IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1354/19

HELD AT MBABANE

In the matter between:

METROPOLITAN EVANGELICAL CHURCH INTERNATIONAL **APPLICANT**

And

MHLONIPHENI KHUMALO **1st RESPONDENT**

SOLOMON NHLENGETFWA **2nd RESPONDENT**

BHEKISISA DLAMINI **3rd RESPONDENT**

DUMSANI KUNENE **4th RESPONDENT**

COMMISSIONER OF POLICE **5th RESPONDENT**

Neutral Citation: *Metropolitan Evangelical Church International vs Mhlonipheni Khumalo & 4 Others [1354/19] [2019] SZHC 212 (14th November 2019*

Coram: **M. LANGWENYA J.**

Heard: **4 October 2019**

Delivered: **14 November 2019**

Summary: *Interim Church Board approaches Court on a certificate of urgency seeking an interdict against respondents-Applicants want to convene Church Conference and fear it will be disrupted by the respondents-Requirements of an interim interdict must exist contemporaneously.*

Matter raises disputes of fact at many levels- dispute on whether the applicant is a Church administered through provisions of the Constitution or whether it is a Company- Dispute of facts was foreseen by disputants- application dismissed.

JUDGMENT

Introduction

[1] On 21 August 2019 this matter was enrolled as an urgent application before this Court. On 16 September 2019 the judge who was on duty when the matter was enrolled recused herself from hearing the matter because, as she

put it, she had 'previously dealt with a similar matter between the same parties[1]' in case number 1949/18. The matter was enrolled and arguments were heard in the contested motion roll of 4 October 2019.

[2] In the present matter, Metropolitan Evangelical Church International is the applicant; while in case number 1949/18 the applicant herein is reflected as the first respondent. Ben Tsabedze features in both applications as deponent and chairperson in the Court papers on behalf of the Metropolitan Evangelical Church International. Bhekisisa Dlamini is the first applicant in case number 1949/18 while in the present proceeding he appears as the third respondent.

[3] The applicant herein is described as a Church and as a Company by the disputants.

[4] In case number 1949/18, the High Court gives the genesis of the dispute between the parties as emanating from positions that are created by the Constitution of the first respondent and not its Articles of Association or the Companies Act[2]. The positions that are contested in case number 1949/18 are those of President, vice president and of Church Board of the Metropolitan Evangelical Church International. The argument being that the applicants in case number 1949/18 were unlawfully removed from office as

[1] See entry of 16 September 2019 on Judge's file of case No. 1354/19.
[2] See paragraph 9 of the Judgment of case no. 1949/18.

members of the Church Board by the respondents who were elected as an *interim* Church Board in the annual church conference on 23 November 2018 whose term expires in the following annual church conference of July 2019.

[5] The present matter seeks an order, among others, interdicting the respondents from interfering with the conduct of the Church conference and the election of the Church Board in line with the Constitution of the Church. The respondents oppose the application.

[6] This introduction shows the interconnectedness of the two matters and that the current matter cannot be divorced from the facts and findings of the High Court in case number 1949/18.

Orders sought

[7] The applicant approached this Court on a certificate of urgency seeking the following relief:

1. Dispensing with the usual forms relating to service and time limits provided for by the Rules of this Court.
2. Condoning the applicant's non-compliance with the Rules of this Court regarding service of court process and time limits.
3. Restraining and or interdicting the first to the fourth respondents from:

3.1 Interfering with the administration of the Metropolitan Evangelical Church International by the *Interim* Church Board or any subsequent Church Board that may be elected in terms of the Applicant's Constitution.

3.2 Interfering in any adverse manner with the transacting of the Applicant's Conference business and the election of the Church Board in line with the Constitution of the Applicant.

4. Directing that the fifth respondent assign members of the Royal Eswatini Police Service to assist the applicant in enforcing compliance with the interdict by the Respondents or any person acting under or through the Respondents.

5. Ordering that prayers 1, 2, 3 and 4 operate with immediate and *interim* effect pending finalization of the matter and calling upon the first, second, third and fourth respondents to show cause why the prayers are not made final on the return date to be determined by the Court.

6. Costs at a punitive scale

7. Further and or alternative relief.

Applicant's case

[8] The Founding affidavit in this application is deposed to by Ben Tsabedze who avers that he is the chairman of the applicant's *interim* Church Board. The papers before Court state that by virtue of a resolution passed on 10 August 2019 by the *interim* Church Board, Ben Tsabedze is authorized to represent the applicant in the current proceeding. In the Founding affidavit, the applicant is described as a Christian Church established by a Constitution

and a body corporate with perpetual succession whose local headquarters is situate at iKhwezi mission in the Lubombo district.

