

Doctrinal Sanction and the Protection of the Rights of Religious Associations: *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151

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Abstract

Scholarship on the protection of religious rights and freedoms in the context of religious associations in South Africa has gained in momentum since the decision by the Equality Court in *Johan Daniel Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* some years ago. Emanating from this were diverse scholarly insights on what the parameters of religious associations should be, with specific focus on sexual conduct, religious doctrine and membership of religious associations. The South African judiciary has not been confronted with a similar challenge since the decision. However, with the advent of the judgment by the Supreme Court of Appeal in *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* in 2014, questions as to the parameters of the rights of religious associations in the context of sexual conduct and religious doctrine again present themselves. This article consequently analyses the mentioned judgment by the Supreme Court of Appeal to further an understanding of the parameters of associational rights of religious institutions against the background of a truly plural and democratic society, as supported by the Constitution of South Africa.

Keywords

Religious rights; associational rights; religious associations and disciplinary action; religious associations; human rights; church and state.

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1 Introduction

Emanating from the South African Supreme Court of Appeal (SCA) judgment of *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa*¹ (*De Lange*) are matters related to the parameters of the rights of religious associations pertaining to doctrinal sanctioning. The SCA in *De Lange* was not confronted with a challenging dispute to decide upon in the context of the principle of "avoidance by the judiciary of doctrinal entanglement". Furthermore, the judgment presents nothing "out of tune" with what the courts in South Africa and democratic and constitutional dispensations such as Australia, Canada, the United Kingdom and the United States of America have already said on the matter. However, although the SCA in *De Lange* missed an opportunity (due to the course chosen by the Appellant) in having to decide upon matters related to doctrinal sanctioning and "unfair discrimination" related to conduct due to sexual orientation by persons serving "core functions" in such associations, this article elaborates on what the judiciary's preferred route should be. This is of fundamental importance for the furtherance of the debate on the rights of religious associations in a democratic and heterogeneous society such as South Africa. Also, this article critically investigates arbitration regarding disciplinary procedures taken by a religious association in the context of the autonomy to be ascribed to religious associations.

2 Facts

The Rev Ecclesia de Lange (the Appellant), an ordained Minister in the Methodist Church of Southern Africa (MCSA), informed her congregants of

* Shaun de Freitas. B Proc LLB LLM LLD (UFS). Associate Professor, Faculty of Law, University of the Free State. Adjunct Professor, School of Law, University of Notre Dame Sydney (Fremantle Campus). Email: defreitas@ufs.ac.za. During the finalisation of this article for publication the Appellant's appeal to the Constitutional Court was dismissed, the said Court having found that the Appellant had renounced her unfair discrimination claim before the High Court and was therefore not entitled to raise the claim for the first time on appeal. It was also confirmed by the Court that it should not rule on this question as a court of first and last instance and that arbitration should first have been sought. The judgment was therefore based on procedural grounds. Consequently, the Constitutional Court has yet to decide on the substance pertaining to clarity on the parameters of freedom to be granted regarding appointments by a religious association against the background of sexual conduct that may be in opposition to the central tenets of such an association. Therefore, this case note proposes the direction that the Constitutional Court should take when confronted with a similar challenge in future.

¹ "The Presiding Bishop of the Methodist Church of Southern Africa for the time being" as the first respondent and "The Executive Secretary for the time being of the Methodist Church of Southern Africa" as the second respondent.

her planned marriage to another woman by way of a letter that she read to the congregants.² Soon after this the Appellant was suspended from the Ministry pending the outcome of a disciplinary hearing.³ The charge against the Appellant was in terms of the "Laws and Discipline of the Church" (L & D) which stipulated the recognition of only heterosexual marriages,⁴ and that "Ministers shall observe and implement the provisions of the L & D and all other policies, decisions, practices and usages of the Church".⁵ The Church's District Disciplinary Committee (DDC) found the Appellant guilty of failing to observe the said provisions of the L & D (and all other policies, decisions, practices and usages of the Church).⁶ The Appellant then filed a notice of appeal to the Church's Connexional Disciplinary Committee (CDC) against the decision taken by the DDC.⁷ The CDC confirmed the verdict of the DDC and ordered that the Appellant "be discontinued from the ministry of the Methodist Church of Southern Africa".⁸

The L & D provided the Appellant with the option of having the dispute referred to arbitration if she wished to challenge the decision of the CDC.⁹ The Appellant formally requested the Convener of the Connexional Arbitration Panel of the Church (the Convener) to refer the dispute to arbitration.¹⁰ In accordance with the L & D, the Convener signed an agreement on behalf of the Appellant, which included the terms of and the process that would govern the arbitration.¹¹ At this point the Appellant approached the High Court for the following relief: (1) setting aside the arbitration agreement, and in the alternative, an order that such an arbitration agreement would cease to have effect; (2) a declaratory order that the decision by the MCSA was unconstitutional and unfair discrimination based on sexual orientation; (3) reviewing and setting aside the decision by the DDC whereby the Appellant was suspended as a minister and which had been confirmed by the CDC; and (4) reinstating the

² *Ecclesia de Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] 151 (ZASCA) (hereinafter *De Lange*) para 3.

