IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 646/2022**

In the matter between:

AFRICA EVANGELICAL CHURCH	**1st APPLICANT**
TERRENCE MTHETHWA	**2nd APPLICANT**
PETROS NKAMBULE	**3rd APPLICANT**
ANDREW DLAMINI	**4th APPLICANT**
KENNETH MABUZA	**5th APPLICANT**
SABELO DAMOI	**6th APPLICANT**
EDWARD NHAMBOSSE	**7th APPLICANT**
MAPHIKELE DLAMINI	**8th APPLICANT**

And

AFRICA EVANGELICAL CHURCH (PTY) LTD	**1st RESPONDENT**
SIPHO ROMAN MASEKO	**2nd RESPONDENT**

BHEKI ZWANE	**3rd RESPONDENT**
MGCINI PETER SHONGWE	**4th RESPONDENT**
THOBILE GUMEDZE	**5th RESPONDENT**
MANDLA NGWENYA	**6th RESPONDENT**
JOSEPH MNTJALI	**7th RESPONDENT**
NORMAN HLATSHWAYO	**8th RESPONDENT**
THE REGISTRAR OF COMPANIES N.O	**9th RESPONDENT**
THE REGISTRAR OF THE HIGH COURT	**10th RESPONDENT**
THE ATTORNEY GENERAL	**11th RESPONDENT**

Neutral citation : *Africa Evangelical Church & 7 Others v Africa Evangelical Church (Pty) Ltd & Others [646/22] [2025] SZHC 01 (29 January 2025)*

CORAM: **B.S DLAMINI J**

DATE HEARD: 06 December 2024

DATE DELIVERED 29 January 2025

Summary: *Civil Law-Application to interdict unlawful suspension of Executive Committee- Applicants*

also seeking other declaratory orders i.e determination of lawful and/or proper governing structure of the church- Court granting interim relief reinstating Applicants to office pending finalization of the matter in Court-Matter in Court dragging for prolonged period until term of office for Executive Committee expires-Determination of whether there is a live issue for consideration by Court on account of expiry of Committee's term of office.

Held; *There is no live issue for determination by the Court as Applicants' are no longer in office legally. The matter is referred back to the internal structures of the church for resolution with no order as to costs.*

JUDGMENT

INTRODUCTION

[1] This application was brought under a certificate of urgency and was heard by the Court for the first time on the 8th April 2022. The orders sought in the application are as follows;

"*1. Dispensing with the usual forms and procedures relating to the institution of these proceedings and allowing the matter to be heard and enrolled as one of urgent [sic].*

2. An order declaring that the 1st Applicant and the 1st Respondent are two distinct entities and that the 1st Respondent is not the church.

3. That then [the] purported suspension of the current executive being the 2nd to 8th Applicants be set aside as irregular, ultra vires and contrary to the provision of section 33 of the Constitution of Eswatini No.1 of 2005;

3.1 An order staying the suspension pending the finalization of prayer 3 hereof.

4. *An order declaring that the correct body with the powers to run the church (1st Applicant) is the current executive committee being the 2nd to 8th Applicants as duly elected.*

5. *An order that the 1st Respondent changes its name forthwith.*

6. *That the Respondents be interdicted and/or restrained from interfering in the governing affairs of the Applicant.*

7. *That prayers 3 and 5 operate forthwith with interim effect pending finalization of prayers 2, 3, 4, and 5 of the Notice of Motion.*

8. *That a rule nisi be hereby issued calling upon Respondents to show cause on a date to be fixed by the Honourable Court why prayers 1, 2, 3, 4, 5, 6, 7 and 9 should not be made final.*

9. *Costs of suit.*

10. *Granting Applicants and further and/or alternative relief."*

[2] Upon hearing the parties on whether or not to grant the interim relief being sought, the Court subsequently granted interim orders in terms of prayers 1, 3, 3.1, and 7 (with an amendment) of the Notice of Motion. The overall effect of the *rule nisi* in terms of prayers 3 and 3.1 was that the Applicants were to remain in office pending finalization of the matter in Court.

[3] When the matter returned to Court on the 10th May 2022, it became clear that the parties, as fellow church members, needed to be given more time in order to try to resolve the dispute internally. By consent between the parties, the matter was then postponed to the 13th September 2022. What was to follow thereafter was a series of further postponements of the matter, all aimed at trying to resolve the matter internally and amicably between the parties.

