

SOUTH AFRICAN HUMAN RIGHTS COMMISSION INVESTIGATIVE REPORT

WC/1718/0298

In the complaint of:

REVEREND BRIAN STEPHEN

Complainant

and

CHURCH OF THE PROVINCE OF SOUTHERN AFRICA:

DIOCESE OF SALDANHA BAY

First Respondent

BISHOP RAPHAEL HESS

Second Respondent

INVESTIGATIVE REPORT

1.INTRODUCTION

- 1.1. The South African Human Rights Commission (Commission/SAHRC) is an independent state institution, established by S181 of the Constitution of the Republic of South Africa, 1996 (Constitution), as one of the institutions which support constitutional democracy.
- 1.2. The Commission is mandated by S184 (1) of the Constitution, to promote respect for human rights, promote the development, protection, and attainment of human rights, and monitor, and assess the observance of human rights.
- 1.3. S184 (2) (a) and (b) of the Constitution further invests the Commission with the powers to conduct investigations of alleged human rights violations and report on same. In addition, the Commission is mandated

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to take steps to secure appropriate redress where it finds rights have been violated.

- 1.4. The South African Human Rights Commission Act, 40 of 2013 further affords the Commission specific powers to enable it to carry out investigations of human rights violations.

2. THE PARTIES

- 2.1. The Complainant is Reverend Brian Stephen, an ordained priest in the Anglican Church of South Africa (the Church).
- 2.2. The First Respondent is the Diocese of Saldanha Bay, the diocese of the Church in which the Complainant previously served.
- 2.3. The Second Respondent is Bishop Raphael Hess, a Bishop in the Church, and the serving Bishop and executive head of First Respondent.

3. EVENTS RELATED TO THE CURRENT COMPLAINT

- 3.1. The Complainant began serving as Rector of the parish of St Joseph the Worker, Bishop Lavis, Cape Town, in October 2009.
- 3.2. According to the Complainant, from 2009 to 2016, he was subjected to numerous instances of racial abuse by various members of his congregation. In particular, the Complainant avers that a lay minister named Trevor Kordom, among others, repeatedly used racial slurs ('the kaffir priest') to refer to the Complainant in the presence of church members.

- 3.3. On 19 October 2010, the Complainant corresponded with the Second Respondent in his capacity as Rector of the parish and on behalf of the executive of the parish. In the letter (attached as Annexure 1), he described challenges that were being experienced in the parish, including “racial comments [that] have been made about Father Brian and we now feel the bishop should do something to stop this continuing especially in God’s church.”
- 3.4. On 27 January 2013, a meeting was held between the Complainant, Mr Kordom, and two other church members. The meeting was convened by the Complainant. At that meeting, Mr Kordom denied uttering any racial slurs, but apologised and stated his regret for comments he might have made or actions he might have taken, at which point the Complainant stated that he forgave Mr Kordom unconditionally. Hereafter, the Complainant was made aware of further racially discriminatory utterances both by Mr Kordom and other members of the congregation, which persisted during his tenure as rector of the parish in question.
- 3.5. In December 2014, the Complainant fell ill due to psychological distress.
- 3.6. On 29 January 2015, the Second Respondent issued a mandate to three senior clergy members to engage in various meetings, including a meeting with leaders of the parish of St Joseph the Worker to review with the Complainant, among other things, “the sequence of events which unfolded with respect to his illness”.
- 3.7. On 19 February 2015, a meeting was held in connection with the mandate to the senior clergy.
- 3.8. According to minutes of that meeting offered by the Complainant, at the meeting the Complainant raised challenges that he had faced at his parish, including racism, to which he had not received support from the diocesan leadership. At the conclusion of the meeting, one of the senior clergy members suggested that a workshop be arranged in which matters

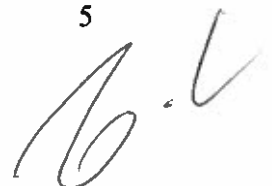
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of race would be addressed and that parishioners be sensitised about matters related to race.

- 3.9. On 1 March 2015, the Second Respondent received an apparently informal report of the efforts taken to that point regarding the mandate issued on 29 January 2015.
- 3.10. On 18 August 2015, the Second Respondent, noting that no formal report had been provided to the Second Respondent or the Complainant, reissued the mandate to two different senior clergy, with a final report due to the Second Respondent by 30 September 2015.
- 3.11. On 13 October 2015, the two senior clergy met with leaders of the parish of St Joseph the Worker pursuant to the mandate. At that meeting, mention was made of a Reconciliation and Healing of Memories workshop by Fr. Michael Lapsley of the Institute for Healing of Memories, the holding of which had been explored within the parish, but the workshop had never happened.
- 3.12. On 15 October 2015, the two senior clergy met with the Complainant pursuant to the mandate. At that meeting the Complainant raised the issue that he had experienced racism from his congregants, which was one of the problems that had made his ministry at St Joseph the Worker difficult for him.
- 3.13. On 14 December 2015, the Complainant wrote to the Second Respondent to raise several challenges being faced in the parish and specifically referred to leadership and racism.
- 3.14. On 9 June 2016, the Complainant filed a complaint with the Commission alleging hate speech by Mr Kordom which ultimately was brought before the Equality Court. That complaint is described in further detail in later sections of this report.



- 3.15. On 1 August 2016, the Complainant was informed by the First Respondent that his incumbency at St Josephs would end on 30 September 2016 but that there were three alternative opportunities available to him within the diocese. The first was in Clanwilliam, the second was a post of Episcopal Vicar, which would involve the Complainant splitting his time between being an assistant to the Second Respondent in the administration office of the First Respondent and being an assistant priest in the parish of Matroosfontein, and the third was as Rector of Hopefield if the position became vacant.
- 3.16. On 1 October 2016, the Complainant ceased to be Rector of St Joseph the Worker and began serving as Episcopal Vicar for a period of 12 months.
- 3.17. On 18 October 2016, a meeting of the Second Respondent's Executive Ministry Support Team took place. According to the attendance register, the meeting was attended by the Second Respondent and three other persons. The following extract of the meeting minutes appears relevant:
"2.1.5 Brian Stephen
The role of Brian in the Diocese was reflected upon. He could be used to bring the voice of the "Black" clergy and people to the matters such as the Youth Synod and other events. He could be a conduit to the "Black, Xhosa speaking" people in the Diocese."
- 3.18. On 15 May 2017, the Complainant instituted proceedings in the Equality Court, separate from the complaint against Mr Kordom, against the First and Second Respondents as well as five other persons based on the statements in the 18 October 2016 meeting minutes. Those proceedings are described in more detail later in this report.
- 3.19. On 28 August 2017, the Second Respondent informed the Complainant via letter that he would not be appointed to St. Mary's Kraaifontein, a parish in which the Complainant had expressed interest, because he did



not have enough experience for the post. In the same letter, the Second Respondent stated that the Complainant's license would expire on 30 September 2017.

3.20. On 30 August 2017, the Complainant filed the current complaint under consideration with the Commission, which is described in detail in later sections of this report.

3.21. On 29 September 2017, the Second Respondent informed the Complainant via letter that he would not be appointed to the Parish of Clanwilliam or any other parish in the First Respondent because "[n]otwithstanding your right to appeal to the Civil Court, you have chosen not to use the processes for healing and reconciliation, provided for in the Canons of the Church". On the same date, the Second Respondent informed the Complainant that as of the following day, 30 September 2017, he would cease to be a licensed minister in the First Respondent.

3.22. On 21 December 2017, the Complainant, through counsel, instituted proceedings against the First Respondent with the CCMA, which are described in more detail later in this report.

