

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: C619/2000

In the matter between:

**THE CHURCH OF THE PROVINCE OF SOUTHERN
AFRICA DIOCESE OF CAPE TOWN**

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

G GALANT, N.O.

Second Respondent

L Z MATHEBULA

Third Respondent

JUDGMENT

WAGLAY J:

[7] The Applicant, commonly known as the Anglican Church of Cape Town, was established in 1876. It is regulated by its founding document, the Constitution and by the Canons developed over the years.

[7] The Third Respondent is an ordained priest of the Applicant church and licenced to hold

the priestly offices of the Canon Pastor of the St George's Cathedral and Archdeacon of the Waterfront.

[7] On 16 November 1999, and after being found guilty by Applicant's ecclesiastical tribunal on two charges of misconduct, the Third Respondent's licences to minister the aforementioned offices were revoked. The sanction imposed by the tribunal upon the Third Respondent is that the Third respondent is not allowed to hold any office or perform any ministry within the Applicant church for a period of at least five years. Although the sanction imposed does not revoke the Third Respondent's ordination as a priest, he will not receive any financial benefit which he would have received had his licence not been revoked.

[7] After the sanction was imposed upon the Third Respondent, he immediately approached the First Respondent - the Commission for Conciliation, Mediation & Arbitration (CCMA) - requesting that it conciliate his dispute with the Applicant which he alleged was that of a dismissal. According to the Third Respondent, the sanction imposed by the Applicant amounted to a dismissal and that such dismissal was unfair as provided for in the Labour Relations Act, no 66 of 1995 (*"the LRA"*). The Applicant denied that the First Respondent had jurisdiction to entertain the dispute - this it did by raising a point *in limine*.

[7] The point *in limine* was based on two grounds:

(i) that the Third Respondent was not an employee of the Applicant; and

(ii) that should the First Respondent assume jurisdiction over a decision made by the Applicant, it would constitute unjustifiable infringement of the Applicant's rights to freedom of religion and association, as set out in the Constitution of the Republic of South Africa, Act 108 of 1996 ("*SA Constitution*").

[7] The Commissioner - the Second Respondent herein - after hearing the evidence and arguments presented by the parties, dismissed the Applicant's point *in limine*. The Applicant now seeks to review and set aside the determination of the Second Respondent.

[7] The evidence that was led before the Second Respondent - both orally and by way of documents - and the arguments presented can be summarised as follows:

(10) The Constitution and the Canons constitute the legal framework within which the Applicant operates. While the Constitution sets out the principles that underlie the functions of the church and the manner in which it is structured by, for example, providing for , the establishment of Dioceses and Synods and the powers and duties of such bodies - the Canons give substance to the principles contained in the Constitution. The Canons relate not only to the appointment and tenure of the clergy, the election of bishops but various other matters such as matrimony and pastoral discipline. The Canons also deal with the disciplinary proceedings of priests and bishops. The rules and regulations that constitute the Canons are applicable not only to the clergy within the Applicant church but also to Applicant's parish councils, church wardens, chapel wardens and the general public who

are members of the Applicant.

- (10) The Anglican Church is divided into various diocese and, while each is independent and autonomous, they are all bound by the same constitution. The Canons may, however, differ from diocese to diocese depending on the peculiarities of the area in which they are based . Whatever the difference, if indeed any, all the Canons must be in line with the Constitution and therefore principally the Canons are similar, if not the same, at every diocese.
- (10) The Applicant is part of the Southern African Anglican Church which not only has close links to the Church of England but with Anglican churches worldwide, and together form part of the Anglican Communion subscribing to the same basic principles of faith as set out in Scripture and Book of Common Prayer and of ordering of Bishops, Priests and Deacons. The applicant is organized and operates almost identically to the church of England and with regard to the relationship between the church and the clergy , there is no difference .
- (10) The Applicant - like its equivalent elsewhere - has three levels of clergy: bishops, priests and deacons. The position of Canon Pastor is that of a priest. Matters relating to the appointment, removal and co-ordination of the clergy are a Diocesan responsibility which is carried out by the Bishop (or Archbishop as in the present matter) of that Diocese.
- (10) In order for a person to become a priest within the Anglican Church generally, the person must demonstrate a clear vocation. This does not mean a wish or desire to be a priest, but

a calling from God to the priestly office. The Church does not allow a person to proceed towards priesthood until the truth of his calling is tested and confirmed by the Church. Once the calling is confirmed, the Church provides the necessary training at the end of which the candidate is ordained - first as a deacon and later as a priest.

