IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 3117/2010

In the matter between:

AFRICAN APOSTOLIC MISSION	**APPLICANT**
VS	
MR PEARSON ONE BIKINISI DLAMINI	**1st RESPONDENT**
THE REGISTRAR FOR THE PROTECTION OF NAMES, UNIFORMS AND BADGES FOR SWAZILAND	**2nd RESPONDENT**
THE ATTORNEY GENERAL AND MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS	**3rd RESPONDENT**

Coram **Ota, J.**

For the Applicant: **Mr. M.Z. Mkhwanazi**

For the 1st Respondent: **Mr. Manana**

JUDGMENT

OTA J.

The Applicant commenced this application by way of Notice of Motion, claiming *inter alia* the following reliefs from the Respondents.

1) Setting aside and / or canceling the certificate of Registration No. N.U.B 11/1995 issued in favour of the 1st Respondent in accordance with Section 6 of the Protection of Names, Uniforms and Badges Act, No 10/1969, as read together with Legal Notice No. 58 of 1969, alternatively,

2) Costs of application

3) Further and or alternative relief

The facts upon which the Applicant contends this application, are predicted on a founding Affidavit of one **Lucas Deli Zwane,** described in that process as a male Bishop of the Applicant. The case for the Applicant as alleged in the said founding Affidavit, is that on or about February, 1995, the new Bishop of the Applicant, together with the Executive Committee of the Applicant, delegated the 1st Respondent, who was then the General Secretary of the said Executive Committee, to Register the Constitution of the Applicant and to apply and obtain a certificate of Registration in terms of Section 6 of the Protection of Names, uniforms and Badges Act, 1969. That on or about the 6th of April 1995, the Applicant's constitution was registered with the Registrar for the Protection of Names, Uniforms and Badges for

Swaziland, the 2nd Respondent herein. That when the 1st Respondent applied for the Certificate of Registration, he applied in his own name and did not disclose to the 2nd Respondent that he was sent by the Applicant to Register the Church as an Institution or Association, as defined in Section 2 of the Act. Therefore, on the 8th of May 1995, the 2nd Respondent issued a certificate to the 1st Respondent in his personal capacity, as opposed to a certificate in the Name of the Applicant, as is evidenced by annexure A.

That the application made by 1st Respondent did not comply with Section 4 of the Act, in that it was not made by the Applicant as an Institution or Association, but by the 1st Respondent who is neither an Institution nor an Association, who is entitled in terms of the Act to make such an application. That the 2nd Respondent therefore acted *ultra vires* the Act, by issuing the Certificate to an individual as opposed to an Institution or Association, pursuant to Section 4 of the Act. That the 2nd Respondent failed to publish the application lodged by the 1st Respondent in the Government Gazette as required by Section 5 of the Act, before issuing the said Certificate, thereby denying the

applicant, the opportunity to scrutinize the application and object to the 1st Respondent being named the applicant therein. That because the 2nd Respondent failed to advert it's mind to the application, it committed a gross irregularity and it's decision was grossly irregular and totally unjustified in the circumstances. That the decision to issue the certificate in the name of the 1st Respondent was arrived at arbitrarily or *mala fide,* in order to further an ulterior or improper purpose by the 1st Respondent, who has now ordained himself as the Bishop of the Church and has taken with him some of the Applicant's congregants as his members. Applicant prayed for the orders sought.

The foregoing facts were confirmed by the supporting Affidavit of **Mrs Mary Motsa,** the Secretary General of the Applicant.

It is on record that the 1st Respondent filed an Answering Affidavit in these proceedings, wherein he raised points in *limine,* which are best summarized as follows:-

1. The Applicant being an Association lacks the legal capacity to sue or be sued in it's own name.
2. The Applicant's Constitution (hereinafter called the Constitution) does not provide for the Applicant to institute proceedings in it's own name.
3. Article 14 of The Constitution anticipates that any legal proceedings shall be instituted in the name of the officers listed in Article 14(1)
4. The application is premature regard had to Articles 12 of the Constitution, which advocates alternative resort to legal proceedings only after the options in Article 12 (a) and (b), have been exhausted
5. Disputes of fact

On the 12th of April, 2011, I heard oral argument from Counsel on both sides of this contest on these legal points. Suffice it to say that I have carefully considered the oral submissions by Counsel, the heads of argument filed of record, and the facts stated herein, with the accompanying annexures. I have no wish to reproduce them in

extenso, but I shall make references to such of them as I deem expedient in due course.

