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Legal Disputes Involving Clergy Discipline: Perspectives from Nigeria and South Africa

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To preserve the integrity and purity of the church, the policies of churches commonly provide for the enforcement of discipline whenever a cleric errs. The concern is that despite these provisions in the governing documents of churches, disputes challenging churches' disciplinary exercise over their clergy are increasingly finding their way into the civil courts for adjudication. These disputes have implications for the reputation, governance and flourishing of a church. Against this backdrop, this article analyses a number of case studies to examine some legal issues arising from the churches' exercise of disciplinary powers over their clergy within the Nigerian and South African contexts. From the analysis of the cases, a wide variety of legal issues associated with implementing church disciplinary procedures are identified to offer some lessons that may enhance the quality of legal risk management for churches.

Keywords: discipline, clergy, Nigeria, South Africa

INTRODUCTION

Members of the clergy hold an important office that is central to the life and governance of a church. In many instances, they also have public positions beyond the membership of their particular church, particularly the senior clergy such as bishops and archbishops. However, it is not uncommon to read or hear about some members of the clergy engaging in misconduct that is inimical to their oaths of office or violates the moral code of their churches. Thus, to preserve the credibility and purity of the Church, governing documents of churches commonly make provision for the enforcement of discipline and sanctions whenever a member of the clergy errs. However, there is a concern that, despite these provisions in the churches' internal governance policies, legal disputes that challenge churches' disciplinary practices and decisions over their clergy are on the rise. Besides having implication for the governance of churches, these disputes also impact on their reputation.

This article accordingly examines a number of legal cases that have arisen from various churches' disciplining of members of their clergy in South Africa and Nigeria. It investigates whether and how the internal governance

1 The author is grateful to Professor Helena van Coller and Professor Mark Hill QC for their comments on and support of this research work.

mechanisms of churches triggered the legal disputes. It also explores the courts' approaches in resolving the disputes. The study argues that a wide variety of legal issues associated with implementing church disciplinary procedures can be identified from the legal disputes and the courts' approaches in resolving them, as well as some lessons that may enhance the quality of legal risk management of churches. The article begins with a brief examination of the nature of clergy discipline. In this section, the focus is on the contextualisation of terms and the identification of the various kinds of ecclesiastical offences and penalties that are common to the governing policies of most church traditions. Thereafter, a number of legal cases involving clergy discipline in Nigeria and South Africa are summarised, followed by an evaluation and analysis of the case studies. The last section gives the summary and the conclusion.

THE NATURE OF CLERGY DISCIPLINE

The term 'clergy discipline' requires a brief preliminary explanation. The word 'clergy' is often used interchangeably with words such as 'pastors', 'ministers' and 'priests'.[2] However, some individuals and church denominations differentiate between these terms.[3] For instance, the 'Pastoral standards, values and practices of the Anglican Church of Southern Africa' uses the term 'minister' and refers to it as

> any person who engages in public or private ministry in the church, whether formally authorised by ordination or licensing, or elected as a lay official, or informally recognised as having authority or influence over others in the Christian community. It naturally includes, but is not limited to, bishops, priests and deacons, lay officers, all licensed lay ministers, Parish Councillors, Sunday school teachers, sides persons, councillors, music leaders, youth leaders and office holders in church guilds and organisations.[4]

This definition is very wide because it includes both the ordained ministers and laity involved in church leadership. However, *The Oxford English Dictionary*

2 R Hammar *Pastor, Church and Law* (Springfield, MO, 1983), p 19.

3 For instance, a US court in *John v State* 173 So.2d 824, 825–826 (Ala. 1964) states that 'there is a difference between a minister and a pastor. A "pastor" is defined in Webster's *New International Dictionary*, second edition, – "the minister or priest in charge of a church or parish … Ecclesiastically, all pastors are ministers or priests, but all ministers or priests are not pastors. A minister has no authority to speak or act authoritatively for any local church, but its pastor does because he is the designed leader and top official of the local church."'

4 'Pastoral standards, values and practices of the Anglican Church of Southern Africa', 2011, s 3, available at <https://anglicanchurchsa.org/pastoral-standards-values-and-practices/>, accessed 11 February 2019.

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defines clergy as 'the body of men set apart by ordination for religious service in the Christian church; opposed to the laity; used of all members of religious orders'.[5] This definition is sexist in that it refers solely to men and not women. It is also restrictive because it uses ordination to qualify who a member of the clergy is.[6] This restricted definition follows the reasoning of the English court in *R v Haslchurst*[7] that a clergyman or clergywoman would include a rector, vicar or curate performing parochial duty. The term 'clergy' in the context of this study follows this restricted meaning: that is, a clergyman or clergywoman set apart by *ordination* for religious services and ministry in a church. This is irrespective of whether a church refers to the clergyman or clergywoman as a priest, minister, rector, pastor, rabbi or any other similar term. Clergy here does not include a lay minister. In this study, the word 'clergy' is used interchangeably with 'ordained minister(s)'.

'Discipline', on the other hand, is defined by *Black's Law Dictionary* as 'punishment intended to correct or instruct; especially, a sanction or penalty imposed after an official finding of misconduct; control gained by enforcing compliance or order'.[8] *The Oxford English Dictionary* defines it in the context of church governance as 'to subject to ecclesiastical discipline; to execute the laws of the church on offenders, *with a view to bring them to repentance and reformation of life*'.[9] Similarly, *The Dictionary of Church Terms* defines discipline as 'a penalty that is imposed by spiritual leaders on a member of a church who commits misconduct *to help him or her restore his or her relationship with fellow Christians and God*'.[10] These definitions illustrate that the rationale of discipline in the context of church governance is not merely to punish but, more importantly, to ensure restoration, reconciliation and relationship-building. Thus, Professor Hill asserts that church discipline 'is not considered to be punitive'.[11] In keeping with this purpose, Mantame AJ of the South African High Court in *Mbewana v The Gospel Church of Power*, held that

5 J Simpson and E Weiner (eds), *Oxford English Dictionary* (second edition, Oxford, 1989), vol 3, p 311.

6 H Black, *Black's Law Dictionary* (fifth edition, St Paul, MN, 1979), p 990, defines ordination as a 'ceremony by which a bishop confers on a person the privilege and powers necessary for the execution of sacerdotal functions in the church.' Similarly, according to M Hill, 'The regulation of Christian churches: ecclesiology, law and polity', (2016) 72:1 *HTS Teologiese Studies/Theological Studies* 1–10 at 4, ordination is 'the process by which the vocation of individuals to serve as ministers is recognised and by which they are "set apart" for ministry'. Although the process by which churches conduct ordination may differ, the approaches in may church traditions are similar. For instance, the Catholic, Anglican, Methodist and Orthodox churches conduct ordination by laying on of hands.

7 13 QBD 253.

8 B Garner, *Black's Law Dictionary* (7th edition, St Paul, MN, 1999), p 476.

9 Simpson and Weiner, *Oxford English Dictionary*, vol 4, p 735, emphasis added.

10 T Malaty, *Dictionary of Church Terms* (Alexandria, 1992), p 39, emphasis added.

11 Hill, 'Regulation of Christian churches', p 6. See also Lord Selbourne LC in *Mackonochie v Penzance* (1881) 6 AC 424, 433: discipline 'has for its objects, not punishment of individual offenders, but the correction of manners and the discipline of the Church'. In the same vein, article 11(1) of *The Methodist Book of Order: the laws and discipline of the Church of the Methodist Church in South Africa* (2016) provides: 'The true spirit of Methodist discipline requires that it be exercised in harmony

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> a church in its discipline symbolises the Body of Christ. Church discipline is a difficult doctrine and the most hard to practice and perhaps that is why at times they stray and are *requested to repent when they come back* ... exercising discipline is very much important to the purity of the entire body and protection from moral decay and impure doctrinal influence.[12]

In light of the above, clergy discipline refers to the process by which a church sanctions an ordained minister who violates the church's laws or moral code with the goal of ensuring reconciliation, restoration, the building of relationships and the purity of the Church. It is said that the imperfect nature of human beings and the fact that the Church is a fallible community further underpin the need for the Church to enforce discipline.[13] Consequently, church discipline is a medium to guarantee and sustain a church's credibility, integrity, resources and smooth governance.[14] To summarise, church discipline aims to build a healthy church. Given that many members of the Church, as well as the general public, see the churches and the clergy as the custodians of morals and virtues, where the discipline of the clergy is not properly dealt with, it has the tendency of undermining the essence of the Church, particularly as it relates to the churches' prophetic ministry to the surrounding community.[15]

The authority of a church to discipline its ordained ministers is predicated on contract in terms of church order and policies on the one hand, and the church's right to autonomy on the other hand. Danchi illustrates the contractual basis as follows:

> An individual, upon joining a religious association, does so with an implied consent to be bound by the procedures governing that association ... Therefore, when church discipline is exercised, the church is merely

with the Grace of Christ, with tenderness, patience and fidelity, seeking rather to win members back to Christ than to discontinue them.'

12 (4132/2011) [2011] ZAWCHC 380 (9 September 2011) para 43, emphasis added.

13 N Doe, *Christian Law: contemporary principles* (Cambridge, 2013), pp 156–157.

14 Hill, 'Regulation of Christian churches', p 6; Doe, *Christian Law*, pp 156–157. See also N Chivasa, 'Handling of pastoral misconduct and discipline: evidence from the Apostolic Faith Mission in Zimbabwe Church', (2017) 73:3 *HTS Teologiese Studies/Theological Studies* 1–8 at 1–2, 'Pastoral misconduct is seen as a negative force that militates against sustaining harmony in the church ... Such behaviours have direct negative implications for the reputation of churches ... Within this framework, when a pastor commits an act of misconduct, members of the church or people who might want to convert to Christianity may get frustrated to know that pastors to whom they seek for pastoral care are involved in such vices.'

15 I Akinloye, 'Human flourishing, church leadership and legal disputes in Nigeria churches', in C Green (ed), *Law, Religion and Human Flourishing in Africa* (South Africa, 2019), pp 25–42 at p 34; H van Coller and I Akinloye, '*The State v Twynham*: the (ir)relevance of further regulation of religious organisations in South Africa', (2019) 30 *Stellenbosch Law Review* 299–314.

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> requiring the offending party to abide by the doctrine that governs the entire congregation.[16]

What flows from this is that a church has the authority to discipline its ordained ministers only as long as they are serving or a member in the church. Once the member of the clergy resigns his or her position in the church, or ceases to be a member, the church's authority to discipline the person ceases.

With regard to a church's right to autonomy and discipline, it is primarily founded on scriptural principles and the constitutional basis of freedom of religion and association.[17] Thus, Pope John Paul II observed that the Church has 'its own and exclusive right' to judge in spiritual and disciplinary matters and this belongs to the church by divine institution.[18] Generally, a church has the right to determine who is religiously suitable to hold her clerical offices, and the state and civil courts are not expected to interfere.[19] The South African Supreme Court of Appeal in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* held that 'the determination of who is morally and religiously fit to conduct pastoral duties or who should be excluded for non-conformity with the dictates of the religion, fall within the core of religious functions'.[20] Thus, the court will accept the finding of an appropriate church

16 T Danchi, 'Church discipline on trial: religious freedom versus individual privacy', (1987) 21 *Valparaiso University Law Review* 387–429 at 389. Similarly, in the South African case of *Yiba and Others v African Gospel Church* 1999 (2) SA 949 (C), 960E, per Schippers AJ stated that an association such as a church has no inherent power to conduct disciplinary proceeding and to punish a member without express provision in its constitutions. I Ekwo, *Incorporated Trustees: law and practice in Nigeria* (Durban, 2007) p 157, states: 'The discipline of a church cannot affect any person except by express sanction of the civil power or by the voluntary submission of the particular person.' See also 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 *Oxford Journal of Law and Religion* 610–618 at 615: 'The constitution, together with the rules and regulations, form the agreement that sets out the nature and scope of authority of an organization, as well as the functionaries and members of the organization. In the context of churches and religious organizations, the church order determines that the particular organization is regulated by means of internal church or organizational rules, compiled by the institution itself and not the state.'

17 For example, the Bible instructs the Church not to let evil to be present within it in order to remain pure from the unrighteous (1 Cor 5:9, 11; Eph 5:1–3). Further, church leaders are to warn the sinful and admonish them to change their evil ways (2 Thess 3:14–15) because church leaders have the duty of the care of souls and are therefore to be obeyed (Heb 13:17a). The procedure for discipline is found in Matt 18:15–17.

