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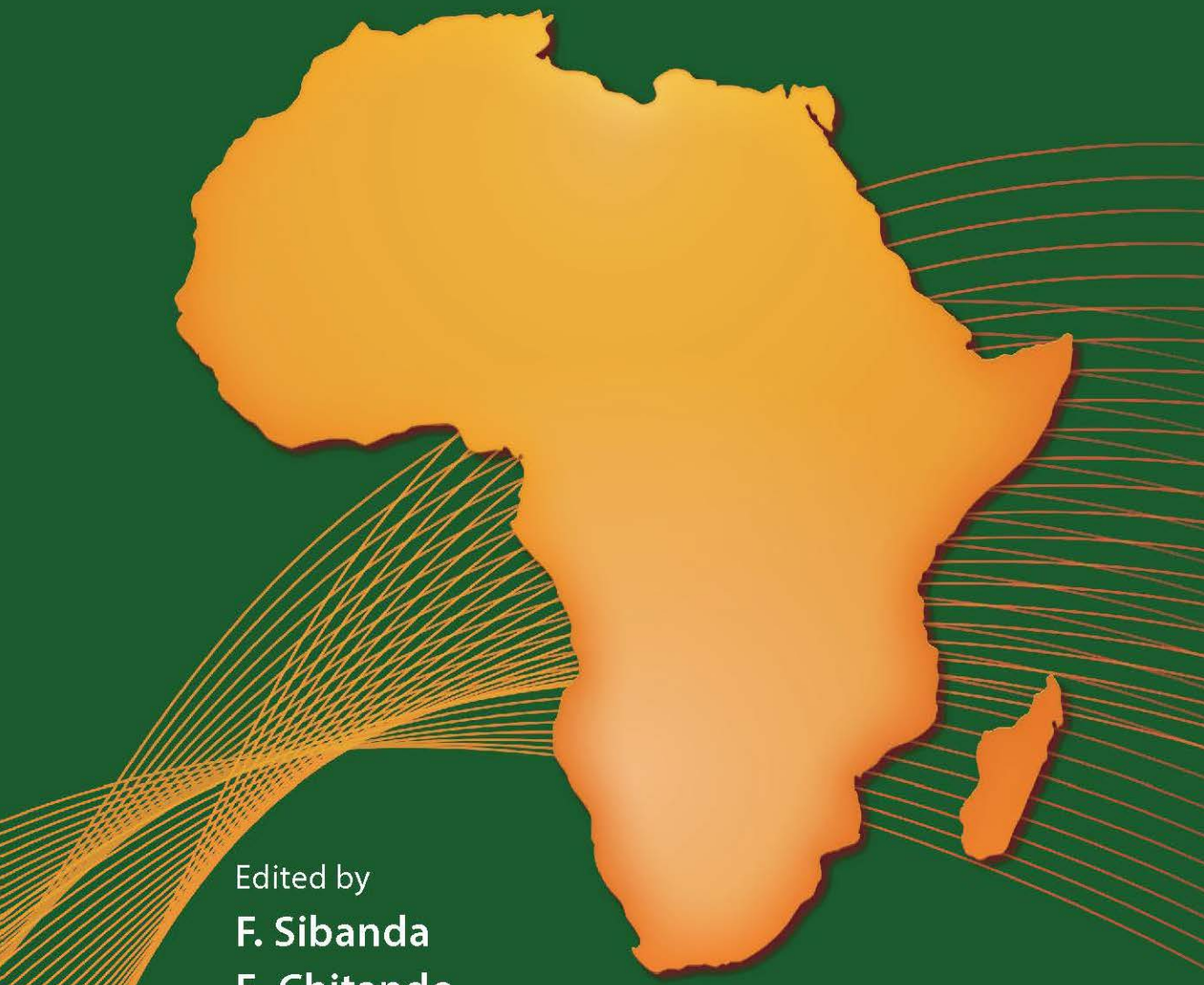

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10 Leadership and governance disputes in South African churches

Helena van Coller[1]

INTRODUCTION

A change in leadership is a natural and indispensable event in the life of any church. Leadership is critical for a church's effective governance, management, growth, health and sustainability. Thus, where leadership succession in a church is not appropriately managed, it may result in a dispute and constitute a serious governance and reputational risk for the church. It also impacts the capacity and sustainability of churches to continue to render the social services for which many churches are known.[2] When it comes to religious institutions and their respective leaders, Section 9.1(c) of the South African Charter of Religious Rights and Freedoms (SACRFF) provides for the right of every religious institution

> in accordance with the principles of tolerance, fairness, openness and accountability to regulate its own internal affairs, including organisational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment towards and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.[3]

Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief echoes these sentiments, affirming that the right to freedom of religion includes the freedom to "train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief".[4] This paper examines and discusses several

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2 Akinloye I. 2019. "Human Flourishing, Church Leadership and Legal Disputes in Nigeria Churches", in Green MC (ed). *Law, Religion and Human Flourishing in Africa.* Stellenbosch: African Sun Media, 33–37.

3 South African Charter of Religious Rights and Freedoms, Explanatory notes on the Charter, 16 May 2016, 4. Online at https://www.strasbourgconsortium.org. The South African Charter of Religious Rights and Freedoms (SACRRF) is a document that defines the freedoms, rights, responsibilities and relationship between the "state" of South Africa and her citizens concerning religious belief.

4 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981), art 6(g).

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South African cases and legislative provisions to provide an overview of how South African courts approach leadership and governance disputes within religious institutions. It also offers brief proposals for addressing ongoing challenges in this area. Grounded in the conceptual framework of alternative dispute resolution (ADR), the article suggests that religious institutions should prioritise proper training, adopt ADR methods such as mediation, and establish clear internal rules to foster good governance and ethical leadership.

