



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1949/18

In the matter between:

**BHEKISISA DLAMINI
ISRAEL MNGOMEZULU
NJABULO NTSHANGASE
SIPHO KUNENE
GRACE NGCAMPHALALA
SIBUSISO MASEKO**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT
6TH APPLICANT**

And

**METROPOLITAN EVANGELICAL CHURCH
INTERNATIONAL
BEN TSABEDZE
SIFISO DLAMINI
MUSA HLOPHE
THEMBA NGCAMPHALALA
NELISIWE NKABINDE
BHEKINKOSI GAMEDZE
SITHEMBISO NXUMALO
CATHERINE ZONDO
NTOMBIFUTHI SIBANDZE
ANTHONY MATSENJWA
SIMON MASHAYISA
SYDNEY NKAMBULE
DUMISA DLAMINI**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT
11TH RESPONDENT
12TH RESPONDENT
13TH RESPONDENT
14TH RESPONDENT**

Neutral Citation : Bhekisisa Dlamini & 5 Others and Metropolitan Evangelical Church International & 13 Others (1949/18 [2019] SZHC 47 (12 MARCH 2019)

Coram : MABUZA – PJ

Heard : 04 FEBRUARY 2019

Delivered : 12 MARCH 2019

SUMMARY

Civil Law : Ecclesiastical matters - The Applicants were members of the Church Board of the 1st Respondent when their term of office was abruptly terminated by vote of no confidence and new members were elected into the Church Board.

Civil Procedure: Interdicts and declaratory orders - Applicants seek interdicts and declaratory orders and an order re-instating them.

Company Law: Applicants grounded their cause of action on section 19 of the Companies Act – Applicants are not directors – Ground fails.

Constitution of the 1st Respondent – Applicants second ground of their cause of action is Article 6.3.6 of Constitution of the 1st Respondent – This ground fails in terms of Article 6.3.0.

Civil Procedure: Points of Law raised by Respondents – Disputes of fact – Requirements of interdict not satisfied – Upheld – Application dismissed with costs on the ordinary scale.

JUDGMENT

MABUZA -PJ

[1] In this matter the Applicants seek an order in the following terms:

1. Dispensing with the usual forms and provisions relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency;
2. Condoning any non-compliance of this application with the Rules of this Honourable Court regarding service and time limits and allowing this matter to be enrolled on the grounds of urgency as set out in the Founding Affidavit filed herewith;
3. Pending finalization of this Application, a *rule nisi* do hereby issue calling upon the Respondents to show cause on a date and time to be set by this Honourable Court why the following Orders should not be made final:
 - 3.1 The 12th and 14th Respondents be and are hereby interdicted and restrained from carrying out any duties and/or assignments or activities relating to the offices of President and Vice President respectively of the 1st Respondent;
 - 3.2 The 2nd to 14th Respondents are hereby interdicted and restrained from carrying out any duties and/or assignments or activities to

the office of Church Board of the 1st Respondent;

- 3.3 Declaring as unlawful and setting aside the decision of 1st Respondent's Conference held on the 23rd November 2018 removing the 1st to 6th Applicants and 12th and 13th Respondents as Church Board Members of the 1st Respondent;
 - 3.4 Declaring as unlawful and setting aside the appointment and/or Selecting of the 2nd to 13th Respondents as members of the 1st Respondent's Church Board;
 - 3.5 Declaring as unlawful and setting aside the appointment of Simon Mshayisa (12th Respondent) and Dumisa Dlamini (14th Respondent) as President and Vice President respectively of the 1st Respondent;
 - 3.6 An Order re-instating the 1st to 6th Applicants as members of the Church Board of the Metropolitan Evangelical Church International (1st Respondent).
4. Costs of suit against the 2nd Respondent to the 14th Respondents;
 5. Further and/or alternative relief.

[2] The founding affidavit is deposed to by Bhekisisa Dlamini (the 1st Applicant) with supporting affidavits by the 2nd to 6th Applicants who all associate themselves with the contents, facts and conclusions of law made in the founding affidavit. Mr. Dlamini is also the deponent to the replying

affidavit and the 2nd to 6th Respondents are deponents to the confirmatory affidavits thereto.

