CIV/APN/61/89

IN THE HIGH COURT OF LESOTHO

In the Application of :

OPEN BIBLE MINISTRIES	1st Applicant
BRUCE BURKE	2nd Applicant

vs

RALITSIE NKOROANE	1st Respondent
SEPHIWE ALPHEUS MAKHUBU	2nd Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice M.L. Lehohla on the 11th day of January, 1991

On 15th February, 1990 this Court confirmed the rule with costs.

The following are the reasons for that decision.

In an ex-parte application moved on 21st March 1989 the applicants sought a Rule Nisi requiring the respondents to show cause why

(a) they shall not be restrained from holding themselves out as authorities of the Open Bible Ministries of Lesotho - O B M for short - until their suspension from membership of the society has been lifted.

(b)they shall not be restrained from interfering with the affairs of the O B M.

/(c) they

(c) they shall not be restrained from attempting to register the site of O B M at Ha Pokane, Qalo, in the district of Butha Buthe in their names or as authorities of O B M.

The prayers under (a), (b) and (c) were ordered to operate as an interim interdict by this Court. On an extended return day almost a year later the application was heard.

In a lengthy affidavit Bruce Burke has averred on behalf of the applicants that O B M is a religious missionary society registered under the Societies Act 1966 under number 84/9 on 23rd March 1984.

He further averred that O B M is a branch of a United States of America missionary society known as Open Bible Ministries Incorporated with its headquarters at Honesdale County Wayne in the State of Pennsylvania,U.S.A.

The U.S.A. Missionary Society extended its pastorality to Lesotho in 1982. In order to facilitate the proposed base of the society in Lesotho Bruce Burke after taking advice for purposes of registering O B M in Lesotho appointed the respondents to respective positions of Chairman and Vice Chairman of Lesotho.

The deponent has filed along with this application a Constitution marked "A" setting out the Directorate of O B M. It was in terms of Article XVII Section 6 thereof that the two respondents were appointed committee members.

In his capacity as General Director the deponent delegated the respondents to approach the Chief of Ha Pokane Qalo with a view to obtaining a site for O B M. This was done and a letter of allocation marked "B" was secured and is before Court.

Article XVII Section 7 K.3 of Annexture "A" shows

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that the entire missionary work was funded by General Headquarters in Pennsylvania U.S.A. (G.H.Q. for short).

Because the deponent found that the respondents had not properly accounted for monies received from various mission projects in 1987/88, and that they were not submitting any monthly reports and thus were breaching provisions of Article XVIII Section 2A he sent them a letter dated 9th May, 1988 warning them about their conduct leading to possible loss of their association with O B M. See Annexture "C".

Around August, 1988 the deponent suspended the respondents from operations of the O B M because of their failure to comply with Section 6 H.7 of Article XVIII.

The deponent averred that O B M had spent M150,000 for buildings and improvements on the site. Of this amount M100,000 came from G H Q.

The deponent complains that the deponents now claim the O B M site as theirs. He avers also that the respondents despite being invited to a conference of O B M in January 1989, failed to attend.

The O B M had resolved that the site allotted to it be registered in accordance with the Land Law of Lesotho. When members were informed in January 1988 by some group of men that the chief of Pokane Qalo had no power to allocate land, the respondents and others were detailed to investigate and rectify the position.

The deponent later received a report in August 1988 that the respondents were trying to register the site in their own names, the intention being to oust the American leadership of O B M from the site.

It was urged on the Court by the applicants to take note of the fact that Jason van den Heuvel is a linkman and a representative of G H Q in so far as G H Q has any dealings with O B M. See page 25F of the record which stipulates the

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functions of a treasurer to the O B M. There is also a NOTE appearing immediately below 25 F saying "In the absence of a committee on any field then all references to "committee" shall revert to the O B M representative or liaison at this printing, this is Mr. Jason den Heuvel".

It would seem therefore in the teeth of Jason being recognised by name in the constitution an argument that his affidavit at page 73 is defective and fails to comply with the requirement that it be administered by a Commissioner of Oaths or be authenticated is not in the right ball park. In my view an acknowledgement in the constitution giving identity and function of an individual cannot be prevailed upon by any breach of procedure in administering an oath to him. The fact that his affidavit can be said to be defective or even non-existent cannot detract from the position that the constitution accords him.

It is contended by the respondents that the 2nd applicant is none of the things that he states he is but just an honorary ambassador. But at page 63 the names, specimens signatures and capacities of office holders clearly indicate that Bruce Burke is a Director while the 2nd respondent whose signature appears first in the list of signatories has signed his name immediately below the respective designations of the three office holders. Surely if he maintained that Bruce Burke is an ambassador he should have declined to append his signature below the contents of a document which in clear and big letters shows that Bruce Burke is Director. Or if the 2nd respondent recognised Bruce Burke as Director as his signature below Bruce Burke's title seems to indicate he should not in these papers have associated himself with the 1st respondent who regards Bruce Burke as an honorary ambassador and nothing else.

It is indeed mystifying that after Bruce Burke has all along been shown in all transactions as Director and recognised as such it should be suggested that a director is yet to be elected or appointed.

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The applicants' attorney submitted that there is no real dispute of fact in this application.

The respondents concede that annexture "A" is O B M'S Constitution. They suggest that O B M is autonomous. But page 6 of the Constitution at p. 19 of the record clearly states that each officer shall sign a doctrinal statement every year and send it to G H Q.

Section 6 at p. 16 shows that each country shall have a committee. Clause XVII 2(a) at 13 binds every member to send reports to G H Q. This is the practice that the respondents followed until they decided to seize control of O B M unilaterally. But the point is that there are sanctions if the doctrinal statement is not signed by an office-bearer: He cannot continue in office. That is the long and the short of it.