(10) At the time the candidate is ordained as a priest (which is done at a service of ordination) he or she is required to publicly and in the affirmative answer certain standard questions which, *inter alia*, confirm that he or she was “*called by God and His Church to the life and work of a priest*” and that he or she accepts “*the discipline of this Church and [will] reverently obey [his or her] Bishop and other ministers set over [him or her] in the Lord.*”

(10) Once ordained as a priest, a priest is not able to carry out any specific ministry: to be able to do so he or she must be licenced by the Bishop of the diocese in which he or she is asked to carry out an active ministry. The licencing is a ritualistic process done either at the Eucharist or at the Morning or Evening Prayer service. The process by which licence is issued is as follows:

(2) the priest makes the Declaration required by Canon 16.2 and signs the Form of Oath and Declaration; and finally

(2) the Bishop reads the Licence and delivers it to the priest ending with the following words which are said to the priest: “*I commit to you the cure, the care of souls, which is both yours and mine.*”

The whole process and the documents read and signed are standard in the Anglican Communion worldwide.

(10) The oath of "*Canonical Obedience*" is an oath of obedience to the priest's ecclesiastical superior to the extent that the superior acts in accordance with the Canons. The Bishop, therefore, cannot expect obedience from the priest outside the framework of the Canons.

(10) Once licenced, his duties and obligations are defined and described in the Applicant's Constitution and Canons. While the Bishop generally exercises supervision and control over the priest, this appears to be done through motivation, guidance and encouragement rather than command and control. The system according to both the Applicant and the Third Respondent operates largely on trust.

(10) The installation of a priest into a ministry carries with it certain financial benefits, in the Applicant's case the benefits given consist of:

a) a stipend, being a monthly subsistence allowance (this is sourced from the incumbent's parish but paid over by the Diocesan Office and the amount of the stipend is reviewed annually);

b) a thirteenth stipend;

c) a housing allowance for priests attached to a parish;

- d) a travelling allowance;
- e) an Archdeacon's allowances;
- f) telephone and electricity charges;
- g) annual and special leave;
- h) removal allowances;
- i) membership of the Sick and Aged Fund;
- j) membership of the Provincial Pension Fund.

The Third Respondent received all of the benefits and tax was deducted , as would be had the benefits constituted salary.

- (xi) According to the Applicant, the benefits recorded above, including the stipend, are regarded by it as its contribution to enable its licenced priest to carry out his or her calling to the priestly office and is not a reward for services rendered.
- (xii) The Constitution and the Canons set out the circumstances in and the procedure by which, a priest's licence may be revoked. One of the ways in which this may happen, as happened to the Third Respondent, is that a licence may be revoked where a member of the clergy is charged with a disciplinary offence , brought before an ecclesiastical tribunal and found guilty after being heard.

(xiii) It was Applicant's evidence that a priest is not regarded as the servant of the Church: while the Church provides the framework for the priest's work (through the Constitution and Canons), the priest is regarded as working for God, ie. the relationship between the priest and the Church cannot be regarded as one of employment. The Applicant simply, according to it, provided the sphere within which priests serve God arising out of their calling. It is for that reason, so Applicant argued, that priests are said to be called of God and serving God and offering their lives to God - this precludes the Anglican Church generally, and the Applicant in particular, from speaking of employing priests.

