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Legal Issues Involving Succession Disputes among South African Churches: Some Lessons

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South African Christian churches have been widely recognised as major civil institutions that play a role in the provision of social services to complement the state effort. But the concern is there has been an increase in the number of disputes involving leadership succession in these churches that have had to be adjudicated by the civil courts in the last decade. These disputes impact on the governance, growth, reputation and sustainability of churches. The South African Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission) identifies weak or lack of effective succession planning in the governing policies of churches as the major cause of these disputes. Against this backdrop, this article analyses some specific cases to explore how church policies influence succession disputes in South African churches. It further explores how the courts engage and interpret the governance policies of churches in the resolution of these disputes. The article reveals that the findings of the CRL Rights Commission are justified. It observes that, among other issues, some churches lack effective and workable succession planning in their governing policies. The policies on leadership succession of these churches are poorly drafted, thereby creating significant lacunae and vacuums leading to conflicts. The article concludes by identifying some lessons that churches can learn from the judicial approach in the resolution of disputes in order to enhance the quality of church policies, thereby reducing their exposure to succession disputes.

Keywords: South Africa, church, leadership, governance

INTRODUCTION

Christian churches as a form of religious organisation have been recognised by jurists, scholars and public commentators as one of the most influential forms of civil organisation within the fabric of public life in South Africa.[2] It is said that

1 The author is indebted to Professor Helena Van Coller for her mentoring and comments on this article.

2 Sachs J in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 at para 33. R Bentley, 'Speaking to a higher authority: teaching philanthropy in religious settings', (2002) 36 *New Directions for Philanthropic Fundraising* 21–36; W Schoeman, 'The involvement of a South African church in a changing society', (2012) 33:1 *Verbum et Ecclesia* 1–8 at 7; P Strauss, 'Mense in Hart van Kerkwees', *Volksblad*, 21 January 2013, p 6; Ignatius Swart, 'Networks and partnerships for social justice? The pragmatic turn in the religious social development debate in South Africa', (2005) 12:1 *Religion and Theology* 20–47. A church in this context refers to a local congregation or religious community of a particular sect of a Christian denomination. It includes both the mainline and African Independent Churches.

many of the non-profit organisations that complement the state's efforts in providing social services in the country were established by churches.[3] Sachs J of the South African Constitutional Court, quoting Carmella, noted that

> Churches … are deeply engaged in service to and discourse with the civil society … For instance, they educate children, provide social and medical services, operate institutions for a wide variety of purposes, and advocate positions on topics of moral and political importance.[4]

He stated further that 'engagement in the culture by "churches" renders religion a public phenomenon, socially relevant beyond the small communities of adherents'.[5] Similarly, the former President, Jacob Zuma, reportedly acknowledged publicly during the Non-Profit Organisations Summit in 2002 that he himself witnessed the significant contribution by churches in social development.[6] Koegelenberg, quoting the survey of the Ecumenical Foundation of South Africa, observed that, as far back as 2011, the value of the social services that churches contributed in the country on an annual basis amounted to almost 3 billion South African rands (approximately US$200 million).[7]

There is a concern, however, that a search of the law reports reveals that there has been an increase within the last decade in the number of leadership succession disputes in South African churches that have to be adjudicated by the civil courts.[8] These disputes are particularly prominent among the African Independent Churches (AICs).[9] This is not to say that the mainline churches

3 E Goodchild, 'Best corporate governance practices: financial accountability of selected churches in the Free State Province', LLM thesis, University of the Free State (2016), pp 2–5.

4 *Christian Education South Africa* at para 33, citing A Carmella, 'Mary Ann Glendon on religious liberty: the social nature of the person and the public nature of religion', (1998) 73:5 *Notre Dame Law Review* 1191–1216 at 1195.

5 *Christian Education South Africa* at para 33.

6 Goodchild, 'Best corporate governance practices', p 5.

7 R Koegelenberg, 'Social development partnerships between religious communities and the State', (2001) 110 *Journal of Theology for Southern Africa* 97–109 at 103.

8 See, for instance, the cases of *African National Church v Tsatsa* (2308/2016) [2017] ZAFSHC 108; *African Presbyterian Bafolisi Church of Southern Africa v Moloi* (3775/2009) [2010] ZAFSHC 1; *African Gospel Church v Ndyalivani* (513/2014) [2015] ZAECBHC 6; *Christian Catholic Apostolic Church in Zion v Hlamandlana* (1499/14) [2015] ZAECMHC 51; *Waanar v Emmanuel Pentecostal Mission Churches* (Case No 27044/04, Gangen AJ, 11 December 2012); *Church of God and Saints v Mzileni* (Case No 669/94, Ebrahim AJ, 25 September 1997). Leadership succession in this context refers to a transition from one leader to another in a church.

9 The AICs are churches that have been started independently in Africa by Africans. In other words, they are churches that express Christianity in the African context. In the South African case of *Mduduzi Shembe v Vela Shembe* (AR 250/2017) [2018] ZAKZPHC 45 at para 18, Madondo DJP said, regarding the AICs: 'In practice, in churches of this nature the application of the canon law is much blended with the application of traditional law and customs.' Furthermore, according to Pieter Coetzen, this category of churches constitutes the highest population of Christians in South Africa, with a membership of 40.8 per cent of the total Christian population. See P Coertzen, 'Constitution, charter and religions in South Africa', (2014) 14 *African Human Rights Law Journal* 126–141 at 127.

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are immune to the experience.[10] It is also important to note that these disputes are not limited to South Africa; some other countries, particularly in Africa, are experiencing similar disputes.[11]

The fact remains that a change in leadership is a natural and indispensable event in the life of any church. Leadership is critical for effective governance, management, growth, health and sustainability of a church. Thus, where leadership succession in a church is not properly managed, it may result in a dispute and also constitute a serious governance and reputational risk for the church. It also impacts on the capacity and sustainability of churches to continue to render the social services that some of them are known for.[12] This is further important because succession disputes are often intra-denominational affairs and rank as one of the major sources of church schisms.

The American legal scholars Lupu and Tuttle highlight another concern that church leadership disputes pose in a democratic society. They argue that, in a liberal society or any systematic consideration of church autonomy, the judicial role in resolving disputes between religious organisations and their leaders is inevitably a central topic.[13] In relation to the religious autonomy of churches, the South African courts usually claim to adopt an exclusive deference approach to religious disputes, thereby avoiding being drawn into religious affairs.[14] Based on this approach, one would ordinarily expect the courts not to get involved in religious disputes. However, an inference could be drawn both from the arguments of legal scholars and from a critical review of courts' attitudes in some cases that the exclusive deference approach to religious disputes

10 See, for instance, the cases of *The Presbyterian Church of Africa v Sihawu* (3375/12) [2013] ZAECGHC 36; *The Presbyterian Church of Africa v Peter* (3045/2014) [2015] ZAECPEHC 40. The mainline churches, also known as the established or mainstream churches, are churches with long roots, often from connection to the colonial powers and missionaries, such as the Anglican Church of Southern Africa, which is in communion with the Church of England. Other examples of mainline churches include the Methodist Church, the Presbyterian Church, the Dutch Reformed Church and Seventh Day Adventists, among others.

11 For a similar experience in Nigeria, see I Akinloye, 'Human flourishing, church leadership and legal disputes in Nigeria churches', in C Green (ed), *Law, Religion and Human Flourishing in Africa* (Stellenbosch, 2019), pp 25–41. For Zimbabwe, see E Ruwona, 'An investigation into the leadership retirement and succession systems and practices of churches in Zimbabwe: a study of the church of the Province of Central Africa (Anglican dioceses of Harare and Manicaland), Methodist Church in Zimbabwe and the United Methodist Church from assumption of first African leaders to present', MA thesis, Africa Leadership and Management Academy (2009), pp 7, 13–17. For Kenya, see the cases of *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 Ors* (Civil Case No 285 of 2014); *Andrew Inyolo Abwanza v Board of Trustees of Pentecostal Assemblies Of God – Kenya & 3 others* [2009] eKLR; *David Muli v Daniel Nzioki Muli & 2 Others* (Civil Appeal 1 of 2005).

12 Akinloye, 'Human flourishing', pp 33–37.

13 I Lupu and R Tuttle, 'Courts, clergy, and congregations: disputes between religious institutions and their leaders', (2009) *Georgetown Journal of Law & Public Policy* 1–80.

