IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no. DA 3/14

In the matter between:

THE UNIVERSAL CHURCH OF THE KINGDOM OF GOD **Appellant**

(*Applicant in the Court a quo)*

and

MYENI, MXOLISI JUSTICE **First Respondent**

(Third Respondent in the Court a quo)

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

(First Respondent in the Court a quo)

COMMISSIONER SULLIVAN N.O. **Third Respondent**

(Second Respondent in the Court a quo)

Heard: **17 March 2015**

Delivered: **28 July 2015**

Summary: **Appeal – Review – Jurisdiction of CCMA – Test applicable to determine jurisdiction restated – Alleged employer & employee relationship – Whether a pastor is employee of the church ito s213 r/w 200A of the LRA – Both CCMA commissioner & LC finding that church failed to rebut s200A presumption and holding that pastor was therefore an employee of the church.**

On appeal: Interpretation of s200A – meaning of the words *"regardless of the form of the contract"* - s200A applicable only where there is a contract or contractual arrangement in place between parties. *In casu* s200A did not apply. On the facts, the parties never intended to engage in any form of legally binding agreement, including employment contract. Accordingly, appeal upheld.

Coram: Waglay JP, Davis *et* Ndlovu JJA

JUDGMENT

NDLOVU JA

Introduction

[1] The issue in this appeal is whether the second respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA") possessed the requisite jurisdiction to arbitrate an unfair dismissal dispute between the appellant ("the Church") and the first respondent, Mr Mxolisi Justice Myeni. The basis for this jurisdictional challenge (raised *in limine* by the Church in the Court *a quo*) was that Mr Myeni, the Church pastor, was not an employee of the Church, as defined in the Labour Relations Act[1] ("the LRA").

[2] In his arbitration award, the third respondent ("the commissioner") found that Mr Myeni was indeed an employee of the Church. Having made this ruling, the commissioner proceeded and considered the merits of the unfair dismissal claim referred by Mr Myeni against the Church. The commissioner concluded that Mr Myeni was unfairly dismissed and ordered the Church to pay him compensation in the sum of R64 994.96, plus further ancillary relief. The Church launched a review application in the Labour Court, against the award, in terms of section 145 of the LRA. By agreement between the parties, the Court *a quo* was called upon to deal only with the jurisdictional issue raised by

[1] Act 66 of 1995.

the Church *in limine* whether Mr Myeni was an employee of the Church as envisaged in the LRA. The dispute on the merits was held over for determination at a later stage.

[3] After determining the jurisdictional issue in favour of Mr Myeni, the Labour Court (Steenkamp J), in the judgment handed down on 28 November 2013, dismissed the review application, thus upholding the commissioner's finding that Mr Myeni was indeed an employee of the Church and that, therefore, the CCMA did possess the requisite jurisdiction to entertain the matter. The judgment of the Court *a quo* is published as [2014] JOL 32275 (LC). It is against this judgment that the Church now appeals to this Court, with leave of the Court *a quo*.

The factual matrix

[4] The Church is governed under a constitution, known as the Constitution of the Universal Church of the Kingdom of God ("the Church's constitution"), which defines the Church as a voluntary association with the status of a *legal persona.* According to the Church's constitution, the main functions of the Church include operating churches under the auspices of the Pentecostal Evangelical Denomination, exclusively for religious, charitable, educational, philanthropic and benevolent purposes;[2] establishing branches and congregations under the leadership of the LORD JESUS CHRIST and under the direction of the HOLY SPIRIT in accordance with all the commandments and the provisions set forth in the Holy Bible;[3] observing a creed, code of doctrine, discipline and form of worship in accordance with the Statement of Faith;[4] raising up and training assistants, assistant pastors and pastors from among members who demonstrate maturity and faithfulness within the Church in their personal lives;[5] establishing regular religious services for the fellowship and spiritual aid of its congregants;[6] spreading the Gospel and invite the public to the Church through religious campaigns, radio, television, newspaper

[2] Clause 4.1 of the constitution.
[3] Clause 4.3.1 of the constitution.
[4] Clause 4.3.2 of the constitution.
[5] Clause 4.3.4 of the constitution.
[6] Clause 4.3.5 of the constitution.

advertisements, and the like;[7] and supporting missionary work and all things that relate to furthering the work of Jesus Christ in the world.[8] The constitution further provides that the Presbytery is the highest authority in the Church and the Bishop and Pastors are to serve under the Great Bishop, JESUS CHRIST.[9]

[5] Mr Myeni joined the Church in 1993 as an ordinary member. During the following year (1994) he was appointed as an "assistant" or "helper", which was a volunteering role whereby he would assist the resident pastor in his pastoral duties. In 1998, after going through a successful interview and attending a *"class"* for six months in Johannesburg, he was appointed as an auxiliary or assistant pastor and based in Durban, although he was only "officially" ordained in 2004. In terms of the Regulations,[10] an auxiliary pastor becomes a full pastor upon receiving the blessing of consecration. The distinction between ordination (which Mr Myeni received in 2004) and consecration was not made clear in evidence.[11] For the present purpose however, such distinction, if any, would be of no relevance.

[6] On 1 October 2009, a document containing a codified set of Christian doctrinal principles for Church pastors, titled "*Regulations for Pastors"* was signed by Mr Myeni and his wife. On 15 November 2010, Mr Myeni and his wife signed another document that appears to incorporate a religious declaration or vow made by Mr Myeni in his vocation as pastor of the Church, and it is titled "*Declaration of Voluntary Service"*. For the sake of convenience I shall refer to the documents respectively as "*the Regulations"* and "*the Declaration",* or collectively "*the (two) documents"*. A duly authorised representative of the Church and at least one witness also signed the documents at the same time as Mr Myeni and his wife. It is common cause that the Church relied mainly on these documents; hence they are materially and crucially important to this case. I propose to refer to the documents, to the extent relevant for the present purpose.

