

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSKEI DIVISION)

Case No: A 76/06

In the matter between:

THE PRESIDING BISHOP OF THE METHODIST

CHURCH OF SOUTHERN AFRICA

1st Appellant

THE EXECUTIVE SECRETARY FOR THE TIME

**BEING OF THE METHODIST CHURCH OF
SOUTHERN AFRICA**

2nd

Appellant

**ABEL NYANISO MNABA
Appellant**

3rd

and

ZAMUXOLO GRESSWELL MTONGANA

1st

Respondent

**MICHAEL MILANJANA
Respondent**

2nd

**GOVERNOR MLAWULI MCUME
Respondent**

3rd

**MAUREEN KONYANA
Respondent**

4th

**NTOMBIZA NELE DIDIZA
Respondent**

5th

**NOKHAYA MEMKA
Respondent**

6th

**ZODWA XHALA
Respondent**

7th

LINDELWA SIGELA

8th

Respondent

Coram: Chetty, Ebrahim and Schoeman, JJ

Date Heard: 15 September 2006

Date Delivered: 15 September 2006

**Summary: *Laws and disciplines of Methodist
Church of Southern Africa - duty to
exhaust domestic remedies.***

JUDGMENT

CHETTY, J

[1] This appeal represents a further stage in matters ecclesiastical pertaining to the Methodist Church of Southern Africa (MCSA) and comes before this court with leave of the Supreme Court of Appeal. It has its genesis in the appointment of the third appellant as the Superintendent Minister of the Mthatha / Ncambedlana circuit 1306 of the MCSA by its connexional executive. That decision engendered incendiary outrage from the aggrieved respondents and culminated in an agreement concluded between them and the connexional executive of the MCSA to submit to the arbitrator of the MCSA the question whether the third appellant's appointment as such

complied with the Laws and Disciplines (the “L & D”) and related regulations/practices of the MCSA.

[2] Pursuant to an arbitration hearing conducted in accordance with the appellant’s L & D, the arbitrators made an award on 14 November 2003 in the following terms:-

- “1. The decision to appoint Rev, Mnaba as Superintendent is set aside and is referred back to the Connexional Executive to consider afresh.*
- 2. When considering the decision afresh cognisance must be had of the petition of the Complainants referred to at the C. E. meeting of September 2003. Obviously in considering it afresh, the C.E. can have regard to any other factor which it feels is necessary in order to arrive at its decision on whether this is an “exceptional case” and whether there is a “strong motivation” for it. This could for example include amongst other things reassessing whether the reasons given previously by the C.E. are still adequate.”*

[3] Thereafter the first appellant, acting in terms of the L & D as the Connexional executive between its meetings, himself considered the matter and appointed the third appellant as the Superintendent

Minister. I shall deal with the first appellant's reasons for so doing in due course, suffice at this stage to say it is not in issue that the L & D vested the first appellant with the requisite authority to so act in stead of the connexional executive. The appointment galvanised the respondents into action and spawned two applications, the first, under case no 45/04 against the first and second appellants (as respondents) for an order that the arbitration award be made an order of court and the second, under case no 823/04, against the three appellants for a review of the first appellant's decision to appoint the third appellant.

The Application under case number 45/04

[4] It is common cause that the application to have the arbitrator's award made an order of court was launched after the first appellant's appointment of the third appellant. As no relief was sought against either of the first or second appellants, they merely filed a notice to abide the decision. In the accompanying affidavit however, the first appellant elaborated in some detail on the factors which influenced the decision to appoint the third appellant. He denied that he dismissed the arbitrator's decision; that he intended to renege on the pre-arbitration agreement or the agreement itself; or that he disregarded the arbitration award. His *raison d'être* he

expounded as follows:-

“5.3 On the contrary I accepted the Arbitration Award as final and binding, and acted accordingly. It is important to note that in terms of *paragraph 5.23 of the Laws and Disciplines of the Methodist Church of Southern Africa, should any matter arise in the interval between meetings of the Connexional Executive and which cannot be dealt with by the Connexional Executive without the interests of the church or individuals concerned being prejudiced thereby, I in my capacity as Presiding Bishop, may take any necessary action and such action shall be deemed to be the act of the Connexional executive. In the circumstances, although the Arbitration Award referred the matter back to the Connexional Executive to consider afresh, it was in practice referred to me for my consideration.*”

