CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 223/14

In the matter between:

ECCLESIA DE LANGE Applicant

and

PRESIDING BISHOP OF THE METHODIST CHURCH OF SOUTHERN AFRICA FOR THE TIME BEING First Respondent

EXECUTIVE SECRETARY FOR THE TIME BEING OF THE METHODIST CHURCH OF SOUTHERN AFRICA Second Respondent

Neutral citation:	*De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* [2015] ZACC 35
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J and Zondo J
Judgments:	Moseneke DCJ (unanimous): [1] to [68] Van der Westhuizen J (concurring): [69] to [86]
Heard on:	28 August 2015
Decided on:	24 November 2015
Summary:	Unfair discrimination on ground of sexual orientation — disavowal — freedom of religion — right to maintain religious associations — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 — principle of constitutional subsidiarity

Section 3(2) of Arbitration Act 42 of 1965 — good cause not shown — Rule 16A on admission as amicus curiae — leave to appeal denied

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

(a) The application to be admitted as amicus curiae by Freedom of Religion South Africa is refused.

(b) Leave to appeal is refused.

(c) There is no order as to costs.

JUDGMENT

MOSENEKE DCJ (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] Ms Ecclesia de Lange, the applicant, has approached this Court asking for leave to appeal against a decision of the Supreme Court of Appeal. That decision concerned her suspension and discontinuation as a minister of the Methodist Church of Southern Africa (Church or respondents). The Church suspended and subsequently discontinued her role as an ordained minister after she had publicly announced her intention to marry her same-sex partner.

[2] While this dispute raises numerous difficult questions, the immediate issues before this Court are two: whether to overturn the decisions of the Supreme Court of Appeal and Western Cape Division of the High Court, Cape Town (High Court) refusing to set aside the arbitration agreement between Ms De Lange and the Church; and whether this Court should reach and decide the unfair discrimination claim that is now the mainstay of Ms De Lange's case.

Factual background

[3] Ms De Lange first realised in her late teens that she was a lesbian. The disclosure of her sexual orientation led to painful ruptures with her family and the Church, causing her immense emotional loss. Motivated by a sincere desire to serve God, she returned to the Church some years later and eventually answered a call to ministry. In August 2001, she became a probationary minister and in August 2006 she was ordained a minister of the Church.

[4] In April 2004, Ms De Lange began a relationship with a same-sex partner. This relationship deepened with time. In December 2004, she and her partner began living together in the Church manse at Grassy Park, Cape Town, with the knowledge of Church officials. They continued living together in the manse until December 2005 when she relocated to Vredekloof.

[5] From December 2006, Ms De Lange began working as a minister of the Brackenfell and Windsor Park congregations. On the Sunday morning of 6 December 2009, she announced to the congregation her intention to marry her partner. On 8 December 2009, the Church informed Ms De Lange that her announcement was in breach of clause 4.82 of the Church's Laws and Discipline.[1] The Church took the view that in announcing her intention to enter into a marriage

[1] Clause 4.82 of the Laws and Discipline of the Methodist Church of Southern Africa 11 ed (2007) (Laws and Discipline) states: "Ministers shall observe and implement the provisions of the Laws and Discipline and all other policies, decisions, practices and usages of the Church".

with her same-sex partner, she had breached its policy, practice and usage of recognising only heterosexual marriages.

[6] On 10 December 2009, the Church suspended Ms De Lange. Within five days thereafter, on 15 December 2009, she and her partner entered into a same-sex union in terms of the Civil Union Act.[2] They are presently divorced.

[7] The Church's district disciplinary committee convened a hearing to consider the charges against Ms De Lange. On 13 January 2010, the committee found her guilty, sentenced her to time already served under her suspension and further suspended her without emoluments or station. On 18 January 2010, Ms De Lange appealed the committee's decision to the connexional disciplinary committee.[3] On or around 17 February 2010, the connexional disciplinary committee upheld the prior verdict but changed its censure to discontinuation as a minister of the Church. The effect of discontinuation was that she remained an ordained minister, but was barred from exercising any ministerial functions, holding any station or receiving any emoluments.

[8] On 31 March 2010, Ms De Lange referred the matter to arbitration in terms of clause 5.11 of the Laws and Discipline. It provides for binding arbitration of disputes between the Church and its ministers in these terms:

> "No legal proceedings shall be instituted by any formal or informal structure or grouping of the Church or any minister or any member of the Church, acting in their personal or official capacity, against the Church or any formal or informal structure or grouping of the Church, Minister or member thereof for any matter which in any way arises from or relates to the mission work, activities or governance of the Church. The mediation and arbitration processes and forums prescribed and provided for by the Church for conflict dispute resolution (Appendix 14) must be used by all

[2] 17 of 2006.

[3] The Connexion is the headquarters level of the Methodist Church of Southern Africa.

> Ministers and members of the Church. If a matter is referred to arbitration, the finding of the Arbitrator shall be final and binding on all Ministers and members of the Church."

[9] The Laws and Discipline provide for the appointment of an arbitration panel and a convener.[4] The convener is empowered to determine the correct forum for the dispute, designate an arbitrator, determine the issues for arbitration, finalise the arbitration agreement and sign the arbitration agreement on behalf of a party who refuses to sign.[5] In the present dispute, the arbitration panel and the convener were all Church members.

[10] Between April and November 2010, the convener and Ms De Lange's attorneys exchanged letters about the arbitration agreement. Ms De Lange wished to (a) refer to arbitration the question whether she could be discontinued as a minister on the basis of her sexual orientation; (b) reserve her right of appeal before a court; and (c) have written-in an independent right to legal representation that was not at the discretion of the arbitrator. The convener assumed the stance that Ms De Lange's sexual orientation was not the basis of the charges or findings against her. On the other two points, the convener responded that the Laws and Discipline did not provide for an appeal to a court or for legal representation.

[11] On 28 October 2010, the convener circulated the final arbitration agreement to be signed by the parties and returned to him by 8 November 2010. Ms De Lange timeously signed the draft agreement sent by the convener, but did so under protest. The Church failed to sign the agreement sent by the convener; instead, it amended certain terms in the agreement and signed this amended version a day late, on

[4] Clause 2.1(i) of Appendix 14 of the Laws and Discipline provides that an arbitration panel "of not less than three persons and not more than five persons shall be appointed by Conference" according to criteria established by Conference. Clause 2.1(ii) of Appendix 14 of the Laws and Discipline provides that "there shall be a convener of this panel appointed by Conference". Conference is the principal decision-making organ of the Church.

[5] Clause 2.2(ii) of Appendix 14 of the Laws and Discipline.