[9] In their answering affidavit, the respondents deny that Ben Tsabedze is authorized to represent the applicant. Respondents aver that they are directors of the applicant Company and have not appointed Ben Tsabedze to act on the Company's behalf[3].Curiously, Bhekisisa Dlamini-the third respondent herein-avers in his founding affidavit in case number 1949/18 as follows in paragraphs 8 and 9[4]:

> **'[8] The first respondent is Metropolitan Evangelical Church International, an association not for gain duly registered and incorporated in accordance with the company laws of the Kingdom of Eswatini with its principal place of business at iKhwezi mission in the district of Lubombo.'**
>
> **'[9] the second respondent is Ben Tsabedze, an adult Swazi male of ESibovu, EKuphakameni in the Manzini district cited herein in his capacity as the chairperson of the incumbent Board of the first respondent.'**

[10] The third respondents' denial that Ben Tsabedze is chairman of the applicant's *interim* Board and as such authorized to act on behalf of the applicant is farcical and amounts to approbation and reprobation on the issue of *locus standi* of Ben Tsabedze and on the legal status of the Applicant.

[11] The confirmatory affidavit of Simon Mshayisa contends that the first, second, third and fourth respondents have unconstitutionally usurped the powers of the applicant by arguing that the Church is a Section 17 Company

[3] See paragraph 11 of the Respondents' answering affidavit at page 99 of the Book of Pleadings.
[4] See page 73 of the Book of Pleadings.

albeit the registration of the said company was done without the resolution of conference and was never ratified by conference[5]. For this reason, the registration of the applicant as a company is illegal-so the argument goes.

[12] Clearly, in my view the issue of whether the applicant is a Church or a Section 17 Company is still live and raises disputes of fact which require oral evidence to be led. The disputants were aware of the disputes of fact as such was the pronouncement of this Court in case number 1949/18.

[13] The respondents previously served as members of the Church Board of applicant before they were removed from office in the annual conference of the Church in 2018. The *interim* Church Board whose chairperson is the deponent to the founding affidavit herein was elected and mandated to, among others, resolve the matter of the election of the President of the applicant. The third respondent opposed the removal of the previous church board from office before this Court and lost the bid to have the previous church board reinstated in office.

[14] It was on 22 July 2019 and during the annual Church conference at iKhwezi mission that the first, second, third and fourth respondents disrupted the conference and threatened delegates with violence. The conference was, as a result adjourned to a date to be notified in due course. The *interim* Board seeks to re-constitute the annual Church conference on 6 September 2019

[5] See paragraph 3 of Simon Mshayisa's confirmatory affidavit at page 22 of Book of Pleadings.

and fears that the respondents will, again disrupt the conference if they are not interdicted from such interference with the church conference by this Court.

[15] The respondents deny that they have issued any threats or sought to disrupt the operations of the applicant Company in the manner alleged or at all. They assert that instead, it is the deponent to the application who is intent on being disruptive in the company's affairs[6].

[16] This application seeks to interdict the first, second, third and fourth respondents from interfering in any adverse manner with the conduct of applicant's conference and the election of the church board in conformity with the Church's constitution. The applicant further seeks to interdict the first, second, third and fourth respondents from interfering with the administration of the applicant by the *interim* church board or any subsequent church board that may be elected in terms of the applicant's constitution.

Requirements for *interim* Interdict

[17] The requirements for an *interim* interdict are settled. These are: (i) The right which is sought to be protected is clear; if it is not clear, it is *prima facie* established though open to some doubt; and there is (ii) well-grounded

[6] See paragraph 13(e) of the Respondents' answering affidavit at page 101 of the Book of Pleadings.

apprehension of irreparable harm if *interim* relief is not granted and the applicant ultimately succeeds in establishing his right; (iii) the absence of any alternative remedy; and (iv) that the balance of convenience favours the granting of *interim* relief [7].

[18] Whether the applicant has a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence. The right must be a legal right, one that derives from a branch of law[8].

[19] As regards the issue of the *prima facie* right, the Court has to consider whether the applicant has, in its founding papers furnished proof which if un-contradicted and believed at the trial would establish its right. The Court has to consider the facts as set out by the applicant together with the facts set out by the respondents which the applicant cannot dispute and to decide whether with regard to the inherent probabilities and ultimate *onus*, the applicant should on those facts obtain relief when the matter is heard. It is only when the Court considers the facts set out by the respondents and finds that they throw serious doubt on the applicant's case that the applicant cannot succeed[9].