18 Pope John Paul II, 'The Church and protection of fundamental human rights (first address to the Roman Rota)', in W Woestman (ed), *Papal Allocutions to the Roman Rota 1939–1994* (Ottawa, 1994), pp 153–158 at 156, cited in Doe, *Christian Law*, p 155; see also Doe, *Christian Law*, p 187.

19 Even, historically, under the English legal system, in terms of the principle of 'clergy privilege', which is also known as the 'benefit of clergy', according to which exemptions were given to clergy from being tried in civil courts because of the availability of trial in canonical court. This privilege was abolished after various modifications in 1827. See Black, *Black's Law Dictionary*, p 229; Simpson and Weiner, *Oxford English Dictionary*, vol 3, p 312.

20 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* 2015 (1) SA 106 (SCA) para 32. Also in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249 at 255, the English court held that 'the court is hardly in a position to regulate what is essentially a religious function – the determination whether someone is

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judicatory regarding a disciplinary decision as conclusive, as long as the church followed its established disciplinary procedures, and where no evidence of unfairness or arbitrariness exists.

The governing policies of churches commonly set out the standards and disciplinary rules applicable to its clergy, as well as the mechanisms for enforcing them.[21] These disciplinary standards and rules give a framework for identifying and interpreting ecclesiastical misconduct and offences. Since the governing policies and orders of each church reveal the church's theological and doctrinal self-understanding, misconduct for which an ordained minister can be sanctioned may vary from one church to another, and so also the procedure for their enforcement. Professor Doe, however, establishes from his study of the juridical documents of about a hundred churches around the globe that there are fundamental similarities in the type of ecclesiastical offences prohibited in most church traditions.[22] The common examples of ecclesiastical offences include inappropriate sexual behaviours such as rape, fornication, sexual harassment and abuse, and extramarital sexual relations, including but not limited to being celibate in singleness; practices declared incompatible with Christian teachings such as being a self-avowed practising homosexual, conducting ceremonies which celebrate homosexual unions or performing same-sex wedding ceremonies, drunkenness, polygamy, divorce and remarrying, embezzlement and mismanagement of church property and funds, confiscation of church property, simony, heresy, apostasy, schisms, blasphemy, perjury, falsehood and sacrilege; a conspiracy against canonical authorities, gross disobedience to lawful authority, neglect of duty and so forth.[23]

Furthermore, the internal governing mechanisms of churches commonly set out the disciplinary mechanisms or procedures in the form of church courts and tribunals to enforce sanctions against any breach of the church moral code.[24] This procedure is normally short of a formal judicial process, with some characterised by original and appellate jurisdictions and existing in tiered structures,

morally and religiously fit to carry out the spiritual and pastoral duties of his office'. See also G van der Schyff, 'The right to freedom of religion in South Africa', LLD thesis, Rand Afrikaans University (2001), p 102; J Witte, 'The South African experiment in religious human rights: what can be learned from the American experience?', (1993) 18 *Journal for Juridical Science* 1–30 at 24–25.

21 See *Mazwi v Fort Beaufort United Congregational Church of Southern Africa* (Case No. 3865/2009, Mageza AJ, 10 December 2010) para 23, per Mageza AJ: 'These Constitutions provide the Church with the rules framework with which to deal with all matters of discipline, faith and adherence to ecclesiastical norm and custom.'

22 Doe, *Christian Law*, pp 154, 178, 187; Hill, 'Regulation of Christian churches', p 6.

23 See, for example, Canon 37(1) of the Canon of the Anglican Church of Southern Africa 2006; Doe, *Christian Law*, pp 178–182.

24 *Yiba and Others v African Gospel Church* para 960E, per Schippers AJ: 'The constitution of the association and its rules and regulations determine what violations of the rules by members warrant disciplinary action being taken against them, how the domestic tribunal entrusted with the investigation of such violations is to be constituted, the procedure to be followed by the tribunal in the exercise of its functions, and the penalties to be imposed for a violation of the rules.'

such as international, national, regional and/or local levels. For example, churches such as the Catholic, Orthodox and Anglican churches use the hierarchical court or tribunal system,[25] while some Baptist and Methodist churches adopt arbitration[26] and in Presbyterianism a congregation may refer a matter to the presbytery for advice.[27] Where a member of the clergy is found guilty of any prohibited conduct, an appropriate sanction or penalty is imposed. The sanctions vary depending on the misconduct committed. Examples of such penalties include warning, admonition and rebuke, penances, defrocking or deposition, degradation or demotion, suspension, dismissal, state prosecution, expulsion or excommunication.[28]

CASE STUDIES

A glance at the law reports reveals that churches' disciplinary actions towards members of their clergy have elicited a number of legal cases challenging the churches in both Nigeria and South Africa, although there appear to be more instances in South Africa.[29] The questions that arise are: what factors are responsible for such an increase in spite the provisions in the governing policies of many churches regarding clergy discipline and how can the governing policies of churches be used to reduce such legal disputes? The remainder of the article seeks to answer these questions by evaluating and reflecting on some case studies. However, not all of the many cases relating to this issue can be effectively examined. Accordingly, three cases from each of Nigeria and South Africa will be discussed. These cases are selected randomly to cover both the mainline and the African Independent churches.

The Nigerian cases

This section looks at two cases involving the Assemblies of God Church, Nigeria – *Emeka v Okoroafor* and *Anyanwu v Okoroafor* – and one involving an African Independent church – *Egubson v Ikechiuku*.[30]

25 Doe, *Christian Law*, p 164; See *Methodist Book of Order*, art 11; *De Lange*, paras 9–12.

26 See *De Lange*, paras 9–12. Similarly, articles 6 and 10 of the Constitution and By-laws of the Baptist Union of Southern Africa, 1933, empower the executive of the Union to appoint arbitrators and to remove an accredited minister on complaint and finding guilty of misconduct. *Methodist Book of Order*, arts 5(15)–(25) and 11 provide for both hierarchical judicial systems and arbitration.

27 Hill, 'Regulation of Christian churches', p 6.

28 Ekwo, *Incorporated Trustees*, pp 158–159, says that excommunication is of two kinds, the lesser and the greater. The former deprives the offender of the use of the Sacraments and divine office. The latter deprives the offender not only of the Sacraments and the benefits of the divine office, but of the society of and conversation with the faithful.

29 Nigeria: *Emeka v Okoroafor* (2017) All FWLR (Pt 915) 1166; *Anyanwu v Okoroafor* Suit No. FCT/HC/CV/1889/2014 (Musa J, 5 July 2018); *Egubson v Ikechiuku* (1977) LPELR-SC.183/1975; *Eternal Sacred Order of Cherubim and Seraphim v Adewunmi* (1969) 2 *African Law Report* 273. For South Africa, see below, note 52.

30 *Egubson v Ikechiuku* (1977) 6 SC 1.

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Assemblies of God Church, Nigeria – Rev Emeka v Rev Okoroafor and Others

The case of *Rev Emeka v Rev Okoroafor* (*Emeka*) concerns the Assemblies of God Church, Nigeria. In 2010, the appellant, the Revd Paul Emeka, an ordained minister, was elected by the general superintendent of the Church for a term of four years.[31] All 19 of the respondents are leaders in the Church. A petition was written against the appellant in the course of his tenure. In the five-page petition signed by 12 members of the 'Body of Ambassadors of the Kingdom', a unit in the Church, Mr Emeka was accused of high-handedness, financial mismanagement and abuse of office.[32] At the time that this petition was written, the appellant was also the chairman of the Executive Committee of the Church, the body charged with disciplinary matters in the Church. The appellant responded to the allegations made against him in a letter dated 8 October 2013. According to the appellant, as a result of his response to the allegations, he received a vote of confidence from the pastors, presbyters and other members of the Church.[33] It was the appellant's contention that the ninth to nineteenth respondents were not pleased with the vote of confidence he got. Consequently, they wrote another petition accusing him of corruption and acts inimical to the Church's constitution and bylaws.

As the chairman, the appellant contended that he convened a meeting of the Executive Committee to address the impasse in the Church. The first to third respondents, who were also members of the Executive Committee, together with other members, scheduled parallel meetings of the Executive Committee in the absence of the appellant in order to deliberate on the petitions against him. The first to third respondents further convened a special session of the General Committee, the body charged with appeals from decisions of the Executive Committee, to consider the petition against the appellant. The appellant was invited to this meeting, but he refused to attend on the grounds that the meeting did not comply with the Church's rules regarding the convening and the composition of a special session of the General Committee.[34] Before this special session meeting could be held, some members of the Church (not including the appellant) instituted an action to forestall its occurrence. The meeting was held nonetheless, and at it the appellant was removed as the general superintendent. He was also suspended as a member of the Church.[35]

31 *Emeka*, para 1207C–D.
32 W Mbamalu, 'Fellowship at *orita*: a critical analysis of the leadership crisis in the Assemblies of God, Nigeria', (2016) 50:1 *Die Skriflig* 1–8 at 6.
33 *Emeka*, para 1207D.
34 Ibid, para 1208A–B. At 1201F, the appellant contended that the 'Body of Ambassadors of the Kingdom' and the 'Consultative Assembly' were not persons authorised or organs cognisable under the extant constitution and bylaws of the Church to be part of the composition of a special session of the General Committee.
35 Ibid, para 1208C–E.

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The trial court, in the action instituted in which the appellant was not a party, ordered the parties to revert to the *status quo ante bellum*.[36] The appellant thereafter filed an application at the High Court of Enugu State for the enforcement of his fundamental rights, on the grounds that the respondents breached his right to a fair hearing before removing him as the general superintendent and were taking steps to actualise their decision in spite of the existing court order that mandated the parties to maintain the *status quo*, among other grounds. The respondents did not file a counter to the appellant's application, but objected the issuance and service of court processes on them and the propriety of the procedure adopted by the appellant to seek redress.[37]

The learned trial judge in a considered ruling overruled the respondents' objections and granted the appellant's reliefs.[38] Dissatisfied with the ruling, the respondents appealed to the Court of Appeal, where the decision of the trial court was reversed. The appellant, also dissatisfied, appealed to the Supreme Court and the Supreme Court unanimously upheld the decision of the Court of Appeal.[39]

Assemblies of God Church, Nigeria – Anyanwu v Okoroafor and Others

The case of *Anyanwu v Okoroafor* (*Anyanwu*) also concerns the Assemblies of God Church, Nigeria. The case was a fundamental right enforcement suit brought by the applicant, the Revd Anyanwu, against the respondents for suspending him as a minister in the Church. Immediately prior to the suit, the applicant was a minister and the district superintendent for Abuja District of the Church. The first respondent was the assistant general superintendent of the Church. The second to eleventh respondents were leaders in the Church. Some members of the Church accused the applicant of mismanagement and of stealing and/or conversion of 300 million Nigerian Naira that belonged to the Church.[40] The applicant contended that the respondents set up an investigation panel to investigate the allegations against him. The panel found the applicant guilty of the allegations. Acting on the panel's recommendation, the respondents suspended the applicant as a minister in the Church. The respondents further published the applicant's name and picture in a national daily newspaper as having been suspended and dismissed from the Church.[41] The applicant challenged his suspension before the Federal High Court in Bwari on the grounds that the panel that investigated him was illegal and unlawful, as its constitution did not follow the Church's constitution and bylaws: it was

36 Ibid, para 1208F.
37 Ibid, para 1204C–F.
38 Ibid, para 1205A–B.
39 Ibid, paras 1227D–H, 1231G–1232B.
40 *Anyanwu*, para 2. This amount was the equivalent of about 2 million US dollars at the time that the suit was instituted.
41 Ibid, para 6.

