C. of A. (CIV) No.2 of 1986

IN THE LESOTHO COURT OF APPEAL

In the Appeal of

ESAIA THITE Appellant

v

LESOTHO EVANGELICAL CHURCH Respondent

HELD AT MASERU

Coram

Schutz, P
Odes, J.A.
Miller, J A

JUDGMENT

Odes, J.A.

This appeal arises out of an interdict granted by the Court a quo in which the Appellant was restrained at the instance of the Respondent from operating a bank account originally named L.E.C. Secondary School account with the Standard Bank P.L C The bank was cited in the application as the Second Respondent but plays no part in this appeal. For the purposes of this judgment it will be referred to as "the Bank" The Appellant was also restrained "from interfering with or otherwise having any dealings with the Teyateyaneng Lesotho Evangelical Church Secondary School presently run in the

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Lesotho Evangelical Church building at Teyateyaneng without the consent and authority" of the Respondent or its agent. The Bank was restrained from paying out any monies from the named account to the Appellant or his agent and it was further directed to permit the Respondent or its duly authorised agent to operate that account.

The rule nisi was confirmed on the basis of affidavits which were filed by the parties. The Appellant, being dissatisfied with the judgment, appealed to this court, which in turn, after hearing argument, referred the matter back for the taking of oral evidence on the factual issues set out in the order of this Court. The latter order reads as follows -

> "The disputes of fact relate to, and the issues to be determined by the High Court are -
>
> (a) Who is entitled to run and administer the school at Teyateyaneng known as "T Y L.E C. Secondary School" or Teyateyaneng Secondary" School or "Teyateyaneng F.P A. High School".
>
> (b) Who is entitled to utilise the funds in and operate upon the banking account at the Standard Bank Maseru previously under the name "Teyateyaneng L E.C. Secondary School" and at present under the name "Teyateyaneng F.P.A. High School".
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> Accordingly whether the Applicant was and is entitled to all or any of the relief sought in the Notice of Motion".

The Court a quo then heard viva voce evidence from the various witnesses who were called on behalf of the parties to the interdict proceedings.

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The learned Judge proceeded to give judgment which substantially repeated (for the most part verbatim with certain omissions) the judgment which he had delivered at the previous hearing

The judgment then proceeds (at page 259 of the Record) as follows -

> "The question to be decided by this court is whether, having heard oral evidence of both parties and their witnesses, there are any new facts that could persuade the Court to arrive at a different conclusion. I have found no new facts".

Later, on the same page of the record, the judge makes the following observation -

> "I must emphasise that as far as I am concerned there has never been any dispute of fact in this application"

And in concluding that the Respondent was entitled to the relief which the Court originally granted to it, the Judge ordered the Appellant to pay the costs of the previous appeal "because there was never any dispute of fact which could not be resolved by the evidence in the affidavits".

It is clear from the above passages that the learned Judge has totally misconceived the order of this Court. He was directed to hear evidence on what this Court held to be disputes of fact and to make findings thereon. It was not the function of the Court a quo to determine whether there were any new facts which could persuade it to arrive at a different conclusion, its function was to determine what the facts were

Regrettably no factual findings were made by the Court a quo on either of the issues referred back to it, and we do not have the benefit of its findings in relation to the acceptability of the various witnesses

The proper approach of the appellate tribunal in circumstances such as these is aptly set out by Schreiner J A in Van Aswegen v. de Clerca 1960 (4) SA 875 at 882A-E in the following terms -

> "In the present case the learned Judge's view on the effect of the money-raising scheme led him away from a decision on the two issues now in question. It happens, of course, even where a trial Court has made findings of fact, that on appeal those findings are shown to have been wrongly arrived at, and in such cases the appellate tribunal may have to decide the appeal on the record without regard to the findings. It seems to me that the position is similar where, as here, no findings have been made. The appellate Court has to do its best on such material as it has before it. The importance that the onus may assume in such cases is pointed out in Rex v. Dhlumayo and Another, 1948 (2) SA 677 A D at p. 703.
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> "If the appellate Court,"
>
> said DAVIS, A.J.A.
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> "is left in doubt, then .. the result of the appeal must be such as to give effect to the non-discharge of the onus".
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> By "left in doubt" was meant, I apprehend, what LORD THANKERTON in Watt v Thomas, supra at p. 487, intended to convey by the words "is ultimately unable to come to a definite conclusion on the evidence" The onus should not be allowed to operate in such a case unless and until, after all the relevant evidence has been examined to see whether there is a sufficient balance of probabilities on one side or the other, the state of inability to decide is reached."