(xiv) Applicant then argued that, while there is a mutual commitment to the relationship between the priest and the Church, this is not a bilateral and enforceable civil contract; it is a commitment by the priest to serve God through the ministry and office of a priest, and a commitment by the Applicant to support the priest in that ministry. Further that the material benefits attached to the office of the priest was not remuneration but the provision by the Applicant of means to support the priest in order for him to carry out his calling. The amount of stipend that is paid to a member of the clergy is the same irrespective of ability, capability or experience and, in any event, the clergy has no entitlement thereto.

(xv) Applicant, in its evidence, added that it did have in its employ administrative staff who were properly regarded as employees and that it did participate in the secular world and entered into civilly binding agreements, but remained adamant that its agreement with the clergy was not a civilly enforceable one but one that was regulated by ecclesiastical or Canon law, that the licencing process was nothing other than giving Deitary authority for a priest to hold office and not one which evinces any employment contract or any other secular relationship.

(xvi) While not challenging most of the evidence led by the Applicant, the Third Respondent's evidence was that the licence to hold office constituted the employment contract as it was the culmination of negotiations that preceded its grant. According to the Third respondent, he was invited to join the Applicant's staff, informed about the financial benefits attached to the position offered, he accepted the position and, once he was licenced, that concluded an agreement between Applicant and him . What was agreed was nothing other than a contract of employment.

xvii) Third Respondent further argued that the stipend was in fact a salary, that he was entitled to it and that his entitlement was supported by biblical text. In his evidence, Third Respondent conceded that there was a fundamental difference between the relationship of a priest with a church and a secular relationship because, according to him, there was no entitlement between the parties in the former case .

xviii) In essence, Third Respondent's evidence and argument was to the effect that, having regard to the process that preceded the licencing (the correspondence containing an offer to join Applicant's staff and the benefits that were attached to the post offered) the licencing itself , the factual position that he is required to fulfil certain obligations in return for which he receives certain benefits, and that he is answerable to a superior, demonstrates that his position *vis-a-vis* the Church is that of employee and employer.

[9] Based on all of the above, the Second Respondent concluded that the Third Respondent was in fact an employee and the Applicant his employer as defined by the LRA. In arriving at his decision, the Second Respondent examined the common law position

as well as the statutory definition of an employee and applied the test which is now commonly referred to as the “*dominant impression test*” (see *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A)). The Second Respondent specifically took into account that the Third Respondent:

- a) was paid a regular amount every month, which amount was subject to income tax and other deductions for staff benefits;
- b) was eligible for participation in the car loan / travel allowance scheme;
- c) was bound to minister within the confines of the Applicant and in a manner determined by the Applicant, as set out in the Canons and the Constitution of the Applicant;
- d) was subject to the authority of the Bishop, through an oath of obedience, without which he could not hold office; and
- e) was bound by Church practises and was expected to perform his duties personally and to make his time available to the Applicant.

[10] The Second Respondent also found that Applicant has the capacity to contract, has a large workforce at least of administrative staff and has broad powers to affect the working life of its staff . He concluded that a contract of employment came into existence when the Third Respondent was licenced to perform the functions of a priest.

[11] The grounds upon which the Applicant seeks to review or set aside the award are the following:

a)that the Second Respondent committed a gross irregularity in that he failed to enquire into or determine whether or not there was a contract between the Applicant and the Third Respondent;

b)that had he determined the issue of the existence of a contract between the Applicant and the Third Respondent and found that there was a contract, the contract was not one of employment as the key characteristics for the relationship to be one of employment were absent - the Second Respondent's decision was therefor neither justifiable nor rational in relation to the evidence that was properly before him; and

c)that it would be a violation of the rights granted to the Applicant in terms of the S A Constitution relating to the freedom of religion and association if the First Respondent were allowed to determine the alleged dispute .

[12] Applicant is quite correct when it states that the Second Respondent failed to determine whether or not there was any valid and binding contract between it and the Third Respondent. This was a crucial issue. Applicant's primary objection to the First Respondent's jurisdiction was based upon this contention . The Second Respondent nonetheless proceeded to determine the matter on the basis that there was a contract between the parties. In doing so, I am satisfied he committed a reviewable irregularity. This is so because once a party denies the existence of an enforceable agreement, it is necessary to determine whether or not an enforceable agreement exists before determining what the nature of the agreement is . In this matter, by having regard to the duties and obligations of the parties, the second Respondent determined the nature of the agreement without taking into account whether or not the parties had entered into an enforceable employment relationship.