14 See J Van der Vyver, 'Equality and sovereignty of religious institutions: a South African perspective', (2012) 10 *Santa Clara Journal of International Law* 147–169; *De Lange v The Presiding Bishop of the Methodist Church of South Africa* 2015 (1) SA 106 (SCA) at para 39; *Theron v Ring van Wellington van die NG Kerk* 1976 (2) SA 1 (SCA); *Taylor v Kurtstag* 2005 (1) SA 362 (W).

is not absolute in South Africa. Put differently, the approach is not feasible and practicable. Legal scholars like Nwauche and Van der Schyf observe that most South African courts in the course of discharging their adjudicatory functions become enmeshed in religious matters. In his commentary on the case of *De Lange v The Presiding Bishop of Methodist Church of South Africa*,[15] Nwauche observes:

> In fact, when the Presiding Bishop requested the SCA [Supreme Court of Appeal] to refrain from requiring the Church to recognize same-sex unions, *it was asking the SCA to take sides in an internal dispute acknowledged by the Bishop to be ongoing* as to whether the MCSA [Methodist Church of South Africa] recognises same-sex unions as appropriate. *The decision of the SCA in effect favoured those who were against such unions as against those opposed to them and entangled the Court in sacred matters, an exercise the Court stridently argued against.*[16]

In the same vein, Van der Schyf concluded that, in view of the current state of affairs and the precedents, the South African courts cannot 'be heard to say that ecclesiastical matters do not concern them in the least and that they merely pay deference to ecclesiastical tribunals without inspecting the facts'.[17] I have argued that the approach of the Pretoria High Court in the recent case of *Gaum v Resburg*[18] further exhibits the courts' tendency to get entangled in religious disputes.[19] What will perhaps always justify this tendency is the courts' constitutional obligation to adjudicate disputes that are brought before them. Thus, given that courts do get involved in doctrinal disputes and also interpret church orders when adjudicating church disputes, it would be wise for churches to consider and learn from courts' approaches in resolving church disputes, particularly as they relate to succession.[20]

15 2015 (1) SA 106 (SCA).

16 E Nwauche, 'A comment on the exclusive jurisdiction of domestic religious tribunals in South Africa: *De Lange v The Presiding Bishop of Methodist Church of South Africa*', (2015) 4:2 *Oxford Journal of Law and Religion* 313–317 at 315, emphasis added. See also E Nwauche, 'The religious question and the South African Constitutional Court: Justice Ngcobo in *Prince* and *De Lange*', (2017) 32:1–2 *Southern African Public Law* 1–17 at 6, where Nwauche argues that 'the courts do enquire into matters that are ordinarily inherently religious and a fit for the religious question. Justice Sachs' specific opinions in *S v Lawrence* reveal that the Court would engage with doctrinal matters … South African courts would engage with any religious claim pertaining to belief and/or practice, whether entangled or otherwise'.

17 G Van der Schyff, 'Freedom of religious autonomy as an element of the right to freedom of religion', (2003) 3:3 *Journal of South African Law* 512–539 at 527.

18 Unreported, Case No 40819/17.

19 I Akinloye 'Examining the efficacy of church internal governance mechanisms in reducing legal disputes within South African and Nigerian churches', PhD thesis, Rhodes University (2020), pp 94–95.

20 *Ngewu v The Anglican Church of Southern Africa* [2016] ZAKZPHC 88; H Van Coller, 'The church, the bishop, and the missing money: a reflection on the case of Bishop Ngewu and the Anglican Church of Southern Africa', (2017) 6:3 *Oxford Journal of Law and Religion* 610–618 at 614.

The lack of or poor succession planning in the governing policies of churches has been pinpointed as one of the major causes of succession disputes in South African churches. Thus, following the investigative study carried out by the South African Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission) among over 80 religious organisations in South Africa in 2015 and 2016, the commission revealed, among other findings, that many churches 'lack leadership succession plans, which eventually lead to conflict, division and litigation'.[21] In another instance, the former chairperson of the CRL Rights Commission, Thoko Mkhwanazi-Xaluva, while commenting on the leadership crisis in Shembe Church, reportedly linked the succession disputes in the churches with poor governing policy.[22] She said:

> One of the leadership challenges is to have a successor. Many founders of churches have done excellently well. The church flourished in their lifetime, but after they vacate the office or die, due to the poor succession plan, there have not been continuity and sustainability. The constitutions of churches must be very clear about these things (succession plans), in order to prevent a lot of fights within the church that are unnecessary … What we've discovered is that most constitutions are not very clear on succession plans, which has caused a lot of crisis in the country. It is just that the Shembe issue is a national issue. But you'd be surprised at how many thousands of churches, smaller ones, have a similar problem.[23]

Some questions arise from the above. How do church policies influence succession disputes among South African churches? How do the courts engage

21 CRL Rights Commission, 'Final report of the hearings on commercialisation of religion and abuse of peoples' belief systems', p 32 <https://www.gov.za/sites/default/files/gcis_document/201708/report-commecializationofreligionandabuseofpeoplesbelievesystems.pdf>, accessed 12 August 2019. The investigative study followed some complaints made to the commission and a number of media allegations regarding the commercialisation of religion and abuse of people's beliefs by certain religious organisations in the country. Section 181(c) of the Constitution of the Republic of South Africa 1996 establishes the CRL Right Commission as one of the State institutions to 'strengthen constitutional democracy' in the country. Section 185(1) provides for the functions of the commission, which include to 'promote respect for the rights of cultural, religious and linguistic communities' and also to 'promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association. Further, sections 5(1)(e) and 7 of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act of 2002 empower the commission 'to monitor and conduct an investigation on any issue concerning the rights of religious communities in South Africa'.

22 Shembe Church is an AIC in South Africa and is one of the largest church denominations in the country. See S Kumalo and M Mujinga, 'Now we know that the enemy is from within: Shembeites and the struggle for control of Isaiah Shembe's legacy and the church', (2017) 30:2 *Journal for the Study of Religion* 122–153 at 123, 135.

23 Cited in L Mpondwana, '*Succession issues leading to conflicts in several South African churches*', *702*, <http://www.702.co.za/articles/192926/succession-issues-leading-to-conflicts-in-several-south-african-churches>, accessed 11 January 2019.

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with and interpret the governance policies of churches while resolving the disputes? In other words, what lapses do the courts identify in church policies that triggered the disputes? What lessons can churches learn from the judicial attitude to enhance the quality of their church policies in order to reduce their exposure to succession disputes and the consequential losses? This article seeks to explore answers to these questions. It analyses three cases involving leadership succession in the South African churches in the last decade as case studies. Through the analysis of reported cases and the courts' approaches to resolving them, the common factors that link churches policies with the succession disputes can be identified and better understood. Furthermore, the findings from the analysis can provide some guidelines that may help churches within and outside South Africa to fill the vacuum in their governing policies regarding the issues of leadership succession.

To begin, the article briefly conceptualises the major terms used in the article. This is followed by an examination of the nature of leadership succession in the context of a church. Thereafter, three cases involving leadership succession disputes in South African churches are summarised, evaluated and analysed. The findings from this analysis justify the findings of the CRL Rights Commission that some churches lack effective and workable succession planning in their governing policies. The article observes that some churches' policies on leadership succession are poorly drafted, thereby creating significant lacunae and vacuums, leading to conflicts. For instance, there is the absence of provisions on unanticipated vacancy, as well as inconsistencies and inappropriate use of terms, resulting in confusion and disputes. The article further observes that the failure of the church authorities to comply with their church provisions on succession provoked some of the lawsuits. Most of the acts of noncompliance were due to the inability of the church authorities to navigate the basic legal intricacies relating to church affairs that they are called upon to manage, lack of proper legal advice and self-aggrandisement of some church leaders.

CONCEPTUALISATION OF TERMS AND NATURE OF CHURCH LEADERSHIP SUCCESSION

The concepts used in this article include 'leadership succession' and 'church policies'. The word 'leadership' lacks a precise definition. This article, however, adopts the definition of leadership given by Afolabi, a Nigerian scholar. He posits that leadership in a church context 'refers to all who exercise influence, guidance, and direction to those in the church toward fulfilling the church's goals'.[24] This definition sees a leader in a wider context that includes both

24 O Afolabi, 'Alternative dispute resolution: a tool for managing leadership conflict in a church', (2018) 12:4 *Journal of Leadership Studies* 41–45 at 42.

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those who occupy clerical offices, such as priests, and laypersons who direct the non-ecclesiastical affairs of a church, such as the members of a church council. The word 'succession' also lacks a specific meaning. In legal terms it is often used mostly in relation to inheritance involving the estate of a deceased person. For instance, *Black's Law Dictionary* defines it as:

> The devolution of title to property under the law of descent and distribution; the transmission of the rights, estate, obligations, and charges of a deceased person to his heir or heirs. The right by which the heir can take possession of the decedent's estate. The right of an heir to step into the place of the deceased, with respect to the possession, control, enjoyment, administration, and settlement of all the latter's property, rights, obligations, charges, etc.[25]

However, the *BBC English Dictionary* defines succession as 'the act or right of being the next person to have a particular job or position'. Similarly, the *Oxford English Dictionary* defines it as 'the action of a person or thing following, or succeeding to the place of, another; the coming of one person or thing after another'. Since the focus of this article is neither property inheritance nor the administration of an estate, the legal definition is not fitting. The English dictionaries' definitions that describe the word in terms of transition in a job or position best suit the purpose of this article. Therefore, leadership succession in our context refers to a replacement or transition from one leadership to another within a church. Typically, succession in church leadership would usually arise where there is a vacancy in the office of a leader due to expiration of the term of office, the death of a leader, attainment of the prescribed age limit, incapacitation due to age or sickness, operation of law, resignation, transfer, retirement or removal from office. The process of succession is commonly through election, nomination or appointment.