9 November 2010. The Church claims to have made these changes because it had not previously provided any input on the draft. Ms De Lange became aware only much later that the Church had amended certain terms of the draft agreement sent to it by the convener.

[12] The convener selected a practising advocate, Gerald Bloem SC (Mr Bloem), also a Church member, as the arbitrator. On 3 December 2010, Ms De Lange's attorneys wrote to Mr Bloem requesting him to confirm his appointment as arbitrator and provide a date for the parties' preliminary meeting. After various delays, Mr Bloem replied on 16 January 2011. He informed them that he could make a pre-arbitration meeting in Cape Town on 5 February 2011.

[13] On 17 January 2011, Ms De Lange emailed Mr Bloem in an effort to expedite matters. She claims that her ensuing correspondence with Mr Bloem led her to conclude that he was failing to take the process seriously and might be unable to conduct the arbitration in an unbiased manner. In their correspondence, however, Ms De Lange told Mr Bloem that—

> "I would not have signed the [arbitration] agreement . . . if I had any doubts about you being appointed the arbitrator for the case. In particular, now that you have been appointed as Judge, I have even got more faith and confidence that you will deal with my arbitration in a fair and even handed manner."

[14] The pre-arbitration meeting was held on 5 February 2011. Ms De Lange says heated exchanges occurred between her and Mr Bloem during the meeting. She says that the exchanges further entrenched her perception of bias. It also emerged that the parties had signed different arbitration agreements. One of the disputed provisions was Ms De Lange's original clause 7 that provided that the parties did not waive any right to raise legal objections to the proceedings or claim. The other bone of contention related to two of the Church's amended clauses: clause 7 that read that the arbitrator may make any award that was just and appropriate; and clause 12 that provided that the arbitration decision was final and binding on the parties. The parties

were unable to resolve these points. Mr Bloem concluded that no arbitration agreement existed and referred the matter back to the convener.

[15] At that point, Ms De Lange refused to make further submissions to the convener or engage further with the arbitration process on the grounds that doing so would be futile. On 16 May 2011, the Church signed a revised arbitration agreement. This agreement left legal representation to the arbitrator's discretion and provided that the parties did not waive their right to raise legal objections. It did not expressly reserve Ms De Lange's right to appeal the outcome of the arbitration before a court. Since Ms De Lange refused to sign this agreement, the convener, as allowed by the Laws and Discipline, signed on her behalf in June 2011.[6]

[16] With the agreement in place, Mr Bloem requested dates for the arbitration hearing. Ms De Lange did not commit to any date. Instead, approximately a year later, in June 2012, she started litigation proceedings in the High Court. She sought an order setting aside the arbitration agreement under section 3(2) of the Arbitration Act[7] (Act).

High Court

[17] The respondents met Ms De Lange's claim by contending *in limine* (at the outset) that Ms De Lange was bound by the Laws and Discipline and had to submit to arbitration. Ms De Lange retorted that it would be unjust and unrealistic to

[6] Clause 2.2(ii) of Appendix 14 of the Laws and Discipline provides, in relevant part, that "[i]f either party refuses to sign the . . . agreement, the convener shall have the power to sign on their behalf".

[7] 42 of 1965. Section 3(2) of the Act provides:

> "The Court may at any time on the application of any party to an arbitration agreement, *on good cause shown*
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> (a) set aside the arbitration agreement; or
>
> (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
>
> (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred." (Emphasis added.)

expect her to take part in "an arbitration process that would be futile, unfair and serve no purpose".[8]

[18] The High Court noted that the Act and the Constitution existed side by side and that Ms De Lange was bound to undergo arbitration, unless the Court found that, under section 3(2) of the Act, she had shown good cause to deviate from the arbitration agreement. Ms De Lange complained that there had been a long delay in the finalisation of the arbitration agreement and that there still existed no arbitration agreement that had been signed by both parties. She argued that the conduct of the convener and the Church indicated bias. The bias charge was based on the deletion of Ms De Lange's clause 7 from the agreement that she had signed. It was also based on the insertion of the Church's amended clause 7 as well as clause 12 in the final agreement which the convener signed on behalf of Ms De Lange.[9]

[19] The High Court held that there was no good reason to object to the insertion of the Church's amended clause 7. All the clause did was state the usual power of an arbitrator. Ms De Lange's clause 7 simply dealt with the non-waiver of rights. The Court held that the final agreement did not take away or infringe on any of the rights that Ms De Lange sought to protect.[10] Ms De Lange also objected to the appointment of a member of the Church as the arbitrator. However, the Court held that this alone was not a cogent complaint and did not support the allegation that it would result in bias and an arbitration process that would not be objective.[11] The Court held further that the issues to be referred to the arbitrator would be wide

[8] *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa For the Time Being and Another*, unreported judgment of the Western Cape High Court, Cape Town, Case No 11159/2013 (26 June 2013) (High Court judgment) at para 13.

[9] Id at para 20.

[10] Id at para 23.

[11] Id at para 24.

enough to address any concerns that Ms De Lange had.[12] It concluded that she must submit to arbitration as it could not be said that arbitration would be unfair or futile.[13]

Supreme Court of Appeal

[20] Ms De Lange appealed to the Supreme Court of Appeal. Her appeal was dismissed.[14] The core issue before that Court was whether the Church had adopted a rule that precluded her, a minister of the Church, from announcing her intention to marry her same-sex partner.[15] The Court held that because the claim based on discrimination on grounds of sexual orientation was disavowed, it was "unnecessary to engage with the collision between the rights of freedom of association and religious freedom on the one hand, and the right to equality on the other".[16]

[21] The Court had to decide whether Ms De Lange had shown good cause, within the meaning of section 3(2) of the Act, for avoiding arbitration. The Supreme Court of Appeal held that good cause had not been shown. The Court advanced five reasons why Ms De Lange should not be permitted to avoid arbitration. First, a valid arbitration agreement had been concluded between her and the Church and the parties were bound by it.[17] The matter was brought into the ambit of the Act by the agreement signed by the Presiding Bishop, on behalf of the Church, and the convener, on behalf of Ms De Lange. It was common cause that the convener was entitled to sign in her place. Second, the delay in concluding the arbitration agreement was explicable – it was due to the differences between the parties on how the issues were to be characterised.

[12] Id at para 25.

[13] Id at paras 26-7.

[14] *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* [2014] ZASCA 151; 2015 (1) SA 106 (SCA) (Supreme Court of Appeal judgment). The Supreme Court of Appeal disposed of this matter through two judgments: one by Ponnan JA (Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA concurring) and a separate concurrence by Wallis JA with whom Fourie AJA concurred.

[15] Id at paras 6 and 28.

[16] Id at para 20.

[17] Id at para 24.

