CIV/APN/150/80

IN THE HIGH COURT OF LESOTHO

In the Application of :

LESOTHO EVANGELICAL CHURCH Applicant

v

JOHN MATSABA BOKAKO NYABELA Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr.Justice T.S. Cotran on the 18th day of November 1980

The highest governing body of the applicant, the Lesotho Evangelical Church (which in the course of this Judgment I shall mostly refer to as L.E.C. for brevity but sometimes as the applicant or the church) is the Seboka. A copy of the L.E.C. Constitution and rules were made available to me in an agreed translation. The Seboka consists of 72 members the majority elected from presbyteries but other major L.E.C. institutions are represented. The Seboka has an Executive Committee of 10 members and the Committee can nominate six members to the Seboka to make up the total. (ss 18, 128; and 129 of the Constitution where the word "elect" is used).

L.E.C. is divided into six Presbyteries: Leribe, Thaba-Bosiu, Morija, Masitise, Loti I and Loti II and, affiliated to it by agreement, the Presbytery of Johannesburg (the Paris Evangelical Missionary Society) in the Republic of South Africa. (s.12).

Each Presbytery is divided into Parishes.

The parishes are managed or administered by Baruti, i.e. the Parish Priests (sometimes referred to in translation as Pastors or Ministers) and Consistories under the aegis of Presbyteries and Seboka (s.8). The Consistory is a church council which governs or administers parish affairs and has

/authority

authority over all its christians. (s.10(a)). The Consistory is made up of the priest, evangelist(s) caretaker(s), and elected elders. (s.105). The number of elected elders to each Consistory varies, and depends on the numerical strength of the Congregation. (ss 154 and 155). The parish priest is its president. (s.10(b)). The elders can only be elected by the senior members of the congregation (Phutheho e Kholo)(s 9(a)). The Consistory meets once a month or two months but may be called by the parish priest at other times to deal with urgent matters (s.106), but the chairmanship of its meetings is by rotation (s.108). Parishes have a number of outstations and those are managed or administered by an evangelist or a caretaker or elder assisted by a small council (Lekhotlana) (s.11). It would seem that Maseru Parish has both a Consistory and a Lekhotlana.

Each and every parish is represented at the Presbytery by four delegates; the parish priest, one evangelist and two members of the Congregation. (s.13).

John Matsaba Bokako Nyabela, (hereinafter referred to as the respondent) was posted as priest to Maseru Parish in June 1977. This Parish falls under the Presbytery of Thaba-Bosiu. He had been ordained in 1960. He had served in at least four stations in the country before his appointment to Maseru and served on the Executive Committee of Seboka from 1969 to 1970 and from 1973 to the 4th September 1980. In terms of s.189 of the Constitution he took an oath to subject himself to the authority of Seboka and its Executive Committee and to "endeavour to obey the rules governing the church, those that already exist, and that may be made by the Seboka". By s.187 ordination may be withdrawn by the Seboka or its Executive Committee. By s.143 the Executive Committee is empowered to remove and place priests in consultation with the chairman of the Presbytery under which the parish falls.

The Executive Secretary of L.E.C., John Monaheng Diaho, avers in his founding affidavit that the Executive Committee of Seboka held a meeting on the 28th June 1980 (the official minutes are annexure ZZ6) to consider, inter alia, the routine question of placing priests over L.E.C. parishes and other posts. The respondent was a member of the Executive Committee of Seboka and he attended that meeting. It is not clear if he left the meeting when the question of his own placing arose.

/By a majority

By a majority of 5 to 2 with one abstention the Executive Committee ordered that he be transferred from Maseru Parish to Hlotse(Leribe) Parish This transfer was communicated to the respondent by letter apparently on the 29th June 1980. On the 9th July 1980 (annexure BB) he wrote to the Executive Secretary that he rejects the Committee's decision. He gave his reasons, viz, that the decision was made on the instigation of a member of the Executive Committee one Ben Masilo who has now carried out his "threat", that the decision was prompted by "hidden" reasons, and that the Executive Committee by its action was undermining a decision of the full Seboka. He informed the Executive Secretary (who has no vote on the Executive Committee but was in attendance) that he will appeal to the full Seboka to "again intervene". This is a reference to a previous occasion in 1979 which I will deal with in detail later. The Executive Secretary adds in his affidavit that the crux of the respondent's complaint was that the decision of the Committee was actuated by ulterior and perhaps improper motives and in order to satisfy him that that was not the case but was acting routinely complied with his request to refer the question of his new placing to an extraordinary meeting of the full Seboka to be held on the 30th August 1980 at Morija. What was to happen in the meantime was conveyed to the respondent by letter from the Executive Secretary dated 27th July 1980 (annexure R of the opposing affidavit) that the Committee expected him to proceed to Hlotse by "the end of this very month of July 1980".

The respondent wrote on the 1st August 1980 saying (annexure DD of the founding affidavit) that he understood that the Executive Committee acceeded to his request for the matter of his transfer to be placed before the full Seboka at a meeting to be held on the 30th August 1980. He added that until that body decides the Executive Committee has no right to insist on his transfer before that higher court deals with the matter.

The Constitution of L.E.C. does not provide for an "appeal" properly so called to the full Seboka on the question of transfers. An appeal lies as of right only if the Executive Committee relieves a priest of his duties whether permanently or temporarily, but pending appeal, the Executive Committee's decision stands (s.210). It is only the decision that stands however and there is nothing in the Constitution that ousts the jurisdiction of the full Seboka from dealing with a lesser problem before its implementation though one would think it will

/be unusual

be unusual for it to do so. The full Seboka had already dealt with a more serious situation concerning the respondent on the same issues only about fourteen months previously. He may well have been justified in thinking and expecting that his transfer could stay in abeyance until that higher body came to a decision, especially if, as the respondent believed, that the decision was not a bona fide exercise of the Executive Committee's powers.

The Executive Secretary wrote on 27th August 1980 (annexure CC) that the Executive Committee at its meeting on the 22nd August 1980 (which meeting the respondent attended in part) had decided to place his "refusal to comply" with his transfer orders to the full Seboka on 30th August 1980.

The respondent thought that "his refusal to comply" was an entirely different matter and it is common cause that he did not attend that meeting of Seboka. The respondent's reason will emerge in due course.

The minutes of the meeting of the full Seboka are found in annexure ZZ5. The Rev. Masupha reported on the respondent's refusal to comply with his transfer order. The Seboka asked for the correspondence to be read. The letters of 29th June, 1980, the 9th July 1980, 27th July 1980, 1st August 1980 and 27th August 1980 were read. The decision of Seboka of April 1979 was also read. The majority of members present felt that the respondent was insubordinate in two ways :

1. by refusing to be transferred to Hlotse,
2. by absenting himself from the full Seboka meeting which he himself asked for.

By a first vote of 16 to 15(with 15 absentions) Seboka resolved to dismiss the respondent. That would make the number present 46. A compromise was later reached. In the second vote 40 members with 9 absentions (which would make the number present 49 three more than the first ballot) decided :-

1. That respondent be stripped from membership of all committees and commissions of Seboka.
2. That he should go to Hlotse by the 4th September 1980.
3. That failure to obey would be considered as (a) breach of contract and (b) it would entail eviction from his parish house in Maseru.

/On the

On the 31st August 1980 the Executive Secretary wrote to the respondent (annexure EE) that Seboka had received a report from the Executive Committee that he was in contempt of its order to transfer him to Hlotse and that its decision was as above stated. This letter reached the respondent apparently on or about the 4th September. He delivered his reply on the 6th September 1980 (annexure HH). He complained in this letter that the Executive Committee has laid a charge against him and a decision was reached by Seboka without giving him an opportunity of being heard, his defence having been gleaned only from correspondence. In fact on the 4th September 1980 the ultimatum having expired the Executive Committee (having been given the green light) had met on the very same day and resolved to dismiss him. The Executive Secretary wrote to him on the 5th September that he was taken as having resigned his ministry and that he was accordingly deprived of his priesthood (defrocked to use Mr. Viljoen's word) and ordered him to leave his parish house immediately (annexure FF).

