

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 49468/2010

DATE:19/08/2011

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

.....  
DATE

.....  
SIGNATURE

In the matter between:

**LUVUYO, GEORGE MBOMBO**

Applicant

and

**THE CHURCH OF THE PROVINCE OF  
SOUTHERN AFRICA, DIOCESE OF HIGHVELD**

Respondent

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**J U D G M E N T**

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**KGOMO, J:**

**INTRODUCTION**

[1] The Applicant seeks an order reviewing and setting aside the decision of the Respondent to relieve him of his duties as a Priest in the Diocese of Highveld of the Church of the Province of Southern Africa (Anglican Church in South Africa).

[2] The grounds of the review are that the Respondent committed procedural irregularities and that the decision arrived at is thus invalid. It seeks a further order that the matter be remitted back to the Respondent to be heard *de novo*.

[3] The Respondent is opposing the application.

#### THE PARTIES

[4] The Applicant, LUVUYO GEORGE MBOMBO, is an adult male ordained priest who formerly rendered pastoral services under the Respondent at the Diocese of Highveld, stationed at Benoni immediately prior to the institution of these proceedings and who hails from 205 Summersands, 41 Sol Harris Crescent, North Beach, KwaZulu-Natal.

[5] The Respondent, the Diocese of Highveld in the Church of the Province of Southern Africa, the commonly called Anglican Church, is a unit of the Church under Bishop Bennerman having its principal seat relevant to the issues in this case at 101 Woburn Avenue, Benoni, Gauteng.

### ISSUES TO BE DECIDED

[6] It is accepted by both parties that in order to relieve the Applicant of his duties in the Diocese the Constitution and/or Canons of the Church are applicable. The issue is whether the Respondent followed the correct and applicable procedures when doing so;

Put differently,

The question is whether Canon 25(6) or Canons 37 and 39 or Canon 25(6) read with Canons 37 and 39 should have been applied.

### THE PARTIES' STAND POINTS

[7] The Applicant contends that the Respondent acted in terms of Canons 37 and 39, alternatively, Canon 25(6) read with Canons 37 and 39. The Applicant further contends that whether the Respondent relies on Canon 25(6) or not, its action is an administrative act which should conform to the prescripts of the Constitution of the Republic of South Africa 1996 (Act 106 of 1996), as amended (the Constitution) and the rules of natural justice. It is thus the Applicant's case that the Respondent flouted its own procedures in terms of its Constitution and Canons and did not act in compliance or with due

regard to the prescripts and spirit of the Constitution of the Republic of South Africa.

[8] The Respondent contends that it correctly and procedurally acted in terms of Canon 25(6) and that Canon 37 and 39 were not of application or applicable.

#### CHRONOLOGY AND HISTORY OF EVENTS

[9] At the time events leading to the ruling by the Respondent that precipitated this application unfolded the Applicant was the priest-in-charge at the Parish of the Holy Name at Thembisa East within the Diocese of Highveld of the Anglican Church. He was an ordained priest of the Church of the Province of Southern Africa (Anglican Church) for the past 36 years from whom he received financial support in the form of a monthly stipend as well as the use of a house and a motor vehicle. He has been stationed at the Thembisa East Church under Bishop Bannermann for the past six (6) years.

[10] During or about December 2009 a dispute arose between the Applicant and the parishioners of The Holy Name Church in Thembisa. The parishioners signed a petition directed at Bishop Bannermann and the Church demanding that the Applicant be removed from the Thembisa Church. They alleged among others a breakdown of trust and confidence in the Applicant, his lack of spiritual leadership or direction, lack of pastoral relationship, the

use of foul language and further accusations that the Applicant verbally attacked certain members of The Holy Name parish during religious services.

[11] Various meetings took place between the Applicant and the applicable Bishop's Chapter regarding the complaints. The net results of the meetings was that it was agreed that an investigation team was to be set up in order to identify the issues that were the source of the misunderstanding as well as try to come up with solutions in order to restore peace within The Holy Name parish.

[12] An investigation team was set up on 14 January 2010 to deal with the allegations. Various groups or persons from the Church presented their grievances to the panel of enquiry. After it all, a recommendation was made by the investigations team or panel to the presiding Bishop of the diocese that due to irrevocable breakdown in relations between the Applicant and the parishioners, the Applicant should be removed from the parish with immediate effect and be offered an alternative parish where he could continue with and in his ministry, as long as it was not in the parish with complaints. It was further recommended that if available or possible he could also be installed in a specialised ministry within the diocese. Should no vacancy be found within the diocese he could also be given a calling anywhere within the Republic of South Africa.

