



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR 8945/14

In the matter between:

**MLIBO MTETELELI NGEWU**

Applicant

and

**THE ANGLICAN CHURCH OF SOUTHERN AFRICA**

First Respondent

**THE ANGLICAN CHURCH OF SOUTHERN AFRICA,**

**DIOCESE OF UMZIMVUBU**

Second Respondent

**THABO CECIL MAKGOBA N.O.**

Third Respondent

**THE SYNOD OF BISHOPS OF THE ANGLICAN CHURCH  
OF SOUTH AFRICA**

Fourth Respondent

**DONO GABRIEL**

Fifth Respondent

**CLIVE BANNERMAN**

Sixth Respondent

**PETER JOHN LEE N.O.**

Seventh Respondent

**GARTH QUINTON COUNSELL N.O.**

Eighth Respondent

**MOLOPI STEPHEN DISEKO N.O.**

Ninth Respondent

**MARGARET VERTUE N.O.**

Tenth Respondent

**ELLINAH WAMUKOYA N.O.**

Eleventh Respondent

---

**JUDGMENT**

Delivered on: 6 October 2016

---

**BALTON J**

1. This is an application in which the applicant seeks:

1.1 To review and set aside:

1.1.1 The decision of the third respondent to institute disciplinary proceedings against him; and

- 1.1.2 The finding of the panel consisting of the seventh and eighth to eleventh respondents that the institution of disciplinary proceedings against the applicant and the continuation thereof is lawful and valid.
- 1.2 Costs by the respondents opposing the application.
2.
  - 2.1 The applicant is a Bishop for the Diocese of Umzimvubu.
  - 2.2 The first respondent is the Anglican Church of South Africa (the Church), regulated by its Constitution and the Canons promulgated in terms of such Constitution and adopted by the Church's Supreme Legislative Body, the Provincial Synod which comprises the Church's Bishops, clerical and lay representatives from each of the Church's dioceses.
  - 2.3 The second respondent is the Umzimvubu Diocese of the Church.
  - 2.4 The third respondent is the Archbishop of Cape Town and Metropolitan of the Church (the Metropolitan). The Metropolitan is responsible for presiding over meetings of the Synod of Bishops, the election of Bishops and attends to ecclesiastical discipline.
  - 2.5 The fourth respondent is the Synod of Bishops of the Church (the Synod).
  - 2.6 The fifth and sixth respondents are bishops of the Church and are the co-presenters of the charges brought against the applicant by the first respondent.
  - 2.7 The seventh to eleventh respondents are bishops of the Church and members of the panel of bishops of the 'Court for the Trial of a Bishop'.
3. It is necessary to set out the background to the dispute.

4. The applicant was consecrated as the Bishop of Umzimvubu, KwaZulu-Natal in 2003. In December 2010 the Metropolitan received written complaints from members of the Diocese (the Concerned Group) about the applicant's leadership of the Diocese relating to, inter-alia, alleged financial mismanagement.

5. According to the Metropolitan, the complaints were not addressed to the Concerned Group's satisfaction and the situation worsened. In April 2011 he requested the Provincial Treasurer, Mr Rob Rogerson to investigate and report on the concerns.

6. After meeting with the applicant, officials of the Diocese and some members of the Concerned Group, Rogerson reported in May 2011 that:

The situation in the Diocese of Umzimvubu is extremely tense and there is a very real sense of fear of the Bishop... Governance and transparency are sadly missing from the Diocese and there is a very real sense of autocracy about how things are done. The Diocese has been run into the ground financially<sup>1</sup>".

7. The Metropolitan took the following remedial actions:

7.1 In May 2011 he met with the applicant and his wife.

7.2 He led a pastoral team to meet with the applicant, chapter members of the Diocese, Diocesan officials and members of the Concerned Group.

7.3 He appointed a pastoral team under Bishop Phillip to meet with the interested parties in the Diocese to attempt to resolve the various issues.

7.4 He met with the applicant to try and resolve the situation through consultative and pastoral means rather than initiating a formal legal process.

7.5 The problems worsened. Members of the Concerned Group preferred Articles of Presentment or draft disciplinary charges

---

<sup>1</sup> Paragraph 22 on Page 159 of the Indexed Papers

against the applicant which alleged financial mismanagement, the irregular appointment of diocesan officials and 'sexual aberration' on the part of the applicant but did not result in further proceedings against the applicant due to a technical flaw.

