

SOUTH AFRICA / JUDGMENT

Ngewu v Makgoba N.O and Others (AR256/15) [2016]

ZAKZPHC 39 (29 April 2016)

[2016] ZAKZPHC 39

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Van Zyl, Jappie, Henriques

CASE / FILE NUMBER

AR256/15

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO: AR256/15

DATE:

29 APRIL 2016

In

the matter between:

MLIBO

MTELELELE

NGEWU.....APPELLANT

And

THABO

CECIL MAKGOBA

NO.....FIRST

RESPONDENT

THE

SYNOD OF BISHOPS OF THE ANGLICAN

CHURCH

OF SOUTHERN

AFRICA.....SECOND

RESPONDENT

THE

ANGLICAN CHURCH OF SOUTHERN

AFRICA.....THIRD

RESPONDENT

AFRICA,

DIOCESE OF
UMZIMVUBU.....FOURTH
RESPONDENT

JUDGMENT

VAN ZÿL, J (JAPPIE JP and HENRIQUES J concurring):-

1. The appeal in this matter, with leave of the court a quo (Bezuidenhout, AJ), is against the dismissal of an application wherein the appellant as the applicant sought an order restoring him to his position as Bishop of the Diocese of Umzimvubu and for an interdict as against the various respondents restraining them from interfering with the exercise by the appellant of his rights and duties as such.
2. The respondents comprised the Anglican Church of Southern Africa (the third respondent) and its functionaries. Of these the first

respondent was cited in his capacity as the Archbishop of Cape Town and Metropolitan of the third respondent. The second respondent was the Synod of Bishops of the third respondent and the fourth respondent was the Diocese of Umzimvubu, being part of the third

respondent. These respondents, as a matter of convenience, are herein referred to respectively as the Church, the Metropolitan, the Synod and the Diocese.

3. Despite the voluminous application papers, the disputes between the parties ultimately relate to a relatively narrow question of interpretation. At issue was the nature, effect, terms and interpretation of an agreement admittedly concluded between the appellant with the Metropolitan by virtue of an exchange of letters.
4. The first of these was a letter dated 9 February 2012 and addressed by the appellant to the Metropolitan against a background of a schism which had developed within the Diocese of Umzimvubu. In his letter the appellant suggested the appointment of a Vicar General and a Provincial Team to work with the Metropolitan in facilitating a “lasting solution” to the divisive problems within the Diocese. The letter concluded that the appellant agreed that:-

“... the Episcopal responsibilities and authority vested in me (the appellant) at my Collation are hereby placed in your (the Metropolitan’s) good hands for the time being. I undertake not to exercise any Episcopal ministry during this time.

We further agree that this agreement shall only be terminated by mutual agreement between ourselves and the Metropolitan in terms of Canon 21 of the Anglican Church of Southern Africa.

We reserve our right as the Bishop of Umzimvubu to enjoy all the rights and emoluments of the Bishop pertaining to our office.”

5. It is common cause these proposals were accepted by letter dated 9 February 2012. Therein the steps to be taken were set out and included a Pastoral Team to meet with the appellant and his family to plan for his retreat and pastoral care, to consult with the Diocesan leadership including lay officials and to prepare for the arrival in the Diocese of the Vicar General and the Provincial Management Team (the PMT). The latter would inter alia appoint an external company to conduct a forensic audit of the Diocesan and Parishioners' accounts while a separate account

would in the meantime be opened for the Diocese and administered directly by the provincial trustees, in order to receive payments

from disaffected parishes. From available funds payments due to pension funds, the S A Revenue Services and other commitments would

be brought up to date and maintained. Such further or remedial steps as may become necessary from time to time would also be taken.