Proceedings Against Trevor Kordom

3.23. On 9 June 2016, the Complainant filed a complaint with the Commission alleging that Mr Kordom and other members of the congregation had used racial slurs to refer to the Complainant over the previous six years. On 4 November 2016, the Commission received a letter from Mr Kordom dated 14 October 2016, in which Mr Kordom acknowledged uttering words amounting to hate speech prior to the January 2013 meeting in which he apologised, and the Complainant forgave him unconditionally, but that he denied further utterances subsequent to the meeting. This

was disputed by the Complainant and accordingly the Commission on 24 February 2017 referred the matter to the Equality Court for adjudication.

- 3.24. In approximately July 2017, the Equality Court ruled in the complainant's favour and ordered appropriate relief which included sensitivity training for Mr Kordom, an apology to the Complainant and payment of damages. In addition the court ordered the Mr Kordom be suspended from his position as a lay minister for a minimum period of three months, with reinstatement only after due enquiry into his fitness to hold that position in terms of church rules and/or policy. Pursuant to the court order, on 23 December 2017, the Second Respondent suspended Mr Kordom from his position as a lay minister for three months in accordance with the minimum period set out in the order of the Equality Court. On the same date, the Second Respondent issued an apology to the Complainant on behalf of the First Respondent and in his personal capacity for "the insensitive language used by Mr Kordom, that you had to endure."

Equality Court Proceedings Against the Respondents

- 3.25. On 15 May 2017, the Complainant instituted separate proceedings in the Equality Court against the First and Second Respondents as well as five other persons, alleging discrimination based on colour.
- 3.26. One of the documents offered as an attachment in the Equality Court matter consisted of minutes of the 18 October 2016 meeting referenced in paragraph 3.17.
- 3.27. On 14 June 2017, the attorneys for the Respondents filed their opposition to the Equality Court matter, in which they registered their objection to the claim due to insufficient detail.

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3.28. On 10 September 2018, the Complainant informed the Commission that the May 2017 Equality Court matter against the Respondents had been withdrawn.

3.29. To date, the Commission has not been informed that these proceedings have been reinstated.

CCMA and Labour Court proceedings

3.30. On 21 December 2017, the Complainant, through counsel, instituted proceedings against the First Respondent with the CCMA, alleging that

3.30.1. he had been an employee of the First Respondent;

3.30.2. he was unfairly dismissed from his employment;

3.30.3. his unfair dismissal was in retaliation for his reporting of discrimination to the Commission.

3.31. Documents filed in support of the Complainant's CCMA allegations describe treatment of the Complainant by the First Respondent throughout the period from 2010 to 2017, detailing events relating to the racial discrimination alleged in the current complaint before the Commission, including the minutes of the 18 October 2016 meeting.

3.32. On 30 September 2019, the CCMA referred the matter to the Labour Court because of the question as to whether the Complainant was properly considered an "employee" under the Labour Relations Act 66 of 1995.

3.33. As of the date of this report, the Labour Court proceedings are still pending.

4.THE CURRENT COMPLAINT TO THE COMMISSION

- 4.1. In the current complaint, the Complainant alleges
- 4.1.1. that he was subject to racial discrimination from Respondents and other persons within the church from the inception of his incumbency in December 2009 through to the date of the complaint;
 - 4.1.2. that he had reported the racial abuse to the Second Respondent and requested that he intervene, but that the Second Respondent had done nothing to stop the racial abuse;
 - 4.1.3. that the statements contained in the minutes of the 18 October 2016 meeting led the Complainant to conclude that the reason the Second Respondent did not stop the abuse is because the Respondents see his role in the diocese only in terms of his skin colour and ethnicity rather than in terms of his gifts, experience, or abilities as a priest.

5. SCOPE OF INVESTIGATION

- 5.1. The Commission will investigate the following:
- 5.1.1. The alleged racial discrimination from the Respondents and other persons in the church community from 2010 through to the date of the complaint,
 - 5.1.2. Any impact, if at all, of the alleged unfair discrimination on the dignity of the Complainant,
 - 5.1.3. Any impact, if at all, of the alleged conduct on the part of the Respondents on the right of the Complainant to choose his profession, trade or occupation.

5.2. Matters outside the scope of this investigation:

- 5.2.1 The continuing Labour Court proceedings concerning the following:
 - 5.2.1.1 The employment status of the Complainant;
 - 5.2.1.2 the alleged unfair dismissal from his employment;
 - 5.2.1.3 that his alleged unfair dismissal was in retaliation for his reporting of discrimination to the Commission.
 - 5.2.1.4 The minutes of the meeting of 18 October 2016 form part of these proceedings, but the Commission defers to the Labour Court in this regard.
 - 5.2.1.5 Matters relating to Mr Kordom's conduct towards the Complainant. The Equality Court has ruled on this matter, and as such it shall not form part of this investigation.

6. STEPS TAKEN BY THE COMMISSION AS TO THE CURRENT COMPLAINT

- 6.1. After receiving the current complaint on 30 August 2017, the erstwhile Provincial Manager assessed the complaint and determined that the allegations constituted a *prima facie* violation of the right to equality as protected by the terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The complaint was accepted.
- 6.2. The Commission thereafter engaged the Complainant regarding aspects of his complaint on 7 February 2018.
- 6.3. On 8 February 2018, the Commission communicated via email the allegations of the current complaint to the Respondents and advised of the Commission's mandate to resolve disputes by means of alternative dispute resolution (ADR) processes. The email requested an indication whether the Respondents would be amenable to ADR by 8 March 2018.

- 6.4. On 9 February 2018, the attorney for Respondents telephonically requested a copy of the complaint and all supporting documentation from the Commission, to properly consider the request for ADR, which was provided on 12 February 2018.
- 6.5. The request for the complaint and supporting documents was again made to the Commission through the Respondents' attorney on 6 March 2018. The Commission again provided the information on the same day via email.
- 6.6. The Respondents thereafter confirmed amenability to ADR and a date for mediation was agreed for 19 April 2018.
- 6.7. The mediation took place as agreed but the issues presented by the complaint could not be resolved during the session. The parties agreed to attempt further resolution via email. A draft agreement setting out the terms of settlement for consideration by the parties was sent via email on the same day.
- 6.8. On 4 May 2018, the Commission received correspondence from the Complainant as well as a trailing email from his attorney setting out settlement terms desired by Complainant beyond what had been discussed at the mediation session.
- 6.9. On 14 May 2018, a revised settlement agreement containing the terms proposed by the Complainant was sent to the Respondents' attorney for consideration.
- 6.10. On 24 May 2018, a response was received from the Respondents which contained counterproposals. The response and counterproposals were sent to the Complainant on 29 May 2018.
- 6.11. The Complainant responded to the proposal on 30 May 2018 advising that in view of the counterproposals, he believed ~~that~~ that the



Respondents were not serious about resolving the issues. The Complainant sought at that stage to withdraw from the mediation. He was advised that Commissioner A C Nissen intended to engage with him about the matter. It was recommended that the Complainant allow the intervention by Commissioner Nissen and continue with the mediation.

- 6.12. The Complainant had in the interim also sought to set up an appointment with Commissioner Nissen and correspondence in this regard followed during June and July 2018, but ultimately the matter was deemed to not be resolvable via mediation.
- 6.13. On 6 August 2018, the Commission sent correspondence to all parties advising of the termination of the mediation as unsuccessful.
- 6.14. On 20 September 2018, the Commission informed the parties that, in light of the inability to resolve the complaint before the Commission via mediation, investigation would proceed on the allegations as documented as well as the Second Respondent's refusal to provide the Complainant with a letter of good standing, which had prevented the Complainant from obtaining alternative postings within the First Respondent or to gain employment outside of the Church.

7.THE RESPONDENTS' RESPONSE TO THE COMPLAINT

- 7.1. The First and Second Respondents responded to the complaint through an attorney in correspondence received on 18 November 2019. What follows is a summary of key responses in respect of racial discrimination and the letter of good standing as contained in the correspondence to the Commission.



