

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C OF A (CIV) NO.: 26/2019
CIV/APN/56/2019**

In the matter between:

LADY BISHOP MAMOTENA MATSOSO	1ST APPELLANT
PAUL NKOFO	2ND APPELLANT
TSESA LEPIPI	3RD APPELLANT
SENENE MONAPHATHI	4TH APPELLANT
MAHLOMOLA MPHULO	5TH APPELLANT
SIDWEL MOKOMA	6TH APPELLANT
KHOTSO THAMAE	7TH APPELLANT
RETHABILW MOKHAHLE	8TH APPELLANT
SELLO MOHOANE	9TH APPELLANT
TSELISO NTAISANE	10TH APPELLANT

AND

**FATHER MASANGO'S ST JOHN APOSTOLIC
FAITH MISSION**

RESPONDENT

CORAM: DAMASEB AJA
MUSONDA AJA
VAN DER WESTHUIZEN AJA

HEARD: 15 OCTOBER 2019
DELIVERED: 1 NOVEMBER 2019

SUMMARY

Voluntary association created in terms of the Societies Act – non-compliance with the provisions of its enabling instrument, constitution – creation of Interim executive committee not sanctioned by the constitution and therefore unlawful and should not interfere in the administration of the Church.

Res judicata – when it may be raised against a claim – must be the same issues between the same parties – court not satisfied that res judicata is applicable – Appeal dismissed, with costs.

ORDER

The appeal is dismissed, with costs.

JUDGEMENT

P T Damaseb AJA

Introduction

[1] This appeal is concerned with a leadership dispute in a church that arose when the head of the church (the Archbishop) passed away in June 2018. In the wake of the passing of the Archbishop, a group

of individuals was elected to constitute an *interim executive committee* (IEC) and the issue arose *a quo* whether or not it was lawfully created. The respondent, Father Masango's St. John Apostolic Faith Mission (Father Masango's Church), was founded as a voluntary association under a constitution and duly registered under the Societies Act.¹

[2] The appeal is against the judgment and order of Mahase ACJ, declaring the election and registration of the IEC null and void and of no force and effect. The court *a quo* also interdicted the IEC from interfering with the administration and running of Father Masango's Church and the first to tenth appellants from holding themselves out as a duly elected body under the banner of the IEC or under any other title.

Background facts

[3] Father Masango's Church is a religious voluntary association registered in 1997 in terms of the Societies Act. Under the church's constitution, the Archbishop is the 'temporal head and spiritual

¹ 20 of 1966.

leader of the church² and chairperson of the Executive Church Council (ECC).³

[4] The ECC is responsible to assist the Archbishop in the administration of the church and amongst others, to implement all resolutions passed by the General Assembly (GA).⁴ It shall also appoint ‘an assistant General Secretary’.⁵ Most importantly, the ECC ‘shall convene a General Assembly when necessary’.⁶

[5] Following the passing of the Archbishop during June 2018, Father Masango’s Church had not yet selected a successor. Meanwhile, the appellants, without notice to the church or its’ members, met on 19 January 2019 to elect and constitute the IEC which was duly registered with the Registrar of Societies on 14 February 2019. All the appellants cited in the appeal are members of the purported IEC.

² Clause 18.1.2 of the Constitution of Father Masango’s St. John Apostolic Faith Mission.

³ Clause 16. 0 states: ‘Executive Church Council shall be composed of the following: 16.1 The Archbishop who shall be the chairperson. 16.2 Secretary General. 6.3 Assistant Secretary General. 16.4 Treasurer General. 16.5 Bishops in charge of Dioceses’.

⁴ Clause 17.1 and 17.2.

⁵ Clause 17.4.

⁶ Clause 17.5.

