

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No.: J 464/02

In the matter between

**THE SALVATION ARMY
(SOUTH AFRICAN TERRITORY)**

Applicant

and

THE MINISTER OF LABOUR

Respondent

JUDGMENT

MAYA AJ:

[1] The applicant is a worldwide church organisation operating also in South Africa. It is regulated by covenants, orders and regulations, a constitution and an enactment of the Parliament of the United Kingdom, The Salvation Army Act of 1980. It describes itself in terms of this Act, as a “*body corporate not for gain with perpetual succession with the power to acquire rights and incur obligations, to acquire, hold and dispose of property, to enter into contracts and to sue and be sued in its own name, independently of its members, who are not liable for its debts, and have no rights to its assets*”. Its primary objective is to advance the Christian religion and, in

pursuance thereof, to carry out acts of charity and humanitarian relief, to aid suffering humanity. Its leadership is carried out by its clergy, called Officers who are ordained and commissioned ministers of religion. It also engages a number of employees, a majority of whom are unionised under various trade unions in the country, who do not necessarily have religious ties to it, but perform specific duties in the conduct of its affairs in terms of the contracts of employment it concludes with them.

[2] It seeks a declaratory order that its officers are not employees as defined in the **Labour Relations Act, 66 of 1995** (“the LRA”, the **Basic Conditions of Employment Act, 75 of 1997** (“the BCEA”), the **Employment Equity Act, 5 of 1998** (“the EEA”), the **Unemployment Insurance Act, 30 of 1966** (“the UIA”), the **Skills Development Levies Act, 9 of 1999** (“the SDLA”), the **Skills Development Act** (“the SDA”), 97 of 1998 and the **Compensation for Occupational Injuries and Diseases Act, 103 of 1993** (“the COIDA”); and that the provisions of these statutes are not applicable to the said officers.

[3] The respondent, the Minister of Labour, who is cited in his capacity as the official in charge of the Department vested with the administration of this legislation, did not oppose the application on condition that the relief sought with reference to the SDLA be withdrawn. The applicant accordingly withdrew the relevant

prayer.

[4] The basis of the application is that the applicant does not treat its officers as employees. Officers join the Salvation Army as cadets on a voluntary basis, in response to a call of God to spiritual ministry. They are trained for several years. Upon ordainment they sign an undertaking which explicitly excludes an employee/employer relationship, providing as follows:

“I give myself in response to the call of God and on my own free will to the ministry of the Salvation Army, and in doing so I acknowledge that as an officer I regard the fundamental nature of my relationship to the Army as spiritual.... I understand that there is neither a contract of service or employment nor a legal relationship between me and the Army, and accordingly I shall have no legal claims upon the Army or the Army upon me. I understand and agree that, although I may expect to receive allowances according to an official scale, no allowance is guaranteed to me. I accept that any such allowance is not a wage, salary, reward or payment for services rendered.”

[5] The applicant does not therefore implement and comply with the above labour legislation on behalf of the Officers. For example, it does not make unemployment insurance payment, did not file an employment equity plan, does not make payments to the Compensation Commissioner and does not pay skills levies on their behalf. It is thus concerned that should its interpretation of the word “employee” be wrong, severe consequences will follow in the form of deductions and payment of interest and penalties for failure to

comply with the relevant law. Reference was made to a notice issued against the applicant by the Compensation Commissioner warning it for failure to report an accident and injuries allegedly sustained by an alleged “employee”. Further reference was made to an unreported case decided by the CCMA, **Morris Ndarha and Another v The Salvation Army, Case No.: KN 64726** where two Officers referred a dispute which was decided in the applicants’ favour on an objection *in limine* raised by the latter, that the parties had not concluded an employment contract and that the Officers were not employees of the applicant.

[6] **Section 158** of the **LRA** sets out the powers vested in the Labour Court. **Section 158(1)(a)(iv)** thereof empowers the court to make a declaratory order. It is now established that this power is similar to that conferred upon the High Court to make such an order in terms of section **(19)(1)(a)(iii) of the Supreme Court Act, 59 of 1959** and that the approach adopted by the High Court in making such orders should be applied by the Labour Court. See: **NUMSA v CCMA & Others [2000] 11 BLLR (LC) at 1331J-1332A.**

[7] **Section 19(1)(a)(iii) of the Supreme Court Act** reads:

“A provincial or local division ...shall ... in addition to any powers or jurisdiction which may be vested in it by law, have power in its discretion,

and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”

[8] The test which a court faced with an application for a declaration of rights is set out in decided cases such as that of **Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (AD)** where Corbett CJ said at 14F-I:

“Generally speaking, the Courts will not, in terms of s 19(1)(a)(iii), deal with or pronounce upon abstract or academic points of law. An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case (see *Ex parte Nell* 1963 (1) SA 754 (A) at 759H-760B). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (*Nell’s case*, at 760B-C). In *Nell’s case*, supra at 759A-B, Steyn CJ referred with approval to the following statement by Watermeyer JA in *Durban City Council v Association of Building Societies* 1942 AD 27, at 32, with reference to the identically worded s 102 of the General Law Amendment Act 46 of 1935: ‘The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an “existing, future or contingent right or obligation”, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it’.”