EMPLOYMENT STATUS OF CLERGY

I have argued elsewhere that different denominations, such as the Dutch Reformed Church, Reformed Church and Anglican Church, all have different positions in relation to whether a minister of religion is an employee of the church.[5] As early as 1976, in the landmark case of *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika,*[6] the court held that the relationship between the minister and the church council was employment-related, as it was evident that the minister had entered into an employment contract. This contract had to be interpreted in line with the relevant provisions of the Church Order, as the claim was based on the interpretation and enforcement of those contractual terms. Jansen JA emphasised that the employment contract must be read in accordance with the Church Order.[7] The case of *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit & others*[8] is significant for the Dutch Reformed Church. The church dismissed Reverend Noel Schreuder in 1996 under Section 12 of the Church Order, which he claimed was unfair under the Labour Relations Act.[9] The court defined the relationship between the minister and the church as a contractual employment relationship, with the employment contract (*beroepsbrief*) establishing duties between the minister and his congregation.[10] The ruling implies that all employment relationships within the Dutch Reformed Church, including ministers, are subject to current labour laws. According to Section 7b.1 of the Church Order, a *beroepsbrief* serves as a standard employment contract, similar to that of any employee, such as a gardener, secretary or cleaner. The court in *Wagenaar v United Reformed Church*[11] affirmed that a *beroepsbrief* meets

5 Van Coller EH. 2020. *Regulating Religion: State Governance of Religious Institutions in South Africa*. London: Routledge, 184; Van Coller EH. 2013. "´n Regsvergelykende Blik op die Diensverhouding van ´n Predikant" [A Comparative Legal Perspective on the Employment Relationship of a Minister (of Religion)], *Dutch Reformed Theological Journal/ Nederduits Gereformeerde Teologiese Tydskrif (NGTT)* 54(3&4):1–14; Van Coller EH. 2017. "Religious Ministers – Working for God or Working for the Church? A Reflection on Universal Church of the Kingdom of God v Myeni and Others", *Oxford Journal of Law and Religion* 6(1):187–193.

6 *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A).

7 *Theron v Ring van Wellington,* para 26D.

8 *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit & andere* 1999 BLLR 713 (LC).

9 Labour Relations Act 66 of 1995.

10 *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit,* para 20.

11 *Wagenaar v United Reformed Church SA* [2005] 1 BALR 127 (CCMA), para 7.

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all the criteria of an employment contract. In *Church of the Province of Southern Africa (Diocese of Cape Town v CCMA),*[12] the court held that the key issue was whether the parties intended to establish a legally binding contractual relationship at the time of the offer and acceptance. Simply having an offer and acceptance was not enough to form a binding contract; there had to be a clear intention to create a contractual relationship.

In *Church of the Province*, an Anglican priest was suspended for misconduct following a disciplinary hearing. Although he retained his status as a priest, he stopped receiving a salary. The priest argued that his suspension amounted to unfair dismissal and took his case to the Commission for Conciliation, Arbitration and Mediation (CCMA), which ruled in his favour, declaring the dismissal unfair. The Anglican Church then appealed to the High Court, arguing that the CCMA had overstepped its authority because the relationship between the church and the priest was not an employment relationship. Therefore, the CCMA lacked jurisdiction to decide the case. According to the Anglican Church:

> a priest is not regarded as the servant of the Church: while the Church provides the framework for the priest's work (through the constitution and canons), the priest is regarded as working for God, and i.e. the relationship between the priest and the Church cannot be regarded as one of employment. The applicant simply, according to it, provided the sphere within which priests serve God arising out of their calling. It is for that reason, so applicant argued, that priests are said to be called of God and serving God and offering their lives to God – this precludes the Anglican Church generally, and the applicant in particular, from speaking of employing priests.[13]

The court concluded that a contract of employment is required to establish an employment relationship. It found no legally enforceable employment contract between the applicant and the third respondent. Therefore, the parties did not meet the definition of employer and employee under the Labour Relations Act (LRA), and the first respondent lacked jurisdiction to hear the dispute brought by the third respondent. According to the court:

> I agree with the above conclusion and I am satisfied that there was in fact no intention on the part of either the Applicant or the Third Respondent to enter into a legally enforceable employment contract. The failure by the Second Respondent to consider this issue as I have stated earlier, constituted a reviewable irregularity because it goes to the very root of whether or not the First Respondent has jurisdiction to entertain the dispute.
>
> …

12 *Church of the Province of Southern Africa (Diocese of Cape Town) v CCMA* [2001] 11 BLLR 1213 (LC), para 24.

13 *Church of the Province*, para 10 xiii.

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> Since I have found that a contract of employment is necessary for purposes of establishing an employment relationship and that there was no legally enforceable contract of employment between the Applicant and the Third Respondent, the parties are not an employer and employee as defined by the LRA and consequently the First Respondent has no jurisdiction to entertain the alleged dispute referred to it by the Third Respondent[14]

The Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA) were amended in 2002 to introduce a rebuttable presumption about whether a person is considered an employee and, therefore, covered by the Act. According to Section 200A of the LRA and Section 83A of the BCEA, a person is presumed to be an employee if any one of the seven factors listed in Section 200A of the LRA is present in the relationship between the individual and the entity they work for or provide services to. It is not necessary for all seven factors to be present; the presence of just one is enough to establish such a relationship. Section 200A states as follows:

> A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, *regardless of the form of contract*, if any one or more of the following factors is present:
>
> i. the manner in which the person works is subject to the control or direction of another person;
> ii. the person's hours of work are subject to the control or direction of another person;
> iii. in the case of a person who works for an organization, the person is a part of that organization;
> iv. the person has worked for that other person for an average of at least 40 hours per month over the last 3 months;
> v. the person is economically dependent on the other person for whom that person works or renders services;
> vi. the person is provided with tools of trade or work equipment by the other person; or
> vii. the person only works for or renders services to one person (my emphasis added).