[6] Bishop David Macheli, one of the bishops in charge of one of the dioceses, challenged the election and registration of the IEC. The challenge was based on the fact that the purported election of the IEC is unlawful and *ultra vires* the provisions of the constitution of Father Masango's Church which does not provide for an interim executive committee. In addition, Bishop Macheli maintained that the positions in the IEC are not authorised by the constitution and are, to that extent, unlawful. The IEC elected on 19 January 2019 is made up of the following positions: chairperson; deputy chairperson, secretary general; deputy secretary general; treasurer and 5 'advisor' members.

[7] On 17 February 2019, the court *a quo* (Mahase ACJ), granted an interim order, interdicting the appellants from interfering with the administration and running of the church and further called upon the appellants to show cause why the election and registration of the IEC should not be declared null and void.

[8] In opposition to the granting of the final order, the appellants opposed the application on the same day. The fourth appellant deposed to the opposing papers in his capacity as the newly elected ‘deputy secretary general’. He raised several points in *limine*: firstly, that Bishop Macheli does not have *locus standi* or authority having belonged to the defunct council in light of the election of the IEC as the new governing body; that the urgent application was brought *ex parte* in contravention of rule 8(4) of the rules of the High Court ⁷ in that no sufficient time was allowed for the appellants to respond; that the matter was not urgent⁸; that the IEC as an interested entity was not joined; that the members of the IEC were joined in their personal capacities when it should have been the IEC.

[9] As regards the merits of the application, it is disputed that the election and the registration of the IEC is unlawful. The appellants place great store by the court order of 18 January 2019 in CIV/APN/18/2019 by Sakoane J which allowed the elective meeting

⁷ Rule 8(4) provides that every application brought *ex parte* or brought upon notice shall be filed with the registrar before noon on two days preceding the day which it is to be set down to be heard.

⁸ As contemplated by rule 8 (22).

of 19 January 2019 to proceed and resulting in the election of the IEC.

[10] The appellants maintained that since the court *a quo* did not interdict the holding of the meeting as asked for by Bishop Macheli, the validity of the IEC cannot be called in question. It is the appellants' stance that Bishop Macheli only wants to nullify the IEC, because he stood for election at the same meeting but failed to be elected on to the IEC.

Order of court a quo

[11] On 17 February 2019, the High Court granted a *rule nisi* in favour of Bishop Macheli and confirmed the rule on the return date. In her judgment of 25 April 2019 Mahase ACJ condoned the respondent's non-compliance with the rules of court stating that the appellants did not suffer prejudice. The court *a quo* also dismissed all the points *in limine* raised by the appellants.

[12] As for the merits, Mahase ACJ was satisfied that the IEC is not a body created or recognised under the church's constitution and

that it was null and void. The High Court therefore granted relief to Bishop Macheli in the following terms:

‘[T]he respondents are restrained and interdicted from interfering with the administration and running of [Father Masango’s Church] and from holding themselves out as the leadership of the [church] under the banner of none existing entity styled the Interim Executive Committee or under any other title whatsoever. The purported election and registration of the said Interim Executive Committee is also accordingly declared null void and of no legal effect and force’.

The Appeal

[13] The appellants appealed against the whole judgment and orders given by Mahase ACJ alleging that the court erred in various respects. The appellants were represented by Mr Sekatle and the respondent by Ms Pheko.

Points in limine

[14] The appellants persisted on appeal with all the points in *limine* dismissed by Mahase ACJ. I dispose of them briefly. The first ground of appeal alleging that the application was brought *ex parte* is

misconceived in light of the concession made on appeal that the application was in fact brought as one of urgency and on notice to the appellants - and not in terms of rule 8(4) as erroneously argued by the appellants.

[15] As far as urgency goes, as an appellate court we should ordinarily not interfere with the exercise of a discretion by the High Court to either entertain or not a matter on an urgent basis. That approach is now firmly embedded in the practice of the Supreme Court of Namibia and commends itself on the facts before us.⁹

[16] There are two further inter-related procedural grounds of appeal. The first is that the court *a quo* erred by not holding that the appellants were cited in their personal capacities as opposed to their capacities as members of the IEC. The second is that the IEC as a body ought to have been joined. In both respects, it is said, the failure is fatal.