[7] Clause 4.3.6 of the constitution.
[8] Clause 4.3.7 of the constitution.
[9] Clause 5.1.6 of the constitution.
[10] Regulation 4.1.
[11] Record, vol 3 at 255 line – 257 line 5.

'REGULATIONS FOR PASTORS

2. The pastor understands and accepts that:

2.1 He is not an employee of the Church but renders his voluntary service according to his Christian convictions.

2.2 The allowance that he receives from the Church is so bestowed on him, not as remuneration, but to assist him with his subsistent requirements.

3. The pastor understands and accepts that:

3.1 He may not use his position of authority over other pastors, assistants, members or third parties.

3.2 He may not accept, give or take steps to acquire gifts or money from assistants, members or third parties. …

5. [The pastor understands and accepts that]:

5.1 The pastor must regard all monies contributed by people in the Church as holy.

5.2 The pastor may not use the money for any reason whatsoever.

5.3 The pastor's voluntary service will be immediately terminated, should it be proven that he stole any offering or part of it. …

10. [The pastor understands and accepts that]:

10.1 Not all the pastors of the Church are 'consecrated pastors'.

10.2 No auxiliary pastor receives the blessing of consecration.

10.3 No unmarried pastor receives the blessing of consecration.

10.4 Until such time that one receives the blessing of consecration, he is considered and remains a trainee pastor, undergoing [the] said training towards possible consecration. It is only after he has been consecrated that he is given full 'pastorship' in that he becomes a

Pastor of the Universal Church of the Kingdom of God and no longer a trainee pastor.

DECLARATION

I, the undersigned, Mxolisi Justice Myeni ID number 781105 5619 087 do hereby take an oath and declare that:

5. I am **volunteering as a trainee pastor** at the Universal Church of the Kingdom of God. …

7. … **Included in this declaration are some of the principles, responsibilities and discipline that have been clearly communicated to me from the onset, which I unquestionably acknowledge and resolve to abide by and regarding which I have no apprehension or doubt**.

DECLARATION OF VOLUNTARY SERVICE

During the entire period of training programme to date, and henceforth, I always understood that:

1. My voluntary time given to the Church shall not be misconstrued by misconstrued by myself, or any third party acting on my behalf, as any form of employment or contract.

2. I am not an employee of the Church but a servant, rendering my voluntary devotional assistance because of my convictions and causes of the Christian faith.

3. I receive no form of remuneration for any services rendered directly or indirectly by myself to the Church.

4. The Church may, at its own discretion, when possible, with no obligation, under no compulsion, provide me with a subsistence allowance, where necessary. Any form of assistance given shall not be misconstrued as a precedence and/or normal practice, even when [the] said assistance is provided to me at regular and not sporadic intervals. …

5. …

6. …

7. I am fully aware that 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.

8. …

9. …

10. …

11. …

12. I shall not, under any circumstances, obtain personal gist from myself from members, assistants or any other third parties; I shall not use the name of the Church and/or my position in the Church to borrow or acquire money, gifts, appliances, equipment or any other possessions for my personal benefit.

13. …

14. Any contravention of the rules, disciplines, policy, procedures, and convictions embraced by the Church and the Christian faith will result in the summary termination of my voluntary assistance.

15. The Church, although under no obligation to do so, has benevolently provided me with all aspects – spiritual, material and otherwise – which are contained herein. I have never lacked anything materially, physically or spiritually that could revoke and/or annul the Church's benevolence towards myself.

16. I shall not, during the entire period within which I provide my voluntary assistance to the Church, engage in and/or enrol for any type of occupation whatsoever and/or a training programme of any nature, be it personally (sic) or by correspondence, without first informing the Church and obtaining prior authorisation to engage in [the] said activities, and this applies both to myself and my spouse whether our union falls before or after the signing of this declaration.'

(Emphasis added)

[7] On 18 December 2011, the service of Mr Myeni with the Church was terminated by the Board of the Church on the ground of alleged misconduct on his part. Mr Myeni was not satisfied with the termination and thus referred a dispute of unfair dismissal to the CCMA for conciliation. The conciliation process failed and a certificate to that effect was issued, which culminated in the matter being enrolled for an arbitration hearing before the commissioner.

The arbitration

[8] Mr Myeni testified that his duties, as pastor, mainly involved preaching the gospel of God and that, since the Church was open from Monday to Sunday, he was always available to assist with preaching. He performed these duties even before he was ordained in 2004. After his ordination, his duties remained the same, namely, to preach the gospel of God.

[9] In support of his averment that he was an employee of the Church, Mr Myeni testified that he was paid a stipend by the Church in the sum of R1875 per week (or R7500 per month) and every such payment was accompanied by a payslip. In addition, he was provided with accommodation worth R4500 per month, paid for by the Church. Further, both the Unemployment Insurance Fund (UIF) and Pay-As-You-Earn (PAYE) deductions were made from his stipend. He was obliged to compile a weekly work schedule showing what duties he performed and time durations thereof, in a particular week. He was required to conduct about three to four religious services every day. If, for whatever reason, he was unable to perform any of his duties he was obliged to report to his senior, the regional pastor, who would then instruct a reserve pastor to fill up that gap and perform the service concerned. He further stated that during these services, he was required to collect monies from church members which he accounted for to the Church. He said it was in return to the duties which he performed that he was paid the stipend and provided with the accommodation.

