

HIGH COURT
(BISHO)

CASE NO. 669/94

CHURCH OF GOD AND SAINTS OF CHRIST
N O MCEBISI PAKADE

APPLICANT

versus

OLIVER MZILENI & OTHERS

RESPONDENT

J U D G M E N T

EBRAHIM AJ: In this matter, which has been brought by way of motion proceedings, the Applicant, Church of God and Saints of Christ (*'the Church'*), seeks an order in terms of the amended prayers in the notice of motion declaring Mcebisi Pakade the Senior Bishop and lawful leader of the Church. The Applicant also seeks certain ancillary relief interdicting the Respondent, Oliver Mzileni, from holding himself out to be, or passing himself off, as the leader of the Church. The citation in the notice of motion also refers to other respondents but they have not been identified by name.

The Respondent opposes the application and the parties have filed the usual affidavits. On 6 July 1995 the matter was finally referred for oral evidence to be led on certain specified issues, namely, the following:

- (a) Who is the lawful leader of the church of God and Saint of Church (sic).
- (b) Whether the extract of the consticution (sic) referred to in the papers is an extract from the lawful constitution of the church.
- (c) Whether Applicant (sic) has been appointed and still is a Senior Bishop of the said Church.
- (d) Whether Applicant (sic) has been excommunicated by the said Church.
- (e) Whether the order sought by the Applicant should be granted.

On 19 January 1996 the parties held a pre-trial conference in terms of Rule 37. Thereafter Respondent brought an application to set aside the Rule 37 Minute filed herein but same was refused. This Minute records the following:

1.

That parties are in agreement with the following factors:

- 1. That during October 1966 Applicant/Mr Pakade was appointed either as Bishop or Senior Bishop of the Church of God and Saints of Christ in Cradock.
- 2. That the Applicant/Mr Pakade was the sole leader of this Church as there were no other Bishops until 1984.
- 3. That during April 1984 there was a Passover Service at Shiloh and certain allegations of misconduct by Applicant dismissed by some members against the applicant/Mr Pakade.
- 4. That the service of April 1984 was not a Synod meeting but a Passover service.
- 5. That during this Passover service some members of the Church purported to excommunicate the Applicant/Mr Pakade.
- 6. That Applicant's constitution prescribes that members of this Church may only be excommunicated by a Synod and Respondent's constitution is silent about that aspect.
- 7. That Applicant's constitution prescribes that a Senior Bishop shall hold his position for life but Respondent's constitution does not distinguish between an ordinary member, Bishop or Senior in regard to the aspect of excommunication.

8. That respondents constitution is silent about the positions of Senior Bishop, ordinary Bishop though Applicants constitutions prescribes for these positions.

2.

That the parties are in disagreement about the following issues;

- a) That who is the lawful leader of the Church.
- b) Which is the legitimate constitution of this Church between these documents referred to in the papers filed of record.
- c) Whether Applicant was excommunicated within the provisions of the constitution of this Church and whether this excommunication was valid.'

The Applicant, in support of its application, tendered the evidence of Josephus Mcebisi Pakade. His testimony is that the Church was founded in 1910 by one Enoch Mgijima. In 1928 Enoch Mgijima died and was succeeded by Abraham Nkapo, the maternal grandfather of J M Pakade. Nkapo died in 1933 and was succeeded by Samuel Mgijima and then Shadrack Mzileni who died in 1966. He, J M Pakade, was appointed unopposed as the Senior Bishop at a Synod of the Church in Cradock in the same year. From then until the 1980's he was the only Senior Bishop in the Church. The only document published by the Church was one entitled '*Guideline for Ministers*' (Exhibit 'A') and has been in existence since 1913. During the 1950's there was talk of drawing up a constitution for the Church. Thereafter it was drafted and at a meeting of the Church in 1960 it was approved and printed. To his knowledge this is the only document which bears the heading '*Constitution*'. During his term he applied the Constitution as set out in Exhibit 'B'. He was required to ordain ministers from time to time and they were handed copies of Exhibit 'A'. Nothing which appeared in Exhibit 'A' was contradicted by Exhibit 'B' except that the latter contained more information.

He explained that a Passover Meeting was not an administrative meeting but a time of prayer and was based on the bible. It commenced on 14 April and ended on 21 April in each year. A Synod, held in the first week of October each year, was the occasion when the business of the Church was dealt with, for example, the formulation of the laws pertaining to religion as well as the excommunication of church members. During 1984 certain problems had arisen and at the Passover held at Shiloh allegations of misconduct were made against him. He informed the Passover Meeting that this matter could not be discussed there and had to be dealt with at a Synod. The Passover Meeting thereafter ended in a chaotic manner because of a misunderstanding. Since then there has been a dispute in the Church with dissatisfied members forming a break away group and not attending the Church.