The first appellant then referred to a letter which he had addressed to the Arbitration panel wherein the reasons for appointing the third appellant were detailed. Those reasons were expressed in the following terms:-

- “1. In accordance with *the Laws and Disciplines of the Methodist Church of Southern Africa, I accept the arbitration award as final and binding.*
2. *It was then left for me to determine further action regarding*

the superintendency of the Circuit for 2004. I deemed the matter as falling within the ambit of Laws and Discipline, para 5.23 viz as a matter which cannot be deferred for decision . . . without the interests of the Church or individuals concerned being prejudiced thereby As indicated in the award itself, a superintendent is a mission line manager and therefore it is imperative that such an appointment be made. In view of the award, I approached the matter de novo.

3. *In considering the appointment for 2004, I gave careful attention to the 'Submission by the Complainants' that was presented at the Arbitration hearing. It is my understanding that it was the view of the Arbitration Panel that failure by the Connexional executive to examine more fully the objections of the complainants constituted the basis for the award.*

4. *I note that nowhere in the twelve pages have the complainants presented any argument that the Bishop of the Clarkebury District does not have the competencies required from Superintendent Ministers. The basis of their arguments have regard to the process rather than proficiency.*

5. *I proceeded further to examine the reasons submitted by the Circuit Quarterly Meeting (even though these are recommendations and not binding) and the District Bishop. In particular, I have sought the opinion of the Council Stewards, who are the 'Executive officers of the Quarterly Meeting' (Laws and Discipline, para 7.16) through whom all communication affecting the appointment of Ministers are*

*addressed to the Connexional Executive (Laws and Discipline
para 7.18).*

6. *After due consideration of the various submissions, I have concluded that the request for the Circuit to be Superintended by the Bishop in 2004 meets the requirements of exceptional circumstances at this time. Some of the reasons pertain to finances, trust properties, Circuit administration and transitional matters related to the interruption of the prior appointment.”*

The Review Application under case number 823/04

[5] Although s 31(3) of the **Arbitration Act** provided the mechanism for the enforcement of the court order the applicants launched a review application in which they sought an order setting aside the decision of the first appellant to appoint the third appellant as the Superintendent Minister of the Mthatha / Ncambedlana circuit. The appellants duly filed a notice of opposition but prior to delivering the answering affidavits, the appellants' attorney, in an attempt to dissuade the respondents from proceeding with the application, drew the latter's attention to the relevant clauses of the L & D concerning dispute resolution within the MCSA.

[6] The invitation elicited a bellicose response and precipitated a counter application in which the appellants sought an order in the

following terms:-

- “1. That the Application brought by the Respondents (“the First Application”) under the above case number be stayed pending an award made by an arbitrator appointed to determine the dispute in the Respondents’ application.*
- 2. That the Applicants be allowed to approach the above Honourable Court to dismiss the First Application after an award made by an arbitrator, alternatively after a period of 30 (thirty) days from the date of this order should the Respondents not have referred the matter to arbitration in accordance with the Laws and Disciplines of the Methodist Church of Southern Africa within such period.*
- 3. That the Respondents be ordered to pay the costs on the scale as between attorney and client;*
- 4. Further and/or alternative relief.”*

[7] Thus, when the matter came before the court *a quo* on 2 December 2004 it should have been obvious that the counter application required adjudication as a preliminary step in the litigation between the parties. After a rather unnecessary and protracted debate over which application enjoyed precedence the learned judge made a ruling that the counter application be disposed of. In his judgment the learned judge held that the only triable issue to be determined was whether or not the first appellant

complied with the arbitration award. With respect to the learned judge, he was clearly wrong in this regard. The issue for decision was whether or not the respondents, in seeking to have reviewed and set aside a decision taken by the first appellant to appoint the third appellant to the contested position were, bound by the L & D to refer that dispute to arbitration. It seems to me that the learned judge's erroneous view was no doubt influenced by the respondents' counsel's obfuscation of the real issues during the preliminary argument.

