

IN THE HIGH COURT OF LESOTHO

In the matter between:-

**REVEREND ELIAS THATO MONA**

**APPLICANT**

and

**BISHOP SEBASTIAN KOTO KHOARAI  
THE CATHOLIC CHURCH IN LESOTHO**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**CORAM : HON. MR JUSTICE S.N. PEETE**

**DATE : 28<sup>TH</sup> MARCH 2007**

**DATES OF HEARING : 9<sup>TH</sup> MARCH and 24<sup>TH</sup> APRIL, 2006**

**Introduction**

[1] On the 7<sup>th</sup> June 2000, the applicant – an ordained catholic priest since 1986 – filed an application before this court seeking an order couched thus:-

*“1. That the purported dismissal of the Applicant as a priest*

*referred to in 1<sup>st</sup> Respondent's letter dated 9<sup>th</sup> December 1999 be declared null and void and of no legal effect and consequence.*

2. *That Applicant be reinstated to his position as Priest and chaplain of 'Masentle High School forthwith.*
3. *That 1<sup>st</sup> Respondent be directed to publicise the fact of Applicant's reinstatement to the Members of the diocese of Mohale's Hoek.*
4. *That Respondents be directed to pay costs of this application."*

[2] In his founding affidavit the applicant alleges in the main that on the 2<sup>nd</sup> February 2000 the 1<sup>st</sup> respondent Bishop Sebastian Koto Khoarai served upon him a letter dated 9<sup>th</sup> December 1999 in terms of which he was informing him the applicant about

***“the Evangelization of People’s Decree purportedly dismissing me from priesthood.”***

and enclosed therein were two documents – one written in Latin and another allegedly its unofficial translation R4a.

[3] In his para 7 applicant particularly alleges that there is no probable proof that The Pope ever endorsed his dismissal inasmuch as The Pope could never competently have done so without affording [me] a prior hearing and assuming a decision to dismiss was ever made, the said decision would be of no consequence and effect by reason of not having been afforded an opportunity to defend [myself] against any

allegations upon which [my] dismissal is premised.

- [4] Applicant maintains that all cases which carry a perpetual penalty of dismissal from the clerical state are to be governed by Canons 1342 (2) and 1425.
  
- [5] He solemnly states that the 1<sup>st</sup> respondent – Bishop Sabastian Koto Khoarai – has never alerted him to any impending proceedings “*for my dismissal from the clerical state*” and neither did the administrative organs ask him to make any representations in respect of such matter.
  
- [6] He submits that he has thus been arbitrarily (without being afforded opportunity to make representations to whatever allegations) been defrocked.
  
- [7] It should be noted at this stage that the 1<sup>st</sup> Respondent only filed an answering affidavit only after having been granted leave to do so by this court. This was a sequel to an unsuccessful application on points *in limine* before my Sister **Majara J.** and appeal before the Court of Appeal of Lesotho – (CIV/APN/196/2000 and C. of A. NO.3 of 2005 respectively)
  
- [8] In his answering affidavit the 1<sup>st</sup> respondent vouches for the authenticity of the R4a as having been decreed by the late Pope John Paul II as the Supreme Pontiff. He also in great detail described the hierarchy and structure in the Roman Catholic Church, especially the

position of the **Congregation for the Evangelization of Peoples** in the Roman Curia and pointed out that the Congregation is the Pope's arm through which He carries out his duties as the Supreme Pontiff of the Roman Catholic Church.

