THERON AND OTHERS v. CIRCUIT OF WELLINGTON OF THE D.R. MISSION CHURCH IN SOUTH AFRICA AND OTHERS.

(APPELLATE DIVISION.)

1975. *May* 12; *November* 28. VAN BLERK, A.C.J., BOTHA, J.A., JANSEN, J.A., MULLER, J.A. and HOFMEYR, J.A.

Church.—N.G. Sendingkerk.—Disciplinary proceedings.—When Court can interfere with decisions of domestic tribunals of.—Review.—Statutory bodies.—Competence of Court to interfere with decisions of judicial nature of.—Distinction between the merits of a body's act and decisions in respect of questions of law.—Such principles also applicable to contractual tribunals of voluntary associations.

Appellants had been found guilty by the Circuit of Wellington of certain charges of contravening the Ordinance of the Church. At a meeting of the Circuit on 10 May four proposals relating to the punishment to be imposed on the appellants were made. After voting the proposal requiring the appellants to be warned was accepted. There was much dissatisfaction amongst certain members of the Circuit over the decision and, after the chairman had resigned, the meeting broke up in disorder. The meeting was resumed on 12 May. A proposal to

submit the decision relating to punishment to revision was accepted and thereafter, after voting on two proposals relating to punishment, a heavier punishment was imposed on the appellants. Appellants thereupon appealed to the General Synodal Commission against the revision decision and heavier punishments. Although the appellants did not attack the decision of 10 May, the Commission found that that decision was invalid because the punishment proposals before the Circuit could have confused the members of the Circuit and that the voting was in conflict with Rule 1 (12) of the Church Ordinance. The Commission decided further that, as the decision of the 10th was invalid, all acts flowing from that decision, including the revision decision and punishments of 12 May, were invalid and the matter was remitted to the Circuit. Appellants applied in a Provincial Division for the review of, *inter alia*, the decision of the General Synodal Commission but the application was dismissed. An appeal to the Full Bench was also dismissed. In a further appeal,

Held, per JANSEN, J.A. (VAN BLERK, A.C.J., concurring), that the "regulations of the Church" in the Regulations and Rules (the Ordinance of the Church) of the N.G. Sendingkerk in Suid-Afrika were jurisdictional matters and not part of the merits of a decision of either the Circuit or of the General Synodal Commission (Synod).

Held, further, that the rights of the appellants under the Church Ordinance to ". . . put (their interests) to the General Synodal Commission in a document which develops the case" had been frustrated in that the Commission had decided the appeal on a ground which had never been raised and which the appellants could also not have foreseen; that the confusion had arisen after the voting and there was no evidence upon which it could reasonably be concluded that the nature of the proposals or the voting procedure had contributed thereto; that there was no evidence upon which the conclusion could reasonably be reached that the

proposal that the appellants be punished by way of a warning did not reflect the true intention of the majority of the meeting.

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Held, further, in relation to the question whether the voting was in conflict with Rule 1 (12), that in the case of associations a strict compliance with all the procedural rules was not required if nobody was burdened by the deviation therefrom and neither during the meeting nor thereafter had any objections been raised by those concerned.

Held, per HOFMEYR, J.A., that the principles of natural justice had been violated by the Commission and the appellants seriously prejudiced by taking the decision of the Circuit of 10 May under consideration in the circumstances and by depriving them of a proper and fair hearing regarding the punishment which could legally be imposed on them.

Held, accordingly (*per* JANSEN, J.A., VAN BLERK, A.C.J., and HOFMEYR, J.A., concurring), that appellants were entitled to an order declaring that the proposal accepted by the Circuit on 10 May had been validly accepted and constituted the valid imposition of punishment on the appellants.

Per JANSEN, J.A. (VAN BLERK, A.C.J., concurring): In the review of decisions of statutory bodies it is necessary in the application of the formal standard (namely, the general principle that a court cannot concern itself with the question of how a body, clothed with a discretion, exercised its authority, but only with the question of whether the body actually exercised its discretion) to distinguish between the "merits" of the act of a body and decisions in respect of questions of law and questions of fact concerned therewith but which fall outside the "merits". It is sometimes said that the latter refer to "jurisdictional facts" or "preliminary or collateral issues". Where the dividing line between pure "merits" and these matters lie is difficult to determine with precision. It is clear that in general an act of a judicial nature of a contractual tribunal (of a voluntary association) can be interferred with on the grounds embraced by the formal standard: it is a necessary consequence of the application of the basic principles of contract, especially that of good faith. It is also a necessary consequence thereof that in general the extended formal standard must also be applied. A contractual tribunal can indeed be subject to a standard of reasonableness.

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The decision in the Cape Provincial Division in *Theron en Andere* v. *Ring van Wellington van die N.G. Sendingkerk in S.A. en Andere*, 1974 (2) S.A. 505, reversed.

Appeal against a decision in the Cape Provincial Division (VAN ZIJL, J., WATERMEYER, J. and VAN HEERDEN, J.). The facts appear from the judgment of VAN ZIJL, J., in the Court *a quo* and reported in 1974 (2) S.A. 505 (C).

L. R. Dison, for the appellants: "....."

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E. M. Grosskopf, S.C. (with him *W. G. Burger*), for the respondents: A Court of law will only interfere on review with a decision of a domestic court of a voluntary society of persons like the Dutch Reformed Mission Church in South Africa if at the trial or conviction of the person charged: *(a)* an infringement or inobservance of the rules or statutes of the society has taken place; or *(b)* the elementary principles of justice in so far as such

principles have been made applicable either expressly or by implication by the rules or statutes concerned, have been ignored; and *(c)* actual prejudice

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to the party involved flowed from such infringement or inobservance. See *Marlin* v. *Durban Turf Club and Others*, 1942 A.D. at p. 127; *Jockey Club of South Africa and Others* v. *Feldman*, 1942 A.D. at p. 359; *Odendaal* v. *Loggerenberg en Andere, NN.O.* (1), 1961 (1) S.A. at p. 719C-E; *De Vos* v. *Die Ringskommissie van die N.G. Kerk*, 1952 (2) S.A. at p. 93; *Grundling* v. *Beyers and Others*, 1967 (2) S.A. at p. 141C-E (W). Appellant's submission that first respondent was *functus officio* after 10 May 1969 must fail because a body or court according to the common law only becomes *functus officio* after it has executed its duties fully—*in casu* by delivering judgment and the imposition of punishment, and in Church Law there is no provision which is somewhat stricter than the common law rule. *Voet*, 42.1.27; *Estate Garlick* v. *C.I.R.*, 1934 A.D. at p. 502; *Jacobson* v. *George Licencing Court*, 1934 C.P.D. at p. 455; cf. *Leyds, N.O.* v. *Simon and Others*, 1964 (1) S.A. at p. 383. It cannot be argued that a revision was excluded because first respondent had already been *functus officio*. Appellants' argument that a decision in regard to punishment must technically be regarded as a "decision" and is, therefore not susceptible to revision or reconsideration, is not sound. First respondent cannot on any legal basis be *compelled* to impose punishment in terms of the decision of 10 May 1969, especially not where first respondent had already in fact on 12 May 1969 altered its view. The imposition of ecclesiastical punishment is not a simple act like the issue of some or other permit or licence and there are no grounds on which the Supreme Court can substitute first respondent's discretion by its own in the determination of a proper punishment. On a correct interpretation, sec. 175 *(e)* can only be applicable to a decision on the question whether the person charged is guilty or not guilty. If it is also applied to decisions on sentence it may lead to untenable results. Further, it may be extremely difficult to decide which proposal is more favourable to the person charged. From its nature sec. 175 *(e)* is not applicable to a decision on punishment and regulation 1 (12) should be utilised in those cases. In their appeal to the second respondent appellants pertinently objected, *inter alia*, to the revision of first respondent's decision of 10 May 1969 and made the point that judgment should have been given in terms of the original decision. The appellants also pertinently objected against the chairman's casting vote on 12 May 1969. The same objections, although not all the arguments, which appellants now advance against first respondent's proceedings were, therefore, also before second respondent on appeal. This circumstance immediately distinguished the present case from *Turner* v. *Jockey Club of S.A.*, 1974 (3) S.A. at pp. 651D-E; 653H. The circumstances of the present case are much more closely related to those in the case of *Jockey Club of S.A.* v. *Feldman*, 1942 A.D. 340. Consequently second respondent's proceedings are the basis of these review proceedings. Unless second respondent committed a reviewable irregularity in its disposal of the

appeal, the appellants are not entitled to relief. Otherwise the untenable position could arise that two conflicting judgments exist on the same matter, and *ex hypothesi* there would be nothing invalid about second respondent's judgment. Appellants' appeal to second respondent cannot be vitiated at all on review and the most the appellants can consequently attain is a remittal to second respondent for the proper hearing of their appeal, or, in regard to the

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proceedings of first respondent of 16 September 1969, a remittal to first respondent for proper imposition of punishment. The proceedings before first respondent on 10 and 12 May 1969 are, therefore, not relevant to these review proceedings. See *Jockey Club* v. *Feldman, supra* at p. 355; *Administrator S.W.A.* v. *Jooste Lithium Myne (Edms.) Bpk.*, 1955 (1) S.A. at p. 565. Only an error in regard to the ambit of its powers as result of which second respondent did not exercise its function at all, in contradistinction to the considerations and deliberations which led to its decision, is a reviewable irregularity. See the *Jooste Lithium* case, *supra* at p. 569D-G; *Doyle* v. *Shenker & Co. Ltd.*, 1915 A.D. at pp. 237-238; *Goldfields Investment Ltd. and Another* v. *City Council of Johannesburg and Another*, 1938 T.P.D. at pp. 557-560; *Johannesburg City Council* v. *Chesterfield House*, 1952 (3) S.A. at p. 825; *S.A.B.C.* v. *Transvaal Townships Board*, 1953 (4) S.A. at pp. 177-178; *Anderson and Another* v. *Port Elizabeth Municipality*, 1954 (2) S.A. at pp. 304-305. An enquiry by second respondent in an appeal to it is, therefore, not comparable with the proceedings of a civil court of appeal, and the "reasons for objection" in terms of sec. 240 *(c)* are equally not comparable with the grounds of appeal in a civil court of appeal. The Church Law makes provision for a complete system of domestic courts and bodies which are charged with the interpretation of Church Laws and the maintenance of discipline from the Church to the Synod. The intention is clear, viz. that all issues and objections must be heard within this system and the conclusion is unavoidable that second respondent must be competent to decide on the procedure of a lesser church body. The Church Law is applicable to the whole conduct in life of its members and cannot be equated with the constitution of a club or a professional organisation which makes provision for a domestic court which only has a limited jurisdiction over a limited number of matters. As regards appellants' attack on second respondent's finding in regard to the first respondent's possible confusion, the following submissions are made: *(a)* On review the Court cannot interfere with the merits of second respondent's decision, *Administrator S.W.A.* v. *Jooste Lithium Myne, supra* at p. 569D-E. *(b)* The nature of the proposals and the way in which they were formulated could have caused confusion with first respondent's members, in view of its composition. A large number of the various proposals, especially the subdivisions thereof, were not related to the punishment provisions as contained in sec. 232 and, therefore, not competent punishments. This in itself is indicative of a confused way of thinking. *(c)* It must further be kept in mind that the proceedings before first respondent were conducted orally and it was, therefore, difficult and

confusing to keep all the proposals and their sub-divisions apart and to distinguish between them. As regards the remittal to first respondent, the following submissions are made by the respondents: *(a)* Second respondent found that first respondent had not yet imposed a competent punishment. *Ex hypothesi*, therefore, there can be no question that first respondent was then *functus officio*. *Garment Workers' Union and Others* v. *Industrial Tribunal*, 1963 (4) S.A. at pp. 787G-H, 788G-H. *(b)* The case was also not remitted for a "rehearing", but for the proper imposition of punishment. *(c)* This power to remit is expressly or at least by necessary implication vested in the second respondent by the Church Ordinance. Second respondent has

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no jurisdiction to impose punishment other than in matters concerning doctrine. Sec. 245 read with secs. 200 and 232. First respondent committed no irregularity on 16 September 1969. See *Down* v. *Malan, N.O. and Others*, 1960 (2) S.A. at pp. 742E-743A; *Sahib* v. *Evaton Dorpsraad*, 1960 (1) S.A. at p. 33B-D; *Pretoria Rent Board (Southern) and Another* v. *Levitt*, 1953 (3) S.A. at pp. 40A-43C.