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not a court or tribunal established by law and thus lacked the competence to investigate and to try him for the criminal offences of which he was accused; moreover, he was not given the opportunity of presenting his defence or of being heard by the panel before he was purportedly suspended and dismissed.[42]

The court upheld the case of the applicant and declared that the allegations of mismanagement and stealing or conversion of 300 million Naira of church funds with which the applicant was charged were criminal offences under state legislation. By virtue of section 36 of the Constitution of the Federal Republic of Nigeria, 1999, the applicant ought to be arraigned and tried before a court of competent jurisdiction established under state law, not the investigative panel set up by the respondents to try the applicant. The court held further that the applicant was, by virtue of section 36(5) of the Constitution, presumed innocent of all the allegations made against him by the respondents, and on which he was yet to be tried and found guilty by a competent court.[43] The court accordingly declared as illegal, unlawful and unconstitutional the investigative panel constituted by the respondents to investigate and try the applicant, and the entire proceedings of the panel declaring the applicant guilty and leading to his suspension, and for not affording the applicant a fair hearing.[44] The court further held the publication of the applicant's suspension in a national daily newspaper as malicious. The court consequently awarded the sum of 2 million Nigeria Naira as monetary damages against the respondents and in favour of the applicant.[45]

St Joseph's Chosen Church of God – Egubson and 3 Others v Joseph Ikechiuku
The defendant, Joseph Ikechiuku, was the founder and a minister of St Joseph's Chosen Church of God. By virtue of the Church's governing document, he was the sole incorporated trustee of the Church. The claimants were leaders and members of the governing body of the Church, namely the General Executive Council (GEC). In addition to the wife he had earlier married under customary law, the defendant married six more wives under customary law, claiming that he acted on divine revelation.[46] The claimants and members of the GEC were not satisfied with the conduct of the defendant, he being one who had always disapproved of polygamous marriages.[47] The members of the GEC saw the defendant's conduct as an infraction of the doctrines and regulations of St Joseph's Chosen Church of God. They consequently convened a meeting in the absence of the defendant, wherein they passed certain resolutions, including

42 Ibid.
43 Section 36(5) states: 'Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.'
44 *Anyanwu*, para 19–22.
45 Ibid, para 23.
46 *Egubson*, para 4.
47 Ibid.

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suspending the defendant, and then excommunicated him from the Church.[48] The defendant's suspension and excommunication were communicated to him via a letter.

The suspension and excommunication of Joseph Ikechiuku formed part of the issues considered by the court to determine whether the GEC acted in accordance with the Church's governing policy, 'The Immutable Rules and Conducts', in disciplining the defendant. In doing this, the court considered whether polygamy, the misconduct for which the defendant was disciplined, violates the Church's rule and doctrine. The claimants contended that in terms of chapter 7 of the Immutable Rules, monogamy was to be observed by all members. By marrying six additional wives, the defendant's action was, therefore, inexcusable. The claimants were accordingly justified in first suspending and then excommunicating him from the Church.

The Supreme Court, while upholding the decision of the trial court, observed that, although the Church recognised monogamy as part of its doctrine, it did not abhor polygamy and concubinage. The court said:

> In view of the heavy weather made of monogamy in this case, it is not without significance that this booklet also deals with concubinage ... We are satisfied that the learned trial judge was correct in holding that, although the Immutable Rules and Conducts exhorts members of the church who have one wife not to take on more, it does not forbid polygamy.[49]

The court evaluated the Immutable Rules further:

> For the proper appreciation of the attitude of the church to monogamy, it is necessary to refer to paragraph (c) of the chapter which deals with polygamy. At the bottom of page 42 and the beginning of page 43, are to be found the following: Moreover, many people today in the world are polygamists, that is, they have been the husbands of many wives before they repented. For this reason, if any man becomes a member of the church, having more than one wife, let him in with his wives and let them continue to learn, when the man has come to the full knowledge of the truth in Christ, the Lord shall reveal to him, which amongst his wives is his bone and flesh, then he shall continue with the wife chosen by God and shall do away with the others, this is God's will. But if the Lord reveals that the man and wives should continue their marriage while worshipping Him, let them continue. It is God's will.[50]

48 Ibid.
49 Ibid, para 8.
50 Ibid, para 9.

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After considering the above provisions of the Immutable Rules, the court concluded:

> In the face of these doctrines of the Saint Joseph's Chosen Church of God, it seems to us beyond the realm of reason for the plaintiffs to urge upon any court of law, let alone this court, that monogamy is one of the tenets, nay pillars of the creeds of the church. Nothing could be further from the truth. How can it be claimed with confidence, certainty, and any atom of conviction that a church that openly teaches as a dogma and encourages concubinage and plurality of wives . . . at any time really and truly believes in, and practises monogamy, even if one of the Immutable Rules and Conducts stipulates, as was erroneously pleaded in the statement of claim, 'that no member of the church shall have more than one wife at the same time'?

The court further observed that, according to the Immutable Rules, the punishment for contracting a polygamous marriage or concubinage was a suspension, but the GEC excommunicated the defendant.[51] Accordingly, the Supreme Court upheld the ruling of the trial court that declared the suspension and excommunication of the defendant by the claimants as null and void.

The South African cases

As it was noted earlier, compared to Nigeria there have been more legal cases involving clergy discipline in South Africa, and both the mainline and African Independent churches have been involved.[52] Wallis JA of the South African Supreme Court of Appeal recently observed this point in a case: 'These issues are not novel. They have arisen in various denominations within the broad Christian community when disciplinary steps have been taken against ministers and they have sought to invoke the jurisdiction of tribunals set up to resolve dis-

51 Ibid.

52 For mainline churches, see, for instance, *De Lange*; *Ngewu v Anglican Church of Southern Africa* (Case No. AR 8945/14) [2016] ZAKZPHC 88 (6 October 2016); *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration and others* (2001) 22 ILJ 2274 (LC); *Mbombo v Diocese of Highveld* (Case No. 49468/2010) [2011] ZAGPJHC (19 August 2011); *Salvation Army (South African Territory) v Minister of Labour* (2005) 26 ILJ 126 (LC); *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit* (1999) 20 ILJ 1936 (LC); *Presbyterian Church of Africa v Patrick Peter* (Case No. 3045/2014, 2 June 2015 Goosen J). For African Independent churches, see, for instance, *Fortuin v Church of Christ Mission of the Republic of South Africa* (3626/15) [2016] ZAECPEHC 18 (5 May 2016); *The Board of Incorporators of the African Episcopal Church v Petrus Heradien* (Case No. 9691/12, Louw J, 21 September 2012); *Yiba and Others v African Gospel Church*; *Mazwi v Fort Beaufort United Congregational Church of South Africa*; *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).

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putes.'[53] For the purposes of this article, however, the cases of *Mbombo v Diocese of Highveld*, *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa*, and *Fortuin v Church of Christ Mission of the Republic of South Africa* are examined. These three cases concern the Anglican Church, the Methodist Church and an African Independent Church respectively.

Anglican Church – Mbombo v Diocese of Highveld

The case of *Mbombo v Diocese of Highveld* (*Mbombo*) is a decision of the South Guateng High Court. The applicant, the Revd Mbombo, was an ordained minister with the respondent. The respondent (the diocese) was one of the autonomous units of the Anglican Church of the Province of Southern Africa. Mr Mbombo sought the order reviewing and setting aside the decision of the respondent to relieve him of his duties as a priest. The head of the diocese was Bishop Bennerman. Immediately prior to the commencement of this suit, Mr Mbombo was the priest in charge of the Holy Name Parish Church, Benoni. In December 2009, a dispute arose between Mr Mbombo and his parishioners wherein the parishioners wrote a petition to the bishop requesting him to remove Mr Mbombo as their parish priest.[54] The allegations against him included a breakdown of trust and confidence in him, his lack of spiritual leadership and pastoral relationship, the use of foul language and verbal attacks on certain members of the parish during religious services.[55] Several meetings were held between the applicable bishop's chapter and Mr Mbombo regarding the allegations. As a result of the meetings, it was suggested that an investigation panel be constituted to ascertain the sources of the rift between the parties and to restore peace within the Holy Name Parish Church.[56]

Following the above suggestion, on 14 January 2010, Bishop Bennerman constituted an investigation panel, namely the 'Board of Preliminary Inquiry Panel', to look into the allegations. Several persons and groups from the diocese appeared and presented their case to the panel. The panel found that there was already a total breakdown in relations between Mr Mbombo and the parishioners. The panel recommended to the bishop that Mr Mbombo be removed from the parish with immediate effect and be offered an alternative parish where he could continue with his ministry.[57] The panel further suggested that if possible he could be charged with a specialised ministry within the diocese. Should no vacancy be found within the diocese, he could also be given a calling anywhere within other dioceses of the Anglican Church.[58] The bishop claimed that, following the panel's recommendations, he looked around his

53 *De Lange*, para 59.
54 *Mbombo*, para 9.
55 Ibid, para 10.
56 Ibid, para 11.
57 Ibid, para 12.
58 Ibid.

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diocese and other dioceses for a vacancy to which Mr Mbombo could be relocated, without success. It was only after this that the bishop decided to relieve Mr Mbombo of his duties as a priest in the diocese.[59] Mr Mbombo instituted the present suit after his appeal to the Archbishop of Cape Town (the head of the Anglican Church in Southern Africa) to review the respondent's decision failed.[60]

At the court, both parties agreed that, in order to relieve the applicant of his duties, the Constitution and Canons of the Church were applicable. However, the main issue was whether the respondent followed the correct procedures in relieving the applicant. Mr Mbombo contended that the diocese acted according to Canons 37 and 39, or, alternatively, Canon 25(6) read with Canons 37 and 39, in dismissing him.[61] The diocese, however, argued that it acted only in terms of Canon 25(6) and 25(8).[62] Mr Mbombo contended that, apart from there being no procedural fairness in the processes adopted, the diocese failed to follow its own canons, thereby rendering its decision not only unfair but also void.[63] He argued further that the diocese's irregularities were that he was not afforded the chance to seek legal representation, that he was not allowed to cross-examine witnesses, that incorrect canons were applied or utilised during the inquiry that was conducted and that the panel conducting the inquiry was not properly constituted, among other claims.[64]

59 Ibid, para 14.
60 Ibid, para 16.
61 Canon 37 provides, inter alia, for a series of charges and offences that are of such a serious nature that they deserve to be referred to a board of inquiry; the procedure for preferring charges; the right of the accused and the complainant to be represented by the counsel of their choice and at their own expense; the procedure to be adopted by the tribunal when taking evidence from witnesses; and the duty of the panel to keep a full record of its proceedings. Canon 39 deals with the requisite logistics in relation to the composition and rule of practice of the board of inquiry. Canon 25(6) provides that 'If the Bishop of the Diocese considers that for pastoral reasons the work of God in a Pastoral charge demands that there should be a change of incumbent or assistant Curate, the Bishop shall (failing the consent of the said Incumbent or assistant Curate to the change) take counsel with the chapter of the cathedral church, or with the senate, as the case may be, or if there be no chapter or senate, priests of the Diocese, and if the majority of them agree to such a course, after giving the said cleric an opportunity to be heard, and Section 8 of this Canon, the Bishop shall offer the cleric another ministry in the Diocese stipendiary if the ministry was stipendiary. Should there be none in the Diocese, then the Bishop shall seek in consultation with the cleric another suitable ministry within the Province. However, if it appears to the Bishop, either before embarking on this process or during the process itself, that the reason for the need for a change, in fact, relates mainly or substantially to matters which could constitute charges or accusations in terms of Canon 37(1), then in the absence of any charge under Canon 37(1), the Bishop shall proceed in terms of Canon 39.'
62 Canon 25(8) states that 'If another ministry is not found in the Diocese or within the Province, then if two thirds of the chapter, senate or priests agree that under all circumstances, no other ministry should be offered, then after giving the clergyman an opportunity to be heard, the Bishop may, after explanation and pastoral ministration, upon the expiration of three months' notice, revoke the clergyman's letters of collation or institution, or his licence, as the case may be, without offering another ministry.'
63 *Mbombo*, para 31.
64 Ibid.

