
[7] Vol. 22 pg 2068 lines 17 to 21.

[194] When asked about this in his evidence in chief, he did not provide a direct answer as to why he had not told the people at the funeral that what he was telling them was what he had been told by the late leader or convey that it was the late leader's instructions or wish that he had been secretly told; instead of telling them that he was talking as Inkosi of the Ngcobo clan. He testified that he was announcing or making known the wishes of the late leader, yet of course, this is different to what he said at the funeral.

[195] He testified that when he telephoned Mr Buthelezi, he wanted to check with him whether the name that Mr Buthelezi had matched the one the second appellant had in order to avoid conflict. On this aspect Mr Buthelezi testified that the second appellant said to him that he should tell him the name of the nominated successor.

[196] We do not share the same views as those expressed by Madondo DJP in paragraph 142 of his judgment.[8] His suggested approach seems to be a middle course and in those circumstances we would have thought that there would have been nothing to be said in support of this appeal on the issue of oral nomination. In our view to accept this approach would be turning the clock back after so many years and is inimical to the instruments governing the administration of the church and succession to the office of the Titular Head and the sole trustee.

[197] Pausing here for a moment, it is important to record that the second appellant conceded that Mr Sibisi had informed him a day before the funeral that the late leader had nominated the respondent. The evidence demonstrates that the second appellant knew that Mr Buthelezi was present with a written nomination and intended to pre-empt Mr Buthelezi's announcement with his own announcement as stated in his speech before the funeral. Finally, we find it incomprehensible to regard what was allegedly said by the late leader to the second appellant in the presence of Inkosi Qwabe to be his last wishes when the evidence demonstrates that the leader

[8] 'Allowing the conduct of the second appellant at the funeral of the late leader to cloud or nullify the existence of the oral nomination of the first appellant, by the late leader, in my opinion, will only serve to defeat the last wishes of the late leader and deprive the executive committee, as the church leadership, an opportunity to elect and appoint the titular head of the church who shall *ipso facto* also become the sole trustee of the trust, as the Trust Deed directs. Such an exercise by the executive committee of the church will not only be consonant with the provisions of s 19(3) of the Constitution of the Republic of South Africa, Act 108 of 1996, governing all the citizens of this country, but it will make it possible for the broader church community (congregation) to have a church leader of its own choice. This will, in my view, also help to bring about peace and stability in the entire congregation, by bringing to finality the dispute to church leadership'.

sent Mr Sibisi to deliver a letter to Mr Buthelezi on 16 March 2011 directing Mr Buthelezi to announce his successor at his funeral. It is common cause that all the alleged wishes were communicated before 16 March 2011.

[198] As already stated, he conceded in his evidence in chief that he had no right to appoint a church leader but had the right to express the wishes of the late leader. This, however, is very different to what he said at the funeral. When asked in his evidence in chief, whether it was true that his father had nominated A K Shembe to lead the church his answer was that his father had merely instructed A K Shembe to take the staff and lead the people to the holy mountain of Nhlangakazi as a chief. However, this again differs from what he said at the funeral.

[199] When it was put to him that he was invoking the amaQadi clan custom on succession which dictates that the eldest son would take over from his father, his response was that, if they are subjects of the amaQadi clan that cannot be overlooked. Before the advent of democracy and the Constitution succession followed the primogeniture principle. It is so that in terms of customary law, succession can be from father to son. Hence those left behind in the past would have expected the late leader to be succeeded by his son. In this case the church is governed by Protocol 293/1935 which discards traditional customary practices. The history of the church demonstrates that it is not a foregone conclusion that an elder son would succeed the incumbent Titular Head, and for that reason the incumbent head nominates his successor.

[200] Rev M G Gumede's evidence was that it was known by the committee in charge of the funeral arrangements that an announcement of a new leader was going to be made at the funeral because of the history of the church. It was therefore expected that it would be made by Mr Buthelezi as he was known to be the late leader's lawyer. Rev Gumede testified that the strange part of the second appellant's announcement was that he seemed to have taken it upon himself to make the announcement by virtue of his position as Inkosi, which was not the practice.