Universal Church of the Kingdom of God v Myeni[15] involved the issue of whether a pastor who is in the voluntary service of the church is an employee of the church or not. A pastor of the Universal Church of the Kingdom of God filed an unfair dismissal dispute with the CCMA after his service was terminated for alleged misconduct. The church contended that the pastor was not an employee and that the CCMA lacked jurisdiction to hear the case. However, the arbitrator disagreed, ruling that the dismissal was unfair. Dissatisfied with this decision, the church sought to have the arbitration award reviewed and set aside by the Labour Court.

14 *Church of the Province*, para 39.

15 *Universal Church of the Kingdom of God v Myeni* [2015] 9 BLLR 918 (LAC).

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In the Labour Court, Steenkamp J upheld the arbitrator's finding that the pastor was indeed an employee of the church. The church was subsequently granted leave to appeal to the Labour Appeal Court. The court *a quo*, the court of first instance in this case, based much of its decision on Section 200A of the Labour Relations Act (LRA), which establishes a rebuttable presumption regarding who qualifies as an employee under the LRA. The court evaluated the relationship between the church and the pastor using the factors listed in Section 200A and determined that the church failed to rebut the presumption.

In this case, it was evident that neither the pastor nor the church had the intention to enter into a legally binding contract. However, the court *a quo* overlooked these facts. In the Labour Appeal Court, the church argued that the key question was whether the parties intended to form a contract or be bound by it, and if no such intention existed, then Section 200A of the LRA would not apply. On appeal, Ndlovu J interpreted Section 200A and the 2006 Code of Good Practice as requiring an employment contract or some form of contractual arrangement, whether written or not. The Labour Appeal Court then examined whether a legally enforceable agreement existed between the pastor and the church. It concluded that, based on the parties' conduct and the language used in their agreement, there was no contractual intent (*animus contrahendi)* to create a contract. Consequently, the court held that no contractual obligations existed between the pastor and the church. The appeal was upheld, and the decision of the court *a quo* was set aside.

The constitutional right to freedom of religion allows religious organisations and churches to define and give meaning to various roles within the church, including the position of minister, according to their own religious beliefs. Therefore, each case should be evaluated based on its specific facts and merits. This perspective appears to be supported by the Labour Appeal Court in the case of the Universal Church of the Kingdom of God. When it comes to religious disputes and the jurisdiction of the civil courts, the question that often comes to mind is what basis exists for the court's interference with succession and governance disputes, given the right to freedom of religion and the right of religious institutions to regulate its own internal affairs. Does a civil court have the common law jurisdiction to review the decision of a domestic tribunal where it has disregarded its own rules or did not adhere to the fundamental principles of fairness? The following section will briefly outline the jurisdiction of the civil courts in religious disputes.

JURISDICTION OF THE CIVIL COURTS IN RELIGIOUS DISPUTES

The South African Religious Charter (SACRRF) guarantees every religious institution the right to institutional freedom of religion, including the right to determine its own doctrines and to regulate its own internal affairs, including organisational structures and procedures.[16] Every religious institution is recognised and protected as having authority over its affairs, and the state, including the

16 SACRRF, ss 9, 9.1, 9.2 and 9.3.

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judiciary, must respect the authority of every religious institution over its affairs and may not regulate or prescribe matters of doctrine and ordinances. The term "management of own religious affairs" can be interpreted in many ways, but it usually refers to matters that fall within the dogma of a religious institution and matters that pertain to faith, ritual and doctrine. This encompasses the institution's organisational structure, membership and spiritual administration. In countries where church and state are separate, this implies that maximum freedom in managing religious affairs should be guaranteed to all faiths.[17] Thus, in *Taylor v Kurstag*,[18] Malan J accepted that the decision by the Jewish Beth Din is subject to judicial review but emphasised the importance of judicial deference. The court held: "Although the decisions of the Beth Din are subject to judicial scrutiny, just as those of any other faith are, the values embodied in the doctrines of entanglement and the reluctance to interfere in matters of faith, whether procedural or otherwise, cannot be discarded."

In a decision by the Supreme Court of Appeal in *De Lange v Presiding Bishop, Methodist Church of Southern Africa*,[19] the court was confronted with a dispute relating to the sexual orientation of a spiritual leader. The Supreme Court of Appeal dismissed De Lange's appeal, but she was granted leave to appeal to the Constitutional Court. Before the Constitutional Court, De Lange contended that the church's rule prohibiting ministers from entering into same-sex marriages violated her constitutional right to equality, as the Constitution forbids unfair discrimination based on marital status or sexual orientation.

In its judgment, the Supreme Court of Appeal highlighted the nature of the dispute, noting that it involved sensitive matters of church doctrine and governance.[20] The *DeLange* court held, "The Church should be left to determine domestically, as far as is possible, without interference from the Court. The Court should only become involved in the dispute where it is strictly necessary to do so. Even then, I am advised and submit that it will refrain from determining doctrinal issues, in order to avoid religious entanglement."[21] The court further stated that safeguarding the autonomy of religious associations is a fundamental component of protecting religious rights. This protection has been described as "vital to a conscience-honouring social order".[22] Although the court emphasised that it was not required to address the conflict between the rights to freedom of association and religious freedom, on the one hand, and the right to equality, on the other, it nonetheless expressed the view that "a proper respect for freedom of religion precludes our

17 Krishnaswami A. 1960. *Study of Discrimination in the Matter of Religious Rights and Practices*. New York: United Nations Publication, 48.

18 *Taylor v Kurstag* 2005 (1) SA 362 (W), para 61.

19 *De Lange v Presiding Bishop, Methodist Church of Southern Africa* 2015 (1) SA 106 (SCA).

20 Van Coller, *Regulating Religion*, 44ff.

21 *De Lange* (SCA), para 30.

22 *De Lange* (SCA), para 31.