[13] Following the recommendations, according to the Applicant, the Bishop took a decision in terms of Canon 25(8) to relieve the Applicant of his clerical duties in the diocese. Only subsequent hereto, contrary to the Bishop's contention which I will set out hereunder, the Applicant and the Bishop tried to manage and mitigate the situation by trying to find other dioceses where he could be accommodated without success.

[14] According to the Bishop, following up on the recommendations of the investigations team, he immediately looked around his diocese, other dioceses and even in the greater South Africa for a vacancy where the Applicant could be relocated to without success. It was only after his failure to so secure an alternative vacancy all over South Africa that he (Bishop) decided to relive the Applicant of his duties.

[15] Nothing was said about any attempts to place the Applicant in a specialised ministry within the diocese.

[16] Applicant then appealed to the Archbishop of Cape Town who is the head of the Anglican Church in Southern Africa, including South Africa. The appeal failed, hence he called himself to this Court for assistance.

#### THE REGULATORY PRESCRIPTS

[17] The parts of the Canons of the Church as well as our Constitution's directives that are applicable to and in this matter are the following:

[18] Canon 25(6) reads as follows:

- “6. *If the Bishop of the Diocese considers that for pastoral reasons the work of God in a Pastoral charge demands that there should be a change of Incumbent or assistant Curate, the Bishop shall (failing the consent of the said Incumbent or assistant Curate to the change) take counsel with the chapter of the cathedral church, or with the senate, as the case may be, or if there be no chapter or senate, priests of the Diocese, and if the majority of them agree to such a course, after giving the said cleric an opportunity to be heard, and Section 8 of this Canon, the Bishop shall offer the cleric another ministry in the Diocese stipendiary if the ministry was stipendiary. Should there be none in the Diocese, then the Bishop shall seek in consultation with the cleric another suitable ministry within the Province. However, if it appears to the Bishop, either before embarking on this process or during the process itself, that the reason for the need for a change in fact relates mainly or substantially to matters which could constitute charges or accusations in terms of Canon 37(1), then in the absence of any charge under Canon 37(1), the Bishop shall proceed in terms of Canon 39.*”

[19] Canon 25(8) correspondingly decrees as follows:

- “8. *If another ministry is not found in the Diocese or within the Province, then if two thirds of the chapter, senate or priests agree that under all circumstances no other ministry should be offered, then after giving the clergyman an opportunity to be heard, the Bishop may, after explanation and pastoral ministration, upon the expiration of three months’ notice, revoke the clergyman’s letters of collation or institution, or his licence, as the case may be, without offering another ministry.*”

[20] The latter part of Canon 25(8) deals with the clergyman's right and procedure to appeal to the Metropolitan or if the Bishop concerned is the Metropolitan, to the Dean of the Province.

[21] Canon 37(4) decrees that –

“4. *All charges shall be made in writing signed by the presenters, wherein shall be specified all the particulars of time, place, and circumstances, alleged by them, intimation being made of the name and address of some person to whom all necessary communications in the cause shall be made, as the agent of the presenters ...*”

[22] According to Canon 37(6) the charge or accusation shall be entitled “*Articles of Presentment*”. In terms of Canon 37(7) the final decision arrived at after the trial or hearing pursuant to Canon 37 shall be transmitted to the Metropolitan or Bishop together with the Articles of Presentment under cover of a minute of reference and agreement indicating that the judgment of the Tribunal over the matters contained in the Articles of Presentment shall, saving for such rights of appeal as may be allowed by the laws of the Church, be held to be final in the cause. In terms of Canon 37(8) both the accused and the presenters may be represented by counsel or representative at their own expense.

[23] Canon 37(9) decrees that no testimony shall be received at the trial except from witnesses who should have, before giving their evidence, made



an affirmative answer to the following question put by the presiding officer at the trial or hearing:

*“Do you promise, as in the presence of Almighty God, that you will speak the truth, the whole truth, and nothing but the truth, whether in the declaration which you shall make or in the answers which you are about to give?”*

[24] Canon 37(15) decrees that after the sentence has been pronounced in the trial or enquiry, if within 30 days after sentence shall have been passed, the President of the Tribunal come across any new facts which may have a bearing on the judgment, the latter shall have the competence to order a re-hearing of the case. If such new facts come to his knowledge after the expiry of the 30 days after the date of the handing down of sentence, the President of the Tribunal shall then refer the matter to the Diocesan Bishops, who in turn shall have the power to annul or modify any such decision.

[25] Canon 37(16) requires the Tribunal to keep a full record of its proceedings, including the Articles of Presentment, the names of the presenters and the accused, the evidence and all retractions together with the judgment and sentence of the Tribunal or Court. The record shall be preserved in the Registry of the Tribunal or Court.