Mr Pakade was cross-examined extensively by Mr Notshe, who appeared for the Respondent. He was adamant that Exhibit 'A', which is a reprint of the document produced by the Church in 1913, was not a constitution but that Exhibit 'B', adopted during 1960, was the constitution of the Church. However, he had not been present in October 1960 in Shiloh when the document was adopted and had received this information from people who had attended. Exhibit 'B' was based on Exhibit 'A' and did not repeal the latter, which consisted merely of extracts from the bible. A reference in the minute book to Exhibit 'A' as the constitution was an error on the part of the person who had written the minute. In 1965 there was a discussion concerning two constitutions and the documents involved were Exhibit 'A' and 'B'. But, he could not provide any reference in the minute book to show

that Exhibit 'B' had been adopted as the constitution of the Church.

He asserted that he was the lawfully appointed Senior Bishop of the Church. His appointment as Bishop was on 5 October 1966 and as Senior Bishop, five days later, on 10 October 1966 and nobody opposed his appointment. When asked if he had been appointed to any other position in the Church his reply was that he had not. Later, he asserted that he was appointed to the Chair of the Prophet on the same day that he was appointed Senior Bishop. He conceded that the minutes did not reflect this either. Further, the petition to the Eastern Districts Local Division of the Supreme Court of South Africa, set out in Exhibit 'B', was never proceeded with and consequently the order which was being sought therein was never obtained. Exhibit 'B' had been annexed to the petition as Annexure 'A'. He disputed that his appointment as Bishop was on 10 October 1966 - it took place on 5 October 1966.

He conceded that there was a difference in the two rubber stamps affixed to the minute book and the Certificate of Ordination. The one in the minute book did not reflect his name but that of S Mzileni as the last prophet whereas the Certificate of Ordination included his name. His only explanation for this was that someone else could have affixed this stamp after the Synod had taken place. He was asked to explain what the term '*affixed by*' meant in the certificate and said that this meant that the person had been placed in the chair by the person whose name appeared after that term. However, he could not explain why his Certificate of Ordination as a Bishop in the Church on 5 October 1996 reflected that this had

been done by Shadrack Mzileni who had died 30 years earlier. He had queried this from the secretary and was told that it meant that he taken over from Shadrack Mzileni. The petition to the Supreme Court was intended to resolve the problem which had arisen in the Church regarding to the adoption of a constitution but he did not know whether the petition had been heard in Court or not.

In response to questions from the Court he said that it was the Secretary, T J Ndyumbu, who arranged for the rubber stamp, which appeared on the Certificate of Ordination, to be made up. The Synod had decided that his name should also be reflected thereon and it had been made up after the meeting. The dispute in the Church had existed since 1984 and attempts to resolve it had been unsuccessful. He was unable to say whether he or the Respondent, Oliver Mzileni, had the support of the majority of the members of the Church. This concluded the evidence tendered for the Applicant.

The Respondent, Oliver Mzileni did not testify. Instead, Joshua Joseph Mbayi testified and I propose to set out only those aspects which are most relevant to the determination of the issues. He is an evangelist of the Church and became the secretary in 1964. He denied that Exhibit 'B' was the constitution of the Church. According to him, it had come into existence due to friction which had developed between the Reverend Mgizima and the congregation of Queenstown in 1947. Some time thereafter the advocates involved in the legal dispute which followed drafted a new constitution. There was also Petition to the Supreme Court for the purpose, *inter alia*, of having this constitution adopted and to constitute the Church

as a *universitas personarum*. However, for some reason, which was not explained, the Petition was never proceeded with and consequently an order was never obtained for the Court. He considered Exhibit 'A' to be the constitution of the Church and although the date 1974 was printed on the face of it this referred to the date that it had been reprinted. He confirmed that he had written the minute dated 21 April 1965 and that the minute dated 13 July 1974 had been written by J Ndyumbu. He confirmed further that J M Pakade had been ordained as a Bishop on 10 October 1966. He denied, however, that there was any provision for the appointment of a Senior Bishop.

The rubber stamp appearing on Pakade's Certificate of Ordination was obtained after the Synod and not during it. He was present at the meeting of 22 April 1984 when Pakade was excommunicated and stated that Pakade had not objected to the proceedings nor had Pakade told the meeting that the proceedings were contrary to the constitution. On 3 June 1984 it was suggested that Oliver Mzileni be promoted to lead the Church and was appointed to this position. The group now led by Mzileni was bigger than that led by Pakade.

