

IN THE HIGH COURT OF LESOTHO

CIV/APN/408/08

In the matter between:

ANGLICAN CHURCH

1ST APPLICANT

PIUS XII COLLEGE HOUSE

2ND APPLICANT

AND

LESOTHO EVANGELICAL CHURCH

1ST RESPONDENT

NATIONAL UNIVERSITY OF LESOTHO

2ND RESPONDENT

THE BUIDLING CONTRACTOR

3RD RESPONDENT

JUDGMENT

Delivered by Honourable Mr. Justice T. Nomngcongo

On 12th June, 2009

This application was brought on urgent basis for orders in the following terms:-

- (1) Dispensing with periods and modes of process due stipulated by the rules due to the urgency of the matters.

(2) Directing 1st and 3rd respondents to show cause, if any, on a date and time to be determined by this Honourable Court, why the following orders should not be made final and absolute.

(a) 1st and 3rd Respondents should not be restrained from developing and continuing to make any building developments on a plot adjacent to the applicant's chaplaincy at the 2nd Respondent's campus.

(b) Declaring that the piece of land between Gilbeurt Hall residence and the Anglican Chaplaincy at the 2nd respondent's campus as the land allocated by the 2nd applicant to the 1st applicant.

(c) Setting aside the allocation made by 2nd respondent's council or any other person or body to the 1st respondent.

(d) Granting applicant further and/or alternative relief.

(e) Costs in the event of opposition of this application.

Prayers 1, and 2 (a) to operate with immediate effect pending the determination of these proceeding.

The certificate of urgency filed by Mr. Phoofolo indicates that he had "interviewed and prepared the affidavit of applicant " and not applicants and considered the matter urgent because 1st and 3rd respondents continue to develop the site in dispute despite an agreement between the parties that any further development activities would be suspended.

There is no indication on the record that the applicants obtained the immediate relief that they prayed for. I will take it that they did not . However it

does appear that it was treated with urgency because it was placed before My Brother Peete J. first on the 6th January 2009 and during vacation. The record does not indicate what happened on that day except to record the appearance of Mr. for applicant (sic) and Mr. Mohau for respondent. The following day there appeared Mr. Phoofolo with two counsel and again with Mr. Mohau. On that day Peete J. recused himself from presiding over the case and nothing further appears on record.

The matter was allocated to me by the acting Chief Justice Her Ladyship Hlajoane on the 22nd April 2009. I heard argument on it on the 27th April 2009. After argument I dismissed the application, indicating that full reasons would follow. These are my reasons.

On behalf of the 1st applicant Bishop A.M. Taase deposes that he is leader of the 1st applicant which he refers to as the Anglican Church of the Province of Southern African which is referred to as the Diocese of Lesotho. He avers that the applicant has several parishes spread throughout Lesotho. He goes on to say:

“The Building and other structures in the said parishes are registered in the name of the church. The Diocese is also the owner of the chaplaincy at the National University known as Anglican Centre. “(para. 51 of the founding affidavit.)”

At paragraph 5.2 the deponent then says:

“The land where the Anglican chaplaincy is situated belongs to the Pius XIII College House” (my underlining).

The only meaning I can make out of these averments of the deponent is that the Anglican chaplaincy is owned by 1st applicant but stands on land that belongs (or is owned) by Pius XII college House, the 2nd applicant. In other words that 1st applicant owns only the chaplaincy but the land that it stands on is owned by the 2nd applicant. That the ownership of the chaplaincy is separate from the ownership of the land it stands on.

Be that as it may the deponent continues that he relies on some scanty records “for evidence that the land was allocated to the 1st applicant in 1964 which allocation was confirmed in 1966. In that regard he annexes a copy of a letter dated 30th July 1977 from Pius XII College House addressed to the Rev. Fr. D. Ntestor of the Anglican Chaplaincy. Is it marked annexure “TI”. I produce it if full:

Dear Don,

The following quotations are the only record we have concerning the site.

1. May 3, 1964:“(7) Then came up for discussion the Anglican Bishop’s request for a site of one quarter of an acre on our campus for a residence and a small chapel in the residence. Fr. Superior moved the following motion: that Council unanimously agree to permit the Anglican Bishop of Maseru to build a residence on one quarter acre of land on Pius XII College House land.

The Motion was unanimously accepted and Council agreed that the site for the residence be located roughly south of the area building.”

2. January 22, 1966: “2. Fr. Superior also mentioned the request of the Anglican Bishop for a piece of land. Council was of the opinion that we should keep the land South of the village for future developments, but that a piece of land to the South East which is part of the “green belt” to be ceded to the Oblates could be given to the Anglicans.”