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courts from ruling on matters of religious doctrine, which are within the exclusive domain of the Church."[23]

De Lange's appeal to the Constitutional Court was dismissed primarily because the court determined that she had clearly renounced her unfair discrimination claim before the High Court. The court also held that she should have brought her discrimination claim before the Equality Court.[24] However, in agreeing with the approach taken by the Supreme Court of Appeal, Van der Westhuizen J recognised that fundamental rights and values often conflict and must be weighed, balanced, and limited. Referring to the "doctrine of entanglement", he stated:

> It is of course one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preferences. Courts are not necessarily the best instruments to balance competing rights and values in intimate spheres where emotions and convictions determine choices and association. In this case the Supreme Court of Appeal, relying on the "doctrine of entanglement", held that the dispute at issue was quintessentially one which a secular court should try to avoid, if possible.[25]

Religious institutions, as bearers of the right to freedom of religion, possess the autonomy to establish and implement their own doctrines and beliefs. Courts, in turn, are required to exercise deference and respect toward the "autonomous sphere" of these organisations. However, as demonstrated in the following case, courts retain the authority to assess the lawfulness and fairness of decisions made by such institutions.

In *Fortuin v Church of Christ Mission of the Republic of South Africa*,[26] the Port Elizabeth High Court addressed a case where a religious minister sought judicial review of his church's decision to remove him from his pastoral duties. This case highlighted important issues related to disciplinary actions by religious organisations and offered valuable lessons for such institutions. One key issue was the court's authority to review decisions made by a church and the requirement of fairness. The court examined whether the respondents adhered to fair procedures outlined in their constitution. The applicant argued that the common law permits judicial review of a domestic tribunal's decision if it disregards its rules or fails to adhere to fundamental principles of fairness. The court agreed, finding sufficient grounds to intervene because the church had violated procedural fairness. It was evident from the evidence that the church had not followed its constitutional procedures, leading the court to overturn the decision to disfellowship and suspend the applicant. This case supports the view that civil courts can review and interpret church decisions while generally respecting church customs and doctrines. The courts,

23 *De Lange* (SCA), para 39.

24 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 (2) SA 1 (CC), para 30.

25 *De Lange* (CC), para 79.

26 *Fortuin v Church of Christ Mission of the Republic of South Africa (3626/15) [2016] ZAECPEHC 18.*

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however, should maintain deference to religious practices and interpretations.[27] This view was further supported in a judgment in the case of Bishop Mlibo Ngewu and the Anglican Church of Southern Africa. The KwaZulu-Natal High Court in Pietermaritzburg in *Bishop Mlibo Ngewu v The Anglican Church of Southern Africa* confirmed the jurisdiction of the civil courts in religious matters by stating: "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."[28]

A second important aspect of the *Fortuin* case, which received less attention from the court, was the requirement for the church to exercise its powers in accordance with its church order or constitution. If a church exceeds its authority, its decision can be deemed unlawful and overturned by a court. In *Fortuin*, the applicant argued that the church acted unlawfully because the Church's National Assembly, the highest decision-making body, had not passed a resolution for his disfellowshipping at any of its Annual Assemblies that he attended.[29] He contended that the church lacked the authority to make such a decision and should be annulled. The evidence showed that the applicant was only notified of his suspension during a church conference, and the church failed to provide evidence of a disciplinary hearing. This suggests that the church may not have exercised its disciplinary powers in accordance with its church order, potentially exceeding its authority. As a result, the decision could be considered unlawful and subject to being set aside.

In *Fortuin*, the court also examined the principle of procedural fairness, or natural justice, explicitly focusing on the requirement of *audi alteram partem*—the right to a fair hearing. According to this principle, an accused individual must receive adequate notice of the charges and have a reasonable opportunity to present their case. Common law stipulates that a person involved in a disciplinary hearing must have the charges clearly outlined with sufficient detail to avoid confusion about the conduct being investigated. The applicant argued that the church's actions violated the principles of natural justice, asserting that he had the right to be heard before any decision to disfellowship him was made. Evidence showed that the church had not adhered to fair procedures as required by its constitution. Consequently, the court set aside the decision to remove the applicant from his ministerial duties at the Bloemendal Church.

Our courts have confirmed that private entities, such as churches and religious institutions, can be held to lawfulness, procedural fairness and rationality standards. Common law principles still apply under the new constitutional framework, but only within the area known as "private administrative law". The church order and

27 See further Van Coller EH. 2017. "Legal Disputes and What the Church can Learn from the Case of Fortuin v Church of Christ Mission of the Republic of South Africa and Others", *LitNet Akademies* 14(3) 592–617.

28 *Bishop Mlibo Ngewu v The Anglican Church of Southern Africa and Ten Others* [2016] ZAKZPHC 88, para 33.

29 *Fortuin*, para 13.

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constitution are crucial in helping courts determine the extent of their oversight and review when the legality of a decision is challenged. These documents, along with the rules and regulations, form an agreement that defines the organisation's authority and outlines its leaders' and members' roles and responsibilities. In the context of churches and religious organisations, the church order or constitution establishes that the organisation is governed by internal rules created by the institution itself rather than by the state. According to legal scholar Johan van der Vyver, "It is not for state institutions to judge the substance, or the truth or falsity, of religious belief per se. However, it is a vital function of government to resolve, through its judicial arm, disputes pertaining to the rights and obligations of its subjects. Courts of law ought not to shy away from that function merely because those rights and obligations cannot in a given case be established without doctrinal issues."[30] Through some case examples, the next section will outline the court's approach to leadership and governance disputes in selected South African churches.

THE COURT'S APPROACH TO LEADERSHIP AND GOVERNANCE DISPUTES

Several factors may lead to leadership disputes in a church. Noncompliance with church rules is of particular importance. In the last decade, there has been an increase in the number of disputes involving leadership succession and other governance-related disputes in South African Christian churches that have had to be adjudicated by the civil courts.[31] I will highlight some of these examples in the context of leadership and general governance-related disputes.

