

CIV/APN/141/91

IN THE HIGH COURT OF LESOTHO

In the Application of:

LESOTHO EVANGELICAL CHURCH Appellant

and

REV. PHINNIAS LEHLOHONOLO PITSO Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 4th day of August, 1994.

This case has been remitted to the High Court, by the Court of Appeal, for oral evidence on specified issues.

It is common cause that the Respondent, who is a pastor at Teyateyaneng parish of the appellant church, was, on 12th February, 1991, disciplinarily charged

and convicted, before the Executive Committee of contravening sections 110(b), 189 and 202 of the Constitution of the appellant church, it being alleged that on 30th December, 1990 and at Teyateyaneng parish, he baptized seven children and one child, and confirmed one adult, all belonging to Masoeling outstation of Malimong parish. The following sentence was imposed:

"(i) You are expelled from work as a Reverend of the Lesotho Evangelical Church. You are deprived of being a Reverend of this church of Lesotho Evangelical from the time you receive this notice.

(ii) You will vacate the Reverend's House at Teyateyaneng on Thursday the 14th February, 1991 before 5 p.m.

(iii) Hand over the property of the church to the Chairman of the Presbytery immediately when you receive this notice.

Peace."

The Respondent was unhappy with the decision. He appealed to the Seboka which, however, dismissed the appeal. The Respondent was again dissatisfied with the decision of the Seboka. He approached the High Court for review of which the grounds were that:

- (i) The Seboka had upheld the decision of the Executive committee without considering in depth the reasons he had advanced which reasons showed clearly that the committee of the Seboka had contravened the principles of natural justice;
- (ii) Some of the members who had presided during the initial hearing before the Committee had also presided over the appeal, thus contravening the rules of natural justice.
- (iii) The Respondent had committed no offence by baptizing and confirming the people referred to in the charge against him.

It may be mentioned that the review proceedings

which the Respondent instituted before the High Court were in the form of an urgent application for a Rule Nisi which was granted on 21st May, 1991. Confirmation of the rule was, however opposed by the appellant church which, at the same time, filed with the Registrar of the High Court a counter-application in which the court was moved for an order, inter alia, evicting the Respondent from the church premises at Teyateyaneng parish and interdicting him from carrying out any functions as a pastor in the Lesotho Evangelical church pending the finalisation of the urgent application or review.

The matter was dealt with by Cullinan, C.J. who confirmed the rule and dismissed the counter-application. Against that decision, the Respondent lodged an appeal, on a long list of grounds which could, however, be summed up in that the learned Chief Justice had misdirected himself on a number of points and his decision was, therefore, bad in law.

In dealing with the appeal, the Court of Appeal found, as regards the first ground for review, that the reasons advanced by the Respondent in the disciplinary case were duly considered by both the Executive Committee and the Seboka. The Respondent's contention that in upholding the decision of the Executive Committee, the Seboka did not take into

account that the committee had, in breach of the principles of natural justice, failed to give due consideration to the reasons advanced by the Respondent had, therefore, no basis.

As regards the second ground for review, it was not really disputed that the following were among the members of the Seboka when that body heard the appeal of the Respondent: Simon Mphahama, Ts'eliso Mabote, Masitha Tente, Mojela Mojela, Mantuntle, Rev. Mosiuoa, Rev. Moseme, Rev. Seibolla and Rev. Thebe. It was contented, however, that they had an interest in the appeal inasmuch as they were among the members of the Executive committee which initially presided over the disciplinary case against the Respondent and their own decision was, therefore, in issue.

The Court of Appeal made a distinction between two phases of the appeal: firstly when the appeal was being discussed before the Seboka and secondly when the Seboka was determining the appeal or returning its verdict.

In the circumstances of this case, the court found that there was nothing wrong in the people who were among the members of the Executive committee which initially presided over the disciplinary case against the Respondent participating in the first

phase viz. the discussion of the appeal. It would, however, be a breach of the rules of natural justice and, therefore, an irregularity, prejudicial to the case of the Respondent, for the Executive Committee members who had presided over the disciplinary case to participate in the second phase viz. the determination of the appeal or the return of the verdict. On the papers placed before it, the court of appeal was, however, unable to find, on a balance of probabilities, that the above-named members of the Seboka had participated in the second phase of the appeal.

Turning now to the third ground for review viz. that the Respondent had committed no offence by baptizing and confirming the people from Masoeling outstation of Malimong parish, it was common cause that on 13th December, 1990 a letter purportedly from Masoeling outstation was addressed to the consistory of Teyateyaneng parish. In that letter the Masoeling outstation was requesting the consistory of Teyateyaneng parish to assist in the administration of the sacraments of baptism and holy communion to some members of her congregation. On 20th December, 1990, the Consistory of Teyateyaneng parish replied and acceded to the request on condition that the outstation of Masoeling would prepare, examine and select the members of her congregation who wished to

receive the sacraments. Indeed the Respondent subsequently administered the sacraments to some members from the congregation of Masoeling outstation as requested and approved by the outstation and the consistory (of Teyateyaneng parish), respectively.

The court was referred to sections 110(b) and 202 of the Constitution of the Appellant church.

The sections read:

"110. The consistory advises the minister on church matters. particularly on the following:

(a)

(b) To arrange baptismal and other church feasts, to choose those to be baptized or those to be allowed to partake of holy communion.

202. No minister may baptize, administer sacraments or perform any other duties within the parish of another minister except with the express permission of

that other minister."

