REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 348/12

In the matter between:

UNIVERSAL CHURCH OF THE KINGDOM OF GOD	**Applicant**
and	
CCMA	**First Respondent**
COMMISSIONER L SULLIVAN	**Second Respondent**
M J MYENI	**Third Respondent**

Heard: **8 November 2013**
Delivered: **28 November 2013**
Summary: Pastor held to be employee of church.

JUDGMENT

STEENKAMP J

Introduction

[1] Is a pastor who signed a document that he is in the voluntary service of a church an employee or not?

[2] The third respondent was a pastor of the applicant, the Universal Church of the Kingdom of God. He claims that he was dismissed in December 2011. He referred an unfair dismissal dispute to the CCMA[1]. The church raised a point *in limine* that the pastor was not an employee. The arbitrator disagreed. The church wishes to have that award reviewed and set aside. The arbitrator also found that the pastor's dismissal was fair. The parties agreed that I should first decide whether the finding that the pastor was an employee, is reviewable. If so, *caedit questio*. If not, the parties will return to court to argue whether the arbitrator's further finding – that the dismissal was unfair – is reviewable.

[3] For the reasons that follow, I have come to the conclusion that the award is not reviewable. In my view, the arbitrator correctly found the pastor to be an employee. In doing so, I distinguish the earlier judgment of this Court in *Church of the Province of South Africa (Diocese of Cape Town) v CCMA*[2]; but in doing so, I bear in mind that that judgment was handed down before the addition of section 200A to the Labour Relations Act.[3]

Background facts

[4] Mr Myeni, the third respondent, became a trainee pastor in the church in 1998. He only signed a document titled "Declaration of Voluntary Service" in 2010, although he had been ordained as a pastor by then.

[5] The pastor was ordained in 2004. Mr *Hitchings* submitted that he was never consecrated.[4] However, there was no direct evidence in support or against this assertion in the arbitration. At best, the church's representative put the following to him in cross-examination:

[1] The Commission for Conciliation, Mediation and Arbitration (the first respondent).

[2] [2001] 11 BLLR 1213 (LC); (2001) 22 *ILJ* 2274 (LC).

[3] Act 66 of 1995 (the LRA).

[4] To be ordained means to be appointed or admitted to the ministry of the church. To be consecrated appears to be something more – it is to dedicate the pastor to religious service; although the *Shorter Oxford English Dictionary* equates the verb "consecrate" to "ordain (a bishop etc) to office".

> "You were a volunteer assistant helper for two years. That is your evidence there. You became a trainee or auxiliary pastor in 1998 January. Okay, you were not a consecrated pastor then and you started receiving your stipend in 1998 as well. – Yes.
>
> Okay. I just want to confirm. You were asked the question of what you think your duties are and you said your duty is to preach the gospel of God throughout the world. Is that correct? – Yes.
>
> As a pastor. Okay. You testified that you were ordained or consecrated. – Yes.
>
> In 2004, I think it is 2006. – 2006."

[6] It is therefore not clear from the arbitration record whether the pastor had been consecrated or not. It is common cause that, at the very least, he had been ordained. But the "Declaration of Voluntary Service" only refers to the position of a "trainee pastor". The declaration states, *inter alia*:

> "I am volunteering as a trainee pastor at the Universal Church of the Kingdom of God (hereinafter referred to as the "Church").
>
> ...
>
> During the entire period of my training programme to date, and henceforth, I always understood that:
>
> ....
>
> I am fully aware that the Bishop and the Leadership of the Church are entrusted by God with the appointment for approval or removal of trainee pastors and irrevocably submit myself to their authority.
>
> The Bishop and the Leadership of the Church are, at any time during my voluntary training period, entitled and obliged to decide on my suitability as a trainee pastor and therefore reserve the sole right of summarily terminating my training for this or any other reason.
>
> My trainee position was accepted conditional upon my dedication to developing my spiritual maturity and practical experience, to the extent that I would be eligible for a future appointment as a consecrated pastor or senior pastor."

[7] At the time that his services were terminated, the pastor was, at the very least, ordained. On the evidence before the arbitrator, I doubt that he could still be considered to be in training. Yet the Declaration must be considered, together with all other factors, to decide whether he was an employee or not. There is no evidence that he signed a further contract of employment or other agreement that superseded the Declaration.