Dison, in reply.

Cur. adv. vult.

Postea (November 28).

VAN BLERK, A.C.J.: I have read the judgments of my Brethren and I concur in the judgments of my Brethren JANSEN and HOFMEYR that the appeal should succeed. I also agree with the reasons for his judgment furnished by my Brother JANSEN and with his motivation thereof.

Parties are at liberty to enter into a lawful agreement and our law will hold them bound thereby. So, generally speaking, parties to an agreement will be at liberty to exclude the jurisdiction of the Courts in certain respects provided it is not contrary to public policy or unlawful (cf. *Yenapergasam and Another* v. *Naidoo and Another*, 1932 N.P.D. 96)—a factor which will certainly not always be easy to determine.

The Courts were instituted by the constitution of our country as the protector of the rights of the citizen and as a refuge for him. If he waives this protection by agreement or if the other party wishes to deny him this privilege, it could certainly be expected that such waiver or denial appears from the agreement itself.

It may be mentioned here that this Court frowned at the exclusion of the jurisdiction of the Court as per KOTZÉ, J.A., where he sounded a warning to the Legislature itself when he said the following in *Union Government* v. *Fakir*, 1923 A.D. 466 at p. 471: "....."

9 G

The Church Ordinance does not expressly provide that the Courts are denied their function of adjudication on questions of law. It also sounds

str ıge that a church in a service contract with its minister will deny him his constitutional right by closing the doors of the Courts to him. But, be that as it may.

As indicated by my Brother JANSEN the Church Ordinance was interpreted in the *De Vos* case, quoted by him. That was done notwithstanding the submission that such a step would anticipate the judicial power of the church itself. To this decision a later decision was correctly added, viz. *Odendaal* v. *Kerkraad van die Gemeente Bloemfontein-Wes van die N.G. Kerk in die O.V.S. en Andere*, 1960 (1) S.A. 160 (O) where the Full Bench set aside a judicial decision of the General Synodal Commission.

I also concur in the orders suggested by my Brother JANSEN.

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BOTHA, J.A.: I have had the opportunity of reading the judgments of my Brothers JANSEN, MULLER and HOFMEYR. I agree with my Brother MULLER that, for the reasons mentioned by him, the Cape Division (VAN WINSEN, J.) in the first instance correctly dismissed appellants' application for review and setting aside of certain decisions of the first and second respondents and that this appeal should not succeed, just as the appeal to the Full Bench of the Cape Division correctly failed for the reasons set out in the reported judgment of that Division. I only wish to add a few general remarks.

On more than one occasion this Court already directed attention to the fact that where application is made to a Court of Law for the review and setting aside of a final decision of a *quasi*-judicial tribunal the main question is always whether the tribunal at the hearing complied with the elementary principles of justice and whether or not it actually exercised its discretionary power and not whether the tribunal exercised its powers properly. (See, e.g. *South African Railways* v. *Swanepoël*, 1933 A.D. 370 at p. 378; *Schoch, N.O. and Others* v. *Bhettay and Others*, 1974 (4) S.A. 860 (A.D.) at p. 866; *National Transport Commission and Another* v. *Chetty's Motor Transport (Pty.) Ltd.*, 1972 (3) S.A. 726 (A.D.) at p. 735). Should it be found that the tribunal ignored the elementary principles of justice or in fact did not exercise its discretionary powers, its decisions are set aside. In a long series of cases the Courts identified the circumstances which indicate a failure by the *quasi*-judicial tribunal of exercising its discretionary powers, as for example, where the tribunal understands the nature and ambit of its powers wrongly, or where it acts capriciously or *mala fide*, or where its findings in the circumstances are so unfair that they cannot be explained unless it is presumed that the tribunal acted capriciously or with *mala fides*. (See, e.g. *South African Railways* v. *Swanepoel, supra* at p. 78; *Union Government* v. *Union Steel Corporation (South Africa) Ltd.*, 1928 A.D. 220 at pp. 235 *et seq*. and the large number of cases which followed thereon).

Mere unreasonableness is in itself no indication of a failure to exercise discretionary powers and was never regarded in our judgments as a ground of review on which a Court of Law could interfere in a final judgment of an authorised body. If it were otherwise, Courts could interfere with final findings of a *quasi*-judicial tribunal which in the opinion of the Court was incorrect on the merits, because almost any incorrect finding on the merits

can be regarded as unreasonable. In this way decisions of *quasi*-judicial tribunals would be subjected to the right of appeal to Courts, and the Courts would then be entitled to exercise the discretionary powers which are vested in domestic tribunals either by statute or by agreement and in so doing substitute the discretion of the authorised body by their own.

It is indeed true that unreasonable behaviour on the part of statutory authorised bodies may lead to invalidity on the ground of the presumption that the Legislature will not vest powers in a body to act unreasonably. This principle is especially applicable to the publication of administrative regulations or rules by a delegated body, because there is the presumption that the Legislature will not grant powers for the publication of unjust regulations or rules. (See, e.g. *Feinstein* v. *Baleta*, 1930 A.D. 319; *Delew*

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v. *Brakpan Town Council*, 1937 T.P.D. 439; and *Minister of Posts and Telegraphs* v. *Rasool*, 1934 A.D. 167). Where the power is, however, vested in a *quasi*-judicial tribunal to make a final decision on the proved facts after proper investigation, other principles become operative. In such a case the proper tribunal is: "....."

11 C

(*National Transport Commission* v. *Chetty's Motor Transport, supra* at p. 735).

In the case of *quasi*-judicial tribunals which were, as in the present case, created to hear domestic issues, the question is not so much whether the parties intended thereby to exclude unreasonable behaviour on the part of the tribunal, but rather whether they in fact agreed that the tribunal should investigate and finally decide issues and complaints.

Considerations of expedience or desirability to which Wiechers refers in *Administratiefreg* at pp. 299-300 in regard to administrative bodies cannot be applicable to the proceedings of *quasi*-judicial tribunals which were created to make final decisions on the proved facts after proper hearings. Although opinion and estimate were relevant facts in *Administrator Transvaal and the Firs Investments (Pty.) Ltd.* v. *Johannesburg City Council*, 1971 (1) S.A. 56 of (A.D.) and *Schoch, N.O. and Others* v. *Bhettay and Others*, 1974 (4) S.A. 860 (A.D.), it is perfectly clear from the judgments in these cases that those facts did not affect the accepted legal principles applicable at all, or that the principles set out in the *Union Steel Corporation* case are limited to such cases or to cases where the powers granted include considerations of expedience or desirability. It appears clearly, especially from page 80 of the former judgment where OGILVIE THOMPSON, J.A. as recently as 1971 stressed that unless the principles formulated in the *Union Steel Corporation* case are fully appreciated, remarks in decided cases such as those of Lord GREENE, M.R., in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*, (1947) 2 All E.R. 680 (C.A.) at p. 683 that a Court could interfere if the decision of the authorised body—

"is so unreasonable that no reasonable authority could ever have come to it",

may be misleading. If *stare decisis* still has any meaning, there can be no way in which mere unreasonableness in decisions of *quasi*-judicial bodies can be elevated to a ground for review.

Reference was only made in *Schoch, N.O. and Others* v. *Bhettay and Others, supra* to the facts that the value which the arbitrator had placed on the expropriated land, was mainly based on an estimate, as an additional consideration why the arbitrators did not necessarily leave the evidence of the valuator concerned out of consideration as alleged (see p. 867).

I am, however, of opinion that the above considerations are in the present

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case only of academical importance for I agree with MULLER, J.A., that the Synodal Commission's finding in regard to the proceedings before the Circuit on 10 May 1969 is not unreasonable at all. Apart from the fact that the nature of the proposals was such that it must necessarily have confused members of the Circuit—no evidence of actual confusion was necessary—the addition of sub-divisions which had nothing to do with sentence, must have made it difficult for members of the Circuit to have voted unbiased on punishment. It is only necessary to look at the proposals with their sub-divisions to realise that some members of the Circuit could have voted for a proposal in regard to punishment merely on the ground of a desire to support proposals in the subdivisions which had nothing to do with punishment but were in the interest of the Mission Church. In my opinion, the Synodal Commission, would on this ground also have been entitled—if it was not the confusion to which the Commission referred—to remit the matter to the Circuit for the receipt of proper proposals regarding punishment only. In any case the decision of the Circuit of 10 May 1969 was also set aside for another reason, viz. that the provisions of reg. 1 (12) were not complied with in regard to the voting procedure. As MULLER, J.A., indicates, the Synodal Commission's decision was in this respect obviously neither wrong nor unreasonable. The Synod (or Synodal Commission) is not only the final appeal tribunal in disciplinary cases but is also the highest management of the Mission Church in ecclesiastical matters (sec. 121). The Synod is therefore entitled to ensure that the correct procedure is followed in disciplinary cases. It is also important to remember that in terms of secs. 168 and 169 church tribunals should avoid simulating the nature and attitude of civil courts and must regard themselves as fatherly supervisors and not as Judges, and must attempt with all endeavour to solve cases and issues with full consideration of the well-being of the congregation.

As MULLER, J.A., correctly points out, it is accepted by our Courts that where a matter is allocated to a statutory authorised body, this body's *bona fide* decision on the merits thereof is final and a Court of law cannot interfere, not even on the ground of *bona fide* error of law, except where the error relates to the body's jurisdiction. (See also the decided cases quoted by Steyn, *Uitleg van Wette*, pp. 225-227). In this respect there can in principle be no difference between a body authorised by statute, on the one hand, and a body authorised by agreement, on the other hand. (See also *Turner* v. *Jockey Club of South Africa*, 1974 (3) S.A. 633 (A.D.) at pp. 645-646).

On behalf of appellants we were referred to various English cases according to which a different tendency is exhibited and according to which it would be against public policy to vest final decisions on legal questions in a body authorised by agreement. MULLER, J.A., deals with these cases in his judgment. The tendency in the English judgments is, in my opinion, not very clearly and convincingly formulated and defined. There is in any case no good reason for this Court to follow that tendency, in the light of the accepted South African law.

MULLER, J.A., concurred in BOTHA, J.A.'s judgment.

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JANSEN, J.A.: With leave of this Court the appellants appeal against a decision of the Provincial Division Cape of Good Hope. The judgment is fully reported (1974 (2) S.A. 505 (C)), and it is unnecessary to repeat it here in detail. Where necessary reference will be made to it as the "judgment *a quo*".

It will be convenient to approach the appeal in the first place on the basis of the case of first appellant. After the Circuit of Wellington (first respondent) had investigated certain charges of contravening sec. 167 of the Regulations and Rules (hereinafter called the "Church Ordinance"), the first appellant, then the minister of the Dutch Reformed Mission Congregation, Zionskerk was informed in writing on 20 May 1969 that he was convicted on each of the charges and that he—

"in terms of sec. 232 (1) *(e)* was suspended with retention of the use of the Sacraments, with dismissal from the congregation, loss of salary and especially all rights to a free house and other emoluments as from 1 August 1969".