[201] In any event the evidence of the second appellant during the trial and in his affidavits deposed to in these proceedings was that the late leader had told him of his wish that the first appellant would take over after his death. His evidence

therefore must be looked at in light of what Inkosi Qwabe had said in his evidence before analysing the word 'wish'. Inkosi Qwabe testified that on 10 January 2011 he went to Ebuhleni and met with the second appellant. They saw that the congregation had gone to the mountain but the late leader had not gone. They went to visit the late leader. They exchanged greetings and the late leader addressed the second appellant and told him that he was aware that his fathers and forefathers were moving around him and they were wishing to have him join them on the other side. He proceeded, to state:

'That may be the case, however, you do not have to bother, he is addressing himself to iQadi, my son, in his, words, he was referring to MD, 'is there to take over'.[9]

From there Inkosi Qwabe and the second appellant testified that they were overwhelmed by what the late leader had said and they left his house.

[202] From this, it is not clear whether the late leader made a specific reference to a particular son or just said "my son" would take over. It is also not clear what it is that that son would take over. It was only under cross-examination that he disclosed that the late leader had said to the second appellant that he should not be concerned; M D Shembe was available as the next leader. The late leader, however, did not specify that the second appellant should make an announcement. He was asked as to why he did not assume that the late leader was referring to one of his other sons, and his response was that:

'uThingo to me is a god. Therefore I wouldn't start questioning whether he's talking about other sons. To me it meant MD. Therefore I took him to be meaning or referring to MD'.[10]

[203] In our view, therefore it is not clear whether the late leader made reference to the first appellant when he said my son is there to take over or because he just said that my son will take over Inkosi Qwabe and the second appellant assumed that reference was being made to the first appellant. There were various contradictions by Inkosi Qwabe in this regard. He, also under cross-examination, testified that the late leader had prefaced his talk by saying "as I've told you earlier" and yet this was not his evidence in chief.

[204] It was also apparent in his evidence that he had made a speech at the late leader's funeral. He did so after the second appellant's speech. When asked why he

[9] Vol. 25 pg 2302 lines 5 to 15.
[10] Vol. 25 pg 2321 lines 19 to 25.

did not confirm at the funeral that he was present when the late leader told the second appellant who his successor would be, his response was that he did not see that as being necessary as the second appellant had announced the name. He emphasised that he was not there to support the second appellant in his speech.

[205] The court a quo formed a poor opinion of the two witnesses (the second appellant and Inkosi Qwabe), as much as we find, it said:

'When one reads the evidence in regard to the oral nomination upon which the respondent replies, in my view it has one failing. In both the testimony of Nkosi Ngcobo and Nkosi Qwabe we do not have either in direct speech or indirect speech what the late leader actually said'.[11]

[206] We find it highly improbable that the late leader would have disclosed his wish in the presence of Inkosi Qwabe because of the secretive nature of the issue. It was not necessary for the late leader to repeat his wish in the presence of Inkosi Qwabe as the second appellant said that he had already told him his wish on two separate occasions. We have no doubt that Inkosi Qwabe would have told the congregation that indeed he was present when the late leader made known his wishes to the second appellant. We find that Inkosi Qwabe did not tell the congregation about that because it never happened. In our view, this was a knee jerk reaction on the part of the second appellant and Inkosi Qwabe when the second appellant realised that he did not have the power that he purported to exercise when he announced the first appellant as the successor to the late leader at the funeral. On the evidence before us we find that this aspect of nomination is a fabrication.

[207] Finally on the issue as to whether the late leader's wish can be elevated to reality or a nomination in casu, the second appellant's evidence in this regard was that the late leader had expressed to him his wish that the first appellant would be his successor upon his death. As correctly pointed out in Madondo DJP's judgment, the word wish in the *Oxford Dictionary* is defined as a desire of something that cannot or probably would not happen. We have also considered the other meanings as referred to in the judgment and wish to include the following definition from Collins *English Dictionary*:[12]

'1. to want or desire (something, often that which cannot be or is not the case).