[22] The third ground on which Ms De Lange sought to escape the arbitration proceedings was that the arbitration agreement weighed heavily against her because it (a) required her to waive her constitutional rights; (b) ousted the power of the courts; and (c) denied her the right to legal representation. The Court held against her. It reasoned that the agreement expressly protected her constitutional rights by providing that "[t]he parties . . . do not waive any legal rights they [might] have to raise any objections".[18] It continued to hold that the agreement permits "an application to a competent court to review the findings of the arbitrator".[19] And that the Church has always accepted that the decision of an arbitrator may be subjected to judicial review on the ground of legality. The Court noted that the arbitration agreement was silent on entitlement to legal representation which, in any event, was within the discretion of the arbitrator. The arbitrator ruled that the parties would be represented by lay representatives – not legal representatives. The Court recalled that courts have consistently refused any entitlement to legal representation outside courts of law.

[23] Fourth, the Court refused to void the arbitration agreement on the ground that the appointment of the arbitrator, a member of the Church, was understandable. It ensured that people familiar with the workings of the Church were "appointed to the rather sensitive task of adjudicating disciplinary disputes" of this sort.[20] This was neither biased nor reasonably perceived to be biased. The fifth reason was that arbitration was the appropriate forum to decide the factual dispute which was the crux of this matter, that is, whether the Church had adopted a rule that precluded Ms De Lange from announcing, from the pulpit, her intention to marry her same-sex partner, and whether the district disciplinary committee and the connexional disciplinary committee were misdirected in finding that Ms De Lange

[18] Id at para 26, quoting the arbitration agreement.

[19] Id.

[20] Id at para 27.

was guilty of breaching the rules of the Church. Arbitration would therefore not be in vain.

[24] The Court held that arbitration proceedings are ideal because the dispute was "quintessentially [of] the kind . . . that a secular court should avoid becoming entangled in".[21] The Court held that this matter was not one for the courts, and that the sensitivity of the issues – church doctrine and governance related to marriage, a sacrosanct institution – were best left to the Church to determine internally.[22] The Court further held that the determination of who was morally and religiously suited to assume ministerial duties struck at the core of religious function.[23]

[25] In a separate concurrence, Wallis JA characterised the matter as one "about an alleged arbitration agreement and whether [the agreement] should be set aside or avoided".[24] The concurring judgment expressed reservations about the finding that there was an arbitration agreement and that the Act applies in this matter. The first reservation stemmed from the application of section 2 of the Act which excludes from arbitration "any dispute over any matrimonial cause or any matter incidental to such a cause or any matter relating to status".[25] From this, the concurring judgment raised the concern whether this matter was one related to Ms De Lange's status, and therefore excluded from the ambit of the Act. The second reservation was with the nature of the relationship between the Church and its ordained ministers. Ultimately, the concurring judgment got to the same outcome as the main judgment, albeit along a

[21] Id at para 30. The Supreme Court of Appeal held that the doctrine of entanglement strongly informs courts not to get involved in religious doctrinal issues. The effect of the doctrine is that courts are reluctant to interfere with religious doctrinal disputes. See also Supreme Court of Appeal judgment id at para 33, where the Supreme Court of Appeal discusses *Ryland v Edros* 1997 (2) SA 690 (C) wherein the High Court recognised this doctrine as part of our new constitutional dispensation.

[22] Supreme Court of Appeal judgment id at para 39 read with para 33.

[23] The Supreme Court of Appeal supported its finding that courts ought not to adjudicate on religious disputes with, inter alia, academic literature (see Supreme Court of Appeal judgment id at fns 8-10), as well as foreign jurisprudence of the United States of America, the United Kingdom, Australia and Canada (see Supreme Court of Appeal judgment id at paras 34-8).

[24] Supreme Court of Appeal judgment id at para 43.

[25] Id at para 44.

different path.[26] The concurring judgment nudged the parties to remove their dispute from the judicial secular arena, and to resolve it in accordance with clause 5.11 of the Laws and Discipline.[27]

In this Court

Amicus curiae

[26] Before I deal with the merits of this appeal, I dispose of a preliminary issue: the status of the application for admission as amicus curiae (friend of the court) by Freedom of Religion South Africa (FOR SA).

[27] On the morning of the hearing, counsel for FOR SA sought a postponement of the hearing in order to apply to be admitted as amicus curiae. The Court refused the postponement but granted FOR SA leave to file a substantive application.[28] On 11 September 2015, FOR SA lodged its application after serving it on Ms De Lange and on the Church. FOR SA, however, did not seek the consent of the parties. On 23 September 2015, Ms De Lange filed an answering affidavit. She professed to abide by the decision of the Court in relation to the application and pointed to three defects: (a) FOR SA did not state concisely what its submissions would be, if admitted; (b) FOR SA did not demonstrate that its submissions would be useful to the Court and that they did not repeat the parties' submissions; and (c) although FOR SA had not been granted leave to canvass additional factual material, it failed to restrict itself to the record before the Court. In fact, its papers run to 117 pages containing new facts and prolix and repetitive submissions.

[26] Id at para 43.

[27] Id at para 68.

[28] This Court made the following order on the day of the hearing, 28 August 2015:

> "1. The application for the matter to stand down or to be postponed is dismissed.
>
> 2. The applicant is granted leave to file an application for condonation and for admission as an amicus curiae no later than Friday 11 September 2015."

[28] This Court has considered the application and refuses FOR SA leave to be admitted as amicus curiae. The reasons follow. First, Ms De Lange is correct that the application offends the rules of this Court.[29] Second, the mainstay of the application is the Christian doctrinal definition of marriage and why it is not open to alteration by this Court. This judgment does not reach the difficult intersection of the doctrinal definition of marriage and unfair discrimination. This means that the main thrust of FOR SA's submissions is off the beam and will thus be of no help to the Court's task of resolving the present dispute. Finally, the application is belated and, if granted, will invite Ms De Lange into a further debate on a matter we do not reach.

Leave to appeal

[29] The anterior question is whether this Court should grant Ms De Lange leave to appeal the decision of the Supreme Court of Appeal. The test is by now well settled. The interests of justice dictate whether leave to appeal should be granted. A determination of where the interests of justice reside calls for a careful consideration of all relevant factors. Chief, but not solely determinative, would be whether there is a reasonable prospect that this Court may alter the decision sought to be appealed against. It takes little to appreciate that hearing an appeal that will not change the order targeted is rather fruitless for all concerned. There may be instances where, despite poor merits, this Court would hear an appeal because of a pressing public interest or important constitutional issue. Those instances will be rare and indeed exceptional. No litigant should be put to the burden, in all its forms within litigation, of seeing through an appeal that promises no reasonable chance of success.