In terms of the provisions of the above cited section 110(b) of the constitution of the appellant church, normally the consistory should have advised the minister/pastor at Malimong parish to administer sacraments to members of the congregation of its Masoeling outstation. On the facts disclosed by affidavits, there was, however, no clear indication that there was at the material time, a pastor stationed at Malimong parish. In the absent of a pastor the consistory of Malimong had, therefore, no one in that parish to advise. The question that then arose was what was expected of the Respondent regarding the request from the people of Masoeling outstation. In the opinion of the court that question seemed to have been completely overlooked by the Seboka and its Executive Committee.

It was common cause that the sentence imposed by the Executive Committee and upheld on appeal, by the Seboka, had not been challenged on review. The sentence was, however, considered by the High Court mero motu on the ground that it was too severe. The Court of Appeal accepted the appellant's contention that the Seboka was entitled to consider the question of sentence before the High Court could properly raise, or deal with, it mero motu. In the premises,

the court took the view that the interests of justice would best be served if the matter were remitted to the High Court to hear evidence as the parties might choose to lead on:

(a) the role played by the following persons in arriving at the verdict of both the Executive Committee and the Seboka: Simon Mphahama, Rev. Mosiuoa, Ts'eliso Mabote, Rev. Thebe, Masitha Tente, Rev. Sibolla, Rev. Mōseme, Mantuntle and Mojela Mojela;

(b) the situation that existed, at the time, at Malimong regarding the presence or otherwise of a Minister there. If there was no minister, the arrangements, if any, that were made in that parish for examination of persons in Masoeling wishing to be baptized, the choosing of those qualified for baptism and the carrying out of baptismal ceremony;

(c) any matters of fact or law which

the parties might, in the circumstances wish to place before the court regarding the sentence.

Accordingly, the court of Appeal ordered as follows:

- "1. The order made by the court a quo including the order for costs is set aside.
2. The matter is referred for the hearing of oral evidence before the court a quo at a time to be arranged with the Registrar on issues set out in (a) (b) and (c) above.
3. The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in para. 4 hereof.
4. Save in the case of the deponents to the affidavits presently before us neither party shall be

entitled to call witnesses
unless:

- (a) it has served on the other party at least 14 days before the date appointed for the hearing (in the case of witnesses to be called by the appellant) and at least 10 days before such date (in the case of a witness to be called by the respondent) a statement wherein the evidence to be given in chief by such person is set out; or
 - (b) the court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his or her evidence.
5. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.
6. The fact that a party has served

a statement in terms of para 4 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

7. Within 21 days of the making of this order, each of the parties shall make discovery on oath, of all documents relating to the issues referred to in paragraph 1 hereof. (which are or have at any time been in possession or under the control of such party) Such discovery shall be made in accordance with the rules of court and the provisions of that rule within regard to the inspection and production of documents discovered shall be operative.

8. The incidence of the costs incurred in the application as well as in this appeal shall be costs in the cause."

When the matter subsequently came before him for

oral evidence on the specified issues an application for Cullinan C.J. to recuse himself was made. He granted the application and accordingly recused himself. The matter was reallocated to me.

The case for the Respondent was that the members of the Executive Committee who had initially heard the disciplinary case against him were among the members of the Seboka who presided over the appeal; there was, at the material time, neither a pastor stationed at Malimong parish nor any arrangements made in that parish for examination of persons wishing to be baptized, the choosing of those qualified for baptism, the carrying out of baptismal ceremony, etc. at Masoeling outstation, and in passing out the sentence meted out to the Respondent, the Seboka and its committee did not properly apply their minds to the provisions of the constitution. That was denied by the appellant.

The following witnesses were called to give oral evidence in support of the case for the Respondent: Rev Mandoro, Rev. Morojele, Nkau Nkuebe, Moeketse Malebo and Rev. Pitso (the Respondent himself). On behalf of the Appellant Church, Rev. Moreke, Rev. Thebe, Abia Moletsane and Simon Mphahama testified on oath.

It is common cause from the evidence that prior to 1981 Malimong and Masoeling were the outstations of Cana parish of the Appellant Church. In 1981 Malimong was elevated to the status of a parish with Masoeling becoming one of its outstations. In 1983 the outstation of Masoeling requested to be reverted from Malimong to Cana parish. The request was, however, turned down.

According to Lepati Ntsihlele, he and a certain Simon Masiu delivered the letter, by which Masoeling outstation was requesting to be reverted to Cana, to Simon Mphahama, the caretaker at Malimong parish. In reply to the letter, Simon Mphahama said he would never accede to the request that Masoeling should be returned to Cana parish. The outstation of Masoeling then wrote another letter to the Presbytery of Thaba-Bosiu again requesting to be reverted from Malimong to Cana parish. The Presbytery ordered Malimong parish to convene a meeting of the consistory to address the problem. The meeting was accordingly held on 1st September, 1984.

There was then a pastor, viz. Rev. Polile, stationed at Malimong parish. He was, in fact, stationed there until 1988 when he was transferred to another parish leaving Malimong parish again without a resident pastor.

At the meeting of 1st September, 1984, Rev. Polile explained the purpose thereof. A certain Tente Masitha of Cana parish told the meeting that the congregation of Cana parish was not prepared to accept back the outstation of Masoeling because it had been taken away by the Seboka. He was supported in that regard by Rev. Tseka also of Cana parish. Simon Mphahama then told the meeting that the people of Masoeling outstation who wanted to be returned to Cana parish would be regarded as hedens and could go and establish their own church in the mountains.

For fear of being labelled hedens some people of Masoeling congregation decided to remain loyal to Malimong parish. Others did not and decided to hold their church services at Masoeling outstation rather than go to Malimong parish. There was, therefore, a split in the congregation of Masoeling outstation.