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In arriving at a decision, the court evaluated the canons of the Church vis-à-vis the chronology of events leading to the dismissal of Mr Mbombo in order to determine: first, whether the diocese acted based on Canon 25(6) read with Canons 37 and 39 or otherwise; and second, whether the diocese complied with its canons.[65] Regarding the first issue, the court observed the following:[66]

i. The final and the only report of the panel on which the Bishop Bennerman acted was titled 'Board of Preliminary Inquiry Panel'. The very title 'Board of Preliminary Inquiry' given to the panel was similar to the 'Board of Inquiry' contemplated under Canon 39.[67] Moreover, Canon 25, on which the diocese claimed to have acted, did not provide for an appointment of a Board of Inquiry.[68]
ii. The complaints and/or allegations against Mr Mbombo were of a serious nature as indicating conduct giving just cause for offences listed in Canon 37.[69]

In light of the above observations, the court discounted the diocese's contention that it acted on Canon 25(6) and (8) and held that the diocese acted in terms of Canons 37 and 39.[70] The court proceeded to consider whether the diocese complied with Canons 37 and 39. It observed that:

i. There was no evidence in the panel's record that any of the complainants who gave evidence before the panel took an oath or affirmation as stipulated in Canon 37(9). The record of the panel equally did not specify whether any cross-examination was allowed as stipulated in the Canon.[71]
ii. In terms of Canon 39(c), a three-member Board of Inquiry is authorised and one of them must be a lay communicant with a legal background. However, no lay panellist with a legal background was among the panellists.[72]
iii. The allegations against Mr Mbombo bore similitude with those listed in Canon 39.[73]
iv. Canon 37(12) provides that the proceedings of the panel shall be in public, unless the president of the panel deems it preferable on the grounds of public morals that they should, in whole or in part, be

65 Ibid, paras 31–53.
66 Ibid, para 35.
67 Ibid, paras 33 and 41.
68 Ibid, para 42.
69 Ibid, paras 36 and 42.
70 Ibid, para 35.
71 Ibid, paras 3 and 6.
72 Ibid, para 37.
73 Ibid, para 42.

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> private. The report of the panel showed that there were two distinct sessions, an open session where the applicant was present and a closed session where he was excluded. However, there was no indication in the report of the panel why a part of the proceeding was held in secret and in the absence of the applicant.[74]

Against the backdrop of these observations, the court held as follows:

> The diocese committed a gross procedural irregularity in terms of administrative law principles and requirements as well as in terms of its own Canons ... As seen above the Investigative Inquiry Panel set up did not comply with the peremptory requirements of the Canons. There was no lay person with a legal background, the Applicant was not allowed to cross-examine his accusers, he was not legally represented or represented by any other person of his choice and his fate was decided on the basis of the unconstitutionally obtained evidence as set out above as well as secret evidence that was led [*sic*] in his absence in that inquiry.[75]

The court referred the matter back to the diocese for fresh consideration and/or inquiry before a new panel.[76]

Church of Christ Mission of the Republic of South Africa – Fortuin v Church of Christ Mission of the Republic of South Africa and 2 Others

The case of *Fortuin v Church of Christ Mission of the Republic of South Africa* (*Fortuin*) was decided by the Port Elizabeth High Court. The applicant, Johannes Fortuin, was an ordained minister in the Church, serving in Bloemendal Parish. The second and third respondents were the president and general secretary of the Church respectively. The applicant sought the order of the court setting aside the decision of the respondents to disfellowship him from the performance of his pastoral duties and demanded immediate reinstatement.[77]

Mr Fortuin was disfellowshipped on the grounds that he divorced his wife and married another woman.[78] At the Church's annual conference held in September 2013, Mr Fortuin wrote a letter through the Church's provincial representative, Mr Adams, advising the president of the Church about his divorce. This letter was presented to the National Ministers Association for consideration at the conference. On receipt of the letter, Mr Fortuin was summoned to the

74 Ibid, paras 32 and 49.
75 Ibid, paras 44 and 47.
76 Ibid, para 54(4).
77 *Fortuin*, paras 1 and 13.
78 Ibid, para 6.

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meeting of the National Ministers Executive Committee. At that meeting, he enquired at the outset whether the purpose of the meeting constituted a hearing. He was advised that the sole purpose of summoning him was to receive confirmation from him about his divorce in order to put the members of the committee in better stead. On the last day of the conference, the deputy president of the Church, Mr Lewis, and one Mr Mguzulwa informally notified Mr Fortuin that the president of the Church had announced at the conference that he had been expelled and his ministry with the Church terminated.[79] Mr Fortuin requested a written confirmation of the termination of his ministry and the reasons thereto from Mr Stemela, the then secretary of the Church. Mr Stemela, however, told him not to expect any written confirmation as none would come.[80] With the consent of the members of his Bloemendal congregation, Mr Fortuin continued to minister at the Bloemendal church until a formal notice of his termination was served on him.[81] On 24 January 2015, at Bloemendal church, Mr Lewis formally notified Mr Fortuin that his expulsion was ratified and confirmed pursuant to the decision allegedly taken in October 2012 at a meeting of the ministers and ministers' wives, where it was allegedly resolved that ministers who divorced their spouses would be expelled from the Church.[82]

Mr Fortuin consequently sued and contended that the respondents were acting beyond their powers in expelling him. According to the applicant, the Church's National Assembly is the highest decision-making body that is competent to take a resolution which was allegedly taken at the meeting of other ministers and ministers' wives. Furthermore, the actions of the Church were patently in contravention of the tenets of natural justice because he was denied the right to be heard before the respondents took the decision to disfellowship him.[83]

At the hearing of the case, the respondents raised some points *in limine*, one of which was that the court had no powers to determine religious disputes or to review decisions taken by the church.[84] The respondents contended that their constitution, and the Bible as the supreme authority, preclude a member of the Church from challenging decisions taken by the Church. Therefore, the applicant had no right to refer this matter to the court.[85] Furthermore, since the first respondent (the Church) was a voluntary association, its action through its functionaries did not fall within the definition of administrative

79 Ibid, paras 8 and 9.
80 Ibid, para 9.
81 Ibid, paras 10–11.
82 Ibid, para 12.
83 Ibid, para 13.
84 Ibid, para 14.
85 Ibid, para 17.

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action as contemplated in the Promotion of Administrative Justice Act.[86] Mr Fortuin, however, argued that the decision of the first respondent was of contractual obligation or of a domestic tribunal and therefore subject to a review.[87] Regarding the preliminary objections, the court upheld the applicant's submission. It held that there was ample authority in support of the proposition that courts are empowered to interfere with the decision made by a tribunal where the fundamental principles of fairness have been flouted, and that a reasonableness test based on rationality was a competent basis under the common law powers to review the decisions of voluntary associations.[88]

On the issue of whether the respondents complied with the Church's governing documents in exercising their powers to disfellowship the applicant, the court evaluated the provisions of Article XV of the Church's Constitution, which set out the Church's disciplinary procedure. The court noted that: 'it is clear from the provisions of the first respondent's Constitution that the applicant was entitled to a fair hearing before a decision was arrived at'.[89] Although the respondents claimed that the Revd Fortuin appeared before the Church structures and was given a fair hearing at various stages, they failed to present any evidence before the court to prove their assertion, such as the minutes of the meetings, a record of the proceedings or even where the hearing took place.[90] As such, there was nothing to indicate that a proceeding was held. Accordingly, the court held that the respondents failed to comply with their own constitution and set aside the respondents' decision to disfellowship the applicant.

Methodist Church of Southern Africa – De Lange v The Presiding Bishop of Methodist Church of Southern Africa & Anor

The case of *De Lange v The Presiding Bishop of Methodist Church of Southern Africa (De Lange case)* is an appeal from the Western Cape High Court to the Supreme Court of Appeal (SCA). The appellant, the Revd Ecclesia De Lange, was an ordained minister in the Methodist Church of Southern Africa (the Methodist Church). The first and second respondents were the presiding bishop and the executive secretary of the Church respectively. The appellant announced to her parish congregants her intention to marry her same-sex partner.[91] She subsequently married the said partner, at a time when it was the 'policy, practice and usage' of the Methodist Church according to its Laws and Discipline (L&D) to recognise only heterosexual marriages, pending the outcome of an internal

86 No 3 of 2000.
87 *Fortuin*, para 17.
88 Ibid, para 18. The court further supported its position with other cases, such as *Turner v Jockey Club of SA* 1974 (3) SA 633; *Dabner v SA Railway and Harbours* 1920 AD 583, 589.
89 *Fortuin*, para 20.
90 Ibid, paras 21 and 23.
91 *De Lange*, para 3.

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engagement process.[92] Ms De Lange was immediately suspended pending the hearing of a charge levelled against her before the District Disciplinary Committee (DDC) of the Church. The DDC recommended that she continue under suspension without station or emoluments until such time as the Church mdke a binding decision on ministers in same-sex unions.[93] Ms De Lange appealed the ruling of the DDC to the Connexional Disciplinary Committee (CDC) of the Church. The CDC affirmed the verdict of the DDC.

Ms De Lange further challenged the decision of the CDC in terms of Rule 5(11) of the L&D by having the dispute referred to the Church's arbitration for resolution. Before the arbitration was concluded, she opted to take legal action. In the High Court, she sought to set aside the arbitration agreement with the Church or to obtain an order that such an arbitration agreement would cease to have effect; to obtain a declaration that the decision of the Church to suspend her as a minister was unconstitutional and was unfair discrimination based on sexual orientation; and to review and set aside her suspension and reinstate her as a minister with payment of entitlements.[94] To support her claim, she argued that the Methodist Church has not determined that same-sex partners should not take positive steps to enter into a civil union, therefore, the Church is bound by her own rules. She contended that, while the Church had the rights to freedom of religion and association, what the Church could not do was to not have a clear and pre-announced law forbidding people to enter into same-sex marriages and after the fact then try to create the impression that such a law existed.[95] The High Court dismissed her claims and ruled that her 'application is premature and that she should first submit to arbitration'.[96]

On appeal to the SCA, Ms De Lange sought to avoid the arbitration agreement on the ground that, first, the arbitrator, a Methodist Church member, was biased, and second, the arbitration itself forced her to waive her fundamental rights under the constitution and ousted the jurisdiction of the courts and that the agreement denied her legal representation. Although the appellant had at the High Court avowed her claim of unfair discrimination based on sexual orientation, her counsel moved the SCA to pronounce on the question of whether there was indeed a rule in place as contended by the Methodist Church.

The SCA held that Ms De Lange was not calling upon unfair discrimination based on sexual orientation in her claim, but was advancing a case based on an

92 Ibid, paras 5–6. *Methodist Church of South Africa: laws and discipline* (2000).
93 *De Lange*, para 8.
94 Ibid, para 1.
95 Ibid, para 18.
96 Ibid, para 15.

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entitlement to fair administrative action.[97] The court accordingly refused to engage with the issue of unfair discrimination based on sexual orientation. For the court, the question was 'whether the appellant has shown good cause for avoiding the arbitration' and whether, according to section 3(2) of the Arbitration Act,[98] a court had the discretion to enforce an arbitration agreement.[99] The SCA held that the arbitration agreement never waived Ms De Lange's constitutional rights, nor ousted the court's jurisdiction to review the court proceedings; rather, the agreement specifically preserved it. The court found in this regard that there was nothing unlawful in trying to resolve matters first through internal processes and then by review of such processes by a competent court.[100] With regard to the right to a legal practitioner at the arbitration, the court held that the arbitration agreement was silent on the right to legal representation; having left that to the discretion of the arbitrator, the arbitration rightly held that no legal representation would be allowed for either the appellant or the Church and no injustice ensued. Although Ms De Lange contended that the arbitration would be a futile process, the court responded that the central question was whether the Church had a rule that prohibited the appellant from announcing her intentions to marry, and this required a factual determination to be made, which could be dealt with in the arbitration.[101] The court concluded that none of the grounds advanced by Ms De Lange for seeking to avoid the arbitration passed muster.[102] The appellant appealed this decision to the Constitutional Court. The Constitutional Court upheld the decision of the lower courts.[103]

THE REASONS FOR THE DISPUTES

From the case examined above, some sensitive and vital issues relating to the governing policies of the churches involved in these legal disputes have emerged.