The applicable test

[8] Mr *Mfungula* argued that the application for review must be tested against the reasonableness test set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[5]. However, as this court has pointed out previously[6], it is bound by the decision of the Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*[7], in which the LAC held that, in regard to a commissioner's finding on jurisdiction, the question is not whether the commissioner's finding was reasonable but whether on the facts the applicant was an employee. The basis of this approach, as Van Niekerk J pointed out in *Workforce Group,*[8] is that a ruling on jurisdiction made by the CCMA is made for convenience - the CCMA is a creature of statute and cannot decide its own jurisdiction. Whether the CCMA has jurisdiction is a matter for this court to decide. In other words, the issue before the court is whether, objectively speaking, there existed facts which would give the CCMA the jurisdiction to entertain the dispute, ie that established that the pastor was an employee of the church as defined by s 213 of the LRA. That was indeed the first question posed by the church at the arbitration. If so, the further question is whether the arbitrator reasonably concluded that his dismissal was unfair. The

[5] 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC).

[6] Eg *Workforce Group (Pty) Ltd v CCMA & others* (2012) 33 *ILJ* 738 (LC) para [2]; *Melomed Hospital Holdings Ltd v CCMA & others* (2013) 34 *ILJ* 920 (LC) para [44]; *Parliament of the Republic of South Africa v NEHAWU obo members & others* [2011] 9 905 (LC) para [15].

[7] (2008) 29 *ILJ* 2218 (LAC).

[8] Ibid.

parties agreed that the second question will stand over for later determination.

Evaluation / Analysis

[9] Mr *Hitchings* relied strongly on the case of *Church of the Province of South Africa (Diocese of Cape Town) v CCMA*[9] for his argument. But at the outset, it must be noted that that case was decided before the legislature introduced s 200A of the LRA in 2002.[10] And although the judgment in *Salvation Army (South African Territory) v Minister of Labour*[11] was handed down on 2 September 2004, the learned acting judge in that matter did not refer to section 200A.

[10] Section 200A reads as follows:

> "**200A. Presumption as to who is employee.**—(1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:
>
> (*a*) the manner in which the person works is subject to the control or direction of another person;
>
> (*b*) the person's hours of work are subject to the control or direction of another person;
>
> (*c*) in the case of a person who works for an organisation, the person forms part of that organisation;
>
> (*d*) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
>
> (*e*) the person is economically dependent on the other person for whom he or she works or renders services;
>
> (*f*) the person is provided with tools of trade or work equipment by the other person; or
>
> (*g*) the person only works for or renders services to one person.

[9] [2001] 11 BLLR 1213 (LC); (2001) 22 *ILJ* 2274 (LC).

[10] That section came into effect on 1 August 2002: *Government Gazette* 25515. The *CPSA* judgment was handed down on 7 September 2001. It does not appear to have gone on appeal.

[11] [2004] 12 BLLR 1264 (LC).

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3) of the *Basic Conditions of Employment Act*.

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6 (3) of the *Basic Conditions of Employment Act*, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are *employees*.

(4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are *employees*.

[S. 200A inserted by s. 51 of Act 12 of 2002.]"

[11] There is no dispute that the pastor earned less than the prescribed threshold.[12] He was paid R1875, 00 per week, ie about R97 500 per year. He was also given accommodation that was valued at R4 500 per month or R54 000 per year. The Code of Good Practice was published on 1 December 2006[13], i.e. after the *CPSA* and *Salvation Army* judgments. This Court has to determine the question whether the pastor was an employee with regard to s 200A and the Code, as the arbitrator did. In terms of ss 203(3) and 203(4) of the LRA, any person – including the CCMA arbitrator and this Court – must take the Code into account for the purposes of deciding if the pastor was an employee.

[12] Section 200A establishes a rebuttable presumption as to who is an employee for the purposes of the LRA – one that did not exist at the time of the *CPSA* judgment. In order to be presumed an employee, an applicant must demonstrate that he or she works for or renders services to the person or entity cited as the employer; and that any one of the seven factors listed in s 200A is present in their relationship. The presumption applies regardless of the form of the contract. Accordingly, the arbitrator – and the Court -- must evaluate the evidence concerning the actual nature of the relationship.

[12] Currently R 193 805, 00 per year.

[13] GenN 1774 in *Government Gazette* 29445.

[13] In this case, there clearly was a relationship between the church and the pastor. The pastor rendered services – quite literally, in the form of devotional services – in the name of the church. At least the following factors listed in s 200A were present in the relationship:

13.1 The manner in which the pastor works was subject to the control or direction of the church. He had to complete a weekly work schedule. If he was unable to conduct sermons, he needed to report to his senior, the regional pastor.

13.2 The pastor's hours of work were subject to the control or direction of the church. He had to conduct three or four sermons per day.

13.3 The pastor formed part of the Universal Church of the Kingdom of God. He did not present sermons in the name of any other church or simply on his own, albeit "in the name of God".