The first appellant's case is that he prays for an order declaring that the lawful punishment imposed on him is not as reflected in the letter, but as contained in proposal II at the meeting of the Circuit on 12 May 1969, or, alternatively, as contained in proposal IV at the earlier meeting on 10 May 1969 (judgment *a quo*: pp. 511B, 510E). In each case it would mean that the applicant was not suspended. In essence he, therefore, asks for a declaration that he is entitled thereto that only the punishment contained in one or the other of the two proposals be meted out to him.

Seen in this light the issue is mainly about the correct interpretation of the relevant provisions of the Church Ordinance. The respondents submit, however, that the Court cannot come to this interpretation. It is submitted that the first appellant placed the issue before the General Synodal Commission (second respondent) and that as the Commission has come to a decision (viz. declaring the proceedings of the Circuit in regard to the imposition of punishment on 10 and 12 May invalid and remitting the matter to the Circuit for imposition of punishment *de novo*), the appellant is now bound thereby and cannot now argue before a civil court that that decision was factually or legally erroneous. Reliance is, therefore, placed on the general principle that a Court cannot consider the question of *how* a body, vested with discretion, exercised the discretion, but only with the question *whether* the body in fact exercised the discretion, it is concerned with the

manner in which the act was executed and not with the *contents* of the act; or, stated differently, that a Court will not interfere with the "merits" of an exercise of discretion. For convenience sake this test will hereinafter, if necessary, be referred to as the "formal test" (in contradistinction to the material test).

It must be stressed that none of the respondents claim that it in the present case, as a body of the church, has any greater immunity against interference by a civil court than an organ of other voluntary associations and also not that questions of legal personality are involved. (In regard to legal personality cf. the unpublished thesis of D. C. G. Fourie, *Die Nederduits Gereformeerde Kerk as Regspersoon in die Suid-Afrikaanse Privaatreg*, Potchefstroom, 1973). Indeed, attention can be directed to the fact that in 1865 the last claim to general church immunity was made by the Rev.

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A. Murray and others in *Burgers* v. *Murray and Others*, 1 Roscoe 258. It may, however, be that the church has complete autonomy on questions of doctrine (cf., *inter alia*, Act 23 1911, sec. 7 *(a)*—which has thus far not come into operation yet), but it is unnecessary to express an opinion on this; it is also in view of respondents' attitude unnecessary to pause any further on the question of the immunity of the church (if any) or the relationship between the State and the church (cf. J. D. van der Vyver, *Die Juridiese Funksie van Staat en Kerk*).

The respondents' contention, as already mentioned, is that on general grounds the Court cannot interfere with the merits of the General Synodal Commission's exercise of discretion. The principle on which the respondents rely, which only leaves room for the formal test, is mainly founded on decisions in regard to the so-called "inherent" jurisdiction of a Supreme Court to interfere with actions of statutory bodies vested with discretionary powers. Those decisions are also especially relevant in which the point of view is held that unreasonableness of such acts do not *per se* render them invalid, but can at the most be an indication of, e.g., the presence of *mala fides* or the absence of proper attention—which undoubtedly can be grounds of invalidity. (Cf. *Union Government* v. *Union Steel Corporation (South Africa) Ltd.*, 1928 A.D. 220 and cases which follow thereon); also the decisions which contain the principle that an error of law on the part of such statutory body do not necessarily bring about the invalidity of the act (cf. *Doyle* v. *Shenker and Co. Ltd.*, 1915 A.D. 233 and cases following thereon).

A recent summary of certain aspects of the formal test, with reference to a decision of the National Transport Commission, can be found in *National Transport Commission and Another* v. *Chetty's Motor Transport (Pty.) Ltd.*, 1972 (3) S.A. 726 (A.D.) at p. 735E-H: "....."

14 H

It is important to remember that the upholding of the decision of the Transport Commission—"right or wrong"—proceeds from the premise that

that body was appointed as "the final arbiter in its special field" and that the whole decision itself fell within the boundaries of that field. Indeed, it is one of the inherent problems in applying the formal test to determine whether, e.g. a legal or factual mistake falls within or outside the unlimited and final

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judgment which is vested by the authorising statute in the body concerned. Such body is not necessarily the final judge in regard to each factual or legal finding which it makes in the course of the exercise of its duties. A striking example is found in *Local Road Transporation Board and Another* v. *Durban City Council and Another*, 1965 (1) S.A. 586 (A.D.). The Local Transportation Board in the alleged exercise of its power—

"to receive applications for motor transport certificates for motor transport or for renewals thereof and to consider them and to, subject to the provisions of this Act, in its discretion refuse such applications or grant such applications either fully or partially . . ."

(Sec. 5 *(c)* of Act 39 of 1930) refused certain applications for renewal on the ground of an incorrect finding that the original certificates were legally invalid. This Court held that it could interfere on the ground of this error, notwithstanding the fact that the Local Board relied on *Doyle* v. *Shenker, loc. cit.* In essence it amounts to the fact that the Board's decision did not fall within the ambit of its final and exclusive field.

It, therefore, becomes necessary when applying the formal test to distinguish between the "merits" of a body's act and decisions in regard to legal questions and factual questions which are concerned therewith, but which fall outside the merits. Sometimes it is said that the latter cases refer to "jurisdictional facts" or "preliminary or collateral" questions. Where the dividing line between pure "merit" and these matters lie, is difficult to determine precisely. In the aforesaid case of the local Road Board it was done as follows (p. 598C): ". . . . . ."

15 E

The criterion of "the issue before it" is, however, difficult to work with, as well as similar criteria, as whether the body "asked itself the wrong question", or applied the "wrong test", and whether the facts or error of law "go to jurisdiction". The divergent judgments in the important English case of *Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 A.C. 147 (H.L.); (1969) 1 All E.R. 208 (H.L.) illustrate the difficulties most clearly.

In regard to the approach of this inherent problem in the application of the formal test it is, however, important to remember that acceptance of the principle that the vesting of discretion by the Legislature is also a vesting of power to act unreasonably in that field, is contrary to the common law presumption—

"that the Legislature does not contemplate an unjust, unfair or unreasonable result" (Steyn, *Uitleg van Wette*, 4th ed., p. 106). According to Steyn, *op. cit.*, p. 245 this presumption also has the effect in the field now under consideration—

"that in the case of statutory vesting of power it must also be presumed that the Legislature did not intend granting the power for unjust, unfair or unreasonable behaviour or instructions".

This would mean that, unless otherwise provided, the power granted must be regarded as limited by the criterion of reasonableness, in other words, that unreasonable acts fall outside the power. At p. 254 the author, with reference to the distinction between general and specific powers, direct attention to the following:

"It appears to be more reasonable and more sound in principle, in view of the protective function of our Courts which is so essential especially in the case of

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questions of unreasonableness, to presume that in every case where the Legislature confers a discretion however limited it may be, that discretion is conferred with the intention that it should not be exercised in an unjust, unfair or unreasonable manner. The mere fact that the nature of the authorised act is more fully circumscribed is not sufficient, for as far as a discretion still remains, to render this presumption ineffective."

In so far as the application of the formal test renders this presumption ineffective, it is contrary to the basic principles of our common law (cf. e.g. the criticism by implication by Steyn, *op. cit.*, p. 249 of the *Union Steel Corporation* case, pp. 236-7). Presumably this is again a case where English law concepts, viz. that of the "prerogative remedies" (among which *certiorari*) with their limitations, influenced our judgments (cf. Wiechers, *Administratiefreg*, p. 301). It would, therefore, be more in line with our law to extend the formal test than to apply it strictly in cases where there is doubt about the intention of the Legislature, in other words, not to give a broad interpretation to the "merits" in that case.

It is remarkable that in England there is now no longer such a strong preference for formalism. S. A. de Smith, *Judicial Review of Administrative Action*, 3rd ed., pp. 105-6 formulates the position as follows: "....."

16 H

The well-known passage in Lord GREENE's judgment in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*, (1948) 1 K.B. 223 at p. 230, (1947) 2 All E.R. 680—which also influenced our judgments, viz.:

"It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere . . .; but to prove a case of that kind would require something overwhelming . . ."

(my underlining) is evaluated as follows by *De Smith* in the light of the present-day evolution (pp. 310-11): "....."

17 B

The application of the formal test in our judgments is accompanied by more problems than the standing formulation thereof conveys. It is, however, not only concerned with the difficulties regarding the determina-

tion of the limits of the "merits"—where the common law presumption against unreasonableness may possibly play a role in suitable cases, but the standing formulation does also not sufficiently reveal certain relevant developments in our judgments. As early as 1906 already it was accepted that a finding by a statutory body with no evidence whatsoever to justify it, was invalid and amounted to a gross irregularity (*Mpemvu and Others* v. *Nqasala*, 26 S.C. 531 at p. 534). In addition there are also cases which indicate that not only the absence of any evidence whatsoever, but also the absence of evidence on which a finding can reasonably be made, may be a ground for invalidity. A certain McLoughlin was convicted by the South African Medical and Dental Council on a number of charges of improper and scandalous behaviour, as defined in sec. 80 of Act 13 of 1928, and his name was deleted from the register of medical practitioners. McLoughlin then made application for review to the Witwatersrand Local Division and the application succeeded on the ground of alleged irregularities. On appeal by the Board to this Court (*S.A. Medical and Dental Council* v. *McLoughlin*, 1948 (2) S.A. 355 (A.D.)) it was found that the reliance on an irregularity was unfounded and the question whether the convictions were justified was then considered. By majority judgment all the convictions were confirmed. What is of importance to the present case, is, however, not so much the result, but the tests which some of the Judges of Appeal applied. A reference thereto is found in the similar case of *Lipron* v. *S.A. Medical and Dental Council* (T.P.A. 8 September 1948). There BLACKWELL, J. (WILLIAMSON, A.J., concurring) said the following: "....."

18 B

On appeal to this Court the decision was confirmed (*S.A. Medical and Dental Council* v. *Lipron*, 1949 (3) S.A. 277 (A.D.)). In regard to the first count HOEXTER, J.A. (WATERMEYER, C.J., GREENBERG, J.A. and SCHREINER, J.A., concurring) says: "....."

18 C

And in regard to the second charge the learned Judge of Appeal says: "....."

18 D

In the *Lipron* case the majority judgments in the *McLoughlin* case were, therefore, followed. That the English law played a part in the latter case, appears to be probable. TINDALL, J.A. (at p. 393), not only refers to *Leeson* v. *General Council of Medical Education*, 59 L.J. Ch. 233; (1889) 43 Ch.D. 366, but the Court was also, *inter alia*, referred to the later case of *Allison* v. *General Council of Medical Education*, (1894) 1 Q.B.D. 750 and *Halsbury*, 2nd ed., vol. 22, para. 564. In the *Leeson* case the question whether

"it was proved that there was no statement before them (i.e. the body) upon which they could reasonable and honestly arrive at the conclusion at which they did arrive"

(p. 378) was related to a subjective test which referred to the honesty of the body. *Halsbury*, however, subjects the reasonableness of the conclusion to an objective test: "....."

18 H

This is based on the *Allison* case where all the Judges applied such a test:
Lord ESHER, M.R. (p. 760): "....."

19

LOPES, L.J. (p. 763): "....."

19 A

DAVEY, L.J. (p. 766): "....."

19 B

It is difficult to avoid the conclusion that the test applied in *McLoughlin's* case can be found here, and that (with exception of TINDALL, J.A., who expressly refrained from expressing an opinion) the Court preferred the approach in the *Allison* case to that in the *Leeson* case. It is remarkable that in the later English case of *Lee* v. *Showman's Guild of Great Britain*, (1952) 1 All E.R. 1175 the Court of Appeal *per* SOMERVELL, L.J. (at p. 1179F-G) and DENNING, L.J. (at p. 1183A) also preferred it.

