CIV/APN/139/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REVEREND RAMAKHUTSOANE LIETA	**APPLICANT**

vs

BISHOP JOSEPH TSUBELLA	**1ST RESPONDENT**
REVEREND JOSEPH LEODI	**2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 25th May 2001

On the 5th April 2001 my Brother **Mofolo J.** granted an interim court order couched in following terms:-

"1. That a **Rule Nisi** be issued calling upon Respondents to show cause, if any on 26th April, 2001 why the following orders shall not be made final and absolute:

(a) Dispensing with the normal modes and periods of service of this application due to the urgency hereof.

(b) That Applicant be declared to be eligible for retirement only on 24th March, 2002.

(c) That 1st Respondent be restrained from relieving Applicant of his duties as a pastor of the 'Church of the Province of Southern Africa' in the Diocese of Maseru.

(d) That 1st Respondent be retrained from sending another pastor replacing Applicant in the Parish of Ha Hlajoane pending finalisation hereof.

(e) That 1st Respondent be ordered to continue to pay Applicant his stipend in March and April, 2001 and in the months that follow.

(f) That 2nd Respondent be ordered not to process Applicant's pensions documents with the Province pending finalisation hereof.

2. Costs of suit.
3. Granting Applicant any further and/or alternative relief.
4. Prayers 1 (a), (c), (d), (e) and (f) to operate with immediate effect."

It is not in dispute that even though 1st and 2nd respondents had been cited respectively in their capacities as the Bishop and Diocesan Secretary/Treasurer of the Diocese of the Church of the Province of Southern Africa (commonly known to us all as

Anglican Church of Lesotho), the church itself had not been joined in the proceedings; this could be attributed to the drafting attorney's negligence in failing to cite the church because in purporting to retire the applicant the 1st and 2nd respondents were acting in their official capacities and were so cited in paragraphs 2 and 3 of the founding affidavit as Bishop and Diocesan Secretary/Treasurer of the Diocese of Lesotho of the Province of Southern Africa respectively.

Mr Phoofolo, for two respondents, duly filed a notice of intention to oppose along with the answering affidavit of the first respondent who in his paragraph 4 states **in limine**:-

> "Applicant has sued us in our personal capacities without joining the Church. On this ground alone the application must be dismissed."

In his replying affidavit the applicant chose not to reply to the point in limine raised by the first respondent in para 4 of his answering affidavit, and simultaneously filed an application for joinder of "**Diocese of Lesotho of the Church of the Province of Southern Africa as 3rd respondent in this matter**"; in his para 4 of his founding affidavit to the application for joinder the applicant states:

> "I have been informed by my lawyer and I have believed him that the Diocese of the Church of the Province of Southern Africa which ought to have been joined in this proceedings was inadvertently left out. I believe my lawyer and wish to rectify that mistake by asking the Honourable court to join the Church as 3rd Respondent in this proceedings."

It is clear that the applicant in effect concedes the material failure to join the church as one of the respondents; the point **in limine** raised by the respondent was therefore properly raised and must therefore be upheld with costs occasioned therefor.

What is in issue is whether the court should dismiss the application outright or permit the application to continue and grant leave to applicant to join the church as one of the respondents in the application.

Mr Phoofolo submits that the issue of non-joinder is similar to a **plea-in-abatement** and has the effect of destroying the cause of action; he submits that it is not dilatory; he cites **Harms**- Civil Procedure in the Supreme Court p.278; **Anderson vs Gordik Organization** 1960 (4) SA 244. It should be noted however that **Herbstein and van Winsen** - The Civil Practice of the Supreme Court of South Africa (1997) p.187describe it as merely dilatory and **Isaacs** in **Beck's** Theory and Principles of Pleading in Civil Cases - chapter one para 13 - p.24 confirms this view and says that if successfully pleaded, the plea of non-joinder merely delays the action or application. I am persuaded by the latter view - cf **Matime v Moruthoane** - 1985-89 LAC 198.