[7] See Prest, *Interlocutory Interdicts,* Juta 1993 at page 55; see also *David Themba Dlamini v Sylvian Longendo Okonda and seven others* Civil Case no. 1995/2008 at paragraph 14.
[8] See *Minister of Law and Order v Committee of Church Summit* 1994 (3) SA 89(B) at 98; *Lipschitz vWattrus NO* 1980 (1) SA 662(T) at 673D
[9] See *Webster v Mitchell* 1948 (1) SA 1186(W) at 1189.

[20] As chairperson of the *interim* Church Board of the applicant[10], the deponent has established a *prima facie* right, although open to some doubt- to bring the application to Court. This is confirmed by the third respondent in his founding affidavit of case number 1949/18. On the face of provisions of the Church Constitution, the Church Board has a clear right to convene the church conference and preside over its proceedings.

[21] It is alleged that the respondents disrupted the church conference in July 2019. This is denied by the respondents. The applicant apprehends that the respondents will again disrupt the church conference which the *interim* church board plans to convene sometime later in the year. The second requisite of an *interim* interdict is a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to the applicant. The test is objective and the question is whether a reasonable person, confronted by the facts, would apprehend the probability of harm. Actual harm need not be established on a balance of probabilities. If the applicant can establish a clear right, this apprehension of irreparable harm need not be established. I am of the view that the applicant has satisfied this requirement for the grant of an *interim* interdict. If the *interim* church Board is unable to convene the church conference and, say elect office bearers who in turn should ensure the smooth running of the applicant, irreparable harm may be caused to the applicant.

[10] A fact that is confirmed by the third respondent (Bhekisisa Dlamini) in case number 1949/18

[22] On the issue of the balance of convenience, I have this to say. I must weigh the prejudice the applicant will suffer if the *interim* interdict is not granted against the prejudice the respondents will suffer if it is[11]. On this account, the balance of convenience would favour that the interdict sought be granted. I am of the view that the respondents have failed to establish why the *interim* church board should be interdicted from executing their duties which includes the convening of a church conference. The respondents have also failed to state the precise nature of the irreparable harm that will be caused to them if the *interim* church board convenes the church conference.

[23] The requirements of an interdict must exist contemporaneously. This is the case in this matter.

Interdict-a discretionary remedy

[24] It is trite too that an interdict is a discretionary remedy. In *Francis v Roberts*[12], Beadle CJ stated as follows:

> **'The Court always has a discretion to refuse to grant an interdict even though all the requisites for an interdict are present. That this is so is beyond doubt'**

[25] The effect of the interdict which is being sought by the applicant is to circumvent and undo the judgment of this Court in case number 1949/18 which is valid. The Court ordered that the issues raised herein cannot be

[11] LAWSA Vol II paragraph 4 06 and the authorities cited there.
[12] 1972 (2) RLR 238(A) at 248F

decided on the basis of the papers as they require the leading of oral evidence. The applicants were aware of this when they embarked on this application. For this reason, even though all the requirements of the interdict have been established, it would be an improper exercise of discretion to grant an interdict to undo a valid court judgment.

Urgency

[26] The issue of urgency, the applicant submits is now academic as it was agreed *inter partes* that it should fall away. The respondents aver that the applicant has failed to set forth explicitly the facts that render the matter urgent. I am of the view that indeed the issue of urgency is but academic at this stage as timelines were, by consent set and a date agreed upon which the matter would be argued before another Judge of this Court. To reopen this issue would, in my view amount to this Court reviewing the decision of another Judge of this Court-a situation that is untenable at law.

Respondents' case

[27] The respondents raised the following points in *limine* that: the deponent to the founding affidavit does not have *locus standi* since the directors of the applicant have not authorized him to move the application on behalf of the company; that the application must fail for reasons of non-joinder of the Registrar of Companies as well as the company-Metropolitan Evangelical Church International; that the orders sought are unsustainable as the applicant seeks to enforce provisions of an unsigned and unregistered

constitution of the church; that the prayers sought are unlawful as they seek to prevent respondents from performing their statutory functions and obligations as directors of the company called Metropolitan Evangelical Church International; that the issues before court are *res judicata* as the honorable Mabuza PJ found that the matter of interdicts and appointment of church boards for instance cannot be resolved on the papers as they raise disputes of fact; lastly that the applicant has failed to set forth explicitly the facts that render the matter urgent as well as state why redress at a future date is not possible.

[28] I have already addressed the issue of the *locus standi* and or absence thereof of the deponent to the founding affidavit to this application.