- [9] He admits that a cleric or a priest may lose his clerical state by a rescript of the Holy See which can do so in terms of Canon 290 (3) of the Canon Law of the Roman Catholic Church.
- [10] He further admits that he issued the “**Canonical Warning**” dated 4<sup>th</sup> January 1999. Its full text reads:

*“4 January 1999.*

*Rev. Elias Mona,  
Mohale's Hoek.  
Lesotho.*

#### ***CANONICAL WARNING***

*Father Mona,*

*It has come to our notice that you are frequently drunk over weekends, causing many incidents, including a recent occasion when you were arrested and spent a weekend in jail. These situations bring scandal to the Christian faithful.*

*It has also come to our notice that on several occasions you have been found in a compromising situation: women shielding your inert, drunken body in the street by squatting over you, women fighting over you and on once occasion someone alleging forced intercourse or rape.*

*These incidents are public knowledge, to the point that you have become notorious in our diocese. This situation has caused great confusion and scandal among the faithful, to the extent that they are asking whether the Church is showing any leadership at all or whether the Church's law on*

*priestly celibacy has been changed.*

*It is equally a matter of record that many encounters between us regarding this and other matters, during which we urged you to change your mode of life and to conduct yourself more according to the example of our Lord Jesus Christ, have proved fruitless. Indeed, you seem to be completely unable to exercise self-control.*

*It is therefore necessary to issue a canonical warning to you, to the effect that, should you not come to the bishop's house and accept being sent for rehabilitation and thereby immediately retrain from the external sins against the sixth commandment (c 1395,1), I shall be forced to issue a decree of suspension a **divinis** against you.*

*You have fifteen days in which to respond to this warning, failing which a decree of suspension will be issued. This will be followed by the further steps envisaged in c 1395,1.*

*Yours in Christ Jesus,*

*S.K. Khoarai, Bishop of Mohale's Hoek      Phatsoane, VG & Chancellor"*

This warning was only handed to Applicant on the 9<sup>th</sup> April 1999.

[11] To this warning the applicant replied on the 19 April 1999 as follows:

*"19/04/1999*

*YOUR EXCELLENCY  
BISHOP S.K. KHOARAI  
DIOICSE OF MOHALE'S HOEK  
P.O. BOX 88  
MOHALE'S HOEK*

*(BY REGISTERED MAIL)*

*Your Excellency,*

*re: CANONICAL WARNING*

*I refer you to the above mentioned matter and acknowledge receipt of your letter dated 4/1/99 which I received on the 9/4/99.*

*At the outset with due respect I wish to vehemently deny all accusations leveled against me as being devoid of truth. In particular I deny that I have*

*ever had any encounter with you regarding my behaviour as you have alleged or at all.*

*With due respect I wish to object to the issue of the canonical warning as it is being issued without first having afforded me any prior hearing on the said obnoxious allegations against me.*

*Consequently, I appeal to you to reconsider your decision on this matter and allow me the opportunity to defend myself in the true spirit of Christian Brotherhood.*

*Yours in Christ Jesus,*

*PER: \_\_\_\_\_*  
*Rev. T. MONA*

*cc. La sacra congregazione per Il Clero  
Palazzo delle congregazioni  
Piazza Pio XII, No.3  
Roma 00193”\_\_*

- [12] He goes on to explain that the applicant persistently refused to accept the document when original service was effected on him; and that it returned unclaimed when sent by registered post (17/3/99).
- [13] He proceeds to state that he then personally delivered the Canonical Warning on the 9<sup>th</sup> April 1999.
- [14] It cannot be disputed that this Canonical Warning of the 4<sup>th</sup> January 1999 which the 1<sup>st</sup> Respondent describes as a medicinal or corrective measure designed to rehabilitate an offender in order that he mends his ways, related to the decree of suspension which was later certified by the 1<sup>st</sup> Respondent on the 25<sup>th</sup> January 1999.
- [15] It should suffice at this juncture to state that my Brother **Ramodibedi**

J (as he then was) traversed the issue of suspension and gave a reasoned judgment setting the suspension aside. (CIV/APN/207/99 – dated 4<sup>th</sup> November 1999)

[16] It is common cause that the 1<sup>st</sup> Respondent had addressed himself to The Pope on the 7<sup>th</sup> May 1999 annexing a large “*Dossier for the case of Dismissal from the clerical state of Rev. Elias Thato Mona*”. This Dossier was submitted to the Congregation for the Evangelisation of Peoples in Rome in Italy.

