

SOUTH AFRICA / JUDGMENT

Mpulu and Another v Mokaba and Others (831/13) [2014] ZAECHGHC 49 (29 May 2014)

[2014] ZAECHGHC 49

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket

CASE / FILE NUMBER

831/13

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION – GRAHAMSTOWN)

CASE

NO.:831/13

DATE

HEARD: 27/3/14

DATE

DELIVERED: 29/5/14

NOT

REPORTABLE

In

the matter between:

AMOS
MONGEZI
MPULU First
Applicant
THE
PRESBYTERIAN CHURCH
OF
AFRICA Second
Applicant
and
GEORGE
MOKABA First
Respondent
CHARLES
VAKALA Second

Respondent
 SONWABO
 MDLUNGU Third
 Respondent
 GODFREY
 DUKWANA
 Fourth
 Respondent
 MZUKISI
 WELCOME
 FALENI Fourth
 Respondent
 Voluntary
 association – ongoing disputes between two rival factions of
 church – disputes of fact going to core issue
 of which faction
 the legitimate leadership of church – disputes of fact so
 pervasive and all-embracing that matter cannot
 properly be decided on
 the papers – dispute of fact must have been foreseen by the
 applicants – application dismissed
 with costs.

JUDGMENT

PLASKET J:

[1] This matter is the latest in a long line of cases that have been brought in various high courts around the country by one or the other of two warring factions in the second applicant, the Presbyterian Church of Africa. Both factions claim to be the legitimate leadership of the church.

[2] The first applicant (Mpulu) describes himself as the ‘duly elected Moderator’ of the second applicant and he claims to have both standing and authority to represent the second applicant in these proceedings. In keeping with the nature of the dispute, the respondents dispute his title, standing and authority. He applies for the following relief:

‘1. That those Respondents who claim authority within the hierarchy of the Second Applicant on the strength of having succeeded Reverend

MATOMELA, or his successors in title, are finally declared to hold no official position within the Second Applicant.

2. That the Respondents, and those who seek title as their successors in title, and those who make common cause with them, be and are hereby finally interdicted from:

2.1 utilising the name of the Presbyterian Church of Africa throughout the Republic of South Africa; and

2.2 utilising the Church buildings and Manses of the Presbyterian Church of Africa throughout South Africa; and

2.3 soliciting funds from congregants in the name of the Presbyterian Church of Africa; and

2.4 utilising the official uniform of the Presbyterian Church of Africa throughout South Africa; and

2.5 utilising the Constitution of the Presbyterian Church of Africa as their own; and

2.6 carrying out any ministerial duties in the form of marriages, funerals and related holy services under the name and auspices of the Presbyterian Church of Africa.

3. That all members of the Second Applicant who have derived their positions within the hierarchy of the Second Applicant through

membership of, and affiliation with, the Church Body led by the First Applicant, are the rightful and constitutionally elected Officials of the Second Applicant.

4. That all persons who purport to hold positions in the Second Applicant through affiliating themselves with the First Respondent

and his predecessor in title and successor in title are unconstitutionally and illegally occupying such positions and are not the authorised Officials of the [Second] Applicant

5. That the First Applicant be declared the elected moderator and legitimate Head of the Presbyterian Church of Africa.

6. That the ongoing applications launched by the Respondents and those who make common cause with them, against the First and Second

Applicants and those who make common cause with them, be declared to be vexatious.

7. That the Respondents and those who make common cause with them be and are hereby interdicted from initiating further legal proceedings

against the First and Second Applicants.

8. That the Sheriff and members of the South African Police Force, wherever they may be situated in the Republic of South Africa, be requested to assist the Applicants in the implementation of this declaratory order in the event of any contravention thereof.

9. That the costs of this application be paid by the Respondents, jointly and severally, the one paying the others to be absolved, on a scale as between attorney and client.'

[3] As I shall illustrate, the papers are replete with disputes of fact. The respondents in their answering affidavit submitted that the application should be dismissed because these disputes of fact should have been anticipated by the applicants who then proceeded by way of application at their peril. The same point is made in the heads of argument of Mr Rosenberg who, together with Mr Simonsz, appeared for the respondents. Neither side has

applied for the matter to be referred to oral evidence or trial. Instead, the matter was argued on the papers. That would mean that the facts upon which the matter would have to be decided would have to be determined on the basis of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*:^[1] the facts that would determine whether the applicants are entitled to the relief claimed by them would be their own factual averments that are either admitted by the respondents or cannot be denied and the respondents' factual averments.

