

Church unity and church unification In search of a virtuous way

ABSTRACT

The article is about finding a virtuous for church unification in light of freedom of religion. It is argued that freedom of religion offers churches the freedom to determine the way for church unification. It is however necessary that this way must be determined in the Church Order of Churches.

1. THE TITLE AND THE ARGUMENT

In 1994 AJ LTC Hárms wrote the following in a concurring minority report to the judgement of his colleagues Hefer, Vivier, Zulman and Streicher “Die feit dat die VGK se aansoek afgewys word, beteken nie dat kervereniging of –ontbinding regtens onmoontlik is nie, slegs dat dit moeilik is en dat die wyse gevolg in hierdie geval ondeugdelik was.” (The fact that the application of the URCSA is rejected does not mean that church unification or – dissolution is legally impossible, only that it is something difficult and that the route travelled in this case was not virtuous.) (Hoogste Hof van Appèl van Suid-Afrika, Saaknommer 536/96; 27 November 1998).

The history of churches in South Africa in their relation to the courts of the country show that it has always been difficult for churches to change their identity without a minority of members of the denomination walking away with the identity and properties of the original denomination. The argument of this paper will be to show that the guaranteed freedom of religion in the Constitution of South Africa (1994) has opened new possibilities for churches to unify.

2. FREEDOM OF RELIGION

Just as is the case with religion there is also a wide variety of opinions about freedom of religion (Vermeulen&Kanne,2004,76-77; Sap,2004,114-117; Blei,2003,2-3; Van Drimmelen,sa,199). A fairly general accepted definition of freedom of religion can be found in the Universal Declaration of Human Rights (1948) where the following can be read in art 18 “Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private to manifest his religion or belief in teaching, practice, worship, and observance.” (Van der Vyver,1996, Religious Perspectives XXIV). Article 9 of the European Convention for the Protection of Human Rights and Freedoms with its nearly identical article in the International Convention on Civil and Political Rights (1966) and the American Convention on Human Rights (1969): reads as follows: (1) “Everyone has the freedom of thought, conscience, and religion; this right includes the freedom to change his religion or belief and freedom either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice, and observance.” (2)

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." (Van der Vyver, 1996, Legal Perspectives, 26).

In the South African Constitution freedom of religion, conviction and opinion is described as follows in art 15(1) "Everyone has the right to freedom of conscience, religion, thoughts, conviction and opinion." Art 15(2) provides for the exercise of religion at state or state subsisted institutions under certain conditions while art 15 (3) provides for legislation that recognizes certain religious marriages also given certain conditions."

In his effort to define the essential rights and freedoms of religious freedom Witte identifies the following six elements as being essential to freedom of religion:

- (i) freedom of conscience;
- (ii) the free exercise of religion;
- (iii) the acknowledgement of religious pluralism;
- (iv) religious equality before the law;
- (v) the separation of church and state;
- (vi) the disestablishment of religion.

These are indeed very handy distinctions that Witte makes to help us understand what freedom of religion entails. It stands to reason that the description of freedom of religion in internationally accepted documents is also very fundamental to our understanding of religious freedom.

3. CHURCHES AND THE COURTS IN SOUTH AFRICA

In 1998 a very important Appeal Court case between the Dutch Reformed Church in Africa and the Uniting Reformed Church in Southern Africa was heard by a panel of five appeal judges in Bloemfontein. While all the judges concurred on the findings written by Judge Werner Vivier, Judge L T C Harms also wrote an own opinion in which he *inter alia* said the following. "Matters of faith are not meant for civil courts but when churches turn to the civil courts general civil principles must be applied to solve the dispute" (Harms, 1998,2). This entails that the traditional principles that apply to voluntary associations are implemented, that the principles of contract are applied; that the general rules of interpretation are used and that the *ultra vires* doctrine/principle is considered as very important. The *ultra vires* doctrine means that if a church body acts beyond its competence the civil court is obliged to see its acts as null and void no matter what the theological, ecclesiastical or political reasoning might be. Judge Harms also points out that the constitutional rights of the individual members of the voluntary association weigh heavy in the court's opinion. In this regard he quotes AJ Stratford in the case *Wilken v Brebner* referring to a minority opinion in *General Assembly of Free Church of Scotland v Lord Overtoun* [1904] AC 515 (HL) who *inter alia* made the following remark "the bond of union of a Christian association may contain power in some recognized body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved." (Harms, 1989,4). With regard to the Dutch Reformed Church in Africa, AJ Harms also points out that in the General Synod of the Church it is not just about a mere rule of the majority. Certain rights regarding the confessions of the church are entrenched and there is no better way to entrench these rights other than by way of formalities, even though they are selfindulged that have to be complied with (Harms, 1998,7).

