C OF A (CIV) NO.12/06

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

Lesotho District of the United Church	**APPELLANT**

And

REVERENDMOTHONYANA LAWRENCE MOYEYE	**FIRST RESPONDENT**
'MALIMAKATSO MOYEYE	**SECOND RESPONDENT**
'MAKOALI MAKOETJE	**THIRD RESPONDENT**
'MATHABISO NTAOPANE	**FOURTH RESPONDENT**
THABANG 'NEKO	**FIRFTH RESPONDENT**
TSEPO MOTHAE	**SIXTH RESPONDENT**
MR MOLIBELI	**SEVEN RESPONDENT**
SABATH MOTHOKHO	**EIGHT RESPONDENT**
AGNES 'MAITUMELENG MOTHOKHO	**NINTH RESPONDENT**
THEKO LEKETA	**TENTH RESPONDENT**
OFFICER COMMANDING MASERU POLICE	**ELEVENTH RESPONDENT**
THE ATTORNEY GENERAL	**TWELFTH RESPONDENT**

CORAM:

RAMODIBEDI, JA
GROSSKOPF, JA
TEELE, AJA

HEARD : 27 MARCH, 2007
DELIVERED : 4 APRIL 2007

SUMMARY

Civil application – Interdict – Constitution of a church – The contractual nature thereof as between the church and its members – Non-joinder.

JUDGMENT

RAMODIBEDI, JA

[1] This appeal revolves around two decisions, namely:-

(1) a decision taken on 22 June 2004 by a group calling itself a Special National Board Sub-Church Board suspending the first respondent's licence as a Pastor in the appellant church;

(2) a decision taken on 10 July 2004 by the Regional Director Africa, Rev. Jerry Richardson ("Richardson") dismissing second to tenth respondents as members of the appellant Church Board.

[2] On 28 July 2004, and consequent upon the decisions referred to in the preceding paragraph, the appellant church launched an application in the High Court (Nomngcongo J) in which it sought an order in the following terms:

"1. Interdicting 1st *respondent from holding and / or continuing to hold himself out as the Pastor of the applicant.*

2. *Interdicting the 1st to 10th respondents from holding or continuing to hold themselves out as members of the Church Board of the Local Church of the applicant at Khubetsoana.*

3. *Interdicting the 1st to 10th respondents from continuing to run an illegal school under the name of the applicant on the applicant's site at Khubetsoana, Maseru.*

4. *Directing the 11th respondent to remove or cause to be removed, the illegal school run by the 1st to 10th respondents on the applicant's site.*

5. *Directing the 1st respondent to hand over to Rev. David Allen Kline all official documents of the applicant that are still in his possession.*

6. *Directing the respondents herein to pay costs hereof jointly and*

severally, the one paying the other being absolved and the 11th and 12th respondents paying only in the event of opposition hereto.

7. Granting applicant such further and / or alternative relief as this Honourable Court may deem meet."

[3] On 7 August 2006, the learned Judge *a quo* dismissed the application principally on the ground that both the Special National Board Sub-Church Board and the Regional Director Africa had no power under the constitution of the appellant church to make the decisions referred to in paragraph [1] above.

[4] Concerning the alleged running of an illegal school on appellant's premises, the learned Judge held that the appellant had failed to show what provision of the Education Act had been breached and that, in any event, the court would not usurp the right of proper authorities to administer the Act. The learned Judge felt that this was especially the case in view of the fact that the appellant had already appealed in writing to such authorities.

As I understand the judgment *a quo* it was thus necessary to

await the outcome of the complaint in question before approaching the court for relief.

[5] The appellant has appealed against the correctness of the Court *a quo's* decision.

[6] The admitted facts show that the appellant is a church registered in accordance with the Societies Act 1966. It has its headquarters at Friebel Estate in Maseru district. The first respondent is a pastor in the appellant church.

Second to tenth respondents on the other hand are members of the appellant Church Board.

[7] In terms of its constitution the appellant church has a hierarchy of leadership. At the apex thereof is the National Board of the Church.