³ *De Lange* para 4. The appellant and her partner married each other prior to the disciplinary hearing (*De Lange* para 5).

⁴ *De Lange* para 6.

⁵ *De Lange* para 7.

⁶ *De Lange* para 8. The DDC recommended that the Appellant continue under suspension until the Church had made a binding decision on ministers in same-sex unions. At the time the Church was debating the issue of civil unions between same-sex partners (Yearbook 2008 2.5.1 [vi]) (*De Lange* para 22).

⁷ *De Lange* para 9.

⁸ *De Lange* para 10.

⁹ *De Lange* para 11.

¹⁰ *De Lange* para 12.

¹¹ *De Lange* para 14.

Appellant as a minister of the MCSA with retrospective effect.¹² The High Court concluded that the Appellant's "application is premature and that she should first submit to arbitration", thereby dismissing her application.¹³

¹² *De Lange* para 1.

¹³ *De Lange* para 15.

3 Supreme Court of Appeal decision

3.1 *Majority judgment*

According to the SCA in *De Lange*, the Appellant was not calling upon "unfair discrimination based on sexual orientation in her claim",¹⁴ but was rather advancing a case based on an entitlement to fair administrative action.¹⁵ For the Court the question was "whether the appellant has shown good cause for avoiding arbitration" and that, according to section 3(2) of the *Arbitration Act*,¹⁶ a court has discretion to enforce an arbitration agreement.¹⁷ The Court subsequently came to the finding that none of the grounds presented by the Appellant for seeking avoidance of the arbitration was justified.¹⁸

The grounds, together with the Court's finding, were as follows: Firstly, the Appellant contended that there was no valid arbitration agreement.¹⁹ The Court responded that the Appellant accepted that the Convener was entitled to sign on her behalf in accordance with the L & D.²⁰ Secondly, the Appellant stated that there had been a delay in concluding the arbitration agreement.²¹ It was the view of the Court that the delay was in large part explicable.²² Thirdly, the Appellant complained that the arbitration agreement required her to waive her constitutional rights, excluded the power of the courts, and denied her legal representation.²³ The Court found in this regard that: (1) the Appellant could not be taken to have waived her rights; in fact, the arbitration agreement preserved these rights; (2) there was nothing unlawful in trying to resolve matters, firstly, in internal processes (and then by review of such processes by a competent court);²⁴ and (3) the judiciary had denied any entitlement to legal representation "as of right *in fora* other than courts of law".²⁵ Fourthly, the Appellant was of the view that the arbitrator, as a member of the Church, would at the least be reasonably perceived as

¹⁴ This is mentioned because counsel for the Appellant sought to advance such a case in her heads of argument, but this was disavowed by the appellant (*De Lange* para 19).

¹⁵ See *De Lange* para 19.

¹⁶ *Arbitration Act* 42 of 1965.

¹⁷ *De Lange* para 23.

¹⁸ *De Lange* para 29.

¹⁹ *De Lange* para 24.

²⁰ *De Lange* para 24. This will be discussed in more detail below, as Justice Wallis in the minority judgment had concerns in this regard.

²¹ *De Lange* para 25.

²² *De Lange* para 25.

²³ *De Lange* para 26.

²⁴ *De Lange* para 26.

²⁵ *De Lange* para 26.

biased,²⁶ but the Court found nothing objectionable to private associations seeking to exclude outsiders from disciplinary processes.²⁷ Fifthly, the Appellant was adamant that the arbitration would be a futile process.²⁸ The Court's response to this was that the central question was whether the Church had a rule that prohibited the Appellant from announcing her intentions to marry, and this required a factual determination to be made, which could be dealt with in arbitration.²⁹

The Court then elaborated on the importance of associational rights where not only individuals but also members of a particular religion had the right to practise that religion "in association with others and in conformity with the dictates, precepts, ethical standards and moral discipline which that faith exacts".³⁰ In this regard, the Court concluded that

in a dispute such as was placed before it, the internal rules adopted by the Church should be left to the Church to be determined internally and without interference from a court.³¹

The Court confirmed that

individuals who voluntarily commit themselves to a religious association's rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies³²

and that the Appellant had not convinced the Court as to why the arbitration process should be set aside. Consequently, the appeal failed.³³

3.2 Minority judgment

Justice Wallis³⁴ had reservations about the finding in the majority decision that there was a binding arbitration agreement between the Appellant and the Respondents. Justice Wallis pointed out that the clause in the L & D which imposes an "obligation to arbitrate disputes" is reliant on the understanding that the entire contents of the L & D constitute *a contract*

²⁶ *De Lange* para 27.