⁹ *Namib Plains Farming & Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC) at 484B-D; *Cargo Dynamics Pharmaceuticals (Pty) Ltd v Minister of Health and Social Services and Another* 2013 (2) NR 552 (SC); *Chair, Council of the City of Municipality of Windhoek v Roland* 2014 (1) NR 247 (SC); *Makoabe Mohaleroe v Lesotho Public Motor Transport Company Pty (Ltd) and Another* C OF A (CIV) 16/2010, delivered 20 April 2011.

[17] There is merit in Ms Pheko's counter argument that the appellants were cited by virtue of their being members of the IEC and not merely as ordinary members of Father Masango's Church. Counsel referred the court to annexure 'DM2' to the respondent's founding affidavit which lists all (and only) the appellants as members of the IEC. As Ms Pheko submitted, it is apparent from 'DM 2' that the appellants are cited because they represent themselves as members of the IEC, and not for any other reason.

[18] In their purported capacity as members of the IEC, the appellants are the only people who have an interest in the matter and will be affected by any order that a court could make in this matter. The inter-related preliminary objections must therefore also fail as they put form above substance.

[19] The suggestion that Bishop Machelo did not have *locus standi* to bring proceedings on behalf of the respondent church was not persisted with on appeal (and correctly so) and nothing further need be said about that.

[20] The last procedural ground of objection is premised on the plea of *res judicata*. Mr Sekatle for the appellants developed the objection this way: It was incompetent for Mahase ACJ to have decided on the validity of the election and registration of the IEC when the same issues were adjudicated by Sakoane J in the failed attempt by the Bishop (on 18 January 2019) to interdict the elective conference that resulted in the election of the IEC.

[21] Counsel was referring to Bishop Macheli's urgent application of 18 January 2019 in CIV/APN/18/2019 seeking to interdict the meeting scheduled for 19 June 2019 on the basis that it would likely cause violence amongst members of Father Masango's Church. Sakoane J refused the relief then sought and allowed the meeting to proceed but directed the parties to seek the assistance of the Berea Police to ensure that the meeting proceeded without incident.

[22] According to Mr Sekatle, the issues that were determined by Mahase ACJ are the same as those determined by Sakoane J, as between the same parties arising from the same set of facts,

rendering the matter *res judicata*. The argument goes that Mahase ACJ's order declaring the election and registration of the IEC null and void, amounts to an impermissible review of the order by Sakoane J.

[23] Ms Pheko for the respondent took the opposite view. In her submission, the matter that served before Sakoane J was concerned with seeking to prevent the meeting taking place on 19 January 2019 for fear that it could lead to violence.

[24] Ms Pheko further submitted that the matter before Mahase ACJ was directed at the nullification of the election of the IEC and its subsequent registration, both of which had not occurred before 19 January 2019. Accordingly, the plea of *res judicata* is not applicable.

[25] *Res judicata* is a plea that the matter in issue has already been decided by a competent court. The plea forecloses parties privy to the dispute from re-litigating their claims, or re-litigating questions of fact or law; requires that the facts involved in the latter case should

be identical as those involved in the prior case for the plea to succeed.¹⁰

[26] The animating principle of *res judicata* is that once the court has rendered its decision on a matter it becomes *functus officio* and it loses the competence to correct, alter or supplement its own decision.¹¹ The courts' jurisdiction in the matter is then fully and finally exercised and its authority over the subject-matter ceases.¹²

[27] The application of 18 January 2019 heard by Sakoane J was between the church and the first appellant only. The present application is against all those who purport to have been elected as members of the IEC. In the first matter, the relief sought was essentially to interdict the first appellant from continuing to take

¹⁰ *Ben Radiopelo Maphate v I Kuper Lesotho* C OF A (CIV) 55/2013, delivered on 31 May 2019.