The respondent avers that he did not receive this letter.

Section 214 of the L.E.C. Constitution provides :

> "Any Minister convicted by the Seboka or its Committee will not appeal to any Court of law. Similarly the church will not take the matter to any Court outside the church. All matters relating to the ministry are dealt with by the church only".

The dilemma is obvious to lawyers but not so obvious to laymen. The respondent thought that he cannot or should not go to court to challenge a decision by his church, and the L.E.C. could not stop him preaching or get him out of his parish house except by a Court order. The L.E.C. made the first move.

On the 8th September 1980 the L.E.C. sought legal advice and on the 15th September launched an urgent ex-parte application in which a rule nisi was sought and granted calling upon the respondent to show cause why :-

(a) He should not be interdicted from performing duties of any kind as a minister of L.E.C. or holding himself out in any manner whatsoever as such a minister or other servant of the L.E.C.

(b) He should not forthwith vacate the L.E.C. house he occupied.

Prayer (a) operated as an interim interdict until the return date.

/The respondent

The respondent, having now received legal advice that he can challenge his dismissal, resists the application on the following grounds :

1. That the original decision of the Executive Committee of Seboka dated 28th June 1980 to transfer him to Hlotse was not taken in accordance with s.143 of the Constitution and therefore invalid.
2. That the "appeal" to the full Seboka against his transfer was converted by the Executive Committee thereof into a "disciplinary hearing". He alleges that no charges were laid and action was taken without his being given an opportunity to defend himself thus rendering the full Seboka's decision invalid as being contrary to the rules of natural justice.
3. That the disciplinary action Seboka purported to take was made pursuant to an invalid order by its Executive Committee to transfer him.
4. That, in effect, he was made a scape goat of a dispute between the Executive Committee and Maseru Parish and thus the decision to transfer him was not taken impartially.
5. That one member of the Executive Committee Ben Masilo was biased in that it was he who had proposed his transfer and having done so should have recused himself from sitting on the Executive Committee. The respondent adds that if one member is biased, or if he has reason to believe that he was so biased, renders the decision of the whole Executive Committee invalid.
6. That the Executive Committee as a whole were biased and this renders their decision invalid, and their own participation in the meeting of the full Seboka on the 30th August 1980 renders the decision of that latter body also invalid.

Supporting affidavits, with documents, were filed by V.M. Malebo a member of Maseru Parish congregation with keen interest in parish affairs and an observer at meetings of (1) the Thaba-Bosiu Presbytery and (2) Seboka; R.T. Motsamai, Treasurer of Maseru Consistory since 1972; M. Mpopo a member of the Maseru Consistory since 1950; Mpho Mohapi, a member of the Lekhotlana of Maseru Parish since 1977; and Chadwick Nkhabu, an evangelist in Maseru Parish who attended the meeting of Seboka on the 30th August 1980.

The L.E.C. filed replying affidavits from John Monaheng Diaho, their Executive Secretary, and supporting affidavits from Ben Masilonyane Masilo; Boyce Mpobane the Treasurer of the Executive Committee of Seboka; M.M. Tiheli the Educational Secretary of L.E.C.; the Rev. G.L. Sibolla President of L.E.C.;

/and

and the Rev. Mapolela Seotsanyana who had chaired the Seboka meeting of the 30th August 1980.

The respondent prayed that the application be dismissed and also, by way of a counter application, that the Court should order the Executive Committee to re-instate him as a priest of Maseru parish with all the rights duties and privileges attached to it. The question whether the respondent was or was not prepared to go to Hlotse on the 4th September becomes hardly relevant at this late stage.

At the outset of the hearing Mr. Viljoen for L.E.C. submitted firstly that the relationship between the L.E.C. and the respondent was one of contract between master and servant and that if the respondent's dismissal was in fact wrongful his only remedy was in damages and he cannot be reinstated and in any event the post has now been filled. He argued that no servant can be foisted on an unwilling master. He referred to Van Coller v. Administrator General of the Transvaal 1960 (1) S.A. 110 at 111 H, 112 E, 113 C, 115 A-E; Ridge v. Baldwin 1963 (2) All E.R. 66 at 71 G-H; Gyrundling v. Beyers and Others 1967 (2) S.A. 131 at 141 D-E, 146 B-G; Maclean v. Workers Union 1929 All E.R. (Reprint) 468 at 473 A-B and footnote of same page, Moliea v. Ncholu 1971-1973 LLR 14 at 20. The above five cases involved two teachers, a chief constable, a union secretary and a union member. They are no authority for the proposition that a priest of a church (of any denomination) is the servant of the governing body of that church. Priests are not servants in a purely contractual sense. The submission that the relationship was one of pure contract was not made by any counsel who appeared as far as I can see from the cases referred to me on the subject of discipline of the clergy such as Smith v. Keetmanshoop Classis of the Dutch Reformed Church, S.W.A. and Others 1971 (3) S.A. 353; Motaung v. Mothiba N.O. 1975 (1) S.A. 618; African Congregational Church v. Dimba 1933 WLD 29; Long v. Bishop of Cape Town 4 Searle 162; and Bredell v.Pienaar and Others 1922 OPD 578. There is nothing in the Constitution of the L.E.C. to support the contention that as between them and their priests there is a service agreement the breach of which renders the L.E.C. liable in damages only. The position is the same in England from the earliest times and I believe in all countries that have adopted Anglo-Saxon

/jurisprudence.

jurisprudence. (See S.A. de Smith Judicial Review of Administrative Action 1973 Ed 1976 Impression p. 137 et seq) The office of a priest is one of status and dignity (see Capel v. Child 1832 (2) Cr. & J 558 cited by de Smith, supra, p.198 footnote 37, and L.A. Rose Innes Judicial Review of Administrative Tribunals in South Africa 1963 Ed. p. 53 footnote 84). An interesting case on status wherein a chairman of a statutory corporation was summarily dismissed by the Minister but reinstated by the courts can be found in Chief N.S. Maseribane and Others v. J.R.L. Kotsokoane and the Solicitor General C. of A.(CIV) No.6 of 1977 dated 21st July 1978 - unreported. The submission that a priest can be dismissed by his church with impunity save for a right to recover damages if the dismissal was proved wrongful must accordingly fail.

It was submitted by Mr. Viljoen secondly that with regard to respondent's counter application for reinstatement that it was premature. He had been dismissed by the Executive Committee on the 4th September 1980 and had not exhausted his constitutional remedies for he can still properly appeal to Seboka against that decision. This is correct, but there are several exception to the rule. Where the tribunal or official which was established to afford the remedy has already prejudged the case, or has already decided adversely to him without having heard him on the merits, the remedy need not be pursued. (Crisp v. S.A. Amalgamated Engineering Union 1930 A.D. 225, and Bredell v. Pienaar and Others, supra). The rationale of the rule is put by Rose Innes, supra, p. 81 and especially at the middle of p.82, last paragraph, as follows :

> "Until a final decision has been given adverse to an application before the domestic or statutory body and its appellate organs, it cannot be said that an irregularity which may have occurred will not be set right nor justice done. This justification loses its force where the appellate body has prejudged the matter and was itself the body which in the first instance committed the irregularity".

In any event, in view of the course this case has taken, an "appeal" to that tribunal might well prove abortive in the circumstances. This submission must accordingly fail.

The Constitution of L.E.C. gives wide powers to the Seboka and to the Executive Committee thereof but these powers are not

/absolute.

absolute. They are subject to the provisions of its own rules and of course the law of the Land. Looking at the Constitution these powers can be divided into two groups: purely administrative and discretionary, and quasi judicial. Perusal of ss 208, 209, 212 and 244 of the Constitution convinces me that in some respects, but not all, (contrast Ramafole v. NUL and Others - an educational discipline case - CIV/APN/156/80 dated 29th October 1980 - unreported) it has some of the trappings of a judicially constituted body. Discipline of priests and members of the clergy must be in conformity with the rules, such as they are, and the minimum requirements of the canons of natural justice must be observed. L.A. Rose Innes, supra p.55 summarises the legal position thus .