3.2 AJ Werner Vivier, expressing the view of the whole panel of judges, agrees with AJ Harms, that the Dutch Reformed Church is seen by the courts of the country as a voluntary association. To this he adds that local congregations are juridical persons and that for the proper interpretation of the Constitution (the Church Order of the Church) the words must be considered with regard to the meaning and intention (aard en opset) of the Church Order but also with regard to the context of the Church Order as a whole – this includes what can be called the whole matrix within which the Church Order is set. AJ Vivier then continues to distinguish about twenty four of the most important characteristics of this broad context in which the Church Order of the DRCA is set. As part of these characteristics AJ Vivier points out that the General Synod does not have the authority to alter an article of the Church Order if such a change is beyond its competence. Furthermore the competence of a voluntary association to change its constitution is restricted to changes than can reasonably be seen as within the view and intention of the parties at the concluding of the contract. At the same point AJ Vivier however points to the opinion of Judge Ogilviy Thompson who interpreted this last view as that the court would normally not be inclined to interfere with that which was done in good faith to the advantage of the voluntary association (Vivier, 1989,29). AJ Vivier is of opinion that although the General Synod of the DRCA has the competency to decide over many matters with regarding to the local congregations it does not have the competency to take decisions on its own regarding the properties or the identity of local congregations. The properties and assets of a local congregation cannot be dispossessed one sidedly by the General Synod - this can only be done with the consent of the members. Judge Vivier then continues to identify the members as “al die gemeentes van die kerkverband” (all the congregations of the denomination). He also refers to the judgment of Chief Judge Kotze in the so called Standerton case where the members of the *Nederduitsch Hervormde* Church, even after unification with the DRC, claimed that they were still the legal owners of a certain property at Trichardtsfontein. “it is clear that if at the time of the completion of the union in 1885, there were any members of the *Nederduitsch Hervormde* congregation who did not concur in the union, or acquiesce in it at a later date, those members must be considered to have remained *Hervormd*, and as still constituting the *Hervormde* congregation of Standerton, and therefore as being entitled to the ownership of the piece of donated land at Trichardtsfontein with the church building on it. This follows from the nature of a corporation or religious body (*Universitas*), such as a church association, and from the doctrine applicable thereto. Thus Ulpian says Dig.3.4,7,s.2). ‘*Sed si universitas ad unum redit, magis admittitur posse eum convenire et conveniri, cum jus omnium in unum reciderit, et stet nomen universitatis*,’ (Compare Voet,3.4,s1) (But if a corporate body is reduced to one member, it is usually conceded that he can sue and be sued, since the rights of all have fallen to one and the corporate body continues to exist in name only), (Maar as ’n korporatiewe liggaam tot een gereduseer word, word dit gewoonlik toegegee dat dit dat dit kan dagvaar en gedagvaar word, en dat die reg van almal in een terugval en bestaan die universitas in naam). The two separate corporations, to wit, the *Hervormde* congregation and the *Gereformeerde*, resolved in 1885 to terminate their existence as such, and together to form another and new corporation or body. This could only be brought about by the consent or acquiescence of each individual member of the two separate corporations. The majority, that is the general Church Assembly, could indeed bind the minority with reference to everything which came within the scope and object of the corporation or church association, for such power is within its authority; but when the majority attempts to dissolve and terminate the corporation or church association, by a resolution to unite it with another association, and so to bring another and new corporation into being, then the majority exceeds the limits of its authority; it is then acting *ultra vires*. The General Church Assembly of the *Nederduitsch Hervormde* Church cannot, by its resolutions of 1882 and 1885 to unite with the *Gereformeerde* Church and form a new church or corporation, compel the members of the former

church who did not wish for union, to join in it, however desirable and praiseworthy the union may happen to be.” (Vivier, p 36-37).

From the Standerton finding AJ Vivier draws three conclusions.