It is convenient, at this stage, to observe that during the course of the hearing of the evidence, Appellant's counsel requested

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that the written application made by the Respondent be produced. Respondent's Counsel objected to this request on the basis that because Respondent did not itself intend to use that document in the trial, it was therefore not discoverable The learned Judge upheld the Respondent's objection. In my view, the learned Judge misdirected himself in upholding the objection and appears to have overlooked the provisions of the Rules relating to discovery .

Rule 34 (1) of the High Court Rules empowers a party to an action to require any other party to make discovery on oath within 21 days of receipt of a notice in writing of all documents "relating to any matter in question in such action"

It is apparent from the terms of the Rule that the duty to disclose documents is much wider than the learned Judge conceived it to be There is nothing in the Rule which limits the documents to be discovered to those which the party making discovery intends to use in the trial in support of his own case. Indeed such an approach would defeat the very purpose of discovery which is after all, to disclose all relevant documentation "which may - and not must - either directly or indirectly enable the party who requests discovery, either to advance his own case or damage the case of his adversary." Robinson v Farrar & others 1907 TS 740 at 742 , Nathan, Barnett & Brink Uniform Rules of Court (2nd Ed) p 218 - 20 and the authorities there cited)

The document which the Appellant s Counsel requested disclosed was highly relevant to the issue before the court a quo and should have been discovered The ruling of the learned upholding the objection to its disclosure therefore constituted a misdirection

It therefore becomes necessary to examine the evidence given and to determine where the probabilities lie.

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The Respondent, which at all times bore the onus of establishing that it was entitled to the relief which it claimed, adduced its evidence first in support of its contention that the school in question and therefore control of its funds, vested in it and not in the Appellant

Mr Mosaase, the Commissioner of Lands, testified that the application for a site for a school was originally made on the 15th December, 1981 in the name of the Respondent However, he received a letter dated 19th January, 1983 from the Appellant on behalf of the "Committee of Parents" which read as follows -

> "re SITE TY LEC SECONDARY SCHOOL.
>
> We started the Secondary School mentioned above in 1982 We applied for a site, which was promised to us under the same name T Y. L E C Secondary School and it was surveyed We all along believed that it was a school under the LEC church and the LEC's also believed likewise But as things went along, the Ministry of Education wanted to know as to who had granted permission for the school with what letter It is then that LEC then started denying it and we as parents took responsibility for it
>
> I now request that this site which has been applied for in the name of LEC should please be changed over to us as the parents of children who attend that school, particularly, because it was applied for by us in the name of the LEC originally
>
> We now call the school Teyateyaneng Community Secondary School
>
> E THITE on behalf of the Committee of Parents"

Mosaase proceeded with the application on the basis of the above letter's contents but stopped processing it when he received a query from the Respondent relating to the Appellant's authority to alter the registration of the site Under cross-examination, Mosaase conceded that no official of the Respondent had ever

approached him in connection with the allocation of the site, that the site had never been allocated to the Respondent or the L E C Secondary School and that the Parents Association had paid the fees for the legal documentation which ahd been drawn up

Mr Tiheli gave evidence in his capacity as Secretary for Respondent's schools In that capacity, it was his responsibility to know all the schools controlled by the Respondent He stated that he could not openly associate with this particular school because it was operating illegally but averred that the Parents Committee controlled it on his behalf He disputed that the school was a community school but persisted in his view that it was a school under the control of the Respondent

Mr Tiheli was unable to produce any documentary evidence from the Committee of the Presbytery of Respondent from which he normally obtained his instructions, advising him that a school had to be opened He explained that he did not exercise any control over the spending of funds of the school and had no knowledge of the funds deposited into the bank account nor of the school's financial statements He sought to explain these anomalies on the basis that the school had been operating illegally.