In his testimony, Nts'ihlele told the court that the group that had decided to hold church services at Masoeling outstation appointed him as their leader and/or Evangelist. On behalf of his group, he requested Rev. Polile and Rev. Tseka of Malimong and Cana parishes, respectively, to come and administer sacraments at Masoeling outstation but all in vain. Rev. Polile's excuse was that he was aware that there was, at Masoeling outstation, a confusion with which

he did not want to associate himself. Rev. Tseka said to accede to the request would amount to interfering with the affairs of Malimong parish under whose jurisdiction the outstation of Masoeling was. The Seboka was also approached with a request to help but could not be of assistance.

Eventually Ntsihlele and his group approached the Government. They addressed exhibit "A", a letter of 29th January, 1989, to the Ministry of Interior, Chieftainship and Rural Development (now Home Affairs) requesting the latter to intervene by reverting the outstation of Masoeling from Malimong to Cana parish. The Ministry discussed the issue with the Seboka and decided to accede to the request. On behalf of the Ministry, Nkau Nkuebe communicated the decision to Seboka per exhibit "B", a letter of 18th December, 1989. This was confirmed by Nkau Nkuebe, who, notwithstanding the fact that he had not filed a statement, was by agreement of both counsels allowed to testify in this case. The Seboka took the view that the question of whether or not the outstation of Masoeling should be reverted from Malimong to Cana parish was a church matter in which the Government or the Ministry of Home Affairs had no right of intervention. The Seboka, therefore, repudiated the decision of the Ministry of Home Affairs.

In the contention of Ntsihlele, his congregation at Masoeling outstation had been neglected from 1984 by the Seboka, Cana and Malimong parishes. Consequently he requested the assistance of Teyateyaneng parish which acceded to the request on conditions that Masoeling outstation would prepare, examine and select those who qualified to receive the sacraments of baptism, confirmation, etc. The Respondent, who was, at all material times, the pastor at Teyateyaneng parish, had been rendering assistance to Masoeling outstation under those conditions from 1986 up to 1990 when he was disciplinarily charged and convicted before the committee of the Seboka as aforesaid.

It is significant that in his own mouth Ntsihlele testified that the group of the congregation of Masoeling outstation that refused to be governed by Malimong parish had appointed him the leader and/or Evangelist. It was in his capacity as the Evangelist that Nts'ihlele approached the consistory of Teyateyaneng parish for assistance in the administration of sacraments to some people from Masoeling outstation. S. 165 of the constitution of the appellant church clearly provided, in part:

"165. The Evangelist ... is
placed by the Parish

pastor and the
consistory who look
after him as required
by the rules of the
church."

(my underlinings)

I have underscored the words "is placed by the Parish pastor and the consistory" in the above cited S.165 to indicate my view that Ntsihlele who was admittedly appointed by only a section of the congregation of Masoeling outstation, and not by the Pastor and the consistory of Malimong parish, was not validly appointed the Evangelist under the constitution of the Appellant Church. Assuming for the sake of argument that an Evangelist was empowered to seek the assistance that he sought from the Consistory of Teyateyaneng parish, Ntsihlele was not so empowered for the simple reason that he was not a validly appointed Evangelist.

The evidence of Nts'ihlele was corroborated, in material respects, by Ernestina Ntsapi, a member of his group of Masoeling congregation. She, however, told the court that in 1986/7 when the Respondent started rendering assistance to some people from Masoeling congregation Rev. Polile, the pastor at Malimong parish, used to make periodical visits to

Masoeling and hold church services for the group that had remained loyal to his parish. The church services were held at a rondavel belonging to a certain Mphunyetsane in the village of Ha Mphunyetsane at Masoeling.

According to Ernestina Ntsapi, Malimong parish still arranged church services for her loyalists who held prayer meetings at the rondavel of Mphunyetsane and the last such services were held on 16th August, 1992.

Rev. Pitso, the Respondent, testified on oath and confirmed the evidence of Ntsihlele. It may, however, be pointed out that although he initially testified that the reason why his parish of Teyateyaneng was approached with the request to administer sacraments to people from Masoeling outstation was the absence of a pastor at Malimong parish under whose jurisdiction the outstation admittedly fell, the Respondent later changed and conceded that there was in fact, a pastor, namely Rev. Polile, stationed at Malimong parish until 1988 when he was transferred from that parish. In 1990 when he admittedly baptized and confirmed people from Masoeling outstation as alleged in the disciplinary charge against him, there was, therefore, no resident pastor at Malimong parish and the people to whom he administered the sacraments were neglected.

Regarding participation in the hearing of the appeal by the Executive Committee members who had initially heard his disciplinary case, the Respondent told the court that he was present when the Seboka heard the appeal on 27th and 28th April, 1991. There was a time when he and the members of the Executive Committee were asked to leave the room in which the appeal was being heard so that the Seboka might take its decision. He and some of the members of the Executive Committee complied. He, however, noticed that the following members of the Executive Committee did not: Rev. Thebe, Messrs. Ntsaba and Mantuntle.

According to the Respondent, Rev. Thebe was the Executive Secretary of the church and in that capacity had the right to attend the meetings of both the Seboka and the Executive Committee. He had, however, no voting right in the meetings. The Respondent would not dispute it, therefore, if it were said Rev. Thebe did not vote when the Seboka took its decision on the appeal. Messrs. Ntsaba and Mantuntle were the Secretary and the Deputy Secretary, respectively, of both the Seboka and the Executive Committee. They were, as such, voting members of the two bodies.

It is clear from his evidence that, at the time the Seboka took the decision on the appeal, the Respondent had gone out of the room in which the

appeal was being heard. Assuming the correctness of his evidence that when the other members of the Executive Committee left the room, Ntsaba and Mantuntle remained behind, the Respondent is not, therefore, in a position to say with any degree of certainty that they participated in the decision over the appeal.

