



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 1314/2013

In the matter between:

**THE ROMAN CATHOLIC CHURCH  
OF SWAZILAND**

**Applicant**

And

**BONGANI NDWANDWE N.O.  
MACHAWE MADUNA**

**1<sup>st</sup> Respondent**

**2<sup>nd</sup> Respondent**

**Neutral citation:** *The Roman Catholic Church of Swaziland v Bongani Ndwandwe N. O. & Another (1670/2013) [2013] SZHC 251 (12<sup>th</sup> November, 2013)*

**Coram:** **M. Dlamini J.**

**Heard:** **5<sup>th</sup> November 2013**

**Delivered:** **12<sup>th</sup> November 2013**

*Applicant church – its priests therefore not employees – no contractual relationship – relationship of applicant and its priest ecclesiastical - application – signature on document purchasing merx not proof of*

*ownership per se – matter should be considered in totality of circumstances – application against deputy sheriff – duty of deputy sheriff to sue out an interpleader – failure thereof put him into risk of incurring costs should application be decided against him.*

Summary: The applicant seeks for the return of a *merx* attached by 1<sup>st</sup> respondent pursuant to a writ of execution against a judgment debtor, Father Joseph Mafola.

### Dispute

[1] The applicant contends that it is the owner of motor vehicle registered VSD 658 AH, a silver grey Toyota Hilux. This motor vehicle was allocated to the judgment debtor for performing church duties. The respondent was therefore wrong to attach the said motor vehicle. The applicant prays for its return.

[2] The respondent informs court that the said motor vehicle ownership belongs to judgment debtor and Father Mafola jointly. They further allege in the alternative that Father Mafola is the employee of applicant and therefore applicant is vicariously liable.

### Issues

[3] The question for determination is whether applicant and Father Mafola own the motor vehicle jointly. A further matter for determination is whether father Mafola is an employee of applicant and whether applicant is vicariously liable for the act of Father Mafola.

## Determination

[4] The applicant has attached a lease agreement between Standard Bank and itself as proof of ownership of motor vehicle.

[5] The lease agreement reads:

*“Lease Agreement between Standard Bank (Swaziland)  
Ltd and Mater Dolorosa Catholic Church.”*

[6] This lease agreement according to applicant is proof that it purchased the motor vehicle.

[7] Applicant further attached the blue book of the motor vehicle which indicates applicant as the owner.

[8] Respondent however insists that the applicant and Father Mafola are joint owners of the motor vehicle by virtue of Father Mafola signing the lease agreement. A blue book is not proof of ownership.

[9] From the onset I must state that the arguments advanced on behalf of respondent are untenable in law.

[10] The applicant is according to paragraph 2 of the founding affidavit:

*“The Roman Catholic Church of Swaziland, a “universitas”, with power to sue and to be sued having its Headquarters at the Caritas Centre, Manzini.”*

[11] Firstly it is clear that applicant is a *legal persona*. As well put by in **De Beers Consolidated Mines ltd v Howe 1906 Act 455**, the following is true of applicant:

*“... cannot eat or sleep, but it can keep house and do business”*

[12] In other words applicant cannot read or write, but applicant can enter into contracts and acquire property.

[13] By virtue of applicant’s inability to read or write, applicant had to be represented in order to enter into a binding contract. It did so under the hand of Father Mafola. The signature of Father Mafola therefore on the lease document is not proof of ownership. The totality of the circumstances must be considered.

[14] In the result, I find that the applicant is the owner of the said motor vehicle.

[15] The respondents have argued in the alternative. They contend that the judgment debtor is an employee of applicant and therefore applicant is vicariously liable for the debts of applicant.

[16] This arguments falls at the onset for the following reasons:

[17] Firstly, the respondent failed to cite the applicant in the main action which resulted in the judgment sought to be executed. If what he says today is anything to go by, he would have cited the applicant as well. It is for that reason that the judgment sought to be executed does not cite Applicant. It cannot therefore at this stage of the proceedings be said that applicant is part of the contract when it was not joined in the main cause of action.

[18] Secondly, the respondents allege that Father Mafola is an employee of applicant.

[19] **In Church of Province of Southern African Diocese of Cape Town v Commissioner for Conciliation, Mediation and Arbitration and Others 2002 (3) SA 385** the court was faced with a similar question.

[20] The court found as follows in relation to the applicant at page 389:

*“The Anglican Church (similarly the Roman Catholic church) is divided into various dioceses and, while each is independent and autonomous, they are all bound by the same constitution. The canons may, however, differ from diocese to diocese depending on the peculiarities of the area in which they are based. Whatever the difference, if indeed any, all the canons must be in line with the constitution and therefore principally the canons are similar, if not the same, at every diocese.”*(words in brackets my own)

[21] The court further found:

*“In order for a person to become a priest within the Anglican Church (or Catholic church) generally, the person must demonstrate a clear vocation. This does not mean a wish or desire to be a priest, but a calling from God to the priestly office. The church does not allow a person to proceed towards priesthood until the truth of his calling is tested and confirmed by the church. Once the calling is confirmed, the church provides the necessary training at the end of which the candidate is ordained - first as a deacon and later as a priest.”*