²⁷ *De Lange* para 27.

²⁸ *De Lange* para 28.

²⁹ *De Lange* para 28.

³⁰ *De Lange* para 31. Also see *De Lange* paras 32-38.

³¹ *De Lange* para 39.

³² *De Lange* para 40.

³³ *De Lange* para 41.

³⁴ With Justice Fourie concurring.

between church and minister (and church and member).³⁵ In the words of Justice Wallis,

It seems more likely that their [ministers'] acceptance of the L & D is an *obligation and discipline flowing from their calling to be a minister and the acceptance of that call by going through the process of ordination*.³⁶

There was therefore no contractual agreement (of employment) in this regard, but rather "an expression of her [the Appellant's] vocation to ministry exercised under the discipline of the church".³⁷ Therefore, if on the ordination of the Appellant there was no intention by the Appellant and the Church to enter into a contract in relation to the Appellant's employment in terms of the L & D, *there was likewise no intention to enter into any other contract and therefore there was no arbitration agreement between the parties that can be the subject of the Arbitration Act*.³⁸

On the other hand, Justice Ponnann (in the majority judgment) found that it was not necessary to determine whether the relationship between the Appellant and the Church was contractual

because it was agreed that the agreement signed by the Presiding Bishop on behalf of the Church and the convener on behalf of Ms De Lange brought the matter within the ambit of the Arbitration Act.³⁹

This the Convener was entitled to do in terms of the L & D.⁴⁰ According to the said Justice, the Appellant initially maintained in her founding affidavit that "there was in place a valid agreement and that she was intent on arbitration".⁴¹ The Appellant, according to Justice Ponnann, "accepted" that

³⁵ *De Lange* para 51 (author's emphasis).

³⁶ *De Lange* para 57 (author's emphasis).

³⁷ *De Lange* para 66. See *De Lange* paras 57-66 for Justice Wallis' elaboration on matters related to "contracts of employment" and "ministry" against the background of churches. Also see Justice Wallis' examination of the "structure of the church and the L & D", Justice Wallis' finding that the L & D is not the same as the constitution of a voluntary association and fulfils a different purpose (*De Lange* paras 52-53). What comes to the fore in this analysis is that "contracts of employment" have to do with matters related for example to a letter of appointment setting out a Minister's duties, salaries and other benefits that would be due to him or her in return for the performance of those duties (para 59) and where there is a unilateral right to resign (in contrast to a "vocation" and in contrast to where rights and duties arise entirely from a church's constitution) (*De Lange* para 66).

³⁸ *De Lange* para 67 (author's emphasis).

³⁹ *De Lange* para 24. In the words of s 1 of the *Arbitration Act*, "arbitration agreement" means *a written agreement* providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not" (author's emphasis).

⁴⁰ *De Lange* para 24.

⁴¹ *De Lange* para 24.

the Convener was entitled to sign on her behalf (which was in accordance with the L & D), therefore bringing a binding agreement into force, and consequently that the Appellant should be bound to its terms.⁴² This Justice Wallis disagreed with, stating that the Appellant did not sign the arbitration agreement; it was signed by the Convener on her behalf, and therefore there was no binding agreement.⁴³

Justice Wallis made it clear that if there were no binding arbitration agreement (whether as a result of there being no contractual relationship between the Appellant and the Church, or because the Appellant did not, according to the said Justice, agree to arbitration), it would make no difference to the outcome of the judgment in that the appeal would still have been dismissed.⁴⁴ The reason for this is that the Appellant did not seek an order that finds the arbitration agreement void; she sought an order that *sets aside the arbitration agreement* between her and the Respondents or, alternatively, a declaration that the said *agreement ceases to have effect* to any dispute between them.⁴⁵

According to the majority judgment, therefore, there was an arbitration agreement, because the Appellant "accepted" that the Convener was entitled to sign on her behalf (as stipulated by the L & D). However, according to the minority judgment there was no arbitration agreement because there was no contractual relationship (of employment) between the Appellant and the Church, thereby making void all other agreements (including the arbitration agreement) resulting from the relationship between the Appellant and the Church. Added to this, the minority judgment, contrary to the majority judgment, indicated that there was no agreement to arbitrate in any event; however, this was of no consequence, because there was no contract of employment (for reasons already explained). This finding by the minority judgment, as explained earlier, would not have influenced the outcome of the majority judgment.

⁴² *De Lange* para 24.

⁴³ *De Lange* para 58. Also see para 50.

⁴⁴ *De Lange* para 43.

⁴⁵ *De Lange* para 47.