- (i) Chief Judge Kotze did not find that the Hervormde congregation of Standerton continued to exist. On the grounds of the Ulpianus text he found that that one remaining member can form a congregation.
- (ii) AJ Vivier then continues to make the following very interesting remark namely that the view that one remaining member can continue to form a congregation must perhaps be reviewed under the current circumstances where according to the Church Order the church council is the authoritative body that acts on behalf of the congregation – he does not expand on this. He however agrees with the *dictum* of Chief Judge Kotze in which he clearly states that the general synod does not have the authority to decide on church unification or the creation of a new church without the consent of all members (be it congregations or members of congregations) (“... dat die algemene sinode nie gemagtig is om sonder toestemming van alle lede (of dit nou gemeentes of gemeentelede is) tot kerkvereniging en die stigting van ’n nuwe kerk te besluit nie.”).
- (iii) AJ Vivier also refers to the unpublished doctoral thesis of D C G Fourie *Die Nederduitse Gereformeerde Kerk as Regspersoon in die Suid-Afrikaanse Privaatreg* where Fourie comes to the conclusion that the authority to dissolve a church and form a new church with an own name, confession, church order and liturgy for the congregations, without the consent of the members, can only be given by government. In this regard Fourie refers to a private law *Die Nederduits Gereformeerde Kerken Verenigings Akte 23 van 1911* which provided for the lawful unification of the Dutch Reformed churches by way of a decision by the synods that had to be approved by at least three quarter of the church councils in all the provinces. Also in this case the underlying view was that the consent of the congregations for church unification was necessary. The required majority consent could not be reached and it was only on 12 October 1962 that the General Synod of the Dutch Reformed Church could be constituted thus creating the Dutch Reformed Church as a denomination (Vivier,1989,40).

4. THE CURRENT POSITION IN THE DUTCH REFORMED CHURCH

4.1 Approval/approbation by the members of a congregation or another church body of a decision taken by a church council or another church body before that decision becomes official, is a very old tradition in reformed church government. It means that a decision cannot become official before it has gone through all the necessary procedural processes’ which then also includes approval by another body – be it the congregation or another body. Within the church. The approval not only entails a formal approval of the procedures that were followed but in many cases also an approval of the life and teaching of the person(s) involved (Jansen,1937,96-97). In earlier years it was often the case that the church also had to get the approval of the worldly authorities for certain decision that they wanted to take as church. In a sense this approval of a decision by a body other than the one that initially took the decision can be seen as a form of procedural entrenchment of the rights of the members of the church.

In the Church Order (2004) of the Dutch Reformed Church various instances can be noted where the approval by the members of the congregation are needed for decisions taken by the church council.

- (i) The election of elders and deacons by the church council can only become official after it has been approved by the members of the church. When a minister is called to a local

congregation both the approval of the members of the local church is needed as well as that of the presbytery. The church council from where the minister is being called must also approve of his/her going before the inducement in the new congregation can be made.

- (ii) Another form of procedural entrenchment can be found in article 44.1 and art 44.2 of the Church Order (2004). In fact there are two formulations. The first reading “Change of the confession of faith can only take place after each synod, independently approved of the change with a two-thirds majority.” The second reading: “Change to the confessions of faith can only take place after two thirds of each synod as well as two thirds of all the church council each approved it with a two thirds majority.” The idea is that the second formulation will become the official article once it has been approved with a two thirds majority of all the synods and after that with a two thirds majority by the General Synod – up to this point in time not all the synods have yet approved of this change since they have not met since the General Synod of 2004 (Church Order, 2004, art 44.1 and 44.2).
- (iii) Third field within the Dutch Reformed Church where we find that the system of approval is made use of is in By Law 6 of the Church Order (2004). This By Law is about the *increasing* of congregations, the *combining* of congregations, the *becoming one* of congregations and the *unification* of congregations. This By Law applies only to congregations of the Dutch Reformed Church. In the case of the *increasing* of congregations it is required that a majority of the members involved must sign the request and guarantee form to form a new congregation before the local church council can send the request through to the presbytery (Church Order, 2004, By Law 6:1.1.3.2). In the case of the *combination* of functions of two church councils one of the requirements is that at least 66% of the members of the two church councils approve of the agreement after which the agreement must be made known to members of both congregations on two consecutive Sundays for their approval (Church order, 2004, By Law 6:2.1.2). In the case of *two Dutch Reformed congregations becoming one* in the sense that one congregation ceases to exist and becomes one with the other congregation the requirement is again that the two church councils must approve of the agreement each with a 66% majority after which the agreement is put to the members of the two congregations for their approval on two consecutive Sundays (Church Order 2004, By Law 6:4.1.2). When it is a case of *two congregations becoming one* by forming a totally new congregation the requirement is that all the uncensored confessing members of the two congregations that want to unite must be offered the opportunity by way of a questionnaire-ballot to indicate in writing whether they are for the unification or not (Church Order 2004, By Law 6:4.1.2). It is further required that the questionnaire-ballot must be given to the members of the two congregations personally by the church councils without any effort to influence them (Church Order, 2004, By Law 6:4.1.21.) It is the responsibility of each member of the two congregations to hand in their completed questionnaire-ballot at the church office before or on the date indicated (Church Order, 2004, By Law 6:4.2.2.3). Approval by a majority of the members who handed in their questionnaire-ballot is necessary before the joining of the two congregations can go ahead (Church Order, 2004, By Law 6:4.1.2.3) It thus seems that all the above mentioned facets of expansion, combination, taking up of one congregation into the other or the coming into existence of a completely new congregation through the amalgamation of two existing congregations is well taken care of in the Church Order of the Dutch reformed Church.
- (iv) The question is, what is the case if it is about the unification of two denominations? The one facet that has to be taken note of is the requirements of article 44 of the Church Order (2004). The other matter is the decisions that the Synod of 2004 took with regard to the unification process within the Family of Dutch Reformed Churches. In 2004 the General Synod decided