Now, there is absolutely no doubt in my mind that the deponent of the founding Affidavit, **Lucas Deli Zwane,** who is a Bishop in the Applicant church has the *locus standi* to institute proceedings in Court on behalf of the Applicant. This is a power which is expressly conferred on him by Section 14 of the Constitution of the Applicant, exhibited in these proceedings, as annexure A. The Constitution by that Section, lists the officers within the Applicant church, who are conferred with powers of Attorney, amongst whom fall the Bishop. For avoidance of doubts that Section reads as follows :-

> *" 1 4 Powers of Attorney*
>
> *i) The following leaders and officers shall have powers of attorney:-*
>
> *Arch Bishop*
>
> *Bishop*
>
> *President*
>
> *Executive Secretary General*
>
> *Secretary*

ii) The members mentioned in sub-section (1) may seek legal advice or hire, an attorney if need be"

It goes beyond any per adventure from the foregoing, that as a Bishop in the Applicant Church, the said **Lucas Deli Zwane,** is clothed with the power to institute proceedings on behalf of the Applicant. It was suggested by learned counsel for the 1st Respondent, **Mr Manana,** in oral argument, that, pursuant to Section 14 of the Constitution, the Bishop was not to act alone, but in concert with the other members named under that section, who would confer him with the said powers via a resolution reached at a meeting of the Executive Committee of the Applicant. I find that this line of argument cannot be maintained in the face of the clear and ambiguous language of Section 14, which by it's use of the phrase "*Powers of Attorney*" clearly demonstrates, that each of those officials named therein, has power of Attorney to institute the said proceedings. Besides, I hold the view that if the intention of the Applicant's Constitution was for the powers of Attorney to be held collectively, and to be exercised only after a resolution reached at a meeting of the Executive Committee, it would have said so in clear and unambiguous language.

Furthermore, it was also suggested in argument by learned Counsel for 1st Respondent, **Mr Manana,** that this action is premature. His contention on this wise is premised on the provisions of Section 12 of the Applicant's Constitution which is headed Disciplinary Actions. That section provides as follows:-

"*1 2 Disciplinary Actions*

When any Church member has committed an unlawful act, the Executive Committee shall have powers through the Arch-Bishop, Bishop or president to take the following action:-

a) *warning the member on two occasions*

b) *deliver judgment to the member which shall include amongst other things:-*

i) charging a certain fee as a fine

ii) removal from office if the member hold office of any sub committee of the Church

iii) suspension

iv) demotion

v) ex communication from the Church for a period determine by the Executive Committee of the Church

vi) withdrawal of Church membership

vii) any penalty

C) Taking member to Court if he:-

i) refuses to obey the decision of the Executive Committee

ii) Interfers by any means with the congregation or person anointed in his/her position if sub-section (a) and, or, (b) have been applied

iii) Pulling all or part of the congregation to follow him if subsections (a) and, or, (b) have been applied"

Mr Manana contended that pursuant to Section 12 ante, the Applicant was required to have exhausted the options enumerated in 12 (a) and (b), before commencing proceedings pursuant to 12 (c). I must say that I do not agree with this proposition. I agree entirely with **Mr Mkhwanazi** for the Applicant, that Section 12 should not be construed as operating as an ouster clause to litigation as a measure of first resort. I see absolutely nothing in the said constitution

stopping the Applicant from approaching the High Court of Swaziland for redress, in the way and manner it is presently in court pursuant to it's rights under the Constitution of the Kingdom of Swaziland Act No. 001,2005. Moreso as I hold the view that the remedy sought herein is not one that is capable of being dealt with internally.