4 Analysis

4.1 *Conduct resulting from sexual orientation and the rights of religious associations*

In *De Lange* we find confirmation of the view supported by the South African judiciary in the past (and by the foreign law of Australia, Canada, the United Kingdom and the United States of America, for example) that the judiciary should not involve itself in "internal" matters (matters of governance and doctrine) related to a religious association (also referred to as the court's "avoidance of doctrinal entanglement").⁴⁶ This should be understood in the context of a court's reviewing the validity of disciplinary steps taken by a church against a member (or a group of members) who has contravened the church's internal rules and doctrine. Of relevance to the courts is whether a member (or a group of members) voluntarily committed himself or herself to being bound to the internal rules and doctrine⁴⁷ of the church; whether the action taken by the church in sanctioning a member (or a group of members) is in accordance with its internal rules and doctrine (and therefore not *ultra vires*); and whether such action was procedurally equitable and just.⁴⁸ Needless to say, when a religious association acts in a

⁴⁶ See for example, Woolman and Zeffertt 2012 *SAJHR* 205-206; and Raath and De Freitas 2002 *NGTT* 276-284. Also see the South African Supreme Court of Appeal judgments of *Mohamed v Jassiem* 1996 1 SA 673 (A), especially 714D, and *Kievits Kroon Country Estate v Mmoledi* (875/12) [2013] 189 (ZASCA) para 27.

⁴⁷ Especially when it pertains to the "core doctrine" of a church. Note here what Justice Ngcobo in his minority judgment said in the South African Constitutional Court judgment of *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) namely: "as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the doctrine. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, do not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of a practice", cited in *Taylor v Kurtstag* 2005 1 SA 362 (W) para 41. Also see *Mohamed v Jassiem* 1996 1 SA 673 (SCA) 713J-714E, also cited in *Taylor v Kurtstag* 2005 1 SA 362 (W) para 40. Justice Ngcobo's statement in the above should also be understood in the sense that the foundational beliefs of the non-religious are also incapable of scientific proof and can seem "bizarre, illogical or irrational" to the religious as well. This should be taken note of by the South African judiciary in future matters pertaining to the rights of religious associations. Consequently, in the midst of disagreement there needs to be an equitable degree of acceptance of the beliefs (whether religious or non-religious) of "others".

⁴⁸ Examples of an equitable and just approach are, "...the right to know the case one has to answer; the right to representation; the right to test evidence through cross-

manner not conducive to the protection of fundamental rights and the harm committed to a member (or a group of members) is of a serious nature, the courts should intervene.⁴⁹

As referred to above, the Court in *De Lange* elaborated on the importance of associational rights where not only individuals but also members of a particular religion have the right to practise that religion

in association with others and in conformity with the dictates, precepts, ethical standards and moral discipline which that faith exacts.⁵⁰

In this regard,

the internal rules adopted by the Church should be left to the church to be determined domestically and without interference from a court⁵¹

and persons who voluntarily commit to a religious association's rules should be prepared to accept the outcome of fair hearings conducted by those bodies.⁵²

In the context of the popularly followed principle of "avoidance of doctrinal entanglement by the judiciary",⁵³ the relief sought by the Appellant was not very challenging to the Court in *De Lange*. The reason for this was that: (1) the MCSA's rules were clear pertaining to its recognition of heterosexual

examination; the right to an impartial tribunal; the clarity and transparency of offences and penalties; the right to an effective appeal; and the obligation on tribunals to give reasons for decisions" (Hill *Right to Due Process in the Church* 70).

⁴⁹ In this regard, the Supreme Court of Canada in *R v Big M Drug Mart Ltd* 1985 1 295 (SCR) has the following to say: "Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience", cited in Benson *Associational Framework* 72.

⁵⁰ *De Lange* para 31. Also see paras 32-38.

⁵¹ *De Lange* para 39.

⁵² *De Lange* para 40.

⁵³ With reference to the South African High Court decision of *Taylor v Kurtstag* 2005 1 SA 362 (W), Justice Ponnann explains that the "doctrine of entanglement qualifies a reluctance of the courts to become involved in doctrinal disputes of a religious character" (*De Lange* para 33), and, referring to *Ryland v Edros* 1997 2 SA 690 (C) in *Taylor v Kurtstag* 2005 1 SA 362 (W), Justice Ponnann states that this doctrine "may now be part of our law" (*De Lange* para 33). This, observes Justice Ponnann (referring to *Allen v Gibbs* 1977 3 SA 212 (ES) in *Taylor v Kurtstag* 2005 1 SA 362 (W)) differs from the position prior to the coming into force of the *Constitution*, where the court "refused to 'adjudicate upon a doctrinal dispute between two schisms of a sect unless some proprietary or other legally recognised right was involved'" (*De Lange* para 33). In other words, the "new approach" is that where issues arise which do involve matters of doctrine, even when proprietary or other legally recognised rights are involved, courts would be precluded from deciding the issues. See the rest of 703 of *Ryland v Edros* 1997 2 SA 690 (C) to confirm this.

marriages only;⁵⁴ (2) the Appellant had voluntarily committed herself to the internal rules of the Church; and (3) the procedures followed in the disciplinary action taken by the church were in accordance with its internal rules and were just as well as equitable. The doctrinal matter underlying the church's approach towards the Appellant was the fact that the Appellant was involved in a "same-sex civil union" and this was in opposition to a central tenet of the church, which exclusively allowed for "heterosexual marriages". Not only was this a core doctrine of the Church, but it was coupled to someone involved in a "core function of the Church" (someone who was involved in the "spiritual leadership" of the Church⁵⁵), the Appellant being at the time an ordained and practising Minister in the MCSA.