[13] According to the Applicant, what existed between the Third Respondent and it, was not a civilly enforceable contract but an ecclesiastical or spiritual agreement, an agreement that was regulated by its Constitution and Canons and not by secular law. This argument is based on the following:

a)no person can enter the priesthood within Applicant's communion without being called by God, which calling is tested by the Church;

b)that ordination to priesthood does not guarantee office, yet an oath of obeisance is required before ordination;

c)the licencing process was ritualistic and merely confirmed, yet again, the oath taken when admitted to priesthood and entrusted the priest with the "*cure of souls*" in respect of the licensed area;

d)the rights, duties and obligations as contained in the Constitution and Canons, while regulatory, did not create rights outside its confines;

e)that since the function of the priest is to spread the word of God, the priest is therefore not a "*servant*" of the Church but a servant of God.

ie. As a priest is one who takes up the position because he is "*called*" upon to do so by God and is a person who serves and offers his life to God, it cannot be said that he is an employee of the Church - the Church does not employ priests but merely facilitates their calling by providing the framework within which a priest can serve God. The only regulatory framework that governs their relationship, therefore, is the Constitution and the Canons.

- [14] The unchallenged evidence led by the Applicant was that the Applicant, as a member of the Anglican Communion, shares fundamental characteristics with the Church of England - in particular the way the clergy relate to the Church, and contended that it, like the Anglican Churches worldwide, do not enter into any contract of employment with its clergy. This contention is supported in a number of decided cases.
- [15] In the most recent case that has been reported - Diocese of Southwark v Coker [1998] ICR 140 (CA), a decision of the Court of Appeal in England - Coker, a clergyman with the Church of England who received a monthly stipend and benefits similar to those received by the Third Respondent, alleged that he was dismissed and challenged the fairness of his dismissal. The Church contended that Coker was not an employee for the purpose of the Employment Protection (Consolidation) Act of 1978 because there was no contract between Coker and the Church.
- [16] Coker's dispute was first considered by the Industrial Tribunal in England who decided that he was indeed an employee and the Church his employer. The Church appealed this decision to the Employment Appeal Tribunal. The Appeal Tribunal reversed the finding and found that Coker was not employed under a contract of service but was a holder of an ecclesiastical office and, as such, his rights were confined not by contract but by ecclesiastical law. Coker then appealed to the Court of Appeal. The Court of Appeal concluded that he could not be held to have entered into a contract with the Church at all and it was therefore unnecessary to decide whether he was party to an employment contract or some other type of contract.
- [17] In reaching this conclusion, the Court of Appeal stated as follows (at 146F - 147H per Mummery LJ):

*"In **President of Methodist Conference v Parfitt** [1984] ICR 176, 183, Dillon LJ*

said:

'[T]he courts have repeatedly recognized what is and what is not a contract of service and I have no hesitation in concluding that the relationship between a church and a minister is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service.'

...

Although not explicitly analysed in these terms in the authorities, the simple reason, in my view, for the absence of a contract between the church and a minister of religion is the lack of intention to create a contractual relationship ...

In my judgment, the legal position is as follows:

(1) Not every agreement constitutes a binding contract. Offer, acceptance and consideration must be accompanied by an intention to create a contractual relationship giving rise to legally enforceable obligations.

(2) That intention is to be objectively ascertained. In the case of an ordinary commercial transaction, it will be for the person who contends that there was no contract to establish that the intention to create a binding contract has been negated.

(3) In some cases, however, there is no contract, unless it is positively established by the person contending for the contract that there was such an intention to create a binding contractual relationship. This is such a case ...