[17] A letter addressed to His Holiness late Pope John Paul II dated 7<sup>th</sup> May 1999 reads in full:

*“His Holiness, Pope John Paul II  
Vatican City*

*7 May 1999*

*Most Holy Father,*

*I, Sebastian Koto Khoarai, Bishop of Mohale’s Hoek, Lesotho, in which, as a result of lack of qualified personnel, there is no ecclesiastical Tribunal, hereby most humbly petition Your Holiness to grant a decree of dismissal from the clerical state and of dispensation from the concomitant obligation of celibacy for Rev Elias Thato Mona, who has been responsible for many grave offences against the sixth commandment and has, also for various other reasons as will be gleaned from the accompanying dossier, been a serious cause of scandal in the local Christian community over a lengthy period of time.*

*In spite of advice to amend his ways and to repair the scandal given to the community of the faithful, given him on many different occasions over the past eight years, and in spite of the instruction for him to make a spiritual retreat in order to reconsider his vocation, Rev Elias Thato Mona has persisted in his scandalous way of life.*

*On the 9<sup>th</sup> day of April 1999 a final canonical warning was served on him*

*at the Masentle Catholic High School where he teaches, in the presence of Fathers Patrick Phatsoane, omi, VG and William Thahanyane, scp, consultor, which he refused either to accept or to hear. This was followed by a decree of suspension a **divinis** on the 30<sup>th</sup> day of April 1999, served on him in the same manner and in the presence of the same consultors. Nevertheless he persists in his misconduct. Furthermore he refuses to apply to be released from the clerical state and for a dispensation from the obligation of celibacy.*

*While it grieves us deeply to make this petition, Holy Father, we consider that the good of the Church demands that Rev. Elias Thato Mona be dismissed from the clerical state and be dispensed from the concomitant obligation of celibacy.*

*Asking your Apostolic blessing, we remain, yours humbly in the Lord.*

*+ Sebastian Koto Khoarai  
Bishop of Mohale's Hoek*

*Rev. Patrick Phatsoane, omi  
Vicar General & consultor*

*Rev. William Thahanyane, omi  
consultor"*

- [18] This letter in effect was asking for the dismissal of the applicant from the clerical state; and we know that the Applicant challenged his suspension on the 24<sup>th</sup> May 1999 and that when my Brother **Ramodibedi J** set aside the suspension on the 4<sup>th</sup> November 1999, the applicant had – on the 15<sup>th</sup> October 1999 – already been effectively dismissed from the clerical State with the approval of The Pope in *forma specifica*. (See R4a). This Decree is worded thus:-

*"P/N 4624/99*

*(Unofficial translation)*

*CONGREGATION FOR THE EVAGELIZATION OF PEOPLES*

*DECREE*

*Bearing in mind the notoriety and obstinacy with which the Revd ELIAS*



*THATO MONA diocesan priest of Mohale's Hoek, has committed offences such as referred to in par 1395 par 1;*

*Having considered the great difficulties of dismissing him from the clerical state by the penal process following the norms of canon 1342 par 2, canon 1425 par 1 section 2a, and canons 1717 to 1719;*

*Keeping before our eyes the special Mandate to this Congregation for the Evangelization of peoples, granted in (papal) Audience of 15 October 1999, of derogating from the common norms in similar cases;*

*Having considered all these things maturely, and weighing up with (due) deliberation that the headstrong priest has been warned again and again;*

*(now therefore) this Congregation has DEGREED:-*

*That the Revd. ELIAS THATO MONA, diocesan priest of Mohale's Hoek must be advised of the penalty of dismissal from the clerical state.*

*Given at Rome, from the Offices of the Congregation for the Evangelization of Peoples, on the 15<sup>th</sup> of October 1999.*