[26] Canon 39 deals with the specifications relating to formal charges as well as the requisite logistics in relation to the composition of the Tribunals or Courts.

[27] Canon 39(2)(a) and (b) decrees that –

- “(2)(a) *Subject to Section 4, the Bishop (or in his absence, the Vicar-General), or receiving the Articles of Presentment under Canon 37 of Judicial Proceedings must within twenty (20) days constitute a Board of Preliminary Inquiry. The time periods set out here and elsewhere in this Canon must be adhered to, unless there is good cause not to, in which case the act in question must be effected as soon as possible in the circumstances.*
- (b) *The Bishop must, within seven days of receiving the Articles of Presentment, transmit a copy of the Articles of Presentment to the Accused. Should the Accused wish to deliver a written answer to the Bishop, he must do so within seven days of receiving the Articles of Presentment. The Bishop must send this reply to the Complainant within seven days and advise the Complainant that he may respond to the Accused’s reply. Should the Complainant wish to respond to the Accused’s reply, he/she must do so within seven days of receiving the reply.”*

[28] In terms of Canon 39(c) the Board must consist –

*“... of two priests and a lay person learned in the law (also a confirmed communicant of the Church of the Province), provided that should the charge fall under Canon 37(1)(a) or (b), at least one person must be a woman.”*

[29] Canon 39(4) provides as follows –

- “(a) *If a charge relates to Canon 37(1)(a) or (b), the Bishop may within seven days of receiving the Articles of Presentment immediately suspend the Accused with emoluments.*

- (b) *The Board must in its report decide whether there is a prima facie case against the Accused, and whether to advise the Bishop to confirm any suspension of the Accused under Subsection (a), or if not already suspended, to suspend him or her.*
- (c) *If the Bishop wishes to consider suspending the Accused without emoluments after receipt of the Board's report, he may only do so after hearing the Accused on this and considering all submissions made by or on behalf of the Accused. Thereafter the provisions of Section 20 will apply."*

[30] Canon 39(10) provides that the judgment of the Tribunal shall be that of the majority of its members, and all members shall have the right to state the ground for their finding. It further decrees that in cases of charges under Canon 37(1)(a) or (b), all members of the Tribunal must produce written reasons for their decisions. Members of the Tribunal may write joint, concurring judgments.

#### APPLICATION OF PRESCRIPTS TO THE FACTS *IN CASU*

[31] The applicant contended that apart from there being no procedural fairness in the processes adopted, the Respondent also failed to follow its own Canons, thereby rendering their decision not only unfair but also *null and void*. Some of the manifestations of the above purported irregularities were that he was not afforded the chance to seek legal representation, was not allowed to cross-examine witnesses, incorrect Canons were applied or utilised during the enquiry that was conducted and the panel conducting the enquiry was not properly constituted among others.

[32] Counsel for the Respondent started arguments on behalf of the latter by quoting emotional passages from an ecclesiastical authority, *The Deliberate Church* by Mark Dever and Paul Alexander the long and short whereof was that anybody who chooses to lead people spiritually must act in an exemplary manner, leading from the front in a manner that is befitting a man of God.

[33] Emotions aside, the Respondent's case was that it acted in accordance with Canon 25, specifically Canons 25(6) and 25(8). Although the final report of the Diocese of Highveld titled "*Board of Preliminary Inquiry Panel*" dated February 2010, which is the only report by any organ(s) of the Respondent that dealt with the taking away of the Applicant's powers and competencies to serve as a priest specifically mentioned that the Board of Inquiry was constituted in terms of Canon 39, it was strongly argued on its behalf that it was a "*slip of the pen*" and that the Respondent actually was acting in terms of Canon 25.

[34] It is common cause and our law that by virtue of the parole evidence rule it is not ordinarily competent for a person who is relying on a written document to come up with verbal extra-documentary interpretations that contradict what is written in the document. Nevertheless, I will investigate the entire course and scope of the Respondent's actions to determine whether its assertion of a *bona fide* or genuine mistake can be sustained.

[35] It can be accepted that after the parishioner's petition was received, the presiding Bishop did consult with the Applicant as well as the relevant Chapter of the Cathedral Church and a decision was taken to conduct an investigation. The question to be answered is : Under which Canon was such an investigation or enquiry conducted? Applicant contends that it was in terms of Canons 37 and 39, alternatively Canon 25(6) read with Canons 37 and 39 when regard is had to the nature and character of the proceedings. The Respondent insists that Canons 37 and 39 never played a part : that it acted in terms of Canon 25.