[4] The matter commences from a fact that is common cause – that a schism occurred in the church at some stage. Thereafter every material fact appears to be in dispute. In paragraph 1.1 to 1.3 of the founding affidavit, Mpulu claims to be an ordained minister and the moderator of the church. This is denied by the deponent to the answering affidavit, Sonwabo Mdlungu, who avers that Mpulu was ex-communicated from the church and so is neither a minister nor the moderator.

[5] In paragraph 11 of the founding affidavit, Mpulu states that the five respondents 'are cited in that they are the individuals who have usurped senior positions within a breakaway faction of the Second Applicant, and have utilised these positions to attempt to seize control and authority within the hierarchy of the Second Applicant'. In answer to this, Mdlungu says:

'115. I dispute that I usurped any position and I categorically deny that I belong to a breakaway faction. I maintain that I belong [to] the original Presbyterian Church of Africa and it is the First Applicant and his followers who broke away from the original Church.

116. Whether a faction is a breakaway or not is a factual inquiry. It would not be correct for the Court to try and resolve this question on affidavit.'

[6] Even allegations made by Mpulu that, in 2004, letters were addressed to the respondents inviting them back into the church, and that an effort was made to resolve the problem, are denied but Mdlungu claims that he and the other respondents are committed 'to resolving the schism in the best interests of the Church'.

[7] In paragraphs 15 and 16 of the founding affidavit, Mpulu says:

'15. In 2008 a meeting was called by Reverend NOCANDA in Alice, with a view to eliminating the rift which had occurred by virtue of the breakaway faction usurping authority within the Church, This also proved to be a futile exercise as the Respondents would not accept the authority of those who had been constitutionally elected within the body of the Second Applicant.

16. In 2010, the Respondents and those who made common cause with them, addressed a letter to our legal representatives in order that a meeting could be held in Cape Town for the 24th of October 2010. I arranged that a delegation including myself travelled to Cape Town for the purposes of this meeting but, on

arrival, we were simply advised that an urgent application had been served on us in Port Elizabeth, that the Respondents were not

intending to go to Cape Town and we had been induced to travel to Cape Town as a ruse.’

[8] In answer to these allegations, Mdlungu says:

‘120. I dispute that the late Reverend Nocanda convened any meeting to resolve the schism – the meeting referred to in this paragraph was actually called by Reverend Matomela, the then Moderator of the Assembly. He convened a number of meetings which Reverend Nocanda together with the First Applicant and their followers refused to attend.

121. It is correct that in 2010, the Assembly, after a number of attempts to call the First Applicant to the negotiating table, instructed lawyers to convene a meeting in Cape Town for the 24th October 2010.

122. The Nocanda faction did not even have the courtesy of confirming their attendance at the meeting. No reply was made to the invitation and no venue was agreed upon.

123. It is further not correct that there was any urgent application served upon the first applicant on the 24th October 2010. I challenge the First Applicant to produce the notice of motion of that application, failing which, to withdraw this

claim.’

[9] I shall stop there. Little point will be served by dealing with every dispute of fact that is raised. Those that I have set out are illustrative of what is contained in the rest of the papers. They also illustrate how fundamental they are to the issues that I am called upon to decide. They are all the more intractable because both factions are able to produce documents that on their face appear to be official documents of the church. So, for instance, Mpulu claims authority to institute these proceedings on behalf of the church on the basis of a certificate in terms of the church’s constitution. Mdlungu makes a similar claim and attaches a certificate issued by the ‘Executive commission/committee of the General Assembly’ of the church to evidence his authority.

[10] In *National Director of Public Prosecutions v Zuma*[2] Harms DP stated that ‘[m]otion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts’ and that [u]nless the circumstances are special they cannot be used to resolve factual

issues

because they are not designed to determine probabilities’.