Both quotations are from the minutes of the Council of Pius XII College House. I hope they may be of some help to you.

I remain,

Yours sincerely

It is obvious that this was a reply to an inquiry that was made by the Rev. Fr. D. Nestor to Pius XII College House concerning the site on which the Anglican Chaplaincy is located. It is confirmed by the next annexure "T 2" to which I will shortly refer. The reply refers to what appears to be minutes of meetings held in 1964 and 1966 in which a Fr. Superior brings up for discussion the question of a request by the Anglican Bishop of a site. It is not clear whether the 1966 meeting was a sequel to the 1964 but the 1st applicant says in this regard that the allocation by 2nd respondent done in 1964 and was confirmed in 1966 (para 5.3 of the founding affidavit). The land in question, from these minutes is not demarcated with any particularity except to say in the 1964 minutes that it is located roughly South of the area building and in the 1966 minutes to the "South East which is part of the green belt".

What is remarkable about annexure "T1" is that is in all probability a reply to a letter emanating from the 1st applicant but that letter has not itself been annexed to its founding affidavit. So it is with annexure "T2". There is not annexed the letter that drew the reply from the Registrar of the National University of Lesotho. I also produce the letter dated 14th December 1977 and addressed once again to the Rev. Fr. Nestor of the Anglican Chaplaincy.

Dear Rev. Nestor,

I have for sometime been persuing the question of registration and title deeds for the site on which the Anglican Chaplain is built. From inquiries made it seems the allocation of this site was a transaction between the Anglican Church and the Council of the Pius XII College House. Consequently the University was not involved and therefore has no records on the matter.

In the circumstances, I think the question of title deeds for this site should be persuade with the council of Pius XII College house and not with the university administration since the site did not belong to the university.

Yours sincerely

It seems to me that this was a follow-up inquiry from the National University of Lesotho regarding title deeds or other evidence of registration of the site on which the Anglican Chaplaincy is built. It is no more than that and the registrar was unable to help and referred the matter to the council of Pius XII college.

The 1st applicant avers that “the land in question comprises the portion now fenced by the 1st applicant as well as the land adjacent to it” which is the site in dispute. There is no record evidencing a title deed to the land because “applicants have always maintained harmonious relations befitting of sister church denominations” (para 5.3) according to Bishop Taaso

The first applicant finally annexes “T3” which minutes a meeting styled “consultative meeting.” The minutes record that: “The Vice Chancellor indicated that although the meeting was not statutory, it was intended to create a forum to resolve an impasse with respect to construction of the Lesotho Evangelical church chapel.” It was attended by Prof. A.F. Oganrinade, the Vice Chancellor chairing, Ms A.M. Mphuthing, Registrar who recorded the minutes, His Grace Archbishop B. Mohalisi of the Roman Catholic Church, His Lordship Bishop Adam Taaso of the Anglican Church, Mr. Robin Pater, administrator of the Anglican church, Rev. M. Kometsi Executive Secretary of the L.E.C., Mr. Moiloa Vice Secretary, Rev. L. Kheekhe, the sector and chaplain of the Anglican Church and the Rev. T.G. Lerotholi, chaplain of the Roman Catholic Church.

The Vice Chancellor in that meeting catalogued the events that led to the Board of Development allocating land between Guilbeault Hall and Anglican Centre to the L.E.C. on condition that a plan of the proposed building is presented to the Board to ensure that it conforms to the University standards. “This decision was communicated to the L.E.C. (1st respondent). The minutes records that construction started in 2008, and furthers that: “That was when the Anglican (sic) started raising his concerns with the Vice Chancellor on the premises that LEC was building the church in contravention of the Council’s decision. It is also recorded that the Vice Chancellor had requested Rev. Moshoeshoe to stop building until he provided him with a plan for the Chapel. He had assured him he would but had not done so but simply continued with construction.

A discussion then followed. According to the minutes, His Grace Archbishop Mohlalisi pointed out that issues pertaining to Pius XII fell within the jurisdiction of the “Oblates of Mary Immaculate and that the Rev. Mokhahlane who is superior to the Rev. Moshoeshoe should be present in the discussions of such issues. In any case he concluded that the two should be consulted only after council had pronounced itself on the matter. The L.E.C. responded that the Rev. Mokhahlane would have no authority without a mandate from the Executive Council which was then represented by those that represented the L.E.C.