'Church policies' in this context refers to a set of rules, regulations, principles, doctrines or tenets by which a church has prepared itself to sanction its beliefs and activities and the relationship between the members themselves and between members and the principal operators. In most cases, churches have both written and unwritten policies. In the case of the latter, a court will enforce an unwritten practice as constituting a part of a church governance mechanism if it can be proved as an established practice or custom of the church. Regarding the efficacy of a church practice and custom, an American expert on church law, Richard Hammer, states that 'if an unincorporated

25 H Black, *Black's Law Dictionary* (fifth edition, St Paul, MN, 1979), p 1283. See also, *The South African Judicial Dictionary* (Durban, 1960), p 771, where succession is defined as 'a real right passed from a deceased person to a living person'.

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church has no constitution or bylaws, or its constitution and bylaws do not deal with elections, then the established practice of the church should be observed'.[26] It is important to mention that it is not impossible to have churches without any form of written policy. An instance of this will possibly be found among the AICs that are located in the rural areas where most members are not lettered. Where church policies are written, they can take different nomenclatures and exist under a variety of titles. They may be embodied in single or multiple documents, such as a constitution, codes of canons, a charter, covenants or a manual of laws.

'Church policies' is used interchangeably in this article with 'internal governance mechanisms', 'governing documents', 'governing instruments' and 'governing policies'. An important feature of most church policies is that, in most instances, they bear resemblance to secular regulations in the sense that they can be prescriptive, permissive or prohibitive.[27] Although they may be essentially theological in origin and substance, they are mostly juridical in form. Accordingly, the court regards these policies as legal documents. Thus, where a church has governance mechanisms, it is required that it should abide by them. When there is a church dispute relating to internal church affairs, the court will ordinarily resort to the church internal mechanisms to resolve the dispute. Numerous cases confirm the position in South Africa that, although courts ought not to become entangled in issues of religious doctrine during adjudication, civil courts do have the authority to interpret a church order and to act accordingly.[28]

Compared to secular organisations, for which there are abundant scholarly writings on the various theories and styles of leadership succession,[29] it appears that there is little academic discourse dedicated to theories of leadership succession in churches. This may be due to the variation in leadership succession patterns across church denominations and traditions.[30] Consequently, the few available writings on leadership succession in churches generally focus on the succession pattern of a particular denomination or

26 R Hammar, *Pastor, Church and Law* (Springfield, MO, 1983), p 32.

27 For instance, in the Anglican Church, most of the principles of canon law do not bind those churches internationally but are of persuasive authority. However, at the international level, the 1983 *Code of Canon Law* of the Roman Catholic Church binds all the faithful of the Church, including bishops, clergy and laity.

28 *Theron v Ring van Wellington van die NG Kerk*; *Taylor v Kurtstag*; *Ngewu*. See also Van Coller, 'The church, the bishop, and the missing money'.

29 See, for example, W Rothwell, *Effective Succession Planning: ensuring leadership continuity and building talent from within* (third edition, New York, 2005); P McKenna, 'The leadership succession process: identifying, developing, electing', (2015) 34:6 *Of Counsel* 6–11; R Charan, 'Ending the CEO succession crisis', (2005) 83:2 *Harvard Business Review* 72–81; R Khurana, *Searching for a Corporate Savior: the irrational quest for charismatic CEOs* (Princeton, NJ, 2002).

30 See B Pugh, 'Succession plans: is there a biblical template?', (2016) 36:3 *Journal of the European Pentecostal Theological Association* 117–130.

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church tradition.[31] But, typically, the nature of a church polity will influence the leadership style and succession pattern that a church adopts.[32] Accordingly, as the governing policy of a church is commonly expected to provide for the polity the church adopts, so also it is expected that the mechanism will articulate the leadership and succession approach of the church.

An effective and workable leadership succession plan plays a role in the life of a church. First, it guarantees organisational continuity.[33] The fact that a leadership transition has successfully taken place in a church suggests that there are people to carry on the vision of the church. Put differently, a successful transition in leadership is critical for a church to continue its ecclesiastical objectives from one generation to another. This point is in keeping with the nature of a church as an institution that possesses perpetual succession. In other words, while the office of a church leader may remain constant, the persons who occupy the office change. This fact further underscores the rationale for recognising an ecclesiastical office as a corporation sole. Second, an effective and workable leadership succession plan helps a church to experience a smooth leadership transition. In other words, a smooth leadership transition is an indication that a church has good and effective governance in place.[34] A poor succession policy can create governance and management crises for a church. Where there is a succession crisis, the growth of the church may be impaired and schisms may become inevitable. A leadership succession plan is thus vital to determine the success or otherwise of a church. It can also be used to measure the stability, progress and growth of a church.

As already mentioned, litigation involving leadership succession disputes in churches has become prominent in South Africa and some other African countries in recent times. There is not space in this article to examine all of these cases effectively. Accordingly, I focus on three South African cases, involving the Nazareth Baptist Church, the Gospel Church of Power in Africa and the Seventh Day Adventist Church. While the first two cases concern AICs, the third case involves a mainline church. The basis for selecting two cases involving AICs and one involving a mainline church is because, as already observed, there

31 C Tushima, 'Leadership succession patterns in the apostolic church as a template for critique of contemporary charismatic leadership succession patterns', (2016) 72:1 *HTS Teologiese Studies/Theological Studies* 1–8, <https://hts.org.za/index.php/hts/article/view/2968/7375>, accessed 17 February 2021; E Johnson, 'How congregations experience leadership: patterns of leadership succession in US Presbyterian and Methodist congregations', paper presented at the American Sociological Association Annual Meeting, 2007, 1–23; R Ngomane and E Mahlangu, 'Leadership mentoring and succession in the charismatic churches in Bushbuckridge', (2014) 70:1 *HTS Teologiese Studies/Theological Studies* 1–10, <https://hts.org.za/index.php/HTS/article/view/2065>, accessed 17 February 2021; K Garfield, 'The Graham succession', *Christian Century*, 25 August 2009, pp 25–29.

32 Church polity is the operational and governance structure of a church. It denotes the ministerial and authority relationship and structure of a church.

33 K McDonagh, L Prybil and M Totten, 'Leadership succession planning: a governance imperative', (2003) 66:4 *Journal for Hospital Governing Boards* 15–18.

34 Ibid.

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are more AICs in most African countries and in South Africa in particular.[35] Moreover, AICs are more often involved in leadership disputes than mainline churches.

NAZARETH BAPTIST CHURCH

The case of *Mduduzi Shembe and two others v Vela Shembe* (hereafter '*Shembe*') involved a dispute in the Nazareth Baptist Church, Ebuhleni (hereafter 'the church'). This church is reportedly the largest of the factions of the Church of Nazareth (popularly known as the Shembe Church) and among the largest AICs in South Africa.[36] The suit in question, which came on appeal before the Kwazulu-Natal High Court, Pietermaritzburg Division, arose when Vimbeni Shembe, the titular head of the church and the sole trustee of the Church of the Nazareth Ecclesiastical Endowment Trust, died in 2011. At his funeral, the second appellant, who is a member of the church and the traditional ruler of the community where the church is located, announced the first appellant as Vimbeni Shembe's successor. This first appellant is Shembe's son.[37] On the same occasion, Buthelezi, Shembe's lawyer, read out a deed of nomination and an undated handwritten letter claimed to have been written by Shembe, wherein the respondent (the Shembe's nephew) was nominated as his successor. The pronouncement of these two people as the successors to the late leader polarised the church and resulted in the suit.

At the trial court, the respondent, who was then the claimant, sought an order giving effect to the deed of nomination nominating him as Vimbeni Shembe's successor and an order appointing him as the sole trustee of the Church of the Nazareth Ecclesiastical Endowment Trust. The first appellant opposed the claimant's application. In the first appellant's counter-application, he sought an order declaring him (the first appellant) to be the duly appointed titular head of the church through an oral nomination by the late Vimbeni Shembe or, alternatively, empowering the executive and advisory committee of the church to elect and appoint him as the leader of the church.