[3] The application is opposed by the Respondents. The answering affidavit is deposed to by the 2nd Respondent Ben Tsabedze, with supporting affidavits by the 3rd and 11th Respondents who both confirm and support the 2nd Respondent and align themselves with the facts and conclusions set out in the answering affidavit. Mr. Tsabedze has described himself as the chairperson of the 1st Respondent's interim Church Board which was elected into office on the 23rd November 2018, and at paragraph 12.3 indicates that the interim Board's term of office will end at the next Annual conference which is during July 2019.

[4] The Respondents raised several points of law herein. And because these are intertwined with the facts it was agreed between the parties at the hearing that the application be argued holistically, inclusive of both points of law and the merits.

[5] I set out the facts hereunder. The Applicants were elected into the 1st Respondent's Church Board by the Annual Conference of the 1st Respondent

during July 2016 for a term of three years. Their term of office was to terminate on July 2019.

[6] However, their term of office was terminated by a vote of no confidence on the 23rd November 2018 at the Annual Conference of the 1st Respondent. In their place the Conference elected the 2nd to 14th Respondents. Hence the present application.

[7] The Applicants ground their application on firstly, the articles of association and secondly on the 1st Respondent's constitution.

[8] The 1st Respondent was registered in terms of section 17 of the Companies Act No. 8/2009, on the 26th February 2014. The 2nd to 6th Applicants say that their removal as members of the Church Board at the Annual Conference of 23rd November 2019 was contrary to Article 39 of the Articles of Association of the 1st Respondent which article provides for the disqualification of Directors.

[9] A perusal of the Articles of Association (Annexure A) at page 67 revealed the directors to be other people and not the Applicants. Ms. Matsebula was

asked by the Court to reveal which of the directors listed therein were the Applicants and she was unable to do so. Clearly the reliance on section 39 of the Articles of Association is mistaken and cannot stand. Furthermore the positions being contested are created by the constitution of the 1st Respondent and not the Articles of Association or the Companies Act.

[10] The Applicants also seek to rely on the 1st Respondent's Constitution. It is stated by the Applicants that in 1998 the Church drafted its first Constitution. In 2011 a Resolution was taken to amend the first Constitution. The amended Constitution was adopted in July 2014 at the 1st Respondent's Annual conference but it was never signed to date. It is common cause between the parties that the 1st Respondent carries out its operations under this unsigned Constitution.

[11] The Applicants rely on article 6.3.10 of the Constitution that the term of office of any or all members may be shortened through resignation or death or gross neglect of Christian unity. That none of these instances had occurred when they were illegally and unlawfully removed as Board Members at the Conference of 23rd November 2018.

[12] They also rely on article 6.3.5 of the Constitution which provides that the Church Board Members' term of office shall be three years and only six members shall vacate office and the other members shall vacate office the following year. Thus they argue that since they were elected into office during July 2016, their three year term should have terminated in July 2019.

[13] They further state that they were removed from office on grounds not provided for in the Constitution. Hence they argue that that their removal from office ought to be declared unlawful and set aside and they be reinstated. Likewise, the Board that replaced them has been illegally and unlawfully appointed "such appointment must be set aside."

[14] The response on the merits by the Respondents is that the Applicants' term of office was shortened due to gross neglect of Christian unity as provided for in article 6.3.0 of the Church Constitution, hence the vote of no confidence that led to their removal from office. Mr. Tsabedze outlines the events that led up to the Applicants removal. I set these out hereunder and the responses from the Applicants.

[15] Mr. Tsabedze says that the the ousted Church Board was tasked by the Annual Conference in 2016 after its appointment to set in motion the process to fill the vacancy of President following the demise of the then President. The Board which comprised of the Applicants together with the 11th, 12th, and 13th Respondents failed to execute this mandate which simply required the nomination of six persons by the Church Board together with the General Board whose names would be referred to the Annual Conference for elections.

[16] The Applicants response is that whilst the Presidential issue was raised at the 2016 Conference, it is denied that the Church Board was mandated to elect a President it came in office in 2016. At the Annual Conference of 2016, there were differing views amongst the delegates on the Presidential issue. The Church Board only allowed the issue to be deliberated at all levels until a consensus was reached. These deliberations were to include the Church Board, Pastors, Gogo Fakudze who is the Founder's Spouse and the Swaziland Conference of Churches. Reliance is placed on the Annual Church Conference Minutes of the 29th and 30th July 2016 which were attached and marked "D".