The comments that followed pointed out that “peaceful co-existence and ecumenism were so deeply entrenched that they could not be disturbed by a dispute over a piece of land”. The L.E.C. then asked why the issue arose when allocation followed by fencing occurred in 1999. The answer was that the dispute was sparked by the surfacing of construction. After this several agreements were recorded ending with one that said “that council would deliberate on the recommendation of the Board of Development.” So much for the affidavit of Bishop Taaso.

Next was the affidavit of Emile Lefa Moteaphala who describes himself as the Father Provincial of the Missionary Oblates of Mary Immaculate (OMI). He says “according to my knowledge as supported by records at my disposal” “Pius XII College was granted a site where the present National University of Lesotho is situated. This was by Royal Charter which also established the said Pius XII College House. He continues that the Pius XII college owns the piece of land so

granted and it extends right down to Guilbeaurt (sic) Hall, which includes the portion where the chaplaincy of the 1st applicant is situated. An averment is then made that:

“That land was given to the applicant church. I further confirm that the University administration has always been aware of that fact hence the need for L.E.C. to negotiate any site thereon with the second applicant mainly. Such negotiations did take place, but have not been concluded (minute 5 and 6 in annexure “TL3).

He concludes that the University and its Board of Development had no right to allocate “over land” to the L.E.C.

Once again we meet an ambivalence here that the land was given to the 1st applicant while the Pius XII retains ownership of it. Specifically this had been preceded by an averment that

“I should emphatically add that the land on which the Anglican Chaplaincy is situated and beyond up to Guilbeaurt (sic) Hall is the land of Pius XII College House under the control of the missionary oblates of Mary immaculate.”

The deponent testifies that his knowledge is derived from records. None have been annexed. I can only assume that they are the same as those annexed by the 1st applicant. After all the only assistance that Pius XII college could afford the 1st applicant are “T1” and “T3”.

The answering affidavit was deposed to by Pati Moiloa who described himself as the Vice President of the synod of the Lesotho Evangelic Church duly authorized thereto. He raised several points in limine:-

- (a) Lack of urgency
- (b) Serious disputes of fact
- (c) Non disclosure
- (d) Non compliance with the rules of court
- (e) No case for an interdict and declaration of rights.

Regarding the merits he points out that it was the duty of the applicants to ascertain the proper identity of the 3rd respondent. He goes to say that the land on which it (1st respondent) is situated belongs to 2nd Respondent. He observes that in terms of annexure "T1", 1st applicant was allocated was a quarter of an acre which equals the land that the 1st applicant is occupying and that land has been fenced in by 1st applicant. In his reply to this Bishop Taaso says nothing about the size of the land occupied by 1st applicant but says that what was fenced in was the developed part of the chaplaincy but that, that did no mean they had waived their right to the unfenced portion.

He observes that the annexure to "T2" being the site plan, presumably of the National University of Lesotho or its predecessor UBLS indicates that the Anglican Chaplaincy as in 1966 was on University land. This is denied by Bishop Taaso. Pata Moiloa then says that the minutes "T3" are not on accurate reflection of the proceedings of that day. But as correctly pointed out on behalf of the applicants he does not put forward what he considers the correct version.

He explains how the University had taken the position around 1980 that it was undesirable to have church denominations on University property but by 1999 had relented from this position and decided to allocate land to the L.E.C. He explains how the first attitude of 2nd respondent led 1st respondent to negotiate with 2nd applicant and how when those negotiations bore no fruit he reverted to the 2nd respondent leading to the 1999 allocation to the 1st respondent.

The deponent points out that after the 2nd respondent allocated the land to it in 1999 it was immediately fenced in and that the 1st and 2nd applicants sites are in fact also fenced in. He points out that the Rev. Kheekhe of the 1st applicant in fact wrote a letter in which he merely complained about the proximity of the disputed site to the chaplaincy and said nothing about ownership. The letter which the 1st applicant did not produce is annexed. I produce it in full.

St. Andrews Anglican Chaplaincy
National University of Lesotho
P.O. Roma 180
15th July 2008

The Vice Chancellor
NUL
P.O. Roma 180

Dear sir,

**Re: PLEA TO REVISIT THE DECISION OF THE UNIVERSITY BOARD OF
DEVELOPMENT OF ALLOCATING SITE TO THE LESOTHO EVANGELICAL
CHAPLAINCY ADJACENT TO THE ANGLICAN CHAPLAINCY**

The Church Council of the Anglican Chaplaincy met and discussed the consequences of having two denominations almost on top of each other as decided by the University.