8. In February 2012 at the Synod of Bishops held at Modderpoort, in response to the concerns and the report of Bishop Phillip, the Bishops of the Church in an agreement with the applicant and in accordance with Canon 21(3)<sup>2</sup> decided that:

8.1 A task team under the leadership of Bishop Brian Germond of Johannesburg be appointed to investigate and address the various issues in the Diocese, including the commencement of a forensic audit.

8.2 The Diocese should be placed under administration and the applicant should cede his episcopal authority to the Metropolitan.

9. The applicant agreed in a letter dated 9 February 2012<sup>3</sup> to the Metropolitan to temporarily relinquish his episcopal responsibility with a view to a Provincial Task Team (the PTT) appointed by the Synod of the Church investigating and mediating the conflict within the Diocese. A dispute as to whether this agreement remains in force is the subject of motion proceedings before this court under Case No. 13144/2013.

---

<sup>2</sup> Canon 21(3) reads as follow:

When the Synod of Bishops becomes aware of events, developments or reasons which indicate to it that in its opinion the affairs of a Diocese merit an inquiry or investigation in relation to possible support, or other action that might need to be taken by the Diocese or the Province or both, it shall have the power to appoint a task team to inquire into or investigate these matters at the cost of the Common Provincial Fund.

The task team shall report its findings and recommendations directly to the Synod of Bishops. The Synod of Bishops shall make whatever decision it feels appropriate in the circumstances in consultation with the Diocese concerned.

<sup>3</sup> Pages 78 - 79 of the Indexed Papers

10. The Church subsequently appointed PFK Consulting PE Pty Ltd (PFK), a fraud investigation team, as forensic auditors to investigate the financial affairs of the Diocese and its parishes.

11. In May 2012 Bishop Funginkosi Mbhele was appointed as Vicar General of Umzimvubu to ensure continued episcopal leadership in the Diocese during the applicant's absence.

12. On 19 October 2012 PKF submitted a report with the following findings:

12.1 The existence of multiple suspicious internal withdrawals from the bank accounts and an extensive misappropriation of funds.

12.2 A substantial lack of accounting records and supporting documentation and a lack of internal accounting controls with no evident oversight or monitoring thereof.

12.3 One partner holding total control over the bank accounts creating an environment that is open to and conducive to fraud, mistakes, lack of oversight, waste and/or abuse.

12.4 The responsible individuals must be held accountable for the wrongdoings.

13. In March 2013 Rogerson presented the PFK report at the first Synod of Bishops.

13.1 He noted inter-alia that:<sup>4</sup>

The concerns raised by the "concerned group" have been shown to be justified and clearly there has been misappropriation of funds, specifically those raised for the Cathedral project.

13.2 He recommended that the Bishops of the Church should, inter alia, consider charges against the applicant for reckless conduct, misappropriation, breach of trust and failure to fulfil canonical duties.

---

<sup>4</sup> Paragraph 32, Page 164 of the Indexed Papers

14. The Bishops resolved in terms of Canon 21(3) to appoint a Provincial Task Team (PTT) under the leadership of Bishop Ntlali to follow up on issues raised in the PFK report.

15. From 6 to 10 May 2013 Bishop Ntlali's Team visited the Diocese, met with various diocesan structures and submitted its final report to the Metropolitan on 30 September 2013. It read inter alia as follows:

15.1 The exercise of intervention is costly and expensive.

15.2 Whilst the situation remains volatile, the PTT has great difficulty discerning the cause of conflict as the 'Concerned Group' keeps changing from pillar to post stating their demands, creating their own parallel Diocese and administration.

15.3 It appears that the Concerned Group's ultimate goal is to oust the applicant.

15.4 The majority of the people are still content with the applicant's pastoral ministry.

15.5 The applicant be restored to his episcopal ministry in the Diocese, subject to various conditions requiring the applicant to:

15.5.1 Effect a reconciliation process.

15.5.2 Appoint two task teams, the first from the Diocese and the Concerned Group to ensure proper administration and financial management and the second from the Diocese and the Concerned Group to deal with land and development issues.

