

IN THE HIGH COURT OF LESOTHO

In the matter between :

REV. FATHER GABRIEL JOSEPH KHANG

APPLICANT

and

BISHOP PHILLIP MOKUKU

RESPONDENT

JUDGMENT

For Applicant - Mr. Mafantiri

For Respondent : Mr. Phoofolo

Delivered by the Honourable Mr. Justice T. Monapathi
on the 14th day of February 2001

Applicant herein sought amongst others a discretionary remedy of review of the revocation of his licence as a priest. Although the issues in this matter ended up being considerably compressed to a few points of law, the Court thought that it would bring more insight if the history of the matter was dealt with more abundantly. A paramount consideration would have to be that most common law

remedies including declaration, review to set aside and correct are discretionary but:

“..... they may be withheld by the Court even if the substantive grounds for the grant of the remedy have been made out.” See L Baxter ADMINISTRATIVE LAW, p.712-713.

It means that an applicant’s case can succeed as to showing reviewability, standing and ground but still be refused relief sought. As learned authors H W R Wade and CF Forsyth say in ADMINISTRATIVE LAW (7th edition) said such remedies are:

“ discretionary and the Court may therefore withhold them if it thinks fit. In other words the Court may find some act to be unlawful but may nevertheless decline to intervene” p.718.

Applicant who had been a priest of the Second Respondent (Church) had had his licence revoked in 3rd March, 1988. Applicant was dissatisfied therewith. He said it was wrongful and unlawful, and it had been without a hearing. On the 15th April 1988 Applicant appealed to the Archbishop of the church who was then Reverend Desmond Tutu, who was sometimes in the past the predecessor in-title to the First Respondent (Diocesan Bishop of Lesotho).

It became common cause that the Applicant’s appeal was not prosecuted until the Archbishop replied the Respondent that the matter was being referred back to the diocesan bishop to state his side of the story. It would appear that nothing further was done by the diocesan bishop concerning this appeal. Then on the 7th May 1996 the Applicant launched this review proceed to this Court on notice of motion wherein he sought the following prayers:

- “1. Directing and calling upon the Respondent to show cause, if any, why:
 - (a) The proceedings if any, and the decision of the Respondents contained in the 1st Respondent’s letter of the 3rd March 1988

addressed to the Applicant revoking the latter's licence shall not be reviewed, corrected and set aside.

- (b) The Respondent shall not be ordered to review or issue Applicant with the necessary licence in order to perform his functions as a priest in the Diocese of Lesotho.
- (c) the Respondent shall not be directed to pay Applicant's salary at the rate of M447.02 per month with effect from June 1988 to date.
- (d) Applicant shall not be granted such further and or alternative relief as this Honourable Court may deem fit.
- (e) Respondents shall not be directed to pay the costs of this application."

As the Applicant said in his founding affidavit the revocation of his licence had flouted the principle of *audi alteram partem* in that he had not been given an opportunity to be heard. The letter of dismissal had been prepared by the First too significant paragraphs in which the First Respondent said:

" Dear Father

I discussed with you the word of God in the parish of Maseru East and as a result I asked you to transfer to the parish of Masapong you refused to accept such a transfer.

I asked you to meet with the Senate of the Diocese last Friday (February 26) but you did not avail yourself of that opportunity to be heard by the Senate.

Therefore, regretfully I have no other cause but to inform you in terms of canon 24, section 5, that your licence will be revoked upon expiration of three months from now that is on the 30th May 1988.

Further I ask you not to preach administer sacrament or engaging any other pastoral activity in the parish of Maseru East or in the diocese from the date you receive the letter. You of course will receive your stipend until the end of May and may reside in the Rectory of Maseru

East until that date.” (My underlining)

I would take the view that the above invitation was for the Applicant to make himself be heard by the senate.