[36] Canon 37(1) lists a series of charges that are of such a serious nature that they deserve to be referred to a Tribunal constituted in terms of Canon 39, with or without a charge sheet or Articles of Presentment as they are called in the Canons. When one scrutinises the complaints and/or allegations that were presented to the investigative team calling itself the Board of Preliminary Inquiry Panel which tabled its report dated February 2010, one can see that the Applicant is accused of such serious matters as conduct giving just cause for scandal or offence (37(1)(e)), violate the Constitution or Canons of the Church of the Province (37(1)(i)), evidence gross disobedience (37(1)(j)) and gross neglect of the duties of a priest's office (37(1)(k)). These and others, according to the report and the chronology of events, came out during the very first investigative meeting set up to explore and establish the authenticity of the complaints which led to the petition that was circulated, calling for the removal of the Applicant. The report does not evidence any of the complainants having taken any oath or affirmation in terms of the Canons

as shown above. The record equally does not indicate whether any cross-examination was allowed. Worse still, the report shows that there were two distinct sessions : an open session where the Applicant was present and a closed session where he was excluded.

[37] In terms of the Canons of the Church a three member panel board of enquiry is authorised or appointed in terms of Canon 39. The Bishop appointed three panellists in this instance. The Canons require that of the three panellists, one of them must be a lay communicant with a legal background. According to the Applicant's papers, the lay panellist on the panel appointed to do the investigations neither has a legal background or legal qualifications. This was never gainsaid by the Respondent. This Court thus finds that the panel appointed to do the investigations was fatally flawed.

[38] In the report itself the Applicant pertinently brought it to the attention of the investigative panel that none of the complaints aired in the open session were brought to his attention before the panel was constituted.

[39] In terms of Canon 25(6) which the Respondent purports to have acted –

*“... if it appears to the Bishop, either before embarking on this process or during the process itself that the reason for the need for a change in fact relates mainly or substantially to matters which could constitute*

*charges or accusations in terms of 37(1), the Bishop shall proceed in terms of Canon 39."*

[40] As stated above, the individual accusations levelled at the Applicant by the parishioners fell squarely within the ambit of the above quoted part of Canon 25(6) and they thus called for the presiding Bishop to invoke Canon 39. The above, coupled with the fact that the Board of Preliminary Inquiry Panel understood their process to have been in terms of Canon 39, renders, in my view, the Respondent's contentions that it acted all the way in terms of Canon 25 untenable. The above is also consistent with the provisions of Canon 39(1) which reads as follows:

*"The Bishop of the Diocese, if he shall see sufficient cause, shall have the liberty to act without such charge being preferred; he shall then at once place the matter in the hands of a Board of Preliminary Inquiry as defined in the following subsection."*

[41] The very title of the Board of Inquiry that conducted the investigations rhymes with the Board as contemplated under Canon 39. This makes the Applicant's contention and submission that the Respondent at all times intended to act within the provisions of Canon 39 in conjunction with Canon 37 sound very credible.

[42] The nature of the allegations levelled against the Applicant in my view called for the Respondent to have invoked Canons 37 and 39. A charge sheet or Articles of Presentment should have been issued and served on the

Applicant and the matter ventilated openly and in keeping with the spirit of the two abovementioned Canons. The procedural provisions set out in Canon 37 ought to have been followed. It is my finding that the Respondent's failure to do so is a procedural irregularity that vitiates the entire proceedings. The Applicant was not given the right to be heard as required by our Constitution. It is my further finding that Canon 25 makes no provision for the appointment of a Board of Inquiry. That competence rests with Canon 39.

[43] The recommendations and conclusions reached and made in the report dated February 2010 constitute a charge and/or an accusation(s). In terms of Canon 25(6), in the absence of a formal charge, as was the case with the Applicant here, the Respondent should have proceeded in terms of Canon 39 read with Canon 37 once these allegations surfaced

[44] By failing to act likewise the Respondent committed a gross procedural irregularity in terms of administrative law principles and requirements as well as in terms of its own Canons. The above renders the procedure followed reviewable and the decision arrived at stands to be reviewed and set aside.

[45] What complicates the matter further is what happened on 24 December 2009. On this date, at a bishop's meeting attended by the Applicant, Bishop David Bannermann and Archdeacon Mpho Masekela, some of the purported complaints in issue here were discussed. The status of this meeting is not clear when the Canons of the Church are considered. However, it was decided at this meeting that an investigative team would be



set up. It is clear that the above meeting was not in terms of Canons 25, 37 or 39. The nature of the complaints discussed or the Applicant was confronted with or about fell in my view within the ambit of Canon 25(6) and thus called for the procedures in terms of Canon 39 read with Canon 37, with or without a charge sheet.