*(Signed) Joseph Cardinal Tomko, Prefect*

*(Signed) Archbishop Marcellus Zago, OMI, Secretary*

*JOHN PAUL II, by Divine Providence the Supreme Pontiff, observing all the provisions enacted in article 110 of the General Instructions of the Roman Curia, in Audience granted to the undersigned Cardinal prefect on the 15<sup>th</sup> day of October 1999, having heard from him the story of offences committed by the above-mentioned priest,*

*has approved this present Decree in forma specifica, thus excluding all possibility of appeal or further recourse, and dispenses and absolves the said priest from each and every obligation connected with the presbyteral order, not excluding the law of holy celibacy.*

*Anything to the contrary notwithstanding.*

*(Signed) Joseph Cardinal Tomko, Prefect*

*(Signed) Marcellus Zago, OMI, Secretary"*

- [19] The appellant's victory over the suspension became pyrrhic when on the 2<sup>nd</sup> February 2000, he received a letter from the 1<sup>st</sup> respondent dated 9<sup>th</sup> December. The letter reads in full:-

*"Dear Mr Mona,*

*9<sup>th</sup> December 1999*

*I have been instructed by the Congregation for the Evangelization of Peoples to communicate the enclosed Degree to you, dated 15<sup>th</sup> October 1999, in which you have been dismissed from the priesthood. I have also been instructed to make your dismissal known to the faithful of the diocese.*

*I enclosed a translation of the Decree for your convenience.*

*In view of the above development, I have no choice but to ask you to vacate premises and to leave the parish within 15 days of receipt of this letter.*

*Sincerely yours in Christ,*

*+ Sebastian Khoarai, OMI.,  
Bishop of Mohale's Hoek*

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*Mr. E. Mona,  
Masentle High School,  
P.O. Box 229,  
MAFETENG 900.*

*cc. His Eminence Cardinal Josephus Tomko, Praefectus  
Apostolic Nuncio  
Apostolic Visitor  
His Grace Archbishop B. Mohlalisi, OMI.,"*

[20] The crux of the issue is to determine whether the applicant had been formally called upon to make representations before the Dossier pleading for applicant's defrockment was dispatched to Rome and this is principally a question of fact.

[21] The Dossier contains the following documents:-

a) 1<sup>st</sup> respondents letter to His Holiness dated 7<sup>th</sup> May 1999;

- b) Canonical Warning – dated 4.1.99;
- c) A Note proving service on 9.4.99;
- d) Decree of Suspension – dated 24.1.99;
- e) A Note proving service – dated 30.4.99;
- f) Curriculum Vitae of Applicant;
- g) Affidavits from various people with a covering comments of Examining Judge **Marc de Muelenaer**.

All these people recommended laicization (defrockment) of applicant because of his alleged drinking and womanizing tendencies.

[22] A glance through the Dossier reveals a sad catalogue of events since 1997/8 regarding the standing of the applicants and other priests in the Roman Catholic Church in the Mohales' hoek Diocese and it seems as early as April 1998 the 1<sup>st</sup> respondent had already been instructed by the Congregation to prepare a case for the dismissal from clerical state of Father Mona because of his alleged alcoholism and alleged promiscuity which are offences against Canons 1394 and 1395.

[23] It seems Apostolic Visitations had even preciously been ordered by the Congregation in October 1996 and July 1997 and were led by the Most Reverend **Cardinal Napier** OFM Archbishop of Durban and several interviews with Church's faithful and other people were undertaken.

[24] The instructions of the Congregation also provided a *modus procedendi* for dismissal from clerical state especially of the Applicant. These were:

- a) proof that Canons 1394 and 1395 were being contravened by applicant;
- b) Proof that Lesotho is a mission territory where there is no Ecclesiastical Tribunal regularly functioning to handle such misdemeanours;
- c) Official (Canonical) suspension;
- d) Petition addressed Holy Father countersigned by two diocesan consultors;
- e) Proof that the priest has refused to be dismissed from the clerical state (Canon 290)

[25] According to this procedure and if all steps had been followed, the Congregation (Dicastery) “after examining each case carefully would then present the case to the Holy Father for his approval in *forma specifica* of the dismissal of the priest from the clerical state with dispensation from celibacy.”