The evidence of Rev. Mandoro was that he was a member of the Seboka. He was present when the Seboka heard the appeal of the respondent on 27th and 28th of April, 1991. He confirmed the evidence of the Respondent that at one stage during the hearing of the appeal those members of the Seboka who were also members of the Executive Committee were required to leave the room in which the appeal was being heard. Some members of the Executive Committee did leave the room as required. Others did not. They were Ntsaba, Mantuntle and Rev. Thebe. Ntsaba and Mantuntle remained taking the minutes as the Secretary and the Deputy Secretary, respectively, of the Seboka. Rev. Thebe remained behind because he was the Executive Secretary of the church.

According to the witness, Ntsaba and Mantuntle did vote in the appeal of the Respondent. Although a non-voting member of the Seboka Rev. Thebe did

participate in the deliberations over the appeal (whatever that means).

The evidence of Rev. Morojele, another member of the Seboka who participated in the hearing of the appeal on 27th and 28th April, 1991, corroborated, in all material respects, that of Rev. Mandoro. Rev. Morojele did not, however, personally notice Nts'aba and Mantuntle actually voting.

In his testimony, Moeketse Malebo told the court that he was a member of the Seboka. He was present when the Seboka heard the appeal of the Respondent. He was, in fact, seated close to Nts'aba and Mantuntle who were taking the minutes of the Seboka.

There was a time when those members of the Seboka who were also members of the Executive Committee were required to leave the room in which the appeal was being heard. Rev. Mosiuoa, a reserve member of the Executive Committee, was reluctant to leave and had to be physically forced out. Some members of the Executive Committee, viz. Nts'aba, Mantuntle and Matee who had complied with the request to leave the room in which the appeal was being heard so that the Seboka might take its decision later returned into the room. Although the decision on the appeal had not been taken as yet, nobody objected to their return into the room.

When the Seboka voted on the appeal, Nts'aba, Mantuntle and Matee were, therefore, present. The witness was, however, not positive whether or not they actually voted on the appeal.

According to Moeketse Malebo, the decision on the appeal of the Respondent was taken by voting which was by show of hand i.e. not by secret ballot. He no longer remembered who counted the votes and would not, therefore, dispute it if it were said Rev. Moreke did.

It is worth noting that in their evidence Rev. Pitso, Rev. Mandoro and Rev. Morojele testified that at the time members of the Executive Committee were required to leave the room in which the appeal was being heard so that the Seboka might take the decision on the appeal, Nts'aba and Mantuntle did not do so. That was, however, denied by Malebo according to whom Nts'aba and Mantuntle did leave, but later returned into the room before the decision on the appeal could be taken. Again Malebo testified that Matee was another of the members of the Executive Committee who left, but later returned into, the room in which the appeal was being heard, a fact which was, however, not mentioned at all by Rev. Pitso, Rev. Mandoro and Rev. Morojele. In my view, Malebo might have been exaggerating in his evidence which, for that reason, ought to be approached with caution.

On behalf of the Appellant Church, Simon Mphahama testified that in 1981 he was a member of the church council of Malimong outstation of Cana parish, the consistory of Cana parish, the Presbytery of Thaba-Bosiu and the Seboka. He confirmed that during the same year, 1981, the church council of Malimong outstation applied, to the consistory of Cana parish, that the outstation be elevated to the status of a parish. The consistory approved the application and accordingly made a recommendation to the Presbytery of Thaba-Bosiu. The Presbytery accepted and referred the recommendation to the Executive Committee of the Seboka. Likewise the Executive Committee approved the recommendation which was submitted to the Seboka.

At its meeting of the 26th April, 1981 the Seboka finally decided that the outstation of Malimong be elevated to the status of a parish with Masoeling becoming one of its outstations. The new parish was formally inaugurated during December of the same year, 1981. Simon Mphahama was in the group that formed the first consistory of Malimong parish.

There was, however, no pastor, stationed at the new parish and the consistory had to ask pastors from neighbouring parishes to come and administer sacraments to the congregation of Malimong parish and her outstations which included Masoeling. He

confirmed the evidence that in 1984, a group of the congregation of Masoeling outstation approached the parish of Malimong with an application that the outstation be reverted to Cana parish. According to Simon Mphahama, the application was unprocedurally made inasmuch as it was directed to the parish of Malimong and not the consistory thereof. It was turned down.

The matter did not, however, lay to rest for the group continued, outside the church regulations and procedures, to demand that Masoeling outstation be reverted to Cana parish. In his evidence, Simon Mphahama told the court that in 1986 the Presbytery convened a meeting at Masoeling outstation to resolve the problem. The application to revert Masoeling outstation from Malimong to Cana parish was discussed and turned down, again on the ground that the proper procedures had not been followed. He denied, however, the evidence of Nts'ihlele and Ernestina Ntsapi that he told the meeting that the people of Masoeling who wanted to be returned to Cana parish would be regarded as hedens and could go and establish their own church in the mountains. On the intervention of the Government, the Seboka also considered and dismissed the question of reverting Masoeling outstation from Malimong to Cana parish.

According to Simon Mphahama, the first resident pastor to be stationed at the new parish of Malimong in 1982 was Rev. Buti. He was, however transferred from that parish in 1983. There was consequently no resident pastor at Malimong parish until 1985 when Rev. Polile was stationed there. Rev. Polile was transferred from Malimong parish in 1988. When in 1990 the Respondent baptized and confirmed some people from Masoeling outstation, as alleged in the disciplinary charge, there was, therefore, no resident pastor at Malimong parish.