Non-compliance with church internal mechanisms

As was indicated earlier, the governing documents of churches are contractual documents that bind the church, its members and its clergy.[104] Accordingly,

97 Ibid, para 19.
98 No 42 of 1965.
99 *De Lange*, para 23.
100 Ibid, para 26.
101 Ibid, para 28.
102 Ibid, para 29.
103 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa*, 2016 (2) SA 1 (CC).
104 It should be noted that the contractual relationship here is different from the employment contract between a church and its clergy, which has been the subject of scholarly debate for years. This debate is outside the scope of this article. But for insight into the debate within the South Africa context where it has been prominent, see H van Coller, 'Religious ministers: working for God or working

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as church members and the ordained ministers are expected to obey the church policies, so also a church is expected to comply with its own rules when exercising disciplinary power. It is trite law in Nigeria and South Africa that the court will intervene by means of a review and set aside the decision of a church where it is found that the church fails to follow its own rules when exercising disciplinary powers.[105] The KwaZulu-Natal High Court in *Bishop Ngewu v The Anglican Church of Southern Africa* confirmed the view that 'It is common cause between the parties that this court can review proceedings of the Church if there has been non-compliance with the Church's Constitution and/or Canons or with the principles of natural justice.'[106] However, while it is good to note that most of the churches involved in the case studies have written internal governance policies regarding discipline, non-compliance with the governance policies apparently triggered the majority of the legal disputes. In the Nigerian context, for instance, although the court did not decide *Emeka* on merit, the reliefs that the appellant sought in the suit point to the reasons why he instituted the suit. The very first relief that the appellant sought states:

> A declaration that the meeting held by the respondents on 6 March 2014, purportedly at a meeting of the General Committee of the Assemblies of God, to determine allegations made against the applicant was illegal and unconstitutional, *the same not having been properly convened and constituted in accordance with the provisions of the Constitution and bye-laws of the Assemblies of God, Nigeria, 2002*.[107]

Another relief states:

> A declaration that the 'Body of Ambassadors of the Kingdom' and the 'Consultative Assembly' are not persons authorised or organs cognisable under the extant 2002 Constitution and bye-laws of the Assemblies of God, Nigeria and have no functions thereunder, no powers to try, investigate or discipline the applicant for any alleged misconduct and especially for any alleged criminal offences.[108]

for the Church? A reflection on *Universal Church of the Kingdom of God v Myeni and Others*', 2017 (6) *Oxford Journal of Law and Religion* 187–193. See also *Church of the Province of South Africa (Diocese of Cape Town) v CCMA* (2001) 22 ILJ 2274 (LC); *Salvation Army v Minister of Labour* [2004] 12 BLLR 1264 (LC); *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 ILJ 2832 (LAC).

105 See the decision of the Nigerian courts in *The Registered Trustees v Adeosun* (1986) 3 NWLR (Pt 30) 561; *The Registered Trustees of Tabernacle Congregation Church, Nigeria v Ikwechegh* (2000) 13 NWLR (Pt 683) 1; *Irene Thomas v The Most Revd Timothy Olufosoye* (1986) 1 NWLR (Pt18) 669. For South Africa, see *Mazwi*, para 24.

106 *Ngewu*, para 33.

107 *Emeka*, para 1199D–F, emphasis added.

108 Ibid, para 1201F.

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Similarly, in *Anyanwu*, the applicant complained that the respondents, who were the leaders of the Assemblies of God Church, did not comply with the Church constitution in their attempt to discipline him.[109] In *Egubson*, the court identified several acts of non-compliance committed by the GEC of St Joseph's Chosen Church of God when it suspended and excommunicated Joseph Ikechiuku, the spiritual head and founder of the Church. The court specifically noted that the GEC was not properly constituted in accordance with the Church's Immutable Rule in the absence of Ikechiuku, who was the sole trustee of the Church.[110] The court further observed that the punishment imposed by the GEC on Ikechiuku was higher than what was stipulated by the Immutable Rule of the Church: while the Rule provides for a suspension as the maximum punishment to be imposed on anyone who enters into a polygamous marriage, the GEC excommunicated the respondent.[111]

Similar situations were obtained in South Africa. In *Fortuin*, for instance, the applicant complained that, according to the constitution of the Church of Christ Mission of the Republic of South Africa, only the Church's National Assembly was competent to make a resolution to disfellowship him, but that decision was taken at the meeting of the ministers and ministers' wives. Also, contrary to the Church's constitution, he was not given a fair hearing before he was disfellowshiped.[112] The conclusion reached by Renqe AJ is particularly apt. He held: 'From all the aforegoing reasons, it is clear that *the respondents failed to comply with their own Constitution* and in the circumstances, the applicant has clearly made out a case for the relief sought.'[113] Similarly, in *Mbombo*, the court observed that Bishop Bennerman and the Board of Preliminary Inquiry Panel of the Diocese of Highveld did not comply with the Church's Canons and Constitutions in dismissing the Revd Mbombo. The court observed that the complainants who gave evidence before the investigative panel did not take an oath or affirmation, and were not allowed to be cross-examined as stipulated in Canon 37(9); that the panel failed to comply with Canon 37(12), which provides that the proceedings of the panel should be held in the public; and that no lay panellist with a legal background was among the member of the investigative panel as stipulated in Canon 39(c).[114]

The conclusion that may be drawn from the above is that the non-existence of governing mechanisms was not the primary factor that led to the disputes, but rather the poor implementation of or non-compliance with the internal governance mechanisms of the churches. However, the courts' approach in setting

109 *Anyanwu*, para 3–4.
110 *Egubson*, para 12.
111 Ibid, para 9.
112 *Fortuin*, para 13.
113 Ibid, para 28, emphasis added.
114 *Mbombo*, paras 36, 32, 49, 37.

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aside most of the church disciplinary procedures and decisions for flouting their internal policies reinforces the position of the law that the court will scrutinise church internal order vis-à-vis church actions to determine whether the church has flouted its own orders and policies.

Church tribunals and the principles of natural justice

From the extant literature and the cases examined in this article, the common procedures through which churches exercise disciplinary control over their clergy can be classified into two types: domestic inquiry and domestic tribunal. A domestic inquiry refers to an internally instituted fact-finding person or body charged with the responsibility of conducting a preliminary investigation to find out some facts about the truth of a given matter. The inquiry does not make a final decision, but merely remits its findings to another organ of the church, which has the ultimate responsibility of making a final decision on the matter investigated. An example is the investigation team (the Body of Inquiry) constituted by Bishop Bennerman to look into the allegation made against Mr Mbombo in *Mbombo*,[115] and also the panel constituted by the leaders of the Assemblies of God Church to investigate the allegations against Mr Anyanwu in *Anyanwu*.

A domestic tribunal, on the other hand, not only is invested with fact-finding and quasi-judicial functions, often through an adjudication system, but also reaches a final decision on a matter investigated. The finality of decision-making significantly differentiates a domestic tribunal from an inquiry. An example of a domestic tribunal is the DDC of the Methodist Church of South Africa, which investigated and found Ms De Lange guilty of breaching the L&D of the Methodist Church of Sothern Africa in *De Lange*.[116] However, it is not unusual for a body that sets out as a domestic inquiry to end up performing the *quasi*-judicial functions of a domestic tribunal. Thus, it is the character of the functions of a body that determines whether it is an inquiry or a tribunal. For the purpose of this study, these two procedures are collectively referred to as the 'church tribunal'.

Under common law, administrative tribunals of private and public institutions are not bound to adhere strictly to the formal procedural requirements or rules of evidence applicable to a formal court of law during disciplinary proceedings, but they are to observe the principles of natural justice.[117] Where a disciplinary exercise is conducted without adhering to the principles of natural

115 Ibid, para 12.
116 *De Lange*, paras 6–7.
117 A Emiola, *Remedies in Administrative Law* (second edition, Ogbomoso, 2011), p 116; Ekwo, *Incorporated Trustees*, p 157. In *LPDC v Fawehinmi* (1985) 2 NWLR (Pt 7) 392, Oputa JSC said: 'I can see no valid reason why, if the principles of natural justice have to be applied to a tribunal entrusted with a final decision, the same should not be true of a tribunal which has to decide a preliminary point which may affect the right of the parties.'

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justice, a person who is adversely affected can approach the court for judicial review to set aside the disciplinary exercise and decision.[118] However, the meaning and scope of natural justice have proven to be very difficult to define owing to diverse viewpoints.[119] Karibi-Whyte JSC, in the Nigerian case of *Adeniyi v Governing Council, Yaba College of Technology*, said:

> it is the universal principle of ancient origin and common to all mankind. They were recognised as part of our indigenous and other African cultures and philosophy of principles of justice. It is, indeed, as asserted by Coke, a principle of divine justice.[120]

In another Nigerian case, Eso JSC, quoting with approval Fortescue J in *R v Chancellor of Cambridge University*,[121] said: 'Even, God gave Adam an oral hearing, despite the evidence supplied by his act of covering his nakedness, before the case against his continued stay in the Garden of Eden was determined against him.'[122]

Natural justice is captured in two Latin maxims: *audi alteram partem* (no man shall be condemned unheard) and *nemo judex in causa sua* (no man shall be a judge in his own case). Lord Denning MR in the English case of *Surinder Kanda v Government of Malaya*[123] encapsulated the two rules as follows:

> The rule against bias is one thing. The right to be heard is another … These two rules are the essential characteristics of what is called natural justice. They are the two maxims: *nemo judex in causa sua* and *audi altarem partem*. They have recently been put in two words: *Impartiality* and *Fairness*. But they are separate concepts and are governed by separate considerations.

These two rules are protected in section 36 of the Nigerian Constitution as the principle of 'fair hearing',[124] and in section 33 of the South African Constitution

118 This position in South Africa and Nigeria can be contrasted with the position in the UK, where a clearer distinction would be made between public and private bodies in respect of the imposition of natural justice standards. In the UK a party cannot obtain judicial review from a church tribunal because it is a private, not a public, body; it is non-justiciable in that jurisdiction. See, for instance, the decision of the Supreme Court of the UK in *Shergill v Khaira* [2014] UKSC 33.

119 See the South African case of *De Lange v Smuts NO* 1998 (3) SA 785 para 132, per Mokgoro J.

120 (1993) 6 NWLR (Pt 300) 426, 450.

121 (1716) ER 698, 704.

122 *Adigun v Attorney General of Oyo State* (1987) 1 NWLR (Pt 53) 678, 721. See also L Baxter, *Administrative Law* (Cape Town, 1984), p 538; M Wiechers, *Administrative Law*, trans G Carpenter (Durban, 1985), p 208. Wiechers argues that the principles of natural justice represent a fundamental or primeval justice.

123 (1962) AC 322, 337 (PC).

124 Obaseki JSC, in *Garba v University of Maiduguri* (1986) 1 NWLR (Pt 18) 550, 584, said: 'Fair hearing is, therefore, not only a common law requirement in Nigeria but also a statutory and constitutional

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(1996) as 'procedural fairness'.[125] The efficacy of the rules has been recognised by South African and Nigerian scholars and the courts, and the viewpoints from the two jurisdictions are largely similar.[126] What has evolved from the case law in the two jurisdictions as the features of principles of natural justice includes giving to the person who is being investigated or tried before a tribunal the right to: proper notice of intended action[127] and charges or counts;[128] reasonable and timely notice;[129] personal appearance[130] and/or legal representation where the rules of the body allows it;[131] the opportunity to lead evidence and cross-examine witnesses;[132] public hearing; and rule against bias and impartiality,[133]

requirement. The rules of natural justice must be observed in any adjudication process by any court or tribunal established by law.'

125 The South African Constitutional Court in *Pharmaceutical Manufacturers Association of SA In re: Ex Parte Application of the President of the RSA* 2000 (2) SA 674 (CC), para 33, confirmed that the common law principles of natural justice have been taken up in the right to procedural fairness. Having been subsumed by the Constitution, these common law principles continue to play an important role in giving scope and content to the constitutional right to procedural fairness. See also Y Burns, *Administrative Law* (London, 2013), p 352: 'The common law antecedents of procedural fairness are found in the principles or rules of natural justice.'

126 The small difference between the two jurisdictions is discussed below.

127 For the South African cases, see *Dhlamini v Minister of Education and Training Heatherdale Farms (Pty) Ltd* 1984 (3) SA 255 (N); *Zondi v Administrator, Natal* 1991 (3) SA 583 (A). For the Nigerian cases, see *Adedeji v Police Service Commission* (1967) 1 All NLR 67; *Adeyemo v Oyo State Public Service Commission* (1979) 1 OYSHC 83.

128 For the South African cases, see *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 3 SA 589 (CC). In *Mafongosi v United Democratic Movement* 2002 (5) SA 56 (Tk), the court held: 'Surely, procedural fairness required that if the disciplinary body had information prejudicial to the applicant, it should furnish them with such information before the hearing so that they could effectively prepare and deal with it.' See also the Nigerian case of *Garba v University of Maiduguri*, 589–590.

129 See the South African case of *Turner v Jockey Club of South Africa* 1974 (3) SA 633, where the disciplinary action by the Jockey Club was set aside after it was found that the applicant had suddenly been confronted with serious allegations which had not been communicated to him before the hearing. See also the Nigerian cases of *Garba v University of Maiduguri* and *Owolabi v Permanent Secretary, Ministry of Education* (1969) IK/4M/69 (unreported).