[10] On 15 December 2011, Mr Myeni and his wife attended what he described as a normal "*Thursday pastors'* meeting". At the conclusion of the meeting, he and his wife were requested by the Bishop to stay behind. He did not know

the reason therefor. To his surprise, the Bishop accused him of having received sacrificial offerings from certain Church members and converted the same for his own private use. He denied any suggestion that he misappropriated Church funds. However, he admitted receiving some monies from certain Church members on three different occasions, but not under illicit circumstances, which he sought to explain. He said he received two cash amounts from Ms Hlengiwe Dludla - R300 which was a gift and R50 which he received on behalf of a third party being in respect of the sale of a book; and also a gift of R1000 cash from Ms Nkosizile Mkhwanazi whom he said was his personal friend. The Bishop said he was going to conduct further inquiries into the matter and they parted. He was not informed of the outcome of the investigation. Instead, on 18 December 2011, he was advised that the Board of the Church had decided to terminate his services. He regarded this development as a dismissal, which he claimed was unfair and, for this reason, he sought compensation from the Church.

[11] Ms Masangu testified that she was a voluntary worker at the Church, assigned in the department dealing with pastors' affairs. Her duties included explaining to student pastors that they were attending the class in order to be trained to become pastors. Once they finished the training lessons, they would become auxiliary pastors. It was at this stage that she would then explain to them everything about the Declaration and, particularly, the fact that they were rendering a voluntary service to the Church. The auxiliary pastors would then sign the Declaration in acknowledgement that they understood the contents thereof. She would also sign the Declaration. The same procedure applied to Mr Myeni.

[12] The witness pointed out that, in her case, she came to perform voluntary work for the Church after quitting remunerative employment. Her husband was also a pastor in the Church. Whenever a pastor wanted to be away for a certain period of time, the pastor concerned would not need to apply for leave, but would only report to the immediate senior pastor, in which event another pastor would be asked to stand in for the pastor who was away. She sought to differentiate pastors from ordinary workers who were employed by the

Church, such as caretakers, cleaners, and those working in the engineering department. She said there were about 700 to 800 such employees who signed employment contracts with the Church.

[13] Under cross-examination, Ms Masangu conceded that, of the voluntary workers, only pastors were paid a stipend. However, they (the pastors) still remained volunteers. She further mentioned that trainee pastors were taken from a pool of assistants. Formal requirements for eligibility included checking on the individual's good health and police clearance, the latter being in respect of any criminal record.

[14] Pastor Tshabalala testified that he was the senior or regional pastor responsible for monitoring junior pastors. He also signed the Declaration. He was adamant that being a pastor in the Church was different from being employed. When he assumed the role of pastor he was informed by the Church Leadership that he was offering his services as a volunteer in the Church and *"without anything that you are expecting in return, because that is what I was called for".* He said the stipend that he and other pastors received from the Church was only to enable them to buy food and clothing; and to carry out their pastoral duties. However, he was aware that the Church was in no way obligated to pay them the stipend, which was only a subsistence allowance.

[15] He further testified that Mr Myeni was one of the pastors under his charge. He said no pastor was allowed, in terms of the Regulations, to receive money privately from a church member, either as a gift or donation. Only a pastor's wife was allowed to present the pastor with a birthday or Christmas gift, but nobody else. He confirmed that in terms of regulation 12.1, the Church Leadership could terminate the services of any pastor who is found to have contravened any of the regulations.

[16] Given the fact that in the review proceedings the Court *a quo* was called upon to deal only with the jurisdictional point (i.e. whether Mr Myeni was an employee of the Church or not), I shall henceforth concentrate only on that part of the commissioner's award.

[17] The commissioner considered the circumstances under which Mr Myeni rendered his services to the Church and, in this regard, took into account the following: that Mr Myeni underwent an interview and attended class lessons before becoming a pastor; was obliged to conduct religious services; he received a regular income from the Church which was subject to Income Tax and UIF deductions; prepared a weekly work schedule; performed his duties personally and was bound by various Church practices and he was subject to the authority of the Bishop. On this basis, the commissioner concluded as follows:

> '31. On these facts there can be little doubt that the intention of both parties was that of an employment relationship – with the applicant undertaking the services required by the respondent and the respondent remunerating the applicant for so doing.
>
> 32. Of course pastors were also required to sign the Declaration of Voluntary Service. The main if not the only purpose of which is to avoid the provisions of the Labour Relations Act and the applicant's constitutional right to a fair labour practice. Signing a piece of paper declaring that you are not an employee is close to meaningless if it is done, as in this case, at the insistence of the employer. …
>
> 33. There is no doubt that the respondent did not want to enter into an employment contract. It did everything it could to avoid the relationship between it and its pastors being declared an employment relationship and relied on its primary tool in this regard: the "Declaration of Voluntary Service". It may, in fact, have very good reasons for doing so. It is clearly not in the respondent's interests to have its pastors declared employees as they would be subject to the Labour Relations Act.'

[18] The commissioner accordingly ruled that Mr Myeni was indeed an employee of the Church and proceeded with the arbitration. He ultimately found that Mr Myeni was unfairly dismissed and ordered the Church to pay him compensation in the amount equivalent to eight months of his stipend, which the commissioner curiously calculated to be R64 994.96,[12] plus further

[12] If Mr Myeni received a stipend of R7 500 per month, it is not clear how the amount of R64 996.96 is arrived at, computed for an eight months' stipend. (R7 500 x 8 would make R60 000.00).

ancillary relief which included eight months' worth of his accommodation at R4500 per month (i.e. R4500x8 = R36000) less R4500 for every month or part thereof that Mr Myeni continued (or would continue) to occupy the said accommodation up to the time of his departure.