[29] Rule 10(6) of the Rules of this Court lays down three requirements to be admitted as an amicus curiae. The application to be so admitted must—

> "(a) briefly describe the interest of the amicus curiae in the proceedings;
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> (b) briefly identify the position to be adopted by the amicus curiae in the proceedings; and
>
> (c) set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties."

[30] I am thus duty-bound to pose the question: is it in the interest of justice to hear the appeal? I think not. This conclusion I reach for a number of cumulative reasons:

(a) There is no reasonable prospect that this Court would reverse the decisions of the Supreme Court of Appeal and of the High Court that Ms De Lange had not shown good cause under section 3(2) of the Act to set aside the arbitration agreement between herself and the Church.

(b) The Supreme Court of Appeal was correct when it held that in the High Court Ms De Lange had unequivocally disavowed reliance on the unfair discrimination claim and was thus not free to raise the claim for the first time on appeal before the Supreme Court of Appeal. It is similarly the case before this Court.

(c) The doctrine of constitutional subsidiarity requires that an unfair discrimination claim must be heard by the Equality Court first. It was open to Ms De Lange to abide by this requirement by seeking a consolidation of her equality and arbitration claims to be heard under the dual but separate jurisdictions of the High Court.

(d) Ms De Lange failed to file a notice in terms of rule 16A of the Uniform Rules of Court. That omission has deprived other interested parties, including religious communities, of the opportunity to intervene as parties to the dispute or seek admission as amicus curiae. This ground alone is not sufficient for denying leave to appeal. It is, however, a relevant consideration within the assessment of the glitches this matter has run into on its journey through the courts.

(e) If, despite the preceding hurdles, this Court were to decide the unfair discrimination claim, it would do so as a court of first and last instance in a dispute of considerable complexity and vast public repercussions arising from competing constitutional claims.

[31] In examining these grounds closely, as I am about to, it is opportune to reassure ourselves of our nation's commitment to advance and celebrate our diversity, to

respect lawful choices we make and to afford us all equal respect, worth and dignity. And in this regard the equality jurisprudence of this Court remains a vital part of our democratic project, as does the right to association and to practise one's religion.

Setting aside the arbitration agreement

[32] Throughout the courts, Ms De Lange has consistently requested that the arbitration agreement be set aside or cease to have effect on the dispute. In doing so, she has assumed the stance that she is a party to the arbitration agreement within the meaning of section 3(2) of the Act, and that she has shown good cause to be relieved of her duties under the arbitration agreement.

[33] As we have seen, the High Court and the Supreme Court of Appeal disagreed with her contention. The main judgment in the Supreme Court of Appeal held that good cause had not been shown. The concurring judgment supported the outcome of the appeal but for a different reason. It was of the view that there was no valid arbitration agreement for the purposes of section 3(2) of the Act to set aside. This meant that in both courts the arbitration agreement stood valid.

[34] In this Court, Ms De Lange did not contend, correctly so in my view, that the arbitration agreement is invalid despite the life line thrown at her by the concurring judgment in the Supreme Court of Appeal. She rather urged us to set aside the agreement mainly because the constitutional underpinnings of her claim made arbitration an inappropriate forum to resolve this dispute. To this contention I will return later. In somewhat muffled tones, she added that the drafting of the agreement was flawed because the Church did not participate in the initial drafting stages and later unilaterally altered the draft agreement. And when she refused to sign the draft, the convener signed on her behalf but did not do this when the Church refused to sign.

[35] Both these complaints relate to how the agreement was concluded. However, they were not raised to impugn the validity of the arbitration agreement. The main plank of Ms De Lange's case is that there is a binding agreement that must be

set aside. She cannot now convincingly suggest otherwise, nor did she do so. During the hearing, Ms De Lange properly conceded that there was a valid arbitration agreement. We too must approach this dispute on that footing.

[36] The question still remains whether Ms De Lange has advanced good cause to escape the agreement. The Act is not particularly helpful on what could make up good cause. Nor have our courts expressly defined good cause. It is, however, clear that the onus to demonstrate good cause is not easily met.[30] A court's discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out.[31] It is neither possible nor desirable, however, for courts to define precisely what circumstances constitute a persuasive case.[32]

[37] The Supreme Court of Appeal correctly ventured the view that the requirement of good cause in order to escape an arbitration agreement entails a consideration of the merits of each case in order to arrive at a just and equitable outcome in a specific set of circumstances.[33] Put in another way: is it in the interests of justice to hold a party to an arbitration agreement that would result in a futile, unfair or unreasonable outcome or perhaps an unconscionable burden? The Act is of the pre-Constitution kind. Now our understanding of good cause must embrace an enquiry into whether the arbitration agreement, if implemented, would unjustifiably diminish or limit protections afforded by the Constitution. Absent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a truly compelling reason exists.[34] As this Court has itself stated—

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[30] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E-F.

[31] In *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 375, the Court called it a "very strong case".

[32] *Universiteit van Stellenbosch v JA Louw Edms (Bpk)* 1983 (4) SA 321 (A) at 334A. Here too, the Court resorted to the use of a "very strong case" but was reluctant to define what would amount to one.

[33] *South African Forestry Company Ltd v York Timbers Ltd* [2002] ZASCA 110; 2003 (1) SA 331 (SCA) at para 14, quoted approvingly in the Supreme Court of Appeal judgment above n 14 at para 23.

[34] For example, where allegations of fraud are best adjudicated in open court rather than private arbitration proceedings, or where a party's counterclaims affect third parties who were not subject to the arbitration and in

> "the values of our Constitution will not necessarily best be served by . . . enhanc[ing] the power of courts to set aside private arbitration awards. . . . If courts are too quick to find fault with the manner in which an arbitration has been conducted . . . the goals of private arbitration may well be defeated."[35]

[38] Ms De Lange raised a concern that the main issue to be referred to arbitration does not deal with her constitutional challenges. The issue, she says, is whether there is a clear rule or not that prohibits ministers of the Church from entering into same-sex marriages. The twist of the tale is here. During the hearing, Ms De Lange said she now accepts for the purposes of the proceedings in this Court that, although its terms are vague, there was a rule and she has transgressed it. The argument continues that her complaint now is how the Church relied on this rule. She then concludes that because of her concession that the rule exists and that she has transgressed it, the arbitration agreement has become vague and has lost its likely practical effect.