Furthermore say the Applicants, Mr. Tsabedze alludes to a mandate to nominate six (6) persons, however the Respondents went against this mandate which is at variance with the Constitution when they nominated four (4) candidates for President on the 7th December 2018. This illustrates the illegality perpetrated by the Respondents which they seek this Honourable Court to endorse.

[17] Mr. Tsabedze says that unfortunately to the detriment of the 1st Respondent, the ousted Church Board failed and/or arrogantly refused to execute this mandate as a result of evident divisions amongst the Church Board members. There were two factions as it is evident in these papers with the Applicants collectively forming the team that was adamant that the President should not be elected in line with Constitution but a particular individual who was allegedly appointed by the late President was identified as the ideal president.

[18] It is denied by the Applicants that the Church Board failed to execute the Conference mandate of electing a President and that the Church Board was following the order of the Founder of the 1st Respondent, now deceased who nominated the candidate to succeed him as President. This nomination is

contained in the Conference minutes of July 2014 which were attached and marked “E”. It is the Respondents who are in defiance of carrying out the Founder’s wish to have his nominated candidate for President succeed him. The Respondents wanted their own candidate for President which they have unlawfully put in office. Whilst the Respondents rely on the Constitution in relation to the election of President, the Constitution was adopted after the Founder of the 1st Respondent made the appointment of the person who was to succeed him as President. The minutes of the July 2014 Conference bear witness to the Founder’s appointment of his successor and it is denied that this person is “alleged” to have been appointed by the Founder.

[19] The Respondents say that other three Church Board members sought to conform to the prescribed procedure under the constitution for the election of the President. As expected, the Board decided to protract the issue of the filling of the vacancy and several meetings involving the surviving spouse of the late President were held and subsequently, the Swaziland Conference of Churches was also requested to mediate and intervene in sorting the impasse. All these meetings concluded that there should be an election in terms of the constitution.

[20] The Applicants response is that whilst it is admitted that the Founder's surviving spouse and the Swaziland Conference of Churches came on board in the deliberations of the Presidential issue, it is denied that the Swaziland Conference of Churches and the Founder's spouse had authority to dictate how the 1st Respondent should conduct its business. It is maintained that the Founder nominated his successor way before the Constitution was adopted. The Swaziland Conference of Churches did not make a formal written report on these deliberations. However, they made a number of recommendations amongst which were elections in terms of the Constitution. Since the Respondents did not want the candidate appointed by the Founder as his successor, they opted for the option of elections. Those elections were not even in line with the Constitution they seek to rely upon in that they nominated four (4) candidates contrary to the six (6) candidates provided for by the Constitution. There was never any consensus between the Founder's spouse and the Swaziland Conference of Churches. This can be gleaned from the latter's failure to document and issue written reports of its deliberations on the President issue.

[21] The Applicants managed to derail the process until the Conference of 2018 where the Annual Church Conference decided that this issue should be dealt

with decisively. Consequently, the ousted Board was specifically called upon to come up with the six names for election. The Annual Church Conference also resolved that if the Church Board fails and/or persists with its refusal to execute the directive then they should be voted out of office. May I hasten to point out that the failure by the Board to action the directive of the Annual Church Conference and to heed the advice of the Swaziland Church Conference created divisions in the church which adversely affected the Christian Unity within and amongst the members of the Church Board itself and the general members of the Church who were divided along the two factions.

[22] The Applicants deny the contents of paragraph 21 supra. They state that Mr. Tsabedze does not state when exactly in 2018 the Conference decided to take a decisive stand on the President issue. Instead they were given an ultimatum to come up with six (6) nominees for the election of President. Worthy of note is that the Respondents then nominated four (4) candidates in the illegal meeting that saw the 12th and 14th Respondents elected President and Vice President respectively. This resolution and the subsequent elections were not only unprocedural but also unconstitutional. The haste in which the Respondents wanted the President to be elected was

appalling in light of the advice that the Applicants were still deliberating on the issue of the election of the President as it was a thorny one, with two factions on the one hand who were for the successor chosen by the Founder and on the other hand those against the successor's chosen candidate.