Mr Mbayi was cross-examined by Mr Cole, who appeared for the Applicant, particularly in regard to whether the Church was constituted as a *universitas personarum* in terms of Exhibit 'A' or not. Further, what the length of Passover was and when it took place. It eventually emerged that the length of Passover was seven days and had commenced on 14 April and ended on 21 April 1994 and that an eighth day was for a meeting to attend to the business of the Church. He was

also questioned on the differences in the contents of Exhibit 'A' and that of Exhibit 'B'. Exhibit 'B' had been drawn up because of the dispute in the Church involving Mgijima who died in 1953. The delay in printing Exhibit 'B' only in 1960 was because of his death. When questioned about the excommunication of Mr Pakade he said that a Synod was held in October 1982 at Cradock where a decision was taken that Mr Pakade had to apologise for his conduct. This was a formal decision of the Church. But, because Mr Pakade had not apologised he was excommunicated at the meeting on 22 April 1984 after the Passover. When pressed in regard to this he alleged that at a Synod held in Cradock in 1983 it had been decided that the matter be held over to the Passover of April 1984 as Pakade had disobeyed the decision taken in October 1982.

He conceded further that the meeting of 22 April 1984 was not a Synod but it was nevertheless a legal meeting of the Church. Finally, he confirmed that until the 22 April 1984 Pakade was accepted as the leader of the Church. He had been appointed as Bishop in October 1996, and not the Senior Bishop, but he remained the head of the Church until his excommunication. His appointment had taken place in terms of the provisions of Exhibit 'A' and not Exhibit 'B'.

The only other witness for the Respondent was Sonwabo Lungile Tshabe who is a lecturer at Fort Hare University and the editor of a Xhosa/English/Afrikaans dictionary. He holds a BA (Hons) degree from Fort Hare University, a Diploma in Translation from UNISA, and translates documents. His evidence concerned the translation of the word '*makuhlaziwye*' - whether it was '*revive*' or '*revise*'. He

considered *'revive'* to suit the context better than *'revise'*. In cross-examination he conceded that there were differences in translation but having regard to the definition given to the word *'revise'* by the Oxford Dictionary he favoured this translation. This concluded the evidence for Respondent.

Evaluation of the evidence

Neither the testimony of Pakade nor that of Mbayi was definitive in providing an answer to the issues in dispute. The greater portion of their evidence dealt with peripheral issues and was, moreover, based on hearsay and conjecture. Added to this they were clearly prejudiced against each other. Regrettably, too, the parties did not deem it necessary to provide a translation of Exhibit 'B', which is entirely in Xhosa, nor Exhibit 'A', part of which is also in Xhosa. They relied instead on selected extracts from it and the minutes of various meetings of the Church, which similarly are in Xhosa.

Even though the Rule 37 minute recorded that it was agreed that Pakade had been appointed as either Bishop or Senior Bishop of the Church Mr Notshe, nevertheless, went to great lengths in cross-examination to cast doubt on his appointment as Bishop. These efforts were obviously fruitless. In any event, Mbayi admitted that Pakade was appointed Bishop of the Church in 1966 and that until 22 April 1984 he was recognised as the leader of the Church.

Pakade did not state explicitly but implied that when he was appointed as Bishop he was installed in the Chair of the Prophet. Mbayi, however, maintained that

Pakade was not so installed. As I have stated previously, Pakade was unable to provide any reference in the minutes of the proceedings of the Church to substantiate that he had been so installed. I find it most improbable that there would not be any record of an event as important as his installation in the Chair of the Prophet if it had actually taken place. What does appear from the minutes (Exhibit 'D') though is that Evangelist M Nkopo, who had conducted the ceremony of his appointment as Bishop had said that he was the Bishop in place of Bishop Shadrack Mzileni who had passed away and was representing South Africa as a whole. He also presented Pakade to the congregation as the leader of the Church. This much was confirmed by Mbayi under cross-examination.

In my view, the evidence does not substantiate the claim that the position of Senior Bishop exists within the structure of the Church. However, it is clear that Pakade was appointed as Bishop and that he was recognised and accepted in that capacity as the leader of the Church.

In so far as the dispute regarding the constitution is concerned Pakade was unable to refer the Court to any record in the minutes confirming the adoption of Exhibit 'B' as the constitution of the Church. But, what the minutes do reflect is that at a meeting on 21 April 1965 (as appeared from the translation of the relevant extract, namely Annexure 'JJM5') there was a discussion concerning the new constitution. There Pakade as well as Mbayi questioned the absence of certain provisions from the draft of the new constitution. This discussion concluded with Pakade stating that the old constitution should be reprinted and the missing

provisions inserted. Once again I find it highly improbable that if the *'new constitution'* had been adopted thereafter as even discussed that there would not have been a record in the minutes of a subsequent meeting to this effect. Yet, no evidence of this was presented. Since there had been a debate about the acceptability of a new constitution which had resulted in the rejection of the draft thereof then, in the absence of any contrary evidence indicating its acceptance, there is no other conclusion which I can come to save that a new constitution was never adopted.