The critical point in this case is that an assistant curate is an ordained priest. The legal effect of the ordination of a person admitted to the order of priesthood is that he

is called to an office, recognized by law and charged with functions designed by law in the ordinal, as set out in the Book of Common Prayer. The ordinal governs the form and manner for ordaining priests according to the order of the Church of England. Those functions are also contained in the canons of the Church of England and are discharged by a priest as assistant curate. It is unnecessary for him to enter into a contract for the creation, definition, execution or enforcement of those functions. Those functions embrace spiritual, liturgical and doctrinal matters, as well as matters of ritual and ceremony, which make what might otherwise be regarded as an employment relationship in the secular and civil courts more appropriate for the special jurisdiction of ecclesiastical courts.

The legal implications of the appointment of an assistant curate must be considered in the context of that historical and special pre-existing legal framework of a church, of an ecclesiastical hierarchy established by law, of spiritual duties defined by public law rather than by private contract and of ecclesiastical courts with jurisdiction over the discipline of clergy. In that context, the law requires clear evidence of an intention to create a contractual relationship in addition to the pre-existing legal framework."

[18] Mummery LJ went on to say that he saw no reason why an ordained priest, licensed by his bishop to assist the incumbent in his cure of souls, is under contract with the bishop, by whom he is licensed, or with the incumbent he is assisting, or with anyone else, in the absence of a clear intention to create a contract. He agreed with the following *dictum* from In re National Insurance Act 1911: In re Employment of Church of England Curates [1912] 2 Ch 563:

"[the position of an assistant curate is] not the position of a person whose rights are

defined by contract at all. It appears to me that there can be no pretence in reality for arguing that the relationship between him and his vicar, or between him and his bishop, or between him and any one else, is the relation of employer and servant."

[19] Staughton LJ, in concurring majority judgment, stated the following (at 150E - 151B):

"One can say that a minister of religion serves God and serves his congregation, but does not serve an employer. That seems to me to be accurate in general terms ...

I agree with the analysis of Mummery LJ and his conclusion that in general the duties of a minister of religion are inconsistent with an intention to create contractual relations. There may be some subsidiary contract as to a pension, or the occupation of a house; but there is not a contract that he will serve a terrestrial employer in the performance of his duties.

...

If a curate or his bishop, or incumbent, intend to create legal relations, then there will be a contract between them ... But if, as I would hold in the ordinary way, no intention to create legal relations is to be inferred, there is no contract of employment between them ..."

[20] As appears from the *dictum* quoted above from In re National Insurance Act 1911: In re Employment of Church of England Curtes (*supra*), in the early part of the 20th Century the English Courts had already held that the authority of an ecclesiastical superior over an office-holder in the Church is exercised by virtue of ecclesiastical jurisdiction, and does not depend on an employment contract. The question therefore was not what kind of employment contract it was (independent contractor or employer/employee), but whether it was an employment contract at all.

[21] A similar approach was adopted by the House of Lords in Davies v Presbyterian Church of Wales [1986] 1 All ER 705 (HL). In this case, the ministry of a minister of the Presbyterian church had been terminated. He claimed reinstatement. Lord Templeman found that he was not entitled to such relief on the basis that he was not a party to a contract of employment. He set forth his reasons thus (at 709g-j):

"My Lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. But in the present case the pastor of a Church cannot point to any contract between himself and the Church. The book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. The duties owed by the pastor to the Church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the Church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the Church, then his pastorate can be brought to an end by the Church in accordance with the rules. The Law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable church would sever the link between minister and congregation."

[22] In Knowles v The Anglican Church Property Trust, Diocese of Bathurst, (1999) 89 IR 47 the Industrial Relations Commission of New South Wales, Australia, followed the English line of decisions in finding that the relationship between a priest and the Anglican Church was a religious one, based on a consensual compact to which the parties were bound by their shared faith, and not based on any common law contract.