35 See above, note 9. See also R Hackett, 'Regulating religious freedom in Africa', (2011) 25 *Emory International Law Review* 853–879 at 856: the author, an American professor of religious studies who has undertaken several studies on religions in Africa, observes that the mainline religious organizations that have long enjoyed the patrimony of colonial and post-independence governments now find themselves threatened by AICs.

36 The Church of Nazareth is known for its long history of succession disputes, which have polarised the church into factions. In *Shembe*, five factions of the church were identified: those of Ekuphakameni, Ebuhleni, Ginyezinye, Thembezinhle and Johannesburg. See *Mduduzi Shembe v Vela Shembe* at para 24. However, the religious scholars Kumalo and Mujinga list seven factions: see Kumalo and Mujinga, 'Now we know that the Enemy is from within', pp 123, 135. In 1996, the number of members of the Shembe Church was put at 454,760: see *Statistics South Africa Census 2001: Primary Tables South Africa Census '96 and 2001 Compared*, Report no 03-02-04 (Pretoria, 2001), p 25.

37 *Mduduzi Shembe v Vela Shembe* at paras 116, 191.

The second appellant, who was also the first appellant's witness, testified that before Vimbeni Shembe died, he told the second appellant as his friend and confidant on four different occasions that the first appellant would be his successor. On one of these occasions, a third party who was also a community leader, namely Inkosi Qwabe, was present. The first appellant further challenged the authenticity of Vimbeni Shembe's signature on the deed of nomination. At the instance of the first appellant, the trial court invited four handwriting experts and forensic document examiners to establish the authenticity or otherwise of the signature on the deed of nomination and the handwriting on the undated handwritten letter. Three of the experts confirmed the signature on the deed of nomination and the writings in the undated letter as that of the late Vimbeni Shembe. The fourth expert testified that the disputed signature was a forgery.

In arriving at the judgment, the trial court engaged with the provisions of the church's trust deed adopted in 1935 that is applicable to all the factions of Shembe churches. It also engaged with the church constitution that was adopted in 1999 and was applicable only to the Nazareth Baptist Church, Ebuhleni (the faction in dispute). The trial judge, Jappie JP, accepted the testimonies of the three expert witnesses and rejected the evidence of the fourth expert witness as not worthy.[38] He also rejected the evidence of the second appellant on the oral nomination of the first appellant by the leader of the church. Not satisfied with the decision, the appellants appealed to the High Court. One of the issues raised on appeal was whether Vimbeni Shembe had nominated the first appellant or the respondent, or had nominated both of them as titular head of the Nazareth Baptist Church. The High Court took the judicial notice of the church practice that each incumbent titular head during his lifetime nominates and appoints a successor and that this can be done either in writing or orally.[39] In their majority ruling, Mnguni and Poyo-Dlwati JJ held:

> In our view the court *a quo* was correct in concluding that the late leader nominated the respondent as Titular Head of the Nazareth Baptist Church as appears on the Deed of Nomination and supported by the letter received by Buthelezi Attorneys on 16 March 2011 . . . we are satisfied that all this evidence leads to the ineluctable conclusion that it would be highly improbable for the late leader to have made another nomination other than the one contained in the Deed of Nomination.[40]

The High Court accordingly rejected the appeal and upheld the decision of the lower court by finding the deed of nomination more probable.

38 Ibid at para 70.
39 Ibid at paras 40, 199.
40 Ibid at paras 178, 189.

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THE GOSPEL CHURCH OF POWER

The case of *Mbewana v The Gospel Church of Power and 6 others* (hereafter *Gospel Church*)[41] involved an AIC and Pentecostal-charismatic church known as the Gospel Church of Power in Africa, the first respondent. The second respondent was a bishop and the head of the first respondent. The applicants were evangelists and leaders in the first respondent. The first respondent was a splinter faction of a church known as the Gospel Church of Power in the Republic of South Africa, founded by Bishop Sam Daphula in 1972. After Bishop Daphula's death in 1997, the governance of the church temporarily resided in the hands of his wife, Nolight Daphula, assisted by a group of priests.[42] In the same year, the elders in Daphula's church met to decide on Bishop Daphula's successor, but they failed to reach a consensus, leading to frictions and schism in the church. One of the splinter groups that emerged from the schism was the first respondent. The first respondent started in 1998 and was led by six priests and some evangelists. For administrative convenience, it was decided among these pioneer leaders that they should choose among themselves a leader who would act as a bishop.

After several consultations, the second respondent was selected and was consequently consecrated as a bishop on 21 September 2001. He had since remained the bishop and head of the first respondent until the commencement of the suit. At the time of his consecration as a bishop, there was no constitution in place for the church, but only a draft version, although the process of drafting a constitution had begun in 2000. After a lengthy period of consultation nationally and otherwise, the constitution was finalised, signed and adopted by the church in 2002. The reason for the wide consultation was to allow the process to be as inclusive and democratic as possible.[43] This adopted constitution was in the IsiXhosa language (one of the official and widely spoken languages of South Africa) because it was the language chosen, understood and spoken by the majority of the church members. The IsiXhosa constitution was, however, termed a 'temporary constitution' because the members felt that it should be translated into English in order to enable the church to register marriage officers at the Department of Home Affairs.[44]

In 2002, an English constitution was drafted and was taken to the National Church Leadership Summit held in Queenstown that year. The English constitution was read out to the church leaders who attended the summit and it was subsequently signed at the summit. The English constitution was not, however, a translation of the IsiXhosa constitution as contemplated by church members,

41 (4132/2011) [2011] ZAWCHC 380.
42 *Mbewana v The Gospel Church of Power* at para 5.
43 Ibid at para 9.
44 Ibid at paras 10, 12.

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but a standalone constitution. On 7 April 2007, at a National Leadership Summit held in Cape Town, it was again recognised and accepted that the English constitution was not a translation of the IsiXhosa constitution. To address this error, a constitutional translation committee was established. However, at the time that this case was brought, the translation had not been produced.

The applicants' contention was that, in terms of the IsiXhosa constitution, a bishop's term of office was two years but, because the second respondent was very autocratic, he had steadfastly refused to vacate office. The applicants therefore sought an order of the court directing the second respondent to step down from the position of bishop of the church, and that, pending the election and consecration of a new bishop in accordance with the provisions of the IsiXhosa constitution, the pastors and evangelists of the church should jointly appoint a person who would, for the time being, act as bishop of the church. In effect, the claimants claimed that the IsiXhosa constitution was the legitimate constitution of the church and remained in place until such time as it was amended or replaced by a new IsiXhosa constitution. On the other hand, the respondents contended that the IsiXhosa constitution regarded by the applicants as the proper constitution was defunct; the legitimate constitution was the English constitution, having been adopted at a later stage. They submitted further that, because the English constitution had no timeframe on when a bishop should step down, the tenure of the bishop was discussed in a meeting held in April 2007. It was decided at this meeting that the tenure of the second defendant would be unlimited and continuous, with only the bishops appointed after him being limited to a two-year term of office. Thus, the crux of the matter was whether the IsiXhosa constitution was the only valid and binding constitution of the church.

The court accepted the IsiXhosa constitution as the legitimate constitution of the church because it was the constitution that was widely endorsed by the church members. The court was not inclined to accept the English constitution because there was no evidence that it had democratically come into being, as had the IsiXhosa constitution. The English constitution was endorsed by the church leaders alone at the leaders' summit. The court also rejected the view that the meeting/summit of the church leaders held in April 2007 could legitimately lengthen the tenure of office of the second respondent. In his judgment, Mantame AJ held:

> There is no doubt that a great deal of animosity has brewed over time and the source of this dispute could be traced back to two constitutions ... At the same time, I am not convinced that a meeting like that one of the 7 April 2007, could just willy nilly decide on the relaxation of the rule governing the tenure of office of the Second Respondent, and governance

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> issues that affect the entire members of the congregation nationally and across the border, without the leadership consulting with the general membership. What is striking is the fact that this two-year tenure will once more apply to the Second Respondent's successor. In my view, there is no reason or merit to this suspensive condition
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> ...
>
> It is my view that whatever decision that is taken by the leadership, it has to be canvassed to the general membership. Even if such decisions mentioned above were taken in good faith by the Respondents, and the purpose thereof was to enhance the functioning of the First Respondent, if that decision was not endorsed by the entire membership of the congregation, it is as good as not being taken from the onset. Lay societies need information sharing and transparency to function optimally.
>
> ...
>
> I am therefore inclined to trace the footsteps back to the constitution that received a nod after the whole consultation process was finalised. ... I cannot agree more with the Applicants that the greater percentage of the congregation speaks IsiXhosa. Therefore, it makes no practical sense to have a guiding document written in English. In my view, the constitution encompasses the rules and regulations of the Church and therefore, it is of paramount importance that it should be understandable to those it applies to, given the primary foundation of the Church.
>
> ...
>
> It is inconceivable that a fraction of the leadership could make a decision that affects the congregation in its totality.[45]

Accordingly, the court ordered the second respondent to vacate the office of bishop and head of the church, his tenure having lapsed in terms of the IsiXhosa constitution.