The Applicant has not disputed that the document titled *'Guideline for Ministers'* was utilised by the Church to regulate the conduct of its affairs and was in fact recognised as the constitution of the Church. It is also stated to be such in the Petition. It was the only document which was relied upon to regulate the affairs of the Church and in the absence of proof that it has been replaced it remains the constitution of the Church. Accordingly, I find that Exhibit 'A', and not Exhibit 'B', is the legitimate constitution of the Church.

The only further issue that falls to be determined is whether the excommunication of the Applicant took place in accordance with the provisions of the constitution of the Church and consequently whether it was valid. Mbayi had conceded that proceedings relating to excommunication took place at a Synod of the Church. It was admitted that the Passover meeting of 22 April 1984 was not a Synod although he still tried to create the impression under cross-examination that it was one. He did not dispute that the Passover was usually a time for prayer and any

meeting held at the end of the period dealt with ordinary church matters only. Notwithstanding this Respondent had, in terms of the Rule 37 Minute admitted that this meeting was not a Synod and it is bound by this admission. Moreover, on Mbayi's own evidence the Church had previously taken a decision in regard to the misconduct of Pakade and this was to the effect that he should apologise. It is more probable than that if Pakade failed to honour this decision the matter would be dealt with again at a Synod of the Church and not at any other meeting.

The translation of an extract from a minute of the proceedings of the meeting of 22 April 1984 does not support the Respondent's contention that Pakade's excommunication was valid. If anything, the minute casts doubt on this. It reflects that the trustee Dondolo, with whose wife Pakade had been accused of having a relationship, had expressed his dissatisfaction with the previous decision of the Church and sought to have it changed. He was then permitted to reopen the matter and flowing from that a decision was taken incorrectly, in my view, to excommunicate Pakade. It appears further from the minute that Pakade had in fact complied with the decision of the Synod as Dondolo stated that he had come to him to ask for forgiveness and that Dondolo's wife had written to the Church asking to be allowed to come to Church again. Dondolo, however, made it very clear that he was not prepared to forgive them. In my view, these proceedings were improper and the excommunication of Pakade cannot be deemed to be valid.

Mr Notsche submitted in argument that the order being sought should not be granted as Pakade has not shown that any of his rights or interests have been

prejudicially affected by the decision of the Church. But, I am not persuaded by this argument. In my view the decision to excommunicate him is prejudicial to his interests and would entitle him to seek redress. But, even if I were to hold that this submission is correct, which I clearly do not, then it would still not be apposite here as the application is being brought by the Church and not Pakade. I do not deem it necessary, therefore, to comment any further on this submission and I leave it there.

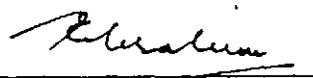
In the circumstances, the issues in respect of which oral evidence has been tendered are determined as follows:

- a) The lawful leader of the Church of God and Saints of Christ is Mcebisi Josephus Pakade;
- b) The extract of the constitution referred to in the papers is not an extract from the lawful constitution;
- c) Mcebisi Josephus Pakade has not been appointed the Senior Bishop but Bishop of the Church and is still a Bishop thereof;
- d) Mcebisi Josephus Pakade has not been validly excommunicated by the said Church;
- e) The order sought by the Applicant in its Notice of Motion is to be granted in an amended form.

It follows further that since the Applicant has been substantially successful that it should be entitled to have costs awarded in its favour.

In the result, the order that I issue is the following:

- (i) Mcebisi Josephus Pakade is declared to be the leader of the Church of God and Saints of Christ;
- (ii) The Respondent, Oliver Mzileni, is interdicted and restrained from in anyway holding himself out to be or passing himself off as a leader of the Church of God and Saints of Christ or performing or attempting to perform any acts as leader of the said Church;
- (iii) The Respondent, Oliver Mzileni, is interdicted and restrained from using the name, Church of God and Saints of Christ;
- (iv) The Respondent, Oliver Mzileni, is interdicted and restrained from interfering in any manner whatsoever with the affairs of the Church and from holding services in the building of the said Church;
- (v) The Respondent, Oliver Mzileni, is ordered to pay the costs of the application.



Y EBRAHIM
ACTING JUDGE OF THE HIGH COURT (BISHO)

Date: 25 September 1997