15.5.3 To take a year-long sabbatical within three months. During his absence a Vicar General would take over his episcopal duties.

16. The Synod meeting on 30 September 2013 did not support the PTT's proposals and resolved that the Applicant should stand trial under Canon 38.

17. On 3 December 2013 the Metropolitan appointed a Board of Preliminary Inquiry in terms of Canon 38(3)(a) to consider whether the applicant had a *prima facie* case to face in relation to the charges set out in the Articles of Presentment.

18. Canon 38 (3) (a) and (b) reads as follows:

- a. The Metropolitan on receiving such Articles of Presentment, may within twenty-one days constitute a Board of Preliminary Inquiry, consisting of two Diocesan Bishops not being presenters of the charge and not more than two lay persons, one of whom is learned in the law (being confirmed by the Communicants of the Church of the Province), and shall forthwith inform the accused of the Appointment of such Board and, if such a Board is constituted, invite the Accused to submit to the Board an answer to the Articles of Presentment, if the Accused so desire.
- b. The Board shall consider whether there is a *prima facie* case against the Accused and shall report within thirty days of their appointment to the Metropolitan, who shall decide whether further proceedings shall be taken or not. If the Metropolitan so determines, he may exercise his visitational powers under section 2 (g) of Canon 2 of the Metropolitan.

19. The Board of Preliminary Inquiry consisted of Bishop Nopece, a member of the Provincial Task Team, Bishop Phillips, the Dean of the Province and Advocate Raubenheimer who chaired the Board.

20. On 12 December 2013 the Metropolitan informed the applicant that he had appointed a Board of Preliminary Inquiry and invited him to respond to the Articles of Presentment. On 24 December 2013 the applicant provided the Board with his response.

21. The Board issued a report dated 30 January 2014 in terms of which it found that there was a *prima facie* case against the applicant on most of the charges. The report was only signed by Advocate Raubenheimer and reads inter alia that the Board:

- 22.1 Considered the Articles of Presentment, the PFK report and the applicant's representations to the Board.
- 22.2 Was of the view that its role was not to determine the applicant's guilt or innocence or whether the charges against him should be quashed, but rather to determine whether or not there was sufficient evidence to indicate that the applicant had a *prima facie* case to face.
- 22.3 Concluded that there was insufficient evidence to support a *prima facie* finding of the applicant having given just cause for "scandal and offence".
- 22.4 Concluded that there was sufficient evidence to support a *prima facie* finding that the applicant had mismanaged funds, been negligent in relation to the Church's funds and property, misappropriated or misused Church funds, managed Church finances inappropriately and provoked dissension in the congregation, committed a breach of trust and promoted dissension.<sup>5</sup>

22. On 31 January 2014 the Metropolitan issued a notice under the hand of the Provincial Executive to the applicant that he had decided to proceed with a trial in terms of Canon 38.

23. He duly informed the applicant and the Presenters (Bishops Bannerman and Gabriel) of his decision.

24. It emerged from email correspondence<sup>6</sup> between Bishop Nopece and the Metropolitan that Bishop Nopece was not privy to the deliberations of the other two Board Members or the report prepared by the Board. Nopece expressed his disappointment that he had not had prior sight of the report and disagreed with the report's conclusion that there is a *prima facie* case against the applicant.

---

<sup>5</sup> Page 169 – 170 of the Indexed Papers

<sup>6</sup> Page 133 of the Indexed Papers



25. The Metropolitan replied to Nopece in an email that he would ‘factor in’ Nopece’s input and discuss it with the other Members of the Board. The Metropolitan reconsidered all the reports and Nopece’s concerns and did not consider it necessary to retract or amend his decision to charge the applicant.

26. On 18 November 2014, the fifth and sixth respondents presented the following seven charges against the applicant:

- (1) Causing scandal or offence;
- (2) Fraudulent, corrupt or dishonest behaviour;
- (3) Negligent management of Church property;
- (4) Misappropriation of Church property;
- (5) Violating Resolution of Permanent Force No 5;
- (6) Breach of trust relationship; and
- (7) Promoting dissention in the Church.

27. The applicant was served with Articles of Presentment or disciplinary charges in terms of Canon 38 on 22 November 2013.