[39] I do not agree with this newly found contention. It is best met by looking at the terms of the arbitration agreement. The High Court described the issues to be referred to arbitration in terms of clause 3 of the arbitration agreement in this way:

> "3.1 Did the District Disciplinary Committee and/or the Connexional Disciplinary Committee have the jurisdictional authority to deal with the charges that were laid against the Complainant, namely that she acted in breach of paragraphs 4.82 and 11.3 in that contrary to the Laws and Discipline and/or policies, decisions, practices and usage of the Methodist Church of Southern Africa she announced to the Brackenfell and Windsor Park Societies her intention to enter into a same-sex civil union on 15 December 2009, it being the Church's policy, practice and usage to recognise only heterosexual marriages?

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respect of which the arbitrator lacks investigative powers. See *Welihockyj and Others v Advtech Ltd and Others* 2003 (6) SA 737 (W) at paras 28-9 and 35. See also Ramsden *The Law of Arbitration South African and International Arbitration* (Juta & Co Ltd, Cape Town 2009) at 108.

[35] *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at paras 235-6.

3.2 Does the arbitrator have the jurisdictional authority to deal with this dispute?

3.3 Should the:

3.3.1 verdict and the sentence of the Second Respondent; and

3.3.2 decision of the First Respondent to discontinue the Complainant;

be reviewed and set aside?"[36]

[40] From the terms of the agreement, the substantive questions on whether the preceding disciplinary committees had the power to discontinue, and properly discontinued, Ms De Lange's ministry sit at the centre of the envisaged arbitration. Even if, according to her, the main issue is the application of the rule by the Church, and not the rule itself proscribing same-sex marriages by ministers, the arbitrator will have the power to enquire into how the rule, if any, was enforced. So the arbitration will be useful and of practical effect.

[41] In another argument, Ms De Lange charged that the Church's stance on same-sex marriages was irrational or hypocritical. The Church allowed her to be in a homosexual relationship whilst being a minister, and allowed her to stay in the Church's manse with her partner, but drew the line at recognising her same-sex marriage. The Church responded that its doctrine recognises a marriage only between one man and one woman. It however strives to strike a balance between belief on the one hand and tolerance on the other. It tolerates homosexual relationships but requires its ministers not to enter into same-sex marriages. The line seems to be closely drawn to the Church's doctrine. Whether it is defensible, and was defensibly applied, is also a matter that the arbitration may productively canvass. It follows that we cannot assess whether the line is rational or hypocritical without adjudging the Church dogma.

[42] Happily, during the hearing both Ms De Lange and the Church assured us that this Court need not traverse that troubled terrain. It follows that the merit of the complaint on where the Church has chosen to draw the line between ministers in

[36] High Court judgment above n 8 at para 25.

homosexual relationships and those who have entered into same-sex unions is not and cannot be a bar to arbitration. If anything, the "irrational and hypocritical" distinction, on Ms De Lange's take, may be fruitfully explored at the arbitration, as the arbitrator probes the correctness of the decisions of the preceding disciplinary hearings.

[43] I am persuaded by the submissions of the Church that arbitration would be the ideal forum for Ms De Lange and the Church to see where the balance between dogma and tolerance should be struck. It is not only appropriate but it would be the best solution in the present circumstances. If the nature of the rule proscribing same-sex unions of ministers of the Church is vague and uncertain, domestic arbitration would again be the appropriate forum to provide clarity and indeed the reasonable accommodation that Ms De Lange urged upon this Court to find and impose on the Church.

[44] Ms De Lange's other complaint against the arbitration was bias. It amounted to this: the arbitrator is a member of the Church and is bound to represent the interests of the Church and make an award that is in line with its Laws and Discipline. In my judgement, the Supreme Court of Appeal rightly dismissed this charge. It has no factual basis. In a long letter to the arbitrator, Mr Bloem, Ms De Lange denied ever having accused him of incompetence or bias. The Supreme Court of Appeal correctly held that arbitration would not be vitiated only by reason that the arbitrator was a member of the voluntary association concerned. Often, a member well-versed with the norms and rules of an association may be more suited to the arbitration task than an outsider.

[45] The decisions of the High Court and Supreme Court of Appeal that no good cause has been shown to set aside the arbitration agreement cannot be faulted. Further, arbitration is the appropriate forum to decide if the line that has been drawn by the Church in Ms De Lange's case is acceptable. It would not be appropriate for this Court to interfere at this stage especially considering that the line is close to the Church's doctrines and values. No good reason has been shown why arbitration

would not be suited to resolving the present dispute. In any event, the outcome of the arbitration would be open to judicial review and would create room for a fulsome and timeous pursuit of an equality claim.

The unfair discrimination claim

[46] In her notice of motion in the High Court, Ms De Lange initially asked for declaratory relief based on unfair discrimination. In turn, her founding affidavit stated that her application was grounded on the decision by the Church to discontinue her role as an ordained minister. She considered this decision wholly unfair. The reasons she advanced were aligned to the infringement of her right not to be discriminated against on the basis of her sexual orientation in terms of sections 9 and 10 of the Constitution. Ms De Lange also went on to assert that the Church's conduct contravened the Promotion of Equality and Prevention of Unfair Discrimination Act[37] (Unfair Discrimination Act).

[47] In answer, the Church pleaded that the High Court lacked jurisdiction to hear the matter because Ms De Lange raised an unfair discrimination claim, the Unfair Discrimination Act was applicable and the Equality Court had exclusive jurisdiction. The Church pointed out that, on her own version, Ms De Lange had conceded that the Unfair Discrimination Act was applicable, but failed to identify the specific provisions she purported to rely on. In addition, the Church pleaded that Ms De Lange had failed to comply with the procedural requirements of the applicable statute.[38] The Church concluded that Ms De Lange's cause of action was directly reliant on section 9 of the Constitution and disputed the correctness of the conclusions

[37] 4 of 2000.

[38] See section 20 of the Unfair Discrimination Act. Section 20(1) embraces a broad notion of standing. Once a complainant envisaged in section 20(1) institutes proceedings, the clerk of the Equality Court refers the matter to a presiding officer who then determines whether the application falls within the jurisdiction of the Equality Court. Before deciding whether a specific case should be heard, the presiding officer must consider all material factors as enunciated in section 20(4). If a matter fails to meet the jurisdictional requirements of the Equality Court, the presiding officer is empowered to direct the matter to an alternative forum. Section 20(9) further obligates the State and constitutional institutions to assist any person wishing to institute proceedings under the Unfair Discrimination Act.

of law that Ms De Lange drew. Nonetheless, the Church went on to argue that its discontinuation of Ms De Lange did not amount to unfair discrimination or, alternatively, that the discrimination was justified under section 36 of the Constitution.

[48] In her replying affidavit and in response to the Church's contention that the High Court lacked jurisdiction, Ms De Lange had this to say:

> "I am not seeking to advance a claim of unfair discrimination based on sexual orientation. I am advancing a case based on the administrative common law namely that I am entitled to fair administrative action and that the decision by the First Respondent does not comply with the common law prescripts in this regard."