130 See the South African cases of *Fraser v Children's Court, Pretoria North* 1996 (8) BCLR 1085 (T) and *Bam-Mugwanya v Minister of Finance and Provincial Expenditure and others, Eastern Cape* 2002 (3) BCLR 312 (Ck); and the Nigerian case of *Oyeyemi v Commissioner for Local Government* (1992) 2 NWLR (Pt 226) 661.

131 See the Nigerian case of *Adigun v Attorney General of Oyo State* (1987) 1 NWLR (Pt 53) 678, 708. However, in *De Lange*, para 26, the South African Supreme Court of Appeal, citing the cases of *Commission for Conciliation, Mediation and Arbitration v Law Society of the Northern Provinces* 2014 (2) SA 321 (SCA) para 19 and *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) para 5, stated that 'our courts have consistently denied any entitlement to legal representation as of right in *fora* other than courts of law'. Burns, *Administrative Law*, p 358, in contrast, argues that 'in that context, a highly technical matter affecting, for example, the individual's status, way of life, reputation, and so on, should entitle him or her to legal representation'.

132 See *Garba v University of Maiduguri*; *Oyeyemi v Commissioner for Local Government*.

133 See the Nigerian case of *State Civil Service Commission v Buzugbe* (1984) ANLR 372, in which the plaintiff had attacked his senior officer in a memorandum, and the officer later took part in the disciplinary process. See also *LPDC v Fawehinmi*, 300; *Osam-Pinanko v West Ghana Zion Church* (1967) ALR Comm 52.

among other rights.[134] However, from the tenor of the cases, the rules of natural justice are not absolute, but may be limited in certain instances.[135]

In Nigeria, it has long been established that the principles of natural justice are binding on the exercise of administrative tribunals of public institutions as well as domestic tribunals. Thus, in the *Eternal Sacred Order of Cherubim and Seraphim v Adewunmi*, a case that concerned a disciplinary exercise by a church, Coker ACJN said: 'We think the principle will apply to *any functionary* who performs judicial or quasi-judicial duties.'[136] However, the position is not clear with regard to South Africa. While it is established by virtue of sections 4, 5 and 6 of the South African Promotion of Administrative Justice Act (PAJA)[137] and section 33(1) of the Constitution, as well as a plethora of judicial authorities,[138] that administrative tribunals of public institutions exercising a public function must observe the principles of natural justice during disciplinary proceedings, there are inconsistent authorities regarding the applicability of the principles to domestic tribunals like church tribunals. Thus, in *Cronje v United Cricket Board of South Africa*,[139] Kirk-Cohen J noted that the conduct of private bodies is ordinarily governed by private law and not public law. These bodies do not exercise public powers and their conduct is accordingly not subject to public law rules of natural justice. He stated further that the rules of natural justice are of public law. However, private individuals and bodies may expressly or by implication incorporate the rules into their contracts; it is only where the constitution of a voluntary association incorporates the rules of natural justice that they then apply between the association and its members.[140] Legal scholars such as Devenish, Govender and Hulme, De Waal and Currie, and Currie and Klaaren are also of the opinion that the common law review applies only in those instances where private entities are required to do so in their domestic arrangements.[141] The implication of this argument

134 In *De Lange v Smuts NO*, para 132, the South African Constitutional Court held that procedural fairness under the Constitution is not restricted to the two rules of natural justice referred to above and that 'the exact content has eluded judicial definition'. In effect this means that, in appropriate circumstances, the party entitled to procedural fairness is entitled to more than just the application of the *audi altarem patem* and the *nemo judex in causa sua* rules. In this case, the court held that a party is entitled to those 'principles and procedures, which in the particular situation or set of circumstances, are right and just and fair'.

135 Instances where the principles can be limited include where waiver or necessity is proved, or where state legislation expressly excludes the application of the principles. See Emiola, *Remedies in Administrative Law*, pp 95–96; G Devenish, K Govender and D Hulme, *Administrative Law and Justice in South Africa* (Durban, 2001), pp 279–280.

136 (1969) 2 *African Law Report* 273, 282.

137 No 3 of 2000.

138 *Janser van Rensburg v* Minister *of Trade and Industry NO*, 2000 (11) BCLR 1235 (CC); *Yates v University of Bophuthatsana* 1994 (3) SA 815 (B).

139 2001 (4) SA 1361 (T).

140 Ibid, paras 1375–1376; see also *Pennington v Friedgood* 2002 (3) BCLR 298 (C).

141 Devenish, Govender and Hulme, *Administrative Law and Justice*, p 25; I Currie and J De Waal, *Bill of Rights Handbook* (fifth edition, Durban, 2005), pt 645; I Currie and J Klaaren, *The Promotion of*

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is that the court will not review a domestic tribunal decision once it is proved that the constitution of a body or association precludes the application of the principles of natural justice.

However, other scholars, including Burns, Hoexter and van Coller, consider the approach in *Cronje* to be very limited.[142] Professor Burns, for instance, contends:

> Although bodies such as sports club and other similar associations are not creatures of statutes, and although they do not exercise government (state authority), it cannot be denied that the unequal relationship in private law in the sphere of voluntary associations is in many aspects analogous to the authoritative relationship (of inequality) encountered in public law. This is why the rules of administrative law are often applied by way of analogy to the disciplinary actions of private associations at common law. The application of the rules of fair procedure at the disciplinary hearings of these voluntary associations are geared towards protecting persons adversely affected by the decisions of churches, trade unions, clubs and even the decisions of arbitrators ... Historically the courts have applied the principles of natural justice to these domestic tribunals in order to assist members of associations who are in a position of inequality. The common law principles of administrative law have not disappeared with the advent of the constitutionally entrenched right to just administrative action. The courts, as guardians and watchdogs of the rights of the individual, should continue to apply these common law principles by analogy. It should also be remembered that the Bill of Rights has horizontal application, which makes the requirement of procedural fairness applicable to these associations.[143]

Administrative Justice Act Benchbook (Witwatersrand, 2001), pp 26 and 64. The position of these authors mirrors that in the UK, where there is no developed principle that natural law or administrative law requirements will apply to church inquiries or tribunals. In the UK, there is a clear distinction between private bodies (such as churches), who are held to their contractual requirements, and public bodies (governmental), to which natural law and administrative requirements apply. See *Shergill v Khaira*.

142 Burns, *Administrative Law*, p 182; C Hoexter, *Administrative law in South Africa* (Durban, 2007), p 124; H van Coller, 'Religious institutions and the review jurisdiction of the courts', (2017) 14 *LitNet Akademies* 991–1039 at 992: 'The principles of natural justice were applicable, it was argued, because these domestic tribunals "wield powers as great as, if not greater than, any exercised by courts of law. They can deprive a man of his livelihood." It is possible to subject private actors to the requirements of lawfulness, procedural fairness and rationality.' See also G van der Schyff, 'Freedom of religious autonomy as an element of the right to freedom of religion', (2003) *Journal of South African Law* 512–539 at 527.

143 Burns, *Administrative Law*, pp 182–3; Y Burns, 'Do the principles of administrative justice apply to the actions of domestic bodies or voluntary associations such as the South African Rugby Football Union and the United Cricket Board?', 2002 (17) *South African Public Law* 372–81. See also L Thornton, 'The constitutional right to just administrative action: are political parties bound?', (1999) 15 *South African Journal on Human Rights* 351–371.

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The latter view has been followed in a number of cases, including *Marais v Democratic Alliance*.[144] This case concerned the question of whether the constitutional right to procedural fairness applied to the actions of a political party, a private institution like a church. The court found that the decisions of the national management committee of a political party did not constitute administrative action as defined in PAJA. Nonetheless, it held that the applicant in the case was denied a fair opportunity to prepare and present his case, which was a basic of the rights guaranteed by the tenets of natural justice. Applying the principle of natural justice in the case, Van Zyl J held:

> It now remains to establish whether or not the procedure employed by the respondent, with a view to removing the applicant as Mayor of Cape Town and terminating his membership of the respondent, was fair and in accordance with the rules of natural justice. At the outset, it requires to be observed that the political stratagem employed by the respondent to achieve this goal ... smacks of unfairness, unreasonableness and a lack of good faith. Inevitably, it calls into question the fairness of the procedure followed by the respondent to achieve such a goal.[145]

It is interesting to note that the series of cases where the courts have applied the principle of natural justice to domestic tribunals, irrespective of whether they were included in their constitutions of the associations or private bodies, involved religious tribunals.[146] In *Mbombo*, for instance, the court concluded that

> it is a common cause that our constitutional jurisprudence and the rule of law and of natural justice requires *any tribunal* to act fairly and procedurally. It is my considered view and finding that the tribunal in this matter did not do so.[147]

144 2002 (2) BCLR 171 (C).

145 Ibid, para 191.

146 See *Taylor v* Kurtstag *NO* 2005 (7) BCLR 705 (W), where the court accepted that the decisions of religious tribunals are subject to the same common law review jurisdictions as those of other voluntary organisations. It also found that the Beth Din, like any other religious tribunal, is subject to the common law jurisdiction of the courts. See also *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Africa* 1976 (2) SA 1 (A), a case involving disciplinary proceedings in a church. Jansen JA held that, as a general rule, the same principles applied whether decisions of statutory or contractual bodies were under review. The only difference was that, in the first instance, the starting point was the intention of the legislature, while in the second it was the intention of the parties. In *United Methodist Church of South Africa v Sokufundumala* 1989 (4) SA 1055 (O) the church was held liable for not complying with the rules of natural justice when excising its disciplinary powers. See also *De Lange*, para 38: 'This standard goes back at least to this statement by Stirling J. in *Baird v. Wells* (1890), 44 Ch.D at p. 670: "The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to bona fide."'

147 *Mbombo*, para 52, emphasis added.

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Given the discussion above, it is fair to argue that church tribunals in South Africa are bound to follow the principles of natural justice when exercising disciplinary control. The author also believes that making sure that church tribunals follow this principles is essential for two reasons: first as a matter adhering to the universal idea of justice, and secondly, to identify objective reasons for the allegation in the first instance and what the church might learn from the entire exercise. However, from the case studies examined in this article, it was the failure of the church tribunals and the investigative panels to comply with the principles of natural justice in their exercise of disciplinary control that led to most of the legal disputes. In *Emeka*, for instance, the applicant complained thus:

> A declaration that the proceedings and decisions of the said purported meeting of the General Committee of the Assemblies of God, Nigeria, culminating in a purported dismissal and suspension of the applicant are null and void, the proceeding having been conducted and the decisions having been reached in contravention of the rules of natural justice and the applicant's right under section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).[148]

In the same vein, in *Anyanwu*, the court observed that the investigating panel did not give Mr Anyanwu a fair hearing.[149] Although, the issue of fair hearing was not one of the main concerns raised in *Egubson*, the Nigerian Supreme Court nevertheless observed that the defendant, Joseph Ikechuiku, was not given a fair hearing. The court noted:

> Now, on the evidence, at the meetings held on 13th and 15th June 1970, at which the plaintiffs were appointed trustees for the purposes of the Land (Perpetual Succession) Act, the defendant *as life chairman was not present. He knew nothing about the meetings. He was not invited thereto* because from the point of view of the plaintiffs he had been ex-communicated from the church and had ceased to be a member thereof.[150]

In *Fortuin*, the court similarly observed that the actions of the Church patently contravened the tenets of natural justice and that Mr Fortuin had the right to

148 *Emeka*, paras 1199G–1201A. Furthermore, para 1200B states: 'A declaration that the applicant's alleged dismissal from the ministry and suspension as a member of the Assemblies of God, Nigeria, is in contravention of the applicant's right to a fair hearing as secured under section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).'. See further para 1201C–H.

149 *Anyanwu*, paras 19–20.

150 *Egubson*, para 12, emphasis added.