[26] It is important to note that the priest – as Petitioner – is also to be consulted regarding the merits of the cause in the process. The compilation of these affidavits and explanations from the errand priest is intended to enable the Congregation in Rome to consider all the relevant facts before coming to a decision.

[27] It seems that a decision having been taken to defrock the applicant certain procedural steps had to be taken; and canonical warning and suspension were some of these steps.

[28] What is lacking though – and cannot be gleaned from the papers – is whether (a) the applicant was ever formally asked, and he refused, to be liacised; (b) applicant was ever made aware of the recommendation for his dismissal from clerical state to be made to the Congregation and that he had to make certain representations as a petitioner. OR was – as Papal Decree states – the applicant labeled as notoriously obstinate and headstrong and impervious to multiple warnings. These were the pertinent factors which the Congregation for the Evagelization of Peoples surely bore in mind and considered before decreeing dismissal of applicant as it did on the 15<sup>th</sup> October 1999 and that this Decree was approved by Pope John Paul having heard Cardinal Joseph Tonko.

[29] In these proceedings Applicant's case stresses the following issues:

- a) that R4 (the Decree) has no probative value inasmuch as it is a document in the nature of a hearsay;
- b) that there is no evidence that Pope John Paul II ever endorsed the dismissal – without affording him a prior hearing;
- c) that he was not afforded any opportunity to defend himself against allegations upon which his dismissal is premised;
- d) that Canon 1342 (2) excludes dismissal from clerical state (a perpetual penalty).

[30] These are serious issues of fact; and whilst it is clear that the applicant

replied to the Canonical Warning dated 4/1/99 by his letter dated 19<sup>th</sup> April 1999, categorically denying the serious allegations of drunkenness and womanizing, the applicant still insisted upon his right to have been afforded prior hearing before the canonical warning was decreed. (See Para 11, *supra*)

- [31] In CIV/APN/207/99 my Brother **Ramodibedi J.** (as he then was) had this to say:-

*“It is common cause that before the Applicants were served with suspensions as fully stated above they should have been given letters of “Canonical Warning” It is their case however that even at that stage that they were not given an opportunity to be heard. Indeed in the case of second Applicant I find that his averment in this regard in paragraph 5 (iii) of his founding affidavit has remained completely uncontroverted and I accordingly accept it and proceed on the basis of its correct. I do so on the authority of **Plascon – Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623 at 634-35.”*

- [32] By the same token the respondent has not controverted the specific allegation in para 7.4. which reads thus:-

*“7.4 I verily state that other than the aforementioned canonical warning and suspension, the 1<sup>st</sup> respondent has never alerted me of any impending proceedings for my dismissal from the clerical state, neither has any of the 2<sup>nd</sup> Respondent’s administration staff asked me to make any representations in respect of such matters.”*

- [33] This court has not been shown any document advising the applicant that besides the canonical suspension, dismissal proceedings were

then afoot and applicant being advised of his right then to make representations responding to the allegations or to apply for voluntary defrockment. The last communication between the 1<sup>st</sup> respondent and the applicant was – according to papers before court – his canonical suspension served upon applicant on 30<sup>th</sup> April 1999, after which he applied to court to have the suspension set aside.

[34] The way 1<sup>st</sup> respondent's affidavit is drafted leaves much to be desired – it does not address specific issues raised in the applicant's founding affidavit paragraph by paragraph but merely addresses general issues e.g. "APPLICANT'S DISMISSAL". Under this heading para 7.4 is not directly addressed or controverted – and this leaves everything to conjecture.

