CIV/APN/92/94

IN THE HIGH COURT OF LESOTHO

In the matter between :

LESOTHO METHODIST CHURCH — Applicant

and

REVEREND MATHEWS MOHALE — Respondent

RULING

Delivered by the Honourable Mr. Justice T. Monapathi on the 6th day of March 1995

This was an application filed on an urgent basis on the 28th March 1994. On the 29th March 1994 a rule nisi was issued calling upon the Respondent to show cause why the following orders shall not be confirmed, namely:

(a) That the Respondent shall not be directed to return the items listed in Annexure "A" attached to the Founding Affidavit.

(b) Declaring the Respondent's dismissal from the Applicant Church to have been lawfully made.

(c) That the Respondent be interdicted from continuing to function as a minister of religion of the Applicant Church and carrying out any ceremonial function of the church pending the finalization of this Application.

It was only on the 9th December 1994 that the Applicant filed a replying affidavit thus lending support to the view that the Application could no longer be regarded as an urgent one.

Not only have I agonized over that the application seemed to be incapable of resolution on the papers as they stood but this became abundantly clear throughout the Counsels' arguments. That is why at the end I made an order that the following matters be referred to trial on viva voce evidence. That is:

(a) The question whether the Applicant was enrolled as a Minister of the Applicant.

(b) Whether the Applicant was elected a Chairman of the Applicant.

(c) Whether the decision to dismiss the Applicant was taken by the appropriate body.

(d) Which is the rightful Committee of the Applicant Church.

It is often difficult to formulate with precision matters that are to be decided on trial flowing from apparent conflict or absence of clarity that is often revealed from the papers after high powered arguments such as this Court heard in the matter. I agree with Mr. Mda that some issues can often be resolved by resort to the provision of the governing constitution. But one must not lose sight of the fact that it may not be conducive to justice to look at the constitution without investigating the circumstances that led to resort to the provisions of the

Constitution. More often than not strict compliance with the Constitution is often regarded as mischievous, maverick or a form of obsessive politicizing with the Constitution. In other words strict compliance with the provisions of the Constitution has never been popular. One of the problems that Courts come into confrontation with is where power for taking certain actions are alleged to be derived from sections of the constitution which turn out to be wrong sections. Would a Court of law decide that the action itself was wrong without investigating the circumstances? Indeed at the end of the day it may be found that the question may have been resolved by resort to the Constitution. But this often becomes clear after investigation of all relevant circumstances.

Against the backcloth of problems that clearly stood in the way of resolution of the matter on affidavits and taking into account the problems that are attendant on the nature of application proceedings, such as this, it often ends up being a battle of wits from practitioners that takes the following form:

(a) Supplementing statements in affidavits by statements from the bar. This can be done so cleverly (mostly at replying stage) that the Court becomes unable to distinguish points of law or fact replied to or whether statements made from the bar can in fact be found in the papers.

(b) Introducing at replying stage completely new points that the other Counsel is taken off balance, is unable to reply adequately. Alternatively the matter goes to

and fro like a ping pong game it resulting in the Court coming in as if to defend or speak on behalf of the other party thus creating a wrong impression.

(c) A refusal to disclose information on important issues on the grounds that there are no instructions from clients. These are often crucial pieces of information that are often helpful to the Court towards a just decision.

These are the two ingenuous and outstanding examples of matters referred to in (c) above:-

"Court - Mr. Mosito, since this Respondent seems to have been assistant Minister and Vice-Chairman of the Church Counsel at one time and alleges to have been responsible for some church out posts, was he enrolled as an elder or Minister?

Mr. Mosito My Lord, that is the problem that we have spoken about in referring to clause 7 of the Constitution. That he must prove. We have no instructions. He was not ordained."

Another example

"Court - You may be right that a Minister may be enrolled and thereafter be possessed of no certificate for a number of reasons. You have heard Mr. Mosito's attitude about your client's ordination, minutes of such decision and the absence of a certificate. But does your client in fact have a certificate of ordination?

Mr. Mda My Lord I have no instruction on the issue, but this man was a minister as the record shows and I do not understand why now a certificate of ordination is sought now after a long time, the Respondent has been functioning as a Minister". In the result Counsels thus refuse to divulge important information.

Indeed there is a plethora of cases along the lines of Roomhire Co. (Pty) Ltd v Jeppe Street Mansion 1949(3) (T) 1155 about whether: (a) the Respondent has faithfully demonstrated genuine dispute of facts which are material and that absence of real averments as against bare denials upon which the Court urged by to find for Applicant. Again I was referred to Soffiantini vs Mould 1956 (4) EDL 150 which urged on "a robust approach" to the effect that: "the fact that it is difficult to decide the matter on affidavit is not a reason why the Court should shirk from deciding the matter". That what amounts to bare denials to Applicants allegation will not give rise to a real or genuine dispute of fact. That is how Mr. Mosito submitted. Mr. Mda sought to persuade me citing Tamarillo (Pty) Ltd vs BN Aitken 1982 (1) SA 398 (AD) that the Applicant assumed the risk of a likelihood of a dispute of facts arising and on that ground the application ought to be dismissed. I have understood that case to be authority for the proposition that, if notwithstanding that there are facts in dispute on the papers, the Court is satisfied that on the facts stated by the Respondent together with admitted

facts in the applicant's affidavits, the applicant is entitled to relief, it will make an order giving effect to such finding. This has also not been easy. But for the purpose of my ruling, that the matter be referred to trial as aforesaid, it was not even necessary that there should be a dispute of fact so long as it is a case that cannot otherwise be decided on affidavits. (See also Turnbull vs Vanzyl 1974 (1) SA 440 at 443). It means there are situations where there is no positive evidence (an affidavit) to contradict the evidence of the applicant but where there are substantial grounds for doubting the correctness of the statements. It can also be vice-versa. It is sometimes unsafe to adopt the robust approach. This is implicit the discretion given to the Court in terms of Rule 8(14) unless there are factors which show that such a cause is undesirable, improper or unjust.

I did not intend to decide anything even where one ought to have been guided solely by the provisions of the Constitution. Two examples would suffice. Which body dismisses a member and when is a member a Minister. This approach would lead to extreme injustice. This is more so I reiterate where the circumstances are not clear on affidavit. Much as I was persuaded that the dismissal of the Application entails serious consequences on the church, equally the declaration that the Respondent was lawfully dismissed also entails serious consequences on the status of the

Respondent and as a person. The Respondent on the clearest probability has regarded himself as a responsible functionary of the Applicant Church and clearly not just as an ordinary Church member. That is why a decision about his status needs careful consideration in order to arrive at what is right and avoid what is unreasonable, unfair and unjust.

T. MONAPATHI
JUDGE

For the Applicant : Mr. Mosito

For the Respondent : Mr. Mda