[8] It appears from the affidavits filed in this case that the real upshot of the dispute between the parties is a subject of much controversy. The main antagonists appear to be the first respondent and one Reverend David Allen Kline ("Kline") who has deposed to the founding affidavit on behalf of the appellant. In paragraph 1 of his founding affidavit Kline describes himself as "assistant superintendent" of the appellant. The first respondent disputes this. Kline further calls himself "Acting General Superintendent of the UCP." The first respondent claims no knowledge of this, presumably because the letters UCP ostensibly do not seem to stand for part of the name of the appellant church, namely, United Pentecostal Church" (UPC).

[9] Be that as it may, however, Kline says that the real problem started when the church was fraudulently charged a fee of M3600.00 for "legal services" by a non-existent attorney called Joseph Mohlomi. The first respondent on the other hand denies this. He avers that the problem started with

Kline himself by refusing to accept the laudable and plausible explanation made by the first respondent concerning a transaction of landed property of one Motsoahole Moji. The first respondent avers that this transaction resulted in the engagement of the fictitious attorney Mohlomi. More importantly, he charges in paragraph 7 of his answering affidavit that the reason why Kline is "doing everything against me is because I challenged him when he reinstated one Rev. Michael Mokhoabane while still on pension, without following the provisions of the constitution or consulting the National Board which effected the said suspension."

[10] It is not necessary to decide on the veracity of the accusations and counter accusations by the respective deponents. The real question for determination is whether the Special National Board Sub-Church Board and the Regional Director Africa respectively had the power under the constitution of the appellant church to make the decisions referred to in paragraph [1] above. The onus rests on the appellant to demonstrate this. It shall suffice merely to add that the respondents challenge the authority of these bodies to make the decisions that they did. The first respondent positively avers that such decisions were made by an "incompetent", "group of people". Therein lies the crux of the matter.

[11] Now, the law is well established that the rights and obligations between a church and its members, as in any voluntary association, are derived from the constitution of the church itself. This includes the power to suspend or dismiss ministers or officers of the church. The relationship between the parties is one of a contractual nature. The terms of such contract in turn are contained in the constitution. It follows that a church or voluntary association has no powers to act except those conferred on it by its constitution expressly or by necessary implication. The constitution enjoys paramountcy and the church or voluntary association concerned can only act within its limitations.

See **Lesotho Evangelical Church v Nyabela 1980 LLR 446 (HC) at 448; Lesotho Evangelical Church v Mandoro 1980 – 1984 LAC 127 at** 129.

[12] Viewed in the light of these principles, it is instructive to note that there is not a single clause in the appellant's constitution which expressly or by necessary implication confers power on either the so called Special National Board Sub-Church Board or the Regional Director Africa to make the decisions that they did on 22 June 2004 and 10 July 2004 respectively as fully set out in paragraph [1] above. There is simply not a

body in the appellant's constitution called a "Special National Board Sub-Church Board." Similarly, Kline conceded already in paragraph 12 of his founding affidavit that there is not a body called Regional Director Africa in the constitution of the appellant church. He made the point in these terms:-

"I must clarify to this Honourable Court that while there is no provision on the constitution of the UPC for the Regional *Director this is administrative title that the currently (sic) general superintendent of the applicant also uses. He is the substantive general superintendent and it is his powers as such, that he is (sic) dismissed the said respondents."*

Kline's averments are not borne out by the appellant's constitution.

[13] In terms of Article VII Section 1 of the constitution of the appellant church, the National Board consists of the following members, inter alia, the General Superintendent and the Assistant Superintendent. None of these officers were present at the meetings held on 22 June 2004 and 10 July 2004 respectively. On the contrary, non-members of the National Board were allowed to attend the meeting. But worse still, Richardson chaired the meeting despite the fact that he has no such power under the constitution. Such meetings are chaired by the General Superintendent in terms of Article VI Section 1 which reads in these terms:-

"1. The General Superintendent shall be the UPCI Senior Missionary, until his successor be appointed by the UPC1. He shall be chairman of the National Conference and the National Board and shall attend all regular and specifically called meetings of the National Board." (Emphasis supplied.)