6. *At the time the candidate is ordained as a priest (which is done at a service of ordination) he or she is required to answer, publicly and in the affirmative, certain standard questions which, inter alia, confirm that he or she was ‘called by God and His Church to the life and work of a priest’*

*and that he or she accepts 'the discipline of this church and [will] reverently obey [his or her] bishop and other ministers set over [him or her] in the Lord'.*

7. *Once ordained as a priest, a priest is not able to carry out any specific ministry: to be able to do so he or she must be licensed by the bishop of the diocese in which he or she is asked to carry out an active ministry. The licensing is a ritualistic process done either at the eucharist or at the morning or evening prayer service. The process by which licence is issued is as follows:*
8. *The oath of 'canonical obedience' is an oath of obedience to the priest's ecclesiastical superior to the extent that the superior acts in accordance with the canons. The bishop, therefore cannot expect obedience from the priest outside the framework of the canons.*
9. *Once licensed, his duties and obligations are defined and described in the applicant's constitution and canons. While the bishop generally exercises supervision and control over the priest, this appears to be done through motivation, guidance and encouragement rather than command and control. The system, according to both the applicant and the third respondent, operates largely on trust.(bracketing and underlining my own and emphasis)*

[22] There are a number of benefits awarded to a priest, one being a stipend which was described by **Waglay J.** in the **Church of Province of Southern Africa Anglican Diocese of Cape Town** (*supra*) as follows at page 390:

*“being a monthly subsistence allowance (this is sourced from the incumbent's parish but paid over by the diocese office ...”*

[23] The above position holds true in relation to applicant *in casu*, although a Roman Catholic.

[24] The question is on the basis of the above characteristics, could it be said that a priest as in the position of Father Mafola entered into a contract of service? **Waglay J** answered this poser by drawing from various English decisions. The learned judge quoted **Staughton LJ** as follows:

*“One can say that a Minister of religion serves God and serves his congregation, but does not serve an employer. ... If a curate or his bishop, or incumbent, intend to create legal relations, then there will be a contract between them ... But if, as I would hold in the ordinary way, no intention to create legal relations is to be inferred, there is no contract of employment between them.”*

[25] The learned judge then refers to **Davis v Presbyterian Church of Wales [1986] ALL ER 705 (HL)** where **Lord Templeman** reasoned:

*“My Lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. But in the present case the pastor of a church cannot point to any contract between himself and the church. The book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. The duties owed by the pastor to the church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of*

*...serving God is not accepted to the church, then his pastorate can be brought to an end by the church in accordance with the rules."*

[26] The following extract from **Greek Orthodox Community of South Africa Inc v Ernogenous SCGRC 99-653 (2000) SASC 329**, from Supreme Court of Australia was cited:

*"...the spiritual character of the relationship, the fact that it is ecclesiastical authority which may be exercised over the person, the nature of the duties of a priest or a minister, the commitment and decision to the service of God, the fact that the position may also be regarded as an office and the fact that there is a submission to a set of pre-determined rules and conditions or orders and to a set of ecclesiastical discipline will generally militate against a finding that the necessary intention [to enter] into contractual relations has been formed."*

[27] The honourable judge (**Waglay J**) then concluded before upholding the application at page 400:

*"...I am satisfied that there was in fact no intention on the part of either the applicant or the third respondent to enter into a legally enforceable employment contract."*

[28] I see no reason to detract from this well reasoned judgment *in casu* as it is common cause that Father Mafola is a priest under applicant.

[29] Before I enter the necessary orders, it is apposite to point out that it is an irregularity for the first respondent as an officer of this court to defend the present application.



[30] First respondent, having been served with the present application was duty bound to file an interpleader in terms of Rule 58 (1).

[31] **Bernstein v Visser 1934 CPD 270** at 272-273 defined an interpleader as:

*“Now interpleader is a form of procedure whereby a person, who is a stakeholder or other custodian of movable property, to which he lays no claim in his own right, but to which two or more other persons lay claim, may secure that they shall fight out their claims among themselves, without putting him to the expense and trouble of an action or actions. Interpleader in the case of execution is a species of this genus.”*

[32] **Juta AJA in Week v Amalgamated Agencies Ltd. 1920 AD** at 238 stated:

*“Cases frequently arise where a third party makes an adverse claim to property seized by the sheriff under an execution, and that the latter, but for the following safeguard, would be consequently subject to considerable risk in the discharge of his duties, to meet which, relief by way of interpleader is provided.”*

[33] As the 1<sup>st</sup> respondent neglected his duties of filing an interpleader, he has taken the risk to be meted with costs.

[34] In the premises, I enter the following orders:

1. Applicant’s application succeeds.

2. 1<sup>st</sup> respondent is ordered to release the motor vehicle Toyota Hilux 2.7 VVT1 Raider R/B 4x4 Double Cab, Silver Grey registered VSD 658 AH.
  
3. Respondents are ordered to pay costs.

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**M. DLAMINI  
JUDGE**

**For Applicants : N. Sithole**  
**For Respondents : L. Simelane**