In *Clan Transport Co. (Pvt.) Ltd.* v. *Swift Transport Services (Pvt.) Ltd. and Others; Clan Transport Co. (Pvt.) Ltd.* v. *Rhodesia Railways and Another*, 1965 (3) S.A. 480 (F.C.) at p. 490 the *Lipron* and *McLoughlin* cases are dismissed as "not dealing with common law review"—apparently incorrectly. Although the reviews in these cases fall under sec. 42 (5) read with sec. 18 of Act 13 of 1928, it is clear that this Court in both cases did not see its powers of review otherwise than its ordinary inherent powers of review (cf. *McLoughlin* case, pp. 391-3). In fact a careful study of the *Lipron* case indicates that there was possibly no evidence whatsoever on which the convictions could have been founded. But that makes it all the more important that this Court expressly utilised the question whether there was evidence on which a finding could reasonably be made, as its test.

That the application of this test did not occur here unintentionally, further appears from the fact that shortly before this Court in a similar case of a conviction by a military court used a similar test (*Van Duyker* v. *District Court Martial and Others*, 1948 (4) S.A. (A.D.)). GREENBERG, J.A. (WATERMEYER, C.J., and CENTLIVRES, A.J., concurring) formulated it as follows (at p. 694): "....."

19 H

That it can also possibly be said in this case that there was in fact no

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evidence whatsoever does not detract from the fact that this Court expressly approved and applied the wider test.

Apparently this Court never expressly departed from the *McLoughlin, Lipron* and *Van Duyker* cases. In *Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad* v. *Kruger*, 1972 (3) S.A. 318 (A.D.) at p. 329D the test is mentioned, but not further discussed. There are indeed several cases with *dicta* which on account of their prevalence can perhaps be regarded as opposed to the acceptance of this test. But on closer scrutiny these judgments appear to be cases where the vested power incorporated considerations of efficacy and desirability (on the ground of general interest, public welfare, etc.—cf. Wiechers, *Administratiefreg*, pp. 299-300) or where opinion or estimation plays an important part. *The Administrator, Transvaal and The Firs Investments (Pty.) Ltd.* v. *Johannesburg City Council*, 1971 (1) S.A. 56 (A.D.) may serve as an example of the former group and *Schoch, N.O. and Others* v. *Bhettay and Others*, 1974 (4) S.A. 860 (A.D.) as an example of the latter group. Against this the *McLoughlin, Lipron* and *Van Duyker* cases are concerned with acts of a purely judicial nature. In my opinion, the said general *dicta* must be strictly limited to the type of case which was heard and should not be read so as to exclude the application of the broader test to acts of the latter nature. In this way effect is also given to the common law presumption that the Legislature does not grant the power to act unreasonably.

It must, therefore, be accepted that as far as statutory bodies are concerned the formal standard (for interference on review) was extended in our judgments, in regard to purely judicial pronouncements, not only to cover the case where the finding was based on no evidence whatsoever, but also the case where the evidence was not of such a nature that the finding could reasonably be based thereon. Because even then the material test—hereinafter called the "extended formal standard"—is not whether the Court itself would have decided differently and the distinction between appeal and review remains unaffected. It must, however, be stressed that in the application of the extended formal standard the Court will *necessarily* have to apply legally correct standards in order to determine the *facta probanda* and decide what can be regarded as "evidence" in the particular case. This is inherent in this standard—as well as in the test whether there is any evidence whatsoever on which a finding can be made; and this is also what the Court in fact did in, e.g. *McLoughlin's* case. At p. 393 even TINDALL, J.A., says the following: "....."

20 H

It may in a particular case, where a statutory body as a result of an error of law in regard to the *facta probanda*, e.g. by interpreting a statutory provision incorrectly, have the result that the Court could interfere. To the extent that they refer to acts of a judicial nature cases like *Doyle* v. *Shenker, supra; Johannesburg City Council* v. *Chesterfield House (Pty.) Ltd.*, 1952 (3) S.A. 809 (A.D.) and *Administrator, South-West Africa* v. *Jooste Lithium*

Myne (Edms.) Bpk., 1955 (1) S.A. 557 (A.D.) are no bar to this approach. These are cases where the particular enabling provisions, in order to give

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effect to the obvious intention of the Legislature, were expressly construed as vesting exclusive jurisdiction in regard to the particular legal question, in other words, where the provisions draw the dividing line between "merits" and collateral facts so that a legal question can fall within the limits of the former. In *Doyle* v. *Shenker, supra* it was accepted without more ado that the particular legal question fell within the ambit of the magistrate's unlimited discretion and formed part of "a suit which the magistrate had jurisdiction to try" (p. 236), i.e. that it was the intention of the Legislature; in the *Chesterfield House* case, e.g., the authority to determine "whether any person is entitled to compensation under sec. 49" was interpreted to include the legal question concerned—rightly or wrongly; and in the *Jooste Lithium* case the Court found that the intention of the Legislature was clearly to leave the interpretation of the particular regulations to the inspector and on appeal to the Administrator (p. 569C-E). Whether the legal question forms part of the "merits" depends, therefore, on the particular legislation and the policy which appears therefrom. It, however, appears that in the case of acts of a statutory body of a purely judicial nature the extended formal standard must be applied on review unless a different intention appears from the legislation.

It is generally accepted that the principles of review which are applicable to the acts of statutory bodies are also applicable to domestic tribunals created by contract. In principle there seems to be no reason why that should not be so, provided certain obvious differences between the two categories are kept in mind. In the case of statutory bodies the intention of the Legislature is the starting-point; in the case of the latter the intention of the parties is decisive. If sometimes in the case of statutory provisions—*inter alia*, in view of specific words or the obvious intention of the Legislature—full effect is not given to the common law presumption that the Legislature will not grant the power to act unreasonably—contracting parties can certainly not be regarded as willing to subject themselves to unreasonable acts. The nature of the remedies available to the injured party is also not identical in the two cases. It may be convenient in the case of a statutory body to speak of the Court's "inherent power of review" with its consequential remedies; but in the case of a contractual body the remedies are contractual only. This latter difference is clearly appreciated by *H. W. R. Wade*, a writer on the English law. (1969 *L.Q.R.* 468 at p. 472).

It is clear that in general the Court may interfere in the judicial act of a contractual tribunal on the grounds embodied in the formal standard: it is a necessary consequence of the application of the basic principles of contracts, especially that of good faith. In my opinion, it also necessarily follows from those principles that the extended formal standard should be applied. There are indeed *dicta* in our judgments which appear to be contrary to the possibility of such application. But it must be remembered that this standard

has not previously been pertinently discussed in regard to contractual tribunals and that the standard itself was only pertinently dealt with in the *McLoughlin* case, *supra*. Older cases can, therefore, not be decisive. But even a case like *Du Plessis* v. *The Synod of the D.R. Church*, 1930 C.P.D. 403 at p. 424 can be distinguished and limited to the facts of the case. The exception succeeded in that case because the plaintiff attempted to appeal purely on the merits. In addition it may be that the Church has exclusive

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jurisdiction over questions of doctrine. In the recent case of *Turner* v. *Jockey Club of South Africa*, 1974 (3) S.A. 633 (A.D.) the correctness of the following *dictum* was left undecided (p. 647A): "....."

22 B

The analogous case of arbitration does also not indicate the contrary, but rather serves to support the application of the extended formal standard. The authority of the arbiter is based on an agreement (submission) in respect of which there can be no doubt at all that the parties intend to remove the issue from the courts and to entrust it to him—the intention is that his decision should be made an order of court and that even execution should take place in terms thereof. It is, therefore, remarkable that the Arbitration Act, 42 of 1965, which controls the position today, does not even give absolute effect to that intention (notwithstanding sec. 28). The Court retains a discretion at the conclusion of Court proceedings which were instituted in conflict with the arbitration agreement (sec. 6); in a proper case it can release a party of the arbitration agreement (sec. 3 (2); and at the request of a party it can take the decision of legal questions on itself (sec. 20 (1). The fact that the Court will not readily interfere with arbitration in this way, does not detract from the fact that the Court retains the final say in these respects. The history of the arbitration agreement (*compromissio*) in our law also indicates that control by the Court is preserved. At the end of the 18th century it was accepted practice that an arbitration decision was subject to a type of appeal, known as *reductie*. J. Voet, *ad Pandectas*, 4.8.26, *circa* 1700, already accepted that arbitration was subject to a tacit condition *si aequum arbiter definierit* and for that reason renouncement of *reductie* was in anticipation readily susceptible to restitution. The present view of the finality of the decision of an arbiter was derived from the English law. In the year 1898 DE VILLIERS, C.J., said the following in *Dutch Reformed Church* v. *Town Council of Cape Town*, 15 S.C. 14 at p. 21: "....."

22 H

(Cf. *Dickenson and Brown* v. *Fisher's Executors*, 1915 A.D. 166).

But modern writers on the English law of contract like Cheshire and Fifoot, *Law of Contract*, 9th ed., p. 335 said the following in 1969: "....."

23 A

The writers consider it as a subdivision of a more general rule, "....."
(p. 334).

23 A

Treitel, *Law of Contract*, 3rd ed. (1970), pp. 372-4 formulates the general rule even wider: "....."

23 B

The accepted English law, therefore, acknowledges the supreme authority of the Courts, especially as far as legal questions are concerned.

Reference to the analogous instance of arbitration would, therefore, as far as our common law is concerned, indicate that a contractual tribunal can indeed be subject to the standard of reasonableness; and as regards the English law that the final decision of at least questions of law would vest in the Court. This supports the view expressed above that in general, in addition to the formal standard, the extended formal standard must also be applied in our law.

An investigation must still, however, be made in regard to the extent to which parties are at liberty to exclude this jurisdiction of the Court by their agreement. The extreme case where, e.g. the management of a club on the basis of an unlimited discretion has the power to terminate the membership of a member, is not considered here now. We are dealing with acts of a judicial nature and it appears to be at least doubtful whether the parties could completely exclude the application by the Courts of the formal standard, although there may be a deviation from some of the fundamental principles of justice (*Marlin* v. *Durban Turf Club and Others*, 1942 A.D. 112). But what about the extended formal standard, especially to the extent that it embraces legal questions? In *Jockey Club of South Africa and Others* v. *Feldman*, 1942 A.D. 340 at p. 351, TINDALL, J.A., says the following: "....."

23 G

But here the learned Judge probably had in mind with "the merits", the factual issues which served before the Court. He could not have had in mind the extension of the formal test—which only occurred later in our judgments. To read this passage today as subject to the new test, would, however, not violate it. But it is unnecessary to furnish an adequate answer on this aspect. If it is accepted that the parties to an agreement could exclude the extended formal test, it must be accepted, that as result of the good faith which is basic to a contract, the extended formal test is applicable unless the contrary appears.

On account of the influence of the English law on our judgments in regard to this whole field, it is informative to see how the modern English Court approaches the decision of a domestic tribunal which was created by agreement. With reference to a conviction of a contravention of domestic

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rules and consequent termination of his membership, DENNING, L.J., *inter alia*, says the following in *Lee* v. *The Showmen's Guild of Great Britain*, (1952) All E.R. 1175 at pp. 1180H-1181H, 1182D-G: "....."

24 G

It must, however, be mentioned that in the *Lee* v. *Showmen's Guild* case SOMERVELL, L.J. directs attention to the possibility that certain cases may be approached differently: "....."