13.4 The pastor worked for the church for at least 40 hours per month.

13.5 The pastor was economically dependent on the church. He earned no other income.

13.6 The pastor only worked for or rendered services to the church.

[14] Has the church nevertheless been able to rebut the presumption that the pastor was its employee?

[15] Mr *Hitchings* attempted to do so with reference to the *CPSA* case. In this regard, he noted that the relationship between the pastor and the applicant, the Universal Church of the Kingdom of God, had the following in common with that between the priest and the Anglican Church in *CPSA*[14]:

15.1 A priest in the CPSA receives a stipend, like the pastor;

15.2 A priest receives a housing allowance, while the pastor received free accommodation for him and his family;

15.3 Tax was deducted for both;

[14] *Supra*, with reference to the features outlined in para [7].

15.4 A priest's license may be revoked if he is guilty of a disciplinary offence;

15.5 The pastor's duties and obligations were defined, as were those of a priest.

[16] The *ratio* of the decision in *CPSA* is that the arbitrator determined the issue on the basis that there was a contract between the parties; but he did not determine if that was in fact the case. That, the court found, was a reviewable irregularity.[15] And the court further found that, in that case, there was no intention to create an employment contract.[16]

[17] But it must be stressed, once again, that the *CPSA* case was decided before the legislature intervened to create the presumption of who is an employee in s 200A; the acting judge in the *Salvation Army* case did not consider the presumption; and both cases were decided without the benefit of the guidance now provided by the Code of Good Practice. Also, section 200A specifically provides that the presumption applies "regardless of the form of the contract".

[18] Neither legal representative referred to the development of the English case law subsequent to *CPSA*, which was based largely on the English case law at the time. In *CPSA*, the court relied on the following English cases: *Davies v Presbyterian Church of Wales*[17]*; Diocese of Southwalk v Corker*[18]*; In re: National Insurance Act 1911; In re: Employment of Church of England Curates*[19]*;* and *President of Methodist Conference v Parfitt.*[20]

[19] Since then, the English law has developed over the last 12 years, as the learned authors in *Harvey on Industrial Relations and Employment Law*[21] point out:

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[15] *CPSA supra* para [12].

[16] *Ibid* paras [34] – [35].

[17] [1986] 1 All ER 705 (HL);

[18] [1998] ICR 140 (CA).

[19] [1912] Ch 563.

[20] [1984] ICR 176.

[21] Brennan et al, *Harvey on Industrial Relations and Employment Law* (LexisNexis, Issue 223, August 2012) paras [113] – [115].

"The law here has seen very considerable change in recent years. A member of the clergy was traditionally regarded as an officeholder (*Parker v Orr* (1966) 1 ITR 488). Sometimes the reason given was that his or her master is not amenable to the jurisdiction of the early courts; or more prosaically that the spiritual nature of the job is inconsistent with a contract of employment. Also, it was submitted, the role of priest or minister of whatever denomination, acting as such, necessarily involved such a degree of independent judgment and discretion that his or her relationship with the church or church authorities could not be a contract of employment.

For many years the case law applied these views. While there was nothing to prevent there being an employment relationship in relation to any separate or extra duties, the 'core' duties of clergy did not give rise to a contract of employment. A Methodist Minister was held not to be an employee of his church (*President of the Methodist Conference v Parfitt* [1984] IRLR 141, [1984] ICR 176, CA) and a similar result was reached by the House of Lords in relation to a Church of Wales minister (*Davies v Presbyterian Church of Wales* [1986] IRLR 194, [1986] ICR 280, HL) who may have had rights in relation to stipend and removal under the Church's own rules but could not claim employment protection rights as an employee. A curate in the Church of England was similarly categorised in *Diocese of Southwark v Coker* [1998] ICR 140, (1997) Times, 16 July, CA though arguably on slightly different grounds that there is no actual rule against employment status but that there is a strong presumption against it (which had not been displaced on the facts).[22] It therefore seemed that employment rights could only be extended to clergy by amending legislation. However, that position was then altered by later cases.[23]

This traditional position started to change when the status of a Church of Scotland minister was called into question; she accepted that she was not an 'employee' and so could not claim unfair dismissal, but the House of Lords held that she *did* come within the wider statutory definition "more akin to the 'work' definition in the [Sex Discrimination Act] 1975 s 82 (under 'a

[22] [It should be noted that, in South African law, the presumption in s 200A goes the other way: i.e. in favour of the relationship being that of employment. The cases outlined in this paragraph, before the further developments discussed in *Harvey*, are those that the court in *CPSA* relied on].

[23] My underlining.