SEVENTH DAY ADVENTIST CHURCH

The case of *Setsiba v Trans-Orange Conference of Seventh Day Adventists and 57 others* (hereafter *Adventist Church*)[46] is a more recent decision of the Gauteng High Court involving leadership and succession feud in a mainline church: the Seventh Day Adventist Church, South Africa. The first respondent (hereafter 'the TOC') is a religious organisation that is governed by a written constitution. It forms part of the seven conferences constituting the South African Union Conference of the Seventh Day Adventists Church (SAU), the second

45 Ibid at paras 31, 36, 42(1), 42(3).
46 (6277/2014) [2018] ZAGPJHC 62.

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respondent. The TOC members consist of a substantial number of local churches within a specified jurisdiction, which have been formally approved for membership by a vote of delegates. Each of these local church appoints delegates to a session or meeting of the TOC. The TOC functions through an executive committee that is elected from time to time by the delegates.

The incidents that happened at a special business meeting (not a regular business meeting) of the TOC held on 24 February 2013 (hereafter 'the February meeting') triggered the present suit.[47] The SAU executive called for this February meeting to be held by the TOCs. The notice convening this February meeting specified that the only agenda item in the meeting was 'to receive the report of the Diswilmar Farm'. All members of the executive committee of the TOC at the time the February meeting was convened (hereafter the 'former TOC executive') boycotted the meeting. The meeting was nevertheless held. At the meeting, a number of resolutions were adopted, including removing the entire former TOC executive who boycotted the meeting and electing a new executive committee (hereafter the 'February executive'), who would hold office until the TOC regular business meeting was held on 25–27 October 2013.[48] The applicants in the suit were all members of the former TOC executive. The February executive convened a regular business meeting of the TOC in October 2013. At this October meeting, another new executive committee was appointed (hereafter the 'October executive'), who took over from the February executive. The former TOC executive disregarded the resolutions adopted at the February meeting and continued to act as the executive of the TOC, resulting in two parallel TOC executives, each claiming to be the only legitimate TOC executive.

The applicants consequently instituted this action and sought, among other reliefs, a declaration that the various resolutions removing them and appointing the February executive, and the subsequent appointment of the October executive, were void for noncompliance with the TOC's constitution. They further sought a declaration that the former TOC executive was the only legitimate executive committee of the TOC. The applicants relied on the following grounds:

i. The February meeting was a special constituency meeting and was convened by the SAU. The TOC was not, therefore, constitutionally constituted to hold elections for the appointment of a new executive

47 It must be noted that this incident birthed other litigation. The court in this suit observed: 'The present litigation is but one of a plethora of litigation which has ensued pursuant to the February meeting and the positions adopted by the respective parties.' See *Setsiba v Trans-Orange Conference* at para 94.

48 *Setsiba v Trans-Orange Conference* at para 16.

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committee and, axiomatically, not capable of removing the entire executive for cause;

ii. No notice had been given that there would be a removal of the executive committee and that the appointment of a new executive committee would occur at the February meeting, whereas Article 2, section 2 of the TOC constitution makes the provision of an agenda a peremptory requirement;

iii. Since the appointment of the February executive was void, the exercise of their actions, including the convening of the meeting of the regular business meeting held in October and the appointment of the October executive was also void.

The respondents contended that, according to the church constitution, all meetings enjoyed the power, express or implied, to deal with a situation removing the executive. They relied on Article 2(8) of the TOC constitution for their power to remove the TOC executive for cause.[49] They argued that because the February meeting had the power to remove the executive for cause, it implicitly enjoyed the right to elect and appoint a new executive as, failing that, the TOC would be left leaderless.

The court held that from a reading of the provisions of Article 2(2) of the TOC constitution, it was the TOC executive and not the SAU executive that should call for meetings. Consequently, the TOC was not constitutionally constituted to hold elections for the appointment of a new executive or the removal of the entire former TOC executive for cause.[50] The court held further that the election of the TOC executive committee was regulated by Article 2(1), Article 2(8) and Article 5(1) of the TOC constitution. In each instance, reference was made to a regular triennial constituency meeting and no reference was made to a special constituency meeting as was the position with the February meeting.[51]

Regarding the validity of the notice convening the February meeting, the court held that, although the notice was not to be construed with excessive strictness in measuring the notification given, the notice did not give members fair notice of all the matters which arose at the meeting. A notice should enable members to properly understand, consider and form a judgment upon the business of the meeting. As such, the former TOC executive could not be said to have

49 Art 2(8) of the TOC constitution provides: 'All officers and members of the executive committee who are not ex officio members shall be elected by the delegates at the regular meeting of the conference constituency and shall hold their office until the next regular meeting of the conference constituency, unless they resign or are removed from office, for cause, by the executive committee or a special constituency meeting. The election/appointment of departmental directors, associate departmental directors, associate secretaries, or associate treasurers, if not determined by the delegates at the conference constituency meeting, shall be referred to the executive committee.'

50 *Setsiba v Trans-Orange Conference* at paras 27, 29 and 44.

51 Ibid at para 31.

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been given a fair hearing before they were removed for cause.[52] The court further declared the October meeting and the October executive elected in the meeting void on the ground that the February executive who convened the meeting and conducted the election was not properly constituted in the first instance, because, at common law, noncompliance with the peremptory provision of an agreement or constitution results in the setting aside of the conduct which flows therefrom.[53]

The court refused, however, to grant the declaration recognising the applicants as the subsisting TOC executive and neither did the court declare the actions of the February and October executives void in their entirety. According to the court, doing so would further disintegrate the church and lead to more chaos. The court held:

> In my view, the matter must be approached from the perspective of considering an order which is just and equitable in the circumstances so as to restore unity to the TOC.
>
> . . .
>
> In the present circumstances, it would not serve the interests of justice or resolve the disputes between the parties to merely grant the declaratory orders sought and render void all the actions taken by the February executive and the October executive consequent thereto. To the contrary, this would only deepen the divide between the two factions.
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> . . .
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> In my view, the primary policy consideration applicable in the present instance is that appropriate steps must be taken to reunify the TOC and the divided factions within it. A remedy must be crafted which sets aside the divisive actions of the past and creates a mechanism where unity can be achieved by making a fresh start in the management of the TOC in order to be fair and just within the context of the present disputes.
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> . . .
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> The granting of the declaratory relief sought by the applicants will not in my view adequately address the present problems; but will only result in further disputes and litigation. A broad declaratory order setting aside the resolutions and meetings of February 2013 and October 2013, coupled with a declaration that the erstwhile executive is the only legitimate executive, would only foster the strife and discord in the TOC.[54]

This reasoning followed the provision of section 172(1)(b) of the South African Constitution, which confers a generous jurisdiction on a court in proceedings for judicial review to make orders that are just and equitable.

52 Ibid at paras 54–63.
53 Ibid at para 139.
54 Ibid at paras 13, 142, 144, 152.

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EVALUATION

Several factors may lead to leadership disputes in a church. According to a Nigerian cleric and professor of religious studies, Peter Awojobi, such factors will include doctrinal differences, racial discrimination, incompetence, greed, power conflict, personality clash and poor communication.[55] This section identifies the primary or secondary causes of succession disputes in the church that evolve from the facts of the cases summarised above.

Noncompliance with church rules

Both the Shembe Church and the Seventh Day Adventist Church have provisions on leadership succession in their governing policies. However, the failure of the church authorities to obey those provisions was the main trigger for the lawsuits.[56] In *Adventist Church* there was a chain of acts of noncompliance with the TOC constitution. For example, contrary to the provisions of the TOC constitution, the SAU convened a meeting that should have been convened by the TOC. The TOC unlawfully removed the former TOC executive without proper notice as stipulated under the church constitution. The TOC also unconstitutionally elected the February executive in a 'special meeting' instead of a 'regular business meeting'. Regarding the noncompliance of the defendants in the suit, Dippenaar AJ, noted:

> The evidence presented by the respondents and the minutes of the February meeting reflect that the TOC constitution was in any event not complied with in relation to the election of the organising committee and the new executive committee members inasmuch as the voting was not held by secret ballot, as is required, but by ordinary vote.
>
> . . .
>
> It further does not appear from the minutes of the February meeting that the relevant provisions of the TOC constitution had been followed in the constitution of the organising committee or the nominating committee, which preceded the appointment of the February executive.
>
> . . .
>
> In my view, the procedure adopted at the meeting did not follow the peremptory procedures laid down by the TOC constitution and fall [*sic*] foul of the notice and other requirements prescribed therein.[57]

55 P Awojobi, 'Leadership conflict in the Nigerian church', available at <http://www.biblicaltheology.com/Research/AwojobiPO01.pdf>, accessed 11 December 2018.