[23] The Respondents say that the Applicants faction led by the 4th Applicant was clear that they will not have another President besides the one they believed was appointed by the late President to take over the reins in defiance with the constitution.

[24] In response the Applicants state that there is no proof of such and reiterate that the Founder in the Annual Conference of 2014 named his successor. The Constitution was adopted after the Founder's choice of President to succeed him had been made. Instead the Respondents rely on the constitution which they defied in electing the 12th and 14th Respondents. These candidates in terms of the Constitution should have come out of a pool of six nominees and not four.

[25] Mr. Tsabedze further stated that in order for the above Honourable Court to further appreciate the problems engulfing the church simply because of the

issue of the President, he begged leave to annex the minutes of the Annual Conferences of the 11th July 2017, 3rd November 2017, 2nd November 2018, and 23rd November 2018 and 14th December 2018 marked “METRO 3”, “METRO 4”, “METRO 5”, “METRO 6” and “METRO 7” respectively.

[26] In response the Applicants stated that the attached minutes were noted. However, Mr. Tsabedze did not point out to the Court the exact precepts from these minutes which precepts demonstrate the problems engulfing the Church. These problems have also not been stated. Worthy of note is that the Respondents refused to furnish the Applicants with the minutes of the 2nd November 2018 and 23rd November 2018 when a request for them was made.

[27] The Applicants’ further complaint was that the Annual Conference of the 23rd November 2018 unlawfully passed a vote of no confidence against them, yet the Constitution did not provide for a vote of no confidence, ouster or removal of Board Members. The Respondents deny that the vote of no confidence was unlawful and state that it was resorted to after the deliberate defiance by the Applicants to facilitate the constitutional process to elect the

President of the Church. And that this conduct caused divisions and factions which adversely affected the unity of the church.

[28] The Respondents further state that due to the disunity there were already two centres of power within the Church Board itself. It is the Respondents' contention that inasmuch as the Constitution does not set out the removal of Church Board Members, it clearly permits premature termination of office for a member or members who grossly neglect Christian Unity. And that the Constitution allows for the removal of the Church Board by the Church Conference as the most supreme organ in terms of the Constitution.

[29] It is the Respondents' further contention that the current Board was directed to deal with the long outstanding issue of the President and they have successfully completed this task within two months after appointment. They argue that restoring the divisive Board will further cause conflict and perpetuate factionalism.

[30] The Applicants' base their reply hereto on the Articles of Association which do not apply. Even though Mr. Dlamini states that there was no division, he goes on to say that some members of the congregation wanted the President

appointed by the founder and others wanted election to be conducted. There is a dispute of fact right there.

[31] I turn now to the supporting affidavit of 11th Respondent. He begins by confirming the averments contained in the answering affidavit that relate to him. He goes on to state that he was the Chairperson of the Church Board that comprised the Applicants which were ousted on the 23rd November 2018. He continues as follows:

“2.2 That the ousted Church Board was divided into two factions along the lines as stated in the Answering affidavit. The division resulted in the Board failing to function as a unit and in one accord. One of the most glaring issue related to the election of the President of the Church and it is common cause that Applicants have always insisted that a candidate for the position of President was long chosen by the predecessor and therefore there was no need to conform to the constitutional provisions regarding the election of the President.

2.3 This issue has been referred for resolution to various forums without any success the final one being the Swaziland Conference of Churches. The recommendations by this institution were that we should adhere to the provisions of the constitution.

2.4 Following the resolution of the Annual Conference that the process of electing the President should be commenced with and that the Church Board should return with the list of candidates, the Church Board failed to meet notwithstanding that members had expressed that they will attend. The issue

is relatively old and started in 2016 and has constantly stood out as a sore thumb.

2.5 The Annual conference then resolved to oust the Board due to the failure to execute a specific mandate in relation to the election of the President and the Vice President. During the Church Board meetings the Applicants in particular the 4th Applicant was clear that as long as they constituted the Board, there will be no election of the President. Consequently, the Church Board has since 2016 failed to execute the assigned duties by conference to expedite the election of the President and the Vice President.

2.6 The decision of the Annual Conference to oust our Board was premised on our failure to do what Conference directed us to do mainly due to our internal divisions as the Church Board on the Presidential issue. I also wish to confirm that at all material times hereto, the entire ousted Church Board was aware of the decision to oust us and there was a meeting held to discuss the way forward on the 30th November 2018. In this meeting there was no indication by the Applicants that there was any objection to the process.