[4] At the height of all the postponements, another application brought under a certificate of urgency was instituted by some of the Applicants under High Court Case No.1027/2023. The relief sought by Applicants in Case No.1027.2023 was as follows;

"1. *Dispensing with the usual forms and procedures relating to the institution of these proceedings and allowing the matter to be heard and enrolled as one of urgency.*

2. *Staying the removal of First to Eighth Applicants pending the finalization of prayer 4 hereunder.*

3. *Reviewing and setting aside the decision by the First to Seventh Respondents to dissolve the African Evangelical Church Executive Committee and have an interim executive committee elected arbitrary, ultra vires and irrational.*

4. *Directing the First to Seventh Respondent to furnish a copy of the minutes of the meeting dated 18th March 2023 to the Registrar of the High Court within seven (7) days.*

5. *An order staying the operation of the interim Executive Committee from exercising any functions and/or powers of an executive committee pending the finalization of the matter.*

6. *That prayer 2, 4, and 5 operate forthwith with interim effect pending finalization of the matter.*

7. *That a rule nisi hereby issue calling upon the Respondent to show cause on a date to be fixed by the Honourable Court why prayers 1, 2, 3, 4, 5, 6, 7, and 8 herein should not be made final.*

8. *Costs of suit.*

9. *Granting further and/or alternative relief as it may deem fit."*

[5] In High Court Case No. 1027.2023, the parties were not necessarily the same as the parties in High Court Case No. 646/2022. Of particular note is that the First Applicant in Case No. 646/2022 (Africa Evangelical Church) was made the First Respondent in High Court Case No. 2027/2023. Legally, one could say that this was a fresh application because the parties in these two applications are not the same. However, substantially, the matters are similar in that both were aimed at keeping the current executive committee in office

pending finalization of the various matters in Court. The application under High Court Case No. 1027/2023 was heard by His Lordship, Justice M. Mavuso, who, upon hearing the parties, also granted an interim order as prayed for by the Applicants.

[6] The interim orders granted by my brother, Justice M. Mavuso, complicated the matter even further in that it also kept the Applicants in office as the executive committee of the church. Practically, after it became clear that the parties could not find each other in terms of resolving the matter internally, there would have been no point in hearing the matter (Case No. 646/2022) on the merits since there was another interim order keeping the Executive Committee in office pending finalization of that matter in Court (Case No.1027/23). The view that this Court took was that Case No. 1027/2023 should be finalized first before the main matter under High Court Case No. 646/2022 could be dealt with on the merits.

[7] The dispute under High Court Case No, 1027/2023 was only finalized towards the end of the year 2024 (between September and October 2024). This Court is made to understand that the parties reached

consensus that the interim executive committee had been unlawfully elected and that it should be dissolved. The effect of this agreement was that the Applicants in the main matter remained in office as per the order granted by this Court on the 8th April 2022. It was only then that the parties were allocated a date to argue the matter on the merits. However before the matter could be dealt with on the merits, the Respondents in the main matter (Case No.646/2022) brought an application dated 31st October 2024, in which the following relief was sought;

"1. That the rule nisi issued by the Court, on the 8th of April 2022, is hereby discharged, alternatively;

2. That the court holds that the second to eighth Applicant's term of office has terminated and/or has come to an end by effluxion of time in terms of First Applicant's contention.

3. That the Second to Eighth Applicants are declared no longer in office as the executive committee of the Applicant church in terms of its constitution as their time in office has come to an end, alternatively;

4. *That First Applicant's Board took a resolution that all matters pending before Court should be removed.*

5. *Costs against any Respondent who opposes unsuccessfully the present application.*

6. *Further and/or alternative relief."*

[8] The Respondents relied on clause 4.4.2.3 of First Applicant's Constitution which stipulates that the Regional Executive Committee shall hold office for a period of not more than three (3) years. According to the Respondents, the Applicants were elected into office in August 2019 and therefore their term of office should have expired in June 2022. In response to the allegation that their term of office came to an end in June 2022, the Applicants stated as follows;

"**Contents hereof are noted save to state that the interim court order issued by this Honourable Court meant that the remaining in office of the Applicants was solely based on the court order and**

the finalization of this matter pending before this Honourable Court."

SUBMISSIONS OF THE PARTIES

[9] At the hearing of the matter, Applicant's counsel submitted that the Court has a legal duty to hear and finalize the matter since it is still on the Court's roll and has not been dealt with on the merits. Applicants submitted that all matters brought to Court must be finalized on the merits and that the issue of Applicant's term of office having expired is irrelevant.