56 See similar cases, such as *Waanar v Emmanuel Pentecostal Mission Churches*; *Church of God and Saints v Mzileni*.

57 *Setsiba v Trans-Orange Conference* at paras 42, 58, 60.

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Similarly, constitutional noncompliance instigated the *Gospel Church* case, whereby the second defendant refused to vacate the office of bishop and head of the church, ten years after his tenure expired in terms of the church's IsiXhosa constitution. A relevant question at this point concerns the factors that make church authorities frequently disobey their churches' governing documents. It could be argued that the church authorities might not have been adequately equipped to navigate all the basic legal issues relating to the implementation of the church polices and affairs that they were called upon to manage. For instance, in *Adventist Church*, the court observed that the church authorities ignorantly took steps that 'run afoul of the laws'. The court stated:

> Insofar as the resolutions taken at the February meeting and what followed were flawed, it is equally arguable that the February executive, and later the October executive, took the law into their own hands in implementing the resolutions and the disciplinary measures taken against individuals and local churches which supported the applicants. *It appears clear that the TOC constitution and other prescripts, as well as the principles of natural justice, were not properly complied with in various respects.*
>
> . . . From the undisputed facts, it appears that both the applicant faction and the respondent faction effectively did so, *albeit under the belief that their actions were justified.*[58]

It may be further contended that proper legal advice was not sought, particularly in *Gospel Church* and *Adventist Church*. These two cases can be contrasted with *Shembe*. In *Shembe*, Vimbeni Shembe, the deceased leader of the church validly engaged the services of a lawyer to take care of his succession plans. It should be noted that it was the deed of nomination prepared by Buthelezi, the lawyer to Shembe, that the court accepted. Given this, it is submitted that seeking proper legal advice can assist a church in complying with the legal demands of its governance mechanisms, thereby reducing exposure to avoidable dispute or, at least, taking steps that the court would be inclined to uphold.

Regulatory vacuum and lacuna

Although all the churches in the case studies had governing instruments in the form of constitutions, there appeared to be an instance where no provision at all was made regarding leadership succession. In *Gospel Church*, it was reported that, after the death of Bishop Daphula, the governance of the Gospel Church of Power in the Republic of South Africa fell to Bishop Daphula's wife and a group of priests before the church leaders met to consider Daphula's successor.

58 *Setsiba v Trans-Orange Conference*, emphasis added.

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But at this meeting they did not reach a consensus, leading to schisms. This fact is suggestive of the absence of a constitution or policy that provided how the leader of the church would be determined. For all we know, there was no mention of any regulatory instrument governing the church at that time, before the church broke into factions. Even after the Gospel Church of Power in Africa emerged from the Gospel Church of Power in the Republic of South Africa, the defendants in *Gospel Church* admitted that the English constitution that the church leaders adopted at the church's leadership summit in 2002 did not provide for the tenure of a bishop.[59] In instances where there are provisions on leadership succession in the church constitutions, some of the provisions are filled with lacunae that make succession become unworkable and disputes unavoidable. For example, in *Gospel Church*, although the IsiXhosa constitution, which the court accepted as the 'legitimate constitution', provides for leadership tenure of two years in the office of the bishop, it does not appear to have provisions regarding interim succession. This seems to be the reason why the applicants in the case sought an order that would make 'the pastors and evangelists to jointly appoint a person who shall, for the time being, act in the position of the bishop of the church'.[60] Had the constitution had a provision for interim succession, the applicants would simply have requested that the provision be enforced.

From the foregoing, it can be argued that what makes the governance mechanisms of a church effective is not simply having a constitution or a succession policy in place but that the constitution and policies are detailed and extensive enough to address all the conceivable and foreseeable occurrences regarding the church's affairs. Succession planning is an exercise in risk management; in order to address the gaps identified in the case studies, in the same manner as policies for secular organisations and business entities, church policies regarding succession should encompass a framework of key features such as the tenure for each appointment and the required criteria for assuming each leadership position, such as age, sex, tribe, educational qualification, experience and skills, among other important criteria. The policy must also be clear on the medium of assuming each office, whether by election, appointment, nomination or otherwise, and must stipulate who will be responsible for the process. It must provide similar provisions for determining the composition of the governing and management committees of the church, as well as the criteria for balancing the membership of the committees in terms of sex, age, tribe and geographical demographics. The jurisdiction or other authority which attaches to an office should also be included. Finally, there must be a provision for interim succession in the case of a sudden vacancy. These recommendations are essential for any church in virtually all jurisdictions.

59 *Mbewana v The Gospel Church of Power* at para 42(3).
60 Ibid at para 4(2).

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Complexities and inconsistencies in churches internal mechanisms

Other factors that are discernible from the case studies include inconsistencies and ambiguities in the church governing policies, such as where the policies provide for conflicting succession procedures. In *Shembe*, for instance, both the unwritten traditions and the written instruments of the church recognised the right of an incumbent leader to nominate his successor either orally or in writing. Thus, Mnguni and Poyo-Dlwati JJ in their judgment observed: 'It has become the practice of the church from inception that each incumbent leader would nominate a successor during his lifetime … It is also apparent from the history of the church that this nomination need not be in writing.'[61] Thus, both the oral nomination of the first appellant and the written nomination of the respondent as the successor of the late leader in *Shembe* apparently complied with the church's policies, thereby leading to confusion and dispute. Madondo DJP in his decision also observed:

> The respondent contends that the late leader nominated him in writing as his successor, whereas the first appellant contends that the late leader orally nominated him as his successor. Both nominations were in accordance with the church practice …
>
> The handwriting experts have advanced detailed reasons for their conclusion that the signature on the Deed of Nomination was that of the late leader. On the other hand, *the evidence, considered in its entirety, does not exclude both the possibility and probability of the existence of the oral nomination of the first appellant by the late leader as his successor.* On the balance of probabilities, it can, therefore, safely be concluded that the late leader also orally nominated the first appellant as his successor in the church leadership. As a result, the two contestants for the positions of the church's titular head and sole trusteeship of the trust are the respondent, Vela Muhle Shembe, and the first appellant, Mduduzi Shembe.[62]

In *Gospel Church*, the multiple governing documents – that is, the IsiXhosa and English constitutions – which provided for different approaches to leadership succession primarily led to the church dispute. While delivering his judgment in the case, Mantame AJ observed: 'there is no doubt that a great deal of animosity has brewed over time and the source of this dispute could be traced back to two constitutions'.[63]

61 *Mduduzi Shembe v Vela Shembe* at paras 181, 130.
62 *Mduduzi Shembe v Vela Shembe* at paras 170–171, emphasis added.
63 *Mbewana v The Gospel Church of Power* at paras 31, 42(1). In the case of the *Church of God and Saints v Mzileni* at pp 9–10, the court similarly identified the uncertainty in the multiple governing documents as one of the causes of the dispute and lamented the non-clarity of the church documents.

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An analogous problem is the inappropriate use of words that are ambiguous or convey different and multiple meanings in churches' governing documents. This problem is mostly attributed to poor drafting. In *Shembe*, Madondo DJP took a long interpretative voyage to evaluate the meaning ascribed to the words used in the church constitution and trust deed to arrive at his judgment. He held:

> The emphasis should be placed on the use of the words, 'nominate' and 'recommend', Vela Muhle Shembe for 'appointment'. In order to have a better understanding and application of such words in the present matter, they should be given their ordinary grammatical meaning
>
> . . .
>
> If the words, 'nominate', 'recommend' and 'appointment', are given their ordinary grammatical meaning, it becomes more apparent that the late leader did not actually appoint the respondent as the titular head and the sole trustee of the trust, but he merely put him forward for election and appointment, by the relevant executive committee as an approved suitable candidate.[64]

When the words that are used in a church's succession policy can be subjected to multiple interpretations, they can lead to disputes. They can also make the court uphold a decision that may be contrary to the true intention that the provisions set out to achieve. Where the church doctrine is wrongly interpreted, it may lead to a threat to church autonomy. Thus, Mpondwana, a public commentator, has rightly advised that churches need to clarify vague terms about their succession plans.[65] Ekwo, a legal author and judge in the Nigeria High Court, also observes that the words used in church policies are the key to unlocking the intention of the church.[66] Where there are inconsistencies and inappropriate use of words in church mechanisms, uncertainty and confusion abound, and disputes may become inevitable as the churches in the case studies experienced.

Personalisation of succession policies

It is further observed from the case studies that the policies of some churches are framed around an individual, such that the succession processes and decisions fall within the person's sole discretion and prerogative. The court in *Shembe* noted that

> no ordinary human being is in a position to nominate or suggest who the next Shembe shall be, save the incumbent titular head himself. . . . it has

64 *Mduduzi Shembe v Vela Shembe* at paras 163, 165.
65 Mpondwana, 'Succession issues'.
66 I Ekwo, *Incorporated Trustees: law and practice in Nigeria* (Durban, 2007), p 74.