[46] In the light of the fact that the only other investigative team set up subsequent to the above meeting of 24 December 2009, was the Board of Preliminary Inquiry the only inference that can be drawn is that this Investigative Inquiry Panel which reported back in February 2010 is the one that was dealing with the serious accusations that called for the invocation of Canons 37 and 39.

[47] As seen above the Investigative Inquiry Panel set up did not comply with the peremptory requirements of the Canons. There was no lay person with a legal background, the Applicant was not allowed to cross-examine his accusers, he was not legally represented or represented by any other person of his choice and his fate was decided on the basis of the unconstitutionally obtained evidence as set out above as well as secret evidence that was led in his absence in that inquiry.

[48] In terms of Canon 39(3) –

*“The Board shall consider whether there is a prima facie case against the Accused, and shall report immediately after reaching its decision to*

the Bishop, who shall decide whether further proceedings shall be taken or not ...” (my emphasis)

My understanding of the above excerpt from the Canons is that in the circumstances of this case, after the Investigative Inquiry Panel had established what they regarded as a *prima facie* case against the Applicant and handed down its recommendations, the presiding Bishop should have constituted a full and proper inquiry, invoking the provisions of Canons 37 and 39. The Applicant’s very future and livelihood was at stake and he should have erred on the side of caution and rather went on a circumlocution course that ensured that the panel or inquiry or hearing complied fully with the Canons – both in form and procedure. Unfortunately, it is my finding that the Bishop did not do so. As a result, there are serious structural faults in the composition of the panel he constituted and procedural irregularities in the processes the panel followed.

[49] Canon 37(12) provides that –

*“The proceedings shall be public, unless the President of the Tribunal shall deem it preferable, on the grounds of public morals, that they should, in whole or in part, be private.”*

There is no indication in the report of the Board of Preliminary Inquiry Panel what the basis was for some of the evidence to be heard secretly and in the absence of the Applicant, “*nogal*”. It is an irregularity that goes to the root of the fairness of the proceedings.

[50] The ultimate decision to relieve the Applicant of his duties in my view, does not follow the recommendations of the Board of Inquiry Panel. The panel recommended that –

*“... the Rector needs to be removed from the parish with immediate effect and be offered alternatives to continue his ministry elsewhere and differently or in a specialised ministry within the Diocese ...” (my emphasis)*

among others. Failure to find an alternative post as a normal priest should not have been the end of the road for the Applicant. In line with the panel's recommendation the Church authorities ought to have looked for a specialised ministry position within the Diocese. It is common practice that Church headquarters sometimes employ ordained priests in administrative capacities, i.e. away from the normal contact with congregations.

[51] Instead of terminating the services of the Applicant summarily as he did after what he alleges he did to find another posting, the Bishop should or ought to have placed the Applicant under his wing at the Diocesan head office or any other comparable place where the Applicant could be coached and counselled. The above would have honoured the Board of Inquiry's recommendation to –

*“(1) (provide) feedback to the Diocesan Chapter and later to a broader stakeholders and the congregants to identify areas of attention, learning and action ...*

*(2) ... Create a coaching/mentoring and counselling and development plan for the Counsel and the Rector.”*

[52] It is common cause that our constitutional jurisprudence and the rule of law and of natural justice requires any Tribunal to act fairly and procedurally. It is my considered view and finding that the Tribunal in this matter did not do so.

[53] It is my further finding therefore, that the Respondent committed gross irregularity and transgressed or infringed on the Applicant's rights to a fair hearing. The decision to relieve the Applicant of his duties is thus procedurally and substantially unfair and stand to be reviewed and set aside. The Applicant should be reinstated to the position he was in when the decision to relieve him of his duties was taken pending compliance with the order I am about to grant.

#### ORDER

[54] The following order is made –

54.1 The decision of the Respondent in terminating the Applicant's pastoral services in the Holy Name Church is declared unfair and unprocedural;

54.2 The decision of the investigating committee herein is reviewed and set aside;

54.3 The procedure followed by the Board of Preliminary Inquiry Panel of the Diocese of Highveld is declared to have been irregular for lack of compliance with the Canons of the Church;

54.4 The matter is referred back to the Respondent for a fresh consideration and/or inquiry before a new panel.

54.5 The Respondent is ordered to pay the costs of this Application.

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**N F KGOMO**  
**JUDGE OF THE SOUTH GAUTENG**  
**HIGH COURT, JOHANNESBURG**

FOR THE APPLICANT

ADV N MANAKA

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DATE OF ARGUMENT

28 JULY 2011

DATE OF JUDGMENT

19 AUGUST 2011