[35] 1<sup>st</sup> respondent's Para 8 reads:-

*"8.2 ...I wrote a petition to His Holiness Pope John Paul II, which is part of the dossier referred to above, and mentioned in the petition that-*

- (i) the Applicant had despite advice, refused to amend his ways an repair the scandal in the community of the faithful.*
- (ii) On 9<sup>th</sup> April 1999 I served a final canonical warning on him which he refused to accept or to hear.*
- iii) On 30<sup>th</sup> April 1999, I served the Applicant with a decree of suspension.*

*"8.3. The Congregation considered the dossier and the petition*

*together with the Applicant's response (to the Canonical Warning which the Applicant had himself copied to the Congregation for the Evangelisation of Peoples. After considering all that was presented before it and having been mandated there by His Holiness Pope John Paul II the Congregation for Peoples issued a decree of dismissal."*

[36] In short, the 1<sup>st</sup> respondent submits in his answering affidavit that due to applicant's recalcitrant attitude, the applicant had thereby abused the opportunity to present his case against what were indeed very serious allegations against him and that applicant merely desired to frustrate all the inquiries into his misconduct.

[37] To this, the applicant retorts in his replying affidavit by contending thus:-

**"8.2 Re: para 8.4, 8.5, 8.6, 8.7 and 8.8**

*"I deny that I was ever given any opportunity to defend myself against any allegations of misconduct. It is significant that REM<sup>2</sup> (Applicant's reply to Canonical Warning) was my plea to the deponent to afford me an opportunity to defend myself. The deponent honoured my plea: it is ironic that the deponent now dubs REM<sup>2</sup> as my representation.*

8.2.1.2 *It is significant that I was never apprised of any case presented against me before the Congregation. The latter never gave me any opportunity to defend myself against any such case."*

[38] It seems fair to infer that having been suspended, the applicant was



taken and treated as a stubborn, headstrong, obstinate priest who did not deserve to be given opportunity. Indeed 1<sup>st</sup> respondent states:-

*“8.7 The Applicant’s initial refusal to accept the warning, and his refusal to deal with the charges brought against him under that canonical warning, means that he did not have to answer to those charges alternatively he was not prepared to answer them.”*

[39] The 1<sup>st</sup> respondent explains that at the relevant time, as is at present, there was no Ecclesiastical Tribunal in Lesotho to adjudicate penal cases; and that The Pope had given a Special Mandate to proceed administratively – rather than judicially – in certain cases and to present directly to Him for approval any decrees of dismissal from the Clerical State.

[40] It is these administrative procedures – *modus procedendi* – that needed to be strictly followed in the absence of a judicial inquiry. A very detailed *Modus Procedendi* has been attached by the 1<sup>st</sup> Respondent (*Record, vol. II, p. 72 etc.*). It reads in part:-

*“...For this purpose, it would be necessary to abide by the following procedure:*

- 1) The bishop should officially suspend the priests in question from every power of order and government for a certain length of time (can.1333).*
- 2) He should impose or declare a penalty in an administrative manner, i.e. by an extra-judicial or administration decree (can. 1342 §1) (enclosure 2)*

- 3) *The bishop should compile a petition addressed to the Holy Father, which is countersigned by two diocesan Consultors as witnesses, in which he presents in details the elements and particulars of each specific case, requesting expressly the dismissal from clerical state and the dispensation from the obligation of celibacy for the priests in question, making it clearly known to the Holy Father that the priests are from a mission territory which is deprived of an ecclesiastical Tribunal; that the priests are involved in case as specified in can. 1394 and 1395, 1-2; that they continue to persist in the offence and for that matter suspended by the bishop; and that they have refused to apply to be dismissed from the clerical state (can. 290, 3") and the dispensation from the obligation of celibacy (can.291).*
- 4) *The document should be sent to the congregation for the Evangelization of Peoples, through the Nunciature in Pretoria. The Apostolic Nuncio will include his remarks confirming that all the conditions related to the case have been fulfilled.*
- 5) *This Dicastery after examining each case carefully will then present the case to the Holy Father for his approval in a specific form, of the dismissal from the clerical state with dispensation from celibacy."*