24 H

The view of DENNING, L.J., was subsequently, *inter alia*, followed by the Queen's Bench in *Baker* v. *Jones and Others*, (154) 2 All E.R. 553 at pp. 558H-559A. It was found there: "....."

25

It is unnecessary to consider to what extent these English cases agree with the principles of our law, but the approach of DENNING, L.J., is in many respects comparable to the approach of this Court in the *Lipron* case, *supra*. *Lee's* case has frequently been mentioned in our judgments, but disagreement therewith was apparently only expressed in *Bekker* v. *Western Province Sports Club (Inc.)*, 1972 (3) S.A. 803 (C) at pp. 821H-822—only by way of *obiter dictum*.

It has already been concluded above that the extended formal test is applicable to contractual tribunals unless the contrary appears. The agreement must, therefore, be the starting point. The decision in *Welkom Village Management Board* v. *Leteno*, 1958 (1) S.A. 490 (A.D.) at pp. 502C-503D is instructive where the following is, *inter alia*, said: "....."

25 D

This was a case of a decision of a statutory body and it was said that the aggrieved person should first have appealed to the domestic appeal tribunal. Notwithstanding the fact that it was provided in respect of the appeal tribunal that "its decision shall be final" it was nevertheless found that it contained no implication that the aggrieved person should first have appealed to the appeal tribunal before approaching the civil court.

With the aforegoing in view, we can now at last return to the respondents'

contention that as the appellant placed the issue before the General Synodal Commission and that body gave a decision, the appellant is bound thereby and he cannot now ask the civil court to interpret the relevant provisions of the Church Ordinance and to come to a different decision. It has already been mentioned that the respondents do not claim greater immunity against interference by the Court than that which a "voluntary association" enjoys. Indeed, in this field churches have always been treated in our judgments on the same basis as such associations. It is an approach which had already been established in 1843 by the Legislature of the Cape in Ord. 7, which dealt mainly with the Dutch Reformed Church in South Africa. Sec. 8 provided, *inter alia*, that the rules and regulations of that church—
"....."

25 H

The well-known passage in the judgment of Lord KINGSDOWN in the Privy Council in 1863 must also be read in the light hereof. This was in the case of *Long* v. *Bishop of Cape Town*, 4 Searle 162, an appeal against a decision of the Cape Court and Lord KINGSDOWN said the following:
"....."

26 C

Writers on church law like F. B. O'B. Geldenhuys, *Die Regsposisie van Kerkraad, Ring en Sinode onder die Gereformeerde Stelsel van Kerkregering soos toegepas in die Gefedereerde Ned. Ger. Kerke in S.A.*, p. 349 (*inter alia*) and D. C. G. Fourie, *op. cit.*, raise certain objections to this view of the church. Fourie, *inter alia*, p. 132 especially directs attention to various problems in regard to the view of, e.g. a congregation in this light and he also formulates the remedy of a member as flowing from delict. In the present case similar problems arise and it is also unnecessary to discuss the repeal of the Ordinance (by Act 22 of 1961), because it is clear that the appellant, as minister, entered into a service contract, which must be read as being subject to the Church Ordinance and that in essence his claim amounts to a demand that the provisions of that contract must be enforced.

It follows from what was said earlier that the decision of the General Synodal Commission binds the appellant and that it only excludes the civil court in regard to matters falling within the Commission's exclusive jurisdiction (i.e. "merits" entrusted to the Commission). The decision will be subject to the formal standard and the extended formal standard unless the contrary clearly appears from the "contract". (In view of developments in our judgments, indicated above, Lord KINGSDOWN's *dictum* that—
"the decisions of such tribunal will be binding when it has acted within the scope of its authority"
must be read in this sense).

It is, therefore, necessary to look at the following provisions of the Church Ordinance:
Constitution, sec. 9:

"*(a)* All members of the congregation who are not prohibited from participation in the holy sacraments, as well as all lesser church councils have the right to

lodge objections and/or complaints against a member or office bearer or against the decision of a lesser church council of the Mission Church in accordance with the regulations of the Mission Church.

(b) In the case where the complainant on questions of doctrine, or the respondent in all other cases considers himself aggrieved by the judgment, he has the right to appeal to a higher church council. Each resolution or decision of a lesser council is subject to appeal to a higher council, also in church suits. The decision of the Synod is, however, always final."

Sec. 130:

"The decisions and judgments of the Synod in the last resort in regard to cases dealt with by lesser church councils and brought on appeal before it, are decisive."

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Sec. 146:

"The General Synodal Commission is entrusted to: .....

(d) give judgment in cases of church discipline on appeal, in cases of church issues and matters of mere administrative nature in the first instance or on appeal: its decision shall remain valid and be in force until quashed, set aside or amended by the Synod."

Definitions:

"(3) Decision: Decision refers to disciplinary cases and ecclesiastical issues.

(4) Resolution: Resolution in church language refers to matters of management and matters of administrative nature.

(26) Judgment: Judgment is the finding of a church management in a disciplinary case or ecclesiastical issue."

The General Synodal Commission, therefore, exercises the appeal jurisdiction of the Synod. That the use of the word "final" or "decisive" in regard to the limits of the unlimited and exclusive discretion of both these bodies is not conclusive, appears from the *Letano* case quoted above. It would especially not be conclusive in regard to legal questions and the interpretation of the Church Ordinance in a case which is concerned with the procedure of the Circuit, like the present case. The inevitable result of regarding the Synod or Synodal Commission as the sole interpreter of the Church Ordinance for all purposes whatever, would be that in all cases where such interpretation is in issue, the aggrieved person should first appeal to the Commission before he can approach an ordinary civil court—the latter would not be in a position to hear the case without infringing the exclusive jurisdiction of the General Synodal Commission. Acknowledgement of the possibility of an appeal to a civil court even before utilising domestic remedies in full, would, therefore be contrary to the exclusive jurisdiction of the Synodal Commission to interpret the Church Ordinance. In the case of the "Nederduitse Gereformeerde Kerk in die O.V.S." the possibility of an appeal to the civil court even before full utilization of domestic remedies has already been accepted for a long time in cases where alleged fundamental irregularities and unlawful acts are raised (*De Vos* v. *Die Ringskommissie van die Ring van die N.G. Kerk, Bloemfontein and Another*, 1952 (2) S.A. 83 (O) at pp. 102D-103E; *Odendaal* v. *Kerkraad van die Gemeente Bloemfontein-Wes van die N.G. Kerk in die O.V.S. en Andere*, 1960 (1) S.A. 160 (O) at pp. 165 *infra*—167). The Synod could, therefore, not have been regarded as the sole interpreter of the church regulations. Indeed, in both cases the Free State Court interpreted the regulations itself—in the former

case even before any appeal was noted to the Synod; and in the latter case after the General Synodal Commission had dismissed the appeal.

There is also a further consideration which indicates that the Synod or General Synodal Commission does not have exclusive jurisdiction on the interpretation of the Church Ordinance in a case like the present. Sec. 224 of the Church Ordinance provides:

"The Circuit gives judgment taking the facts of the case into consideration in accordance with the Church law, and gives written notice thereof to all interested parties."

If the fact is taken into consideration that the "Church law" in particular circumstances amounts to material contractual provisions, it is hardly thinkable that the Circuit is here entrusted with the power to alter that contract by an erroneous interpretation. The Circuit must apply Church law according to its correct meaning and a deviation from that would amount to a violation of its jurisdiction. Similarly the Synod or General Synodal Commission will also not have the power to amend the provisions of the

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contract by an erroneous interpretation. In fact, if the General Synodal Commission should associate itself or "condone" an "irregularity" of the Circuit, it would itself be guilty of that irregularity (*Feldman's* case, *supra*, at p. 355 at the bottom; *Smith* v. *Ring van Keetmanshoop; N.G. Kerk Suidwes-Afrika en Andere*, 1971 (3) S.A. 353 (S.W.A.) at p. 359E). The result is that neither the Circuit nor the Synod, but the Court is the final arbiter in this regard. Formulated differently, the "Church Rules" are jurisdictional questions and not part of the "merits" of a decision of either the Circuit or the General Synodal Commission (Synod).

There is also nothing in the Church Ordinance which indicates an exclusion of the extended formal standard.

Against this background the General Synodal Commission's decision (viz. remittal to the Circuit) must be seen. The Commission accepted the following proposal in the majority report of the Temporary Legal Commission:

"The General Synodal Commission finds that no valid decision was taken by the Circuit on Saturday 10 May 1969, concerning the disciplinary steps imposed on the appellants, because the proposals which were tabled, or important parts of those proposals did not all relate to the convictions, and therefore could have confused the members of the Circuit, and because the voting on the proposals took place contrary to the provisions of rule 1 (12). Consequently all other actions by the Circuit which flowed from this invalid decision must be declared void."

It is remarkable that the appellant did not raise any of the two grounds contained in the proposal and he did not in any way attack the validity of the decision of 10 May. The General Synodal Commission relied *mero motu* on these grounds.

In view of the importance of this aspect it is necessary to quote the relevant part of appellant's notice of appeal fully:

"*(d)* It has come to my notice that the Honourable Circuit on Saturday, 10 May 1969 concluded its investigation and came to the conclusion that the minister and the church council should be found guilty and seriously reprimanded, with certain conditions. As result of the said decision by the Circuit the chairman insisted on the alternative proposal of complete suspension. Hereafter chaos reigned in the meeting as result of which the chairman left the chair. The meeting then broke up in disorder.

On Monday, 12 May 1969, the Circuit again gathered and took the decision of Saturday, 10 May 1969, in revision and the alternative proposal became the decision of the meeting. I shall appreciate it if you will consider this procedure in the light of church law because information which I obtained from the Actuary of the Dutch Reformed Mother Church causes me to come to the conclusion that revision can only take place for the benefit of the persons charged. The procedure should have been that judgment should have been given and members of the Circuit who felt aggrieved by the decision should have appealed to higher tribunals.

I am of opinion that sec. 21 of Rule 1 was contravened. In terms of the Standing Order the Circuit may on its last day of sitting take a decision in revision if no objection is raised. I think that the last day of sitting was Saturday, 10 May 1969, because a resolution was taken at the meeting. It must also be mentioned that at the 'resumed' meeting on 12.5.69 also the 'scriba' (secretary) and the chairman of the Circuit Commission resigned without giving acceptable reasons.

I also wish to bring to your attention that the chairman used his casting vote to come to the decision on which the judgment was based.

According to sec. 175 *(e)* of the Regulations and Rules of the Dutch Reformed Mission Church in South Africa: 'In the case of an equal vote the decision is in favour of the person charged,' the decision should have been given in favour of the persons charged."

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Certain of the statements made here do not entirely agree with the facts, but it can be ascribed to the fact that the appellant did not then already have the correct particulars at his disposal. It is, however, clear enough that he was not attacking the validity of the resolution of 10 May. What he did raise was, *inter alia*, the validity of the revision resolution on the 12th and the procedure thereafter.

It is an open question whether the General Synodal Commission was entitled at all, on this notice of appeal, to consider the validity of the resolution of 10 May. But even if it is accepted in favour of respondents that the Commission could have done that, it still appears to be a case where the Commission contravened the fundamental principles of justice. That these principles are applicable to appeals to the Commission, cannot be doubted. Not only is there no indication to the contrary, but the Church Ordinance expressly grants the person charged the right to furnish "the reasons for his objection" (Church Ordinance, sec. 240 *(e)*) and
"interested parties are at liberty to place their interests mutually before the Synod or the General Synodal Commission in a document which develops the case . . . ".
(Church Ordinance, sec. 244). The "reasons for objection" mentioned in sec. 240 *(e)* obviously include more than grounds of appeal only and would also include argument. These rights of the appellant were frustrated in that the General Synodal Commission decided the appeal on a ground which was never raised and which the appellant could also not foresee. Not only could the appellant, had he known, have furnished further argument, but it is also conceivable that he could have requested to adduce evidence in this regard. That the fundamental principles of justice came in issue here and that the decision of the General Synodal Commission must, therefore, be declared void, appears to be clear. (Cf. *Lukral Investments (Pty.) Ltd.* v. *Rent Control Board, Pretoria and Others*, 1969 (1) S.A. 496 (T) at pp. 509C, 510F-H; *Kannenberg* v. *Gird*, 1966 (4) S.A. 173 (C) at pp. 186G-187E).