The African Independent Churches (AICs) constitute some of the highest population of Christians in South Africa, with a membership of just over 40 per cent of the total Christian population.[32] Disputes are particularly prominent among these churches.[33] The court, in *Mduduzi Shembe v Vela Shembe*, described the Church of Nazareth, an African traditional church, by observing, "In practice, in churches of this nature the application of the canon law is much blended with the application of traditional law

30 Van der Vyver J. 2001. "Constitutional Perspective of Church-State Relations in South Africa", *Brigham Young University Law Review* 1999(2):670.

31 See for instance: *Bethesda Christian Center NPC v Department of Social Development* (009335/2022) [2022] ZAGPPHC 767 (6 October 2022); *Governing Body: Apostolic Faith Mission Ngwelezane Assembly v Ndlovu (*4025/2017) [2023] ZAKZDHC 53 (10 August 2023); *African National Church v Tsatsa* (2308/2016) [2017] ZAFSHC 108; *Presbyterian Church of Africa v Peter* (3045/2014) [2015] ZAECPEHC 40 (2 June 2015); *African Gospel Church v Ndyalivani* (513/2014) [2015] ZAECBHC 6; *Christian Catholic Apostolic Church in Zion v Hlamandlana* (1499/14) [2015] ZAECMHC 51; *Presbyterian Church of Africa v Sihawu* (3375/12) [2013] ZAECGHC 36 (25 April 2013).

32 Coertzen P. 2014. "Constitution, Charter and Religions in South Africa", *African Human Rights Law Journal* 14:127.

33 For some interesting examples relating to succession disputes, see Akinloye IA. 2021. "Legal Issues Involving Succession Disputes among South African Churches: Some Lessons", *Ecclesiastical Law Journal* 23(2):160–190.

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and customs."[34] The Church of Nazareth has a long history of succession disputes that have divided the church into factions. The Shembe Church has provisions on leadership succession in its governing policies. However, the failure of the church authorities to obey those provisions was the main trigger for the lawsuits.[35]

Founded in 1910 by Prophet Isaiah Shembe, the Nazareth Baptist Church (the Church) has its headquarters at Ekuphakameni Mission in Inanda, Durban, KwaZulu-Natal. The main dispute involved leadership succession within the Ebuhleni congregation. The late Mr. Vimbeni Shembe was the last leader of Ebuhleni and the sole trustee of the Nazareth Ecclesiastical Endowment Trust (the Trust). Succession in Ebuhleni is governed by the Trust Deed (Protocol 293 of 1935) and the Church's Constitution adopted in 1999. The Trust was established by Isaiah Shembe's eldest son to manage Church property and regulate succession.[36] The Constitution designates the church as a "corporate body with perpetual succession", outlining succession for a single nominee. While both the Trust Deed and the Constitution address leadership succession, the Trust Deed covers scenarios with multiple or no nominees, whereas the Constitution only addresses a single nominee.[37] The first applicant, Mr. Mduduzi Shembe, claimed that the late Vimbeni Shembe had orally nominated him as his successor. The second applicant, Mr. Inkosi Mqoqi Ngcobo, was the great-grandson of Inkosi Mandlakayise Ngcobo, whose homestead was established as the Ebuhleni Church by Mr. Vimbeni Shembe's father (Mr. Amos Shembe) in 1979. The third applicant, Reverend Mbongwa Friend Nzama, previously served as chairperson of the Ebuhleni Church's executive committee. Ms. Ntombifikile Shembe N.O. (the respondent) is the executrix of the estate of the late Mr. Vela Shembe, who contested the oral nomination claimed by the first applicant, asserting instead that he had been nominated by Vimbeni Shembe through a written Deed of Nomination.

The trial judge, Jappie JP, accepted the testimonies of the three expert witnesses but dismissed the evidence of the fourth expert witness as untrustworthy. He also rejected the second appellant's evidence regarding the church leader's oral nomination of the first appellant. Dissatisfied with this decision, the appellants appealed to the High Court. In the High Court, the majority agreed with the trial court's interpretation of the provisions of the Trust Deed Protocol and the Constitution of the Nazareth Baptist Church. They held that:

> In our view the court *a quo* was correct in concluding that the late leader nominated the respondent as Titular Head of the Nazareth Baptist Church as appears on the Deed of Nomination and supported by the letter received by Buthelezi Attorneys on 16 March 2011… we are satisfied that

34 *Mduduzi Shembe v Vela Shembe* (AR 250/2017) [2018] ZAKZPHC 45, para 18.

35 For some other views on the *Shembe*-case, see Kumalo S and Mujinga M.2017. "Now we Know that the Enemy is from Within: Shembeites and the Struggle for Control of Isaiah Shembe's Legacy and the Church", *Journal for the Study of Religion* 30(2):123, 135.

36 *Shembe v Shembe,* para 17–24.

37 *Shembe v Shembe*, para 33ff.

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> all this evidence leads to the ineluctable conclusion that it would be highly improbable for the late leader to have made another nomination other than the one contained in the Deed of Nomination.[38]

The court further held that "the reasons and findings of the court *a quo* are unassailable on the issue that there was only one nomination made by the late leader wherein he nominated the respondent as the Titular Head and sole trustee".[39] The High Court accordingly rejected the appeal and upheld the lower court's decision by finding the deed of nomination more probable.