> "As a general rule the Court will interfere on review, in the case even of a purely administrative bodies with an absolute discretion :
>
> (a) If the administrative authority acted ultra vires;
>
> (b) .....
>
> (c) if the administrative body or official disregarded the direct provisions of the statute;
>
> (d) if there was fraud, bad faith or corruption;
>
> (e) if the body or official acted for improper or ulterior purposes or motives.
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> In the case of a tribunal with quasi judicial functions a review will further lie,
>
> (f) if the tribunal or official failed to observe the principles commonly referred to as the rules of natural justice which lay down a right to be heard without bias in one's case."

Mr. Unterhalter for the respondent attacked the three decisions of Seboka or its Executive Committee (on 28th June 1980, 30th August 1980 and 4th September 1980) on all five grounds. Since the attack was directed in the main upon the role and actions of one member of the Executive Committee of Seboka, the grounds are closely interrelated.

The onus of proof is on the respondent. It follows that all affidavits filed, the documents, and minutes of meetings are both relevant and admissible (Prof. de Smith, supra, p.291 and cases cited) in so far as it is possible to resolve the issues raised without the benefit of viva voce evidence.

The Court must perforce go back to events over the past three or four years in order to examine if the respondent was

/able

able to discharge the onus placed upon him.

The respondent avers that when he was posted as priest to Maseru Parish in June 1977 he found two differences between the parish and Mr. Masilo: the first about his performance as manager of Maseru Parish schools and the second about his credentials to sit on the Seboka Mr. Masilo avers that there were no differences and that the respondent created them. The affidavits as a whole indicate that there was disgruntlement although it may well have been yet in its infancy. Mr. Masilo's failure to get elected as delegate of the Maseru Parish to Thaba-Bosiu Presbytery took place it would seem in April 1977 before the respondent took over. The procedure permitting a levy on parents of school children (discussed below) was introduced in June 1976 before the respondent took over. Whatever the truth one thing is certain· the respondent had been ordained since 1960, had served in four posts at least, and had been a member of Seboka between 1969 and 1970 and 1973 and 1977, the latter period coinciding with Mr. Masilo's own unchallenged tenure as a member of Seboka. It was at no time suggested in the papers before me that in the last 17 years before then the respondent had committed any contravention of the Constitution or rules or had "defied" the church whatever that may mean.

The background leading to the respondent's dismissal must be now be chronicled :

1. The L.E.C. run their schools through one of their officials with the title of 'Secretary of Schools" or the "Educational Secretary". In 1973 Mr. Masilo was appointed by the Educational Secretary of the L.E.C. as manager of schools for the Maseru Parish. It is an honorary appointment and carries no stipend or allowances.

2. Section 256 of the L.E.C. Constitution provides :-

> "The Educational Secretary and the manager of schools may collect schools fees with the approval of the Ministry of Education. These fees must be recorded by the manager of schools. Teachers have no right to keep these monies for themselves. The manager and teachers decide on what these monies can be used for and the manager must report utilisation of these funds to the Consistory, the Educational Secretary, and the Ministry of Education".

3. Since 1972 (Education Order 1971 Vol. XVI Laws of Lesotho) the final arbiter over management and administration

/of schools

of schools throughout the country is the Ministry of Education.

4. School fees were abolished some years ago but the Ministry of Education vide a letter dated 10th June 1976 (annexure T to the respondent's affidavit) to Educational Secretaries and others concerned with schools management permitted a "levy" or a "maintenance" fee to be imposed on parents of pupils but only if certain conditions are satisfied. The material parts read :

> "1.(a) Budget should be drawn and placed before the Education Officers for approval.
>
> (i)The roll of the School children at which the maintenance fees is needed.
>
> (ii)Budget for an individual child per year.
>
> (iii)Total sum needed for maintenance fee.
>
> (iv)For what the maintenance fee collected.
>
> (b) At the end of every year, a full report should be made showing:-
>
> (i)How much money was collected.
>
> (ii)What things were accomplished with the money collected.
>
> (iii)How much money was actually used.
>
> 2. Education Officers must inspect the Account books and actually inspect the things done any time they so wish to do so."

5. The parish priest is ex-officio the assistant to the manager of the schools within his parish (s.194 of the Constitution). The respondent was therefore Mr. Masilo's assistant in the management of schools in Maseru Parish.

6. On the 3rd October 1978 a letter was sent to the Educational Secretary of L.E.C. schools by the secretary of the Maseru Consistory and countersigned by the respondent(annexure K) as follows :

> "The Maseru Consistory once again requests you to urge the Manager of the Maseru Parish Schools to give it a financial report for the schools.
>
> The Maseru Congregation are anxious to know of the affairs of their schools but up to now they have not been given a report whatsoever
>
> Peace. "

7. On the 6th January 1979 a letter(annexure L) was addressed to Mr. Masilo by the secretary of the Maseru Consistory

/and

and countersigned by the respondent. It reads :

> "The time has come when a Church report meant for presentation at the meeting of the Presbytery should be prepared.
>
> The Maseru Consistory accordingly requests you to prepare the school report to be included in the Church report in general.
>
> We would be grateful if such a report would reach us before 21.1.1978.
>
> Peace. "

8. On the 2nd February 1979 the Rev. G.L. Sibolla, President of Seboka, wrote (annexure M) to the respondent as follows :

> "Rev. J.M.B. Nyabela,
>
> Peace father. I have passed on to Mamathe's, upon my return I request that we should meet here in the office. I am unable to specify the time. I shall see when I have returned.
>
> The purpose of the meeting follows upon the request by Mr. Masilo that the three of us should meet because he wants to talk to us.
>
> I should be most grateful if you would be present. "

9. The respondent duly attended the meeting on or about the 8th February 1979 There may have been two meetings but it is common cause that at the first or the second meeting (it does not matter which) Mr. Masilo uttered the following words :

> "Rev. Sibolla, I tell you now I have drawn my sword and if Rev. Nyabela does not destroy me, I shall destroy him".

The circumstances leading to the use of these words are in dispute and cannot be resolved on the papers suffice it to say that it does emerge from the affidavits that whilst the respondent took the remark as a physical or at least a spiritual threat Mr. Masilo and the Rev. Sibolla took it in a lighter vein and have in their affidavits underplayed its implication.

10. The respondent reported this to his Maseru Consistory and congregation. The upshot was :

(a) the appointment by the congregation of what can be described as a "protection"or "vigilante" committee to safeguard the respondent from physical harm,

/(b).....

(b) complaints were forwarded to :

(i) The President of Seboka, the Rev. G.L.Sibolla, (annexure V to Mr.Malebo's affidavit)

(ii) the Commissioner of Police that the respondent's life was in physical or spiritual danger (annexure T)

(iii) the secretary of Thaba-Bosiu Presbytery about Mr.Masilo's threat,(annexure U)

(iv) the secretary of the Committee of Priesthood affairs also on the same subject. (annexure W).

11. The respondent avers that thereafter he was ignored and ostracised or as the British say "sent to Co—ventry" by the Executive Committee and wrote a letter to the Executive Secretary voicing his concern at such a treatment (annexure N of the opposing affidavit). The Executive Secretary avers in reply that if this happened he would not be surprised as it was due to the respondent's general conduct.

12. On the 13th March 1979 the congregation of Maseru Parish wrote to the Educational Secretary of L.E.C.(annexure X to Mr. Malebo's affidavit) to stop Mr. Masilo from exercising the functions of manager of its schools in Maseru Parish and requested an audit of the schools accounts. He was also informed that a meeting will be held on the 25th March 1979 to elect a school committee in keeping with the Ministry of Education regulations. The respondent signed this letter as parish priest. Mr. Masilo avers that he had established one himself in the past, implying that this would be a rival one.

13. On the 24th March 1979 the Executive Committee of Seboka summoned the respondent to appear before it on the same day at 10 a.m. to answer "certain allegations affecting his priesthood"(annexure "O" of opposing affidavit). He was found guilty on the spot apparently because of refusing to talk to the Executive Committee in relation "to laws" they referred him to. These "laws" were not however specified. The punishment meted is reflected in a letter from the Executive Secretary dated the 25th March 1979 couched in the following terms (annexure Q of respondent's affidavit):

> "I am instructed by the Executive Committee of Seboka, to inform you that, following what you said before it on the 24th March, 1979, it has come to the following decisions:
>
> (1) With effect from the 24th March, 1979 you are

/suspended

suspended from your work as the Minister of the Maseru Parish until you find it necessary to talk to the Executive Committee of Seboka in relation to the laws they referred you to.