This was followed by the Supreme Court of South Australia in Greek Orthodox Community of SA Inc v Ermogenous, SCGR 99 - 653 (2000) SASC 329 where the majority of the Court held the English and other Commonwealth case law to be persuasive, and that the intention of the parties to enter into contractual relations was the decisive factor. This factor, due to the spiritual nature of the relationship between a priest and his Church, could not be presumed and was ultimately found to be lacking. The Court held that:

“the spiritual character of the relationship, the fact that it is ecclesiastical authority which may be exercised over the person, the nature of the duties of a priest or a minister, the commitment and decision to the service of God, the fact that the position may also be regarded as an office and the fact that there is a submission to a set of pre-determined rules and conditions or orders and to a set of ecclesiastical discipline will generally militate against a finding that the necessary intention [to enter] into contractual relations has been formed.”

[23] The New Zealand Court of Appeal followed roughly the same route in its 1998 decision in Mabon v Conference of the Methodist Church of New Zealand, [1998] 3 NZLR 513 which held that no employment relationship existed because the priest had failed to prove that an intention to create a legal relationship existed.

[24] The common thread that runs through all of these decisions is that, in a church and clergy relationship, the crucial question is whether, at the time the parties concluded the offer and acceptance, they intended to create a legally binding contractual relationship, ie. the mere fact of an offer and acceptance did not equate to a binding contractual relationship : the offer and acceptance had to be accompanied by the intention to create the contract.

[25] This Court had to decide a similar point *in limine* as raised by the Applicant before the Second Respondent, in the matter of Noel Schreuder v Nederlandse Gereformeerde Kerk (unreported case number J273/97, 5 March 1999). In that matter the Court held, on the facts, that a 'predikant' in die 'Nederlandse Gereformeerde Kerk' was an employee because he had been required, at the commencement of his appointment, to sign a letter of appointment setting out his duties and providing for his receipt of a salary . The Court there held as follows:

"Die beroepsbrief bepaal dan verder wat die predikant in ruil vir die vervulling van hierdie pligte ontvang. Daar is gevolglik volgens Dr Scholtz 'n plig op die predikant om sy ampspligte soos uiteengesit te vervul. Die predikant verkry aan die anderkant in ruil hiervoor weer 'n salaris en verlof- en pensioenvoordele asook lidmaatskap van 'n mediese fonds en assuransiedekking. Die beroepsbrief is dus die dienskontrak tussen die predikant en die gemeente (kerkraad).

...

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

[26] Also in Mankatshu v Old Apostolic Church of Africa and Others, 1994 (2) SA 458 (Tk AD), the Court considered the nature of the relationship between the church and its priests who had been excommunicated and held that their relationship was regulated by the Church's Constitution and that there were no provisions in that constitution for a contract of employment between them and that the constitution itself did not constitute a contract.

[27] In our law the principles that are applicable to contracts generally are also applicable to contracts of employment. Grogan, in his book "Workplace Law" (6th Edition at page 26) sets out the requirements for a valid contract to come into being as follows:

- "(a) There must at the time of contracting have been consensus between the parties in the sense that they had the serious intention to create mutual rights and duties to which they would be legally bound, and they must have each been aware of such intention.*
- (b) Each party must have the capacity to act in the sense that he or she is legally capable of performing the act which gives rise to the formation of the contract.*
- (c) The rights and duties assumed must be possible to perform.*
- (d) The rights created and duties assumed must be permitted by law.*
- (e) If formalities are prescribed for the formation of the contract, they must be observed."*

[28] A contract must of course be entered into freely and voluntarily with both parties being fully aware of the duties to which they have agreed. The only restriction is that a contract must not be one which is forbidden by statute or is *contra bona mores*. A contract may be written or oral, express or tacit. In the case of an employment contract Grogan (*op cit*) quite correctly states that what is required between the parties is a voluntary agreement with one party agreeing to perform certain specified and/or implied duties for the other for an indefinite period, and to be commanded to

carry out such duty in a particular way for a fixed or ascertainable wage (page 27). There are no formalities that are required to be complied with for the formation of an employment contract.