> contract personally to execute any work or labour')[24] and so could maintain an action against the church for sex discrimination: *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, [2006] IRLR 195. This decision deliberately did not pronounce on employment status under ERA 1996 s 230, but shortly afterwards the question arose directly in *Stewart v New Testament Church of God* [2008] IRLR 134, [2008] ICR 282, CA where the Court of Appeal upheld the judgement of the EAT that it *was* open to a tribunal to find that the Minister of an American Church operating in the UK was an 'employee' for the purposes of claiming unfair dismissal. Although the earlier case law (above) had been hostile to such a conclusion…, The Court of Appeal held that there is no rule of law either way and that the indirect result of *Percy* was to leave the matter to tribunals as a question of fact. The spiritual nature of the work may be a factor against an employment relationship…, But in some cases… That may be outweighed by other factors consistent with employment."[25]

[20] In *President of the Methodist Conference v Preston (formerly Moore)*[26] the Court of Appeals held that a Methodist minister was an employee and so able to claim unfair dismissal. The judgement went on further appeal to the UK Supreme Court. The Supreme Court handed down its judgement earlier this year.[27]

[21] The Supreme Court in *Preston* allowed the appeal by majority of four to one (Lady Hale dissenting), and held that Ms Preston – a superintendent minister in the Methodist church – was not an employee, but was serving as a minister "pursuant to the lifelong relationship into which she had already entered when she was ordained".

[22] Lord Sumption, for the majority, used as his starting point section 230 of the Employment Rights Act 1996, that defines an employee as someone who has entered into or works under a contract of service or apprenticeship. It will be immediately apparent that that section is

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[24] Compare this to the wider definition of 'employment' in s 213 of the LRA, i.e. "in any manner assists in carrying on or conducting the business of an employer".

[25] *Harvey* also notes that, through legislation, Church of England clergy are now given the right to claim unfair dismissal before a tribunal.

[26] [2012] IRLR 229, CA.

[27] *President of the Methodist Conference v Preston* [2013] UKSC 29, 15 May 2013.

narrower than section 213 of the Labour Relations Act, that includes under the definition of 'employee' –

> "any other person who in any manner assists in carrying on or conducting the business of an employer".

[23] Having considered the judgments in *Coker, Davies, Parfitt,* and *Percy*, Lord Sumption came to the conclusion that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers generally. He held:[28]

> "The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against the factual background."

[24] Having considered the facts of the relationship between Ms Preston and the church, Lord Sumption held that the question whether an arrangement is a legally binding contract depends on the intentions of the parties. The question is whether the parties intended the benefits and burdens of the ministry to be the subject of a legally binding agreement between them.

> "Part of the vice of the earlier authorities was that many of them proceeded by way of abstract categorisation of ministers of religion generally. The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister."[29]

[25] In her dissent, Lady Hale pointed out that there is nothing intrinsic to religious ministry which is inconsistent with there being a contract between the minister and the church. It is normal for rabbis to be employed by particular synagogue, for example. Priests appointed in the Church of England are now engaged on terms which expressly provide that there have the right to complain of unfair dismissal to an employment tribunal.

[28] *Preston* [2013] UKSC 29 para 10.

[29] *Preston* para 26.

She also pointed out that it is possible to hold an office and also to be employed. An obvious example is University teachers, who may hold the office of (say) Professor at the same time as having a contract of employment.[30]

[26] In short, then, the UK Supreme Court has accepted that a minister can be an employee; but the question in each case must be answered according to the manner in which the minister is engaged and the rules governing his or her service. This depends on the intentions of the parties and, as with all such exercises, any such evidence of the parties' intentions must be examined against the factual background.

[27] In the earlier South African case of *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit*[31] that is what Basson J did. The court considered the "beroepsbrief" setting out the minister's duties; his duties with regard to home visits ("huisbesoek") and sermons; his remuneration in the form of a "traktement"[32]; and the fact that he fulfils a "calling", does not detract from him being an employee. The court concluded:[33]

> "In die lig van hierdie getuienis is ek oortuig dat die bedoeling van die beroepsbrief is om kontraktuele verpligtinge in die vorm van 'n dienskontrak te skep tussen die predikant en sy of haar gemeente."

[28] More recently, the Labour Court again considered a similar relationship in *Rev Petrus v Evangelical Lutheran Church & others.*[34] The court reiterated that each matter must be considered on its own merits and its own facts to establish if the parties intended an employment relationship. And importantly, it added[35] that there need not be a written contract to establish an employment relationship. That distinguishes the position in our law from that expressed in the English cases considered

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[30] *Preston* paras 36-37.