Racial Discrimination

- 7.2. The Respondents indicated that:
- 7.2.1. the initial complaint by the Complainant to the Equality Court, merely alleged that the basis of the complaint was "*Discrimination – based on colour*".
 - 7.2.2. the Respondents had filed a preliminary response to the complaint raising, among others, the issue of the lack of particularity in the complaint;
 - 7.2.3. the Complainant had thereafter set out that the Second Respondent had made an alleged racially discriminatory statement relating to the Complainant during the 18 October 2016 meeting;
 - 7.2.4. the discussion which took place at the 18 October 2016 meeting indicates that members of the executive committee were trying to find meaningful possibilities to apply the personal abilities of the Complainant within the diocese;
 - 7.2.5. the participants in the discussion sought to reach out to and strengthen the inclusion of previously marginalised communities in their own language;
 - 7.2.6. the assertion that the Second Respondent took no steps to stop racial abuse of the Complainant is untrue;
 - 7.2.7. although the Respondents were not a party to the Equality Court matter against Mr Kordom, they nonetheless gave effect to the court's order once it was issued.

Letter of Good Standing

7.3. With respect to the letter of good standing requested by the Complainant, the Respondents aver that:

7.3.1. the Complainant was never an employee of the First Respondent;

7.3.2. the issue of whether an employment relationship existed as alleged by the Complainant is the subject of ongoing litigation in the Labour Court;

7.3.3. any obligation to provide documentation of the type requested by the Complainant would arise in only two circumstances, namely:

7.3.3.1.a certificate of service in terms of labour legislation (S42 of the Basic Conditions of Employment Act 75 of 1997); or

7.3.3.2.a report from one bishop to another within the Church when a cleric seeks to transfer to a different diocese, as provided in the canon law;

7.3.4. the Second Respondent has never received a request from another bishop within the Church for a report under the relevant canon regarding the Complainant.

8.THE COMPLAINANT'S COMMENTS

8.1. The response summarised above was provided to the Complainant for comment. In response the Complainant provided further documentation relating to the dispute between himself and the Respondents.

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- 8.2. The Commission was advised that the documentation is also relied on in the pending Labour Court matter. The documentation provides support for the Complainant's claim that he had informed the Respondents of the situation he was encountering as early as 2010 but that no steps were taken to address the racial abuse in particular, at the time when it was taking place.
- 8.3. The Complainant indicated that the documentation shows that the Respondents were aware of the racial abuse when it was happening, chose to view the problem in terms of a lack of leadership skill on the part of the Complainant, in fact seeking to blame him as the priest in the parish for the problems experienced there, and charging another more senior priest with the responsibility of mentoring him without addressing the racial abuse.
- 8.4. Moreover, the Complainant indicated that he had secured an employment opportunity with the South African Police Services. He was however not able to provide the SAPS with a letter confirming his good standing or other documentation pertaining to his prior work as a priest, and accordingly the position of chaplain was not offered to him.
- 8.5. The way the Complainant's relationship with the First Respondent was terminated, particularly the failure to provide a letter of good standing, prevented the Complainant from being appointed to a position with an outside organisation.
- 8.6. By effectively blocking the Complainant from finding a post within the Church or with an outside organisation, Respondents have made it impossible for the Complainant to continue to pursue his calling as an Anglican priest.

9.HUMAN RIGHTS UNDER INVESTIGATION

9.1. Having assessed the complaint, the Commission accepted that the alleged violation to the right to equality¹; right to dignity²; and right to freedom of trade, occupation, and profession³ required investigation. In its assessment however, the Commission was mindful that several issues forming the basis of the complaint to the Commission are related in varying degrees to the litigation before the Labour Court. In this regard, the Commission has confined its considerations to the alleged violations of human rights presented in the context of the complaint.

10. ISSUES FOR CONSIDERATION

10.1. Arising out of the complaint received and the response thereto, the Commission must consider:

10.1.1. Whether the Complainant was subjected to unfair discrimination by the Respondents as alleged, or at all;

10.1.2. Whether the Complainant's right to freedom of trade, occupation or profession was infringed by the Respondents;

10.1.3. Whether the Complainant's right to human dignity has been infringed by the conduct of the Respondents.

11. LEGAL FRAMEWORK

Domestic legislation

11.1. The Constitution of the Republic of South Africa, 1996 "Supremacy of Constitution"

¹ Constitution of the Republic of South Africa, 1996, Section 9(1) and 9(4).

² Ibid. Section 10.

³ Ibid. Section 22.

2. *This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*⁴

"Application

8. (1) *The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state.*⁵

"Equality

9. (1) *everyone is equal before the law and is entitled to equal protection and benefit of the law.*

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

(3)

(4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prohibit unfair discrimination.*

(5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*⁶

"Human Dignity

10. *Everyone has inherent dignity and the right to have their dignity respected and protected.*⁷

⁴ Constitution, Section 2.

⁵ Ibid at Section 8(1).

⁶ Ibid at Section 9.

⁷ Ibid at Section 10.

11.2. Promotion of Equality and Prohibition of Unfair Discrimination Act No. 4 of 2000

The Promotion of Equality and Prohibition of Unfair Discrimination Act No. 4 of 2000 (hereinafter referred to as the "Equality Act") gives expression to Section 9 (Equality) of the Constitution.

Definitions

Section 1 provides the following definitions relevant to this complaint:

*"**discrimination**' means any act or omission, including a policy, law, rule, practice, condition, or situation which directly or indirectly—*

(a) Imposes burdens, obligations, or disadvantage on; or

(b) withholds benefits, opportunities, or advantages from, any person on one or more of the prohibited grounds;"⁸

*"**prohibited grounds**' are-*

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth, or

(b) ...⁹

Application

Section 6 of the Equality Act prohibits discrimination by the State or any other person.¹⁰

Prohibition of Unfair Discrimination on the ground of race.

⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter "Equality Act"), Section 1.

⁹ Equality Act, Section 1.

¹⁰ Ibid at Section 6.

Section 7 of the Equality Act provides that “no person may unfairly discriminate against any person on the ground of race, including-

- a. The dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence.
- b. The engagement in any activity which is intended to promote, or has the effect of promoting exclusivity, based on race;
- c. The exclusion of person of a particular race group under any rule or practice that appears to be legitimate, but which is actually aimed at maintaining exclusive control by a particular race group
- d. The provision or continued provision of inferior services to any racial group, compared to those of another racial group;
- e. The denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such a person.

Burden of proof

Section 13 of the Equality Act sets out the requirement to discharge the burden of proof:

“13. (1) If the complainant makes out a prima facie case of discrimination—

(a) the respondent must prove, on the facts before the court that the discrimination did not take place as alleged: or

(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place—

(a) on a ground in paragraph (a) of the definition of “prohibited grounds” then it is unfair, unless the respondent proves that the discrimination is fair...”.¹¹

Determination of fairness

Section 14 of the Equality Act specifies the relevant factors when assessing fairness:

“14. (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair the following must be taken into account:

- (a) The context;*
- (b) the factors referred to in subsection (3);*
- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.*

(3) The factors referred to in subsection (2)(b) include the following:

- (a) Whether the discrimination impairs or is likely to impair human dignity;*
- (b) the impact or likely impact of the discrimination on the complainant;*
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;*

¹¹ Ibid at Section 13.

- (d) *the nature and extent of the discrimination;*
- (e) *whether the discrimination is systemic in nature;*
- (f) *whether the discrimination has a legitimate purpose;*
- (g) *whether and to what extent the discrimination achieves its purpose;*
- (h) *whether there are less restrictive and less disadvantageous means to achieve the purpose;*
- (i) *whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—*
 - (i) *address the disadvantage which arises from or is related to one or more of the prohibited grounds; or*
 - (ii) *accommodate diversity.*"¹²

11.3. Case Law

Freedom of trade, occupation, and profession

In the case of *Coetzee v Comitis and Others*¹³, the court addressed the impact on human rights when an organisation holds authority over an individual's ability to freely follow their occupation or trade. The following extract most appropriately embodies the court's views:

"Mr Cassim was eventually constrained to concede that the regulations of the NSL impact on the following three fundamental rights of a player:

- (1) Freedom of movement.
- (2) The right to choose a profession or occupation freely.
- (3) The right to dignity.