See also *ex parte Chief Immigration Officer, Zimbabwe* 1994 (1) SA 371 (ZS) at 376E-377F.

[9] It was contended on the applicant’s behalf, *inter alia*, that:

- It is an interested party with an interest in both an existing and future right and obligation and has *locus standi* to bring the application because the legislation in issue places an obligation on it to perform certain acts and pay certain monies; the declaration sought is therefore part and parcel of its obligations;
- The status of its officers is not defined statutorily or in common law;
- Its dispute with the Compensation Commissioner is one of the factors which warrants the grant of the declarator which shall be binding on all interested parties; and
- It has no alternative remedy except to argue this issue at various forae whenever a dispute arises; a grant of the declarator at this stage will be more practical and ensure a saving on legal costs as it will bring about legal certainty on the relevant issue.

[10] It seems to me on a consideration of these submissions and other relevant facts alleged by the applicant in its papers that the issue raised is a live and important one which no doubt will at some stage come before this court or another appropriate forum. It is also undoubted in the circumstances that despite the undertaking which the Officers sign on ordainment there is real uncertainty and some measure of anxiety in the minds of the relevant parties. I am satisfied therefore that the applicant has established suitable circumstances which render a ruling on the issue necessary.

[11] It now remains to determine the nature of the relationship which exists between the applicant and its Officers. **Section 213 of the Act, as amended by s 51 of the Labour Relations Amendment Act No 42 of 1996**, defines the term “employee” as follows:

“ ‘Employee’ means:

- (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 the carrying out or conducting the business of an employer”.

The term is similarly defined in the BCEA and EEA. The definitions in the SDA and UIA are structured differently but carry substantially the same meaning as those set out in the former Acts.

[12] Commenting on the nature and meaning of employment, Myburgh JP said in the case of **SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC) at 591E-G**:

“The legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded (*Smit v Workmen’s Compensation Commissioner* at 64B; *Liberty Life Association of Africa Ltd v Niselow* at 683D-E), ‘although the parties’ own perception of their relationship and the manner in which the contract is carried out in practice may, in areas not covered by the strict terms of the contract, assist in determining the relationship’ (*Borcherds v C W Pearce & J Sheward t/a Lubrite Distributors* at 1277H-I). In seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it (*Golber v Durban City Council* 1970 (3) SA 325 (N) at 331B-C). As Brassey ‘The Nature of Employment’ at 921 points out, the label is of no assistance if it was chosen to disguise the real relationship between the parties, ‘but when they are bona fide it surely sheds light on what they

intended’.”

[13] In addition to the fact that the applicant does not conduct employment contracts with its Officers, who instead sign the undertaking mentioned hereinabove which expressly excludes an employment relationship, it was further submitted that the nature of the relationship is clearly not one of employer and employee. The following features thereof were highlighted:

- The relationship between the applicant and the Officers is spiritual and is governed by religious conscience and the Officers’ covenant with God; the Officer responds to a call of God to spiritual ministry and the applicant merely provides the sphere within which the Officers serve God;
- An Officer does not sell his services nor does the applicant buy such services; no salary nor allowance is guaranteed to the Officers who only receive a living allowance to enable them to forgo secular employment and carry out a Christian spiritual ministry through the applicant;
- An Officer’s leisure pursuits must be in keeping with his spiritual calling;
- An Officer does not retire from his calling; devotes his entire life to God and the applicant and remains a minister of religion until death;
- Save for direction in respect of administrative matters there is no control over the manner in which an Officer fulfils his spiritual calling and ministry; he then chooses when and where to pray, the style of

preaching, his pastoral care and other aspects of the ministry.

[14] In the case of **The Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others (2001) 22 ILJ 2274 (LC)**, Waglay J collected and analysed the relevant authorities decided by South African courts and courts in other jurisdictions on the nature of the relationship between a church minister and his church. He concluded at 2285E:

“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...”

The learned judge continued thus at 2287G: **“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”.**

See also **Lewis & Another v Contract Interiors CC (2001) 22 ILJ 466 (LC) at 471F.**

[15] In my view, it is clear in all the circumstances of this matter that the applicant does not enter into contracts of employment with its clergy. There is no such intention on the part of both the applicant and the Officers concerned. The Officers are therefore not “employees” of the applicant as envisaged by the labour legislation. The applicant has made out a case for the grant of the declarator it seeks.

[16] The following order is accordingly made:

The Officers of the applicant are declared not to be employees as defined in the Labour Relations Act, 66 of 1995; The Basic Conditions of Employment Act, 75 of 1997; The Employment Equity Act, 5 of 1998; The Unemployment Insurance Act, 30 of 1966; The Skills and Development Act, 97 of 1998; The Compensation for Occupational Injuries and Diseases Act, 103 of 1993, and the said Acts are not applicable on such Officers.

MAYA, A.J.

For the Applicant: Mr H Gerber
Instructed by Van Staden & De Beer Inc.

Date of hearing: 20 August 2004

Date of judgment: 2 September 2004