The Applicant then said that the only other letter that he received from the First Respondent was on the 5th March 1988 after the senate had already sat. That it was only after it had sat that he received the letter marked “C” which unfortunately was undated. The letter is headed: “The request that you come and meet the Bishops “senate” tomorrow at 11 in the morning”. I felt that this letter was important in indicating just that attitude about apparent reasonableness absence of presence of ulterior motive and presence of good faith on the part of First Respondent. After the introductory platitudes in connection with affairs of the church the First Respondent said:

“----- And with regard to the refusal to accept my request that you take over St Marks parish, Masapong I have requested God work and it is still responding but because of human frailty not able to understand his reply. For this reason, I request you Father you should come to meet “senate” tomorrow at 11 in the morning to state your reasons why you fail to accept my request to oversee the souls of the people of St Mark’s parish Maseru.” (My underlining)

In this letter it is impressed that the Applicant had already refused to accept transfer and significantly he was being invited to attend before the senate. It could be (and this was not put in issue by denial) that he received the invitation after the sitting of the senate. One would have been interested to find out what the Applicant’s attitude was. It would have been fair if he had insisted and requested that he to presents his views even after the sitting.

The Applicant was further dissatisfied. That is why on the 15th April 1988

he addressed an appeal to the Most Reverend Desmond Tutu, the Archbishop of Cape Town (The provincial or senior most head in the whole church in South Africa) against his revocation. Indeed the notice reveals a lot of interesting procedural and canonical queries that concerned the senate hearing at which the Applicant was absent. Receipt of the appeal was duly acknowledged. Unfortunately as he response indicated the Archbishop was away from office and would deal with the letter as soon as possible upon his return. There was to be yet another delay.

On the 14th August 1995 Applicant's Counsel wrote to Archbishop Tutu and recorded that the Applicant's appeal had been noted in 1988 had not been heard. Furthermore Applicant had, as he alleged, in the meantime suffered untold hardships due to the fact that he had to received any salary ever since 1988 less that a month later (4th September 1995). The Archbishop responded to say:

“The Archbishop regrets that this matter which was raised by you in 1988 was not followed through. The manner in which an appeal can be made to the Archbishop requires a submission by both Diocesan Bishop and the Appellant so that the Archbishop can look at both side of the case. The Archbishop is thus referring the matter back to the Bishop of Lesotho before he is able to respond to your request.”

Applicant's Counsel conveyed that his client was shocked to observe that still there had been no progress in the matter by 13th November 1995 when a letter was written back to the Archbishop of Cape Town in which letter he felt that he was left with the impression that his client had been denied the right of an appeal. And then Counsel recorded lastly:

“In the circumstances we are instructed that should you fail to respond within 14 days from today we should approach Court of law for proper relief.”

Five months later this application was filed in this Court.

One Tsuoane Leodi deposed to an affidavit that he had been appointed deputy sheriff of this Court on the 8th May 1996 when he served the application papers on the Respondent. This resulted in a Court Order allowing the prayers in this application being granted by default on the 28th May 1996. This was followed by an application for contempt after resistance of a writ of execution which the First Respondent resisted by refusing to accept it and point out the assets of the church. The application became opposed. This was followed by a thin answering affidavit whose value can only be described as infinitesimal. I asked myself why the deputy sheriff (Mr Lemena) even bothered to file a replying affidavit. The most important thing that followed was that an application for rescission and stay of contempt proceedings was applied for on the 26th May 1995. Suffice it to say that the prayers sought were granted by Court apparently by consent. The matter of the application became regularly opposed with the aid of three affidavits namely answering affidavit of Reverend Joseph Nteo Leodi, Bishop Andrew Duma who had become successor tot he Applicant and latterly that of Bishop Joseph Mahapu Tsubella successor to the latter.