Noteworthy is that the trial court found that the constitution of the church governed the question of succession in the church. It found that the trust deed did not apply to this issue. Vela was then declared the lawful successor to the late leader of the church, Vimbeni Shembe. With the special leave of the court, the appellant brought an appeal to the Supreme Court for Appeal.[40] The Supreme Court of Appeal upheld the trial court's finding that the constitution applied to the leadership succession issue and the ruling that the late Vele Shembe was the legitimate leader of the Shembe Church. The court held: "For all of the above reasons, and others which need not be canvassed, it cannot be said that the trial court misdirected itself in the finding that the only choice of successor was Vela. In my view, that conclusion is unassailable. No actual misdirections were identified. The full court was accordingly bound by this second finding, as is this court."[41] Mduduzi Shembe, the son of the late leader Vimbeni Shembe, approached the apex court, the Constitutional Court of South Africa, for leave to appeal a Supreme Court of Appeal ruling. However, the Constitutional Court refused the applicants' leave to appeal.

Some more recent examples include a High Court decision in the matter of *Bethesda Christian Center NPC v Department of Social Development*.[42] Members of Bethesda Christian Centre NPC, a faith-based nonprofit organisation, were unable to resolve their leadership disputes internally and turned to the High Court, a secular court. The main issue was that the church had not held an annual general meeting for years, contrary to its constitution and memorandum of incorporation. Despite this, an external bishop eventually organised a general meeting, leading to a successful election of new leadership. However, the "old leadership", including the church's founding members, sought to prevent the newly elected leadership from taking charge.[43] On 16 March 2022, the Director of Nonprofit Organisations issued a formal notice to the church under Section 20 of the NPO Act. The notice outlined several violations of the Nonprofit Organisations Act 71 of 1997 (NPO Act), including the failure to submit annual reports for multiple years, neglecting to hold annual general

38 *Shembe v Shembe*, paras 178, 189.

39 *Shembe v Shembe*, para 209.

40 Reported as *Shembe v Shembe NO* (957/2018) [2019] ZASCA 172 (2 December 2019).

41 *Shembe v Shembe* (SCA), para 34.

42 *Bethesda Christian Center NPC v Department of Social Development* (009335/2022) [2022] ZAGPPHC 767 (6 October 2022).

43 *Bethesda Christian Center NPC v Department of Social Development,* paras 2-3.

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meetings and elect board members as required by the Church's constitution, not providing names of office bearers, and generally failing to adhere to transparency and good governance principles expected of a registered nonprofit organisation. [44]

The object of the NPO Act is to create an environment in which nonprofit organisations can flourish.[45] This is done by ensuring that nonprofit organisations are run properly and efficiently and in accordance with codes of good practice.[46] Nonprofit organisations are not obliged to register as such with the Director of Nonprofit Organisations. Still, once registered, they have the benefit of "allowances" prescribed by the Minister for Welfare and Population Development.[47] Once registered, a nonprofit organisation must, according to the standards of generally accepted accounting practice, keep its books of account, draw up its annual financial statements and report to the organisation itself.[48] It must also provide the Director of Nonprofit Organisations with such reports and a "narrative report of its activities".[49] The NPO Act obliges nonprofit organisations to comply with their own constitutions and regulatory documents and keep the Director of Nonprofit Organisations abreast of such compliance or changes thereto.[50] In dismissing the application, the court was of the view that:

With reference to the NPO Act and the issues of compliance with its provisions and the notice issued by the Director of Nonprofit Organisations, it is surely also more to the benefit of the Church that it is run in compliance with its obligations in terms of the NPO Act by a board seeking to ensure its continued registration, than by an (unelected) board who had placed that registration in jeopardy and who had promised, but failed to remedy the Church's noncompliance with the Act.[51] The court granted the counter application for a declaratory order and declared that those elected at the Annual General Meeting of the Church held on 9 July 2022 (and subsequently co-opted) constitute the current Board of the Church until otherwise elected at a subsequent valid general meeting.[52]

Governing Body: Apostolic Faith Mission Ngwelezane Assembly v Ndlovu[53] involved a dispute relating to the governing structure vested with the authority to govern and manage the affairs of the Apostolic Faith Mission of South Africa. The Apostolic Faith Mission of South Africa has a formal constitution The court emphasised the

44 *Bethesda Christian Center NPC v Department of Social Development*, para 14.

45 NPO Act, s 2(a).

46 NPO Act, s 6.

47 NPO Act, s 11.

48 NPO Act, s 17.

49 NPO Act, s 18.

50 NPO Act, s 19. *Bethesda Christian Center,* para 30-33.

51 *Bethesda Christian Center NPC v Department of Social Development*, para 47.

52 *Bethesda Christian Center NPC v Department of Social Development*, para 50.

53 *Governing Body: Apostolic Faith Mission Ngwelezane Assembly v Ndlovu* (4025/2017) [2023] ZAKZDHC 53 (10 August 2023).

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importance of following the prescribed constitutional procedures, by stating as follows:

> I dwell for a moment on the constitution as, in my view, it plays a significant and pivotal role in the determination of this application. It is a substantial document, comprising some 110 pages. It is trite that the constitution of a voluntary association, together with all the rules or regulations passed in terms thereof, collectively form the agreement entered into by that association's members and serves as the internal statute of that association. It is a contract concluded between its members, which then binds them.[54]

The court concluded and held:

> It is entirely likely that disputes may arise from time to time in a voluntary association. Any association of human beings is a potential breeding ground for possible dissensus. It is for that reason that a good and detailed constitution is beneficial as it identifies channels and procedures for the ventilation and resolution of such disputes that arise. The AFMSA has such a constitution. Rather than act presumptuously as it has, the members of the Interim Committee ought to have followed the prescribed constitutional procedures to deal with their grievance or they, not Pastor Phangwa, ought to have left the church. Instead, the members of the Interim Committee went outside the constitution of the AFMSA in both the creation of the Interim Committee and in the decisions that the Interim Committee subsequently then took. The decisions thus taken by it are not the decisions of the governing body and cannot be permitted to stand and to bind the Ngwelezane local assembly.[55]

The court granted a declaratory order confirming that the governing body of the Ngwelezane local assembly was the only governing structure vested with the authority to govern and manage the affairs of the Apostolic Faith Mission of South Africa, Ngwelezane local assembly and its branches.[56]

In *Presbyterian Church of Africa and Another v Peter*,[57] a minister had been excommunicated by the Cape Presbytery, and the church sought a final interdict restraining him from holding himself out as a member of the applicant, from soliciting funds from members of the church, and from entering in or upon any property owned or rented by the applicant. The court granted the relief sought by the church and described the application as:

> another in a very long line of similar cases where the church has sought to restrain certain individuals from participating in its affairs. There are numerous judgments of this court, which detail a sorry saga of factional and related disputes within the governing structure of the church. In this case – as in a number of other matters – the respondent has raised certain

54 *Governing Body: Apostolic Faith Mission Ngwelezane Assembly v Ndlovu*, para 6.