[49] Ms De Lange reiterated this stance in the following fashion:

> "This is not a case where I complain about unequal treatment. Although unequal treatment is at the heart of the matter that is not an issue before this Court. All that this Honourable Court must decide is whether the Disciplinary Committee's decision is a rational just administrative action or not."

[50] The High Court refused to hear the matter on unfair discrimination and dismissed the application. Ms De Lange then, in her heads of argument and from the bar of the Supreme Court of Appeal, proceeded to advance the claim of unfair discrimination.[39] The Supreme Court of Appeal refused to decide the case on the basis of unfair discrimination, having found that Ms De Lange had unequivocally disavowed her unfair discrimination claim.

[51] In this Court, Ms De Lange sought to say the statement in her High Court replying affidavit was made on the advice of her legal team and not on a factual basis. She contended that the Supreme Court of Appeal erred in its assessment of the disavowal and that, if read in context, her replying affidavit simply responded to the

[39] Supreme Court of Appeal judgment above n 14 at para 19.

suggestion that she should have brought her application to the Equality Court rather than the High Court in terms of "administrative common law". The main thrust in this Court was that her disavowal was not unequivocal.

[52] There is no reason to depart from the Supreme Court of Appeal's finding that Ms De Lange unequivocally disavowed her unfair discrimination claim. Her very words are not open to doubt. She unambiguously deserted her unfair discrimination claim in order to escape the jurisdictional challenge posed by the Church. It would be plainly unfair to all concerned to permit her to revive at this late stage a claim she disavowed in certain terms.

Subsidiarity: unfair discrimination and the Equality Court

[53] The Church's first line of defence in its written submissions is the principle of constitutional subsidiarity. This Court, on numerous occasions, has held that where legislation is enacted to give effect to a constitutional right, a litigant may not by-pass the legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.[40]

[54] The Church submitted that Ms De Lange's claim may not be directly based on section 9(4) of the Constitution. It should have been channelled through the Unfair Discrimination Act and heard as required by section 20. In this Court,

[40] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31. The majority judgment repeated the importance of the principle of subsidiarity and the need to adhere to it. This Court held at para 160 that—

> "allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, 'would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation.'" (Footnote omitted.)

This Court further held at paras 122 and 180 that the Promotion of Access to Information Act 2 of 2000 is legislation enacted to give effect to section 32(2) of the Constitution, and therefore the applicant should have frontally challenged this legislation for its shortcomings in terms of the principle of subsidiarity.

See also *Sali v National Commissioner of the South African Police Service and Others* [2014] ZACC 19; 2014 (9) BCLR 997 (CC) at para 4 and *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 40.

Ms De Lange retorted that she could not take her claim to the Equality Court because her claim was not only about unfair discrimination in terms of section 9(4) of the Constitution, but also about the arbitration agreement between the parties. She went on to submit that a High Court cannot sit as an Equality Court and also have the powers of a High Court.

[55] Section 16(1)(a) of the Unfair Discrimination Act provides, subject to section 31, that every High Court is an Equality Court for the area of its jurisdiction. The beckoning question is whether a High Court sitting as an Equality Court has the powers of an Equality Court and of an ordinary High Court. Here, the question would be whether a High Court was empowered to resolve both the equality claim and the arbitration dispute at once.

[56] In a trilogy of cases, the Supreme Court of Appeal took the posture that the Equality Court is a special purpose vehicle and a creature of statute deriving its powers from the Unfair Discrimination Act. It existed separately and distinct from the High Court.[41]

[57] The Equality Court considered whether a consolidation of claims falling within the distinct jurisdictions of the High Court and Equality Court is permissible.[42] It made reference to the case of *George* where the Supreme Court of Appeal had paved the way for consolidation by remarking that—

> "the question of double jurisdiction this case raises is not unique, and is likely to arise in every case brought under the [Unfair Discrimination Act]: and . . . there is no reason why those who have interrelated remedies under the [Unfair Discrimination

[41] *Manong & Associates (Pty) Ltd v Department of Roads and Transport Eastern Cape and Others (No 2)* [2009] ZASCA 50; 2009 (6) SA 589 (SCA) at paras 54 and 57; *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Another (No 1)* [2009] ZASCA 59; 2009 (6) SA 574 (SCA) at paras 30-1; and *Minister of Environmental Affairs and Tourism v George and Others* [2006] ZASCA 57; 2007 (3) SA 62 (SCA) (*George*) at paras 12-3. See also *Qwelane v Minister of Justice and Constitutional Development and Others* [2014] ZAGPJHC 334; 2015 (2) SA 493 (GJ) (*Qwelane*) at para 5.

[42] *Qwelane* id at para 1.

> Act] and other legislation should not be entitled to pursue their remedies in parallel proceedings before the High Court, in its capacity as an Equality Court, and the High Court in its ordinary capacity.
>
> . . . .
>
> Given that the problem of concurrency will inevitably recur, the most productive and expeditious way of achieving efficiency would seem to lie in the matter being referred to the same High Court Judge who, in his capacity as an Equality Court Judge, is presiding in that Court."[43]

[58] In *George*, it was held that Equality Court proceedings and constitutional challenge proceedings may be consolidated for hearing before a single Judge sitting as Equality Court and as High Court.[44] There is indeed much to be said for this approach of permitting consolidation of disparate claims before a High Court. The consolidation will not only serve the procedural requirements of the Unfair Discrimination Act but will also avoid piecemeal litigation and costs.

[59] It seems to me, on this Supreme Court of Appeal authority, the consolidation of disparate claims was quite permissible at the time Ms De Lange initiated her claim in the High Court. It was open to Ms De Lange to seek consolidation to avoid the charge of violating the doctrine of constitutional subsidiarity. When her attention was drawn to the lack of jurisdiction of the High Court over an equality claim, she chose to avoid the difficulty by disavowing her unfair discrimination claim rather than following the path of seeking a court order to consolidate her disparate claims. This subsidiarity ground alone is fatal to the application for leave to appeal.

Rule 16A notice

[60] Rule 16A of the Uniform Rules of Court[45] serves to facilitate the admission of amici curiae by providing courts with guidelines on how this should happen.[46] It is an

[43] *George* above n 41 at paras 17 and 19.

[44] Id at para 17. The Equality Court came to the same conclusion in *Qwelane* above n 41 at para 8.

[45] These rules regulate the conduct of the proceedings in the High Court. Rule 16A, entitled "Submissions by an amicus curiae", in relevant part, provides:

entry point for non-parties into public interest matters with constitutional ramifications.[47] A court may waive the requirements of the rule.