He, however, argued that because the applicant entered the contract with Hellenic freely and voluntarily, it does not violate these rights. I have

¹² Ibid at Section 14.

¹³ *Coetzee v Comitis and Others* 2001(1) SA 1254 (C) para 38.

difficulty in understanding this argument. As I have set out above, the applicant, or any person who wants to play professional soccer, is subject to the rules and regulations which I have set out above. In my view, these rules are akin to treating players as goods and chattels who are at the mercy of their employer once their contract has expired. In my view these rules violate the most basic values underlying our Constitution. If entering a contract which incorporates these rules is the only option open to a person who wants to pursue a career of professional football, it can hardly be said that he agreed to these terms out of his own free will.”¹⁴

“The onus lies with the NSL to satisfy this Court that the compensation regime is a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors. In my view, there is no rational connection between the regime and the purpose it purports to serve.”¹⁵

Intersection of religious associational rights and other constitutional rights

The exercise of religious freedom, either individually or at an organisational level, is constitutionally recognised. However, when the exercise of this freedom intersects with other constitutional rights, the question of how the Constitution protects these competing rights raises a complex set of considerations. This central question regarding the exercise of religious freedom and supreme law was considered in the case of *Christian Education South Africa v Minister of Education*¹⁶. The extract below contextualises the issue aptly:

“The underlying problem in any open and democratic society based on human dignity, equality, and freedom in which conscientious and religious freedom must be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic

¹⁴ Ibid at para 38.

¹⁵ Ibid at para 40.

¹⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757.

norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. ¹⁷

In the matter of *Gaum and Others v Van Rensburg and Others*, the Court recognised processes adopted by a Church in respect of its own decisions, but articulated the legal test to be followed in cases where discrimination by a church based on gender was the subject of litigation:

“When the Church Order provides for mechanisms to amend, review or substitute decisions, these methods must be used. If processes outside of the Church Order is utilised it shall constitute an irregular process.”¹⁸

“In the heads of argument, the Church accepted that the 2016 decision constituted discrimination based on sexual orientation. The Church has an onus to prove that the discrimination is fair but put up no facts in the papers to discharge this onus. The enquiry then shifts to whether the Church can justify the infringement in terms of section 36 of the Constitution, but the Church pleaded no case of justification at all. Only, for the first time in the Church’s heads of argument, the fairness is addressed as the Church exercising freedom of religion. The Church was thus invoking a “trump” right; religious freedom, trumping or ousting the rights of Gaum which is the incorrect test.”¹⁹

Human Dignity

In the case of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others [2016] ZACC 38* the Constitutional Court once again emphasised the centrality of human dignity to the evaluation of violations of the right to equality. The case came before the Constitutional Court because of the use of the k-word in the workplace by an employee towards another employee. In this instance the employer, following a disciplinary process terminated the employment of the employee

¹⁷ Ibid at para 35.

¹⁸ 2019 (2) All SA 722 para 59.

¹⁹ Ibid at para 64.

found guilty of using the discriminatory terminology. In its judgment the court references the impact of racist speech to the dignity of human beings making extensive use of the historical context which characterised the use of the k-word in particular to illustrate the dehumanising impact of this word. It is clear that the violation of the right to equality, implicit in the use of the k-word violates the right to dignity for the reasons stated.

12. Responses of the parties to the preliminary report

12.1. The preliminary report containing the findings and recommendations of the Commission was shared with the parties to ensure the fairness and transparency of the process.

12.1.1. The parties were invited to share their views on the content of the report with the Commission for its further consideration.

12.1.2. Both the Complainant and Respondent made use of the opportunity afforded to address their concerns and provided the Commission with extensive comment on its preliminary finding.

12.1.3. The Commission considered all the comments and the supporting documentation provided by the parties. The relevant contentions and the impact, if any, on the finding are recorded below.

12.2. Comments of the Respondents:

12.2.1. The Respondents recorded their objection to what they consider an expanded scope to the complaint. They expressed the view that they had not been afforded the opportunity to test evidence considered by the Commission in making the findings in the preliminary report.

- 12.2.2. The Respondents took issue with the 'broad findings' made by the Commission and which it averred it had not been afforded the opportunity to respond to as, after they had requested particularity, the issue appeared to relate to the content of minutes of a meeting and the record of discussions regarding the Complainant.
- 12.2.3. The Respondents provided their version of the events in their response to the preliminary findings. The Respondents detail correspondence and meetings which took place, which were aimed at resolving conflict within the parish, including the racial discrimination. They however allege that the racial discrimination, was insufficiently particularized, to enable the Second Respondent to address it (it is alleged in this regard that the Complainant refused to put the complaint in writing or identify the perpetrators of the racial abuse).
- 12.2.4. A meeting of the parish council at which the Complainant accepted an apology from his abuser and extended forgiveness to him is used to illustrate the Respondents' view that the Complainant as the parish priest should have been at the forefront of the resolution of any disputes within the parish including personality clashes with the parish management.
- 12.2.5. The Respondents set out in extensive detail the hospitalization of the Complainant but deny that a single incident of racism (they allege that they were only aware of a single, isolated incident) could have been a contributing factor and instead indicate that family, and marital stressors resulted in the Complainant experiencing mental health problems.
- 12.2.6. Medical reports Commissioned by the Respondents are highlighted for their lack of any mention of racial abuse as a cause of the mental breakdown experienced by the Complainant.

12.2.7. Further interventions in the parish following the Complainant being hospitalised, which the Respondents characterize as an abandonment of the parish by the Complainant, and a minute of those interventions reflect that “parishioners should be sensitized about race related matters in the context of where we are today” as part of the process of welcoming the Complainant back to the parish following his absence on medical grounds.

12.2.8. The Respondents accordingly deny the Complainant’s claim that his concerns about racism in the parish remained un-addressed. It is not evident from the comments however whether the minuted intention that parishioners be sensitized about ‘race related matters’ in fact took place. The Commission is obliged in the absence of a statement confirming whether the proposed sensitization took place or not to assume that it did not in fact take place.

12.2.9. The Respondents further aver that the continuing tensions between the Complainant and the parishioners should be considered in the light of his mental health and as personality clashes, rather than because of racial discrimination and the divisive nature of such tensions. Examples are provided of clashes within the parish by way of illustrating the Respondent’s view that the tensions in the parish were brought about by the conduct of the Complainant which he then ‘conveniently attributes’ to racism.

12.2.10. It is considered noteworthy by the Respondents that all assistance offered by them, was met with resistance by the Complainant and that ultimately the conflict in the parish resulted in a complete breakdown of the relationship between the Complainant and the parish.

Handwritten signature or initials in the bottom right corner of the page, appearing to be 'B.C.' with a flourish.

- 12.2.11. As regards the issue of the disputed minutes of the meeting of the Diocese Council, the Respondents aver that the conclusions reached by the Commission are untenable because they ignore the fact that the Complainant had just days before the meeting been appointed to a post created for him and that the extensive explanation contained in the Respondents letter dated 19 November 2019, is ignored in favour of a 'startingly[sic] simplistic' conclusion that the meeting considered candidates for posts primarily on the basis of racial and linguistic characteristics.
- 12.2.12. The Respondents advised the Commission that they engaged extensively with the Complainant regarding his experience of racial discrimination as well as other issues which arose in relation to his ministry at St Joseph the Worker, Bishop Lavis.
- 12.2.13. It is further contended that the finding that the Complainant is entitled to a letter of good standing is incorrect in law. The Respondents contend that they have in fact in November 2019 provided the Complainant with a letter confirming all licenses issued to the Complainant and a letter confirming his period of appointment as a priest within the diocese. They accordingly consider the point moot.
- 12.2.14. They consider that the Commission has overstepped its competence in dealing with the issue at all. The Respondents contend that based on the principle of subsidiarity, the issue is correctly dealt with in terms of the basic BCEA and LRA.
- 12.2.15. The Respondents deny that the Complainant was an employee and that only were he considered an employee would he have the right under s42 of the BCEA to claim a certificate of service.