55 *Governing Body: Apostolic Faith Mission Ngwelezane Assembly v Ndlovu*, para 41.

56 *Governing Body: Apostolic Faith Mission Ngwelezane Assembly v Ndlovu*, para 44.

57 *Presbyterian Church of Africa and Another v Peter* (3045/2014) [2015] ZAECPEHC 40 (2 June 2015).

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> challenges to the authority of the applicant. In this case too the respondent has placed in issue – to a certain extent – the authority of the deponent to the founding affidavit to act on behalf of the church.[58]

These sentiments were also expressed by the court in the case of *Presbyterian Church of Africa v Sihawu*,[59] where the court held:

> In conclusion it is appropriate to remark briefly on the fact that this is yet another in a long line of High Court applications related to the ongoing leadership dispute in the applicant church. In almost every instance the litigation has been directed to a prohibitory interdict of one form or another, often brought on the basis of some alleged urgency. Different parties have been involved in some instances but, as appears from the several judgments of this court and the courts of the Eastern Cape, very similar issues have been raised and the allegations and counter allegations have followed a familiar pattern.[60]

Clearly, churches still face ongoing leadership disputes and factional and related conflicts within their governing structures. These disputes frequently escalate and ultimately reach the civil courts for adjudication. The last section will briefly discuss proposals for addressing ongoing leadership and governance disputes in churches.

ADDRESSING LEADERSHIP AND GOVERNANCE ISSUES

Effective leadership within religious communities and through multi-faith forums is crucial for addressing leadership and governance disputes within religious communities. The South African Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission) can play a crucial role. The CRL Rights Commission is one of the Chapter 9 institutions (State Institutions Supporting Constitutional Democracy under Chapter 9 of the South African Constitution) and was established under the terms of Act 19 of 2002. Section 185 (1) of the Constitution states that the functions of the CRL Rights Commission are to (a) promote respect for the rights of cultural, religious and linguistic communities; (b) promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, based on equality, non-discrimination and free association; (c) recommend the establishment or recognition, by national legislation, of cultural or other councils for communities in South Africa. Section 185 (2) emphasises the function of the Commission to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities. According to Section 5 of the CRL Act, the Commission has the authority to resolve tensions among cultural, religious and linguistic groups, handle

58 *Peter*, para 2.

59 *Presbyterian Church of Africa v Sihawu* (3375/12) [2013] ZAECGHC 36 (25 April 2013).

60 *Sihawu* , para 27.

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requests concerning the rights of these communities and provide recommendations to relevant governmental bodies regarding legislation affecting their rights.

Apart from the CRL Rights Commission, several other self-regulating organisations exist. One such organisation is the South African Council of Churches (SACC), an inter-denominational forum that unites 36 member churches and organisations. According to its vision, "The SACC works for moral reconstruction in South Africa, focusing on justice, reconciliation, integrity of creation, and eradicating poverty. It also contributes towards empowering all who are spiritually, socially, and economically marginalised."[61] Another organisation is the National Interfaith Council of South Africa (NICSA), a non-profit company (NPC) consisting of all faith-based organisations in South Africa. The vision of the NICSA is "to take an inter-faith approach to building a new society with new moral values and attitudes". They aim to "strengthen, restore and re-build the integrity of the family and human values through interfaith dialogue and cooperation, as well as other interventions to promote national social cohesion and prosperity".[62]

In its 2023/2024 Performance Plan, the CLR Commission highlights five pillars or thrusts of its strategic plan. One focuses specifically on how to "strengthen legal services as an instrument of facilitating the reduction of friction between and within communities and empower them with the skills to promote reconciliation among themselves and others through Alternative Dispute Resolutions (ADR), drawing from rich African traditional methods/practices of resolving disputes and or conflicts".[63] In several of the discussed examples, churches also failed to adopt ADR mechanisms to resolve their leadership and governance disputes. In the context of religious institutions, applying ADR to leadership conflicts involves various procedures beyond litigation to find mutually acceptable resolutions for all parties involved. This includes conciliation, negotiation, mediation and arbitration. In faith-based organisations, ADR typically does not rely on secular law to resolve disputes. Instead, it enables parties to address conflicts based on their own religious principles, both in terms of procedure and substance.[64] Where religious institutions and churches thus adopt ADR processes in leadership and governance-related disputes, it can reduce the possibility of their exposure to court entanglement. According to Nigerian legal scholar Idowu Akinloye:[65]

> Seeking a means of resolving disputes other than litigation does not necessarily forestall the existence of conflicts but, if effectively employed, it may prevent a church from the risk of a dispute that has to be adjudicated by the civil courts. ADR also promotes the resolution of disputes in a much

61 South African Council of Churches. Online at: http://sacc.org.za/mission-vision-constitution.

62 Van Coller, *Regulating Religion*, 227.

63 CRL Commission 2023/2024 Performance Plan, 2. Online at https://static.pmg.org.za/Annual_Performance_Plan_-2023_-_2024_Final_V1.pdf

64 Broyde M. 2018. "Faith-based Arbitration Evaluated: The Policy Arguments for and Against Religious Arbitration in America", *Journal of Law and Religion* 33(3):340–389.