28. A Court for the Trial of a Bishop (‘the Tribunal’) was appointed in terms of Article XIII of the Constitution and Canon 36(1) and (3). The Tribunal comprised of the seventh to eleventh respondents.

29. The Metropolitan and Bishop Phillip did not participate in the Canon 38 trial due to their involvement in the matter. In terms of Canon 36(3), the Diocesan Bishop senior by consecration should preside at the ecclesiastical trial. Bishop Lee agreed to act as President of the Tribunal.

30. The proceedings commenced on 1 April 2014 and the applicant raised various point *in limine*.

31. The Tribunal dismissed the applicant’s points *in limine* and held on 29 May 2014 that the trial should proceed to consider the merits of the charges contained in the Articles of Presentment.

32. It is accordingly this decision to proceed with the trial that is before this Court on review. The application also challenges the Metropolitan's decision to institute disciplinary proceedings against him.

33. It is common cause between the parties that this court can review proceedings of the Church if there has been non-compliance with the Church's Constitution and/or Canons or with the principles of natural justice.

34. It is important to note that the decision to institute disciplinary proceedings was taken by the Synod at a meeting on 30 September 2013. This decision is not challenged. The decision of the Metropolitan to institute disciplinary proceedings upon the Board of Preliminary enquiry's report is being challenged on the basis that Nopece did not see the report or agree with it.

35. In my view the issue to be decided is whether this court can interfere in the Tribunal's unconcluded proceedings. The Tribunal has not considered the merits of the charges against the applicant. Its proceedings have been stayed pending the outcome of this application.

36. In **WAHLHAUS & OTHER v ADDITIONAL MAGISTRATE, JOHANNESBURG AND ANOTHER**<sup>7</sup> the Appellant Division set out a salutary general rule that appeals are not entertained piecemeal. The Court held that:

Nor, even if the preliminary point decided against the accused by a magistrate be fundamental to the accused's guilt, will a Superior Court ordinarily interfere – whether by way of appeal or by way of review – before a conviction has taken place in the inferior court. (See *Lawrence v A.R.M. of Johannesburg*, 1908 T.S. 525, and *Ginsberg v Additional Magistrate of Cape Town*, 1933 C.P.D. 357). In the former of these two cases INNES, C.J., said at p 526:

“This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter”.

---

<sup>7</sup> 1959 (3) SA 113 (A)

It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdicts, or *mandamus* – against the decision of a magistrate's court given before conviction. (See *Ellis v Visser and Another*, 1956 (2) S.A. 117 (W), and *R v Marais* 1959 (1) S.A. 98 (T) where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdown* (6<sup>th</sup> ed., vol. 1 p. 750) state:

“While a Superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the untruncated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.”

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts. I would merely add two observations.<sup>8</sup>

37. In **MAGISTRATE, STUTTERHEIM v MASHIYA**<sup>9</sup> the Supreme Court of Appeal held that:

The power to intervene in unconcluded proceedings in lower courts will be exercised only on cases of great rarity where - grave injustice threatens and where intervention is necessary to attain justice.

38. In **CONSOLIDATED NEWS AGENCIES (PTY) LTD (IN LIQUIDATION) v MOBILE TELEPHONE NETWORKS (PTY) LTD AND ANOTHER**<sup>10</sup> this court said the following:

Before concluding we are constrained to make the comments that follow. Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have that issue decided first.

---

<sup>8</sup> At 119 F – 120 C

<sup>9</sup> 2004 (5) SA 209 (SCA) para 14

<sup>10</sup> 2010 (3) SA 382 (SCA) para 89 and 90

This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.

39. It is thus clear that a Court will only interfere in unconcluded proceedings if a grave injustice will occur and it is necessary to intervene to attain justice. I will proceed to determine whether the applicant has in fact satisfied this Court that it should intervene in the unconcluded proceedings

40. The applicant submits that:

- 40.1 He will incur the same costs twice and may not be able to afford to defend the matter if it starts *de novo*.
- 40.2 The Panel pointed out in their reasons for dismissing the applicant's points in *limine* that this appears to be the first trial of a Bishop by the Church since the trial of Bishop Colenso in the nineteenth century.
- 40.3 The process prior to the institution of the disciplinary proceedings against him was not carried out in accordance with the requirements of the Canons and is flawed.
- 40.4 The decision to institute disciplinary proceedings against him is *ultra vires*, alternatively, irrational.
- 40.5 Bishop Nopece was not privy to the deliberations that led to the report on which the Metropolitan relied. The report is null and void.
- 40.6 The composition of the Panel is not in accordance with the principals of natural justice.