As stated earlier, the Appellant was not calling upon "unfair discrimination based on sexual orientation in her claim",⁵⁶ but rather she was advancing a case based on an entitlement to fair administrative action.⁵⁷ In the words of the Court as per Justice Ponnar:

Despite having sought a declaratory order to the effect that the decision by the Church to discontinue her as a minister constituted "unconstitutional and unfair discrimination based on sexual orientation" ... she [the Appellant] deliberately chose, with legal advice, not to pursue this case on that ground. We cannot therefore decide it on a basis that she disavowed.⁵⁸

⁵⁴ This, irrespective of the fact that the Church was, at the time, involved in debates related to the accommodation of same-sex civil unions.

⁵⁵ In the South African Equality Court case of *Johan Daniel Strydom v Nederduitse Gereformeerde Kerk Moreleta Park* 2009 4 SA 510 (EqC) (hereafter *Strydom*), the respondent (a church) terminated the contract it had with the complainant, who was a music teacher in the church, due to the complainant having been involved in same-sex conduct; conduct which was in opposition to the core doctrine of the Church. Justice Basson found among other things that there was no convincing evidence by the Church that the complainant "was in a position of spiritual leadership" (*Strydom* para 17); and therefore that the Church was in no position to sanction the complainant. In this regard, see Lenta 2009 *SALJ* 827-860, who argues in support of providing religious associations with the freedom to act in accordance with their internal rules of governance when sanctioning a member who is involved with the "core functions" of such an association. For scholarship in support of providing religious associations with a more substantial degree of autonomy (hereby differing to some extent from the position taken by Lenta 2009 *SALJ*), see De Freitas 2013 *BYU L Rev* 421-455; and Benson 2008 *CCR* 295-310. For scholarship in stark contrast to the view taken by De Freitas 2013 *BYU L Rev* and Lenta 2009 *SALJ*, see Bilchitz 2012 *SAJHR* 296-315. Bilchitz argues for a strict limitation on the rights and freedoms of religious associations when it comes to appointments by such associations of persons who sexually conduct themselves in ways that are in conflict with the central doctrine of the said associations.

⁵⁶ Although counsel for the Appellant sought to advance such a case in her heads of argument, which were subsequently renounced by the appellant.

⁵⁷ See *De Lange* para 19.

⁵⁸ *De Lange* para 19. This disavowment was unequivocally expressed by the Appellant in a replying affidavit and the Court confirmed that "affidavits constitute both the

The Court therefore found it unnecessary to address the

collision between the rights to freedom of association and religious freedom on the one hand, and the right to equality on the other, or to enter into the very enlightening and thought-provoking debate on that score.⁵⁹

For the Court the question was whether the appellant had shown good cause for avoiding arbitration – *De Lange* was about

an alleged arbitration agreement and whether it should be set aside or avoided ... and the case was argued on the footing that there was a binding arbitration agreement concluded by the parties.⁶⁰

The question that is the focus of this article is the following: what would the position have been if the Appellant had advanced a claim of "unfair discrimination based on sexual orientation"? *De Lange* stands as a lost opportunity for the judiciary to develop South African constitutional jurisprudence pertaining to the relationship between "equality and conduct related to sexual orientation" on the one hand, and the "associational rights of religious associations" on the other.⁶¹ The closest that the judiciary has come to this in the democratic South Africa was in *Johan Daniel Strydom v Nederduitse Gereformeerde Kerk Moreleta Park (Strydom)*.⁶² However, in *Strydom* the complainant's position and function in the Church was not viewed as akin to "spiritual leadership". Also, the complainant was not a member of the said congregation and his contract with the Church did not stipulate that he had to refrain from sexual conduct with someone of the same sex (or, for that matter, any other sexual conduct in opposition to that permitted by the central doctrine of the Church). In *De Lange* the Appellant was ordained as a Minister⁶³ in the MCSA and was involved in an office related to "spiritual leadership" and a "core function" of the Church.

pleadings and the evidence", see *De Lange* para 19. Also, according to the Court, it seemed that the Appellant's claim of unfair discrimination based on sexual orientation, which was included in the heads of argument, had not been pursued in the High Court (*De Lange* para 19).

⁵⁹ *De Lange* para 20.

⁶⁰ *De Lange* para 43.

⁶¹ As stated earlier, this was as a result of the Appellant's having disavowed relying upon a claim of "unfair discrimination based on sexual orientation", which she had sought in her heads of argument. In fact, the Court in *De Lange* was concerned that this claim had not already been initiated when the Appellant approached the High Court (*De Lange* para 19).