that Dutch Reformed congregations will be consulted and “tested” in the process of church unification (General Synod 2004, Acts, p 428, pt 12). It was also decided in pt 14.4 of the Decision Register that: “The church councils make their consensus decision or the decision taken with a two thirds majority of the church council known to the congregation on two consecutive Sundays for their approval. If opposition to the decision leads to the need for testing the members of the congregation it must be done. In the end the church council must make their approved decision known to the synod.” Register of Decisions General Synod 2004, Acts, p 429, 14.4).

5. IN CONCLUSION: SUGGESTIONS FOR FINDING THE VIRTUOUS WAY

5.1 Freedom of religion allows churches to formulate their own order in consistence with their confessional and church orderly identity, which must always be theologically justified. The question must be raised whether it is not an infringement on the guaranteed right to freedom of religion that South Africa enjoys constitutionally since 1994, that the legal system of the country awards churches their legal identity and then judges them in terms of this legal identity that was awarded. Does freedom of religion not mean that churches have the right to be judged according to their legal identity as expressed in their own church order i.e. as a faith organization with a faith identity expressing their rules of existence and identifying the bodies that have the authority to take decisions with regard to certain matters? It must be granted that the courts of the country, while seeing the church as a mere voluntary association, have always accepted the church order of the church as the binding document for the actions of the church. If the church did not comply with its own constitution it was called to task by the courts of the country. All of this means that churches have the responsibility to see to it that their church orders are legal expressions of their faith identity and that their actions as churches are always in compliance with their church order – also in the case of church unification.

5.2 The Dutch Reformed Church does seem to have a problem. On the one hand the church has entrenched its confessional identity in article 44 of the Church Order and that will have to be complied with. On the other hand the General Synod by way of decision has ensured its members that the final decision of their church council with regard to church unification will be brought before them for their approval/approbation and if necessary even for their testing (General Synod 2004, Register of decisions nr 14.4, Acts 2004, 429). This however is not in any way formalized in the Church Order or any By Law of the Church. With regard to internal expansion, combination and unification of congregations it is done in By Law 6 of the General Synod (Church Order 2004, By Law 6). The question is whether this must not also be done with regard to a possible unification process between the Dutch Reformed Church and other denominations. In such a process the DRC must comply with the requirements of art 44 – that is clear. It is however not clear from the Church Order that the Church has also undertaken by way of a decision to get the approval of the members of the church for church unification and even, if necessary to test the members for their opinion. If this is not also clearly spelled out in the Church Order it can happen that the courts of the country can revert to the decision of the Standerton case where it was pointed that one remaining member can claim to be the continuance of the church. Freedom of religion allows a Church to formulate its own order. If it does not do that it risks to be judged in terms of general civil law and not in terms of their own law. As long as that happens churches will not really enjoy freedom of religion. Freedom of religion can indeed help churches to find a virtuous way in the process of church unification.

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