[10] Applicants' also argued that Respondents are approaching the Court with dirty hands in that ever since the Court granted the interim orders, Respondents have been consistently refusing to comply with same and were constantly disturbing the Applicants in the execution of their duties. A prime example of the defiance of the Court Orders was the unlawful conduct by Respondents of electing an interim executive committee whilst they were still in office and while the interim court order was still in force.

[11] In Applicants' own words;

> **"[6.1] The Courts are there to administer justice and ensure that same is done and not merely seen to be done. In *casu,* the Applicants approached this Honourable Court and prayed for certain orders. These orders were still in the process of being adjudicated upon. The Court must thus ensure the finality of the matter.**
>
> **[6.2] What must be gleaned herein is the fact that the Respondents desire this Court to discharge the rule. This is *ultra vires.* It is submitted that when the Applicants instituted these proceedings, they were clothed with the authority to do so. Now, the Board cannot institute proceedings seeking a discharge of the rule. This is tantamount to disputing the authority of the Applicants when they instituted these proceedings."**

[12] On behalf of the Respondents, it was submitted that since there is a concession by Applicants that their term of office lapsed, there is no

live issue which the Court can determine at the behest of the Applicants.

[13] Respondents submitted that as a matter of fact, when the application was instituted in Court, Applicants had a few months remaining in office. The granting of the interim order by the Court effectively extended Applicant's stay in office for more than 2 years, a thing which, according to the Respondents, is contrary to the churches' constitution. It is for this reason that the Respondents and the church took a decision to have the *rule nisi* discharged as Applicants' were no longer clothed with the necessary powers of seeking any relief in Court on account of their term of office having expired.

ANALYSIS AND FINDINGS

[14] Applicants acknowledge that they were elected into office in terms of the provisions of First Applicant's Constitution. Clause 4.4.10 of First Applicant's Constitution deals with Regional Executive Committees. In clause 4.4.10.3, it is provided that;

"The term of the Regional Executive Committee members shall be three years."

[15] Applicants concede that their term of office lapsed but argue that since they were lawfully in office when the interim order was granted, the Court should see to it that the matter is finalized properly on the merits either by confirming the rule or discharging same after hearing arguments on the merits.

[16] This Court intends to deal with two fundamental principles on why it would be improper for it to deal with the matter on the merits upon it being proven that the term of office of the executive committee lapsed through effluxion of time.

LOCUS STANDI

[17] Applicants approached the Court and sought to be granted the orders as highlighted above because they were lawfully in office and there was no dispute as to their occupation of office. The duties of Regional Executive Committees are spelt out in clauses 4.5.5.1 to 4.5.5.8 of the Constitution. In clause 4.5.5.5 of First Applicant's Constitution, it is provided that;

"They [Regional Executive Committee] shall evaluate the whole work of the Church in their Regions."

[18] Quite clearly, the Regional Executive Committee wields enormous powers within the ranks of the church. However from a reading of the Constitution, the Regional Executive Committee ranks below the Church Board which is the ultimate governing structure of the First Applicant. Applicants can only exercise lawful powers within the four corners of the church's constitution and nothing more. Accordingly, if the office bearers' term of office came to its natural end, can it be said that they have the legal standing to seek the final orders in a Court of law?

[19] In **Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another (483/22) [2023] ZA SCA 107; 2024 (6) SA 52 (SCA) (27 June 2023)**, the Supreme Court of Appeal (SA), held as follows as regards the principle of *locus standi*;

"*Locus standi in judicio* is an access mechanism controlled by the Court itself. Generally the requirements for locus standi are these: the plaintiff must have adequate interest in the subject

matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant."

[20] Applicants, no doubt, have a direct interest that they should not be unlawfully suspended from office. The Court granted them an interim order and they continued to serve their full term of office. It is unfortunate that the matter could not be finalized during their term of office but that on its own, does not mean the Court should indirectly extend their term of office, thereby impliedly amending the First Applicant's Constitution. The principle pronounced by the Court in the *Firm-O-Seal case* (above) is that the interest sought to be protected must not be academic. It would clearly be academic for the Court to make a pronouncement either confirming or discharging the *rule nisi* since the Applicant's term of office has expired and,

constitutionally, they ought to have long vacated office. The relief sought by Applicants is directly linked to their lawful occupation of office in terms of the Constitution of the Church.

[21] The argument by Applicants that they are entitled to have the Court determine and finalize the other prayers sought in the notice of motion is equally fraught with many challenges. For starters, the Applicants did not approach the Court as ordinary members of First Applicant but they did so in their official capacities as Regional Executive Committee Members. If the official capacity in which Applicants approached the Court has been severed from them, their case hangs in the air without any foundation to support it.