The Labour Court

[19] The Church was not happy with the outcome of the arbitration process; hence, it took the matter up on review in the Labour Court, in terms of section 145 of the LRA. Its grounds of review can be summarised as follows:

1. The finding of the commissioner that Mr Myeni was an employee of the Church was wrong.

2. The commissioner failed to take into account that, by his own admission, Mr Myeni did not render his service to the Church, as envisaged in terms of section 200A of the LRA, but he was doing the work of God.

3. The commissioner failed to take into account the true intention of the parties as evidenced, *inter alia*, by the Declaration of Voluntary Service, namely, that they did not intend to enter into an employment contract.

[20] The Court *a quo* substantially agreed with the commissioner's reasoning and found that the following seven factors present in Mr Myeni's involvement with the Church, conformed to the factors referred to in section 200A, one or more of which would be sufficient to trigger the section 200A presumption ("the s200A Factors"):

1. The manner in which Mr Myeni worked was subject to the control or direction of the Church.

2. His hours of work were subject to the control or direction of the Church.

3. He formed part of the Church.

4. He worked for the Church for at least 40 hours per month.

5. He was economically dependent on the Church and he earned no other income. The Church deducted pay as you earn (PAYE) and Unemployment Insurance Fund (UIF) contributions from his "remuneration" which the Church called a "stipend".

6. On Mr Myeni's tax certificate (IRP5) submitted to SARS the Church was reflected as the employer.

7. At the arbitration hearing, the Church was represented by an official from a registered employers' organisation.

[21] After considering the evidentiary material presented and submissions made, the Court *a quo* stated, amongst others, the following:

> '[30] The absence of a contract of employment does not mean that no employment relationship could be established. As Prof Paul Benjamin (footnote omitted) 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.'[13]

[22] Consequently, the Court *a quo* found that the Church failed to rebut the section 200A presumption and ruled, accordingly, that Mr Myeni was an employee of the Church at the time his relationship with the Church terminated. As noted earlier, by agreement, the aspect relating to the fairness or otherwise of Mr Myeni's dismissal was held over for determination at a later stage, that is, at the hearing of the review application on the merits, at which stage the issue of costs would also be determined.

[13] At para 30.

The appeal

[23] In its grounds of appeal, the Church submitted that the Court *a quo* erred in the following respects:

1. In holding that Mr Myeni was an employee of the Church, as envisaged in the LRA.

2. In finding that the Church did not discharge the *onus* created in terms of section 200A of the LRA of proving that Mr Myeni was not an employee of the Church.

3. In finding that the words "regardless of the form of the contract", as used in section 200A, justified a departure from the actual wording and express intention of the parties, as set out in their agreement (in terms of the Regulations and the Declaration) and oral evidence, that they had no intention to enter into a contract of employment.

[24] Mr *Pauw* SC, appearing for the Church, pointed out that the only question which the Court had to determine was whether the parties ever intended to conclude any contract and to be bound thereby. In his submission, the parties never had such intention at all. That being the case, he submitted, the provisions of section 200A did not apply. According to counsel, section 200A can only apply once there is a contract in place. In other words, the gatekeeper is that there was to be some form of contractual agreement between the parties for the provisions of section 200A to apply.

[25] Mr Mfungula, who appeared for Mr Myeni, hardly had anything to address us about, save to submit that the appellant did not make a case to justify this Court setting aside the judgment of the Court *a quo*. Otherwise he simply left the matter in the hands of the Court.

Evaluation

[26] Mr Myeni alleged that he was employed by the Church, which the Church denied. Thus the *onus* was on him to prove that he was indeed an employee

of the Church as envisaged in the LRA.[14] Unless he established that there was an employment relationship between him and the Church, the CCMA, being the creature of statute, would not have the requisite jurisdiction to arbitrate his dispute.

[27] Given the fact that the review proceedings concerned a ruling by the commissioner on the CCMA jurisdictional challenge, the review test of constitutional reasonableness in terms of the *Sidumo* decision,[15] does not apply. It is said that the value judgment of the commissioner in a jurisdictional ruling has no legal consequence and that it is only a ruling for convenience. Therefore, the applicable test is simply whether, at the time of termination of his relationship with the Church, there existed facts which objectively established that Mr Myeni was indeed the employee of the Church. If, from an objective perspective, such jurisdictional facts did not exist, the CCMA did not possess the requisite jurisdiction to entertain the dispute, regardless of what the commissioner may have determined.[16]

[28] The Labour Court has encountered similar matters in the past. In *Church of the Province of South Africa (Diocese of Cape Town) v CCMA and Others*[17] *("the CPSA decision or judgment")* the Labour Court (per Waglay J, as he then was) concluded that a pastor was not an employee of his church as envisaged in the LRA and that, therefore, the CCMA had no jurisdiction to entertain the pastor's dispute with the church.

