

SOUTH AFRICA / JUDGMENT

Malete v Dliso and Another (1863/2011) [2017] ZANWHC 1 (19 January 2017)

[2017] ZANWHC 1

COURT

North West High Court, Mafikeng

BEFORE

T J Djaje

CASE / FILE NUMBER

1863/2011

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IN

THE NORTH WEST HIGH COURT, MAHIKENG

CASE

NUMBER: 1863/2011

Reportable:

No
Circulate
to Judges: No
Circulate
to Magistrates: No
Circulate
to Regional Magistrates: No
In

the matter between:

SELLO
ELIAS
MALETE Plaintiff
AND
VUYISILE
JOB
DLISO 1st
Defendant
TRIBAL AUTHORITY OF
BAROLONG 2nd
Defendant
BOO RATLOU BA GA PHOI
DATE OF
HEARING
: 07
DECEMBER 2016
DATE OF

JUDGMENT

: 19 JANUARY 2017

COUNSEL FOR THE PLAINTIFF : ADV. ZWIEGELAAR

COUNSEL FOR THE 1ST DEFENDANT : ADV. CHWARO

COUNSEL FOR THE 2ND DEFENDANT : NO APPEARANCE

JUDGMENT

DJAJE AJ

[1] This is an application for absolution from the instance by the first Defendant at the close of the Plaintiff's case. The second Defendant is only cited as a party having an interest in the matter and no order is sought against it.

Background

[2] The Plaintiff issued summons against the first Defendant over the dispute concerning the Bechuana Methodist Church in South Africa. The relief sought by the Plaintiff was a declaratory order and an interdict. The prayers sought by the Plaintiff are:

"1. An order declaring that:

1.1 It was the first Defendant and his followers who have broken away from the church;

1.2 It occurred on 12 December 2000;

1.3 The Plaintiff is the duly consecrated leader of the Church;

1.4 The Plaintiff and his followers are the only ones who are entitled to use the name of the Church;

1.5 The registration of the Church effected by the Plaintiff under registration number P102-2 is the only valid registration of the Church;

1.6 The aforesaid registration number is the registration number of the Church;

1.7 The Constitution adopted and/or used by the Plaintiff and his followers is the only Constitution of the Church;

1.8 The Church buildings used by the Plaintiff and the First Defendant and their respective followers belong to the Church;

1.9 The Plaintiff and his followers are the only ones who are entitled to use the church building situated at 31059 Kraaipan Village, district of Ditsobotla ,North West and the one situated at 1779 Letsopa Township ,Ottosdal, North West for the purpose of church services, conventions, conferences and other activities; and

1.10 The Plaintiff and his followers are the only ones who are entitled to use the pasturing certificates, uniforms, insignia, stationery and other assets of the church.

2 . An order in terms whereof the First Defendant and his followers are interdicted from:

2.1 conducting any church services or any other activities in the church buildings referred to in prayer 1.9 (supra);

2.2 using the name, registration number, Constitution, pasturing certificates, uniforms, insignia, stationery and other assets of the church;

2.3 preventing the Plaintiff and his followers from using the aforesaid church buildings, the name, registration number, Constitution, pasturing certificates, uniform, insignia, stationery and other assets of the church; and

2.4 Interfering in or disrupting or caused the church services, conventions, conferences or other activities of the Plaintiff and his followers held in the said church buildings or elsewhere to be interfered in or disrupted.”

[3] The first Defendant in support of the application for absolution argued that the Plaintiff has failed to satisfy the requirements for an interdict and a declaratory order. It is the submission of the first Defendant that the Plaintiff in his evidence has not

established a definite right. Further that the Plaintiff is approaching this court as an individual and not authorised by the church which as an institution can sue and be sued. The contention by the first Defendant was that failure by the Plaintiff to establish a clear right to the church cannot entitle him to either the declaratory order or the interdict.

[4] In opposing the application the Plaintiff argued that the church cannot be a party in these proceedings as both the Plaintiff and the first Defendant are laying claim to it. Further that both parties are claiming a right over the church when the Plaintiff has until the year 2000 been the leader and in control of the church.

Absolution from the instance

[5] The test for absolution from instance at the end of a plaintiff's case is well established. It is set out in the following passage from *Gordon Lloyd Page & Associates v Rivera and Another* 2001

(1) SA 88(SCA) at 92E-93A:

“The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976

(4) SA 403 (A) at 409G-H in these terms:

“... When absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required or to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff...”

...This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff... As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one... The test has from time to time been formulated in different terms, especially it had been said that the court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’... Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another ‘reasonable’ person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.”

[6] The grounds raised for absolution by the first Defendant are that the Plaintiff has failed to establish the requirements of a declaratory order and a final interdict.

Requirements for final interdict

[7] The requirements for a final interdict are a clear right, an injury or an act of interference actually committed or reasonably

apprehended and the absence of similar protection by any other ordinary remedy. See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[8] Erasmus J in the matter of *Welkom Bottling Co (Pty) Ltd v Belfast Mineral Waters (OFS) (Pty) Ltd* 1967 (3) SA 45 (O) at 56 said the following about a clear right

“eintlik is dit ‘n reg wat duidelik bewys is”.