(2) You are instructed to vacate the Minister's house in Maseru forthwith. The Administrative Secretary(Minister responsible for Seboka Finance) has been instructed to take you together with your household to the Minister's house at Siloe.

(3) I am, further, instructed to inform you that with effect from that date, the 24th March,1979, you are no more a member of all Committees, Commissions and Boards of Seboka.

(4) Lastly, I inform you that the Executive Committee of Seboka directs that, during your stay at Siloe, you will refrain from doing any of the L.E.C. Priesthood duties."

A vehicle was made available to remove him on 2nd April 1979.

14. The Maseru congregation convened a meeting and by letter dated 27th March 1979 to the Executive Secretary (annexure Y to Mr.Malebo's affidavit) informed him that they reject the respondent's suspension and will physically prevent the respondent's removal into exile.

15. On the 9th April 1979 the secretary to the Maseru Parish Consistory (and on behalf of the Consistory) wrote to the Executive Secretary (annexure KK to Mr. Malebo's affidavit) that

(a) in terms of s.139(1) of the Constitution (which allows an appeal to Seboka by a priest or a Consistory if it is thought that the Presbytery made a decision against the provisions of the Constitution) they wished to raise at a full Seboka meeting due to be held on the 21st April 1979 the question of the legality of Mr.B.Masilo's election as member of Seboka, and

(b) that they propose to introduce a motion of no confidence in the whole Executive Committee. The letter was circulated to all priests of L.E.C. and to members of Seboka.

16. On the 21st April 1979 a meeting of full Seboka was held to consider the "explosive situation" in Maseru. The minutes are found in annexure ZZ3. At that meeting the decision of the Executive Committee to interdict and exile the respondent was set aside. He was reprimanded and condemned for "listening to hearsay." He was however reinstated on condition that he stops forthwith to conduct any matter contrary to the church Constitution (page 2 paragraph 1 of minutes). The motion of no confidence in the Executive Committee was not pursued nor the question of the legality of Mr. Masilo's appointment to the

/Executive

Executive Committee. However the Executive Secretary(on behalf of Seboka) wrote on the 24th April 1979 to the Maseru Consistory (annexure MM of Mr. Malebo's affidavit) as follows :-

1. Dissatisfaction over Mr. Masilo's admission to the Thaba-Bosiu Presbytery at its Berea sitting as a delegate of Maseru Parish should be directed to the Presbytery itself.
2. The interpretation of s.117 of the Constitution should be referred by the Maseru Consistory to the Thaba-Bosiu Presbytery Committee.
3. The complaint of the Maseru Parish in connection with Mr.Masilo'as schools manager for his failure to submit schools reports as laid down in Rule 256 of L.E.C. should be taken to the Educational Secretary who has been instructed to deal with the matter.

If I may digress for a moment here, under s.147 of the Constitution, Seboka has "working permanent commissions" that include both a Rules Commission and a Schools Commission. They also have machinery to resolve disputes about interpretation of the rules (s.34), and ultimately, if vagueness is not removed, to refer it to a Law Commission for redrafting. Seboka however elected to side step the issue by passing them to lesser bodies a method not conducive to speedy solutions. There still is no solution to the Constitutional issue.

17. Nothing appears to have happened for several months until the Minister of Education called a high level meeting with the President and Vice President of Seboka and the Educational Secretary of L.E.C., on the 11th January 1980 (annexure OO) to discuss the affairs of Maseru Parish schools. The meeting was inconclusive.

This is the background until the respondent was ordered to be transfered to Hlotse on the 28th June 1980. I have earlier in this Judgment outlined these events but I should mention one other development. The Minister of Education, apparently exercising power conferred upon him by sections 7 and 17 of the Education Order 1971, removed Mr. Masilo from his position as manager of Maseru Parish schools by letter dated the 26th June 1980 (annexure S of Mr. Malebo's affidavit). If the Executive Committee had met on the 28th June 1980 as the Executive Secretary and others maintain, and as the official minutes (annexure ZZ6) disclose, the probabilities are that the Educational Secretary and or Mr. Masilo personally were aware of

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this when they sat or perhaps as they were sitting.

In the light of these incontroverted events the transfer of the respondent originally put by the Executive Secretary as a "question of routine", amongst other subjects discussed, must surely be an understatement. Perusal of the minutes of the meeting of the 28th June 1980 (annexure ZZ6) shows that no other subject apart from placings was discussed and that Mr. Masilo's proposal did indeed come at the end when the meeting was drawing to a close as the respondent had averred. The reasons that emerge from the replying affidavits are somewhat different.

The Executive Secretary:

"I deny that the said decisions were not taken in the bona fide exercise of its powers by the Executive Committee of Seboka. I respectfully submit that ex facie Applicant's as well as Respondent's papers herein the Executive Committee of Seboka and the Seboka itself have shown tremendous patience in the face of Respondent's absolutely intolerable behaviour. Contrary to Respondent having been, as he alleges, the innocent victim of a much more deep rooted dispute within the Church, I respectfully submit that he has been the chief agent in introducing, quite unnecessarily, a rift between some of the members of Maseru congregation and the Applicant's governing organs. If indeed Respondent were an innocent victim, as he alleges, the only obvious solution to the situation that had arisen within the Maseru congregation was to remove him therefrom and save him from the unenviable position of being made a victim of a situation he was not responsible for and leave any confrontation that may have existed between the Maseru congregation and the Executive Committee to the parties concerned. This solution, on his own admission, he denied the Applicant in a manner so defient as to call his ministerial calling into question."

Mr. Masilo:

"I admit that I proposed that Respondent be transferred from Maseru but deny that this was at the time that the discussions were drawing to a close. I also deny the practice for transfers alleged by the Respondent but leave this matter to be dealt with in greater detail by persons more qualified to do so. I aver that there was nothing sinister in my proposal. My proposal was in fact motivated by my consideration for the Respondent who had persisted, in defiance of church regulations and specific instructions of the President and Executive Committee of Seboka to use his congregation as a pressure group. I sincerely felt that the only way to save him from what I saw as an impending show down between himself and the Church was to remove him from Maseru to a different parish.

I respectfully submit that if in fact I was biased and had waged a vendetta against the Respondent as he

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alleges in paragraph 39(e) of his Affidavit I would, contrary to proposing his transfer, have proposed that disciplinary action be taken against him which would, in all probability, have led to his dismissal."

The Rev. Sibolla :

"I deny the words attributed to me by the Respondent but admit that I suggested that Respondent should not be transferred on that occasion (he was speaking of an Executive meeting in July 1979)as I had reason to believe that some vocal members of the Maseru congregation would make an issue of this and once again plunge the church in unnecessary turmoil. This suggestion of mine was readily accepted by members of my Executive Committee."

"I admit that I was not present at the meeting of what Respondent refers to as being of the 25th June, 1980 but which actually took place on the 28th June, 1980. I aver, however, that if I had been present I would have supported Respondent's transfer for the reason that, notwithstanding the specific admonishing of his by the 1979 Seboka, Respondent had persisted with heightened vigour in his conduct of using the Maseru Congregation as a weapon with which to fight the church. I had, by then, satisfied myself that the only way of resolving the dissension that the Respondent had introduced within the Maseru congregation was to remove him therefrom."

Section 143 of the Constitution which I earlier referred to provides that the placing of priests is done in consultation with the chairman of the Presbytery under which the parish falls. The chairman of Thaba-Bosiu Presbytery is the Rev. Morojele. He was present at the meeting but the Executive Secretary admits, though with difficulty (para 15 and 16 of the replying affidavit), that the chairman was not consulted about the respondent's transfer.