The Respondent then called its main witness, Mr. Lebeko, the principal of the schr l, who expressed the view that the school belonged to the Respondent He stated that the Appellant had altered the school stamp on his own and had replaced it with a Founders Parents Association (F.P A) stamp Lebeko testified that he was present when the Constitution of the F.P A was drawn up but stated that the F P A was going to act on behalf of the Respondent, that it had never met officially and that it never purported to run the school. This evidence is not entirely accurate Correspondence

before the Court a quo emanating from the school not only bore the F P.A stamp but was in fact signed by this witness in that form.

Under cross-examination, Lebeko stated that the application to the Educational Secretary was signed by 5 members of the Church Community and that they represented the Church. It is clear from the evidence given on this aspect that the witness infers that because they were all members of the Church, they were therefore its representatives In fact the letter of application was written on behalf of the Church and the community The witness was unable to explain why the application was made on behalf of the community as well as the Church and was most evasive on that aspect He also gave contradictory evidence on the role and membership of Mr Mongangane and his presence when the F.P A Constitution was approved

Lebeko further denied that the school was run by the F.P.A alone after the formation of that body. He testified that the committee was appointed by the Appellant on behalf of Rev. Seotsanyana, who was the manager of the Church schools in the area He conceded that the Church did not contribute any funds towards the running of the school, and that all the members of staff were appointed and paid by the committee, the latter - according to the witness - in consultation with Rev Seotsanyana. It should be noted at this stage that there was no suggestion by any other member of the committee or the Appellant that the Reverend was ever consulted Although he was one of the deponents in the original application, the Reverend was not called as a witness.

There are other unsatisfactory features in this witness's testimony He had difficulty in explaining why in his affidavit he

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had said that the Reverend had refused to sign the application to open the school because he had not been consulted, whereas in evidence he had stated that the did not sign because of lack of time and other commitments His evidence that the committee did not consult the Reverend before applying because "we were not prepared to let him know" is most improbable if the intention was that the school was to be Church controlled. The failure to inform the Manager of the Church schools in the area for the reason suggested is not without significance in relation to the overall probabilities

Mrs Agnes Baholo, the Secretary of the Committee was called to testify simply that she was present in May 1983 when the F.P A. was formed but that it acted on behalf of the Church to whom the school belonged Under cross-examination she averred that the Appellant had informed them that he was reporting to the Church Council and that he had made three such reports in two years She conceded that the Church played no part in the appointment and payment of teachers, which aspects were dealt with by the Committee but she stated that the Church had knowledge of what was being done She admitted having signed a letter to the bank informing it that the name of the account was to be changed from TY L.E.C Secondary School to TY F P.A High School. She contended that the contents of the letter did not reflect the true position and that she was ordered to sign it She did not however report to the Church that the name of the banking account had been changed

The Appellant who was Chairman of the Committee stated that his committee represented the parents of the school, who came from all denominations and included non- Church goers The committee did not represent the Church The original application for a school site was made on behalf of the Respondent, which then distanced itself from the project

When the project, thus launched, failed, they formed the association sometime in 1982 (although its constitution was registered in May 1983). They re-applied, this time as the F P A , and wrote a letter stating that everything which they had done on behalf of the Respondent without its mandate, they were now doing on their own Reverend Seotsanyana had nothing to do with the school and when the school was to be inspected, he had told the inspector that he did not know the school The Appellant told the inspector in the Reverend's presence that the responsibility for the school vested in the committee and the parents and not the Church It should be noted that the Reverend, in his affidavit admitted that he had told the inspector that "I was not the one responsible for opening the school contrary to the law" The Appellant stated that the Reverend wanted to follow the correct procedure and therefore wanted to wait until the application had been lawfully granted. The Appellant did not agree with that approach and the committee then decided to open the school on its own The Reverend allowed them the use of the Church premises for that purpose but held them liable for any damage to the building

In support of his contention that the F P A controlled the school, the Appellant testified that the school principal, Lebeko, corresponded on behalf of the school under the F P A letterhead, that the F P.A stamp was used on all cheques and that except for the initial period, the committee employed and paid the teachers in its own right and not as agent for the Respondent The committee was not accountable to the Church for any of the funds and prior to the application for the interdict the Respondent had never interfered with the use and control of those funds He stated that although the committee intially purported to act on behalf of the Respondent, the latter had at no stage

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requested it to do so The Appellant mentioned that the Reverend had previously denied responsibility for the Mamathe High School, which was now controlled by another Church