[29] An important issue however is whether a contract of employment is a pre-requisite for the creation of an employment relationship. The foreign cases quoted above dealt with statutes which defined an employee as *“an individual who has entered or works under ... a contract of employment”*, or such similar words. The LRA however defines an employee in s 213 as

- “(a) any person, excluding an independent contractor, who works for another person 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 the employer.*

While it is generally accepted that the first leg of the definition of employee refers to the common law contract of service (*locatio conductio operarum*), the second leg of the definition has proved to be somewhat contentious with arguments being made that the definition does away with the need for a valid agreement between the parties to create an employment relationship. Du Toit et al, in their book “The Labour Relations Act of 1995”, state that the purpose of the second leg of the definition is:

“... to make clear that in certain circumstances a person may be employed by another within the meaning of the Act even in the absence of an employment contract between them.” (Page 70)

[30] I cannot accept that the definition of employee seeks to enforce employment contracts where this was not intended by the parties. In interpreting provisions similar to the definition as presently exist in the LRA the old Labour Appeal Court in the matter of Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 660 (LAC) recognised the need to restrict the apparent scope of the wording to avoid absurd consequence (see Du Toit (*op cit*)). However, while I accept that the protective objective of the Act requires a generous interpretation with regard to the meaning of “employee”, it cannot be interpreted to mean that an employment relationship should be forced upon parties who did not intend creating one.

[31] In the Explanatory Memorandum to the Draft Bill (Government Gazette, 10 February 1995, No. 16259, page 118) it was stated that the definition as it now exists in the LRA was chosen “*to include the various forms of atypical employment ...*” - this is understandable - the modern work arrangement where employees are often left to their own devices to carry out their duties necessitates a great degree of flexibility. Hence, while the definition of an employee in the LRA is designed to give the CCMA and this Court a degree of flexibility to determine the existence of an employment relationship, it does not give either the CCMA or this Court the right to create such a relationship simply by considering the duties and obligations of the parties to each other.

[32] The duties and obligations together with the other factual issues that are applicable between parties *inter se* can only help to determine the nature of the contract once it has been established that there is a legally binding agreement between them. In this matter, the Third Respondent argued that what is decisive in determining whether or not a legally binding contract of employment exists is to look at the duties and obligations that one has to the other in a holistic manner. This sounds appealing. It

is patently easier to gather whether or not there is an employer and employee relationship by reference to the duties and obligations, but to do so would be to go against the very basic principle that governs our law of contract, and that is that the parties must have intended to enter into a legally enforceable contract, because the enforceability of the duties and obligations is dependant upon it. Our law recognises that not all agreements constitute legally enforceable contracts. In Electronic Building Elements v Huang, 1992 (2) SA 384 (W) at 387 E, the Court held:

"If the parties choose to exclude from legal enforceability any arrangements arrived at between them, then it can become no more than a moral obligation or an obligation of honour, but unenforceable in a court of law."

[33] The evidence of the Third Respondent at the hearing before the Second Respondent, was that there was a fundamental difference between the relationship of a priest with a church as opposed to a secular relationship, because there was no entitlement between the parties, yet he maintains that once he was issued with a licence a binding legal contract of employment was concluded between him and the church. This argument is difficult to comprehend. If he concedes (as he has) that he could not force Applicant to remit the stipend to him in a court of law or the Applicant enforce his performance through a secular court, how then could there be a binding employment contract between them enforceable in the secular and civil court. Third Respondent refers to the correspondence that was forwarded to him by one of Applicant's priests, offering him the post with the Applicant. This offer also indicated what benefits he would receive if he accepted the position. According to him, the fact of his being licenced was a demonstration of the acceptance of the offer, and thus the coming into being of a valid and enforceable legal contract. While I accept that there was an offer and acceptance, I do not accept that an offer and acceptance such

as evinced here gave rise to a binding contract of employment. In this respect I agree with the *dictum* set out by Mummery LJ in Coker (supra), where he held that an offer, acceptance and consideration are not sufficient to create a contractual relationship giving rise to a legally enforceable obligation - offer, acceptance and consideration must be accompanied by an intention to create a contractible relationship giving rise to enforceable obligation. This *dictum* is in line with the basic principle of contract applicable in our law.