12.3. Comments of the Complainant:

12.3.1. The Complainant reiterated his version that the Respondents had failed to deal effectively with the complaints of racial abuse which were not only brought to their attention but were known to them from the inception of his tenure at St Joseph the Worker. He refers to racial remarks made at his interview in which concern was expressed that his race may chase coloured congregants from the Church. These remarks were made in the presence of representatives of the Second Respondent and attracted no censure or remark from that or any other authoritative quarter.

12.3.2. The Complainant further points out that the series of meetings and interventions which took place failed to address the racial abuse head on and instead sought to find fault with his leadership style. He illustrates this point throughout his comments referring to the actions taken and the failure of the various interventions to address the issue of racism. He further names congregants who also documented their concerns about the racial abuse to which he was being subjected, to the Second Respondent, to no avail.

12.3.3. He further challenges the Respondent to show proof of action taken to address and stop the racial abuse to which he was subjected. He avers that had effective action been taken he would not have been subjected to racial abuse for the five years of his tenure at that church.

12.3.4. In addition, he alleges that the church wardens are officers of the Bishop and representatives of the congregation and as such were under a duty to inform the Second Respondent of the racial abuse. He alleges that he is aware of one church warden, who was present at a meeting on 27 January 2013 at which the main perpetrator of racial abuse Mr Trevor Kordom was also present,

and who brought the racial abuse to the attention of the Second Respondent. He alleges that the Second Respondent was dismissive of this report.

12.3.5. He further states that the Second Respondent should have been provided with a report of what transpired at his (Complainant's) interview. The names of the parishioners present at the interview were recorded so the identities of the persons who racially abused him was or should at that early stage already have been known to the Second Respondent.

12.3.6. Further the Complainant states that on 28 June 2016, in a meeting with the Second Respondent at which his (Complainant's) lawyer Mr Etienne Barnard was present, he disclosed the name of the person to the Second Respondent. He avers that there was no need to advise the Second Respondent of the name of the perpetrator in writing since it was already known to him.

12.3.7. Further to this issue, a letter was addressed to the church wardens containing the name of the perpetrator of the continuing racial abuse and a copy of the letter was provided to Rev Rod Walsh. He notes that this letter is not mentioned in any of the reports submitted by Rev Walsh.

12.3.8. Regarding the matter of a lack of favourable response to the appointment of senior members of the clergy to deal with the problems in the parish, he avers that in respect of Van Staden, his objection to this appointment was because Van Staden had told him that the reason, he was experiencing racial abuse in his parish was because he (the Complainant) "did not understand coloured people". He therefore considered that even before Van Staden commenced the process of assisting with the challenges in the parish, that Van Staden was unsuitable to the job at hand

in that he displayed what could be considered bias, and blamed him, the victim of racism, for the problem of racism.

12.3.9. The Complainant further expressed that his congregation had serious concerns with the appointment of another one of the mentors due to a sexual relationship with a lay minister which led to the breakdown of her marriage. This was raised with the Second Respondent, who ignored the concerns of the members of the congregation.

12.3.10. With reference to the doctors' reports which fail to mention racial abuse as a cause for his condition, the Complainant simply avers that he is not responsible for what these professionals put into their reports and accordingly cannot speak to the point raised by the Respondents. While he concedes that the racial abuse was not the sole cause of his mental condition, he avers that it is a well-known and proven fact that racial abuse experienced over a period of five years can either cause or worsen a mental health condition.

12.3.11. The alleged abscondment from his parish, is disputed by the Complainant. He alleges that he was on leave when he became ill necessitating his hospitalization. A sick note was sent to the Second Respondent. He points out the contradiction in the version of the Respondent in this regard at paragraphs 26 and 28 of their comments respectively.

12.3.12. The objection of the Complainant to Rev. Rod Walsh was based on his consistent failure to report serious matters affecting the Complainant including continuing racial abuse and allegations of flirting with a parishioner to the Second Respondent, as required in terms of the mandate given to Rev. Walsh.

12.3.13. Both he and Rev. Walsh were then referred to an independent counsellor to see if the impasse between them could be resolved. The referral to a psychologist by the name of Terry Wilke was the outcome of his (Complainant's) report to the Bishop regarding the breakdown in the relationship with Rev Walsh. The outcome of the interventions of Mr Wilke was that the psychologist compiled two reports. Only one of these reports was given to the Complainant and he learned of the other report to the Second Respondent when it was sent in response to the complaint in this matter.

12.3.14. The psychologist was found guilty of professional misconduct following a complaint laid by the Complainant with the Health Professions Council of South Africa. The Complainant emphasizes that he at no point authorized the disclosing of his personal medical information and further that regarding this report, he was not able to place it in the public domain as he was not in possession of it at the time when he made his complaint to the Equality Court.

12.3.15. Complainant denies that the letter penned by Father Makhalima related to the scourge of racism in society in general as contended by the Respondents. He contends that the letter resulted from a meeting of the Bellville Archdeaconry where he had sought to discuss the racial abuse, he was subject to. Father Makhalima was requested to write the letter during the meeting and the minutes of this meeting (which are not in his possession) will reflect this request.

12.3.16. The disputed issue of access to the minutes of Diocese Executive meeting is dealt with by reference to the memorandum of understanding relating to the appointment. The Complainant also provided a copy of this MOU and refers to a specific paragraph thereof to show how he came to be in possession of

the minutes. He accordingly disputes that he was in unlawful possession of the minutes. He alleges that had he acquired possession of the disputed minutes unlawfully, he should have been charged under canonical law.

12.3.17. Regarding the allegation that the Respondents had provided a letter of good standing, the Complainant disputes that this is the case. He states that he was licensed by the Second Respondent and accordingly the letter should have been signed by Second Respondent rather than a lay official who has no ecclesiastical authority over a member of the clergy such as himself. The letter provided and referred to by the Respondents is accordingly rejected by the Complainant as insufficient.

12.3.18. The failure by the Second respondent to provide him with a letter of good standing at the time when it was requested and when it would have helped him to secure a placement as a chaplain at the SAPS is emphasized by the Complainant.

12.3.19. Regarding the characterization of the relevant portion of the contents of the minutes, the Complainant confirms that the statements in question clearly considered him in terms of his race, language, and cultural background, rather than in terms of his spiritual gifts and abilities. There is no question in his mind that the statements amount to racial discrimination more especially when considered in conjunction with the letter informing him of the expiry of his license and the fact that there were no posts for him to be placed in when, to his knowledge, there were vacancies.

12.3.20. He further notes that upon viewing this statement he was forced to conclude that the failure to attend to the issue of racial abuse as raised by him and others over the years resulted from the fact that the Second Respondent viewed him as 'black clergy'

and 'Xhosa speaking clergy'. Based on his treatment over the years and the failure to effectively address the racial abuse he was subjected to, he views this as clear evidence of race- based differentiation which severely impaired his dignity.

12.4. Analysis of the Comments of the parties on the preliminary report:

12.4.1. Both parties provided extensive comment. It will be apparent from the Complainant's comments that he agrees with the findings made. His comments simply give further context to and provides further evidence in substantiation of the information already before the Commission.

12.4.2. The Respondents on the other hand object to the finding and the alleged broadening of the scope of the investigation. More particularly, the Respondents contest the procedural issue of not having been afforded the opportunity to address the so-called expanded scope of the investigation.