⁶² See *Strydom* above.

⁶³ Justice Wallis, in his concurring opinion in *De Lange*, provides an interesting analysis and finding pertaining to whether the ordination of a Minister by a Church results in a contractual agreement between the Minister and the Church. Having consulted, among other cases, the majority decision in the UK case of *Preston v President of the Methodist Conference* 2013 4 All ER 477 (SC), Justice Wallis found that the

As stated earlier, the Court found it unnecessary to deal with "the right to equality" and its "collision" with the "rights to freedom of association and religious freedom". Why the Appellant did not include this option remains unclear. If the SCA were to decide on this constitutional matter, then it is argued that an approach needed to have been taken which ascribed substantial autonomy to a church when confronted with conduct by "spiritual leaders" (or persons related to the "core function" of the church) emanating from sexual orientation – conduct contrary to the church's central doctrine. In the words of Justice Ponnau:

As the main dispute in the instant matter concerns the internal rules adopted by the Church, such a dispute, as far as is possible, should be left to the Church to be determined domestically and without interference from a court. *A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement.* It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.⁶⁴

The Court in this regard places a very strict burden as to when the judiciary should intervene in the affairs of religious associations. Here Justice Ponnau clearly states that in a dispute of this kind, a court must only become involved when it is "strictly necessary" to do so, and that the court should "avoid doctrinal entanglement". This understanding should also apply to questions related to conduct in accordance with sexual orientation that is in opposition to the central tenets of religious associations, especially when it pertains to persons in "spiritual leadership" positions and who perform the "core functions" of a church. It is common knowledge that the practice of religion may lead to the violation of other beliefs (whether religious or not) or of other rights, and one would have to look at each instance so as to determine the nature of the right being violated or threatened and the severity of the violation or the threat.

In addition, how we understand rights can overlap with what our beliefs (whether religious or non-religious) dictate to us, and this in turn has an influence on what we understand the nature of a right to be, or how seriously we view a specific violation of or threat to such a right. In this regard, a claim of "unfair discrimination based on sexual orientation" in the context of the right to "equality" that surfaced in *De Lange* requires further attention, and this in turn requires addressing the nature of "conduct related to sexual

Appellant's relationship with the Church is not a contractual relationship "but an expression of her vocation to ministry exercised under the discipline of the church" (*De Lange* para 66).

⁶⁴ *De Lange* para 39 (author's emphasis).

orientation". This has implications as to whether the prohibition of appointments by religious associations based on forms of sexual conduct that oppose the core doctrine of such an association should in fact constitute unfair discrimination (and consequently a violation of the right to equality) in a democratic society that aims to foster diversity. According to De Freitas:

Many religious and non-religious believers, cultures and religious associations in South Africa have as part of their core belief, requirements pertaining to sexual conduct, which are inextricably connected to foundational views on marriage, family, child-rearing and purpose in life ... Irrespective of race, creed or culture, the living (and dead) human body is sacrosanct. The creeds of, for example, the mainstream religions in South Africa are in agreement with this ... Questions as to how and for what purposes we use our bodies are therefore of fundamental concern and naturally overlap with our foundational beliefs and consequently our right to freedom of religion, belief and opinion.⁶⁵

From this it can be gleaned that the form (or forms) of sexual orientation that we choose to practise is of substantial concern and value to us. There are differences among us in this regard, differences which make for highly contentious debates and which are deeply rooted and multi-layered, intertwined with substantial moral concerns, and linked to centuries of religious and cultural tradition and doctrine. There are also many layers of history, philosophy and theology anchored in the psyche and the emotions. All of these are inextricably connected to religious associations due to the nature of religion. In the words of Iain Benson:

what kinds of civil associations discuss the nature of the person and the relationship between the sacral, the sexual and the moral most rigorously and with most impact to the society around them?⁶⁶

The constitutions of religious associations busy themselves with moral questions, unlike those of many other types of associations, such as sports clubs, trade unions and charitable organisations. Religious associations in many instances take seriously matters such as divorce, adultery, the use of demeaning or blasphemous language, the consumption of alcohol, smoking, dietary laws, pornographic material, shopping on holy days, and unhealthy life styles. In the words of Iain Benson:

These rules do not and are not intended to "make sense" to those outside of the particular traditions that uphold them and it is their very peculiarity to outsiders that ought to and does make us chary about trying to judge such beliefs from outside.⁶⁷

⁶⁵ De Freitas 2012 *SAJHR* 262.

⁶⁶ Benson *Associational Framework* 137.

⁶⁷ Benson "Inside/Out and Outside/In" 12.