The Executive Secretary, who is the supreme interpreter of Seboka laws (s.34) says that consultation with the chairmen of presbyteries on transfers can be dispensed with since the Executive Committee can disregard the chairmen's advice. With all respect to his legal knowledge the position is not that simple. The consequences of breach of the rules, according to the authorities, would depend on whether the rule is mandatory (obligatory in plain language) that renders the act void or voidable, or directory only in which case its disregard may make no difference to the result. The problem of deciding on which side of the fence the provision falls is decided primarily on considerations of the Constitution of L.E.C. read as whole. My

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view on the Constitution is that it is in some ways authoritarian but certainly not despotic and tends to be liberal and democratic. It is geared towards achieving concensus if possible in order to preserve what the Constitution calls the "oneness" of the church. I shall tabulate some of these towards the end of this Judgment. Consultation does not seem to me to be a mere formality since the main object of the provisions is to avoid arbitrariness and high handedness. Prof. de Smith, supra p.125, concludes:-

> "The practical effects of the exercise of power upon the rights of individuals will often determine whether the relevant formal and procedural rules are to be classified as mandatory or directory".
>
> "A provision requiring consultation with named bodies before a statutory power is exercised is also likely to be construed as mandatory".

He cites no less than eight cases in support (May v. Beattie 1927, 2KB 353; R. v. Minister of Transport 1931, 47 TLR 325; Agricultural etc.... Industry Training Board v Aylesbury Mushrooms Ltd, (1972) 1 WLR 190; Hamilton City v. Electricity Distribution Commission (1972) N.Z.L.R. 605; Rollo v. Minister of Town and Country Planning, (1948) 1 All E.R. 13, Re Union of Benefices of Whippingham and East Cowes, St James 1954 A.C. 245; Port Louis Corp v. A.G. of Mauritius 1965 A.C. 1111; Sunfield v. London Transport Executive 1970 CH 550. 558). Only one of the above reports is available in my library but fortunately it does deal with the meaning of the word "consultation".

In Rollo's case, supra, Bucknell LJ formulated the position thus :

> "Consultation in the sub-section means that on the one hand, the Minister must supply sufficient information to the local authority to enable them to tender advice, and on the other hand, a sufficient information to the local authority to enable them to tender that advice".

Morris J. had said in the Court below (1947(2) All E.R. 496 at 500 B-D) :

> "The word "consultation" is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of

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> failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one. In deciding whether consultation has taken place, regard must, in my judgment, be paid to the substance of the events and it cannot be conclusive either way according to whether parties said in terms that a consultation under s.1 of the Act was taking place, or to take place, or was intended, or whether nothing relative to this was said at all".

In that case there was adequate consultation to satisfy the section of the Act. Here there was none with the Rev. Morojele the person primarily concerned with the maintenance of peace of a parish within his Presbytery. We do not know how he voted but he may have been taken by surprise.

There is one authority to the same effect in South Africa in the not very well reported case of Virginia Cheese and Food Co. v. The Minister of Agricultural Economics and Marketing, 1961 (1) S.A. 229. (See also Rose Innes Judicial Review of Administrative Tribunals in South Africa p. 107).

The cases, or at any rate those whose reports are available to me, were concerned with Acts and statutory rules and not with constitutions of a church or voluntary association or other institution but there is no difference in principle to the approach I therefore hold that the Executive Committee's decision to transfer the respondent without consultation was ultra vires s.143 of the L.E.C. Constitution and therefore invalid.

If I am wrong and if s.143 is directory only failure to consult must nevertheless be taken as one factor to be considered with other factors when determining whether a member of the Executive Committee was acting fairly or for ulterior motives. Was the failure to consult inadvertent and therefore excusable or was it prompted by a desire to stifle debate on a matter likely to arouse controversy? The matter of transfer of priests is prima facie a purely administrative one within the discretionary powers of the Executive Committee not reviewable by the courts if exercised in good faith. But the courts have held that powers of transfer do not exclude the audi alteram partem rule(Van Coller's case, supra): It makes no difference, in my view, whether this power was granted by statute or by the constitution of a voluntary association. We are now told by the L.E.C. that the removal to

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Hlotse was not quite routine, but was done, in effect, under the guise of routine, to facilitate a confrontation with the congregation of Maseru Parish in what is seen to be the best interests of, and to prevent a rift in, the church. Was this a bona fide exercise of a purely administrative or discretionary power?

The effect of using a rule enacted for a particular purpose to a different purpose from the one intended is, to say the least, unfair and unreasonable, and invites the Court to inquire into and compare, the conduct and actions of the members of the tribunal with their professed motives.

The respondent avers in his opposing affidavit that since he was posted to Maseru, he has been asking Mr. Masilo, the manager of schools in the parish, and member of the Executive Committee, to furnish financial reports to submit to the Consistory and these were not forthcoming. Mr. R T. Motsamai, the Treasurer of the Maseru Consistory, averred that Mr. Masilo submitted one financial report on schools in 1973/1974 and not one report thereafter. The secretary of the Consistory officially demanded financial report on schools in October 1978 and January 1979 (annexures K and L of respondent's opposing affidavit) The Constitution of L.E.C requires that these reports be submitted to the Consistories. Mr. Masilo, in a replying affidavit, swears he had always submitted financial reports on schools to the Consistory at any rate until 1977, and thereafter to the Educational Secretary, and (as far as he can remember) also to the Ministry of Education.

Mr. Tiheli the Educational Secretary, who is also a member of the Executive Committee as can be seen from the minutes of the meeting held on 4th September 1980 (annexure ZZ7), agrees with Mr. Masilo and swears on events subsequently to 1977 as follows :

> "The first time I knew that there was any dissatisfaction by the Maseru congregation with the said Masilo's performance as Manager of schools was when I received a letter signed by the then Secretary of the Maseru consistory and the Respondent dated the 15th January 1978 a copy of which is annexed hereunto marked "XX" with a fair translation thereof marked "XX 1". To this letter I replied through Annexure "YY" a fair translation of which is "YY 1" at the same time writing Annexure "ZZ" a fair translation of which is Annexure "ZZ 1" To this annexure the said Masilo replied orally admitting that he had not sent a copy of his 1977 financial report to

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> the consistory and giving the reasons set out in his Affidavit. He,however,denied that he had not,for years,submitted financial reports to the Maseru Consistory which denial I accepted since no such complaint had ever been made to me prior to Respondent's posting to the Maseru parish. I would like to add that my replying to the letter of the Maseru consistory was only an act of courtesy having regard to the fact that the consistory is not entitled to deal with me direct. It should submit all its complaints to the presbytery whose chairman, in terms of regulation 194 I consult with in appointing school managers. Such chairman would then go into the matter and, if he finds it necessary, consult with me with a view to seeing what action could be taken against such manager concerned."
>
> "Before I could communicate to the consistory the reply of the said Masilo, I learnt that my letter Annexure "XX" had been read to and discussed by the Maseru congregation. This I resented most profoundly as I felt that the Maseru consistory in writing the letter was not interested in my resolving the matter but rather in getting ammunition to inflame the passions of members of the Maseru congregation. I was not prepared to be placed in a position where I appeared to be dealing directly with a congregation thus undermining the authority of Applicant's officers and bodies entitled to do so. I consequently resolved to have no further dealings in the matter with the Maseru consistory."

Whatever his and Mr. Masilo's understanding of the Constitution might have been and however much lack of confidence they had in the respondent and/or his Consistory, and/or his congregation, one would have thought that they would have reposed some confidence in the High Court whose aid the L.E.C. in the first instance invoked. Litigants some times do not realise that law is logic. Where one group - of three persons - swear that financial reports have not been submitted there is, by the nature of things, only their oaths. Where another group - of two persons - one of whom is supposed to be the author of these financial reports, and the second of whom by virtue of his appointment (and s.256 of his Constitution, let alone the Ministry of Education's directive of 10th June 1976 annexure T, supra) is supposed to be the recipient of these reports, they had the opportunity to place before the Court tangible evidence which can conclusively prove that the oaths of the first group is false beyond reasonable doubt. There is no shortage of copying machines in Lesotho. Mr. Masilo gives a financial report for the years 1975 to 1979 as follows :

> "..... a levy of M10 per year per child for maintenance of school buildings (was collected) and this money was in fact used not only for maintenance <u>per se</u> but for buildings and furnishing of new class rooms as existing class rooms accommodation was very critical".