[22] Interestingly, Applicant's counsel was alive to the predicament which his clients are facing because in his heads of argument, he wrote that;

"[6.4]...The proceedings in *casu* were instituted by the Applicants who were the Regional Executive Committee in the best interest of the 1st Applicant. As such, the intervening party [Church Board] cannot withdraw nor discharge this rule. <u>What must occur is that any new Regional Executive Committee must be the one to</u>

withdraw these proceedings as they have the mandate of the day to day business of the 1st Applicant." [under-lined for emphasis]

[23] One could not have said it any better than Applicants' counsel. It is only a new Regional Executive Committee, duly elected in terms of the church's constitution that can take a decision either to pursue the present application or withdraw it as they deem fit.

[24] The Court also noted that in terms of clause 4.5.2.4, it is only the Church Board that is clothed with powers to sue and to be sued on behalf of First Applicant. This clause provides;

"The Board shall sue or be sued on behalf of the Africa Evangelical Church."

[25] Applicants were clearly misinformed in approaching the Court with regards to the other prayers unrelated to their suspension. The issues sought to be addressed by Applicants lies squarely within the ambit of the Church Board as the ultimate authority of the church, if they as the Regional Executive Committee, are unable to resolve same.

PRAYERS SOUGHT INCOMPETENT

[26] The prayers sought to be granted outside of Applicants' suspension are, in the Court's view, incompetent to grant. At the heart of the dispute regarding prayers 2, 4 and 5 is a question of determining a proper governance structure as mandated by First Applicant's Constitution on the one hand, and the First Respondent's memorandum and articles of association on the other hand.

[27] What Applicants' are asking for in the other prayers is to ask this Court to wear the shoes of the brethren in that church and direct them how to walk and manage their spiritual journey. It is not for this Court to decide on behalf of the church which document between the constitution and the memorandum ranks higher to the other or how the church should treat these two conflicting documents. It is also not for this Court to decide who, between the directors of First Respondent and the Regional Executive Committee or other structures is senior in rank or how the relationships between these portfolios must be managed.

[28] The reality on the ground is that even if I was legally bound to hear the matter to finality on the merits, the only logical outcome I would have issued would have been to refer the matter back to the parties for resolution internally. It is difficult to comprehend how the Court would be in a position to direct for example, that the directors of First Respondent rank lower or superior to members of the Regional Executive Committee or that the memorandum and articles of association rank either superior or lower to structures of the constitution. I also do not think that as a Court, I would be acting correctly to direct that the First Respondent must change its current name. To do this would be equal to going to a man's house and directing that the wife must never wear anything 'red' because the neighbor is allergic to seeing anything red in the street. The Court would, in such circumstances, be over-stepping its mandate.

[29] Our common law Courts have emphatically stated that it is not the duty of the Courts to unnecessarily interfere with the sensitive and sacred space of religious practices and beliefs. The Supreme Court of Appeal (SA) in **Ecclasia De Langa v The Presiding Bishop of the**

Methodist Church of Southern Africa (726/13) [2014] ZASCA 151 (29 September 2014), held as follows;

"**[31] It is so that our Constitution protects an individual's right to practice his or her religion as well as the rights of members of a particular religion to practice that religion in association with others and in conformity with dictates, precepts, ethical standards, and moral discipline which that faith exacts. Protecting the autonomy of religious associations is considered a central aspect of protecting religious rights. Indeed such protection has been described as 'vital to a conscience honouring social order'. As the Constitutional Court held in *Minister of Home Affairs v Fourie (Doctors for Life International and Others, amici curiae); Lesbian and Gay Equality Project v Minister of Home Affairs 2006 (1) SA 524 (CC) para 94*;**

'In the open and democratic society contemplated by the Constitution, there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other.'

[32] Witte states that;

"Active religious rights require that individuals be allowed to exercise their religious beliefs privately and groups be allowed to engage in private worship assembly. More fully conceived, active religious rights embrace an individual's ability to engage in assembly, religious speech, religious worship, observance of religious laws and ritual, payment of religious taxes, and the like. They also embrace a religious institution's power to promulgate and enforce internal religious laws of order, organization, and orthodoxy, to train, select, and discipline religious officials, to establish and maintain institutions of worship, charity, and education, to acquire, use, and dispose of property and literature used in worship and rituals, to communicate with co-believers and proselytes, and many other affirmative acts of manifestation of the beliefs of the institution.'