[29] A similar conclusion, as in the *CPSA decision,* was reached by the Labour Court in *Salvation Army (South African Territory) v Minister of Labour*[18] *("the Salvation Army decision or judgment")* where the applicant church sought a declaratory order to the effect that its clergy (referred to as "Officers") were not

[14] *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC) at para 5; *Kloof Gold Mining Co Ltd v National Union of Mineworkers and Others* (1986) 7 ILJ 665 (T) at 674H-J; *Dempsey v Home and Property* [1995] 3 BLLR 10 (LAC) at 17F-G.
[15] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.
[16] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd* (2008) 29 ILJ 2218 (LAC) at paras 40 and 41, citing with approval *Benicon Earthworks & Mining Services (EDMS) BPK v Jacobs No and Others* (1994) 15 ILJ 801 (LAC) at 804 C-D.
[17] (2001) 22 ILJ 2274 (LC); [2001] 11 BLLR 1213 (LC).
[18] [2004] 12 BLLR 1264 (LC) at paras 14-16.

employees of the church as defined in the LRA and other labour legislation specified therein. The Court granted the application.

[30] In terms of the LRA definition, *"employee"* means[19] –

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; and
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer."

[31] Subsequently, the Legislature introduced section 200A[20] into the LRA, in terms of which a rebuttable presumption was created in relation to establishing who an employee is, as defined in the LRA. Subsections (1) and (2) of section 200A read as follows:[21]

> (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;

[19] Section 213 of the LRA.
[20] The insertion was introduced in terms of section 51 of the Labour Relations Amendment Act 12 of 2002 which came into effect on 1 August 2002, in terms of Government Gazette 25515. The *CPSA* judgment was handed down on 7 September 2001.
[21] The wording of section 200A of the LRA is identical to section 83A of the Basic Conditions of Employment Act 75 of 1997 which, however, is not of relevance in the present matter.

(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.

(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".*[22]

(Emphasis added)

[32] On 1 December 2006, the *Code of Good Practice: Who is an employee* came into effect[23] ("the Code of Good Practice") and set out some guidelines on the application of section 200A.[24] To the extent relevant, the Code of Good Practice provides the following:

'13 A person is presumed to be an employee if they are able to establish that one of seven listed factors is present in their relationship with a person for whom they work or to whom they render services. ….

14 Subject to the earnings threshold, the presumption applies in any proceedings in terms of either the BCEA or the LRA in which a party ('the applicant') alleges that they are an employee and one or more of the other parties to the proceedings disputes this allegation. …

16 The presumption applies **regardless of the form of the contract**. Accordingly, a person applying the presumption must evaluate evidence concerning the actual nature of the employment relationship. The issue of the applicant's employment status cannot be determined merely by reference to either the applicant's obligations as stipulated **in the contract** or a 'label' attached to the relationship **in a contract**. Therefore a statement **in a contract** that the applicant is not an employee or is an independent contractor must not be taken as conclusive proof of the status of the applicant. (Emphasis added)

[22] The amount determined by the Minister is currently R205 433.30 per annum, in terms of Government Gazette No.37795 published in Government Notice No.531 dated 1 July 2014.
[23] In terms of Government Gazette No. 29445, Part I (regs 1-11) published in Government Notice No.1774 dated 1 December 2006.
[24] Article 2 of the "Code of Good Practice: Who is an employee".

> 17 The fact that an applicant satisfies the requirements of the presumption by establishing that one of the listed factors is present in the relationship does not establish that the applicant is an employee. However, the onus then falls on the 'employer' to lead evidence to prove that the applicant is not an employee and that the relationship is in fact one of independent contracting. If the respondent fails to lead satisfactory evidence, the applicant must be held to be an employee.'

[33] The Court *a quo* noted that in both the *CPSA and the Salvation Army judgments*, the Labour Court found against the party who claimed to be the employee. However, the Court sought to distinguish the two cases in that the *CPSA judgment* was handed down prior to the introduction of section 200A,[25] whilst in the *Salvation Army decision* the Court did not make any specific reference to section 200A, which then cast some doubt whether the Court in that case considered the implications of the section at all.

[34] The Court *a quo* further took into account that, in any event, both the *CPSA* and the *Salvation Army* decisions were given before the Code of Good Practice came into effect in 2006. I will return to deal with the Code of Good Practice shortly. Presently, I propose to consider the interpretation and implications of section 200A of the LRA.

Whether section 200A was properly interpreted by the Court a quo and whether the section and its presumption applies in this case

[35] It was common cause that the s200A factors were present in Mr Myeni's relationship with the Church. On this basis, the commissioner appeared to have assumed that section 200A and its presumption therefore automatically applied. So did the Court *a quo*. Notwithstanding the oral and documentary evidence presented on behalf of the Church, the commissioner found that the Church failed to rebut the section 200A presumption and came to the conclusion that Mr Myeni was indeed employed by the Church at the time his service was terminated. The Court *a quo* upheld that conclusion.

[25] The *CPSA* judgment was handed down on 7 September 2001, whereas section 200A took effect from 1 August 2002.

[36] It is necessary, in my view, first, to undertake a proper interpretation of section 200A and, second, to determine whether, given the facts of this case, the section applies. To my mind, a proper interpretation of the words *"regardless of the form of the contract"* in section 200A informs me that the existence of an employment contract or any other contractual arrangement between the disputing parties (regardless of the form thereof) is prerequisite for section 200A to apply. Indeed, the portions of article 16 of the Code of Good Practice (which I have emphasised in bold, above)[26] appear to confirm this view. In other words, some form of contract must be evident, which need not be formal or in writing.

[37] In my view, a better understanding of section 200A can only be informed by the clearer understanding of the circumstances surrounding the evolution of the section. There is no doubt that the introduction of this section was intended to safeguard and protect vulnerable workers who, in terms of the LRA, qualified to be treated as "employees" and to enjoy the legal protection under the LRA, but who are somewhat manipulated by some unscrupulous employers and induced to conclude contracts in which they (the workers) are conveniently described either as independent contractors or something similar. In this way, employers escape their obligations under the LRA *vis-à-vis* the workers concerned. Therefore, in terms of section 200A, even if a contract does not refer to "employment", it is presumed to be an employment contract if the s200A factors are present. This was doubtlessly the primary rationale behind the promulgation of section 200A. Simply put, section 200A advocates substance over form.