[11] Rule 6(5)(g) of the uniform rules provides for cases that cannot be resolved on the papers, It states:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that

oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

[12] Rule 6(5)(g) envisages a discretion being exercised as to the conduct of a matter when factual disputes arise in motion proceedings.[3] The way in which this discretion ought to be exercised was dealt with in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[4] in which Murray J stated:

‘It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated *infra*) the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute

of fact can properly be determined by calling *viva voce* evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings,

or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the

applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action.’

[13] In one of the many cases between the factions – *Presbyterian Church of Africa v Sihawu & others*[5] -- Goosen J made the point that, given the inevitability of disputes of fact arising in litigation between the two factions of the church, applications would, in future, be brought at the applicant’s peril. He said in this regard:[6]

‘In this instance I decided the application essentially on the basis of this court’s lack of jurisdiction. It was therefore not necessary to consider the issues raised in relation to the existence of disputes of fact which it was alleged were readily foreseeable. At face value however, it seems to me that there is some merit in the contention that the existence of fundamental disputes of fact are readily apparent in this ongoing saga of litigation. That being so the time may well come when a party to this intractable leadership squabble is non-suited on that account.’

[14] I am of the view that that time has come. This matter cannot properly be decided on the papers because the disputes of fact are pervasive and all-embracing and concern the core issue of which faction is the legitimate leadership of the church. I find myself in the same position as Colman J in *Carrara & Lecuona (Pty) Ltd v Van der Heever Investments Ltd & others*[7] when he said that he did not know, on the papers, who was telling the truth and that ‘no Court could possibly know without hearing oral evidence’. It would be inappropriate and undesirable in these circumstances to decide the matter on the basis of an application of the *Plascon-Evans* rule.

[15] Secondly, it must have been obvious to the applicants that their legitimacy as leaders of the church, and the corresponding

illegitimacy of the respondents, would be hotly disputed. They therefore proceeded by way of application at their peril. No application was made to refer the matter for oral evidence or to trial and even if such an application had been made, I would not have considered a referral to evidence or to trial to have been a proper way of dealing with the matter. I take the view that the application must be dismissed with costs on account of the applicants proceeding in the face of what should have been clearly anticipated intractable

disputes of fact.[8]

[16] Even though I expressly found that it would not have been proper to decide the matter on the papers, the same result would have been achieved if I had applied the Plascon-Evans rule: every dispute of fact would have been resolved in favour of the respondents, and that would have meant that the applicants could not have made out a case for the relief which they claimed.

[17] In the result, the application is dismissed with costs.

C Plasket

Judge of the High Court

APPEARANCES

Applicants: S Cole instructed by NN Dullabh & Co, Grahamstown

Respondents: S Rosenberg SC and D Simonsz instructed by GM Yeko Attorneys, Grahamstown

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (A) at 634E-635D.

[2] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009

(2) SA 277 (SCA) para 26.

[3] Adbro Investment Co Ltd v Minister of the Interior 1956

(3) SA 345 (A) at 349H-350A; Conradie v Kleingeld 1950

(2) SA 594 (O) at 597.

[4] Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949

(3) SA 1155 (T) at 1162. See too Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 430G-H; Gounder v Top Spec Investments (Pty) Ltd

[2008] ZASCA 52; 2008 (5) SA 151 (SCA) para 10.

-
- [5] Presbyterian Church of Africa v Sihawu & others ECG 25 April 2013 (case no. 3375/12) unreported.
- [6] Para 28.
- [7] Carrara & Lecuona (Pty) Ltd v Van der Heever Investments Ltd & others 1973 (3) SA 716 (T) at 720B-C. See too Cullen v Haupt 1989 (4) SA 39 (C) at 40J-41B.
- [8] Transnet Ltd t/a Metrorail & others v Rail Commuters Action Group & others 2003 (6) SA 349 (SCA) para 22; Windsor v Dove 1951 (4) SA 42 (N) at 49A-B; Blend & another v Peri-Urban Areas Health Board 1952 (2) SA 287 (T) at 291H-292B; Seloadi & others v Sun International (Bophuthatswana) Ltd 1993 (2) SA 174 (B) at 191C-192C.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2014/49.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mpulu-and-another-v-mokaba-unknown-topic-aecghc-2014>

Prepared on 12 October 2026 · Esheria