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[11] Vol. 39 pg 3676 lines 22 to 25.
[12] *Collins English Dictionary* 10 ed (2009).

2. to feel or express a desire or hope concerning the future or fortune of.
3. to desire or prefer to be as specified.
...'.

In our view, all these definitions seem to point to the fact that when one expresses a wish there is no certainty that it will eventuate. Therefore, a wish cannot be elevated to a reality which would be a nomination in this matter. Something more would be required especially in the light of the Deed of Nomination and the letter delivered to Mr Buthelezi on 16 March 2011.

[208] After giving the issue careful thought we remain unpersuaded that the court a quo erred in concluding as follows:

'I find it inexplicable that if the late leader had indeed said to Nkosi Ngcobo that he wished and he desired that Mduduzi Shembe his son should succeed him, then why did Nkosi Ngcobo not expressly say so at the funeral and why did the late leader not ask the inkosi to announce this. In my view that would have been the most opportune moment for the inkosi to have said so. Instead why did Nkosi Ngcobo refer to the fact that he is making the announcement as to who should succeed the late leader on the basis that he is the inkosi of the predominant tribe which dominates that area where the church is situated. Moreover we do not have from Nkosi Ngcobo as to what the late leader in fact and actually said to him. It is for these reasons that I conclude that the respondent had failed to discharge the onus which rest upon him to show on a balance of probabilities that there had in fact been an oral nomination.'[13]

[209] In our view the reasons and findings of the court a quo are unassailable on the issue that there was only one nomination made by the late leader wherein he nominated the respondent as the Titular Head and sole trustee.

[210] What remains to be considered is the question of costs. The general rule is that in the ordinary course costs follows the result. In *Giddey NO v JC Barnard & Partners*[14] O'Regan J said:

'The ordinary rule is that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. Where the discretion contemplates that the Court may choose from a range of options, it is a discretion in the strict sense. The ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the

[13] Vol. 39 pg 3679 lines 5 to 17.
[14] *Giddey NO v JC Barnard & Partners* 2007 (2) BCLR 125 (CC) para 19.

decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.' (Footnotes omitted.)

[211] The court a quo dismissed with no order as to costs the application under Case Number 6259/2011 on the ground that the respondent had failed to discharge the onus of showing that the first appellant had acted contemptuously of the court order. The first appellant was the successful party in the application under Case Number 6259/2011 and the costs ought to have followed the result of that application. Having carefully considered this issue, we are satisfied that the respondent has achieved substantial success in this appeal. Consequently, there seems to be no reason why the costs should not follow the result.

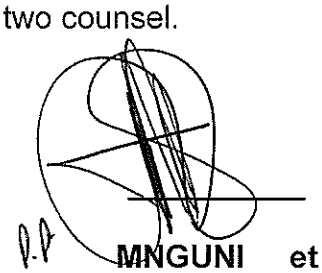
In the result the following order shall issue:

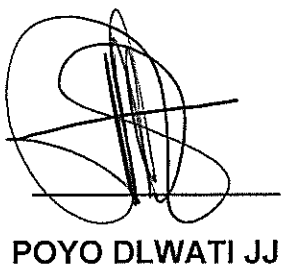
Order

(a) The appeal succeeds to the limited extent that paragraph 4 of the order of the judgment of the court a quo is set aside and is replaced with the following order:

'The respondent is ordered to pay the costs of the application under Case Number 6259/2011, such costs to include those occasioned by the employment of two counsel.'

(b) Otherwise, the appeal is dismissed with costs, such costs to include those occasioned by the employment of two counsel.





MNGUNI et POYO DLWATI JJ

Appearances

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Delivered:	11-12 April 2018
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