¹¹ *Sylvie McTeer Properties v Kuhn and Others* 2017 (4) NR 929 (SC), at 938C-D.

¹² *Mukapuli and Another v Swabou Investment (Pty) Ltd and Another* 2013 (1) NR 238 (SC) at 241A-C; *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) at 52F para 96; *Brown and Others v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 524J para 24; *Bekker NO v Kotzé and Another* 1994 NR 345 (HC) (1996 (4) SA 1287) at 348E (SACR at 1290G) and *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F:

'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.' (Per Trollop JA.)

charge of the administration and to avoid violence by stopping the purported elective meeting scheduled to take place on 19th January 2019.

[28] The relief sought before Mahase ACJ sought to interdict the appellants from assuming the leadership of the church on the strength of their purported election as the IEC; including declaring as void the election of that body.

[29] The respondents in their own answering affidavit state at para 5.5 as follows about the first application:

'The correct perspective is that ... [Bishop Macheli] unsuccessfully attempted to stop the elective meeting on the basis of unfounded allegations of violence not that the meeting violated any of the clauses of the constitution.' (My underling for emphasis).

[30] That the proceedings had that objective, Ms Pheko submitted, is confirmed by the order made by Sakoane J on 18 January 2019 in the following terms:

'The parties are directed to seek the assistance of the Berea Police to ensure that the meeting of the 19th January, 2019 proceeds without any incidences'.

[31] I am satisfied that the two matters were not between the same parties and that different causes of action were relied on and the nature of the relief sought distinctly different. The *res judicata* objection must therefore also fail.

The merits

[32] The gravamen of the appellants' complaint on appeal is that the court *a quo* erred in holding that, as an institution, the IEC was not recognised; that its election was unlawful and that its registration with the Registrar of Societies remained a 'mystery' as it was not in accordance with the Societies Act.

[33] Mr Sekatle for the appellants submitted that the effect of Sekoane J's order of 19 January (allowing for the elective meeting to proceed) and the subsequent registration of the IEC by the Registrar

General of Societies on 14 February 2019, is that the IEC was validly constituted. Although conceding that the church's constitution did not provide for an Interim Executive Committee, counsel in argument took the view that it was in keeping with past practice. (I must interpose here that such a past practice was not pleaded on the papers).

[34] Ms Pheko countered that the election of the IEC was not done in accordance with the provisions of the constitution; that the appellants acted *ultra vires* by electing a body and in a manner that is not provided for under the constitution.

The applicable test for findings of fact

[35] Since these are motion proceedings, the judge *a quo* had to accept the version of the respondents unless it was far-fetched. In my view, the matter can be resolved on the common cause facts as it turns entirely on the interpretation of the constitution of the church.

[36] I briefly set out the salient allegations made by Bishop Macheli and compare those against what the respondents state in their answering affidavit.

[37] Bishop Macheli states that in June/ July 2018, the Archbishop of the church and his wife, the Lady Bishop, passed away leaving the institution without a leader. He avers that no successor has yet been elected and that arrangements are underway to facilitate the election of a new Archbishop.

[38] Bishop Macheli states that the appellants elected a so-called interim executive committee 'without giving notice to anybody and or all members of the church entitled to attend in writing or giving notice to the Church itself'. According to the deponent, a structure called an interim executive committee is not provided for in the constitution and that the portfolios of Secretary General and Treasurer must be approved by the GA after nomination by the Archbishop. The assistant secretary general shall be appointed by the ECC. The above is the quintessence of the case made by Bishop Macheli in support of the relief he sought *a quo*.

[39] The appellants deal with those allegations in the following way. They state that they did not elect themselves but that they were elected by 'the diocese'. Since the Archbishop had died it was not an impediment for the creation of the portfolios to which they were elected. The IEC's role is to prepare for the GA which will either approve or reject them. Because there is no ECC in existence at the moment, a GA meeting cannot take place – hence the election of the IEC to facilitate the holding of a GA.