6. As indicated, the essential dispute before the court a quo then related to and flowed from an interpretation and application of the relevant terms of this agreement. According to the founding affidavit of the appellant the firm PKF was appointed as the external auditors tasked with the investigation of and reporting upon the financial affairs of both the Diocese and its parishes. They reported and thereafter the PMT in turn reported to the Synod, which then resolved that the appellant stand trial under the provisions of Canon 38 on charges of misconduct.
 7. The applicant alleged that since the PMT, to which he also referred as the Provincial Task Team, had completed its work, the proceedings had entered a new phase, namely one of confrontation during the course of which the appellant would be charged with misconduct in terms of Canon 38. He alleged that this new phase did not fall within the contemplation of the agreement regarding his voluntary suspension from the office of Bishop and accordingly that his undertaking to be suspended was no longer binding. Put differently, it was contended that the "(suspension)agreement terminated upon the completion of the process contemplated in terms of Canon 21", as it was put in a letter by the appellant's attorneys of record and addressed to the Metropolitan on 20 November
2013. In the same letter demand was made for the appellant to be permitted to resume his duties as Bishop of the Umzimvubu Diocese "until the finalization of the Canon 38 process". In response the Metropolitan refused the demand and noted that termination of the suspension required mutual agreement.
8. The Court below approached the dispute on an interpretation of the agreement. It concluded that upon a reading of the agreement in its totality the provisions of Canon 21 needed to be completed before the agreement to suspend could be brought to an end. Since the disciplinary hearing in terms of Canon 38 still needed to be completed and since no additional agreement to terminate the suspension during the interim had been concluded,

the appellant had not established any entitlement to the relief sought. Accordingly, so it was held, the voluntary suspension to which the appellant had agreed remained effective until completion of the Canon 38 disciplinary proceedings, unless some other agreement were to be reached. In the result the application failed and costs, including the costs of two counsel, followed the result.

9. Mr Blomkamp, who appeared for the appellant in the appeal before us, submitted that the primary issue to be determined was whether the interpretation placed by the court below upon the agreement was correct and more particularly, whether the finding that the appellant would remain suspended from his post until the Canon 38 proceedings were finally concluded was correct. In this regard counsel submitted that on a proper construction of the agreement the court should have found that the agreement terminated once the “Provincial Task Team” PMT had rendered its report to the Synod.
10. In developing his argument counsel for the appellant submitted that the court a quo should have held that the effect of the agreement was for the appellant to submit to suspension, or to stand aside, in order to afford the PMT the opportunity to perform its investigative functions and to report thereon, but that the agreement was not intended to regulate the position beyond the report of the PMT to the Synod. Accordingly, so counsel contended, once the report had been submitted the PMT had performed its intended functions and the position should have reverted to what it was prior to the agreement for the appellant to stand aside being concluded. On the approach of counsel for the appellant this meant that the appellant should then have resumed his normal duties as Bishop of the Diocese and that this would have remained the position irrespective of the disciplinary proceedings in terms of Canon 38 thereafter instituted by the Synod against the appellant. This was so because the Canons of the Church did not provide for any right to suspend the appellant pending the outcome of these proceedings.
11. According to counsel for the appellant the proper approach to the interpretation of the agreement was to have considered the language used in formulating the agreement, read in context and having regard to the purpose for which it was concluded. In this regard emphasis was placed upon the contents of Canon 21(3) which empowered the Metropolitan to appoint a task team, inter alia, to investigate and report to the Synod through the Metropolitan.
12. With reliance upon the authority of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18 counsel submitted that it was necessary to emphasise that the object of the agreement, as expressed therein, was for “giving space” to the PMT to “find a lasting solution to the divisive problems that we have been experiencing”, as a result of which the appellant agreed to step back and surrender his authority to the Metropolitan “for the time being”. It was submitted that these latter words were indicative of an agreement to relinquish his position temporarily only and that they suggested a suspension for a limited period, as opposed to an open-ended suspension.

13. Counsel further drew attention to the fact that Canon 21 contained no provisions for either an agreement, or for the consensual termination thereof. Pointing out that the Synod are given wide powers in terms of Canon 21(3), inter alia, following the report to it to “take whatever decision it feels appropriate in the circumstances in consultation with the Diocese concerned”, counsel submitted that a proper interpretation of the agreement was that the suspension agreement should have been held to have terminated once the PMT had reported. Insofar as the Synod then might have decided upon any further action, this was a new phase and was neither contemplated, nor provided for in the suspension agreement because the agreement was merely intended to provide an interim solution “for the time being” and that the words “lasting solution”, in context, did not suggest that the voluntary suspension would endure beyond the report of the PMT.
14. Likewise, the Vicar General appointed to the Diocese at the same time was intended to work with the PMT and upon the latter reporting, the need for the continued functioning of the former would also have fallen away. To interpret the agreement in the manner in which the court a quo did, so it was submitted, amounted to that court giving such an expansive meaning to the words so as to make a bargain for the parties, which was impermissible.
15. Mr Dickson SC, who appeared with Mr Swain for the respondents, supported the judgment of the court a quo and submitted that the appeal and the interpretation of the agreement required consideration at two levels. In the first instance the respondents contended that the court a quo was correct in its consideration of the agreement in context and in attributing meaning thereto upon what may conveniently be called a grammatical approach. An alternative or different approach, so counsel submitted, would entail a so-called purposive interpretation.