With this in mind we must be cautious of ascribing generalised meanings to concepts such as "unfair discrimination", "equality" and "harm" in the context of conduct in accordance with sexual orientation. For example, Justice Albie Sachs' view on "equality" in this regard is most insightful where in *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁶⁸ he comments that:

Equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.⁶⁹

In *Minister of Home Affairs and Another v Fourie and Another (Fourie)*⁷⁰ Justice Sachs states:

... acknowledgement by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.⁷¹

The protection of human rights demands agreement on certain fundamentals; yet, on the other hand, the quest for such protection should include sensitivity towards the different meanings that may be ascribed to such rights, as beliefs (whether religious or non-religious) in many instances play a role in the interpretive process. This is to be expected from heterogeneous societies ruled under constitutions that are supportive of democracy and pluralism. This is in line with a contemporary departure from the Rawlsian ideal of overlapping consensus in even contentious moral

⁶⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC).

⁶⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) 1574-1575.

⁷⁰ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).

⁷¹ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 98. In *De Lange*, Justice Ponnar refers to the following relevant excerpt from the *Fourie*-judgment, namely: "In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other" (*De Lange* para 31).

matters towards that of the idea that legal contestability should remain open,⁷² and that reason's diversity is natural to societies.⁷³

John Inazu makes a comment most relevant to the purposes of this article, pertaining to the clash between a religious association's acceptance of certain forms of sexual conduct and forms of sexual conduct that may be opposed by such an association. Inazu states:

We are left with a choice between two constitutional visions: a radical sameness that destroys dissenting traditions or the destabilizing difference of a meaningful pluralism. Honouring one ideal sacrifices the other.⁷⁴

The latter vision should be adopted to further the richness of pluralism. In a diverse society such as South Africa, which prides itself on its Constitution, the importance of this for group interests with special emphasis on religion cannot be over-emphasised. *De Lange* not only addresses this, but also presents future possibilities to us as postulated in the above.

4.2 Religious associations and arbitration in South Africa

The differences in the majority and minority judgments related, among other things, to the relevance of determining whether there was a "contractual relationship" between the Appellant and the Church and whether there was an "agreement to arbitrate". As stated earlier, according to the majority judgment there was an arbitration agreement because the Appellant "accepted" that the Convener was entitled to sign on her behalf whilst, according to the minority judgment, there was no arbitration agreement, because there was no contractual relationship between the Appellant and the Church. Consequently, according to Justice Wallis all other agreements (including the arbitration agreement) emanating from the relationship between the Appellant and the Church should be void. Added to this, and contrary to the majority judgment, the minority judgment found that there was no agreement to arbitrate in any event (because the Appellant had not personally signed for arbitration), but this was of no consequence, as there was no contractual relationship of employment (for reasons already explained). This finding (as stated earlier) would not have influenced the outcome of the majority judgment.

What should the position be in the light of Justice Wallis' view that there was no contractual relationship (of employment) between the Appellant and the

⁷² Benson *Associational Framework* 16.

⁷³ Rescher *Pluralism* 77-78.

⁷⁴ Inazu *Liberty's Refuge* 184.

Church, and therefore (for reasons already explained) no arbitration agreement to be bound to? This means, according to Justice Wallis, that even if there were an agreement to arbitrate, then this would fall away due to there being no contractual relationship (of employment). It is the author's view that the Appellant voluntarily accepted the authority of the L & D (which includes arbitration arrangements) when she joined the Church, and that the finding by Justice Wallis that there was no contractual agreement (of employment) between her and the Church is therefore irrelevant. In other words, the mere fact that the Appellant bound herself to the L & D, the latter including arbitration options (as a last resort before the courts are approached), is sufficient to allow for arbitration if an agreement is reached for arbitration. This is justified by the importance of the protection of the rights of religious associations as argued for earlier, and the contractual requirements as set out by Justice Wallis for the relationship between the Appellant and the Church are therefore not applicable.

With the above in mind, it is submitted that where the rules of a church make allowance for arbitration, it is best that the internal rules stipulate that the complainant personally sign a written agreement with the church to confirm an agreement. Rather than having the convener of the arbitration panel sign on behalf of the complainant, as took place in this instance. This would be preferable, irrespective of the rather convincing finding by Justice Ponnar that the Appellant "accepted" that the Convener was entitled to sign on her behalf, thereby bringing a binding (written) agreement into force.⁷⁵ If the complainant refuses to sign acceptance for arbitration then the ordinary process of going to court should suffice. It also needs to be noted that the L & D on the one hand stipulated an obligation to arbitrate disputes (rather than to resort to secular courts), while on the other hand the L & D suggested that it was for the convener to determine if the dispute in question should go for arbitration.⁷⁶ It would therefore be more prudent for those rules of a church making provision for arbitration to stipulate either an "exclusive obligation" for arbitration or that the convener should make a determination whether arbitration should be entered upon (but that preference should be given to the former).

Having said this, however, it is questionable whether arbitration should be included in the rules of a church, bearing in mind Justice Wallis' view that

it is conceivable that the right of persons to hold an office, which could include a person in the position of a minister of religion ordained to serve within a

⁷⁵ *De Lange* para 24.