This result can also be reached in a different way. It has already been

decided above that the Synod or the General Synodal Commission does not possess exclusive jurisdiction to interpret the Church Ordinance and that the application of the extended formal standard is not excluded. On this basis the question may, therefore, be asked whether the decision of the General Synodal Commission was legally sound and whether there was evidence on which it could reasonably have been based.

The General Synodal Commission obviously accepted the majority report of the Temporary Legal Commission and its motivation thereof. It is, therefore, necessary to refer thereto. The report, *inter alia*, says:

"It is clear that the Circuit kept the decision on the guilt or innocence of the persons charged very clearly separated from its resolution on questions of punishment. According to the record of the Circuit and the reply of the Circuit Commission the decisions on the guilt of the persons charged were reached unanimously. These persons were found guilty and thereafter deliberations on the degree of application of disciplinary measures took place. Eventually four proposals crystallised. The chairman accepted all four of them and allowed voting on them. Proposal 4 was then eventually accepted. There was, however, much dissatisfaction and a measure of confusion at the meeting. The resignation of the chairman and the confusion led to the postponement and the revision, the validity of which is now denied by the appellants.

What went wrong then with a Circuit which for weeks handled a difficult case with calm dignity and even reached a completly unanimous finding of guilty, that it then in

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the application of logical measures of punishment decayed into confusion? In our opinion, it was impossible for the Circuit to pass a satisfactory resolution for two reasons, especially:

Firstly the nature of the proposals was such that they must necessarily have confused the members of the Circuit. With the possible exception of proposal 1, not one of the other proposals was *ad rem* as far as the convictions on the indictment were concerned. Proposal 2 is not related to the convictions as such at all. Proposal 3 is entirely incomplete and contains no proposal about the punishment of the majority of the convicted persons. Proposal 4 can as far as its first paragraph is concerned be regarded as *ad rem*, but it contains five sub-divisions which are not relevant at all. Even proposal 1 contains a point *(b)* which does not agree with the other points. In our opinion, the chairman erred in accepting proposals of this nature. He should have separated matters and if necessary also persons and should only have accepted proposals which were as a whole *ad rem* to the point on which a decision had to be made. But by allowing the proposals as recorded he made it impossible for any impartial member to express by vote a clear preference in favour of a particular act by the Circuit. A vote for any of the proposals, even if it was the proposal which appeared to him the most acceptable, would have left him dissatisfied. Secondly, we are dealing here with a strange voting procedure. Proposal 4 was first put against proposal 2 and voting took place on the two. Thereafter proposal 4 (which obtained most votes) was put against proposal 3 and again proposal 4 was carried. In conclusion proposal 4 was put against proposal 1 and it was accepted. Without commenting on the merits of this voting procedure we must draw attention to the fact that it was completely contrary to the provisions of Rule 1 (12). A valid resolution in any of our church bodies can only be taken if this provision is complied with.

We must, therefore, come to the conclusion that on Saturday, 10 May 1969, no valid resolution was taken by the Circuit in regard to the punishment of the persons who had been convicted on the indictment. All further acts which flowed from this resolution are, therefore, also invalid. The position is then, in our opinion, that the Circuit acted perfectly correctly up to the point where the persons charged were convicted, but it then followed the wrong procedure. A number of persons are, therefore, now convicted, but not yet punished."

The second paragraph of this quotation, which is italicised, appears to reveal a fundamental error in the majority report. The test for the validity of the resolution of the 10th would not be the possibility of a "satisfactory resolution" or not, but whether the resolution reflected the intention of the majority. Confusion arose *after* the voting and there was no evidence on which the conclusion could reasonably have been reached that the nature of the proposals or the voting procedure contributed to that. The confusion arose because the minority did not wish to subject themselves to the majority resolution not to suspend and not on account of the nature of the proposals. But apart from this the question may be asked why an "impartial member" could not himself have made a proposal if he had been of the opinion that none of the proposals deserved his clear preference. In essence, the decision of the General Synodal Commission amounts to a setting aside of a legal act (the voting) on the ground of a possible error on the part of the members of the Circuit. There was, however, no evidence on which it could reasonably have been decided that proposal 4 did not reflect the true intention of the majority of the meeting. The mere fact that the proposal contained subdivisions which in the eyes of the Commission were not relevant, cannot in itself be a ground for invalidity.

The reliance placed in the majority report on Rule 1 (12) of the Church Ordinance is based on an acceptance that the provision is peremptory, with

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the consequential invalidity of any other voting procedure. This appears to be an incorrect interpretation. It is a well-known fact that it is not readily accepted that in the case of associations a strict compliance with all procedural rules is insisted upon if nobody is prejudiced by the non-compliance. In the present case, neither during the meeting nor thereafter was any objection raised by the parties concerned. Whether the Court *a quo's* view that Rule 1 (12) has no application to disciplinary cases is correct, need, therefore, not be considered.

Also on the ground of the extended formal standard the decision and the consequential order of the General Synodal Commission must be declared invalid.

In view of the invalidity (on two grounds) of the decision of the General Synodal Commission, the question arises whether the matter should be remitted to that body. In analogous cases of statutory bodies the Court has already sometimes regarded remittal unnecessary and decided the matter itself—but only in exceptional cases. It is understandable that where the Legislature entrusts a particular discretion to a body which the Court normally does not have, the Court will be hesitant to appropriate that discretion to itself. But in a case like the present where a judicial function is concerned which the Court normally exercises itself, this obstacle does not exist. In addition it has already been decided that in the present case the Synod or General Synodal Commission does not have exclusive jurisdiction on the legal questions and that in fact the Court is the final arbiter on the matter. Remittal would, therefore, serve no purpose and the Court must now

take onto itself the decision of the legal questions with reference to the Church Ordinance.

As already mentioned, this case must be approached as a claim for enforcement of a contract of service. This is in agreement with the principle expressed in regard to associations in *Marlin* v. *Durban Turf Club and Others*, 1942 A.D. 112 at p. 122: "....."

31 F

(My italics). This principle was confirmed in the *Feldman* case, *supra* at p. 347. The appellant's contention is that according to a correct interpretation of his contract, the Circuit on the 10th made a binding resolution on his punishment and that it was not entitled to repeal it on the 12th and to substitute it by another; alternatively, that if the resolution could have been repealed in that way, the punishment imposed on him on the 12th is that which is contained in the proposal which is least burdensome to him and not that which was allegedly adopted by the casting vote of the chairman. When interpreting the contract, i.e., *inter alia*, the Church Ordinance, contractual principles must obviously be applied.

The basis of appellant's contentions is sec. 175 of the Church Ordinance:

"*(a)* When applying church supervision and discipline, judgment is given by majority of votes, provided at least two-thirds of the members in the case of the Church Council and two-thirds of the members according to the attendance-roll in the case of the Circuit or Synod are present.

(b) .....

(c) Members of a church meeting must be present at the hearing of a disciplinary case and must cast their vote, unless they are disqualified, have leave of absence or can furnish reasons which are accepted by the meeting.

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(d) If through the absence of members for one or other of the said reasons the number falls to below the required minimum, the number of members is supplemented in the manner prescribed in sec. 178.

(e) In the case of an equal vote, the decision is in favour of the person charged."

It is remarkable that the decisive moment is the voting. Those present *must* vote and judgment is given "by majority vote". The clear implication is that the casting of a majority of votes on a proposal constitutes the judgment. The "definitions" in the Church Ordinance also throws light on this:

"(3) Decision: Decision refers to disciplinary cases and ecclesiastical issues. (See judgment).

(4) Resolution: Resolution in church language refers to matters of management and matters of administrative nature.

(26) Judgment: Judgment is the finding of a church management in a disciplinary case or ecclesiastical issue."

A "finding" of a church body can obviously only be contained in a proposal which was accepted, and that a decision in a wider sense is an acceptance of a proposal appears also from Rule 1 (8):

"(8) Ballot:

Each ballot in Church meetings takes place by the voting of members who are present. For a decision an absolute majority is required. In the consideration of disciplinary cases sec. 175 is taken into consideration."

If it is remembered that in the imposition of disciplinary punishment the acceptance of the proposal is in essence a legal act, it is clear that the joint expression of intention is complete when the vote has been taken. That notice thereof to the interested parties does not constitute the judgment appears from sec. 224:

"Notice of Circuit's Judgment:

The meeting of the Circuit gives judgment after finding on the issues in accordance with church laws, and thereafter gives interested parties written notice."

The wording clearly indicates that the giving of judgment precedes the notice. (This distinction appears even more clearly from the procedure in the case of appeal to the Circuit:

"After judgment by the meeting of the circuit copies thereof are given to the Church Council and those concerned with the case."

(Sec. 214)).

Sec. 176 can possibly be seen as an obstruction in the way of this interpretation.

"176. Judgments:

The judgments of church bodies includes briefly both the grounds as well as the church regulations on which they are based."

But this must be seen in the light of the procedure where a decision is reached by means of a ballot. Once a proposal is accepted, it will be merely a secretarial function to give effect thereto, to embody it in a document and "by mentioning the sections of the church regulations". In this respect the procedure coincides rather more closely with that of the Courts of Holland in e.g. the 18th century than with the deliberations of a modern court here. The decisive moment is the ballot and there is no deviation from that. The cases of managements of a company or of a city council as against third parties are not analogous: here the appellant already stands in a contractual relationship to the Circuit even before the vote is taken and the contract

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determines the effect of the ballot. Finality is reached by asking for proposals and the voting which follows and not by the "notice".

This conclusion is supported by the fact that even resolutions on administrative matters cannot be repealed without more ado (Rule 1 (21) read with definition (4)). It must certainly also be the case in respect of a decision regarding discipline which may affect contractual rights adversely. Indeed, it also appears to have been the view of the General Synodal Commission, otherwise it would be difficult to understand why it was of the opinion that if the decision of the 10th was valid, that would have been the judgment and, on the contrary, that because the decision of the 10th was invalid, all acts flowing from that decision were also invalid.

If a decision (or "judgment") is not susceptible to revision, it follows that in the present case the only valid decision is that which is contained in proposal IV which was adopted at the meeting of 10 May. (It is then unnecessary to discuss appellant's contentions about the later meeting). The appellant is, therefore, entitled to a declaratory order to this effect. Further relief would amount to the granting of an order for specific performance.

In the cases to which I have referred above, the Court dealt with decisions of persons or bodies entrusted with statutory duties and powers. The same principle, however, applies in the case of voluntary associations where the members bind themselves contractually to accept the decisions of a domestic tribunal or court. TINDALL, J.A., formulated the legal position as follows in *Jockey Club of South Africa and Others* v. *Feldman*, 1942 A.D. 340 at pp. 350-351: "....."

35 H

The principle also applies in ecclesiastical societies or associations where the members bind themselves contractually to a constitution which makes provision for domestic commissions or tribunals which are instituted to hear mutual differences or complaints and to decide thereon. The limited jurisdiction of civil courts to interfere with the decisions of such church bodies on review was defined as follows by Lord KINGSDOWN in *Long* v. *Bishop of Cape Town*, 4 Searle 162 at pp. 176-177: "....."