[38] Indeed, the factual background to this development can be traced in the *Explanatory Memorandum to Draft Bills 2000*.[27] What is particularly significant to me about this memorandum is the fact that it also implies the existence of a contract or contractual arrangement for section 200A to apply. I refer to the relevant part of the memorandum:

[26] See para 32 above.
[27] Published in (2000) 21 ILJ 2195.

'16.5 … Organisations such as Confederation of Employers of South Africa (COFESA) advise employers that they can avoid labour legislation merely by stipulating ***in contracts*** that the workers are independent contractors without any fundamental change in the employment relationship. The consequences of this approach are not limited to excluding these workers from legislation, such as the LRA and the BCEA. These employers do not register with or contribute to the unemployment insurance and worker's compensation funds or meet their obligations in terms of health and safety legislation. This weakens these funds and imposes the costs of ill health and occupational accidents on the workers, their families and the state. …

16.8 It is proposed to include a series of rebuttable presumptions in the BCEA as a new section 83A and new section 200A in the LRA. These presumptions concern proof of whether an employment relationship exists. The effect of these is to provide that where a particular factor is present in the relationship between a worker and the person for whom he or she works, the worker is presumed to be an employee unless the contrary is proven. …

16.10 Where an employer adopts the attitude that, despite the presence of one of these factors, there is no employment relationship, they will be required to prove this. The employer has full knowledge of the working relationship and will therefore be in a position to present evidence to discharge the onus in appropriate cases.'

(Emphasis added)

[39] Incidentally, this disturbing and manipulative practice by unscrupulous employers was further recognised in the International Labour Organization (ILO) Recommendation of 31 May 2006[28] which, significantly again, clearly indicated the necessity of a contract or contractual arrangement in a scenario which seeks to invoke section 200A. According to the ILO Recommendation,

[28] The Recommendation was issued by the General Body of the ILO at the 90th Session of its General Conference which was convened at Geneva on 31 May 2006. The Recommendation was published in the SA Government Gazette No. 29445 dated 1 December 2006 by virtue of Government Printer's Copyright Authority No. 10505 dated 2 February 1998.

all member states should adopt national policy which would include measures to-

> 'combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of ***contractual arrangements*** that hide the true legal status, noting 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, and that situations can arise where ***contractual arrangements*** have the effect of depriving workers of the protection they are due.'[29] (Emphasis added)

[40] In my view, therefore, a proper construction of section 200A of the LRA requires that there must be a legally enforceable agreement or some contractual working arrangement in place between the parties, for section 200A to apply. In the *dictum* referred to above, Steenkamp J points out: *"The absence of a contract of employment does not mean that no employment relationship could be established"*. However, in the same paragraph, the learned Judge appears to indicate that he was in fact referring to a written contract: *"[W]hen s200A creates a rebuttable presumption … that does not … presuppose the existence of a written contract"*. To that extent, I would agree with him because, as already stated, a contract does not have to be formal or in writing. Otherwise, I would disagree with the learned Judge if he meant to say that a contract, no matter the form, is no *sine qua non* for section 200A to apply.

[41] In terms of the basic rules of statutory interpretation, it is assumed that the words, "*regardless of the form of the contract"*, were not included in section 200A by mistake. Therefore, these words need to be accorded their ordinary grammatical meaning, unless doing so would result in legislative absurdity in relation to this provision. Bearing that in mind, it appears to me that section 200A envisages the presence of a contract, regardless of its form, as *sine qua non* for this provision to apply. Therefore, given my finding of the absence of a contract in the present instance, it followed that section 200A did not apply.

[29] Article 4(b) of the ILO Recommendation, 2006.

Accordingly, the Court *a quo* erred, in my view, in upholding the commissioner's view that the section and its presumption applied.

Whether there was any legally enforceable agreement in place in the relationship between the Church and Mr Myeni

[42] In a UK Supreme Court decision, *President of the Methodist Conference v Preston*[30] *("Preston"),* the majority Court, setting aside the decision of the Court of Appeals[31] held that the respondent, Ms Preston, a superintendent minister in the Methodist Church, was not an employee of the church, but was only serving as a minister *"pursuant to the lifelong relationship into which she had already entered when she was ordained."* Delivering the judgment of the Court, Lord Sumption stated, amongst others, the following:

> 'The question whether an arrangement is a legally binding contract depends on the intentions of the parties. The mere fact that the arrangement includes the payment of a stipend, the provision of accommodation and recognised duties to be performed by the minister, does not without more resolve the issue. The question is whether the parties intended these benefits and burdens of the ministry to be the subject of a legally binding agreement between them. The decision in Percy is authority for the proposition that the spiritual character of the ministry did not give rise to a presumption against the contractual intention. But the majority did not suggest that the spiritual character of the ministry was irrelevant. It was a significant part of the background against which the overt arrangements governing the service of ministers must be interpreted.'

[43] It is clear that besides the section 200A presumption, Mr Myeni has nothing else to rely on. Therefore, the only tangible supportive evidence is the two documents, which however favours the Church. The documents were signed by both parties and they constituted an agreement between them. In terms of the documents, Mr Myeni acknowledged that he was not an employee of the Church – a situation that appears to be precisely what section 200A was intended to combat. As indicated above, article 10 of the Code of Good

[30] [2013] UKSC 29, 15 May 2013.
[31] That is, the Court of Appeals in *President of the Methodist Conference v Preston (formerly Moore)* [2012] IRLR 229 CA.