[40] Apart from attaching to the answering affidavit a copy of the record in the failed application by Bishop Macheli, the appellants attach no other supporting documents in support of their case. The consequence is that they provide no proof for the manner in which the elective meeting was called.

[41] We therefore do not know how, and who of the membership of the church, were invited to the elective meeting and whether the purpose of the meeting was announced and in what form. There is no agenda for the meeting furnished, nor are any minutes of the

meeting provided. There is no attendance list of those who attended to show their identities. That raises the obvious question: How are we to know that the persons who attended and elected the IEC were entitled to vote?

[42] The appellants committed themselves to a particular version in one respect and that, in my view, is dispositive of the appeal. They have asserted that it was ‘the diocese’ that elected the IEC. Now, in terms of clause 20 of the constitution more than one diocese is contemplated. Clause 20 makes that clear:

‘The Diocese

20.1 Temporal body of a defined area by the General Assembly. It shall consist of that number of districts as defined by the general Assembly or Executive Council.

20.2 Diocese shall be under a Bishop appointed by the Archbishop. The controlling organ in the Diocese is the Diocesan Conference – held once a year or more as need arise.

[43] If there is only one Diocese at the moment, the appellants’ affidavit does not make such a case. The inference is unavoidable if

one has regard to the context of the constitution that there is more than one diocese. In the first place, a diocese is headed by a bishop.¹³ The church has more than one bishop¹⁴, so there must be more than one diocese.

[44] In reference to who attends the GA, clauses 14.7;14.14; 14.15 list the following as people entitled to attend: trustee of each diocese, four delegates or their alternative elected by each diocesan conference and four youths elected by each diocese's conference. There are more indicators in the constitution that the church is made up of several dioceses but the above should suffice. The nagging question is: Which diocese is it then that elected the IEC?

[45] What's more, the constitution vests no power in a diocese to elect the ECC. Clause 23 refers to the 'Duties of Diocesan Conference'. They are: 23.1 to consider applications for appointment as evangelists passed by the district conference. 23.2 to attend to any appeals from the district conference. 23.3 to receive financial and

¹³ Clause 20.2.

¹⁴ Clause 14.5.

statistical reports of the circuits. 23.4 to recommend persons aspiring to Ministry to the GA. 23.5 to recommend applications for the establishment of new circuits to the GA.

[46] The above analysis shows that the appellants in the face of an allegation of illegality rely for the validity of the IEC on a process not sanctioned by the church's governing instrument – its constitution which is binding on the members.

[47] The closest that the appellants come to meeting the case of Bishop Macheli is the assertion that he attempted to get elected at the meeting but failed.

[48] Clause 17 of the constitution establishes the ECC. The court *quo* correctly held that there is no structure called an interim executive committee under the constitution. The appellants on appeal failed to indicate to the court any constitutional basis for the existence of the IEC and any basis on which it was registered.

[49] Even the positions to which some of the individuals on the purported IEC were elected are not recognised under the constitution. For example, there is no position in the constitution called ‘advisor member’. In terms of clause 16, the ECC consists of: The Archbishop as chairperson; SG; assistant SG; Treasurer General; bishops in charge of dioceses and the Lady Bishop.

[50] The SG and the Treasurer General are ‘approved’ by the GA on the nomination of the Archbishop.¹⁵ The assistant SG is appointed by the ECC on the recommendation of the SG.¹⁶ In other words, these substantive positions laid claim to by the incumbents on the IEC have been filled in a manner not approved nor recognised under the constitution and there is no explanation by the appellants why.

[51] It is common cause that the Archbishop and the Lady Bishop have joined the celestial universe, but it does not follow that those who hold substantive positions have ceased to hold office. The appellants do not explain why substantive positions had to be filled

¹⁵ Clause 15.7.