Furthermore, the determination of who is morally and religiously fit to conduct pastoral duties or who should be

excluded for non-conformity with the dictates of the religion, fall within the core of religious functions. For, as Gerhard van Der Schyff puts it;

'The right to admit members and clergy would also imply the right to discipline such people in order to enforce conformity and encourage conduct in harmony with religious precepts and teaching.'"

[30] The Court (in the Methodist Church of Southern Africa case-cited above), observed that in the United States of America, '**the establishment clause prevents courts from determining doctrinal disputes.**" (See- para 34 of the judgment). The Court referred to a US Court decision in **United Sates v Ballard 322 US 78 (1944)** in which it was held that;

"...The first amendment has a dual aspect. It not "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" but also "safeguards the free exercise of the chosen form of religion."

[31] The Court went on to refer to the position of the law in the United Kingdom and held as follows;

"**[36] Similarly in the United Kingdom, the decisions of ecclesiastical courts generally not amenable to correction or challenge in the secular courts. That rule, as *R v St Edmundsbury and Ipswich Diocese (Chancellor); Ex parte White and Another [1946] 2 All ER 604 at 605* emphasizes in the following except, is of long standing:**

'I think that the reason is to be found in this. There has always been in England more than one system of law. I will not say that the canon and the civil law is as old as the common law, but it is, at any rate, of antiquity approaching the common law, and was very vigorous and had great effect in the days of the Plantagenets. The common law existed side by side with the civil law, and there were two sets of courts, the courts spiritual and the common law courts.'

Thus in *R v Chief Rabbi of the United Hebrew Congregation of Great Britain and the Commonwealth, ex parte Wachmann [1993] 2 All ER 249 at 255*, the court held:

'That consideration apart, the court is hardly in a position to regulate what is essentially a religious function- the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognized divide between church and state.'

[32] All of these well- articulated common law principles demonstrate with reasonable measure, that Courts should be slow to enter the space of religious matters, but instead should allow these institutions to self-correct and craft their own spiritual journey. On the facts of the present matter, clause 4.5.5.5 mandates the Regional Executive Committee to **'refer all intricate matters to the Board for finalization.'** The internal processes were therefore not exhausted by Applicants prior to coming to Court. If the matter had been deliberated by the Church Board as stipulated in the Constitution of the church, then Applicants could only approach the Court by way of review.

[33] Another difficulty which the Court finds to be glaring on the papers is that Applicants in their capacity as the Regional executive Committee, wield significant power within the church structures. They however did not sufficiently demonstrate all the steps they took in trying to resolve the internal conflict brought about by the constitution and the memorandum and articles of association. It is not disclosed whether Applicants convened the necessary meetings to resolve the conflict and if they did, what was the stumbling block. As already pointed above, the Church Board is, in terms of the Constitution the ultimate body with authority to resolve any conflict within all structures of the church. The Church Board has been pleading with Applicants to withdraw the matter for the longest of time but Applicants have totally refused to comply with the Board's request.

[34] I must hasten to state that Applicants' conduct of willfully and continuously refusing to abide by the Board's directives is to be strongly condemned and harshly criticized. It is true that Applicants may not have been content with the manner of handling their grievances by the higher structures of the church, however to display

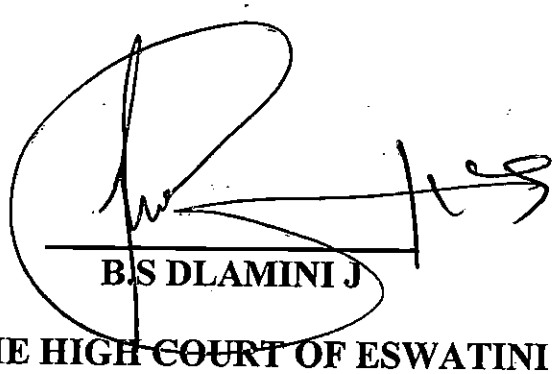
absolute arrogance and total disregard of authority is not acceptable in any human environment, let alone in the Christian faith.

[35] It is for these reasons that the Court, upon hearing arguments on the application brought by the Respondents, proceeded to grant the relief prayed for. The order granted by the Court on the 6th December 2024, which is hereby confirmed, was as follows;

(a) The *rule nisi* and/or interim relief granted by the Court on the 8th April 2024 is hereby discharged.

(b) It is ordered that the matter is referred back to the internal structures of the church for resolution to finality.

(c) There is no order as to costs.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

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