Simon Mphahama confirmed the evidence of Ernestina Ntsapi that during his time at Malimong Rev. Polile used to go and hold church services at Masoeling outstation. He, however, told the court that following the split in the congregation of Masoeling outstation, there existed two factions viz. the faction that refused to be governed by Malimong parish and insisted on Masoeling outstation being reverted to Cana parish and the faction that remained loyal to Malimong parish. The two factions could not work together in harmony. To avoid bloodshed, the faction that remained loyal to Malimong parish decided to hold its prayer meetings at the rondavel of Mphunyetsane. The faction that refused to be governed by Malimong parish and insisted on Masoeling outstation being reverted to Cana parish

held its prayer meetings at the church site of Masoeling outstation. Whenever he visited Masoeling outstation Rev. Polile conducted church services at the rondavel of Mphunyetsane. According to Simon Mphahama the church services were open to all the people of Masoeling who wished to attend. He told the court that Masoeling Evangelist, appointed in accordance with the provisions of the constitution of the Appellant Church, was Mafaesa and not Nts'ihlele. The normal practice for the people of Masoeling wishing to be baptized or confirmed was to give their names to Mafaesa, the Evangelist, who would in turn submit them to the consistory of Malimong parish. The consistory itself would then make suitable arrangements for such people to be examined and selected for baptism or confirmation. After examining them and selecting those who qualified the consistory accordingly advised the pastor to administer the sacraments.

In the absence of a resident pastor he (Simon Mphahama) was the caretaker at Malimong parish. Whenever the need arose the consistory and he, as the caretaker, had always invited and accordingly advised a pastor from neighbouring parishes to administer the sacraments of baptism and confirmation to the people of Malimong parish and her outstations (including Masoeling) after they had examined such people and

selected those who qualified. He denied, therefore, the evidence that the people of Masoeling outstation were, at any time, neglected by the parish of Malimong.

According to Simon Mphahama, in 1991 when the disciplinary case against the Respondent was heard by the Executive Committee, he was not a member thereof. He was appointed a member of the Executive Committee only in 1993. Apart from testifying as a witness, he was not, therefore, involved in the hearing of that case. When in 1991, the appeal of the Respondent was heard by the Seboka, he was already a member thereof. He did participate in the hearing of the Appeal. He confirmed that before the Seboka could take a decision on the appeal, members of the Executive Committee were ordered out of the room in which the appeal was being heard. They did comply with the order. Amongst the people who went out of the room were : Rev. Mosiuoa, Rev. Sibolla, Rev. Moseme, Tseliso Mabote, Masitha Tente, Mantuntle, Mojela and the Respondent himself. Although not a member of the Executive Committee, he too was ordered to leave the room in which the appeal was being heard. He complied. He and the members of the Executive Committee, together with the Respondent, were called back into the room in which the appeal was being heard when the decision was to be announced by the Seboka. Simon Mphahama denied, therefore, the

evidence that some members of the executive Committee, in particular Rev. Mosiuoa, Rev. Sibolla, Rev. Moseme, Tseliso Mabote, Masitha Tente Mantuntle and Mojela, did not leave the room in which the appeal was being heard when they were asked to do so. He conceded, however, that at the time the members of the Executive Committee were asked to leave the room Rev. Thebe did not go out. He told the court that Rev. Thebe was the Executive Secretary of the church. In that capacity he attended all the meetings of both the Seboka and the Executive Committee. He had, however, no voting right in the meetings of the two bodies.

Abia Moletsane testified that he was a school teacher and a member of the Seboka. He was present when the Seboka heard the appeal of the Respondent in April, 1991. He confirmed the evidence that during the hearing of the appeal there was a stage when members of the Executive Committee were required to leave so that the Seboka might take its decision on the appeal. All the members of the Executive Committee, including the official Secretaries of the Seboka viz. Nts'aba and Mantuntle, who were also members of the Executive Committee, did leave the room in which the appeal was being heard. He was then requested to take down the minutes of the Seboka and he complied with the request.

According to Moletsane, only the official Secretaries were permitted to write in the minutes book of the Seboka. During the absence of the official Secretaries, he noted down the minutes on a loose piece of paper. He later handed the paper to Nts'aba so that he, as the official Secretary of the Seboka, might transfer the minutes therein noted to the minutes book in his own handwriting. Although recorded by him on a loose piece of paper the decision of the Seboka on pages 79 et seq. of the High Court record, which is an extract from the minutes book of the Seboka, was, therefore, not in his handwriting but that of Nts'aba, the official Secretary of the Seboka.

Rev. Moreke, another member of the Seboka told the court that he too was present when the appeal of the Respondent was heard in April, 1991. During the hearing of the appeal there was a time when members of the Executive Committee and Simon Mphahama were asked to leave the room in which the appeal was being heard so that the Seboka might take a decision on the appeal. They complied. Rev. Moreke denied, therefore, the evidence that at the time Simon Mphahama and members of the Executive committee were asked to leave the room in which the appeal was being heard any of the members remained behind.

In the absence of Nts'aba and Mantuntle who were

members of the Executive Committee and the official secretaries of the Seboka, Moletsane recorded the minutes at the request of the Seboka. The Seboka unanimously confirmed the conviction of the Respondent by the Executive Committee and accordingly dismissed the appeal. There was, however, several proposals regarding appropriate sentence to be meted out to the Respondent. A vote had, therefore, to be taken on the sentence.

According to Rev. Moreke, he was the one who counted the votes. He was positive, therefore, that voting was by secret ballot and not by show of hands as suggested by Malebo. The ballot papers were, however, destroyed immediately after the voting had been completed.

Rev. Thebe confirmed the evidence that he was the Executive Secretary of the Appellant Church since April, 1989. He was not, however, a member of either the Seboka or the Executive Committee. He denied, therefore, the Respondent's testimony that he was a member of the Executive Committee.