Now we come to the contention by 1st Respondent that the Applicant lacks the *locus standi* to commence this action in it's own name simpliciter, as it was wont to do. I have hereinbefore held that the deponent of the Applicant's founding Affidavit, one **Lucas Deli Zwane,** by reason of being a Bishop in the Applicant church, has the *locus standi* to institute proceedings on behalf of the Applicant, pursuant to the Applicant's Constitution. Whether the action instituted by the said **Lucas Deli Zwane,** can be commenced in the name of the Applicant simpliciter, is a different matter altogether. I say this because, the way and manner that this action is instituted, raises the legal question as to whether the Applicant is a juristic person with the legal capacity to sue or be sued *eo nominee* (in it's own name). Put in another way, does the Applicant have any *locus standi* to institute these proceedings in it's own name?

The term *locus standi* denotes legal capacity to institute proceedings in a Court of law and is used interchangeably with terms like "*standing*" "*or title to sue*". It is the right or competence to institute proceedings in a Court for redress or assertion of a right enforceable at law

A law suit is in essence the determination of legal rights and obligations in every given situation. Therefore, as a general rule, only natural persons i.e., human beings and juristic or artificial persons i.e bodies corporate, are competent to sue or be sued. This trite principle of law was expressed by **Mocatta J,** in the case of **knight and Seale V Dove (1964) 2 ALL ER 307 at 309,** in the following terms "*no action can be brought by or against any party other than a natural person or persons unless such party, has been given by statute, expressly or impliedly or by common law either (a) legal personality under the name by which it sues or is sued or (b) a right to sue or be sued by that name*_____".

See also Foss V Harbottle (1843) 2Ha.461

Mr Mkhwanazi contends, that the Applicant is an institution established in terms of it's constitution and has the powers to sue and be sued in it's own name. He drew the Court's attention to Case No. 1006/2010, wherein the 1st Respondent sued the Applicant in it's own name, contending, that the 1st Respondent is thus estopped from raising this point on the Applicant's *locus standi, in the case instant.*

Let me say it straight away here but with respect, that I completely disagree with **Mr Mkhwanazi** on his stance on this subject matter. I say this because the Applicant is not a body coporate, with perpetual succession, a common seal and a capacity to sue or be sued in it's own name. It is an unincorporated, non statutory, body of persons. It is an Association of persons with no distinct existence from that of it's members. It is not a legal personam. It is not a juristic entity. At best it can be regarded as a juridical entity. It is recognized by law as an Association, but law has not conferred it with a personality separate from it's members. It did not acquire such a personality by reason of it's registration or via it's constitution. It is not a legal entity with the capacity to sue or be sued *eo nominee.* Legal proceedings by or against the Applicant in the circumstances, can only be properly

constituted, if the suit is commenced by any of the officers enumerated in paragraph 14 of it's constitution, as having powers of Attorney, on behalf of the Applicant. Instituting proceedings for or against the Applicant in it's own name simpliciter, automatically renders the suit incompetent. In the circumstances therefore, the application instant which is commenced in the name of the Applicant simpliciter, is incompetent for lack of standing on the part of the Applicant. I find a need to add here, that the mere fact that the Applicant was cited as a defendant in it's own name in Case No. 1006/2010, cannot avail it, as this fact does not confer the Applicant with the standing which it obviously lacks. In the light of the totality of the foregoing, I hold that this action isincompetent.

Mr Manana calls for a dismissal of this action by reason of the said incompetence. I do not think that that is the proper order to follow such a declaration of incompetence. This is because when the standing of a Plaintiff to institute proceedings is questioned, all that is being said in effect, is, that the Court before which such an action is brought cannot entertain the adjudication of such an action. It affects the jurisdiction of the Court to entertain and determine the action. The

course of action open to the Court, if it finds such an action incompetent for lack of standing, is to put an end to it by striking it off the roll. If the Court has no competence to adjudicate, it cannot dismiss the action. The Court cannot dismiss a claim, the merits of which it is not competent to inquire into. A dismissal presumes that the Court has looked in the claim and found it wanting in merits. But it can only so look into the claim, if that claim is competent before the court. A dismissal therefore postulates that the action was properly constituted, and thus competent.

On these premises, since I have found this application incompetent, it is accordingly struck off the roll, with costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 10th DAY OF JUNE 2011

OTA J.
JUDGE OF THE HIGH COURT