[61] The Church submitted that Ms De Lange's failure to give notice of her intention to raise a constitutional issue – unfair discrimination – in terms of rule 16A is unfair as it effectively denies organised religious groups and supporters of gay and lesbian equality alike the opportunity to "join the fray" as amici curiae.[48]

[62] Our courts have considered the implications of non-compliance with rule 16A. The cases range from instances where the claimant failed to give notice to the registrar at the time of filing of the relevant pleading,[49] to instances where the claimant did not give rule 16A notice at all.[50]

"(1) (a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.

(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.

(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.

. . . .

(2) Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution . . . and these Rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties.

. . . .

(5) If the interested party . . . is unable to obtain the written consent [of the parties] he or she may, within five days of the expiry of the 20-day period prescribed in [sub-rule (2)], apply to the court to be admitted as an amicus curiae in the proceedings.

. . . .

(9) The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so."

[46] *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC) at para 25.

[47] Id.

[48] This argument is made to buttress the submission by the Church that it is not in the interests of justice to revive Ms De Lange's unfair discrimination claim, which she abandoned in the High Court.

[49] In *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* [2014] ZAECGHC 106; 2015 (1) BCLR 102 (E) at paras 15-7, Shoprite failed to

[63] Ms De Lange did not file a rule 16A notice at all. The Church argued that because of this omission, it was not in the interests of justice to grant her leave to appeal to advance her claim of unfair discrimination. It submitted this is so because this case is the first of its kind in our courts – the balancing of the rights to freedom of religion and of association, on the one hand, and equality rights in the context of sexual orientation on the other. The Church added that a case of "burning importance" such as this will have an effect on most, if not all, organised religions in South Africa because they too differentiate between their congregants and members on various grounds.

[64] It is true that prejudice that may have resulted from Ms De Lange's failure to give notice in terms of rule 16A has been partially remedied in this Court.[51] The door was not shut on potential amici who wished to enrich this constitutional debate, and assist the Court in arriving at a well-informed decision. However, as the late arrival of

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comply with rule 16A, but subsequently remedied this procedural defect. Shoprite then applied for condonation for not complying strictly with the rule. The High Court found that Shoprite had "shown good cause why its initial failure to comply [with the rule] should be condoned".

In *Weare and Another v Ndebele NO and Others* [2008] ZAKZHC 89; 2008 (5) BCLR 553 (N) at para 6, the High Court granted condonation for the lateness of the rule 16A notice. The applicants failed to notify the registrar within the prescribed period. The applicants had, however, notified the respondents within such time. The Court found that none of the parties had been prejudiced.

[50] In *Phillips v South African Reserve Bank and Others* [2012] ZASCA 38; 2013 (6) SA 450 (SCA); 2012 (7) BCLR 732 (SCA), the court of first instance (North Gauteng High Court) postponed the matter *sine die* (indefinitely) on the day of hearing because it found that Mr Phillips had not complied with rule 16A as there was no indication that he had filed a notice or, if it had been filed, that the notice had been placed on the relevant notice board. The High Court held that failure to comply with rule 16A(1) could not be condoned, and that if the applicant persisted with his constitutional challenge, the matter would have to be postponed so that rule 16A could be followed, and that Mr Phillips would bear the costs of the postponement. The High Court ordered Mr Phillips to pay "wasted costs" to the respondents. The Supreme Court of Appeal, however, set aside the order. The Court, per Farlam JA at para 55, also suggested a way forward in light of the frequency of non-compliance with rule 16A, part of which was that—

> "those responsible for drafting (and settling) founding affidavits in constitutional cases . . . should make it a practice of inserting an allegation that a notice (a copy of which is annexed) has been prepared in terms of the rule, and is to be handed to the registrar . . . when the founding . . . affidavit is filed."

Farlam JA also urged respondents, specifically organs of state, to "follow the practice of checking as soon as the papers are received that the rule has been complied with and, if it appears not to have been, of bringing the omission to the attention of the applicant's attorney".

[51] See the order of this Court dated 28 August 2015 above n 28 granting leave to FOR SA to file an application for condonation and admission as amicus curiae.

FOR SA shows,[52] there would have been considerable virtue in potential amici being able to enter the fray much earlier. Nevertheless, this ground raised by the Church is not in itself a sufficient ground for denying leave to appeal. It is, however, a relevant consideration within the assessment of the procedural glitches that this matter has run into on its journey through the courts.

Court of first and last instance

[65] If, despite the preceding hurdles, this Court were to decide the unfair discrimination claim, it would do so as a court of first and last instance in a dispute of considerable complexity and vast public repercussions arising from competing constitutional claims. This is not a run-of-the-mill claim for equal worth and regard in which this Court may, without more, dispense with the views of the High Court and the Supreme Court of Appeal. If and when the unfair discrimination claim has been properly ripened, it will require all the judicial, if not Solomonic, wisdom we Judges can muster right through our court system.

Conclusion

[66] For all the reasons I have advanced, leave to appeal must be refused.

Costs

[67] None of the parties sought costs and I would make no order as to costs.

Order

[68] The following order is made:

(a) The application to be admitted as amicus curiae by Freedom of Religion South Africa is refused.

(b) Leave to appeal is refused.

(c) There is no order as to costs.

[52] [26] to [28] above.

VAN DER WESTHUIZEN J:

> "And they always have the last word. What the [Court] decides, even with a narrow . . . majority, no person can change. It can declare elections . . . invalid . . . it can ban political parties. . . . [Its judgments] *reach out into the last office, into the last house.*"[53] (Emphasis added.)

[69] This somewhat bitter and angry criticism was aimed at the far-reaching powers of the German Federal Constitutional Court – one of the world's most respected courts. In the 1970s, a wave of criticism – sometimes in more brutal language – emanated from commentators in what was described as a "veritable Blitzkrieg" on the Court.[54]

[70] The reach of the power of courts – especially constitutional courts – is one of the most debated fundamental issues in any constitutional democracy.[55] Often the separation of powers is at the centre of the discourse: How far can a court go before it over-reaches and intrudes into the terrain of the Legislature or Executive? But another dimension of the same question may be as or even more important in the lives of many people: How far do the Constitution and its interpretation and enforcement by courts reach into our private and social lives? Is there, somewhere in our churches, temples, mosques and synagogues – or for that matter our kitchens and bedrooms – a

[53] Lamprecht and Malinowski *Richter Machen Politik* (Fischer Taschenbuchverl, Frankfurt 1979) at 11-2. The authors of the words above were the correspondent and editor, respectively, of current affairs magazine *Der Spiegel*. The free English translation is mine.

[54] See Van der Westhuizen "The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, with Reference to the German Experience (Part 2)" (1991) 2 *De Jure* 245 at 247.