[41] In this case, it must be fully realized between the applicant and the 2<sup>nd</sup> respondent there exists no contract of service or employment such that provisions of the Labour Code may apply e.g. section 66 (4) which reads:-

“(4) Where an employee is dismissed under subsection (1) (a) or

(b) of this section, he or she shall be entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made, unless, in light of the circumstances and reason for dismissal, the employer cannot reasonably be expected to provide this opportunity. The exercise or non-exercise of this right shall not act as

*any bar to an employee challenging the dismissal pursuant to the terms of a collective agreement or contract of employment, or under the provisions of the Code.” (My underline)*

- [42] In my view, no contract existed in a legal sense. Applicant as the priest and “*man of cloth*” has been called by God and has undertaken certain solemn vows under the Canons of the Roman Catholic Church. He is not an employee of the Church in the secular sense but rather a servant of God. The “*numerous benefits*” carried by the respectable status of priesthood have not been specified by the applicant in his founding affidavit. The applicant was admittedly a bible knowledge teacher which was part of his “*calling*” – for which no stipendiary benefit was derived or could be claimed as of right.
- [43] In my view, the administrative *modus procedendi* held in lieu of judicial inquiry is intended to garner material facts for the benefit of the Congregation in Rome so that the Congregation can then consider the merits and demerits of the allegations against the errant priest and to decide whether to decree a dismissal from clerical state.
- [44] To the question whether the applicant was afforded an opportunity to respond to the allegations, the 1<sup>st</sup> respondent has not succeeded to show that this was done. But that is not the end of the matter.
- [45] We are here dealing with the government of a church freedom of conscience and relationship between a church and its priest. In an interesting case of **Mankatshu v Old Apostolic Church of Africa** –

1994 (2) SA 458, **Dumbutshena JA** held that the *audi alteram partem* rule does not apply where a priest who claims that he was denied the opportunity to be heard, fails to prove that he has a justiciable civil right or interest which was prejudicially affected, for example where there exists contract of service/employment between the church and the applicant.

- [46] The court went so far as to say that “*jurisdiction or lack of it, is an important issue when considering whether a party aggrieved by his church can take the dispute to a civil court. The authorities say that, when there is an absence of civil rights or interests prejudicially affected by a decision of a voluntary association, the civil courts have no jurisdiction.*” - **Dumbutshena JA** at 460-61.

It was also held in that case that there was no justiciable contract of service; nor could the constitution be taken as a contract of service.

- [47] In the English case of **Davies v Presbyterian Church of Wales** – [1986] 1 All ER 705 (HC) **Lord Templeman** opined as follows:

*“My Lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. But in the present case the pastor of the Church cannot point to any contract between himself and the Church. The book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. The duties owed by the pastor to the Church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the Church and his religion. His duties are*

*defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the Church, then his pastorate can be brought to an end by the Church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable Church would sever the link between minister and congregation.*

*The duties owed by the Church to the pastor are not contractual. The law imposes on the Church a duty not to deprive a pastor of his office which carries a stipend, save in accordance with the procedures set forth in the book of rules. The law imposes on the Church a duty to administer its property in accordance with the provisions of the book of rules.”*

- [48] Besides being an ordained priest whose service to God also perhaps involved teaching Bible Knowledge at ‘Masentle High School, the applicant has no shown any stipendiary interest that is prejudiced. Between the applicant and the 2<sup>nd</sup> respondent there exists no contractual relationship which gave rise to a legitimate expectation which entitled him to be heard.
  
- [49] Care should be taken in dealing with matters jurisdictional which are exclusively spiritual and those temporal and secular. A priest takes vows devoting his whole life to the church – with obedience, celibacy and sobriety. He is a servant of God through His Church. We are not dealing with an administrative or a public official or institution.
  