⁷⁶ See *De Lange* para 50.

particular faith or denomination, is also a matter of *status*⁷⁷ that cannot be the subject of an arbitration agreement.⁷⁸

Therefore, whether provision should be made for arbitration in accordance with the civil law (in this regard, the *Arbitration Act*) in a religious association's internal rules related to an "office" in the church is questionable, notwithstanding the advantages of arbitration such as bringing a dispute to an end, as well as its being a less expensive and faster means of coming to a resolution. Such advantages should always remain subordinate to the accepted autonomy of religious associations to practise their religion in accordance with their own rules and doctrine (within, of course, the bounds of equity and justice). This should be understood against the broader understanding that the avoidance of "doctrinal entanglement" necessitates as far as is possible an avoidance of an overlap with the civil law and the internal rules of a church where, due to such overlap, conflict may arise between the processes followed by a church in doctrinal sanctioning and the processes required by the civil law. In the same breath it needs to be noted that nothing prevents a religious association from developing its own "alternative dispute resolution" structures and procedures as long as these accord with non-derogable principles of law such as natural justice.

5 Conclusion

De Lange confirms the general position taken by the judiciary (both in South Africa and abroad) that matters related to the internal rules, governance and doctrine of religious associations do not form part of its jurisdiction. It is rather for the judiciary to review whether the disciplinary procedures followed by a church and the actions taken in this regard are in accordance with the relevant church's own rules, governance and doctrine. The relief applied for in *De Lange* by the Appellant limited the SCA to deciding on matters of procedure and therefore the Court was exempt from deciding on matters that went beyond this, more specifically the relief originally sought, yet disavowed by the Appellant, which was grounded upon "unfair discrimination based on sexual orientation". In this regard, a golden opportunity was lost to develop the jurisprudence related to the parameters of the associational rights of religious associations. Nevertheless, this article, against the background of conduct related to sexual orientation

⁷⁷ In the context of s 2(b) of the *Arbitration Act*.

⁷⁸ See *De Lange* para 45 (author's emphasis). "Status" also includes questions related to a person's matrimonial status; whether they are a minor or have been tacitly emancipated; and whether they have become incapable of managing their affairs; their domicile and similar matters, see *De Lange* para 45.

which is in opposition to a religious association's doctrine, proposes an understanding that would best be aligned with a generous approach to the parameters of the rights of religious associations in a society that subscribes to democracy and pluralism.

Then there is the issue related to the relevance and value of arbitration in accordance with the *Arbitration Act* in disciplinary proceedings of religious associations in South Africa. It needs to be noted that the Appellant voluntarily accepted the authority of the L & D (which includes arbitration arrangements) when she joined the Church, which is why the finding by the minority judgment in *De Lange* that there was no contractual agreement (of employment) between her and the Church and therefore that there could be no agreement to resort to arbitration, is irrelevant. In other words, the mere fact that the Appellant bound herself to the L & D, the latter including arbitration options (as a last resort before the courts are approached), is sufficient to allow for arbitration, and this is qualified by the autonomy to be ascribed to religious associations regarding disciplinary procedures. However, a cautious approach is proposed, it being preferable to have the complainant explicitly and personally agree to arbitration specifically. Where arbitration is provided for in the internal rules of a religious association in South Africa, the association's rules should entail an express signature by the complainant to confirm his or her acceptance of the process of arbitration. Rather this than have a Convener sign on behalf of the complainant, where the latter has given consent thereto.

Having said this, the *Arbitration Act* might not be applicable, depending on an interpretation of the word "status", where disputes pertaining to "status" are not subject to arbitration as prescribed by the said Act. Here one needs to bear in mind that this was not a concern according to the majority judgment in *De Lange*, and therefore *De Lange*, being a SCA judgment, can be used as precedential authority negating the concern related to "status". In the context of the popular acceptance by the judiciary of the ascription of substantial autonomy to religious associations in the course of doctrinal sanctioning, it should suffice for a church to sanction a member or holder of an office in the church in accordance with its own rules (within the parameters of equity and justice), thereby not necessarily requiring the inclusion of the civil law in such proceedings, irrespective of the benefits of such civil law. On the other hand, there should be no reason why a religious association, due to the autonomy to be ascribed to it, may not be allowed to develop its own "alternative dispute resolution" structures and procedures, as long as these accord with non-derogable principles of law such as natural justice.

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Legislation

Arbitration Act 42 of 1965

List of Abbreviations

BYU L Rev	Brigham Young University Law Review
CCR	Constitutional Court Review
CDC	Connexional Disciplinary Committee
DDC	District Disciplinary Committee
L & D	Laws and Discipline of the Church
MCSA	Methodist Church of Southern Africa
NGTT	Nederduitse-Gereformeerde Tydskrif / Dutch-Reformed Theological Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SCA	Supreme Court of Appeal