In his capacity as the Executive Secretary of the church, Rev. Thebe attended the meetings of both the Seboka and the Executive Committee. He, however, had no right to vote in the meetings of the two bodies.

The purpose for his attendance of the meetings of the Seboka and the Executive Committee was merely to interpret the law, should the need arise, and note the decisions which he would have to execute.

In his testimony, Rev. Thebe told the court that he was present when the disciplinary case against, and the appeal of, the Respondent were heard by the Executive Committee and the Seboka, respectively. He did not, however, participate in the hearings. He was just sitting and watching the proceedings. He had, therefore, a good opportunity to observe the events in the disciplinary and the appeal proceedings. He did observe that Simon Mphahama was not amongst the Executive Committee members who presided over the disciplinary case against the Respondent.

As the leader of the Presbytery of Berea, under whose jurisdiction the parishes of Malimong and Teyateyaneng fell, Rev. Mosiuoa also did not participate in the hearing of the disciplinary case against the Respondent. He was merely sitting in the meeting of the Executive Committee as an observer like him (Rev. Thebe).

Rev. Thebe confirmed the evidence that at the time the members of the Executive Committee were requested to leave the room in which the appeal was

being heard so that the Seboka might take its decision on the appeal, he did not go out. He remained in the room and observed what was taking place. He was, therefore, in a good position to see that amongst the members of the Executive Committee who left the room as requested were: Rev. Sibolla, Rev. Moseme, Tseliso Mabote, Masitha Tente, Mantuntle and Mojela. Although somewhat reluctantly Rev. Mosiuoa did go out after he had been ordered to do so. Simon Mphahama was also ordered to leave the room in which the appeal was being heard and he complied.

As it has already been stated, according to Rev. Thebe one of his main responsibilities as the Executive Secretary was to give authoritative interpretation of the law (constitution) governing the Appellant Church. In his interpretation of the constitution he told the court that the clergy and the ordinary christians who had committed wrongs were punished under the provisions of Chapters 16 and 20, respectively. The punishment meted out to the Respondent, who was admittedly a pastor and, therefore, a member of the Clergy, could not have been under the provisions of any chapter other than Chapter 16 of the Constitution. When the Executive Committee of the Seboka relieved him, as it did, of his priestly duties, the Respondent remained a member of the Appellant Church. If he asked for forgiveness

his priestly duties could be restored, and parish work assigned to the Respondent. He needed not to be reordained. The Respondent had, however, not approached the Executive Committee for forgiveness.

It is worth mentioning that there was evidence (by Rev. Moreke) to the effect that after it had unanimously upheld the conviction of the Respondent, the Seboka considered the question of sentence and there were three proposals including a reprimand which was a punishment clearly under S. 242 of chapter 20. Assuming the correctness of Rev. Thebe's evidence that only ordinary Christians and not members of the clergy were punished under the provisions of Chapter 20, it would appear that the Seboka incorrectly considered a reprimand as a possible punishment for the Respondent who was a member of the clergy.

Be that as it may, it is significant to observe that S.213 of the constitution provides:

"213. Any minister who has been relieved of his duties will not perform any duties pertaining to his ministry until these are restored to him by the committee of

the Seboka."

(My underlining)

I have underscored the words "until these are restored to him" in the above cited Section 213 of the Constitution to indicate my view that the provisions thereof support the evidence of Rev. Thebe that notwithstanding the fact that the Executive Committee had relieved the Respondent of his priestly duties, they could still be restored to him if he approached that body for forgiveness.

Considering the evidence as a whole, it is not really disputed that when in December, 1990, the Respondent baptized or administered sacraments to people from Masoeling outstation, as alleged in the disciplinary charge, there was no pastor stationed at Malimong parish. The question that arises for the determination of the court is whether or not any arrangements were made, in that parish for examination of persons in Masoeling wishing to be baptized, the choosing of those qualified for baptism and the carrying out of baptismal ceremony.

In the evidence of Nts'ihlele, no such arrangements were made as the people of Masoeling outstation were neglected by Malimong parish. His

evidence was, however, denied by Simon Mphahama, the caretaker of Malimong parish, who told the court that the names of Masoeling people wishing to be baptized or confirmed were normally submitted by the Evangelist (Mafaesa) to Malimong parish. The consistory of Malimong parish examined them and selected those who qualified. In the absence of a resident pastor, the consistory would then invite and accordingly advise a pastor from Neighbouring parishes to administer the sacraments to the people of Malimong parish and her outstations (including Masoeling). The evidence of Simon Mphahama that Malimong parish had always rendered church services to Masoeling people who chose to submit to her authority was corroborated by Ernestina Ntsapi who assured the court that, to her knowledge, the last of such services was rendered on 16th August, 1992.

I have already found that, in terms of the constitution of the Appellant church, Ntsihlele was never validly appointed the Evangelist of Masoeling outstation. Mafaesa was the person so appointed. Assuming the correctness of this finding, it is significant that there is no suggestion that any of the people of Masoeling to whom the Respondent administered the sacraments at his parish of Teyateyaneng in December, 1990, as alleged in the disciplinary charge, ever approached Mafaesa, the

Evangelist, with a request that, in accordance with the prevailing practice, their names be submitted to Malimong parish so that the consistory thereof might examine and select them for baptism and confirmation.

On the evidence, there is no doubt in my mind that in the absence of a resident pastor, proper arrangements were made by Malimong parish, for examination of persons in Masoeling wishing to be baptized, the choosing of those qualified for baptism and the carrying out of baptismal ceremony. The problem of the group of Masoeling congregation that went to Teyateyaneng parish to be baptized and/or confirmed by the Respondent was that it did not want to submit to the authority of, and the arrangements made by, Malimong parish regarding the administration of sacraments to the people of that parish and her outstations (including Masoeling). That being so, the group of the congregation of Masoeling outstation that approached the parish of Teyateyaneng for the administration of the sacraments could not be heard to say it did so because the outstation was, at the material time neglected by Malimong parish.