12.4.3. The Commission considers that, having been afforded this opportunity to comment on the preliminary report, any prejudice which the Respondents may have been subject to has been cured. The Respondents have made extensive use of the opportunity to provide their version of the course of the Complainant's tenure at St Joseph the Worker. The Commission however further notes that in the allegations addressed to the Respondents, the rights violations under consideration, were particularised and the only additional right considered related to the substitution of the right to freedom of trade occupation and profession, since the labour issue, as the Respondents correctly pointed out at the outset, was before another more specialised forum.

12.4.4. Further detail has emerged during the course of the investigation and this has been considered in formulating the findings. While

the Commission does not determine which facts and allegations are brought to its attention, it is bound to take such facts and allegations into consideration in making its determination. In a similar manner to a court making a finding on a competent verdict which the evidence as a whole before it supports such an outcome. The Commission taking into consideration the facts before it has accordingly found violations.

12.4.5. The Commission would have been in dereliction of its duty to not take into consideration the issue which arose and accordingly duly took these facts into consideration. The sharing of the preliminary findings is specifically to enable the parties to respond to further facts which are brought to its attention via the investigative processes.

12.4.6. Based on the process outlined in this report, the Commission is of the view that both parties have been afforded a fair and reasonable opportunity to place all relevant facts before it for consideration. The parties, having taken full advantage of that opportunity, the Commission considers that the process has allowed for the full ventilation of all issues.

12.4.7. The Commission notes the Respondents' documenting of the steps taken over a period of years to address the tensions within the church of St Joseph the Worker. It is, in the view of the Commission, significant that none of the interventions mentioned directly addressed the issue of the racial abuse to which the complainant was subject. It is further significant that at no stage had any of the interventions, based on the documentation before the Commission alleged or been directed at poor performance of duties as rector, by the Complainant. While acknowledging that the running of the parish and the breakdown of relations between the priest and the parish executive is without doubt important from the point of view of the Respondents, it is equally clear that

racist attitudes from members of the parish leadership was an important contributing factor to that breakdown.

12.4.8. The Commission considers that it is probable that in appointing mentors to assist in resolving conflict in the parish, ingrained racist views held by certain members of the congregation, were reinforced. The clear subtext to the appointment of mentors to assist the Complainant was that the Complainant, rather than the abuse he was being subjected to was the problem. The appointment of mentors could, viewed objectively have been perceived by those known to be predisposed to view persons of a different race group as inferior, as confirmation of their views. Rather than expressing confidence in their appointee, the Respondents may in fact have further undermined his leadership through their interventions.

12.4.9. Regarding the assertion by the Respondent that it was unable to address the racial abuse of the Complainant due to the refusal of the Complainant to disclose the identity of the perpetrators of the abuse. The Complainant disputes this and provided the Commission with documentary evidence that the Respondents were, and in terms of procedure, should have been aware of the identity of the perpetrators from the time of his interview already. Evidence of numerous written reports support this contention further.

12.4.10. The Commission therefore accepts the evidence provided that the Respondents were aware of the identity of the perpetrators of the racial abuse. Following on from this, the failure of the Respondent to take appropriate action as mandated by virtue of their respective positions, confirm the view expressed in this report that the Respondents failed, over a period of years, to act specifically directed at the cessation of the racial abuse of the Complainant. Even if the Commission accepts that the

identity of the abuser(s) was unknown, the Respondent has provided the Commission with no statement or document showing any effort on its part to ascertain the identity of the perpetrator(s) of the abuse nor guide the Complainant as to the process to be followed to resolve the matter.

12.4.11. The Commission has, in this report dealt with the dispute relating to the minutes of the meeting of 18 October 2016. The Complainant provided the Commission with a copy of his Memorandum of Understanding relating to the post and this reaffirms the view taken by the Commission that the Complainant was, most likely, lawfully in possession of the minutes. As the Commission has deferred to the Labour Court regarding the minutes themselves however, nothing further needs to be said in this regard.

12.4.12. The Respondents have accepted that the Complainant most likely suffered racial abuse during his tenure as the rector of St Joseph the Worker, although they deny knowing the details of such. The Respondents have, even in their extensive comments and the supporting documentation provided by them, running to some 79 pages, failed to show any decisive action taken in respect of the racial abuse suffered by the Complainant over a period of years, which abuse the Commission is obliged to conclude based on evidence provided by the Complainant, was known, or ought to have been known to them.

12.4.13. The Respondents have submitted a statement by the Second Respondent which was read out in all parishes as a response to the letter penned by Father Makhalima to the First and Second Respondent, which the Respondents aver was not in response to the racial abuse suffered by the Complainant but in fact a general statement about racism in society at large.

- 12.4.14. The Commission is satisfied that the Respondents either knew or ought to have known of the racial abuse directed at the Complainant, and there is no indication provided that any of the actions taken by the Respondents were directed at stopping and eradicating the racial abuse suffered by the Complainant.
- 12.4.15. Regarding the matter of the violation of the right to freedom of trade occupation and profession, the Commission is constrained to note that the objection raised by the Respondents in regard to this issue is contradicted by the views they express about the nature of the relationship. Accepting, for the sake of this report that there is a dispute as to the nature of the relationship and that until characterized as such, the legislation, which has been enacted to give effect to the right in the Constitution, is not applicable to the situation unless and until an appropriate court orders that the relationship is one of employment. Accordingly, the Commission's resort to the provisions of the Constitution directly is entirely appropriate in such an instance. The principle of subsidiarity is not violated where, on the Respondent's own version, the national legislation which is to give effect to the right contained in the Constitution is not applicable to the circumstances of the case.
- 12.4.16. It is undisputed that at the time when an employment opportunity was available to the Complainant, the failure to provide him with a document confirming his qualifications as a priest of the Anglican Church (whatever such document may be called since the Respondent relies on the technicality of 'letter of good standing') was not forthcoming and deprived him of the opportunity to practice his chosen trade occupation or profession.
- 12.4.17. The Respondent contends that the provision of a 'letter of good standing' is a moot point and that it had already on 19

November 2019, provided the Complainant with such a letter. The Complainant contends that the letter provided to him does not comply with the Respondents' protocols in that it is signed by a lay person. The Complainant contends that he was licensed by the Second Respondent and accordingly only the Second Respondent may sign such a letter.

12.4.18. The Commission notes the assertion by the Complainant as to the ecclesiastical authority of the Second Respondent, in regard to himself as a priest. The Commission further notes that despite later providing a letter confirming the licences of the Complainant, that same is rejected as invalid, in accordance with the Respondents own laws, by the Complainant.

12.4.19. A priest of any church is by virtue of the nature of his or her calling only able to exercise that calling within the stricture of the Church as a matter of both practicalities, and very importantly, faith.

13.ANALYSIS OF THE COMPLAINT

13.1. The Complainant alleges that he was an employee of the First Respondent, an assertion challenged by the First Respondent. The Commission is not best placed to make this determination and notes that this issue falls within the mandate of the CCMA/Labour Court and is being considered in that forum.

13.2. In addition, if the Complainant is determined to have been an employee of the First Respondent, the proceedings before the CCMA/Labour Court will necessarily extend to an examination of the events leading to the Complainant's dismissal and whether or not it was unfair. Because of the pendency of that litigation, this report will not consider those issues.

13.3. This examination by the Labour Court will of necessity also extend to a determination of the nature of the disputed minutes of the meeting of 18 October 2016 which formed the basis of the complaint herein. The Commission in light of the evidence of failure to take directed action to eliminate the direct and overt racial discrimination being experienced by the complainant, accordingly, deems it unnecessary to make a determination regarding the content of the minutes.

13.4. Racial Discrimination

13.4.1. Section 1 of the Equality Act defines discrimination to include discrimination arising from any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly:

- (a) imposes burdens, obligations, or disadvantage on; or
- (b) withholds benefits, opportunities, or advantages from, any person on one or more of the prohibited ground.