41. The Metropolitan submits that:

- 41.1 Various canonical and pastoral remedial actions were initiated and undertaken in response to the problems that arose. He had due regard to Act XV of the Provincial Synod and was of the view that the problems in the Diocese needed to be addressed through a formal ecclesiastical process in accordance with the Canon Law.

- 41.2 On 8 January 2014 the Metropolitan granted the Board an extension to 30 January 2014 to submit its report.
- 41.3 Due to scheduling difficulties it was not possible for the Board to meet and they agreed that the members of the Board would discharge their duties via correspondence.
- 41.4 On 11 January 2014 Advocate Raubenheimer submitted a draft report to Bishop Phillip and Nopece for their consideration. On 13 January 2014, having considered the applicant's representations, the draft report was amended in response thereto and again circulated for consideration to the members of the Board. There followed email and telephonic correspondence between Bishop Phillip and Advocate Raubenheimer relating to further changes to the draft report. Bishop Nopece did not interact with the other members of the Board and they took his silence as agreement.
- 41.5 The Metropolitan requested Bishop Nopece's views and that Bishop Nopece revert to him by 31 January 2014.
- 41.6 At 18h59 he had communicated his initial decision to the applicant, Bishop Nopece finally expressed his views in an email indicated that it was "difficult" for him to "agree entirely" with the findings contained in the Board's report and recommended that the Church follow the recommendation of Bishop Ntlali's team, to reinstate the applicant and mandate a diocesan reconciliation process.

42. This Court notes that the applicant has submitted that the ecclesiastical trial will be a great cost to him. However, from the applicant's version it is clear that he has already engaged in litigation concerning the terms of his episcopal duties which indicates that he is not being financially prejudiced when regard is had to the nature of the litigation he may already engaged in.

43. In considering the applicant's submission I am of the view that the applicant's contention that he will incur substantial costs and that this is a significance process as it is the first time since the 19<sup>th</sup> century that a Bishop is

being tried do not constitute a grave injustice for this Court to intervene in the unconcluded proceedings. The applicant has failed to satisfy this Court that it should intervene in reviewing the proceedings of the Tribunal.

44. There is *prima facie* evidence before the Tribunal and it should proceed to determine the merits of the case against the applicant. It is clearly not known what the outcome will be. The applicant can decide at the conclusion of the trial if it is not in his favour whether he wishes to review and or appeal against the finding. At this stage the application to this Court to intervene is premature and unjustified.

45. There is no reason for this Court to intervene and consider whether the proper procedures were followed in charging the appellant. Those are clearly points *in limine* which the Tribunal has ruled upon and there is no need for this Court to intervene at this stage of the proceedings.

46. The applicant sought costs against the respondents who opposed the application. It accordingly follows that costs must follow the successful party or parties in this application. The applicant has refused to accept despite the clear case law regarding unconcluded proceedings to proceed with this application. I am satisfied that the applicant should be ordered to pay the respondents costs of this application.

47. The application is accordingly dismissed with costs.

---

**BALTON J**

Date of Hearing: 29 April 2016  
 Date of Judgment: 6 October 2016

For the Applicant: **PC BLOMKAMP**  
 Instructed by: LLEWELLYN CAIN ATTORNEYS  
 TEL: 033 344 1030  
 REF: L CAIN/mm/10/B255

For the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>  
 And 6<sup>th</sup> Respondent: **S BUDLENDER SC &  
 D BERGSTRÖM**  
 Instructed by: CLIFFE DEKKER HOFMEYER INC  
 TEL: (021) 481 6424  
 LET/1030765  
**c/o:** STOWELL & CO INC  
 TEL: 033 845 0500  
 REF: S Myhill

For the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and  
 11<sup>th</sup> Respondent:  
 Instructed by: BICCARI, BOLLO & MARIANO INC.  
 TEL.: 011 628 9300  
 REF: MR D REDDY/dp/RT1785  
**c/o:** TATHAM WILKES  
 TEL: 033 345 3501