[9] The word ‘clear’ relates to the degree of proof required to establish the right and should strictly not be used to qualify the right at all (*Jones & Buckle Civil Practice* 85n607).

[10] In establishing a clear right the applicant/plaintiff must prove on a balance of probabilities the right which he seeks to protect. See *Nienaber v Stuckey* 1946 AD 1049 at 1053-4.

Analysis

[11] The Plaintiff testified that he is qualified and trained as a Reverend in the church of Bechuana Methodist Church. In 2001 he became the Bishop of the church and accordingly as a Bishop he is the owner of the church. He stated that before becoming a Bishop he was the President of the church for a period of fifteen years. It was his testimony that in the year

2000 at an annual conference of the church there was a breakaway group from the church and the first Defendant was part of the said group. The reason he gave for the group to break away was that they wanted elections to be held at the conference and as the President and chairperson of the conference he refused. He testified that the group was led by Reverend Boikanyo and the first Defendant was just an ordinary member of the church. In 2007 again there was a breakaway group that joined the group of 2000.

[12] According to the Plaintiff the church was founded by Solomon Molotsi in 1905 as Bechuana Methodist Church and he then registered it as Bechuana Methodist Church 'in South Africa' after he became the Bishop. The Plaintiff stated that he is the owner and founder of the church known as Bechuana Methodist Church in South Africa. It was his evidence that the first Defendant and his followers are bothering him at his circuits and taking his church buildings and uniforms. This is what prompted this action.

[13] During cross-examination the Plaintiff was confronted with evidence that he attempted since 1993 to register a church under the name Bechuana Methodist Church of God in South Africa which was an indication that he always had the intention to register a separate church. This was contained in a letter dated '1993-06-02' addressed to the Plaintiff by the Director-General in the Department of Health and Population Development as follows:

"Dear Bishop Maletse

CHURCH : BECHUANA METHODIST CHURCH OF GOD IN SA

I wish to confirm that the name of your church has been listed in accordance with paragraph 5(b) of the information paper on church matters attached hereto. You are free to continue with all activities of the church....."

[14] The Plaintiff was again confronted with a certificate of registration dated 08 August 2005 wherein the church was registered as Bechuana Methodist Church of South Africa by him which is not Bechuana Methodist Church in South Africa. It was put to the Plaintiff that this name is an indication that he was registering a new church different from the one that existed initially.

[15] Reverend Matthews Plaatjie testified that elections were held during the 2000 annual conference and the Plaintiff did not accept them. According to Plaatjie there was a new council announced but the Plaintiff asked the conference if it was accepted and it was rejected. Plaintiff then proceeded to chair the conference. He further testified that in 1990 there was a court action against the usage of the name Bechuana Methodist Church and the new name that was used was Bechuana Methodist Church in South Africa. Since that time in 1990 that was the name used and the Plaintiff was the President of the church.

[16] The dispute in this matter is in relation to the church Bechuana Methodist Church in South Africa. The Plaintiff claims a right over this church as its founder and owner. However he is contradicted by his own Reverend Plaatjie and the documents he was confronted with during cross-examination. Plaatjie in his testimony testified that in fact in the year 2000

there were elections held with a new church council elected. The Plaintiff on the other hand testified that he refused that elections should be held at the 2000 annual conference. Plaatjie further testified that already in 1990 the name the church was using was Bechuana Methodist Church in South Africa. This evidence is in direct contradiction with the evidence of the Plaintiff that he founded the church Bechuana Methodist Church in South Africa and registered it as such in 2007. The church that was registered by the Plaintiff in 2002 is the Bechuana Methodist Church of God in South Africa as per the registration certificate P102-02 dated 5 April 2002. This was after the conference in 2000 when the Plaintiff refused to accept the outcome of the elections and the new council.

- [17] The Plaintiff has not been able to testify about when exactly did he establish the church Bechuana Methodist Church in South Africa. There are no documents produced to substantiate the Plaintiff's claim that he is the founder and owner of the said church. To the contrary, the letter referred to above from the Director- General refers to the church as Bechuana Methodist Church of God in SA, which can mean that the Plaintiff had his own plans of a different church from the Bechuana Methodist Church in South Africa. It is also inexplicable why after the conference of 2000 with a new council elected would the Plaintiff decide to go and have the church registered in the name that had not been used before and now claim it to be a typing error by the secretary.
- [18] At this point the enquiry is whether there is evidence upon which I could or might find (not should or ought to find) for the Plaintiff. If I were to rely on inference, it should be a reasonable one. The evidence presented by the Plaintiff is contradictory and lacks particularity to establish the clear right or a reasonable inference that would entitle him to an interdict or a declaratory order.
- [19] Having considered the evidence before me and the submissions made, I am of the view that the Plaintiff has not met the threshold required in order to avoid absolution from the instance. The application must succeed.

Order

Consequently, the following order is made:

1. Application for absolution from the instance by the first Defendant is hereby granted.
2. The Plaintiff is ordered to pay the costs of suit.

T J DJAJE

ACTING JUDGE OF THE HIGH COURT

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