¹⁶ Clause 19.4.1.

while (it must be assumed because it is not suggested otherwise) there are incumbents in those positions. For example, clause 19.3.4 states that the ‘Treasurer General shall remain in office until the new Archbishop is elected’ in the event of the Archbishop dying or being removed from office. The SG remains in office in the event of the death of the Archbishop ‘until the election of the new Archbishop’.¹⁷

[52] The notion that whatever is not prohibited is authorised, is at odds with the discipline governing creatures of statute or a constitution of a voluntary association of members such as a church. Its actions must be sourced in and be authorised by the governing instrument, either expressly or by necessary implication.¹⁸ To the extent that it is not, the action or conduct in question is *ultra vires* and liable to be set aside. Roman-Dutch courts have not shied away from assuming public law jurisdiction in respect of the actions of voluntary associations constituted by contract in circumstances

¹⁷ Clause 19.2.5.

¹⁸ Baxter, L. 1984. *Administrative Law*. Kenwyn: Juta &Co, pp. 386-7 and the authorities there collected.

where the impugned conduct is alleged to violate the constitutive instrument.¹⁹

[53] The clear language of the constitution does not support the form of election and body that resulted from the meeting of 19 January 2019. It is the appellants' contention that 'the diocese' created under paragraph 23 of the constitution elected the IEC. In so suggesting the appellants painted their colors to the must. I have demonstrated that the stance of the appellants is untenable regard being had to the constitution of the church. The manner in which the IEC has been brought into existence has 'illegality' written all over it.

[54] A finding that the election of the IEC was unconstitutional has implications for the appellants' suggestion that Bishop Macheli is estopped from challenging it because he participated in the election process and lost. As a member of the court posed the rhetorical question during argument: How could an illegality give rise to a legality? In other words, if the process leading up to and including

¹⁹ *Turner v Jockey Club of SA* 1974 (3) SA 633; *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A). The position was put beyond doubt by this court in *Koro Koro Constituency Committee and 2 Others v Executive Working Committee: All Basotho Convention and 6 Others* C of A (CIV) No. 10 of 2019; *Koro Koro Constituency Committee and 2 Others v Executive Working Committee: All Basotho Convention and 6 Others* C of A (Civ) No. 04 of 2019.

the election was *ultra vires* the church's constitution, it is immaterial that the respondent participated in it.²⁰

[55] During argument, counsel for the appellants vacillated between, on the one hand, claiming that the election of the IEC was consistent with an unpleaded past practice and, on the other hand, alleging that the election was in terms of the constitution of the church. It could not have been both. The appellants did not set out in their papers the factual basis for an established practice except for the reference to an *Interim Executive Committee* created in the past.

[56] That there is a past practice to elect an interim executive committee is not the case made by Bishop Machelo but the respondents, albeit in argument only. Had they pleaded such a case the bishop could well have dealt with it. In the absence of an explanation how an interim executive committee was created in the past, nothing should turn on that. It is not unreasonable to assume that it could well have been that such a procedure was sanctioned by

²⁰ Compare: *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2004 (6) SA 222 at para 26: 'For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgment of the general plan thus takes the matter no further.'

an organ of the GA which had the authority to take such a decision during the formative stage of the church – hardly any basis for suggesting that it was as part of an established practice!

[57] In the face of Bishop Macheli's allegations (*prima facie* supported by the constitution) that the election of the IEC was *ultra vires*, the appellants failed to provide any factual and legal basis for the existence of the IEC. The High Court was therefore justified in holding that the election of the IEC was unlawful and null and void. That being the case, there was no basis on which it could have been validly registered under the Societies Act and the order declaring the registration void in law is also proper in law.

[58] The appeal must fail and costs should follow the result.

[59] In the result:

The appeal is dismissed, with costs.

PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree

DR P MUSONDA

ACTING JUSTICE OF APPEAL

I agree

DR J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

For the Appellants: Adv. B.E Sekatle

For the Respondent: Adv. N.B Pheko