On joinder issues, it seems to me that the court has a very wide discretion to exercise under Rule 10 (3) of the High Court Rules-**Pat Hinde & Sons Motors vs Carrim** - 1976 (4) SA 58; the church is certainly a necessary party in these proceedings and joinder of the church is only expedient and convenient for the justice of the case. It seems to me that the failure to join the church was more the result of a drafting inadvertence than anything else and the amendment of the papers to include the

Church can justly be permitted without prejudicing the respondents. An appropriate order as to costs can always be made under Rule 10 (4). It would be futile to dismiss this application only to have it reinstated within days. This would abuse the court process. The court is not bound to dismiss the application as was done in **Matime vs Moruthoane** (supra).

In the circumstances I exercise my discretion in favour of the joinder as applied for but order the applicant to pay costs occasioned by the joinder application.

Facts

Coming to the salient facts of this case, I should point out that the main issue is whether the applicant was born on the 24th March 1936 as he claims and not on the 24th March 1935 as contended by the respondents. The onus is on the applicant to show on a balance of probabilities that his date of birth is as he alleges.

On the 16th January 2001, the first respondent, **Bishop Tsubella** wrote an official letter in which he informed the applicant that he, applicant, was due for retirement at the end of March 2001. It was common cause that clergy of the third respondent retire when they attain the age of sixty six (66).

In his founding affidavit the applicant states that he was born on the 24th March 1936 and that he would therefore be only due for retirement on 24th March 2002. In support of this he attaches the Membership Certificates of the Church Provincial Fund RL3 & RL4 which state his date of birth as 24 March 1936.

Of importance is RL8 which is a copy of the "**Contract of employment for temporary terms**" dated 25 July 1972. This I could not ignore when investigating the probabilities. It stipulates that the applicant's date of birth as 24th March 1936. He has also attached on Exemption Certificate dated 13 March 1985 which states the 24 March 1936 as his date of birth. He finally attached a "To whom it may concern" document or letter apparently written by his mother stating that applicant was born on the 24 March 1936. She has also made an affidavit in support of the applicant.

As already outlined on the 5th April 2001 my brother **Mofolo J.** having read papers filed of record granted the interim order. The respondents duly filed the notice of intention to oppose and also anticipated the return date. The first respondent filed his answering affidavit in which he avers that the applicant himself supplied information contained in his personal file in which he gave 24 March 1935 as his date of birth. It is upon this information as to birth, that the first respondent began processing applicant's retirement for March 24, 2001.

At para 8 of his answering affidavit the 1st respondent states:-

> "Indeed applicant's annexures RL3 and RL4 reflect his date of birth as 24th March 1936. This is a mistake which emanated from Provincial office. The Provincial office obtained information about priests from their Diocesan offices and they had been given correct information from our office's records. How this mistake was made I do not know."

Without imputing fraud or forgery the first respondent admits that RL3 (dated 23-7-97) and RL4 (dated 14-5-98) which are official Pension Funds documents state the 24 March 1936 as applicant's date of birth. Of importance however is RL8 dated 25 July 1972 which confirms this date. I am of the view that when RL8 was first made out in 1972 the applicant cannot be said to have been machinating or manipulating evidence as to his true age. In 1972 the applicant regarded 24 March 1936 as his date of birth. This in my view constitutes an extrinsic piece of evidence in this age saga.

In his replying affidavit, the applicant seeks to explain how some of the church documents especially his personal file state 24 March 1935 as his date of birth. In explaining he states that his passport got lost during his flight from Lesotho to Botswana in 1974. He says he was one of the then BCP refugees who fled to Botswana. When he finally obtained another passport from the Lesotho Embassy in South Africa he discovered that his date of birth had been incorrectly stated as 24 March 1935; and he admits that he had ever since used this date of birth as contained in the passport. This perhaps explains why he supplied this date in his personal file.

> "I gave that date to the church authorities at the time without giving it much thought," he states.

In his replying affidavit he raises what **Mr Phoofolo** described as a new issue e.g. that he demanded the production of the "Confirmation Register", but that the first respondent refused to produce it.