/".....I was

> "..... I was able to put up 14 class rooms at the Tsosane Primary school which, when I took over was just one hall, 3 at Likotsi where there was no school and the church building was used as the only class room and in Maseru 6 at a new site where there were originally 6 leaking class rooms only".
>
> "It is not correct that I have not furnished school reports since 1973 nor that I had frequently but unsuccessfully been requested to do so. Up till the time when respondent was posted to the Maseru parish I regularly submitted financial reports to the consistory. As proof of this I beg leave to cite two occasions namely in 1974 or 1975 when as a result of my report to the consistory about the leaking condition of the class-rooms of the Maseru school it contributed the sum of R70-00 towards the re-roofing of the same and when during about the same time again as a result of my report to the consistory in which I called attention to the fact that the pupils at the Maseru school had to hand-plast with mud the class-room floors every week, a woman member of the consistory who was also a member of the Mother's Union, whose name I cannot now recollect subsequently caused her Union to contribute a sum of about R140-00 for the cementing of the class-room floors. In like manner as a result of one of my reports to the consistory I was given permission to pipe water from the resident minister's house to the school building which had previously been without water".

Funds levied or exacted by a church for a particular purpose do not fall in the same category as funds voluntarily donated for the general purposes of a church. In the latter, the governing organs of the church are free to dispense it, at their discretion, to whomever they please and to whatever cause they see fit The former is strictly accountable to those from whom it is levied or their elected representatives. Section 256 of the L.E.C. Constitution and the directive from the Ministry of Education do not envisage oral reports in vague and generalised terms. To question the validity of this proposition does not seem to me to be heresy in the third quarter of the twentieth century.

The difficulties encountered by the courts in situations of "Plurality of Purpose" that is to say, the case where an actor has sought to achieve unauthorised as well as authorised purposes, and the test or tests that should be applied in determining the validity of his act, and the caution that must be exercised when the situation is compounded by a body or tribunal comprising a number of persons who may be animated by various motives in agreeing to an act or decision, has been fully canvassed by Pro. de Smith, supra, in the chapter entitled "Excess or Abuse of Disrectionary Power" at p.283, especially 287, 292 and 293. He

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was discussing the subject in the context of the limits set by the courts to the exercise of only statutory discretions but then the duties to act fairly, in good faith, and without an ulterior motive, are general principles of administrative law applicable to all manner of situations and these include powers conferred by the constitution of voluntary association upon a committee, a tribunal or body appointed or elected from amongst its members to administer the affairs of its organisation. I think his comments are apposite:- He writes ·

> "Some degree of clarification might result if the Courts were to adopt a new approach to problems of purposes in administrative law. First did the impugned act substantially fulfil the express or implied purpose or purposes for which the power was conferred? If it did not the exercise of power may have to be pronounced invalid irrespective of the actors motives. If however, the purposes appear to have been materially fulfilled, or if there is doubt as to what were the purposes or whether they have been fulfilled, then the Court must ask itself whether it is relevant to ask what end or ends the actor was seeking to achieve. If the Court concludes that it is relevant to consider this subjective factor, it might then find itself assessing the relative weight to be attributed to two or more purposive factors. No all-inclusive formula ought to predetermine the method of evaluation or the result of this process. Choices should be and are available enabling the Court if it has adequate material before it to do justice in the particular circumstances of the case".

The answer depends on the circumstances and the evidence in each case. The South African position is dealt with by Rose Innes, supra, chapters 8, 9, and 10, and he considers that the Courts power to intervene is based on the doctrine of vires. Drawing support from African Reality Trust v. Johannesburg Municipality 1906 T.S. 908, and Ochberg v. Cape Town Municipality 1924 CPD 485, and Administrator, Cape v. Associated Buildings Ltd 1957 (2) S.A. 317 A.D., and Van Eck v. Etna Stores 1947 (2) S.A. 984 A.D. 997, he writes at page 125 :

> "If a public body or individual exceeds its powers the court will exercise a restraining influence. And if, while ostensibly confining itself within the scope of its powers, it nevertheless acts mala fide, or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable except upon the assumption of mala fides or ulterior motive, then again the court will interfere".

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> "An administrative official or tribunal which is authorized to use powers for a particular purpose may not use those powers for any other purpose, even if it be a laudable one or desired for exemplary reasons, or even if the tribunal in good faith, but incorrectly, thinks that the statute does authorize the purpose which it wrongly seeks to achieve. Improper purpose is thus a distinct ground for review and wider than mala fides or fraud, although all these grounds ultimately rest upon the ultra vires doctrine. In cases where no allegation of bad faith or fraud is made or suggested, a review has succeeded on the ground of improper purpose, or ulterior motive as it is sometimes termed".

On any test adopted it is difficult if not impossible for a Court of review to be confident of the assertion that Mr. Masilo who has manifested such open personal hostility to the respondent in the presence of the President of L.E.C. was sitting at that meeting as an independent arbiter with an open mind to consider dispassionately, as an administrator, what is in the best interests of L.E.C. when he was at the very centre of the dispute between him and the respondent and Maseru Parish over both his management of its schools and the challenge to his own credentials on Seboka. On the contrary the reasonable man would think that he was retaliating. The very *least* he could do without laying himself open to the charge of bad faith, and/or improper motive, and/or personal bias was to recuse himself from any vote on any subject involving the respondent. The minutes of the meeting of the 28th June 1980 (annexure ZZ6) do not show the names of those who attended, but if Mr. Tiheli did so, it is difficult to see how he could act impartially in a matter upon which criticism has been directed against him over Maseru Parish schools. I do not have affidavits from other members of the Executive Committee about the matter except from the Rev. Sibolla, who averred that if he had been present at the meeting he would have voted for it. I do not question his good faith but with respect it could well have been tainted with emotion for he seems to have had his ears open to one side(see annexure M)but not receptive to others. The highest body of L.E.C., the Seboka, in which the Executive Committee did not participate, had already considered the issue in April 1979 and that body did not want a "confrontation". Depending on how you look it, the substance of that decision was, it is true, a censure and exhortation to the respondent to "go along" with the Executive Committee but also it was a rebuff and snub to the Executive

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Committee itself. The Seboka was in effect saying, when sitting independently, and without the domination of the Executive Committee, that their summary suspension and banishment of the respondent was unconstitutional.

It follows from what I have endeavoured to say that, in so far as the sitting of the 28th June 1980 was one that was purely administrative with wide discretionary powers, that the decision to transfer the respondent, was on balance of probabilities, animated by an ulterior or improper motive by at least one, possibly two, members of the tribunal. The whole decision is therefore invalid.

It has now been tacitly admitted that the major, if not the only, object of the transfer was to discipline the respondent, or through the respondent, his Consistory and Congregation by removing him to another place. If so the Executive Committee's sitting on 28th June 1980 was a disciplinary one in fact if not in name and thus a quasi judicial sitting to which the rules of natural justice apply. Did the tribunal conform with the principles of natural justice? In dealing with aspects of discipline Prof. de Smith, supra, writes (at pp 198-199) :

> "As we have seen the courts have sometimes held the exercise of disciplinary functions to be non-judicial and therefore not subject to the rules of natural justice. But "discipline", like "privilege", is an unwieldy analytical concept. That the Courts ought not to interfere in certain disciplinary situation is clear enough. A parent reduces his child's pocket money, a school teacher gives a pupil a detention. the Courts will have nothing to do with these matters for reasons of public policy and because the damage sustained is too trivial. It is equally clear that they should and will interfere and will be prepared to set aside decisions for non observance of procedural requirements. If procedural rules have been laid down those rules will be treated as mandatory (this aspect has been discussed, supra) except in so far as they are of minor importance and upon them will be engrafted the rules of natural justice."

The rules of natural justice have been applied in ecclesiastical discipline cases (Capel v. Child, supra) in medical discipline cases (G.M.C. v. Spackman 1943 A.C. 627) and other professional bodies, and too numerous to mention.