[29] The respondents argue that the application should be dismissed for non-joinder of the Registrar of Companies and the Company named Metropolitan Evangelical Church International. I associate myself with the legal position that issues of non-joinder are not so much fatal to the legal proceedings as they are dilatory. The Court is at large to either stay the proceedings or order that the said parties be joined[13]. In light of the fact that this issue is inextricably intertwined with the finding of this Court that this case is fraught with disputes of fact which cannot be decided without the aid of oral evidence, I do not pronounce myself on the legal consequences of the non-joinder.

[13] See *Aaron Mkhondvo Maseko v The Commissioner of Police & Another*

[30] The respondents argue further that the orders sought by the applicant are unsustainable. This is because the applicant seeks to enforce the provisions of an unsigned and unregistered Constitution of the Church. Curiously though is the fact that Bhekisisa Dlamini (the third respondent in the present application) confirms that the applicant carries its operations under this unsigned Constitution in his founding affidavit of case number 1949/18[14]. On this score, all disputants, it would appear were aware and agreed that the applicant Church was carrying out its operations through the Constitution.

[31] In any event, the applicant argues that the registration of the church as a company is unlawful as it was done outside of a resolution of the church conference and without any ratification by the church conference. Once again, this issue raises disputes of fact which cannot be resolved on the basis of the papers.

[32] This Court has in case number 1949/18 found that the applicant carries out its operations under this unsigned Constitution[15].

[33] The respondents herein contend that because the Constitution of the applicant herein was never signed and registered, it therefore has no legal significance but only served as a moral yardstick from time to time prior to the applicant's registration as a company in terms of the Companies Act.

[14] See paragraph 35 of Dumisa Dlamini's Founding Affidavit, Case 1949/18 at page 77 of the Book of Pleadings.
[15] See paragraph 10 of the judgment at page 52 of the Book of Pleadings.

What this contention fails to consider is the fact that the conduct of church conference as well as the election of church boards- are matter that are provided for in the Constitution of the applicant and not in the memorandum and articles of association. This is buttressed by a member of the previous church board (in which respondents herein were members)- Anthony Matsenjwa[16]. He states as follows:

> **'…Another issue that I would like to confirm relates to the registration of the Church as a section 17 Company under the Companies Act. As a chairperson of the Church Board, I can affirm that this position and or state of affairs was never communicated to the Conference and it is shocking. The Constitution has always been our guiding compass and it is mischievous of the applicants to insist on the application of the Memorandum which was never endorsed or approved by conference[17]'**

[34] Mr. Matsenjwa's averments, at the least, suggest a dispute of facts regarding the registration of the applicant herein as a company, and at the most- imputes on the respondents herein dishonesty- in the manner they went about with the registration of the applicant herein as a company. I am of the view that this matter cannot be concluded on the basis of the papers as they stand. Oral evidence ought to be led in this regard. The disputants herein were aware of the dispute of facts herein outlined prior to instituting the current proceedings.

[35] It is respondents' averment further that it is legally untenable for the deponent of the founding affidavit to seek to interdict directors of the

[16] He is the 11th Respondent in High Court Case No. 1949/18 and his averments are contained at pages 62-63 of the Book of Pleadings.

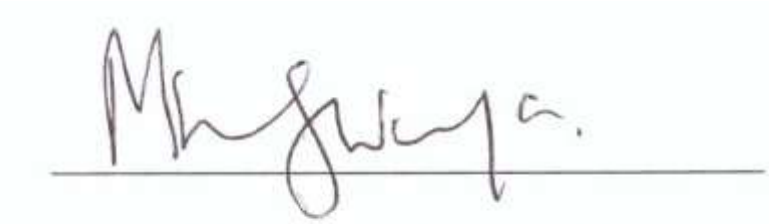
[17] See Anthony Matsenjwa's supporting affidavit at paragraph 2.7 at page 63 of the Book of Pleadings. The supporting affidavit relates to High Court case number 1949/18.

applicant company from carrying out the functions and operations of the company

[36] Since the High Court has already held that the matter of divisions within the church; the conduct of conferences, meetings, and election of church boards in terms of the church's constitution are incapable of resolution on the papers before court on account of being riddled with disputes of fact. I cannot hold differently as I agree with the findings of Mabuza PJ in this regard.

[37] In the result it is ordered that:

1) The application be and is hereby dismissed.
2) Owing to the peculiar circumstances of the matter, each party to bear its own costs.



M. LANGWENYA J.

For the applicant: Mr. M. Ndlangamandla

For the respondents: Mr. M. Ndlovu