I shall now turn to the role played by the persons mentioned in the founding affidavit as having played a part in arriving at the verdicts of both the Executive committee and the Seboka, namely: Rev.

Mosiuoa, Rev. Thebe, Rev. Sibolla, Rev. Moseme, Simon Mphahama, Tseliso Mabote, Masitha Tente, Mojela Mojela and Mantuntle.

It is common cause from the evidence that with the exception of Simon Mphahama, Rev. Thebe and Rev. Mosiuoa, the abovementioned persons, as members of the Executive Committee, were amongst those who presided over the disciplinary case against the Respondent. They did, therefore, play a part in the verdict returned by the Executive Committee. The evidence of Simon Mphahama that at the time the disciplinary case against the Respondent was heard, he was not a member of the Executive Committee and only testified as a witness in that case was not challenged. It is clear from the evidence that Rev. Thebe was the Executive Secretary of the appellant church. His testimony that when the disciplinary case against the Respondent was heard he attended the meeting of the Executive Committee merely as an observer and did not play a part in the verdict returned by that body was likewise unchallenged. It is to be remembered that in his evidence Rev. Thebe told the court that as the leader of the Presbytery of Berea under whose jurisdiction the parishes of Malimong and Teyateyaneng fell, Rev. Mosiuoa also attended the meeting of the Executive Committee as an observer like him (Rev. Thebe). He was not, therefore, amongst the members of the

Executive committee who presided over the disciplinary case against the Respondent. The evidence of Rev. Thebe was not gainsaid in that regard.

In my view, it would be unreasonable to reject as false the unchallenged evidence that Simon Mphahama, Rev. Thebe and Rev. Mosiuoa were not amongst the Executive Committee members who presided over the disciplinary case against the Respondent and played no part, therefore, in the verdict returned by that body. I am prepared to accept it as the truth.

It is not really disputed, on the evidence, that the people who attended the meeting of the Seboka to hear the appeal of the Respondent in April 1991 included the persons mentioned in the founding affidavit viz. Rev. Mosiuoa, Rev. Thebe, Rev. Sibolla, Rev. Moseme, Simon Mphahama, Tseliso Mabote, Masitha Tente, Mojela Mojela and Mantuntle. As it has already been pointed out earlier, the Court of Appeal distinguished two phases in the hearing of the appeal of the Respondent by the Seboka. The first phase was when the Seboka discussed the appeal whilst the second phase was, when the Seboka took the decision, or returned the verdict, on the appeal. In the finding of the court there was nothing wrong or irregular in the members of the Executive Committee who had presided over the disciplinary case against the

Respondent participating in the first phase of the appeal. It would, however, be a breach of the rule of natural justice and, therefore, an irregularity for the members of the Executive Committee who had presided over the disciplinary case against the Respondent also to participate in the second phase of the appeal.

As it has been stated earlier, the Respondent and members of the Executive Committee were, at one stage during the hearing of the appeal, requested to leave the room in which the appeal was being heard so that the Seboka might take a decision on the appeal. According to him, the Respondent and some members of the Executive Committee did comply with the request. There were, however, other members of the Executive Committee who did not leave the room as requested. They were Rev. Thebe, Ntsaba and Mantuntle. The evidence of the Respondent that Rev. Thebe, Ntsaba and Mantuntle did not leave the room as requested was corroborated by Rev. Mandoro and Rev. Morojele. It was further corroborated by Malebo who in addition mentioned the name of Matee as being another of the members of the Executive Committee who did not comply with the request to leave the room in which the appeal was being heard so that the Seboka might take its decision on the appeal. By implication, it was, therefore, the Respondent's evidence that, with the

exception of Nts'aba, Mantuntle, Rev. Thebe and Matee, all the members of the Executive Committee did get out of the room in which the appeal was being heard, at the time they were required to leave in order that the Seboka might take the decision on the appeal. It is, however, significant to observe that Matee and Nts'aba were not included amongst the persons mentioned in the founding affidavit as having presided over both the disciplinary case against, and the appeal of, the Respondent. The Respondent's evidence to do so was clearly an attempt to augment his case as it proceeded along. That should not be permitted.

Be that as it may, the evidence of Malebo that Matee was another of the members of the Executive Committee who did not comply with the request to leave the room in which the appeal was being heard so that the Seboka might take the decision on the appeal was not supported by any of the witnesses for either the Respondent or the Appellant Church. He was in all probabilities, mistaken and I have no hesitation to reject his testimony in that regard, as being unreliable.

It was not disputed that as the Executive Secretary of the Appellant Church, Rev. Thebe attended the meetings of the Executive Committee and the Seboka. He, however, played no part in the decisions

of the two bodies. That being so, the case for the Respondent could not be advanced by the evidence that Rev. Thebe did not go out at the time the members of the Executive Committee were required to leave the room in which the appeal was being heard in order that the Seboka might take the decision on the appeal.

Rev. Thebe, Rev. Moreke, Abia Moletsane and Simon Mphahama, all of whom testified on behalf of the appellant church, denied the evidence of the Respondent, Rev. Mandoro, Rev. Morojele and Malebo that, at the time the members of the Executive Committee were asked to leave the room in which the Seboka was hearing the appeal, Nts'aba and Mantuntle did not go out. They were, in a way, supported in their denial by the record of the minutes - vide page 76 of the record of the Court of Appeal where the following is reflected in the minutes:

".... the chairman of the Seboka (Synod) Mr. Musa declared that evidence was closed and that the Synod (Seboka) should review the facts and agree on a finding. Rev. Pitso and all members of the Executive Committee were asked to recuse themselves and the deliberations were held in camera.