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be heard before the Church could properly take a decision to disfellowship him for divorcing his wife and marrying another.[151] Further, in *Mbombo*, one of the complaints of Mr Mbombo for instituting the suit was the failure of the Anglican Diocese of Highveld to adhere to the principle of natural justice before dismissing him as a priest in the diocese, and the court upheld his claim.[152] Perhaps, it is only in *De Lange* that the church actors not only took care to ensure that the provisions of the church policies were followed, but also took actions that were legally justifiable regarding the principles of natural justice.[153]

From the discussion above, it is clear that the application of the principle of natural justice is critical to every church disciplinary procedure. Churches should therefore not only ensure that the provisions that will guarantee the application of the principles of natural justice are embedded in their policies, but also that the church actors that are involved in disciplinary exercise understand what natural justice means and the legal implications that it has for a church where the rules are not observed during disciplinary exercise. Having regard to the far-reaching consequences which the decisions of these church investigative panels and tribunals may – and often do – have, it is appropriate that a church develop a comprehensive set of guidelines or code on the legal requirements required by the investigating panel and the tribunal, particularly as these relate to the principles of natural justice and due process. Church actors responsible for implementing disciplinary policies can regularly consult such a code to track every step being taken, to obviate a miscarriage of justice and likely legal disputes. For many of the mistakes which these tribunals make can be associated with ignorance of what is required by law.

Church tribunals and their jurisdiction

A requirement which is equally as vital as the principle of natural justice and which may affect the validity of an inquiry and the decision of a church tribunal is the competence of the person or organ of the church to undertake the disciplinary exercise – in other words, its jurisdiction.[154] Like a court, for a church tribunal to assume jurisdiction over a matter, certain factors must be present. The tribunal must be properly constituted with respect to the members and to the qualifications of its members; the subject matter of the action must be within its powers; the action must be initiated by due process; and any condition

151 *Fortuin*, para 13.
152 *Mbombo*, para 7.
153 See generally, *De Lange*, para 26.
154 Jurisdiction is defined as the power of a court or tribunal to adjudicate on a matter. See J Law and E Martin, *Oxford Dictionary of Law* (seventh edition, Oxford, 2009), p 707.

precedent for the exercise of the tribunal's jurisdiction must be fulfilled.[155] Lord Halsbury observed further that 'the jurisdiction of such tribunals is essentially based on contract and limited by rules or regulations which comprise part of the terms of the contract between the particular body and its members'.[156] Thus, the juridical instruments of churches are expected to deal with the issue of jurisdiction of church courts and tribunals in terms of their establishment, composition and jurisdiction. As will be discussed shortly, state legislation may circumscribe the jurisdiction of a church tribunal. It is a rule of law that any exercise performed by a judicial or *quasi*-judicial body without jurisdiction is *ultra vires* and void. However, instances emerged from the case studies where churches' investigative panels and tribunals acted without jurisdiction while carrying out disciplinary exercises. In *Anyanwu*, for instance, the lack of jurisdiction of the church tribunal that investigated and tried Mr Anyanwu was one of the major reasons he sued the Assemblies of God Church, Nigeria. The investigative panel constituted by the Church investigated and tried Pastor Anyanwu and found him guilty of 'criminal offences' that are defined under state legislation. But it is trite law in Nigeria that only the court established by the state has the power to try and punish anyone for such criminal offences.[157] *Anyanwu* is one of the instances where state legislation can limit the jurisdiction of a domestic tribunal.

In the same vein, the court in *Egubson* held the GEC of St Joseph's Chosen Church of God as improperly constituted and lacking the jurisdiction to suspend and excommunicate Joseph Ikechuiku, who was the sole trustee of the church, in his absence. This was because the Church's Immutable Rules required the sole trustee of the Church to be present at any meeting leading to an addition or removal of any of the church's trustees.[158] With regard to the South African cases, the failure of the investigation panel to have a panellist with legal background on the Board of Preliminary Inquiry Panel that investigated Mr Mbombo in *Mbombo* rendered the panel improperly constituted.[159] Similarly, the court upheld Mr Fortuin's claim in *Fortuin* when he contended that the Church's ministers and ministers wives meeting lacked the jurisdiction to make a resolution to disfellowship him.[160]

155 Black, *Black's Law Dictionary*, p 764, says that it exists when 'the court has cognizance of a class of cases involved, proper parties are present, and the point to be decided is within the powers of the court'.

156 *Halsbury's Laws of England* (fourth edition, 2003), vol 1, para 13.

157 In *Denloye v Nigerian Medical and Dental Disciplinary Tribunal* (1968) 1 All NLR 306, 312, it was established that no tribunal other than the regular court could assume jurisdiction over an allegation imputing the commission of crime. See also *Garba v University of Maiduguri; Alalade v Accountants Disciplinary Tribunal* (1975) 1 All NLR 138.

158 *Egubson*, para 12.

159 *Mbombo*, para 37.

160 *Fortuin*, para 13.

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Implicit in the above discussion is that church discipline is exercised within certain legal parameters; otherwise, the church risks liability. The lesson for churches is to make sure that their internal governing policies deal in clear terms with church courts and tribunals in terms of their establishment, composition and jurisdiction (original and appellate). The members of the panel and the tribunal also need to understand and familiarise themselves with the church policies and make sure that every step in their disciplinary action is within their jurisdiction.

Constitutional vacuum

Another salient issue that indirectly triggered some of the disputes was the presence of lacunae in some of the churches' internal governing mechanisms. This issue is particularly prominent among the Nigerian cases. For instance, in *Egubson* St Joseph's Chosen Church of God appears not to have had formal provisions regarding disciplinary measures. This inference can be drawn from the judgment of Sir Udo-Udoma JSC in the case. He noted:

> *Some members of the church* opposed to the defendant then re-doubled their efforts. *They convened a meeting of what they called the General Executive Council* in the absence of the defendant and passed resolutions, first suspending the defendant, then thereafter purportedly excommunicating him from the church.[161]

This extract suggests that it was not a statutorily constituted disciplinary body that dealt with the matter; rather, it was an improvised and impromptu committee that acted as the disciplinary body. The action of the GEC in this regard suggests that the governing documents of St Joseph's Chosen Church of God were silent on the disciplinary proceedings. If there were any such provision in the church's governing documents, it does not appear that the provisions dealt with the disciplining of the defendant, who was the founder, sole trustee and head of the Church.

A similar instance played out in *Emeka*, where the court noted that the Revd Paul Emeka, who was the general superintendent of the Assemblies of God, doubled as the chairman of the Executive Committee of the Church, the body charged with disciplinary matters.[162] Thus, when Mr Emeka responded to the petition written against him, he apparently responded to the Executive Committee, of which he was the head, meaning that he was presiding over his own case.[163] This shows that the governing mechanisms of the church did

161 *Egubson*, para 4, emphasis added.
162 *Emeka*, para 1207E–F.
163 Ibid, para 1207F–G.

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not Contemplate the disciplining of the general superintendent of the Church. Where an officer is invested with the power to make a decision on a disciplinary matter and is himself or herself the subject of the complaint or petition, the obvious thing is to appoint an independent investigator, in order at least to satisfy the requirement of *nemo judex in causa sua*.[164] It seems that the lacuna in the Church's governing documents prompted the other members of the Executive Committee to hold parallel meetings, the meetings which the applicant contended were in breach of the Church's constitution.[165] Williams Mbamalu, a religious studies scholar who has conducted considerable research on the Assemblies of God Church and its several disputes, describes the Church's current state as one of confusion. He pinpoints the weakness of the Church constitution as one of the sources of the Church's many troubles:

> Presently the AGN [Assemblies of God, Nigeria] is at *orita* and it is hard to predict the vivid image of the portentous nature of the survival of the next generation of the church. *Orita* is a Yoruba word meaning junction(s) or crossroads. It is a place where two roads cross at (or about at) right angles, otherwise known as 'the fork in the road' ... The second question at *orita* points to the AGN constitution and bye-laws as one of the causes of the present crisis.[166]

The above concern about the weak governance policies of churches also coincides with a recent comment reportedly made by Poju Oyemade, a foremost Pentecostal pastor in Nigeria, in which he acknowledged that the governing and disciplinary structures of most Pentecostal Charismatic churches in Nigeria are not strong.[167]

Other issues relating to the constitutional lacunae observed from the cases concern uncertainty, inconsistency and lack of clarity of terms in churches' internal policies. In *Egubson*, the court observed the inconsistency in the Immutable Rules and Conducts of St Joseph's Chosen Church of God regarding the prohibition of concubinage. On the one hand, the Immutable Rules provide for monogamy as the only form of marriage allowed in the Church. At the same time, the court observed provisions in the same Rule which promote concubinage and bigamy.[168] This is clear evidence of poor drafting. In the same vein, one

164 Emiola, *Remedies in Administrative Law*, p 84; *Head of the Federal Military Government v Public Service Commission, ex parte Maclean* (1974) 1 All NLR (Pt 2) 269, 305.

165 *Emeka*, para 1208A.

166 Mbamalu, 'Fellowship at *orita*', pp 6–7. The author raises other factors leading to the crisis in the Church, including unhealthy power ambitions and personality clashes.

167 J Augoye, 'COZA rape scandal: Poju Oyemade, Sam Adeyemi react', *Premium Times*, 1 July 2019, available at <https://www.premiumtimesng.com/news/top-news/338226-coza-rape-scandal-poju-oyemade-sam-adeyemi-react.html>, accessed 8 February 2020.

168 *Egubson*, paras 8–9.

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of the concerns of the Revd De Lange in *De Lange* was the lack of clarity and the uncertainty regarding the position of the Methodist Church in South Africa with respect to same-sex marriage.[169] The problem is that, where the church governing document is either too restrictive or too general, it may be subjected to multiple interpretations and thus lead to confusion that may require a court's clarification.[170] In fact, that was one of the issues that the Revd De Lange called the court to consider. Such poor drafting can also lead to poor compliance by those who ought to obey or implement the rule.

Although not raised in any of the cases examined in this article, one question that touches on the present discussion is whether a church can punish a member of the clergy for an offence that is not expressly prohibited in the church's internal policy or moral code? In other words, can a minister be assumed to know the sin that a church will punish? Can a church punish a member of its clergy by simply relying on the ground that the clergyman or clergywoman was convicted in a civil court for an offence against the state, if the offence was not provided for in the church policy? The author is not aware of any case in either South Africa or Nigeria where this question has been the subject of the court's determination. It is, however, doubtful whether the court would allow a church to punish a minister for an offence that was merely speculative and not expressly provided for in the church policy. This is simply because the authority of a church to discipline the members of its clergy is predicated on a contract based on the rules existing in the church code. It is also doubtful whether the court would allow a church to punish a member of the clergy for an offence that was made with retrospective effect. That would be classed as an unfair trial. The point is that churches need to have a comprehensive, detailed and clear policy regarding the list of offences prohibited, the penalty that relates to each offence and the mechanisms for enforcement.

Wrong use of words and terms

An issue that arose in *Anyanwu* that directly connects the internal mechanisms of the Assemblies of God Church and the legal disputes is the misuse of terms for describing ecclesiastical offences. This was demonstrated in the description of the allegation levelled against Mr Anyanwu, when he was charged and tried for the offence of 'stealing and/or conversion of 300 million Nigerian Naira'.[171] According to the Church, Mr Anyanwu breached the Church's

169 *De Lange*, paras 18 and 21.

170 Doe, *Christian Law*, pp 180 and 187: 'Anglicanism, too, is notable for the lack of juridical precision in the definitional elements of its ecclesiastical offences … A substantive law of ecclesiastical offences is employed in all the churches studied here, but generally, offences are expressed with a high degree of generality.'

171 *Anyanwu*, para 2.