[31] (1999) 20 *ILJ* 1936 (LC).

[32] Defined as a "vaste bedrag op gereelde tye uitbetaal aan 'n persoon wat 'n amp beklee, dikwels van 'n predikant se vergoeding gebruik" (*Verklarende Handwoordeboek van die Afrikaanse Taal*, 1994) – i.e. an amount paid to a person who occupies an office.

[33] *Schreuder (supra)* at para [20].

[34] Case no JR 804/10, unreported, 29 June 2012.

[35] *Petrus (supra)* at paras [17] – [18].

above. This view was expressed, *inter alia*, in *Discovery Health Limited v CCMA,*[36] where the Court said the following:

> 'Taking into account the provisions of s 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definition of 'employee' by this court, I do not consider that the definition of 'employee' in s 213 of the LRA is necessarily rooted in a contract of employment. It follows that the person who renders work on a basis other than that recognised as employment by the common law may be an 'employee' for the purposes of the definition.'

[29] On the facts of the matter, the court in *Petrus* concluded that the parties intended an employment relationship, even though there was no signed contract of employment.[37]

[30] The absence of a contract of employment does not mean that no employment relationship could be established. As Prof Paul Benjamin[38] has noted, the definition in s 213 of the LRA does not use the language of contract. And when s 200A creates a rebuttable presumption "regardless of the form of the contract", that does not, in my view, presuppose the existence of a written contract. The Employment Relationship Recommendation, 2006, of the International Labour Organisation states that 'a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee'.[39]

[31] It remains to reconsider the relationship between the pastor, Myeni, and the church in the case before me on the particular facts of this case and in the light of the provisions of the LRA.

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[36] (2008) 29 *ILJ* 1480(LC) at para [51]. See also *'Kylie' v CCMA & others* 2010 (4) SA 383 (LAC); (2010) 31 *ILJ* 1600 (LAC); [2010] 7 BLLR 705 (LAC) paras 21-27; and *Southern Sun Hotel Interests (Pty) Ltd v CCMA & ors* (2011) 32 *ILJ* 2756 (LAC) paras 27-29.

[37] The judgment did not go on appeal.

[38] Paul Benjamin, "An accident of history: Who is (and who should be) an employee under South African labour law" (2004) 25 *ILJ* 787 at 788.

[39] Article 4(b) of Recommendation 197 of 2006, referred to in the Code of Good Practice: Who is an employee.

[32] As set out above, almost every presumption outlined in s 200A applies to this relationship:

32.1 The manner in which the pastor works was subject to the control or direction of the church.

32.2 The pastor's hours of work were subject to the control or direction of the church.

32.3 The pastor formed part of the Universal Church of the Kingdom of God.

32.4 The pastor worked for the church for at least 40 hours per month.

32.5 The pastor was economically dependent on the church. He earned no other income. And the church deducted pay as you earn (PAYE) and Unemployment Insurance Fund payments from his remuneration that it called a "stipend".

32.6 The pastor only worked for or rendered services to the church.

[33] It is also significant that, at the arbitration, the church was represented by Mr Coetzee, an official of an employer's organisation of which the church is a member, namely the "General, Domestic & Professional Employers Organisation". And on the employee tax certificate (IRP5) submitted to SARS the church is indicated as the employer, together with its PAYE and UIF reference numbers.

[34] Mr Coetzee stated at arbitration that the pastor "was called to a disciplinary hearing for a disciplinary meeting in terms of the church's rules. The applicant [i.e. the pastor] was found guilty of serious forms of misconduct...". This is hardly indicative of a relationship other than an employment relationship. The same goes for the assertion by the church's witness, Mr Tshabalala, that the pastor's services can be terminated if he contravenes the church's regulations; and that the pastor fell under his supervision.

Conclusion

[35] On a conspectus of all the facts, I am not persuaded that the church has succeeded in rebutting the presumption contained in s 200A of the LRA. To paraphrase Lady Hale in *Preston*[40], everything in this relationship looks like an employment relationship. If it looks like a duck, walks like a duck and quacks like a duck, it probably is one.

Costs

[36] The issue of costs will be decided at the hearing of the review application on the merits of whether the pastor's dismissal was fair.

Order

I find that the pastor was an employee of the church. The question whether the award that his dismissal was unfair and that he should be reinstated, is reviewable, stands over for later determination.

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Steenkamp J

APPEARANCES

APPLICANT:	BD Hitchings Instructed by Martins Weir-Smith Inc.
THIRD RESPONDENT:	Attorney Mfungula of Noxaka Mfungula attorneys.

[40] *Supra* para 49.