Practice provides, among other things, that *"a statement **in a contract** that the applicant is not an employee or is an independent contractor must not be taken as conclusive proof of the status of the applicant".* It is, therefore, important at this stage to determine whether the agreement (as per the documents) was incorporated in a contract. Put differently, does this agreement constitute a legally enforceable contractual transaction between Mr Myeni and the Church, aimed at regulating their relationship?

[44] Firstly, there was no suggestion on behalf of Mr Myeni that the documents incorporated any legally binding agreement between him and the Church. Secondly, even if there was, it would not pass muster in terms of compliance with formal and essential requirements of a valid contract. It is settled law that the intention of the parties in any agreement - express or tacit - is determined from the language used by the parties in the agreement[32] or from their conduct in relation thereto.[33] Further, that not every agreement constitutes a contract.[34] For a valid contract to exist, each party needs to have a serious and deliberate intention to contract or to be legally bound by the agreement, the *animus contrahendi*.[35] The parties must also be *ad idem* (or have the meeting of the minds)[36] as to the terms of the agreement. Obviously, absent the *animus contrahendi* between the parties or from either of them, no contractual obligations can be said to exist and be capable of legal enforcement.[37]

[45] The facts of this case appear to show that neither party ever intended to enter into any legally binding agreement with the other. Based on the apparent tenor and spirit of the two documents as well as that of the Church's constitution (which Mr Myeni subscribed to) and his own evidence during the arbitration hearing, it seems to me that Mr Myeni's only "contractual" interest,

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[32] *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465.
[33] *Irvin & Johnson (SA) Ltd. v Kaplan* 1940 CPD 647 at 650.
[34] *Bourbon-Leftley en Andere v Wpk (Landbou) Bpk* 1999 (1) SA 902 (C); *Electronic Building Elements v Huang* 1992 (2) SA 384 (W) at 387E
[35] *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465.
[36] *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 487.
[37] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 189, 237; *Steyn v LSA Motors* 1994 (1) SA 49 (A) at 52I-53A; *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 262 (CC) at 290C-D.

if any, would have been more about binding himself to working for God than to be a remunerated employee of the Church who was subject to the labour laws of the country. The following extracts from the arbitration record reflect some parts of his evidence, in this regard:

> '"So I was one of those six which (sic) selected in my church and doing the work of God that is like spreading the good news of God throughout the world."[38]
>
> "To be a pastor mainly is to preach the gospel of God throughout the world."[39]
>
> "COMMISSIONER: "… You tell me what you want. …. Sir, like when I was fired I was working for God. I had no interest in leaving the work of God. I still want to do the work of God, but doing the work of God I can still do it in other churches as well as a pastor. Though I want to continue working for God at the church but most of the things that I have gone through are they going to favour me to be able to carry on my job as I was informed (sic)?"'[40]

The following exchange appears under cross-examination:

> "Do you agree you worked for God? … Yes"[41]
>
> "Do you understand what that means that you are not an employee and you receive a subsistence allowance to keep you do your job working for God? …. Yes."[42]

[46] As for the Church, it is common cause that it never intended to enter into any contract whatsoever with Mr Myeni. Ironically, this position is expressly confirmed by the commissioner's own finding when he said: *"There is no doubt that the respondent [now the appellant] did not want to enter into an employment contract."*[43] On this basis alone, it could not be said, in my view, that the parties were *ad idem* as to the existence of any legally binding agreement between them.

[38] Record, vol 3 at 220 line 24 -221 line1.
[39] Record, vol 222 lines 16-17.
[40] Record, vol 3 at 252 lines15-21.
[41] Record, vol 3 at 264 line 12.
[42] Record, vol 3 at 266 lines 15-17.
[43] Arbitration award, para 33.

[47] In the circumstances, I find that there was no employment contract or contractual arrangement in place between Mr Myeni and the Church which regulated his pastoral relationship with the Church. In *Preston,*[44] the Court remarked that *"[t]he primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service"*. In the present instance, the relationship between the Church and Mr Myeni was governed mainly by the Regulations and the Declaration signed by both Mr Myeni and the Church. However, since both documents did not constitute an employment contract or contractual arrangement, there was no employer and employee relationship between Mr Myeni and the Church.

[48] Having found that there was no employment relationship between Mr Myeni and the Church, I am inclined to accept that the subsistence allowance in the form of a stipend and the accommodation benefits provided by the Church to Mr Myeni and his wife jointly, did not constitute a remuneration package for Mr Myeni because such money and benefits were not owed to him by the Church or given to him in return for his pastoral services. After all, it would be highly unusual in any employment situation that an employer combined two employees in one salary cheque, as Mr Myeni sought to claim that he and his wife were somewhat combined in one "joint salary" of R7 500.[45] This was simply a further illustration that the payment was never intended to be a remuneration package in terms of any labour legislation. For obvious reason, it is not necessary to proceed and deal with the other section 200A factors found to be present in Mr Myeni's involvement with the Church.