As regards new matter being raised in the replying affidavit, I am of the view that it can be taken as trite practice that the applicant must set out his case in full in this founding affidavit. "All the necessary allegations upon which the applicant relies must appear in his founding affidavit, as he will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit" - **Erasmus** -Superior Court Practice - B1-45; **Tumisi vs African National Congress** - 1997 (2) SA 741; **Mauerberger vs Mauerberger** - 1948 (3) 731 at 732; **Registrar of Insurance vs Johannesburg Insurance Co. Ltd** (1) 1962 (4) SA 546 - **Heimstra J.** had this to say:

> "It is quite unrealistic in these circumstances to expect the applicant to be in possession of all facts at the time of the launching of his petition. These are contained in the respondent's books and are peculiarly in the respondent's knowledge"- I would add "or possession".

The new matter must not introduce a completely different claim - **Triomf Kunsmis** - 1984 (2) SA 261. The court has a discretion to exercise - **Bayat vs Hansa** - 1955 (3) SA 547; **Pat Hinde & Sons (Brakpan (Pty) Ltd vs Carrim** - 1976 (4) SA 58; **Director of Hospital Services vs Mistry** - 1979 (1) SA 626 at 635-36). I need not come to a decision on this matter because this Confirmation Register was neither produced before this Court or its contents sought to be traversed or challenged by either party. If it were, I would take such information as being additional or supplementary to the founding affidavit.

Conclusion

In the case of **Amandus Mpiti Taole vs Deputy Principal Secretary & others** - CIV/APN/256/95 (Unreported) Maqutu J. had occasion to determine the issue of retirement age of a public officer who had waited for 24 years before stating what he said was his true age. Taking this to be suspect, the learned judge stated that this was all the more so because when it was said, the public officer's retirement was imminent (because of the information he himself had given). He for the first time revealed this. "The question of the date of birth is an essential part of the contract of employment in the public service. Altering this term of employment is a step that should be seriously and formally approached and cogent reasons given," the learned judge commented.

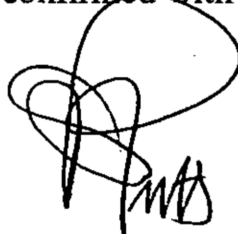
In my view proof of age is a result of a factual inquiry and is not so much depended of evidential credibility. In civil proceedings, proof of age can be furnished by a birth certificate or by the evidence of the mother who was present at the birth - **Hoffman** - South Africa Law of Evidence - 4th ed p. 149. The proof required is on a balance of probabilities. In the present case we have two conflicting dates of birth both relating to the applicant. The applicant explains this - and this has not been denied - by stating that an incorrect date of birth was supplied when his new passport was applied for in South Africa when he was a refugee in Botswana. The court however places much reliance on RL8 which was completed way back in 1972 long before the issue of retirement came to the fore. Applicant could not have anticipated the dispute. In my view RL8 renders more probable the applicant's contention that his true date of birth

was 24 March 1936 and not 24 March 1935. I also fail to comprehend why the information as to the date of birth in RL3 and RL4 state the date of birth as 24 March 1936 and not 24 March 1935, if, at all, correct information was supplied by the Lesotho Diocesan Office to the Province.

The applicant explains that in his Personal File he gave his date of birth as 24 March 1935 because his passport stated this as his date of birth. Whilst this can be taken as a representation which could reasonably be expected to mislead or induce in the Church a belief in the existence of particular state of facts, I however fail to understand how the date of birth "24 March 1936" was supplied by the Diocese to the Province for RL3 and RL4 (dated 23-07-97 and 14.5.98 respectively) if the correct information was indeed supplied by the Diocese. This convinces me of the probabilities in favour of the applicant. In the face of the rather equivocal nature of the documents the court has to look elsewhere for other extrinsic evidence as to the date of birth of the applicant. In my view RL8 supplies this information because when it was made in 1972 no machinations or age manipulations could have existed vis-a-viz applicant's retirement. It is only proper and just to take the 24 March 1936 as the correct date of birth of the applicant.

Assuming that the applicant represented his date of birth in his Personal File Folder "A" as 24 March 1935, it has not been shown that prejudice to the Church has occurred. (**Thompson v Voges** 1988 (1) SA 691)..

In all circumstances of this case, I am of the view that the applicant has shown on a balance of probabilities that his actual date of birth is 24 March 1936 and not 24 March 1935. The rule is therefore confirmed with costs.



S.N. PEETE

JUDGE

For Applicant	:	**Mr Mosae**
For Respondents	:	**Mr Phoofolo**