The respondent avers that Mr. Masilo was biased but Mr.Masilo swears he had no "sinister" motive. His conduct before the meeting, at the meeting when he introduced the motion without

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consulting those who ought to be consulted, and taking part in the vote, and his conduct thereafter, persuades me on balance of probabilities that there was at the very least a factual basis for the respondent's fears. Prof. de Smith, supra pp 237/238 writes :

> "Disqualification for bias may exist where a member of a tribunal has an interest in an issue by virtue of his identification with one of the parties or has otherwise indicated partisanship in relation to an issue. The Courts have refused to hold that a person is disqualified at common law from sitting to hear a case merely on the ground that he is a member of a public authority or a member or subscriber to the voluntary association that is a party to the proceedings. He is however disqualified if he has personally taken an active part in instituting the proceedings or has voted in favour of a resolution that the proceedings be instituted for he is then in substance both judge and Jury".

(R. v. Milledge (1879) 4 QBD and seven other cases cited at footnote 58 page 238, and Law v. Chartered Institute of Patent Agents 1919 2 CH 276.

The subjective feelings of the party aggrieved must in any event be taken into account in deciding the issue. (Rose v. Johannesburg Local Road Transportation Board 1947 (4) S.A. 272; Appel v. Leo and Another 1947 (4) S.A. 766). Was there a real likelihood of bias, or a reasonable suspicion of bias? "Real likelihood" of bias means at least a substantial possibility of bias. "Real suspicion" of bias consists of the apprehensions of a reasonable man aware of the material facts. "Reasonable suspicion" tests are said to look mainly on outward appearances, "real likelihood" tests are said to focus on the Courts evaluation of the possibilities (de Smith, supra p. 231). Whichever test is adopted (see for example the test in Slade v. The Pretoria Rent Board 1943 TPD 246 - headnotes) I reach the same conclusion, viz, that Mr. Masilo was disqualified and if one person is disqualified the decision of the whole tribunal is invalid. (Hack v. Venterpost Municipality 1950 (1) S.A. 172; Newberry v. Durban Corp (1895) 16 NLR 221; Pietersburg Club v. Pietersburg LB 1931 TPD 217 at 212 and other cases cited Rose Innes p. 186). I so hold.

I have carefully examined the applicant's claim that the respondent has contravened the rules of the church in that he was in league with only a tiny vocal clique of the congregation and not the Consistory as such. Nearly all the letters that have gone

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to applicants officials or organs senior to the respondent were in the name of the Consistory. The congregation came into the picture twice: when they met to form a "protection" committee in February 1979 and when they met, or intended to meet, to form a "school parents" committee. There is no evidence that the respondent instigated this himself. There is a register of members of the congregation in every parish (s.45). If the respondent was supporting a rebellious minority either of the congregation or the Consistory, the Executive Committee could have easily proved it. The L.E.C. produced not a single affidavit from anyone. By the nature of the Constitution the elected elders on the Consistory must represent the views of the majority of the congregation. And a priest cannot ignore this and get away with it for long. If it was true, he could (and I am sure he would), have been put on a proper trial. The Executive Committee speak disparagingly of the respondent, the Consistory and the congregation but a priest cannot live in a vacuum. If it is agreed that the basic unit of the church is the congregation they have interrelated rights enshrined in the Constitution, to wit :-

Section 79:

"The meetings(of Phutheho) are held once a week on specified days or any agreed manner. They have the right to be informed and consulted on matters relating to the running of the church by the officers of the church".

Section 81·

"Any christian has the right to raise an objection against any project proposed for the church. He or she does so by advancing his or her reasons for objection to an elder, evangelist, or Minister".

Section 93.

"Functions of the meeting of the congregation are

(a) to examine the report and projects as presented by the Consistory;

(b) to examine the financial report and estimates;

(c) to deal with other matters that may be put before it by the Consistory".

Section 110:

"The Consistory advices the Minister on church matters".

Section 111:

"Although the Consistory has no executive powers in school matters it advices the Minister who is schools manager according to the Education Regulations".

/Section 136

Section 136:

"The congregation may attend deliberations of the Seboka etc..." unless it elects to hold some sessions in camera

Section 151:

"Elders are elected by members of congregation of the church or its branch where they work".

Section 152·

"Where elders are elected they are elected from amongst the congregation."

Section 193·

"The Minister must administer the Parish in accordance with the rules and traditions of the church assisted by the chairman of Consistory to discuss and take decisions together with the Consistory, to appoint and remove evangelists, be the vice chairman of the meetings of the congregation arrange the building program, preach, baptise, administer sacraments, solemnize marriages, bury the dead. All these things he must do in accordance with the rules of the church seeking advice and consulting the Consistory and the congregation in all matters that affect them.

Section 197:

"He(the Minister) must keep minutes of what is discussed and done by the Consistory and also the meetings of the congregation."

Section 243

"All the alternatives from C onwards (this is the kind of punishment a Consistory can impose) will be arranged by the Consistory All punishment meted out must be known to the congregation.

Section 280

"All monies received etc.. what is left over is planned by the parish treasurer, the Minister and the Consistory in consultation with the congregation.

Lastly, but just as importantly, according to s 34(a)(ii) of the Constitution the Priest in his parish, at meetings of both the Consistory and the Congregation, is the interpreter of the provisions of the Constitution

With respect to the applicant, its officers have not pointed out which section was breached and I am by no means persuaded that the charge they have made has been borne out on the papers before me.

Mr. Unterhalter submits that on a fair interpretation of ss 208-213 and 244 the Seboka meeting of 30th August 1980 should have afforded the respondent a hearing after preferring a specific charge. They did not afford him a hearing, and such hearing as they did afford, is vitiated by the participation therein of the biased Executive Committee and the decision was therefore contrary to the rules of natural justice. (Bekker v. Province Sports Club 1972 (3) S.A. 803 at 811 A; Turner v. Jockey Club of S.A. 1974(3) S.A. 633, at 645 H and 646 D-F; Lowlor v. Union of Post Office Workers (1965) 1 All E.R. 353; Peri-Urban Areas Health Board v. Administration of Transvaal 1961(3) S.A. 669 at 673 E; Maseribane's case; Grundling's case, at p. 142; Appel's case at 774, 775; Bredell's case at p. 585; Law's case at 290 (note p. 293); Smith's case at 361-363; Rose's case at 288 - all supra).

Mr. Viljoen submits that the Executive Committee, though it need not have to according to the rules, afforded the respondent both an opportunity to state his case and also ample time to prepare it, and he ignored the full Seboka meeting at his peril. The Executive Committee could do not more. The respondent's prevarication in his affidavits when he says in one part that he was prepared to go to Hlotse, but in fact not going to Hlotse, is an attitude of mind (Mr. Viljoen adds) showing his disregard to church rules and since the respondent knew what the charge was the Court should look at the facts in a "commonsense" and practical way.

With respect I am unable to agree. Prof. de Smith, dealing with the law on voluntary hearings and relying on R. v. Deputy Industrial Injuries Commissioner, ex-parte Moore (1965) 1 Q.B. 456, at 490 and dicta in Wednesbury Corp v. Minister of Housing and Local Government (No.2) (1966) 2 Q.B. 275, at 302-303, and Byrne v. Kinematograph Renters Society Ltd. (1958) 1 W.L.R. 762, at 783-784 (a non statutory case perhaps more appropriate to the facts before me where it was said that a voluntary offer to give a hearing could create an implied contract that the hearing would be conducted in conformity with natural justice despite the absence of any rule providing for a hearing) put it this way at p. 207 ·

> "In some situations an inadequate voluntary hearing may leave so strong an impression of unfairness that it is better for the courts to set aside the decision than to decline to intervene".