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> become the practice of the church from inception that each incumbent leader would nominate a successor during his lifetime.[67]

It is, however, discerned from the case studies that drafting a church constitution or succession policy around an individual has problematic effects.

First, such a leader may become so powerful or autocratic that the members may be unable to challenge the leader where he or she violates the church orders or abuses or manipulates the church's succession processes. Accordingly, the church members may be left with no option other than to resort to a lawsuit to enforce compliance with the church rules. This appears to be the situation that the church found itself in in *Gospel Power*. In the case, Mantame AJ observed:

> To me, it is evident that the members of the congregation tolerated the administration of the English constitution, out of sheer respect of the Second Respondent who is their leader. This is not a problem that came overnight. It seems members of the congregation have been discontent for a long period of time. This is evident from the fact that Applicants are Evangelists from different branches, and this stands to reason that this is not a complaint from one branch that happened to be aggrieved and or malicious.[68]

Second, building a constitution around an individual may limit the effectiveness of church governance where such an individual becomes incapacitated or undesirable to members. Another challenge that is associated with having a constitution revolving around a leader is that succession processes may become non-transparent and members are not carried along in the processes. The court observed this situation in *Shembe*:

> It has become the practice of the church from inception that each incumbent leader would nominate a successor during his lifetime, but keeping the identity of the successor a secret to avoid being killed by other contenders. This has become more important in order to avoid the bloodbath that occurred when J G Shembe died and his son, Londa Shembe, did not accept that Isaiah Shembe had nominated A K Shembe to succeed J G Shembe as the Titular Head of the church and the sole trustee.[69]

67 *Mduduzi Shembe v Vela Shembe* at paras 117, 181.
68 *Mbewana v The Gospel Church of Power* at para 16.
69 *Mduduzi Shembe v Vela Shembeparas* at para 181.

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The merit of keeping the identity of a successor a secret is to avoid harm against the successor. However, such secrecy may not give room for effective leadership mentoring and development. Meanwhile, identifying and mentoring of leaders is one of the fundamental components of effective leadership succession policy. It is imperative that a church balances the transparency of succession processes with whatever succession model it adopts.

It is observed that the issue of personalisation of succession processes is more prominent among the AICs. This seems to be reinforcing the African culture of dominance, superiority and authoritarianism by traditional leaders within church succession policy. As far back as 1960, Sundkler, a professor of church history, made a similar observation regarding African church leadership. He stated that

> a fundamental pattern in traditional African society is the representative character of the chief over against his tribe or people. The representative idea is carried over into the church and applied to its African office-bearer. This pattern or representation imposes itself on the emerging African Church.[70]

While it is not within the scope of this article to prescribe a succession pattern for churches, as that means prescribing doctrine, following the issues that emerge from the case studies, personalising church leadership and succession may be problematic and this may therefore not be the best option for churches.

Failure to adopt alternative dispute resolution mechanisms

Alternative dispute resolution (ADR) simply refers to 'any procedure for settling a dispute by means other than litigation'.[71] Afolabi, an expert on peace and conflict resolution management, maintains that, in the context of a church, 'Applying ADR to leadership conflict includes a wide range of procedures and approaches, other than litigation, that aim to identify resolutions to conflicts that will be mutually accepted by the constituent parties.'[72] The popular mainstream forms of ADR include conciliation, negotiation, mediation and arbitration. It is, however, observed that, except for *Adventist Church*, none of the

70 B Sundkler, *The Christian Ministry in Africa* (London, 1962), p 128. See also P Kohls, 'A look at church leadership in Africa', (1998) 17:2 *Africa Journal of Evangelical Theology* 107–126 at 114; I Zokoue, 'Educating for servant leadership in Africa', (1990) 9:1 *Africa Journal of Evangelical Theology* 3–13; M Matshobane and M Masango, 'Understanding power struggles in the Pentecostal Church government', (2018) 74:1 *HTS Teologiese Studies/Theological Studies* 1–6, <http://www.scielo.org.za/pdf/hts/v74n1/55.pdf>, accessed 17 February 2021.

71 B Garner, *Black's Law Dictionary* (tenth edition, Saint Paul, MN, 2014), p 95. According to S Ware, *Alternative Dispute Resolution* (St Paul, MN, 2001) pp 5–6, ADR encompasses 'all legally permitted processes of dispute resolution other than litigation'.

72 Afolabi, 'Alternative dispute resolution', p 42.

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facts of the cases illustrated that the churches adopted ADR mechanisms to resolve their leadership crises.[73] Meanwhile, Shippee argues that, historically, Christians have a rich tradition of faith-based dispute resolution other than litigation.[74]

Generally, ADR 'helps the organization to address the cause(s) of the conflict for the attainment and articulation of its goals and visions'.[75] It is also cost-effective, faster and more confidential than going to court. In the context of faith-based organisations, ADR does not usually invoke secular law as the law to be used to resolve disputes, but instead 'allows parties to resolve disputes according to their own religious principles, both procedurally and substantively'.[76] The implication of this is that, where churches adopt ADR processes in succession disputes, it reduces the possibility of their exposure to court entanglement. Thus, it is important that churches incorporate ADR processes in their governance mechanisms and effectively use them to forestall litigation. This is in keeping with Jesus' directive in Matthew 18:15–18 and Paul's directive in 1 Corinthians 6:1–6 that Christians should as far as possible settle their disputes internally, rather than taking them to the law courts.[77] Seeking a means of resolving disputes other than litigation does not necessarily forestall the existence of conflicts but, if effectively employed, it may prevent a church from the risk of a dispute that has to be adjudicated by the civil courts. ADR also promotes the resolution of disputes in a much healthier and more confidential way. If all the churches in the case studies had adopted an effective form of ADR, perhaps they would have avoided litigation.

THE APPROACH OF THE COURTS

While the courts are not expected to become entangled in church doctrines whenever a church dispute comes before them for resolution, they nevertheless have the constitutional obligation to adjudicate on the matter to ensure justice in the case. This section considers the courts' approaches in evaluating church policies in the determination of succession disputes.

Internal governance mechanism

As already observed, the courts will be willing to give effect to the provisions of a church policy where there is a dispute that touches on church governance. The

73 *Setsiba v Trans-Orange Conference* at para 110: 'Although there are factual disputes regarding exactly what occurred in certain instances, it is not disputed that there were attempts at engagement and resolution over a protracted period of time.'

74 S Shippee, 'Blessed are the peacemakers: faith-based approaches to dispute resolution', (2002) 9:1 *ILSA Journal of International and Comparative Law* 237–255 at 240.

75 Afolabi, 'Alternative dispute resolution', 42.

76 M Broyde, 'Faith-based arbitration evaluated: the policy arguments for and against religious arbitration in America', (2018) 33:3 *Journal of Law and Religion* 340–389 at 340.

77 Akinloye, 'Human flourishing', p 39; Shippee, 'Blessed are the peacemakers', pp 241–242.

case studies have shown that, where a church has a written governance mechanism, it is the first point of recourse for the courts in evaluating the actions and rights of parties in a succession dispute. However, where the intent of a church's written mechanism is not clear to the court, recourse is made to the established traditions and practices of the church. For instance, in *Shembe* the court took judicial notice of the church practice that each incumbent titular head nominates a successor during his lifetime, and this can be done either in writing or orally.[78] Furthermore, in evaluating a church's written mechanism, it appears that the courts will not allow extraneous inferences to be read into the written instruments. Dippenaar AJ, in *Adventist Church*, took this approach:

> The respondents contend that all meetings enjoy the power express or implied to deal with a situation removing the executive. They rely on article II, section 8 for the entitlement to remove the TOC executive for cause. It is argued that because the meeting had the power to remove the executive, for cause, it *implicitly* enjoyed the right to elect and appoint a new executive as, failing that, the TOC would be left leaderless.
>
> This argument fails to recognise the express provisions of the constitution dealing with the election of an executive committee at regular business sessions and is not underpinned by any facts in substantiation of the contention.
>
> In order to infer an implied term into the TOC constitution, as respondents seek to do, the applicable test is that for inferring an implied term into a contract. . . .
>
> *In my view, the respondents' contention for the importation of an implied term, must fail.*[79]

It appears from the above that the court evaluated the written provision of the church governance mechanism very strictly. The advantage of this is that it reduces the likelihood of entanglement or bringing extraneous issues into the determination of a church dispute.