[55] See, for example, De Vos and Freedman (eds) *South African Constitutional Law in Context* (OUP, Cape Town 2014) at 72.

"constitution-free" zone? This question has triggered many – sometimes emotional – discussions.[56]

[71] In this Court Sachs J said in *Christian Education*:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."[57] (Footnotes omitted.)

[72] During the presentation of oral argument, it was suggested that the sphere where Ms De Lange's disagreement with the Church plays itself out is beyond the Constitution's reach and influence. But, could we have a "constitution-free" space in a constitutional democracy under the rule of law? If so, where does it start? Could we ever operate outside the law when our conduct affects others?

[73] Counsel for Ms De Lange strenuously argued that there can be no "constitution-free" zone in a constitutional democracy. But, do we want courts to decide on our most private choices, likes and dislikes, based on religious and similarly intense preferences?

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[56] Questions on the reach of the law into private spheres, and its relation to morality, are not new. For example, generations of legal philosophy students have had to study the well-known debate between Professor HLA Hart and Lord Devlin. See, for example, Meyerson *Jurisprudence* (OUP, Melbourne 2011) at 279-83.

[57] *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) (*Christian Education*) at para 35.

[74] There is perhaps a third possibility. Could it be argued that the Constitution itself permits a free area?

[75] The Constitution is the supreme law of the land. It allocates powers to the State and enshrines the fundamental rights of its citizens. But it is more. It also states the values on which we have agreed. The Constitution is the credo that binds our nation together. It was born from our sad history of the violation of virtually all human rights and embodies our national vision of the future. It is the yardstick by which we have to measure our achievements and failures. A constitution has been referred to as the "autobiography of a nation", the "window to a nation's soul" or the "mirror in which a society views itself".[58]

[76] So, can one say that the Constitution does not reach our private religious and social spheres? I am not persuaded that we can. Is it not rather the case that the Constitution – as a set of values and protected fundamental rights – indeed reaches even into the most intimate spaces; *but* carries with it *all* the rights and values it recognises? This would include not only equality and non-discrimination which is of high importance in our constitutional constellation,[59] but also privacy, freedom of association and the autonomy of choice that necessarily goes with the recognition of human dignity. All of these were violated during our undemocratic past.

[77] Rights sometimes compete, as we know. The right to equality, for instance, often competes with the rights to free expression, dignity, privacy and freedom of association. Even values like freedom and equality may compete.[60] Therefore they often have to be weighed, balanced and limited. The limitation clause provides for

[58] These and other descriptions were widely used in debates about the drafting of a new constitution for a democratic South Africa in the years leading up to the adoption of the interim and the final Constitution.

[59] The phrase "constitutional constellation" was used in a memorable passage by Jackson J in *West Virginia State Board of Education v Barnette* 63 S Ct 1178 (1943) at para 10.

[60] These appear, for example, in sections 1 and 36 of the Constitution. Whether we are an "egalitarian" or a "libertarian" society has been the subject of debate.

this.[61] To some extent, the balancing exercise is also what the so-called horizontality debate is about.[62]

[78] In *Christian Education* the following was stated:

> "[S]pecial care has been taken in the text expressly to acknowledge the supremacy of the Constitution and the Bill of Rights. Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to 'privatise' constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant."[63] (Footnotes omitted.)

[61] Section 36 of the Constitution provides that:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[62] This Court dealt with the "horizontal application" of the interim Constitution to private legal relationships in, amongst others, *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC). Now, the "horizontal application" of fundamental rights is encapsulated in sections 8(2), 9(4) and 39(2) of the Constitution.

[63] *Christian Education* above n 57 at para 26.

[79] It is of course one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preferences. Courts are not necessarily the best instruments to balance competing rights and values in intimate spheres where emotions and convictions determine choices and association. In this case the Supreme Court of Appeal, relying on the "doctrine of entanglement", held that the dispute at issue was quintessentially one which a secular court should try to avoid, if possible.[64]

[80] The closer courts get to personal and intimate spheres, the more they enter into the inner sanctum and thus interfere with our privacy and autonomy.[65] In a slightly different context Ackermann J said in *Bernstein*:

> "[E]ach right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[66]

[81] In *Magajane* it was explained how *Bernstein* had "described what can be seen as a series of concentric circles ranging from the core most protected realms of privacy to the outer rings that would yield more readily to the rights of other citizens and the public interest".[67] By analogy, it could be argued that the closer the tension

[64] Supreme Court of Appeal judgment above n 14 at para 30.

[65] *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) (*Magajane*) at para 42 which quotes *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (*Bernstein*) at para 67.

[66] *Bernstein* id at para 67.

[67] *Magajane* above n 65 at para 42.

between, for example, equality on the one side and privacy and free choice of association on the other gets to the core of our private inner sanctum, the less suitable courts are to pronounce on the balancing of these rights.

[82] Courts are first and foremost fora where disputes are adjudicated, even though they are used for wider purposes as well. Litigation, as we know it, normally results in the finding of a winning and a losing party, often sealed by a costs order.

[83] Is it contradictory to say that the Constitution does have a role to play in every sphere, but that we do not want a court to intrude into private spaces with the bluntness of its orders? After all, the Constitution is law; we mostly want law to be enforceable; enforcement is important for the rule of law, because unenforceable law can hardly "rule". The Constitution is more than law, however. It is the legal and moral framework within which we have agreed to live. It also not only leaves, but guarantees space to exercise our diverse cultures and religions and express freely our likes, dislikes and choices, as equals with human dignity. In this sense one could perhaps talk about a "constitutionally permitted free space". This is quite different from contending that certain areas in a constitutional democracy are beyond the reach of the Constitution, or "constitution-free".

[84] This case does not require answers to the above vexed questions. It shows a glimpse of the complexity of the issues that cases of this kind may raise. This Court would need the benefit of more reflection and legal argument before giving definite answers. If and when necessary, to be debated and decided properly, procedural compliance, the correct forum and maximum participation by all interested parties – to name a few things – are necessary.

[85] Arbitration, hopefully based on deep reflection and understanding within the religious community where the present issue is situated, has to be the first port of call. And if a court's ruling becomes necessary, this Court should not make one as a court of first and last instance. In view of the complexity of the questions involved, a wide

range of arguments and the views of lower courts would greatly assist this Court, if it were required to grapple with the merits of this case, or another of its kind.

[86] That – in short – is why I concur with the reasoning and conclusion in the judgment by Moseneke DCJ.

For the Applicant:	A De Vos SC, A Schmidt, S Wilson and I De Vos instructed by Pieter Van R Coetzee
For the Respondents:	W Trengove SC and I Goodman instructed by Malherbe Rigg & Ranwell Inc