Whether, in any event, an employment relationship could still be established between Mr Myeni and the Church despite the absence of a contract of employment

[49] In his pleadings, Mr Myeni relied especially on the section 200A presumption, which I have found did not apply in this case, by reason of the fact that there was neither an employment contract nor a contractual working arrangement in place between Mr Myeni and the Church. Nonetheless, even if I were to consider the matter to the exclusion of section 200A, it does not appear to me

[44] *Preston*, above, at para 10.
[45] Record, vol 3 at 242 lines 13-21.

that I would have reached a different conclusion. In other words, even during the "pre-section 200A" era, the existence of an employment contract or contractual working arrangement was, in my view, still prerequisite for the creation of an employment relationship. I am aware that this was a rather contentious, if not controversial issue, occasioned particularly by the wording in the second leg of the definition of an "*employee"* in section 213, which includes *"any other person who in any manner assists in carrying on or conducting the business of an employer".*[46]

[50] This issue was dealt with by Waglay J in the *CPSA* decision. After a comprehensive interpretation of the definition of "*employee"* in section 213 (prior to the introduction of section 200A), the Labour Court found that "***a contract of employment is necessary for purposes of establishing an employment relationship*** *and that [since] there was no legally enforceable contract of employment between the applicant [i.e. the church] and the third respondent [i.e. the priest], the parties are not employer and employee as defined by the LRA and consequently the first respondent [i.e. the CCMA] has no jurisdiction to entertain the alleged dispute referred to it by the third respondent."*[47]

[51] Indeed, it appears to me that, by its very nature, an employment relationship presupposes a working arrangement of a contractual nature between two or more persons, in circumstances where the rights, duties and obligations *inter partes* are legally enforceable. Therefore, in the present instance, even if Mr Myeni had not relied on section 200A, I would still find that there was no legally enforceable agreement between him and the Church and that, for that reason, no employer and employee relationship existed between them. There was simply no contract that could be classified as an employment contract on the evidence.

[52] As stated, Mr Myeni produced no other evidence to support his claim that he was an employee of the Church, other than relying on the section 200A presumption. On the other hand, the two documents supported the Church's

[46] Section 213(b) of the LRA.
[47] *CPSA* at para 38.

contrary version and this evidence was not, in my view, contradicted. Nor was the oral evidence of two witnesses, Ms Masangu and Pastor Tshabalala, challenged at all. Indeed, there seems to be no explanation as to why this oral evidence was apparently completely disregarded by both the commissioner and the Court *a quo*. In my view, there was sufficient circumstantial material in this case to justify a probable inference, in terms of the rule on inferential reasoning in civil proceedings,[48] that Mr Myeni and the Church never had the intention to engage in a legally enforceable agreement. Indeed, this was consistent to the traditional practice in the Church, according to the evidence of the two witnesses.

Conclusion

[53] I think it is time that the resolution of disputes of this nature, with religious spiritual connotations or arising from internal church doctrinal governance, be left to the leadership of the church concerned, unless there is a real compelling reason for a court to get involved. In my view, the constitutional rights to the freedom of religion[49] and of association[50] would be better served and enhanced if that were to happen. Incidentally, recently, in *De Lange v Presiding Bishop, Methodist Church of SA,*[51] the Supreme Court of Appeal (per Ponnan JA, with Wallis, Pillay JJA, Fourie and Mathopo AJJA concurring) dealt with a similar situation. The following remarks by Ponnan JA (with which I fully agree) are both persuasive and educative:

> 'As the main dispute in the instant matter concerns the internal rules adopted by the Church, such dispute as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that the proper respect for freedom of religion precludes our courts from pronouncing

[48] *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1027 para.7; *Law Society, Cape of Good Hope v Berrange* 2005 (5) SA 160 (C) at 171*; Macleod v Rens* 1997 (3) SA 1039 (E); *Mohammed & Associates v Buyeye* 2005 (3) SA 122 (C) at 129D.
[49] Section 15(1) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution")
[50] Section 18 of the Constitution
[51] 2015 (1) SA 106 (SCA).

on matters of religious doctrine, which fall within the exclusive realm of the Church.'[52]

[54] On the facts of this case, I am satisfied that the mutually agreed relationship between Mr Myeni and the Church was one in which Mr Myeni rendered voluntary devotional service to the Church, under circumstances where both he and the Church never intended that such relationship would constitute an employment relationship between them, producing legally enforceable rights and obligations under the LRA. In my view, Mr Myeni's claim borders on the label of disingenuousness and opportunism, to say the least.

[55] Therefore, in my judgment, I hold that Mr Myeni failed to make out a case that he was an employee of the Church as defined in section 213, read with section 200A, of the LRA at the time his pastoral services with the Church were terminated. On that basis, the CCMA did not possess the requisite jurisdiction to entertain the dispute between Mr Myeni and the Church.

[56] For these reasons, I am unable to find the basis upon which the correctness of the judgment of the Court *a quo* can be justified. Therefore, the appeal should succeed, with costs.

The order

[57] Accordingly, the following order is made:

1. The appeal is upheld with costs.

2. The order of the Court *a quo* is set aside and substituted with the following order:

'(1) The review application is granted and the applicant's point *in limine* is upheld.

(2) The arbitration award (Case No. KNDB16320-11 issued on 21 March 2012) is reviewed and set aside; and is substituted with the order that: *"The CCMA does not have the requisite jurisdiction to entertain this*

[52] At para 39.

dispute, by virtue of the absence of employer-and-employee relationship between the parties."

(3) The third respondent (Mr Myeni) shall bear the costs of the review application.'

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Ndlovu JA

Waglay JP and Davis JA concurred in the judgment of Ndlovu JA

APPEARANCES:

FOR THE APPELLANT: Mr P Pauw SC (with Mr BD Hitchings)

Instructed by Martins Weir-Smith Inc

c/o Livingston Leandy Inc, Durban

FOR THE FIRST RESPONDENT: Mr M Mfungula

c/o Noxaka Mfungula Company, Durban