It is further observed that, where the policy of the church is not clear, the courts will draw an analogy from the fundamental tenets of statutory interpretation to unlock the intention of the church instruments. The textual canon of legal interpretation seems to be mostly adopted. In *Shembe*, for instance, the court adopted this approach to evaluate the meaning of 'wish' to determine the intention of the late leader regarding his successor. On this point, Mnguni and Poyo-Dlwati JJ held:

78 *Mduduzi Shembe v Vela Shembe* at paras 40, 130, 199.
79 *Setsiba v Trans-Orange Conference*, paras 36–39, emphasis added.

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> Finally on the issue as to whether the late leader's wish can be elevated to reality or a nomination in casu, the second appellant's evidence in this regard was that the late leader had expressed to him his wish that the first appellant would be his successor upon his death. As correctly pointed out in Madondo DJP's judgment, the word wish in the *Oxford Dictionary* is defined as a desire of something that cannot or probably would not happen. We have also considered the other meanings as referred to in the judgment and wish to include the following definition from Collins *English Dictionary* … In our view, all these definitions seem to point to the fact that when one expresses a wish there is no certainty that it will eventuate.[80]

A similar approach was used in determining the meaning of other words, such as 'appointment', 'nominate', 'recommend', 'pronounce', 'announce' and 'appoint' that were used in the church governance mechanism in the case.[81] This point illustrates the need to adopt an appropriate choice of words in the preparation of church policies.

Furthermore, in construing multiple written instruments of a church that provide for different modes of succession, the courts' approach will be to consider the legitimate church policy. The test of legitimacy is the popularity and acceptability of the instrument. In the *Gospel Power* case, the IsiXhosa constitution was accepted in preference to the English constitution because, according to the court, it was the constitution that was endorsed by the entire membership of the church congregation as opposed to the English constitution, which was accepted only by a section of the church leadership.[82] In effect, the courts will be more inclined to accept a constitution whose development is ascertainable and has the input of the generality of the church congregation. The same principle was adopted in the case of *Church of God and Saints v Mzileni*, another suit decided in South Africa, whereby the court had to choose between two governing documents to ascertain the legitimate leader of a church. Ebrahin AJ held:

> Once again I find it highly improbable that if the *'new constitution'* had been adopted thereafter as even discussed that there would not have been a record in the minutes of a subsequent meeting to this effect. Yet, no evidence of this was presented. Since there had been a debate about the acceptability of a new constitution, which had resulted in the rejection of the draft thereof then, in the absence of any contrary evidence indicating

80 *Mduduzi Shembe v Vela Shembe* at para 207.
81 Ibid at paras 119–120, 122, 163.
82 *Mbewana v The Gospel Church of Power* para 36.

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> its acceptance, there is no other conclusion which I can come to save that a new constitution was never adopted.[83]

It is advisable, therefore, that the church authorities need to be transparent and carry church members along in the preparation or amendment process of church governance mechanisms.[84] In addition, where there is a conflict between oral and written succession processes in a church, given the decision in *Shembe*, the courts will be inclined to follow the written procedure against the unwritten practice of the church.

Natural justice

Under common law applicable in South Africa, administrative tribunals of private institutions are not bound to strictly adhere to the formal procedural requirements or rules of evidence applicable to a formal court of law during disciplinary proceedings.[85] However, they are to observe the principles of natural justice of fair hearing.[86] A church leader may challenge his or her premature removal from office where the principle of fair hearing is not adhered to by the church authority. Where fair hearing is not given, the removal of the leader and the appointment of a new leader may be voided by the court. This is the approach that the court took in *Adventist Church*, where the court held that:

> Insofar as the resolutions taken at the February meeting and what followed were flawed, it is equally arguable that the February executive, and later the October executive, took the law into their own hands in implementing the resolutions and the disciplinary measures taken against individuals and local churches which supported the applicants. It appears clear that the TOC constitutional and other prescripts, as well as the principles of natural justice, were not properly complied with in various respects.[87]

It should be noted that the principle of fair hearing is mostly relevant when a church exercises its disciplinary power to remove a church leader.

The interest of the church

Another factor that influences the reasoning of the courts in the determination of the leadership succession disputes is the 'church interest'. It appears that the

83 *Church of God and Saints v Mzileni* at p 11.
84 *Mbewana v The Gospel Church of Power* at para 36.
85 *Mbombo v Diocese of Highveld* (Case No 49468/2010) [2011] ZAGPJHC 93 at para 52.
86 For example of cases where the issue of fair hearing was raised in the removal of a church pastor, see *Mbombo v Diocese of Highveld*; *De Lange v The Presiding Bishop*; *Fortuin v Church of Christ Mission of the Republic of South Africa* (3626/15) [2016] ZAECPEHC 18.
87 *Setsiba v Trans-Orange Conference* at para 132.

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courts will adopt an approach that will unify the church rather than further disintegrate it. This approach may involve the courts going outside the reliefs sought by the parties. In *Adventist Church*, Dippenaar AJ held:

> In my view, the matter must be approached from the perspective of considering an order which is just and equitable in the circumstances so as to restore unity to the TOC.
>
> . . .
>
> In my view, the primary policy consideration applicable in the present instance is that appropriate steps must be taken to reunify the TOC and the divided factions within it. A remedy must be crafted which sets aside the divisive actions of the past and creates a mechanism where unity can be achieved by making a fresh start in the management of the TOC in order to be fair and just within the context of the present disputes.
>
> . . .
>
> The granting of the declaratory relief sought by the applicants will not in my view adequately address the present problems; but will only result in further disputes and litigation.[88]

However, while the courts may be commended for adopting a humane approach that fosters the unity of the disputing church, there is the need for caution to avoid being compromised by emotions and abandoning the claims of the parties or introducing extraneous issues and becoming entangled in the religious affairs of the church.

CONCLUSION

This article has examined case studies of succession disputes in South African churches. From those case studies it has been seen that, although most of the churches have provisions regarding succession in their governing documents, the failure of the church authorities to comply with their provisions is linked to the litigation in most instances. Moreover, the provisions on leadership succession of some churches are limited, weak and poorly drafted, thereby creating a significant vacuum. For instance, there may be an absence of provisions on unanticipated vacancy; or there may be inconsistencies, non-transparency and inappropriate use of terms in the church governance documents, resulting in confusion and disputes. From the case studies it can be concluded that church succession disputes are significantly influenced by the church governance mechanisms, thereby justifying the claim of the CRL Rights

88 Ibid at paras 13, 144, 152. See further *Mazwi v Fort Beaufort United Congregational Church of South Africa* (Case No 3865/2009) [2010] ZAECGHC 123.

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Commission that a lack of leadership succession plans lead to conflict, division and litigation.

What makes the governance mechanisms of a church effective is not simply having a constitution or a succession policy in place, but churches ensuring that their constitutions and policies are detailed and extensive enough to address all conceivable and foreseeable occurrences regarding church affairs. The policy must be devoid of ambiguous words that can be subjected to multiple interpretations. It must also have interpretation provisions where necessary. The clear intention and the doctrinal viewpoint of a church should be clear from the literal meaning of the words used in its policies. The evolution of the policies should be a product of proper planning. In framing the contents of a church mechanism, therefore, the right choice of words is critical. Where a church policy is clear and comprehensive, it can serve as a stimulus for effective implementation of church policies. This recommendation is expedient, given the fact that most secular courts do not have adequate knowledge of church law. Thus, attention should always be given to the areas where there is most potential for subtle interference with the church's autonomy: where church policies are ambiguous, the courts may interpret the mechanism in manners that do not reflect the true intention of the church. Churches must also incorporate into their policies and explore appropriate alternative and effective means of dealing with their differences. The absence of ADR structures in church mechanisms will continue to prompt Christian disputants to take their disputes to the civil courts. Some churches also appear to build their governance mechanisms around the founder, which does not give room for effective leadership development and effective succession processes.

All of the above issues suggest the need for churches to seek proper legal advice and expertise in the drafting and implementation of their policies to reduce their exposure to avoidable disputes or, at least, to take steps that the courts would be inclined to uphold. The suggestions set out above are imperative, given that the written church policies and church customs are the first points of recourse for the courts in dealing with church succession disputes. However, the courts are more favourably disposed to accept a written provision than unwritten customs. In fact, it is only where the intent of the written mechanism of a church is not clear that recourse is made to the established traditions and practices of the church. Where the policy of the church is not clear, the courts draw an analogy from the fundamental tenets of statutory interpretation to unlock the intention of the church instruments. Where there are several governance documents regarding succession in a church, the court will take the more legitimate policy. The test of legitimacy is the popularity and acceptability of the instrument, particularly the one with evidence that it came into being democratically. This therefore reinforces the need for churches to be democratic in the development of their policies.

In conclusion, it must be reiterated that, although the case studies analysed in this article are from the South African context, the various recommendations made above are by no means less relevant to other jurisdictions outside South Africa, particularly those adopting liberal constitutions that give recognition to the autonomy of churches.

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