/The respondent

The respondent articulates his reasons for not going thus:

Opposing affidavit:

"Thereafter I received the letter dated the 27th August, 1980 which is annexure "C" to the said Diaho's Affidavit and I respectfully refer to the fact that the Executive Committee referred not to my appeal being placed before the Seboka of the 30th August, 1980 but that "my refusal" to comply with the decision of the Executive Committee was being placed before the Seboka. Nevertheless, at the time, I still firmly believed that the Seboka would, at its meeting of the 30th August, 1980, consider my appeal, and I also firmly believed that if there were to be any question of disciplinary action being taken against me, I would be formally invited to appear before Seboka to answer specific charges against me and to state my case. Under the circumstances, I considered it proper that I should not attend the meeting of Seboka on the 30th August, 1980 since, if it saw fit to consider disciplinary action against me, I would subsequently be invited to appear before it and defend myself."

Supplementary affidavit :

"I then realised that there was a danger that the Executive Committee might seek to persuade Seboka to consider, not my Appeal, but some unspecified charges against me. I informed the meeting that I intended to appeal before Seboka with regard to my appeal, but that I would not attend its meeting if it was going to develop into a prosecution. I did not wish to discuss with the Executive Committee what charges they were referring to, as the attitude of the meeting was clearly antagonistic towards me.

I was still firmly under the belief that Seboka would consider my Appeal, but I feared that if it should reject it the Executive Committee might press for charges to be laid against me immediately, and that if I were present at the meeting I might be called upon to answer the charges immediately, withour prior notice and without the opportunity of preparing my defence."

The way I understand the respondent's words is that if the Executive Committee intends to reduce the hearing simply to a question of whether or not it was "failure to comply" on his part, the result would be a foregone conclusion. What he wanted to debate is not really whether he personally should or should not go to Hlotse, but the much wider issue as to why, and the reasons behind, his transfer to Hlotse and <u>that</u> he would not be able to do unless he gets a proper hearing which the Executive Committee were intent on denying him. He thought the Seboka would

/call him again.

call him again. Priests may not be familiar with many trials but they must be of one Trial two thousand years ago.

Were his fears justified?

An evangelist, Chadwick Nkhabu, avers that at the meeting Mr. Masilo took an "active and decisive part in the discussion concerning the transfer failing that the expulsion of the Rev. John Nyabela" and that the Executive Committee of Seboka (those in favour I suppose) did likewise. The Rev. Seotsanyane who chaired the meeting avers that members of the Executive Committee did not influence or improperly influence the decision of the conference, on the contrary Mr. Masilo played a restraining influence on those who wanted to dismiss the respondent outright.

The dispute about whether there was manipulation cannot be solved on the papers, but what can be solved on the papers, is that the chairman, with respect, did not read s.30 of the Constitution. This provides :-

> "For the Seboka to have lawfully sat or convened at least ⅔ of members should be present".

Two important implications arise :

1. That ⅔ of 72 is 48.
2. That a quorum of Seboka can be commanded by the exclusion from the debate the ten members of the Executive Committee.

On (1) the chairman commenced the proceedings without a quorum and this continued (the meeting was a long one lasting several hours) until at least the first division : (16 in favour, 15 against, 15 absentions) - total 46. That decision was therefore invalid (Rose Innes, supra, p.121).

In the second division the minutes read that there were 49 present. Where did the other three come from? and if they did was the correspondence read to them and did they know what it was all about? Or is there a typing or a writing error and the "6" was reversed to "9". I don't know.

On (2) it is evident that whoever chaired the Seboka meeting of April 1979 appreciated the importance and necessity of having an impartial sitting by excluding the Executive Committee from the debate. The Rev. Seotsanyane did not. This is a breach of one of the elementary principles of first and foremost the church,

/or canon,

or canon, or ecclesiastical law "suspectus judex", (see the Codex Juris Canonici, canons 1613-1614, and Naz(ed.). Traite de Droit Canonique iv 95-98 and further see de Smith, supra pp 215-216 and cases in footnotes 7-12, and see also Halsbury's Laws of England 3rd Edition, Vol. 13, especially pp 6-15 for a historical background).

Many writers e.g. Bracton (De Legibus f.412, ff.143 b.185) may have imported the law of the church into the common law which evolved the maxims: nemo judex in causa sua (or nemo debet esse judex in propria causa) i.e. that no one should be judge in his own cause, and nemo potest esse simul actor et judex, i.e. that no one can be at once suitor and judge. The modern civil law is even more jealous about this rule. In Dimes v. Grand Canal Junction (1852) 3 H.L.C. 759 the judgment of Lord Chancellor Cottenham was set aside on the ground of his having been a shareholder in the defendant company. In South Africa the same rule applied from early times commencing in R. v. Plaatjes(1895) 12 SC 351 when a master sat in judgment against his servant who allegedly insulted him - (other cases are collected in Claassen, Dictionary of Legal Words and Phrases Vol. 3 pp 19 and 20). We have gone much further in Lesotho in Letsie and Another v. Commissioner of Police, LLR 1974-1975 (in the press) p. 294 where a charge sheet signed by the Commissioner of Police (under the Police Order Amendment Act 1974 Vol. XIX Laws of Lesotho p. 21) was quashed (with its convening order executed under the delegated hand of a Minister)on the grounds that the Commissioner was the first reviewing authority from a decision of the Special Service Tribunal established under the Act.

In that meeting of the 30th August 1980 which was partially if not wholly illegally consituted, a biased Executive Committee sat in judgment, when it need not to if the chairman had been firmer. It follows that the decision reached was not in accordance with rules of either justice divine or justice human and is therefore invalid.

/There remains

There remains lastly the decision of the Executive Committee of the 4th September 1980 which Mr. Wilgoen submits is still appealable since it was the decisive one that finally carried out the dismissal of the respondent. He also addressed me on the same point when reviewing the possible outcome of the application. With respect the dismissal followed upon an invalid decision of the parent body, the Seboka, which followed upon a previous invalid decision of the same Executive Committee and so this one must also be invalid for the reasons already mentioned. The respondent specifically asked this Court for relief if he has been able to discharge the onus placed upon him. I think he has. To deny him a proper order of vindication now on the ground that some other tribunal of the applicant properly constituted will try him fairly is tantamount to the Court itself condoning a course which might place the respondent in doubt jeopardy. The difficulty has been recognised for example in Rose's case supra (a statutory case where the whole tribunal was disqualified) at p. 290 and p. 291 at the end of the judgment of Lucas A.J. The L.E.C. must find a way to solve its own problems.

To sum up ... On affidavit pleadings, annexures, papers and minutes :

1. In so far as this is an application for a permanent interdict the applicant failed to discharge the onus of proving, as it must, that it has a clear right or its part (Setlogela v. Setlogela 1914 A.D. 221) and the rule is therefore discharged.

2. As for the counter application the respondent has been able to prove, on balance of probabilities, that the Executive Committee of the applicant dismissed his transfer on the 28th June 1980 -
   (a) in its capacity as a purely administrative tribunal:-
      (i) acted ultra vires s 143 of its Constitution and
      (ii) acted unfairly, or from ulterior or improper motive, or in bad faith
   (b) in its capacity as a quasi judicial tribunal on discipline
      (iii) acted against the rules of natural justice on the ground of bias.

3. That Seboka decision of the 30th August 1980 was arrived at contrary to the rules of natural justice on the ground of participation of biased members of its Executive Committee at its sitting.

/4.... The

4. The Executive Committee's decision of 4th September 1980 was based on an invalid decision of Seboka and its last decision is therefore invalid on the same grounds.

   All three decisions are accordingly set aside.

5. In consequence the Court makes the following orders :

   (a) The applicant(and its organs, i.e.the Executive Committee and Seboka) will restore to the respondent his priesthood with all rights, duties, privileges, stipend and dignity including membership of all committees and commissions to which he had been lawfully elected before the 4th September 1980.

   (b) The applicant(and its organs, i.e. the Executive Committee and Seboka)will restore him as priest over Maseru Parish until such time as other lawful orders are passed.

6. The applicant will pay the respondent's costs attendant upon the employment of two counsel under the principles enunciated in Motaung's case,supra pp 630 H and 631 A-G.

CHIEF JUSTICE
18th November, 1980

For Applicant : Mr. H.P. Viljoen, S.C.
(instructed by Mohaleroe, Sello & Co.)

For Respondent : Mr. J. Unterhalter, S.C.
(instructed by Webber, Newdigate & Co.)