2.7 I also confirm that there has been no proper handover to the newly appointed Board. 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.”

[32] Notably is that he concludes by praying that this application be dismissed with costs.

[33] The Respondents raised the following points of law: urgency, that the cause of action unclear, disputes of facts and failure to satisfy the requirements of an interdict.

Urgency

[34] The issue of urgency has been overtaken by events as the matter was enrolled. However, the point of law is good in the sense that the removal of the Applicants was carried out on the 23rd November 2018 and they only approached this Court on the 17th December 2018.

Cause of action not clear

[35] I agree with the point of law that the cause of action is unclear. The Applicants have relied on the Companies Act in particular Article 39 of the Articles of Association which provides for the vacation of office of directors. However, the 2nd to 6th Applicants are not Directors of the Company except for the 1st Applicant. Even if the 2nd to 6th Applicants were directors, the Church Board is a creature of the Constitution of the Church

and the Articles of Association are irrelevant in so far as the remedy sought by the Applicants is concerned. I uphold this point of law.

Disputes of fact

[36] Having outlined the events that led to the Applicants removal hereinabove, it is clear that this matter is fraught with a litany of disputes of fact. These include but are not limited to: the election of the President; some members of the Church wanted the late President's spouse to be elected and others wanted to follow the Constitution; the issue whether or not the business of the Annual General Meeting of the 2nd November 2018 was completed and all issues on the agenda exhausted; the issues surrounding the alleged disunity of the Church; issues surrounding the alleged gross neglect of Christian Unity (Article 6.30). In fact prayers 3.1 to 3.6 by the Applicants all require oral evidence to be led with regard to the circumstances surrounding each prayer. Each prayer on its own raises disputes of fact which cannot be resolved on the papers before me. The annexures to the application need to be properly explained by leading of oral evidence as they themselves raise disputes of fact. The Applicants were aware of this when they embarked on this application.

[37] The supporting affidavit of the 11th Respondent throws a final spanner in the works because he was one of them (Applicants). His affidavit raises a plethora of wide ranging disputes of fact.

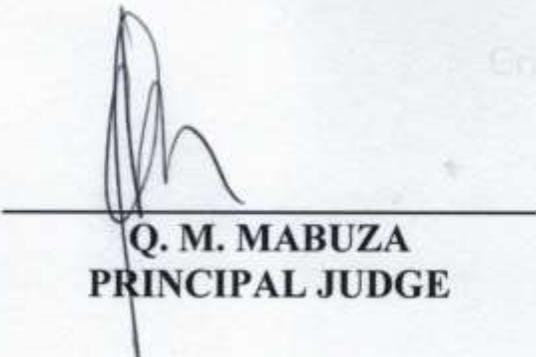
Requirements of an interdict

[38] I agree with the Respondents that the Applicants have failed to fully satisfy the requirements of an interim interdict (or even a final one) for example the right that the Applicants say that they have is open to some doubt. What right can one claim, in matters concerning the Church? What could form the basis of a well grounded apprehension of irreparable injury to the Applicants in matters of the Church?

[39] It is my considered view that the Applicants have failed to establish why the President and the Vice President and the 2nd to 14th Respondents should be interdicted from executing their duties and the precise nature of the irreparable harm that will be caused to them. They merely allege that the Respondents will continue with their illegality without specifying the nature of the illegalities.

[40] The Annual Conference is due to take place during July 2019. The Respondents' status is interim until then. I was informed during arguments that the Applicants still hold the purse strings which is a handicap to the activities of the Church. The solution as I see it would be for the Applicants to wait until the Annual Conference during July 2019 wherein matters can be resolved because in any event under normal circumstances their term of office would have expired. In the unlikely event that I had ordered a trial it could only have begun during June 2019 and would not have been completed by July 2019.

[41] In the circumstances and in view of the foregoing, the application fails and is dismissed with costs on the ordinary scale.



MIRABANF
Crim. Case No.

Q. M. MABUZA
PRINCIPAL JUDGE

For the Applicant : Ms. S. Matsebula

For the Respondent : Mr. MLK Ndlangamandla