[8] The institution of legal proceedings by or against the MCSA is regulated by its L & D and in particular paragraph 5.11 which provides:-

“5.11 No legal proceedings shall be instituted by any minister or member of the church, acting in their personal or official capacity, against the church or any Minister or member thereof for any matter which in any way arises from or relates to the mission, work, activities or governance of the church. The mediation and *arbitration process and forums prescribed and provided for by the church for conflict resolution (Appendix 14) must be used by all Ministers and members of the church. If a matter is referred for arbitration, the finding of the*

Arbitrator shall be final and binding on all Ministers and members of the Church. Notwithstanding anything to the contrary contained in this paragraph, the provisions thereof do not apply to the Presiding Bishop in conjunction with the Executive Secretary when acting in their official capacity in the interest of the Church.”

[9] Similar provisions are to be found in paragraphs 3.8, 5.9 and 5.10 which provide as follows respectively:-

“3.18 No member acting in their personal or official capacity, shall institute legal proceedings against the church or any minister or member thereof for any matter which in any way arises from or relates to the mission, work, activities or governance of the church. The process and forums referred to in *paragraph 5.11 must be used.*

5.9 All legal proceedings by or against the church shall be instituted in the name of the Presiding Bishop and the Executive Secretary for the time being or in the name of the Registrar if such an appointment has been made by the Connexional Executive (Para. 5.41) for and on behalf of the church.

5.10 Acting in their official capacity, no person holding office in the Church, and no organization, Society, Circuit or Synod shall institute legal proceedings for

the Church, save as provided for in Para. 5.9.”

[10] In **Presiding Bishop of the Methodist Church of Southern Africa and Others v Sikhumbuzo Nofemele N.O.** and others, case number 979/2004 (unreported), I held that the foregoing paragraphs of the L & D were clear, unambiguous and precluded the institution of legal proceedings for or against the MCSA save as provided for in paragraph 5.9 of the L & D and commented that in ecclesiastical matters, it was salutary that disputes, as and when they arise, should ideally be resolved through internal mechanisms.

[11] On a proper construction the effect of the foregoing provisions of the L & D was entirely to exclude the court’s jurisdiction in relation to

“any matter which in any way arises from or relates to the mission, work, activities or governance of the church.

[12] The proper course would have been for the respondents to refer the dispute surrounding the first appellant’s appointment of the third appellant as the Superintendent Minister for arbitration. It must be emphasised that the appointment of the third appellant was not a re-appointment as such. It was made by the first appellant after careful deliberation and consideration of all relevant factors. Therefor the learned judge’s finding that it would be an exercise in

futility for the respondents to refer the matter to arbitration overlooks this important factor and ineluctably compels the conclusion that the learned judge misdirected himself in finding against the appellants. It follows that the appeal must succeed and the following orders will issue:-

1. The appeal is allowed with costs.
2. The application under case no. 823/04 is stayed pending an award made by an arbitrator appointed to determine the dispute between the parties concerning the appointment of the third appellant as the Superintendent Minister of the Mthatha / Ncambedlana circuit 1306.
3. The appellants are entitled and permitted to approach the Mthatha High court to dismiss the review application after an award has been made by the arbitrator(s) alternatively after a period of thirty (30) days from the date of handing down of this judgment should the respondents not have referred the matter for arbitration in terms of the L & D of the MCSA.
4. The respondents are ordered jointly and severally to pay the appellants costs.

D. CHETTY
JUDGE OF THE HIGH COURT

Ebrahim, J

I agree.

Y. EBRAHIM
JUDGE OF THE HIGH COURT

Schoeman, J

I agree.

I. SCHOEMAN
JUDGE OF THE HIGH COURT

Obo the Appellants:

Obo the Respondents:

JUDGMENT

PARTIES:

The Presiding Bishop of the Methodist Church of Southern Africa and Others V Zamuxolo Gresswell Mtongana and Others

- Case Number: **A 76/06**
- High Court: **TRANSKEI DIVISION**
- DATE HEARD: **15 September 2006**

DATE DELIVERED: **15 September 2006**

JUDGE(S): **Chetty, Ebrahim and Schoeman, JJ**

LEGAL REPRESENTATIVES -

Appearances:

- for the Appellant(s):
- for the Respondent(s):

Instructing attorneys:

- Appellant(s):
- Respondent(s):

CASE INFORMATION -

5. *Nature of proceedings* : **Application**
6. *Topic:*
7. *Key Words:* **Laws and disciplines of Methodist Church of Southern Africa - duty to exhaust domestic remedies.**