From the above definition, it is clear that in order for discrimination to be found, such discrimination does not need to be direct or even intentional. The definition specifically refers to a “policy, law, rule, practice, condition or situation” which means that both acts and omissions are included in the prohibition due to the entrenched nature of discrimination.

13.4.2. In determining whether the discrimination was fair or unfair the Commission takes into consideration the ultimate impact of the actions in question on the Complainant. The Complainant is part of a group which has historically been the victim of entrenched and systemic patterns of abuse because of the construct of race.

13.4.3. Section 7 of the Equality Act provides that “no person may unfairly discriminate against any person on the ground of race, including-

- a. The dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person,

including incitement to, or participation in, any form of racial violence.

- b. The engagement in any activity which is intended to promote, or has the effect of promoting exclusivity, based on race;
- c. The exclusion of person of a particular race group under any rule or practice that appears to be legitimate, but which is actually aimed at maintaining exclusive control by a particular race group
- d. The provision or continued provision of inferior services to any racial group, compared to those of another racial group;
- e. The denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such a person.

13.4.4. Section 14 (2) (a) of the Equality Act provides for the Respondent to prove that the discrimination complained of did not amount to unfair discrimination because of certain factors identified in the Act, which are set out earlier in this report.

13.4.5. The Equality Act S13 (1) provides that the Respondents must prove that either the discrimination did not take place as alleged or that it did not take place on one of the prohibited grounds.

13.4.6. The Respondents aver, in respect of the allegation that it took no effective steps to end the verbal racial abuse to which the Complainant was subjected in the parish, that the Complainant failed to follow prescribed procedures. This is contradicted by the letters annexed to this report which demonstrate the attempts by the Complainant and others to invoke the procedures of the Canons in resolving the issues arising from racial abuse directed at the Complainant.

- 13.4.7. The discriminatory comments to which the Complainant was subject while serving at St Joseph the Worker in Bishop Lavis are not disputed. Respondents rather say that they did not know about the comments or conduct, which is contradicted by the letters, correspondence, meetings, and reports detailed herein above.
- 13.4.8. The Respondents also aver a lack of knowledge of the alleged racial abuse, but the Complainant has provided documentary proof that the issue was raised over a period of years that directly contradict this assertion.
- 13.4.9. The Commission therefore accepts that the Complainant was subject to racial abuse at the St Joseph the Worker Parish over a period of years and that the Respondents took no direct or effective action aimed at stopping this ongoing racism, thereby enabling the abuse to continue unabated. The actions taken by the Respondents were either ineffective or misdirected and enabled the racial abuse to continue within the environment where the Complainant worked.
- 13.4.10. The position of the Complainant in society is one that requires little explanation. As a black person in post-Apartheid South Africa, he remains subject to the structural inequality of his race. In the specific context of his calling as an Anglican priest, he is in the position of a minority within the Church in the Western Cape. Based on the documentation which he provides, his experience of racial discrimination in the Anglican Church is not unique to him.
- 13.4.11. The nature and extent of the discrimination must be considered in respect of each of the incidents complained of. While the nature of overt racial abuse (such as in the case of the situation with Mr Kordom) is easy to assess, the more subtle racial discrimination of failing to afford a remedy or take seriously the impact of racism on a human being, is more complex and nuanced.

13.4.12. The Complainant alleges that he reported his experience of discrimination to the relevant structures from 2010 onward. He asserted that only after taking the offender to the Equality Court and obtaining judgment in his favour in 2016, was any action taken by the Respondents and, then only in response to the court order. The actions consisted of a reading out of a letter from the Diocese condemning racial discrimination, during a church service. The Commission was able to confirm that this act of compliance indeed took place and the advocacy officer of the Western Cape provincial office of the Commission, Rev Julian Masimila (late) was in attendance on the Sunday that this letter was read out. Lay Minister Trevor Kordom was also suspended for the minimum period recommended in the order of the Equality Court, being a period of three months. It should be noted that the actions taken following the Equality Court ruling occurred after the expiry of the Complainant's incumbency as rector of St Joseph the Worker.

13.4.13. On review of the correspondence to the Respondents and the actions of the second Respondent (i.e., mandating senior pastors to address the circumstances leading to the Complainant's psychological distress and subsequent period of sick leave) among other interventions, it is clear to the Commission that the Respondents were aware of the unfair discrimination against the Complainant and racism within the Parish community in general.

13.4.14. On review of the actions taken by the Respondents including the compliance with the order of the Equality Court which took place after years of racial discrimination suffered by the Complainant, the Commission is impelled to conclude that the Respondents omitted to take the necessary, direct or effective actions to address the specific racial abuse faced by the Complainant, and the general racism within the Anglican church as alleged in the letter addressed to the Respondents by Father Makhalima. This omission by the Respondents was discriminatory.

13.4.15. Having determined that the discrimination as alleged by the Complainant, in fact took place, and having accepted that the Respondents were both aware of and took certain actions to address what they instead characterized as the poor relationship between the rector and the parish, it is accordingly clear that there is a prima facie case of discrimination based on race. Accordingly, and in terms of s13 of PEPUDA, the Respondent bears the burden of proving either that the discrimination as alleged did not take place or to submit facts that would justify the discrimination thereby rendering it not unfair. The Respondents have not discharged this onus in that they have firstly denied that their (in)action amounts to discrimination and secondly have failed to submit facts which would have the effect of providing any justification for their failure to act for consideration by the Commission.

13.4.16. Considering that the proposals of Healing of Memories workshop such as were proposed to effectively deal with the challenge of race relations, were not pursued by the Respondents and that they preferred other measures, is indicative of their attitude to the issue at hand, which was being raised by the Complainant. The question of why they would choose to not deal effectively with the issues raised by the Complainant is also indicative of their attitude toward the Complainant as a person. The impact of the measures actually taken by the Respondents in response to race related issues at the parish, including the appointment of mentors to the Complainant, and ultimately the transfer of the Complainant from the parish in circumstances of ongoing racial tensions, reinforced the perception that it was the Complainant who was the problem and the racism directed at him in the parish. This reinforced rather than deterred fallacious ideas regarding race within the parish.

13.4.17. Based on, among others, the three letters (Letter from the Complainant, Father Makhalima, and the Church warden) sent to

the Respondents, it was incumbent upon the Respondents to at the very least convene a mediation meeting between the members of the parish and the Complainant to attempt resolution of the conflict. Alternatively, as proposed on 13 October 2015 by two senior clergy in a meeting with leaders of the parish of St Joseph the Worker, the Reconciliation and Healing of Memories workshop, should have been arranged by the Respondents. The failure of the Respondents to do either of the above, or indeed any other process which would have brought the matter of racism as experienced by the Complainant into sharp focus with the parish, obviously contributed to the continuation of the culture of unfair discrimination based on race within the parish, resulting in continued suffering of the Complainant.

13.4.18. The Commission considers that as the leadership of the diocese, the Respondents, regardless of the character of the relationship between themselves and the Complainant, had a duty to ensure that the environment in which the Complainant conducted his rectorship was not harmful or disadvantageous to him or to the congregations he served. The termination of the incumbency of the Complainant at the St Joseph the Worker Parish indicates that the ongoing racial tensions in the Parish were ultimately disadvantageous to the complainant.

13.4.19. The Commission accordingly concludes that the Complainant was the victim of unfair discrimination based on his race and that such unfair discrimination was due to the omission by the Respondents who, having been in a position of authority, failed to take measures aimed at addressing racial abuse and unfair discrimination suffered by the Complainant over a period of time. The actions and inactions of the Respondents imposed burdens and disadvantages on the Complainant in that they reinforced notions of racial inequality and racism, and enabled racial abuse against the Complainant to continue within the parish and the church community where the

Complainant was stationed. This ultimately disadvantaged the Complainant in his calling as an Anglican priest, and also negatively affected his state of mental health.