Reverend Leodi who was a priest of the Anglican Church in Lesotho was also a diocesan secretary since 1995. He deposed to that in that capacity has had all the records of the church including the files on the clergy. It may well now became useful to state what Reverend Leodi says in paragraph 2 of his affidavit. The statement has great significance to the fate of the application. He says:

“I have perused through the church’s records in regards to this matter. In my research I have discovered that in March 1988 the then Diocesan Bishop wrote a letter to the Respondent in which, among other things, he gave Respondent three (3) months written notice of his intention to terminate Respondent’s employment. I annex hereto the said letter marked “A”. On the 7th March 1988 Respondent wrote

a letter to the Secretary of the Provincial office of the Anglican church in Cape Town in which he asked for all monies due to him as soon as possible. It is annexed hereto marked "B". On the 24th April 1988, one David Wells who was the Advisor to the Diocesan Secretary in which to he advised the Respondent on how best to invest his pension money. To the best of my knowledge Respondent was thereafter paid his pension money by cheque which was given to him in my presence. The said cheque was drawn on the account of the Provincial Office in Cape Town. I say that by accepting his pension Respondent hereby signified that he has terminated his services with the church and was no longer employed by the Diocese as Priest. It is marked "C". (My underlining)

I did, at the time I made my finding, not only approach the dispute on the understanding that the Applicant herein was seeking a discretionary remedy after five (5) years judging from when he first filed the application. It would be virtually after ten (10) years from the date when his licence was allegedly cancelled. Most unfortunately it was after twelve (12) years after he`accepted to be pensioned off. I deduced that at the time when he launched the application it was after eight (8) years since he had accepted his pension. I had to consider whether relief sought by the Applicant would be a meaningful one as well.

I indicated to Counsel that this matter of the Applicant having allegedly accepted to be pensioned off had a great weight on my mind more especially on the question of prejudice as after acceptance of the pension. That is why when Mr. Phoofolo suggested that cheques evidencing payment of the pension could with leave of Court be shown I invited Mr. Mafantiri in that case whether he could to file a replying affidavit if he wanted to or whether he could put in *viva voce* evidence.

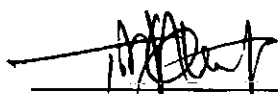
He objected and did not accept. Mr. Phoofolo for Respondents had unwaveringly indicated that he would make a cheque or cheques available to Court to support the fact that the Applicant had since accepted to be pensioned off. I noted that it was undeniable that the Applicant pursued the review application in the instant Court proceedings well aware that he was on pension and had virtually acquiesced for absence of (a better word) to his removal from priesthood. This being connected with the question whether the action complained of has caused prejudice or might still cause prejudice to the Applicant. This is a factor (prejudice) that he would obviously find difficult to prove once he accepted, by waiver and having acquiesced to the offer to accept his pension and removal from priesthood. By his conduct he has made the relief sought futile, non-beneficial and difficult to implement as I concluded.

That the Applicant has involved considerable delay in bringing his claim has been demonstrated beyond doubt. In this case I have had to consider the question whether a useful and legitimate purpose would now be served where the rights of the church and other clergy would be touched. In this I say that the church must have as after removal of the Applicant re-organized and surely it cannot be a meaningful order that would have the effect of negatively impinging on the internal discipline and organization of the church. If it was likely to have that effect it would make the order not a just and proper one in the circumstances. See *EX PARTE FRY* 1954 1 WLR 730 (police/fire brigade). The order sought would be pointless and in the present circumstances if it cannot be tailored to the circumstances which must have changed. This has to be considered in relief such as specific performance and reinstatement where time has already elapsed. See *LESOTHO BANK v MAITSE MOLOI* (OF a (CIV) 31/95 Kotze JA, at p 4-5.

It was clear that even if the Court was wrong in saying that the Applicant

ought to lose his relief by reason of the delay it would not be denied that the rights of the church as an organization would be severely prejudiced. This aspect of pursuing this claim in the circumstances where the Applicant demonstrably accepted removal from his position by conduct, adds an element of lack of good faith which the Court ought to view in a serious light, if it is to invoke equitable considerations one way or the other. Even if the Applicant could succeed to show that his case was good on reviewability, in my discretion I hereby refuse the relief sought. See my comments at the beginning of the judgment.

In all the circumstances of the application it ought to be dismissed with costs.



T Monapathi
Judge