Subsection 2 of section 1 provides that in the event of the General Superintendent being unable to attend any regular or specifically called meeting or conference of the National Board, the Assistant Superintendent, appointed by the General Superintendent, shall preside.

[14] It follows from the foregoing that the appellant church did not act in accordance with the provisions of its own constitution. Put differently, the decisions of 22 June 2004 and 10 July 2004 respectively were ultra vires the constitution of the appellant church. They were as such a nullity.

[15] I turn then to deal with the complaint that the respondents are running an illegal school on appellant's premises. There are several flaws in the appellant's case on this aspect:-

(1) This complaint was not part of the decisions taken on 22 June 2004 and 10 July 2004 respectively.

(2) In terms of the constitution of the appellant church the National Board is the supreme governing body. There is

no evidence that the school issue was ever discussed at the meeting of the National Board. Certainly the Board did not make a decision expelling the school from the appellant's premises.

(3) Despite a clear challenge thereto, Kline has failed to attach a resolution authorising the expulsion of the school in question. This is more so in view of the fact that the resolution "RMM2" belatedly annexed in Kline's replying affidavit specifically reads in relevant part as follows:-

> *"1. Rev. Moyeye and his Committee Members should be sued for refusal to comply with decisions of the National Board."*

As I pointed out in paragraph [15](1)(2) above, and as I repeat now, the decisions of 22 June and 10 July 2004 respectively did not include the decision to expel the

school from the appellant's premises.

(4) The first respondent has stated the following in paragraph 3 of his answering affidavit:-

> "It is submitted that the conduct of the deponent regarding the institution of proceedings against the respondents is ***mala fide*** *and does not truly and validy relate to the applicant in substance or in nature. The deponent is solely prompted by the need to serve his own personal interests to the exlusion of those of the applicant and the general congregation at large and therefore his conduct is not in the best interests of the applicant or congregation at all."*

In paragraph 4 of his replying affidavit Kline does not appear to deny the serious allegation of mala fides levelled against him. He says, inter alia:-

> "I deny that there is *no mala fides in these proceedings."*
>
> (Emphasis supplied.)

(5) There is then the question of non-joinder. The school, including its members, had a direct and substantial interest in the matter. The expulsion sought was undoubtedly going to affect it and the students thereof prejudicially. It should as such have been joined as a party.

[16] That the point of non-joinder can be raised by the Court mero motu is well established in this jurisdiction from such cases as **Masopha v Mota 1985–1989 LAC 58; Matime and Others v Moruthoane and Another 1985–1989 LAC 198; Basotho Congress Party & Others v Director of Elections and Others 1997–1998 LLR & LB 518 at 531; The National Executive Committee of the Lesotho National Olympic Committee and Others v Paul Motlatsi Morolong C of A (CIV) No. 26/01; Mabusetsa Makharilele and Others v National Executive Committee of the Lesotho Congress for Democracy and Others CIV/APN/82/02; The National**

Independent Party (NIP) and Others v Anthony Clovis Manyeli and Others C of A (CIV) No. 1/07. See also Almagamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A).

[12] The following remarks of this Court in **Matime and Others v Moruthoane and Another** (supra) are singularly apposite:-

> *"This (non-joinder) is a matter that no Court, even at the latest stage in proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who had no opportunity to present their case."*

It follows from these considerations that the appellant should have been non-suited on this point alone in so far as prayers 3 and 4 of the notice of motion were concerned.

[18] In the result the appeal is dismissed with costs.

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M.M. RAMODIBEDI
JUSTICE OF APPEAL

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I agree

F.H. GROSSKOPF
JUSTICE OF APPEAL

_____

I agree

M.E. TEELE
ACTING JUSTICE OF APPEAL

For Appellant : Adv R. Thoahlane
For First Respondent : Adv T.J. Mokoko
For Second to Twelfth Respondents : No appearance