Significantly in their respective capacities as chairman and vice-chairman-cum-secretary the respondents are of a lower rank than the Director.

Furthermore inasmuch as Clause XVII section 1 f under the caveat shows that in the event of the committee not functioning all powers shall revert to O B M liason or representative Jason van den Heuvel it seems logical to conclude that the constitution never intended the respondents to be the sole representatives of O B M.

Annexures "E" and "F" clearly show that until June 1986 the authority of the 2nd applicant as Director of O B M was not questioned. It was only when the respondents attempted to take over O B M that they started calling Bruce Burke a foreigner. Annexture "J" shows clearly that all money came from U.S.A. through the Director. Thus the respondents' assertion that they do not know him is a falsity that should be interpreted adversely against its authors; the respondents .

It is contended for the respondonts that they were not given an opportunity to be heard. It is to be wondered what

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opportunity they could be given by a body they did not recognise. Moreover nowhere do the respondents in papers make this assertion or complaint. This constitutes an unsubstantiated submission. The evidence before me shows that the 2nd applicant on page 6 para. 8.3 states that the respondents were invited to a conference of O B M in January 1989 but they failed to attend. In response thereto the 1st respondent on page 50 stated

> "Contents of this paragraph are admitted; second applicant had no legal authority to hold a conference."

The 2nd respondent does not dissociate himself from the 1st respondent's attitude in this regard. So clearly they denied themselves the opportunity to be heard with their eyes open and of set purpose. Their contention being that they could not be heard by a body whose authority they did not recognise.

It was contended for respondents that there is dispute of fact. But at p. 49 para. 7 their attorney does not deny that in response to information required of him by the other side he portrayed the respondents' attitude as being that they were never accountable to the 2nd applicant

> "who since 1987 appeared to be imposing himself as Director trying to take over the administration of the 1st applicant ....."

It is significant that in their deliberate misconception of 2nd applicant's functions the respondents seek to read into the 2nd applicant's discharge of his functions as Director something different interpreted by them as imposing himself as Director trying to take over the administration.

Much store was laid on respondents' behalf by the fact that the Constitution says it is imperative that the indigenous must be used as "foreigners cannot effectively evangelize the populace." For this attitude the constitution relies on Paul's missionary activity which is said to have been five fold. One of this being to establish

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local congregations. The submission in this regard seems to ignore the fact that local congregations are to be established in an orderly fashion and not by usurpation of the still existent authority. Moreover nowhere is it suggested in this constitution that refers to Paul that he at any stage countenanced usurpation of church authority by local congregations. Furthermore the constitution does not say foreigners should not envangelise the populace, it only says they cannot effectively do so. Thus reference on page 14 to these factors is merely an indication of how the missionary business is to be run in order to be "aggressive" and ultimately made effective. To suggest that it is wrong for the mission to be run by foreigners and that it is therefore right to forcefully topple the properly constituted authority of the church is not only wrong in principle but disastrous in consequence.

It was contended for the respondents that G H Q is to be in Lesotho. The constitution does not specify where the G H Q is to be in Lesotho. The respondents registered it in Lesotho knowing that the G H Q is in the U S A. Thus they cannot be heard to say that they are correct in seeking to rely on their own fault.

In very brief but relevant heads of arguments it was contended for the applicants that rules governing application proceedings show that affidavits constitute not only evidence but also pleadings; therefore answering affidavits should contain what would be set out in a Plea plus evidence that would have been led in court. See Herbstein and van Winsen - Civil Practice of the Superior Courts in S.A. 3rd Ed. at p.79. Also Hart vs Pinetown Drive-In-Cinema (Pty) Ltd 1972(1) SA 464 at 469.

As so very often stated the parties stand or fall by what is contained in their affidavits. See Herbstein et al at pp 80-81 - where there is dispute of fact which had been forseen the Court in its discretion may dismiss the application. See Rule 18(14) of the High Court Rules 1980.

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The rules of Court and indeed the practice itself reprobate misuse of answering affidavits if employed to defeat application proceedings. Thus the words of Murray A.J.P. in Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions 1949(3) SA 1155 at 1165 are appropriate that

> ".....; A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by way of motion proceedings in appropriate cases".

Thus the court has to ascertain -

(a) "Whether denials are not fictitious; intented merely to delay the hearing ....."

(b) "Respondent's affidavit must at least disclose that there are material issues in which there is a bona fide dispute of fact".

(c) "The right to make tactical denials to force the opponent into the witness box..... must perforce yield to the applicant's right to the more expeditious and less expensive method of enforcing a claim by motion".

(d) "Once the absence of such dispute of fact is apparent applicant is entitled to have his relief given to him speedily and cheaply on affidavits .....".

It stands to reason that any disagreement with the applicant that is disclosed in the replying affidavit is not enough.

As was stated in Engar & Ors vs Omar Salem Essa Trust 1970(1) SA 77 at 83 "The Court must not permit simple and blatant stratagems of denial to circumvent its effective functioning". The same case is authority for the view that "If a statement constituting a denial is an inference from facts, the affidavit in question must disclose facts supporting the inference". See page 83 F.

In Mashoane vs Mashoane 1962(2) SA 684 at 685 it is stated that

> "It may assist the Court to decide whether or not it can be said on the papers as a whole that the denial in question, which constitutes the conflict is mala fide or unsupportable in all the circumstances disclosed by the papers".

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I have come to the conclusion that this is a case richly deserving of speedy and cheap disposal by virtue of total absence of what one might call serious dispute of fact.

The rule is confirmed with costs and the respondents' contentions dismissed as totally lacking in substance.

J U D G E

11th January, 1991

For Applicants : Mr. Maqutu

For Respondents : Mr. Matete