36 B

This passage was quoted with approval by GARDINER, J.P., in *Du Plessis* v. *The Synod of the D.R. Church*, 1930 C.P.D. 403 at p. 421. In the *Du Plessis* case questions of church doctrine were involved, but it is clear from the judgment of GARDINER, J., that the reason why the Court could not interfere, was purely because the plaintiff agreed contractually to subject himself to the decision of the domestic tribunal. At p. 420 the learned Judge says: "....."

36 D

Then the following passage appears on p. 422: "....."

36 G

And at pp. 425-6 the Judge quotes the following passage from the judgment of Lord IVORY in *McMillan* v. *Free Church*, Sess. Cases *D*.23, 1314 at p. 1332 with approval: "....."

36 H

In the case of *Odendaal* v. *Loggerenberg en Andere, NN.O. (1)*, 1961 (1) S.A. 712 (O), BOTHA, J.P., defined the power to review the decisions of a domestic church court as follows (at p. 719):

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"It is common cause that a court of law will only interfere with a decision of a domestic court of a voluntary association of persons, like the church in the present case, where at the trial or conviction of the convicted person a violation of the rules or statutes of the association concerned occurred or elementary principles of justice were ignored and where such violation or inobservance actually prejudiced the

convicted person. (*De Vos* v. *Die Ringskommissie van die Ring van die N.G. Kerk, Bloemfontein, supra* at p. 94 and the decided cases quoted there).''

It is on the basis of the aforesaid principles, as formulated and applied in our decided cases, that this Court must decide on appeal whether the Court of first instance erred in its decision that there were no grounds in the present case for the review and setting aside of the decisions of the first respondent (the Circuit) and the second respondent (the Synodal Commission).

The Church Ordinance (Regulations and Rules of the Dutch Reformed Mission Church in South Africa) expressly makes provision for the procedure which must be followed in the case of a complaint against a member or office bearer of the church. The complaint must in the first instance be heard and considered by the Circuit and a decision of the said body is ''subject to appeal to a higher church body'' (sec. 9), i.e. the Synod or the General Synodal Commission. Where the appeal is heard by the General Synodal Commission

''its decision will remain of force and effect until it is declared void, set aside or amended by the Synod''.

(Sec. 146*(d)*). In terms of sec. 9 *(b)* the judgment of the Synod ''is always final'' and sec. 130 provides as follows:

''The resolutions or decisions (judgments) of the Synod in the last resort are always final in regard to cases dealt with by lesser church bodies and brought before it on appeal.''

The Church Ordinance (Regulations and Rules) by which the appellants are bound contractually, therefore, clearly formulates that only the church's domestic tribunals will have the authority in, *inter alia*, complaints against members or office bearers of the church and that, subject to appeal to the Synod, the decisions of such tribunals are final and decisive. From this it follows, in my opinion, that the review jurisdiction of the ordinary courts in regard to such matters is excluded—except obviously where decisions of such domestic tribunals can be taken on review on accepted grounds (see the passage quoted above from the judgment of TINDALL, J., in *Jockey Club of South Africa and Others* v. *Feldman, supra*).

The course of events in the case before the Circuit on 10 and 12 May 1969 and the subsequent decision of the General Synodal Commission on appeal that no valid decision had been taken on 10 May 1969 by the Circuit are fully reflected in the judgment of the Court *a quo* at pp. 506 to 511. The Court *a quo* directs attention to the fact (p. 507B) that in order to consider the appeal the General Synodal Commission appointed a Temporary Legal Commission to advise it on the judgment and that the General Synodal Commission accepted the advice of the majority of the Legal Commission. I find it convenient to refer to the motivation by the Legal Commission of its advice to the General Synodal Commission. The function of a Temporary Legal Commission (such a commission consists of eight members, four ministers and four elders) is defined as follows in sec. 137 *(a)*:

38

''*(a)* It considers all the charges, appeals against judgments of lesser church bodies and all the documents relating thereto and further all matters referred to it and advise the Synod concerning its judgment.''

In the present case seven of the eight members of the Legal Commission advised that the decision of the Circuit of 10 May 1969 was invalid and that all acts which flowed from it were also invalid. As reasons for that advice the Legal Commission advanced the following:

"Firstly, the nature of the proposals was such that they must necessarily have confused the members of the Circuit. With the possible exception of proposal 1, not one of the other proposals was *ad rem* as far as the convictions on the indictment were concerned. Proposal 2 is not related to the convictions as such at all. Proposal 3 is entirely incomplete and contains no proposal about the punishment of the majority of the convicted persons. Proposal 4 can as far as its first paragraph is concerned be regarded as *ad rem*, but it contains 5 subdivisions which are not relevant at all. Even proposal 1 contains a point *(b)* which does not agree with the other points. In our opinion, the chairman erred in accepting proposals of this nature. He should have separated matters and if necessary also persons and should only have accepted proposals which were as a whole *ad rem* to the point on which a decision had to be made. But by allowing the proposals as recorded he made it impossible for any impartial member to express, by vote, a clear preference in favour of a particular act by the Circuit. A vote for any of the proposals, even if it was the proposal which appeared to him the most acceptable, would have left him with a feeling of dissatisfaction.

Secondly, we are dealing here with a strange voting procedure. Proposal 4 was first put against proposal 2 and voting took place on the two. Thereafter proposal 4 (which obtained most votes) was put against proposal 3 and again proposal 4 was carried. In conclusion proposal 4 was put against proposal 1 and it was accepted. Without commenting on the merits of this voting procedure, we must draw attention to the fact that it was completely contrary to the provisions of Rule 1 (12). A valid resolution in any of our church bodies can only be taken if this provision is complied with."

As far as the first point is concerned, that in regard to the contents of the proposals which were made on 10 May 1969, I am of the opinion, that the Legal Commission's commentary is sound. It is only necessary to look at proposal 4 of that date (quoted in the judgment of the Court *a quo*, p. 510E-F) which consists mainly of additional proposals which have nothing to do with the imposition of punishment. (In passing attention may be directed to the fact that the same irregularity occurred at the meeting of the Circuit on 12 May 1969: proposal 2 which was put to the vote on that date—quoted in the judgment of the Court *a quo* at p. 511E—contains subdivisions which have nothing to do with the imposition of punishment).

It was on the advice of the majority of the Legal Commission that the General Synodal Commission came to a decision and delivered judgment at p. 507C-F of the judgment of the Court *a quo*.

It is now submitted on behalf of the appellants that the decision of the General Synodal Commission is susceptible to review, *inter alia*, because, so is the submission,

(a) there is no evidence on which it could have been found that the proposals which were put to the vote on 10 May 1969 could have confused members of the Circuit on account of their contents; and

(b) the Commission erred in its finding that Rule 1 (12) was applicable to the voting in disciplinary cases.

39

As regards ground *(a)*, I have already indicated that at least some of the proposals which were put to the vote on 10 May 1969 at the meeting of the

Circuit (and also on 12 May 1969) contain subdivisions which have nothing to do with the imposition of punishment. There was indeed, therefore, evidence on which the General Synodal Commission could have come to the decision that the said irregularity could have confused members of the Circuit. It is not the function of this Court in review proceedings to consider the reasonableness of the finding of the Commission. It was not argued that the Commission was *mala fide* or that it could be said that it did not apply its attention to the case before it. On the judgments of our Courts (see especially *Union Government* v. *Union Steel Corporation (South Africa) Ltd.*, *supra*), the decision of the Commission cannot be interfered with.

As regards ground *(b)* this Court is also not entitled to interfere with the decision of the General Synodal Commission. Where an appeal serves before the Synodal Commission the Commission must give consideration to the question whether the procedural proceedings before the lesser church body (the Circuit) were conducted according to the Church Ordinance (Regulations and Rules) and such consideration necessarily entails the interpretation and application of those provisions and rules which may be relevant. And the decision of the Commission is final, subject of course to an appeal to the Synod. Even if it is found that the Commission's interpretation of Rule 1 (12) was wrong, the Commission's decision would not be susceptible to review—unless it could be said that as result of the erroneous interpretation, the Commission erred in a matter affecting its jurisdiction, which is apparently not the case here.

The appellants' counsel relied on certain decisions which I have not quoted above. He relied, *inter alia*, on the decision in *S.A. Medical and Dental Council* v. *McLoughlin*, 1948 (2) S.A. 355 (A.D.), and especially on the following words of TINDALL, J.A., at p. 393: "....."

39 G

(See also the judgment of CENTLIVRES, J.A., at p. 406 and that of SCHREINER, J.A., at p. 410). What is of importance here, is that just before TINDALL, J.A., uttered the words which I have just quoted, he said the following: "....."

39 H

In the latter case (which is also reported in (1890) 43 Ch. 366) a medical practitioner was convicted by the Medical Board of England of improper behaviour. His application for review was dismissed by the Court and he then noted an appeal. The appeal was dismissed. In his judgment COTTON, L.J., said the following at pp. 377-378: "....."

40 C

FRY, L.J., also concurred.

In view of

(a) The judgments of this Court before the *McLoughlin* case;

(b) the fact that TINDALL, J., specifically refers to the Leeson case (while the Court in the *McLoughlin* case was also referred to the later English case of *Allison* v. *General Council of Medical Education*, (1894) 1 Q.B.D. 750, where the reasonableness test was applied); and

(c) the fact that TINDALL, J.A., does not comment on the statements by the Judges in the *Leeson* case,

I can hardly think that TINDALL, J.A., in the passage of his judgment quoted above intended that a Court has the power on review to interfere only on the ground of unreasonableness in the judgment of a domestic tribunal. It is of course a different case where the domestic tribunal acted so unreasonably that the Court is on review entitled to find that the tribunal was *mala fide* or did not give any attention at all to the case which was before it for decision. But, as already said, that is not the appellants' case. Mention can also be made here of the case of *S.A. Medical and Dental Council* v. *Lipron*, 1949 (3) S.A. 277 (A.D.). In this case the respondent was charged with improper behaviour, in that he had charged higher fees for medical services than that which are usually charged for such services. HOEXTER, J.A., says the following at p. 283: "....."

40 H

In fact there was no evidence on which it could have been found that he charged higher fees than that which are usually charged. I am also of opinion that in this case HOEXTER, J.A., and the other three Judges who concurred, did not intend to extend the accepted grounds for review.

41

Another decision on which the appellants rely is *Lee* v. *Showmen's Guild of Great Britain*, (1952) 1 All E.R. 1175. In this case the respondent (Lee) was convicted by the appellant on a charge of unfair competition and that decision later led to his suspension as member of the Showmen's Guild. He approached the Court. The Court found that he was not guilty of unfair competition and the steps taken against him were declared void. An appeal to the Court of Appeal by the Showmen's Guild was dismissed. SOMERVILLE, L.J., found that there was no evidence on which the respondent could have been convicted of unfair competition. He, however, added the following to his judgment (at p. 1180): "....."

41 D

DENNING, L.J., says in his judgment that, although parties to an agreement may create domestic tribunals to solve their issues, they cannot exclude the civil courts entirely. He formulates it as follows (at p. 1181): "....."

41 F

He also says the following (at p. 1182): "....."

41 H

His finding is (at p. 1183): "....."

42

ROMER, L.J., also found that the appeal should be dismissed, but he approached the case differently. His finding was that, on a proper interpretation of the rules of the appellant (Showmen's Guild), it was clear that the members did not agree to accept the decisions of the domestic tribunal on the interpretation of the rules of the association as final—
"has not contractually outsted the jurisdiction of the courts to entertain his action . . .".
The Judge then adds the following to his judgment (at pp. 1187-1188): "....."