Around 4 a.m. the Synod instructed that

Rev. Pitso and the members of the Executive Committee should be summoned to an open meeting where they were told that the Synod (Seboka) had sifted carefully through the facts presented and decided to confirm the original verdict of the Executive Committee."

To my mind there can be no doubt whatsoever that the Seboka was alive to the fact that its determination of the Respondent's appeal involved the decision of the Executive Committee. The members of the Executive Committee, whose decision was in issue, should not, therefore, be present when the appeal was decided upon. In the circumstances, I consider it highly improbable that the Seboka could have allowed Nts'aba, Mantuntle and Matee, who were admittedly amongst the Executive Committee members who had presided over the disciplinary case against the Respondent, to remain in the room in which the appeal was being heard during the second phase of the appeal viz. when the decision was taken on the appeal.

On the evidence, I am convinced that of the persons mentioned in the founding affidavit, Simon Mphahama, Rev. Thebe and Rev. Mosiuoa were not amongst the Executive Committee members who presided over the disciplinary case against the Respondent. Simon

Mphahama only testified as a witness in that case. Both Rev. Thebe and Rev. Mosiuoa attended the proceedings merely as observers. Simon Mphahama, Rev. Thebe and Rev. Mosiuoa did not, therefore, play a part in the verdict returned by the Executive committee. The rest of the persons mentioned in the founding affidavit, namely, Rev. Moseme, Rev. Sibolla, Tseliso Mabote, Masitha Tente, Mojela Mojela and Mantuntle were, however, amongst the Executive Committee members who presided over the disciplinary case against the Respondent. They did, therefore, play a part in the verdict returned by the Executive Committee.

I am further convinced that all the persons mentioned in the founding affidavit were in the meeting of the Seboka when that body presided over the appeal of the Respondent during the first phase of the appeal viz. when the appeal was being discussed. However, Rev. Moseme, Rev. Sibolla, Tseliso Mabote, Masitha Tente, Mojela Mojela and Mantuntle who were admittedly amongst the Executive Committee members whose decision was in issue before the Seboka, left the room in which the appeal was being heard when the appeal entered the second phase viz. the determination thereof. They did not, therefore, play a part in the verdict returned by the Seboka.

As it has already been stated earlier, Simon Mphahama and Rev. Mosiuoa were not amongst the Executive Committee members who presided over the disciplinary case against the Respondent and, therefore, played no part in the verdict returned by the Executive Committee. However, when the Seboka entered the second phase of the appeal they admittedly complied with the order to leave the room in which the decision was to be taken on the appeal. They could not, therefore, have played a part in the verdict returned by the Seboka.

At the time the members of the Executive Committee were required to go out so that the Seboka might take the decision on the appeal, Rev. Thebe admittedly remained behind. It was, however, common cause that although he remained in the meeting when the Seboka was taking the decision on the appeal of the Respondent, Rev. Thebe did so as a mere observer who had no right to, and did not, vote. He did not, therefore, play a part in the verdict returned by the Seboka.

To sum up, there was, in my finding, no resident pastor stationed at the parish of Malimong when, in December, 1990, the Respondent baptized and confirmed people from Masoeling outstation. However, members of the congregation of Malimong parish and her

outstations (including Masoeling) wishing to be baptized and confirmed were free to submit their names to Malimong consistory which would examine them and select those who qualified. The consistory would then invite and advise a pastor from neighbouring parishes to administer the sacraments. There were, therefore, appropriate arrangements made by the parish of Malimong for examination of members of the congregation of that parish and her outstations (including Masoeling) wishing to be baptized, the choosing of those qualified for baptism and the carrying out of baptismal ceremony.

All the persons mentioned in the founding affidavit did not, in my view, participate in the second phase of the Respondent's appeal viz. the determination thereof. They did not, therefore, play a part in the verdict returned by the Seboka. With the exception of Simon Mphahama, Rev. Mosiuoa and Rev. Thebe, they were, however, amongst the Executive Committee members who presided over the disciplinary case against the Respondent and therefore, played a part in the verdict returned by the Executive committee. The Respondent's contention that the persons mentioned in the founding affidavit had, in breach of the principles of natural justice, played a role in the verdicts returned by the Executive Committee and the Seboka in the disciplinary case and

the appeal, respectively, could not be supported by evidence. It could not, therefore, be allowed to stand.

From the foregoing, it is obvious that the view I take is that the rule nisi ought to have been discharged and the counter application granted with costs. It is accordingly ordered. The appeal, therefore, succeeds with costs to the Appellant Church.

It has already been pointed out earlier, that the sentence meted out to the Respondent was not challenged on review. The High Court dealt with it mero motu on the ground that the sentence was too severe. The Court of Appeal accepted, however, the contention that before the High Court could properly deal with the sentence or its severity, as it did, the Seboka should have first been afforded the opportunity to consider that aspect of the case.

In his interpretation of the constitution, Rev. Thebe testified that the sentence imposed on him could be re-considered if and when the Respondent showed repentence and asked for forgiveness. The Respondent had not yet done that.

I can think of no good reason why the

interpretation of Rev. Thebe should be doubted in this regard. The case is accordingly remitted on the question of sentence to afford the Seboka the opportunity to re-consider the sentence or severity thereof if and when the Respondent asks for forgiveness.

B.K. MOLAI.

JUDGE.

4th August, 1994.

For Applicant : Mr Mphalane

For Respondent: Mr. Matsau.