13.4.20. This finding is confirmed by inter-alia the outcome of the equality court in relation to the unfair discrimination by lay minister Trevor Kordom, the ongoing correspondence between the Complainant and the Respondents in which he requests an intervention by the Respondents which did not materialize as per the correspondence sent to the church on 19 October 2010 (annexure number 1), the meeting with church staff on ^{27 January 2013} ~~15 October 2015~~ (annexure number 2), and the letter from Father Makhalima dated 4 April (annexure number 3), and the appointment of mentors in the parish which reinforced ideas of the racial inferiority of the Complainant rather than addressing and eliminating the racial abuse to which he was subjected.

13.5. Freedom of trade, occupation or profession

13.5.1. In a letter dated 29 September 2017, the Complainant was informed that as of 30 September 2017, he would cease to be a licensed minister of the First Respondent and that there was no position that he would be suitable to fill within the organisation of the Church, where there were to the knowledge of the Complainant vacancies to which his skill and experience level would have been suited. This effectively rendered the Complainant 'jobless' as of that date, particularly because of the nature of his vocation; clerics such as the Complainant are not able to simply change churches or switch religions because of difficulty finding work within the organisation with which they are affiliated.

13.5.2. The issue of the engagement of the Complainant by the Respondents appears in the context of the right to practice one's trade, occupation or profession freely (S22 of the Constitution) however. While it is disputed whether or not the Complainant was

an employee of the church, it is trite that the First Respondent regulates whether or not the Complainant is able to be licensed as a Minister within its area of authority and effectively therefore also whether he is able to engage in his chosen profession.

13.5.3. Despite the specific nature of the Complainant's qualifications and experience, he sought employment outside of the First Respondent and within other Dioceses as well as at other organisations where his skills as an ordained Anglican priest could be utilised. He was not placed at any other parish either within or outside of the First Respondent but did secure an opportunity with the South African Police Services. He was however not able to provide the SAPS with a letter confirming his good standing or other documentation pertaining to his prior work as a priest, and accordingly the chaplaincy was not offered to him. While being in a position of authority, the Respondents through their refusal to provide the Complainant with a letter confirming his canonical license and experience, obstructed and frustrated his opportunity to pursue his calling albeit at a different organisation.

13.5.4. On 15 November 2019, four days after supplying the Commission with their response to the current complaint, the Respondents provided a letter to the Complainant setting out the roles in which he was licensed within the Church as well as the dates in which he served in those roles. In light thereof, noting that in addition the Complainant had never been admonished for poor performance nor been subjected to disciplinary processes for transgressions of any Church Canons (laws) and noting further that the letter was ultimately supplied as requested (albeit in a form not acceptable to the Complainant), demonstrates that there was no adequate reason for the refusal to provide such a confirmatory letter in the first instance.

13.5.5. The Commission accordingly finds that the Complainant's right to his chosen profession was violated by the Respondents' unwarranted failure to provide him with a confirmation of his experience and relevant canonical licenses within a reasonable time.

13.6. Human Dignity

13.6.1. Noting that the Respondents have denied that there was any discrimination against the Complainant by them and noting further that the Commission (and the Equality Court) has found that the Complainant had indeed been subjected to unfair discrimination based on race, which the Respondents despite being in a position to do so, failed to address appropriately over a period of time, the Commission considers that the continued racial abuse together with the enabling environment created by the acts and omissions of the Respondents, impaired the dignity of the Complainant. Once again, the failure by the Respondents to take action directed at the elimination of the unfair discrimination ensured that the Complainant was obliged to continue to work in an environment in which he was continuously demeaned or exposed to potential racial abuse, thus perpetuating the assault on his dignity. It is well established in law that discrimination on any basis but more especially on the grounds listed in S 9 of the Constitution, impairs the dignity of the human being.

13.6.2. Discrimination based on race is one of the most common but also one of the most insidious forms of discrimination in our society today. A refusal to admit that it exists does not make the experience of discrimination any less difficult. In fact, a refusal to recognise its existence devalues the victim to such an extent that they continue, well after the event or conduct has taken place, to be left with feelings of worthlessness

13.6.3. The Complainant alleges that he experience trauma because of the unfair discrimination he suffered which was enabled by the failure of the Respondents to address it adequately, directly or effectively. He provides documentation which shows that in and during December 2014, he was booked off ill by a psychiatrist for several weeks.

13.6.4. The Resondents' failure to take direct or effective actions to address the racial abuse suffered by the Complainant over a prolonged period of time, and through their actions of appointing mentors to the Complainant, who was a victim in this situation, the Respondents enabled an environment that violated the Respondent's right to dignity.

14. FINDINGS

14.1. The Commission finds that the Complainant was the victim of unfair discrimination at St Joseph The Worker Parish and that the failure by the Respondents to take direct or effective steps to address the racial discrimination that the Complainant was subjected to, imposed burdens and disadvantages on him and violated his right to Equality as set out in sections 6 and 7 of PEPUDA and as guaranteed in section 9 of the Constitution.

14.2. The Commission finds that the Complainant's right to his chosen profession was violated by the Respondents' unwarranted failure to provide him with a written confirmation of his experience and relevant canonical licenses within a reasonable time after he requested such.

14.3. The Commission finds that the Respondents' failure to take necessary direct or effective actions to address the racial abuse suffered by the Complainant over a prolonged period, and further, that through their actions of instead appointing mentors to the Complainant, the Respondents enabled a work environment that violated the Complainant's right to dignity as guaranteed in s10 of the Constitution.

15. DIRECTIVES

- 15.1. The Commission directs that the First (Leadership of the Diocese as well as senior/other priests in leadership roles) and Second Respondents arrange and participate in a session or workshop akin to the Reconciliation and Healing of Memories workshop that had previously been considered, or sensitization training with a reputable organisation, within four months of the date of receipt of this report.
- 15.2. The Respondents are directed to submit to the Commission a confirmatory report or certification of the successful completion of such a program or workshop endorsed by the trainers or relevant service providers, confirming their attendance at and adequate completion of such sensitization program/workshop, within 2 weeks of having successfully attended and concluded the program or workshop detailed in paragraph 15.1 (above).
- 15.3. The Commission further directs that the Second Respondent, as the ordained priest responsible for the licensing of other priests and in accordance with the standard practice in the Diocese and Church, within 7 days of the receipt of this report, provide the Complainant through the Commission, with a letter detailing his experience and other qualifications, in the same terms as the letter provided to the Complainant on the 15 November 2019, and which must be signed by the Second Respondent.
- 15.4. All submissions referred to above should be received by the Commission via email at (znair@sahrc.org.za and mduplessis@sahrc.org.za)

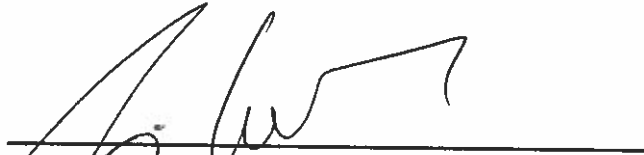
16. RECOMMENDATIONS

- 16.1. The Commission recommends that the Respondents implement programs and interventions within the St Joseph the Worker Parish aimed at promoting deeper and sustained awareness of the values of

non- racism and the Promotion of Equality and Prevention of Unfair Discrimination Act (2 of 2000).

- 16.2. The Commission recommends that the Respondents review their internal grievance and complaints procedures to ensure that clear procedures for lodging of complaints and grievances, as well as effective and time-bound resolution of such matters, are available to persons within the organisation.

SIGNED AT Cape Town ON THIS 7 DAY OF JUNE 2022.



FATIMA CHOHAN

DEPUTY CHAIRPERSON

SOUTH AFRICAN HUMAN RIGHTS COMMISSION