42 E

The appellants in the present case rely especially on the judgment of DENNING, L.J., in the aforesaid case. The basis of the decision of the learned Judge is that where parties contractually agree that an arbiter or domestic tribunal will decide all issues between them, including issues on legal questions, and that such decision will be final, it is against public interest and therefore invalid, in so far as issues on legal questions are concerned. That is not our law. According to our law the decisions of an arbiter, who is appointed by agreement, even on a legal question, are regarded as final and a court may not, contrary to the agreement between the parties, interfere with such decisions. An example which may be mentioned in this regard is the case of ordinary arbitration. See *Dickinson & Brown* v. *Fisher's Executors*, 1915 A.D. at p. 176; *Allied Mineral Development Corporation (Pty.) Ltd.* v. *Gemsbok Vlei Kwartsiet (Edms.) Bpk.*, 1968 (1) S.A. 7 (C) at pp. 16-17; McKenzie, *The Law of Building Contracts and Arbitration in South Africa*, 2nd ed., pp. 146-147. The fact that sec. 20 of the Arbitration Act, 42 of 1965 now provides for the obtaining of an opinion from the Court or an advocate on legal questions before an arbitration court makes a final award, certainly indicates that the decision of the arbiter, even as regards legal questions, is otherwise final. (Sec. 28).

The case of *Lee* v. *Showmen's Guild of Great Britain, supra*, has frequently been quoted in our Courts. In *Johannesburg City Council* v.

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Chesterfield House (Pty.) Ltd., 1952 (3) S.A. 809 (A.D.), to which I have already referred, CENTLIVRES, C.J., gives a summary of the judgment in the *Lee* case and immediately thereafter he says (at pp. 825-826): "....."

43A

(The words "according to South African Law" italicised by me).

In *Feinstein and Another* v. *Taylor and Others*, 1961 (4) S.A. 554 (W), GALGUT, J., referred to *Lee's* case at pp. 558-559, but thereafter he repeats the accepted limitations on a court's powers of review in our law, in regard to both findings of fact and findings of law. See also the judgment of THERON, J., and *Bekker* v. *Western Province Sports Club (Inc.)*, 1972 (3) S.A. 803 (C) at pp. 821-822.

It must be mentioned here that it is not the respondents' case that the Synod (or the General Synodal Commission) has the sole jurisdiction to interpret the Church Ordinance (Regulations and Rules) or, formulated differently, is the only construer of the Church Ordinance. Indeed cases like *De Vos* v. *Die Ringskommissie van die Ring van die N.G. Kerk, Bloemfontein and Another*, 1952 (2) S.A. 83 (O), and *Odendaal* v. *Kerkraad van die Gemeente Bloemfontein-Wes van die N.G. Kerk in die O.V.S. en Andere*, 1960 (1) S.A. 160 (O) serve as authority that a civil court in fact has the power to interpret church law and to act in accordance with its interpretation thereof.

What the respondents do submit is that although a civil court may in review proceedings interpret church law and is not bound by the interpretation given to one or the other provision thereof by church tribunals, the court will not interfere unless one or the other of the accepted grounds for review is present—as, e.g., that the church tribunal's behaviour was such that the conclusion must be drawn that it was *mala fide* or that it did not properly attend to the case or where, as result of an erroneous interpretation of a provision, the tribunal failed to exercise its power—but that is not the case here.

I can, therefore, not agree with the submission of appellants' counsel in regard to the review jurisdiction of a court according to our law. If his submission is accepted, i.e. that a court may interfere on review merely because the domestic tribunal, on the evidence before it, came to a decision which, in the opinion of the court of review was not reasonable, or because the domestic tribunal in the exercise of its power gave a wrong interpretation to a contractual provision, the distinction drawn in our law between appeal proceedings and review proceedings would be a mere pretence.

I now deal briefly with the appellants' submission, that the second respondent (the General Synodal Commission) erred by *mero motu*

considering the validity of the decision of the Circuit of 10 May 1969 without giving the appellants the opportunity to submit argument on that particular aspect of the case. In my opinion this submission is not sound.

The appellants noted appeal in writing to the Synod (General Synodal Commission), after receipt of a written notice of the "judgment on sentence by the Circuit". In the case of the first appellant the introduction to his notice of appeal reads as follows:

"I, the undersigned, hereby wish to note an appeal against my conviction and the judgment on a charge by the Circuit Commission of the Circuit of Wellington at the Circuit of Wellington in session at Paarl on 26 April 1969, and further:

I wish to base my defence on the following: . . ."

Then follow in the said document grounds on which, mainly the conviction, but also the judgment in regard to imposition of punishment are contested. As regards the latter, reference is made to the decision of 10 May 1969, as well as to the revision resolution of 12 May 1969 and the subsequent decision, by the chairman's casting vote, "as result of which the judgment (the suspension of the appellants) was given". What the appellants submitted was that the revision resolution as well as the decision, which was taken by the chairman's casting vote, were invalid and that for those reasons the judgment of suspension was invalid.

From what I have already said it appears that the appellants with their appeal, in addition to the contesting of the conviction, wanted to have the sentence, viz. suspension, quashed. It also appears clearly from a subsequent letter dated 11 September 1969 addressed by the appellants to the Circuit in which the following account of the occurrences is reflected:

"On Monday, 12 May 1969, your Honourable Circuit imposed on us a disciplinary measure: suspended with retention of status and sacraments. This measure was immediately operative as from the said date.

We then appealed against our conviction and suspension. On 14 August 1969 the General Synodal Commission considered our appeal and decided: . . ."

The result of the appeal proceedings was that the appeal against the conviction was dismissed, but the appeal against the sentence succeeded, although on grounds other than those advanced by the appellants.

In view of the result of the appeal in regard to imposition of sentence, I am of the opinion that it was not necessary at all for the General Synodal Commission to have afforded the appellants an opportunity of submitting argument on the grounds on which the appeal against sentence was decided in favour of the appellants. It can hardly be said that the failure to give them such an opportunity prejudiced the appellants. (See the passage quoted above from the judgment in *Odendaal* v. *Loggerenberg en Andere*).

There remains the appellants' submission that, even if Rule 1 (12) is applicable to disciplinary cases, the General Synodal Commission erred in declaring the decision of the Circuit of 10 May 1969 invalid on the ground that the procedure at the ballot had not complied with the said Rule.

For the aforesaid submission appellants' counsel relies on cases like *De Vos* v. *Die Ringskommissie van die Ring van die N.G. Kerk, Bloemfontein and Another, supra* at p. 95; *Odendaal* v. *Kerkraad van die Gemeente Bloemfontein-Wes van die N.G. Kerk in die O.V.S. en Andere, supra* at pp. 169-170; *Rajah & Rajah (Pty.) Ltd. and Others* v. *Ventersdorp Municipality and Others*, 1961 (4) S.A. 402 (A.D.) at pp. 407-408.

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These cases, and there are also others, are authority for the view that a Court will not set aside the proceedings of a domestic tribunal only on the ground that it has not complied in all respects with the relevant provisions, if the deviations from the rules are not material and nobody is prejudiced. These principles are, however, not operative in the circumstances of the present case. In this case there was an appeal against the decision of the Circuit to the General Synodal Commission and the latter declared the

decision of the Circuit invalid, *inter alia*, on the ground of non-compliance with the prescribed voting procedure. The actions of the General Synodal Commission were not unreasonable at all; in any event not so unreasonable as to afford a ground for review.

The fact that a civil court would not, *on review*, have declared the decision of the Circuit invalid, solely because the prescribed voting procedure had not been complied with, affords no ground for a submission that the General Synodal Commission acted unreasonably or erroneously *on appeal* by declaring the decision concerned invalid on the ground of non-compliance with the prescribed voting procedure.

The argument of appellants' counsel amounts to a submission that this Court, in the exercise of its powers of review, must take the appeal jurisdiction of the General Synodal Commission on itself and must substitute the General Synodal Commission's decision by its own. That is not our law.

BOTHA, J.A., concurred in the decision of MULLER, J.A.

HOFMEYR, J.A.: I had the opportunity to read the judgments of my Brethren BOTHA, JANSEN and MULLER. I cannot associate myself with the dismissal of the appeals by BOTHA, J.A. and MULLER, J.A., and I concur in the judgment of JANSEN, J.A., that the appeals should be upheld.

The facts of this case have already been fully reported in *Theron en Andere* v. *Ring van Wellington van die N.G. Kerk in S.A. en Andere*, 1974 (2) S.A. 505 (C). I, therefore, do not repeat the particulars of the case. In the first place I also deal, like JANSEN, J.A., in his judgment, only with the case of the first appellant, Theron, and as I have already indicated I agree with my Brother that the appeal should succeed. As I can come to this finding without relying on all the grounds formulated by my Brother, I prefer, in the particular circumstances of the case, to reach the said result in the following manner. In the first place I am convinced that the decision of the Circuit of 10 May 1969 (which in broad outline amounts to a resolution that the appellant be seriously warned and reprimanded, but not suspended) was not susceptible to revision, for the reasons stated by JANSEN, J.A. This decision should, therefore, in my opinion, still have been binding, had it not been incorrectly declared void by the Synodal Commission, without any lawful objection having been raised against the validity thereof.

The Synodal Commission based its setting aside of the decision mainly on the possibility that at the voting, which culminated in the acceptance of the said decision, there could have been confusion in the minds of the members of the Circuit. Not one of the parties who appeared on appeal before the Synodal Commission raised this ground for the setting aside of the said

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decision. The Commission acted *mero motu* when it took this ground into consideration. It did not inform the appellant at all that it would consider such a very serious decision against him on new grounds in regard to which there was no formal objection. As the appellant received no notice, he had no opportunity of filing a defence.

It could be submitted on good grounds that the annulment of the decision of the Circuit of 10 May 1969 was invalid. After all the Synodal Commission itself did not find that there was in fact confusion at the voting, but only that such a possibility of confusion existed. The confusion that might be revealed by the minutes of the meeting of 10 May 1969 arose after the voting and was apparently caused by the extraordinary behaviour of the chairman who abandoned the chair after the voting. He did not make any allegation of confusion at the voting, which could be expected if there was such confusion, but he caused the following statement to be recorded:

"At this stage (i.e. after the result of the vote had been announced) the chairman requests that it be recorded that he completely dissociates himself from the decision of the Circuit which does not impose suspension, although there is overwhelming proof of malpractices."

It was also recorded that two other ministers, members of the Circuit, associated themselves with the attitude of the chairman, who also tendered his resignation during the course of the meeting.

The Synodal Commission also in the aforesaid circumstances (which I referred to briefly with only one object in view, viz. of indicating that the objection to the Synodal Commission's acts was not merely academical) violated the principles of natural justice and seriously prejudiced the appellant by considering the Circuit's decision of 10 May 1969 in the way it did and by denying him a proper and fair hearing in regard to the punishment which could lawfully have been imposed on him.

All the proceedings of the Synodal Commission and of the Circuit in regard to the punishment imposed on the appellant should, therefore, be declared invalid and void, except the decision of the Circuit of 10 May 1969 which remains intact and valid. There is in the circumstances no finding to be made and, therefore, no reason why the matter should be remitted to any tribunal. (See *Maske* v. *Aberdeen Licensing Court; Gilbert* v. *Aberdeen Licensing Court*, 1930 A.D. 30, and *Livestock and Meat Industries Control Board* v. *Garda*, 1961 (1) S.A. 342 (A.D.) at p. 349). This Court has the inherent jurisdiction not only to set aside the irregular proceedings of the Synodal Commission, but also to rectify it (see the *Maske* case, *supra* at p. 38). I accept that the Circuit will as a matter of course take the following step in the ordinary procedure, viz. the announcement of the decision to the appellants.

I, therefore, agree with the orders suggested by JANSEN, J.A., in respect of all the appeals.

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