That is, to identify and consider in context the mischief sought to be addressed by the agreement in order to attribute a sensible

meaning thereto. However, in the final analysis counsel for the respondents submitted that in the present matter either route gave

rise to the same result, so that it mattered not that the court a quo appeared to have confined itself to the former approach.

16. Canon 21(3) provides, inter alia, that when the Metropolitan becomes aware of events, developments, or reasons which in his opinion merit investigation of the affairs of a particular diocese, then he shall be entitled to appoint a task team to inquire into and investigate the matters of concern and then to report its findings to the Synod. The Synod of Bishops are afforded wide powers and may, in terms thereof, thereafter refer the matter to trial under Canon 38.

17. It is not in dispute that the admitted schism which had developed in the Diocese of Umzimvubu whilst under the control of the appellant as its bishop merited investigation and that the appointment of the PMT was justified. The consensual suspension of the appellant from his duties as the Bishop of Umzimvubu was also not controversial. But the difficulty arose as to when such suspension would terminate.
18. In the appellant's letter of 9 February 2012 to the Metropolitan the appellant postulated not only the appointment of a "Provincial team" (the PMT) but also his own withdrawal from the functions as Bishop of the Diocese as contributing to the finding of a "lasting solution" to the divisive problems experienced. The object, with reference to the wide ambit of the investigative, remedial and disciplinary powers envisaged in Canon 21, including the power to charge and require a Bishop to resign from office in terms of Canon 14(2), was thus not merely to obtain a report from the PMT, but rather to finally resolve the difficulties which had beset the Diocese of Umzimvubu.
19. The mere reporting by the PMT to the Synod of Bishops, in context and whilst a step in the process of finding a lasting solution would not, by itself necessarily create such a solution. This is all the more so where the Synod then decided, as here, to initiate charges of misconduct as against the allegedly offending Bishop, a process which would probably be time consuming and might well end in the removal of the Bishop from office and thereby his permanent withdrawal from the Diocese concerned.
20. Objectively it would serve little purpose to suspend the Bishop concerned from his duties within the Diocese only until the PMT had delivered what is effectively an interim report and then to reinstate the Bishop within the Diocese whilst further disciplinary actions were pursued against him conceivably resulting in his permanent removal. Such a process would be unlikely to contribute to any lasting solution of the difficulties experienced within the Diocese concerned and may well have the effect of exacerbating such difficulties and to reverse whatever interim remedial measures had been put in place by the PMT to protect the Diocesan interests, or assets, or both, as envisaged in Canon 21(3).
21. In the view I take of the matter the interpretation of the agreement represented by the appellant's letter of 9 February 2012 and as contended for by the appellant is, in context, untenable. As set out in prayer 1 of the appellant's notice of motion he sought reinstatement and an order entitling him to resume his episcopal duties and rights as Bishop of the Diocese "pending the Applicant's removal or suspension from the office as Bishop of the Diocese of Umzimvubu of the Anglican Church of Southern Africa (Church) in terms of the Canons of the Church".

22. Objectively the meaning to be preferred is that the suspension of the appellant would endure until a lasting solution was found, or until the parties consensually decided otherwise. It is manifest that no agreement had been achieved, or was likely in the circumstances to be achieved, which would permit the appellant to resume his duties as the Bishop of the Diocese of Umzimvubu, at least until the disciplinary proceedings under Canon 21(3) read with Canon 38 had run its course.
23. It follows that in my view Bezuidenhout, AJ in the court below was correct in concluding that the voluntary suspension to which the appellant had agreed would remain in force at least until final completion of the disciplinary proceedings under Canon 38 and that the appellant was not in the circumstances entitled to the relief sought.
24. I am of the opinion that the appeal cannot succeed and should be dismissed. Costs, as in the court below, should follow the result. Although at the appeal the appellant was represented by only one counsel, both sides were represented by two counsel in the court of first instance and the costs order made on that occasion included the costs of two counsel. In the appeal before us the respondents were again represented by and asked for the costs of two counsel. Counsel for the appellant did not make any submissions in regard thereto in reply.
25. In the result I would propose that the appeal be dismissed, with costs, such costs to include the costs of two counsel, wherever employed.

VAN ZYL, J. JAPPIE, J.P. HENRIQUES, J.

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Prepared on 10 October 2026 · Esheria