The Church Council resolved that I should write, to humbly request those who are or have been involved in the decision of allocating a chaplaincy site to the Lesotho Evangelical Church adjacent to or rather on top of the Anglican Chaplaincy, to revisit this decision.

The council sees this action if allowed to materialize as having far reaching negative consequences on the ministry and relationships of the two denominations. Actually, the decision will be a breeding ground for constant conflicts. The role of the church is to be a model of peace and harmony, light and salt to the world and not otherwise.

On behalf of the Anglican Chaplaincy, I have inquired extensively about this decision, but have failed to find the originator and implementer of this decision. We do not wish to see our sister denomination incurring unnecessary expenses and future generations (of both denominations) paying heavily because of our short-comings.

We therefore humbly request your kind office to intervene and revisit this decision expeditiously, so as to save the mission and ministry of both denominations.

Thank you.
Yours faithfully

LEBOHANG KHEEKHE (REVD)
CHAPLAIN

CC: LEC CHAPLAIN (REVD. M. MOSHOESHOE)
DIOCESAN ADMINISTRATOR
DIOCESAN REGISTRAR
UNIVERSITY REGISTRAR
VICAR GENERAL (RT. REVD PS MOKUKU)

Pali Moiloa points out that construction on the site is at an advanced stage; the walls are almost complete, windows and frames are already in place.

He finally points out that 2nd Respondent in allocating it a piece of land was giving effect to its bye-laws, the relevant portion of which reads:

Ordinance No.1

“In terms of section 3 (2) (1) of the National University Act Council has decided as follows

1. That there shall be chaplaincies created by Council representing respectively Roman Catholic Church, the Anglican Church, the Lesotho Evangelical church and other protestant denominations.”

What emerges from all this is that come two in 1964 or 1966, the 1st applicant was given a piece of land measuring an acre. The 1st applicant does not deny that it was an acre. The 1st says that the present fenced site is an acre in extent. The 1st respondent avoided to challenge the assertion. It does not appear that it was given any more land after that. The land so allocated was fenced in leaving the site now in dispute.

The sites are part of the greater National University of Lesotho (2nd respondent. The University, at least before 1999 considered the portion of land now in dispute as part of its property and dealt with it as such. Through one of bodies it ultimately gave that portion to the 1st Respondent

in 1999. Whether or not that allocation was approved by the council of the University is a matter for the University. After the allocation the 1st respondent fenced in the site. The applicants did not raise a finger for next eight to nine years.

The 1st applicant does not tell us why when he fenced in his chaplaincy he left out the portion now in dispute. Except to give a spurious answer that he fenced only the developed portion. Fencing is meant to demarcate one's property; it is inconceivable that one should fence part only of one's property and leave the other for no reason at all and add to that keep quiet when someone else fences the same property.

When the 1st applicant began to stir on the 15th July 2008 in a letter that was concealed to the court, the Rev. Kheekhe only complained that 1st respondent was building too close to the Anglican chaplaincy and that this would lead to conflict. Quiet strange coming from a priest whose Bishop says in the founding affidavit that they always maintained harmonious relations with 2nd applicant "befitting of sister church denominations." It would appear then that the Rev. Kheekhe did not consider the L.E.C. as a sister denomination with which they could co-exist as they did with the 2nd applicant who is in equal proximity. Be that as it may when the second respondent points out that surely the Rev. Kheekhe would have said that this was 1st applicant's property. The reply is that he did not know at the

time. The question is then who knew and when, in the light of the assertion in this letter that he was the mouth piece of the church council of the Anglican chaplaincy.

The construction of the chapel on the site is nearly complete. A building does sprout overnight like mushrooms. Building materials are put on site, foundations are dug and laid out. Walls then go up. This happened in full view of the applicants.

Against this back-ground the applicants rushed to court on an urgent basis seeking final orders. I must confess I have not seen a case of worse abuse of process.

A lot of arguments have been advanced about who owns the property in dispute. I will not go into it. Suffice it to say that in not considering referring the matter to trial to resolve the disputes, which in any case the applicants foresaw when they approached court urgently, the Land Act 1979 section 82 disposes of the matter conclusively. It provides:-

“Where at the commencement of this Act, any land or part thereof has, whether by error or otherwise, been the subject of two or more allocations,

the allottee who has used the land and made improvements thereon shall hold title to the land in preference to any allottee who left the land unused and undeveloped”

It is for these reasons that I dismissed the application with costs.

T. NOMNGCONGO
JUDGE

For Applicant : Mr. Phoofolo
For Respondent : Mr. Mohau