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constitution and his oath of office. However, the terms used to define the ecclesiastical offences committed by Mr Anyanwu resemble the offences listed and punishable in state legislation.[172] In Nigeria, as in some other nations, a person who is alleged to have committed any offence is presumed innocent until he or she is proven guilty by a competent court of jurisdiction.[173] The competent courts in this context are a creation of the 1999 Constitution of Nigeria[174] and do not in any way include domestic and administrative tribunals like the church investigative panel that found Mr Anyanwu guilty.[175] Ayoola JSC said concerning domestic tribunals *in Okonkwo v Medical and Dental Practitioners Disciplinary Tribunal*,

> Where an allegation of infamous conduct made against a practitioner cannot be established without proving facts that would amount to an offence covered by the criminal code, the tribunal should yield to the courts established for the trial of such offence. To hold otherwise may lead to a conflict of verdicts, where a tribunal had first tried the matter and found the practitioner not guilty of infamous conduct, while on the same set of facts, a criminal court finds him guilty of a criminal offence and convicts him, or vice versa.[176]

Implicit in the above principle is that, until a clergyman or clergywoman who is alleged to have committed a criminal offence that also violates a church moral code is found guilty by a 'competent court', the church will not be competent to exercise disciplinary control over him or her. To illustrate this, a church that prohibits bigamy in its code will only be able to discipline a clergyman who contracted bigamy after he has been found guilty of bigamy by a competent court. Questions that beg answers here include what happens if a church is genuinely convinced or has the evidence to believe that a clergyman has violated its moral code in a way that necessitates taking a disciplinary measure, but the 'competent court' did not found the clergy guilty of the same offence? In other words, can a church discipline a person whom a competent court has tried but did not found guilty? The application of this rule will, prima facie, have implication for the autonomy of a church to discipline its ministers if it is required to

172 For instance, see the following Nigerian legislation: Criminal Code Act 1916, s 383; Penal Code Act 1960, s 286; Administration of Criminal Justice Act 2015.
173 Constitution of the Federal Republic of Nigeria 1999, s 36(5).
174 Ibid, s 6(5).
175 *Sofekun v* Akinyemi (1981) 1 NCLR 135. See also *Odigie v Nigeria Paper Mills Limited* (1993) 8 NWLR (Pt 311) 338, 253: 'The position of the law is now well settled that when an allegation of commission of crime is levelled against a person, it is the court set up under the constitution that must have jurisdiction to resolve the issue. This means that no administrative investigative panel has such jurisdiction.' See also I Akinloye, 'Scope and powers of professional disciplinary tribunals in Nigeria', (2016) 1 *Ajayi Crowther Law Journal* 224–247 at 228–230.
176 (2001) 7 NWLR (Pt 711) 206, 235.

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wait for the courts to find an offender guilty. As in the words of a US court, 'churches would be deprived of the right of construing and administrating their church laws, and our proud boast of religious liberty and our absolute separation of church and state could no longer be proclaimed'.[177] This issue is particularly worrisome given the Nigerian adjudicatory system that is widely known for bottlenecks and long delays of trials.[178]

However, from the tenor of some other cases, it appears that a church may be able to circumvent having to wait for a court to pronounce a minister guilty of a crime before it can exercise disciplinary control. This would be possible only if the church labels the ecclesiastical offence(s) which constitutes a criminal offence(s) in the state legislation as 'religious misconduct' or 'a breach of such constitution'. For instance, in *Anyanwu*, the church could have used the phrasing 'act of dishonesty' or 'breach of oath of office' instead of 'stealing'. In the case of *Lana v University of Ibadan*,[179] the Nigerian Court of Appeal held that the two charges of 'an act of dishonesty' and 'academic' fraud levelled against the appellant did not constitute offences under the criminal law and, as such, the staff disciplinary committee was competent to try them even though it was merely a domestic tribunal. Another hint is also discernible from the *obiter* of Sir Udo-Udoma JSC in *Egubson* that the use of the word 'unlawful' to describe the act of concubinage in the Immutable Rules and Conducts of St Joseph's Chosen Church of God was unfitting. The judge suggested that the term 'sinful' was more appropriate.

The point is that, in describing or defining ecclesiastical offences, words that are 'churchy' or that reflect 'religiosity' should be used, rather than strict legal terms. The implication of this is that special legal drafting skills are needed in preparing church governing documents. This issue demonstrates the need for lawyers whom churches engage to draft their policies or who give advice to churches to be specially trained in church law, to obviate errors such as the one reflected in *Anyanw*. It is interesting to note that the Immutable Rules and Conducts to which Udo-Udoma JSC made a reference in *Egubson* were prepared by a lawyer of St Joseph's Chosen Church of God.[180] This fact is evidence of the gap between the knowledge of church law and the general legal practitioners who represent churches.

The author is not aware of any case in South Africa where a church had to wait for a court to find a clergyman or clergywoman guilty before exercising its

177 *Mangum v Swearingen* 565 S.W.2d. 957 at 959 (1978).
178 See I Akinloye, 'An examination of the legal status, powers and roles of the justices of the peace in the Nigerian legal system', (2018) 43 *Journal for Juridical Science* 26–38 at 33; A Akeredolu, 'Duel to death or speak to life: alternative dispute resolution for today and tomorrow', inaugural lecture, Ajayi Crowther University, Oyo, Nigeria, January 2018, p 15, available at <https://www.acu.edu.ng/documents/inaugural/7th%20Inaugural%20Lecture%20-%20PROFESSOR%20ALERO%20AKEREDOLU.pdf>, accessed 12 February 2020.
179 (1987) 4 NWLR (Pt 64) 245.
180 *Egubson*, para 3.

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disciplinary control. What would perhaps have presented such an occasion was the case of *Ngewu v The Anglican Church of South Africa*, but the circumstances of the case did not give the court the opportunity to do so. In the case, the following seven charges were levelled against Bishop Ngewu at the church tribunal: causing scandal or offence; fraudulent, corrupt or dishonest behaviour; negligent management of church property; misappropriation of church property; violating Resolution of Permanent Force No 5; breach of trust relationship; and promoting dissension in the church.[181] The second allegation above appears to be very close to the common law definition of fraud and theft under South African criminal law. However, because the applicant's basis for instituting *Ngewu* was premised on the power of the archbishop to institute a church tribunal to try Bishop Ngewu, the court was not able to pronounce on the issue of whether a church had to wait for a court to find a clergyman or clergywoman guilty before exercising disciplinary control.

Allegation of misconduct and defamation

Another issue that arose in *Anyanwu* that subtly triggered the suit related to malicious publication of the misconduct alleged against a member of the clergy either before, during or after church disciplinary exercise. Such publication, where malicious, can lead to a tort of defamation. Defamation – communicating a misleading or false statement that injures the reputation of another person – can be a form of liability that can threaten churches. The question is whether a church can publicly announce or publish in a newspaper or online a charge of misconduct against a member of the clergy. Traditionally, under the common law of defamation, churches were free to practice church discipline without fear of litigation.[182] It must be admitted that this area of law and church discipline is not much developed in Nigeria and South Africa, unlike other jurisdictions such as the USA.[183] However, it appears that it will possibly become an issue where a clergyman or clergywoman who is disciplined decides to challenge in court the truth of the allegations upon which he or she was disciplined or the procedure adopted in disciplining him or her. Where the member of the clergy succeeds in setting aside the disciplinary exercise or the decision of the church, then the claim of defamation may arise, just as happened

181 *Ngewu*, para 26.

182 See Danchi, 'Church discipline on trial'.

183 See for example, ibid; M Strasser, 'A constitutional balancing in need of adjustment: on defamation, breaches of confidentiality, and the church', (2013) 12 *First Amendment Law Review* 325–384; D Mays, 'Avoiding liability when disciplining pastors or church members', 2009, <http://www.davidbealaw.com/files/articles/ChurchMemberDiscipline.pdf>, accessed 8 February 2020. See also the US case of *Guinn v Church of Christ of Collinsville* 775 P.2d 766 (Oklahoma, 1989), where a woman successfully claimed damages from her former church for (among other things) invasion of privacy and the intentional infliction of emotional distress, after it had announced its decision to disfellowship her to the congregation and three neighbouring congregations in their denomination. See also *Tim Tubra v The International Church of the Foursquare Gospel* 225 P.2d 862 (Ore App 2010).

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in *Anyanwu*. But where the court upholds the church's action, it is doubtful that the claim of defamation will succeed, since a tort of defamation is predicated on the assumption of publication of false information. However, in view of the fact that a church that has exercised disciplinary control over a member of the clergy may not know whether the person who is being disciplined will contest the church's action or the possible outcome if it is challenged, the prudent approach should be to keep the matter as private as possible.

Where the publication of a disciplinary exercise is not carefully handled, it can also undermine the purpose of church discipline, namely reconciliation and restoration. In some cases, it may be necessary to announce the verdict of the church tribunal to the members to protect the flock.[184] If this is to be done, however, the church must provide in its disciplinary policies that the church disciplinary decision will be made public to the members. Even then, no unnecessary details should be disseminated, and the announcement should be devoid of malice or ill will, which could create potential liability for defamation or invasion of privacy. This appears to be the lesson that can be drawn from the South African case of *McPhee v Hazelhurst*.[185] In the case, a judicial committee of the South African Jehovah's Witness Congregation decided to disfellowship a member, which decision went for appeal before the appeal committee of the congregation, who compiled a report containing slanderous allegations concerning the expelled member for the head office. The member sued the four elders of the appeal committee for 400,000 Rand damages for defamation of character. The court held that, since the constitution of the Jehovah's Witness Congregation required such a report to be submitted to the head office and they were acting under a legal duty to disclose the information, they were not acting by ill will towards the expelled member and the information in the report was treated as very confidential. The claim was therefore dismissed. This case is unlike *Anyanwu*, where the court found the publication of the church disciplinary decision in the national newspaper to be malicious.

SUMMARY AND CONCLUSION

This article has examined legal cases arising from churches' approaches in disciplining members of their clergy in South Africa and Nigeria. It has investigated if, and how, the internal governance mechanisms of churches

184 See the US case of *Joiner v Weeks* 383 So.2d 101 (LA App 3d Cir 1980) at 106–107: 'To allow defamation suits to be litigated to the fullest extent against members of a religious board who are merely discharging the duty which has been entrusted to them by their church could have a potentially chilling effect on the performance of those duties, and could very well inhibit the free communication of important ideas and candid opinions.' See also R Flowers, 'Can churches discipline members and win in court?', (1985) 27 *Journal of Church and State* 483–498 at 492.

185 1989 (4) SA 551 NPD.

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contributed to such legal disputes. From the case studies in both jurisdictions, it has been shown that the total absence of governing policies is not a factor that triggered legal disputes regarding churches' exercise of discipline. Rather, factors such as the failure to observe the provisions of church policies and principles of natural justices, exercising disciplinary powers without jurisdiction, constitutional vacuums and poor drafting, among others, were the primary factors that led to most of the legal disputes. It is important to note that it is not impossible that other salient and extraneous factors may catalyse such disputes in this regard, such as malice, over-ambitious desires to attain power and personality clashes, as alluded to by Mbamalu.

Perhaps the most urgent concern is the reason that has been identified for why these factors have played such an important part. What is observed from case studies is that constitutional and administrative law, contract law and tort law interact greatly with churches' exercise of discipline. However, it appears that many of the principal actors who are charged with the implementation of churches' disciplinary practices often fail to familiarise themselves with the provisions of their church policies. For example, one wonders why Bishop Bennerman in *Mbombo* failed to include a panellist with a legal knowledge on the board of inquiry that invested Mr Mbombo, if truly the bishop was abreast of the provisions of the Canons of the Anglican Church. However, some bishops of the Anglican Church in South Africa have exhibited compliance with the same provisions: in *Ngewu*, for instance, Archbishop Thabo Makgobo, while constituting a Board of Inquiry to investigate the petition against Bishop Ngewu (similar to that constituted by Bishop Bennerman), not only included Advocate Raubenheimer in the panel but ensured that he chaired the panel.[186]

Furthermore, some of the church actors do not know the legal implications of not complying with a church's internal governing policies. In *Fortuin*, for instance, the Church of Christ Mission ignorantly argued that the court had no powers to determine religious disputes or to review decisions taken by the church.[187] This argument suggests the ignorance of the church as to the position in South Africa of the power of the court to review.

In the final analysis, the conclusion must be drawn that, while no single factor is responsible for the legal disputes arising from the disciplining of clergy, poor knowledge of the law remains an important one. This is observed in both jurisdictions. The observation of John Grobler, a South African lawyer and author, corroborates this:

> In the course of my legal practice, I've seen church leaders not having a basic knowledge of the law of our land, even where the law affects

186 *Ngewu*, para 19.
187 *Fortuin*, para 14.

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> church matters. The result is that they and their churches are legally vulnerable, more open to legal wrangles and less effective in counselling their members. Every now and then we hear of court cases where churches are involved. Many of these could have been avoided if the church leaders were more knowledgeable on legal matters.[188]

The key point that resonates from the above study is the gap in the knowledge of church law on the part of church actors and even the lawyers who advise the churches and draft their juridical documents. The article has established that, although church discipline is conducted within the sphere of church autonomy and governance, it is not conducted outside a legal environment.

188 J Grobler, *The Essential Legal Guide for Pastors and Church Leaders in South Africa* (second edition, Westgate, 2014), preface.

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