Although this witness's evidence had a number of unsatisfactory features, (he was particularly evasive when questioned about Mongangane's membership of the F P A), it was not contradicted insofar as it related to the attitude adopted by the Respondent represented by Reverend Seotsanyana As indicated earlier, the latter was the pivotal figure who was the link between the Appellant and the Respondent and his failure to testify must raise inferences adverse to the Respondent, particularly where he is able to elucidate the facts and is the one witness available to the Respondent who might be able to refute much of the Appellant's testimony (cf Titus v Shield Insurance Co Ltd 1980(3) S A 119 (AD) at 123)

Tello Mongangane, the Vice-Chairman of the Committee was the final witness to testify He stated inter alia that the school was originally called the T Y L E C School although the committee did not have the permission of the Respondent to use that name His evidence corroborates the Appellant in relation to the background and establishment of the school This witness was very unimpressive and his evidence must be approached with reservation especially where uncorroborated

As can be seen from the above analysis of the various witnesses, a clear dispute of fact emerged in relation to the central issue

The evidence reveals that it was common cause that in 1982 the Appellant and his committee applied for permission to open a Church school under Respondent's auspices The initial correspondence indicates that the Appellant purported to act on behalf of the Respondent and this is conceded by him He states that he and his committee had hoped that the Church would confirm or ratify their conduct and assume control of the school which in fact - so he states -

the Church did not do. This he avers compelled his committee to form its own association, which they did and which later controlled the school. It is also common cause that a school was established before permission was granted for its lawful operation. It seems to be clear furthermore that the Reverend Seotsanyana, Respondent's representative in the area distanced himself from the school, certainly during the period it was operating without permission. The permission to establish the school was granted only in December, 1983.

The real question to be decided is whether the Appellant and his committee had taken matters into their own hands by assuming control of the school, not as agent of the Respondent but totally independently. The various witnesses have given evidence which is contradictory. While certain witnesses state that the Appellant and his committee acted on behalf of the Respondent and others that they acted as an independent body, these statements are by no means conclusive and must be viewed against the background of the objective facts insofar as it is possible to ascertain them without the benefit of any findings thereon by the Court a quo.

A perusal of the Constitution handed into the Court a quo reveals that its members purported to establish an association which was completely independent. One searches in vain within it provisions for a hint of involvement by the Church.

That the F P A was more than a vehicle for the application for a school site admits of little doubt. The correspondence of the school was conducted in its name, a banking account was controlled by it and it collected school fees from its members. The Association appointed and paid teachers. It appears that from its inception some time in 1982 until the Respondent commenced the interdict proceedings in January 1986, the Respondent played no part whatever in managing the school. Indeed, it is clear from the evidence of Lebeko, the

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Principal of the school, called as a witness by the Respondent that the manager of all Respondent's school in the area was not even consulted by the committee before it applied for authority to open the school Lebcko's reason for such non-consultation viz "we were not prepared to let him know' is totally inconsistent with the Respondent's assertion that the F P A controlled the school on its behalf Nothing had been placed before the Court a quo to show that Respondent gave the F P A or the Appellant a mandate to act on its behalf Indeed there is no suggestion by any of the witnesses whether in the affidavits or in the evidence that the Respondent ever instructed or authorised the Appellant or the F P A to act on its behalf It appears that the Appellant had hoped that his conduct would be ratified by the Respondent but when such ratification was not forthcoming the F P A decided to continue on its own

In the light of the above considerations I am unable to find that the Respondent, as Applicant in the interdict proceedings, has discharged the onus resting upon it Indeed the considerations mentioned above indicate that the probabilities point in the opposite direction This conclusion renders it unnecessary for me to determine the other arguments raised by the Appellant

1 The appeal accordingly is upheld with costs

2 The judgment of the Court a quo is altered to read as follows -

"The Rule Nisi is discharged with costs'.

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The Respondent is ordered to pay the costs of the previous Appeal as well as the costs of adducing the viva voce evidence.

M.W. ODES
JUDGE OF APPEAL

I concur

W.P. SCHUTZ
PRESIDENT OF THE COURT OF APPEAL

I concur

S. MILLER
JUDGE OF APPEAL

Delivered on this 25th day of July, 1986 at MASERU.

For the Appellant Mr. C. Edeling
For the Respondent Mr. D. Kuny S.C.