[34] The undisputed evidence led by the Applicant's witness was that there never was an intention on the part of the Applicant to create a legally binding employment contract. The Third Respondent's submission that his intention was indeed so was contradicted by his very evidence that the relationship as a licensee with the Applicant was governed by ecclesiastical law.

[35] In the circumstances, while it is so that the duties and obligations of one to the other could be interpreted as constituting an employment contract, the duties and obligations, like the offer, acceptance and consideration cannot create an employment contract where the parties themselves had not intended one to come into existence.

[36] The licencing ritual on which Third Respondent relies as proof of the intention to create a legally enforceable employment contract does not provide any support for Third Respondent's contention. The very basis of the licencing process is religious: the oath, declaration and "parting" words remove it from the realm of creating civil obligation. The oath of obedience taken by the Third Respondent is no different to the oath he took when admitted to priesthood without being given any ministry or benefits. Committing him to "*cure the carer of souls*" can hardly be seen as a

welcome to an employment relationship.

[37] The licencing process is no more than a formal entry of a priest to the ministry , to put his calling - which comes from God - into action . While it may be difficult to comprehend a “calling from God” , the Applicant and the Third Respondent agree that the very basis upon which their relationship exists is that “calling” . This being so ,the church must be seen as providing the space for those called upon by God to give effect to that Calling . The fact that in providing that space it may be providing all the features of an employment relationship cannot make that relationship an employment one .

[38] Furthermore in the matter of GG Paxton v The Church of the Province of Southern Africa , Diocese of Port Elizabeth (unreported case no.NH 11/2/1985 (PE)) the Industrial Court faced with an identical point *in limine* and dealing with another Diocese of the Applicant church , examined the relevant provisions of the constitution of the church and the canons and concluded as follows :

“The picture which emerges both from a study of the relevant provisions of the constitution and canons , the acts, and ,the actual features of the relationship between the parties , is not one of employment. Rather , it is a picture of a spiritual relationship , commencing in formal terms with the applicant taking an oath of canonical obedience to the Bishop , being invested with the spiritual office of a priest , being licenced to officiate as a priest and authorized to administer the sacraments and perform various other ministrations and duties in accordance with the canons of the church. Certainly the applicant was subject to the authority and discipline of the respondent , but such authority and discipline are derived not from any employment relationship between the parties , but from the ecclesiastical authority of the Respondent , as exercised by its institutions and office-bearers in

positions of ecclesiastical superiority in relation to the Applicant”.

[39] I agree with the above conclusion and I am satisfied that there was in fact no intention on the part of either the Applicant or the Third Respondent to enter into a legally enforceable employment contract. The failure by the Second Respondent to consider this issue as I have stated earlier, constituted a reviewable irregularity because it goes to the very root of whether or not the First Respondent has jurisdiction to entertain the dispute.

[38] Since I have found that a contract of employment is necessary for purposes of establishing an employment relationship and that there was no legally enforceable contract of employment between the Applicant and the Third Respondent, the parties are not an employer and employee as defined by the LRA and consequently the First Respondent has no jurisdiction to entertain the alleged dispute referred to it by the Third Respondent.

[39] By reason of my decision above, I see no need to deal with the other issues raised by Applicant, I may however add that had I not found that there was no contract of employment between the parties, I would not have interfered with the determination as made by the Second Respondent.

[40] Finally, with regard to costs, I am satisfied that this is not a matter in which an order of costs against the Third Respondent would be equitable .

[41] In the result, I make the following order:

The determination issued by the Second Respondent under the auspices of the First Respondent is hereby set aside and substituted with the following:

“The point *in limine* is upheld - the CCMA does not have jurisdiction to entertain the alleged dispute referred by the employee party against the employer party.”

WAGLAY J

JJ Gauntlett SC assisted by MW Janisch instructed by Cliffe Dekker Fuller Moore Inc

nt: PP de Klerk instructed by De Klerks Attorneys

: 7 September 2001