- [50] In the case of **Grundling v Van Rensburg No. 1984 (4) SA 680**

(WLD) (*in Afrikaans*), a preacher had not been informed of the nature of the rumour which was being investigated by the Presbytery Commission until a preliminary investigation was completed and report submitted to the Presbytery. It was held by **Conradie J** that the right to rebut a rumour or a serious allegation at an early stage was a valuable right denial of which amounted to a serious irregularity. But See **Chairman Board on Tariffs and Trade v Brenco** – 2001 (4) SA 511 (SCA) where **Zulman JA** said:-

*“There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercise of power, regardless of their nature. On the contrary courts have recognized and restated the need for flexibility in the application of the principles of fairness in a range of different contexts.”*

- [51] I am of the view that the approach of **Dumbutshena JA** is more appropriate in the circumstances of this case. The 1<sup>st</sup> respondent wrote a letter to His Holiness Pope John Paul II on the 7<sup>th</sup> May 1999 seeking applicant’s dismissal from clerical state and the applicant– probably ignorant of this petition – filed an application in the High Court on the 24<sup>th</sup> May 1999 seeking the setting aside of his suspension. That the relationships had so deteriorated and so soured between the applicant and 1<sup>st</sup> respondent admits no doubt. Invitations to the 1<sup>st</sup> respondent’s house were turned down and registered mail from 1<sup>st</sup> respondent addressed to applicant was ignored. The opportunity to make representations had been removed and there were no avenues for any communication.

- [52] Even assuming that the applicant was not afforded an opportunity to present his case when the investigations of the allegations were afoot, I hold that in view of the fact of his priestly status not based on any temporal contract and was hence devoid of any stipendiary interest, the principle of *audi alteram partem* does not apply.
- [53] The main thrust of Mr. Mda's submission is that the applicant was not afforded an opportunity to respond to the allegations that were being made against him. Applicant chose not to attend the Bishops' house to set the record straight but acrimonious litigation began over his suspension.
- [54] There is plethora of authority to the effect that the *audi* rule is not a limitless principle. It must be contextually applied and where an opportunity has been occasioned but not taken advantage of but ignored, the principle cannot later be claimed more especially where there exists no contractual relationship between the applicant and the person or body that dismisses.
- [55] The *audi* principle is as I have just alluded not an absolute concept or phenomenon. It has limits and its application may be qualified by particular circumstances of each case. Thus, it has been said, the maxim *audi alteram partem* embodies a rule of equity and consequently a man by his own conduct may deprive himself of any claim to rely on it – **Radloff vs Clocolan Ko-Operatiewe Landbou BPK** – 1955 (3) SA 418 at 423 per **Van den Heever JA** (in

Afrikaans); where the learned Judge of Appeal states:-

*“In the Court a quo mention was apparently made of the doctrine audi et alteram partem. Mr **Badenhorst** wisely did not rely on that argument. A man which is invited time and again to state his case and who ultimately refuses to do so can hardly call upon the assistance of this doctrine.”*

- [56] Before concluding this judgment. I should also mention that as regards the authenticity of the R4a – The Decree of the Congregation for the Evangelization of Peoples, this Decree – ex facie – is a foreign document purportedly executed at the Holy See in Rome, Italy.
- [57] The court has an inherent power to consider other evidence other than formal authentication *facta probatum* – to determine whether the foreign document has been executed properly. The Latin language and contents of the document must be looked at their context their relevance and their contemporaneity. The description of the priest in r4a befits applicant as to location (Mohale’s Hoek), circumstance (violation of Canons). All these render it more probable that the document was executed in Rome and dispatched to the 1<sup>st</sup> respondent. There is no cogent reason to contemplate a conspiratorial fraudulent escapade at the in instance of the 1<sup>st</sup> respondent – **Chopra vs Sparks Cinemas (Pty) Ltd** 197 (2) SA 352 (D); *Erasmus – Superior Court Practice* – B1 – 407.
- [58] For all the above reasons I would as I hereby do, dismiss the application with costs.



**S.N. PEETE**

**JUDGE**

For Applicant : **Mr. Z.Mda**

For Respondents : **Mr. Jeffreys (assisted by Mr. Matsau)**