65 Akinloye, "Succession Disputes", 184.

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healthier and more confidential way. If all the churches in the case studies had adopted an effective form of ADR, perhaps they would have avoided litigation.

The absence of effective succession planning in the governance policies of churches has further been identified as a critical factor contributing to succession disputes within South African churches. The CRL Rights Commission conducted an investigative study among more than 80 religious organisations in South Africa during 2015 and 2016. The rationale for the study conducted by the CRL Commission included gaining a deeper understanding of the institutional governance and management of religious institutions: the ownership, governance and role of the leadership team, including practitioners, reverends, pastors, priests, imams, temple leaders, healers, abbots, elders, deacons, board members, small group leaders and similar leadership positions.[66] Many of the complaints detailed in the CRL Rights Commission's report on the commercialisation of religion pertained to financial abuses, misappropriation of funds, and non-compliance with legislation, especially those related to financial and governance matters. The CRL Rights Commission found a lack of good governance structures, including:

- Some Institutions have no Codes of Conduct
- Lack of oversight structures, such as a Church Council, Disciplinary Committee, etc
- In some instances, institutions are controlled and owned by one person.
- In some cases, the finance committee and other church committees constitute the spiritual leader, his wife, and some of his friends.
- Lack of leadership succession plans, which eventually lead to conflict, division and litigation.[67]

Although religious organisations operate as voluntary entities, the CRL Rights Commission can play a crucial role in helping them establish proper governance, ensure compliance with existing laws, and recommend new legislation where necessary. The widespread neglect of fiduciary responsibilities is a matter of grave concern. Religious organisations must recognise their responsibility to balance religious freedom with ethical and community obligations. The Commission highlighted the importance of each religious institution selecting its leaders based on the guidelines established in its constitution to effectively manage leadership succession challenges. Religious institutions should elect their oversight structures to manage the financial and internal affairs of the institution. Schisms and disputes within religious organisations, often accompanied by or for financial reasons, could be avoided for the mutual benefit of the organisations and community. Religious

66 Commission for the Promotion and Protections of the Rights of Cultural Religious and Linguistic Communities (CRL Rights Commission). 2017. Report of the Hearings on the Commercialisation of Religion and Abuse of People's Belief Systems, April, 12. Online at: https://static.pmg.org.za/171017CRL_report.pdf

67 CRL Report, 31-32.

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organisations must get their house in order, among other things, by proper training and putting proper internal rules in place.[68]

In its comments, FOR SA[69] and the South African Council for the Protection and Promotion of Religious Rights and Freedoms supported the CRL Rights Commission's recommendation to adopt a Code of Ethics. The religious sector should develop this code, to which religious institutions and practitioners are encouraged to voluntarily adhere, though not legally required to do so.[70] Towards the middle of 2018, the South African Council for Religious Rights and Freedoms proposed a draft Code of Conduct for Religions in South Africa. The preamble of the Code of Conduct emphasises that the right to freedom of religion and belief is an important mechanism for the equitable regulation of the relationship between religions and the state, providing that religious institutions enjoy recognition, protection and cooperation in a constitutional state as institutions with a specific sphere of responsibility. It confirms the view that the state has the duty to govern justly and impartially in the interest of everybody, to respect, protect and accommodate diverse belief systems and regulate relationships equitably, and not to deny diversity by imposing a uniform standard to the exclusion of differing beliefs or convictions, but instead pursue the full enjoyment of freedom of religion and belief by all. The Code acknowledged with sadness and regret the "unacceptable conduct occurring in religious communities, and condemn any abusive, harmful or illegal activities taking place in the name of religion".[71] It urges religious communities to address such conduct decisively, establish clear standards to guide actions, and prevent abuse and exploitation. The goal is to enhance human dignity and foster a spirit of mutual respect and tolerance among the people of South Africa. Section 16 of the Code encourages religious communities to implement suitable leadership, management, and control mechanisms to ensure that internal operations are conducted and resources are utilised in a lawful and responsible manner.

CONCLUSION

Instances of leadership, governance and financial abuse and misconduct threaten the sustainability of churches and religious institutions, as well as their ability to

68 CRL Report, 35ff.

69 Freedom of Religion South Africa is a non-profit, nondenominational Christian organisation, whose ethos is Bible-based. It is registered as a non-profit company (NPC) in terms of the Companies Act 71 of 2008, and it is also currently in the process of being registered as a public benefit organisation (PBO) in terms of the Income Tax Act 58 of 1962. FOR SA's vision is to be a voice for the Christian Church in South Africa to government and to society, on issues affecting the rights of religious communities in South Africa.

70 FOR SA and the South African Council for the Protection and Promotion of Religious Rights and Freedoms. 2017. Comments on the CRL Rights Commission's Report on the "Commercialisation" of Religion, 28 February, 62, 64. Online at: https://static.pmg.org.za/171017SARRF.pdf

71 Draft Code of Conduct for Religions in South Africa, 29 June 2018, s 8.

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assist in the provision of social services. From a South African perspective, this paper has illustrated that the nature of the employment relationship and the intention of the parties are important factors in defining the employment status of ministers of religion. For any party, including a religious minister, an employment contract is required to establish an employment relationship under labour laws. Without such a relationship, the court lacks jurisdiction over labour disputes. Additionally, the right to freedom of religion allows religious organisations and churches to define roles, including that of ministers, according to their beliefs.

South African courts have shown a willingness to review proceedings of the church if there has been non-compliance with the church's constitution and internal rules and procedures. An analysis of several cases showed that churches still face significant challenges in handling leadership and governance disputes within their structures. Proper training, alternative dispute resolution methods like mediation, and establishing clear internal rules can help religious institutions foster a culture of good governance and ethical religious leadership.

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