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The South African Constitution and freedom of religion: some labour law imperatives and implications¹

ABSTRACT

Despite the fact that the 1996 Constitution provides for certain constitutional religious rights, it is clear that the development of the constitutional status of churches, their office-bearers, clergy and employees in South African law is still in an embryonic stage. Some guidance may be obtained from principled approaches adopted in comparative jurisdictions, and increasingly also in the South African jurisprudence. It is now generally accepted that clergy and ministers of religion render services not on the basis of being employees of the church, but on the basis of a particular spiritual relationship. In these cases labour law would, as a matter of principle, not find application, although practical and pragmatic reasons may exist as to why churches may wish to make use of the rich tapestry of labour law tenets to give content to the said relationship.

It remains possible that churches may choose to avail themselves of the contract of employment construction to determine the nature of their relationship with clergy. Other church workers, such as administrative personnel, would in any event be regarded as employees. In these cases labour law would find application although the specific church context of the relationship, as it is reflected in the applicable church documents, should have an important bearing on how the relationship is understood and the respective rights and obligations of the church and those who work for the church are enforced in labour tribunals.

1. INTRODUCTION

The new constitutional dispensation ushered in by the 1996 Constitution of the Republic of South Africa² has brought with it the protection of a wide range of fundamental rights. One of these rights grants to everyone freedom of religion,³ while another stipulates that persons belonging to a

1 Based on a paper presented at the Church and State Conference (Theme: Freedom of Religion under a new constitutional dispensation in SA), held at the Faculty of Theology, University of Stellenbosch, 24-25 Oct 2001.

2 108 of 1996.

3 Section 15(1). In *S v Lawrance*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) par 92 (quoted with approval by the Court in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par 18) the Constitutional Court accepted that the core of the concept is captured in the following

religious community may not be denied the right, together with others, to practise their religion and to form, join and maintain religious associations.⁴ The collective content and context of these rights has been recognised by the Constitutional Court,⁵ which also remarked that the latter provision must be understood against the backdrop of the constitutional negotiation process, and as giving effect to Constitutional Principle XII, with which the 1996 Constitution had to comply.⁶ This Constitutional Principle stated that collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, should be recognised and protected.⁷

Even if one were to assume that a measure of institutional autonomy is carved out for churches on the basis of anyone or both of these provisions, it needs to be said that the protection of these rights, whether from an individual, collective or institutional perspective, remains qualified by other constitutional imperatives. In the event of one of the mentioned fundamental rights this has been made explicit by the constitutional drafters. Section 31(2) makes it clear that the rights (referred to above) of persons belonging to religious communities may not be exercised in a manner inconsistent with any provision of the Bill of Rights. This was elaborated upon by the Constitutional Court in the case of *Christian Education South Africa v Minister of Education*,⁸ when it stated that section 31(2) "... insures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights".⁹

This, of course, raises the question as to what the nature is of the relationship between the fundamental rights relating to religion (referred to above) and the fundamental rights operating in the labour relations sphere – namely the right to fair labour practices, to freedom of association, to organise, to collective bargaining, and to strike.¹⁰ To my knowledge such a constitutional

description, "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination." See further Devenish G E 1999. *A commentary on the South African bill of rights*, 161-163 and Dlamini C 1998. Culture, education, and religion, in Van Wyk D *et al.* *Rights and constitutionalism: A new South African legal order*, 592.

4 Section 31(1).

5 *Christian Education South Africa* case par 19-20, 22-25. At par 25 the Court stated that the interest protected by section 31 is a qualitative one based on respect for diversity.

6 The interim Constitution (200 of 1993) contained 34 Constitutional Principles in Schedule 4. The new constitutional text passed by the Constitutional Assembly in terms of chapter 5 of the interim Constitution had to comply with these Constitutional Principles.

7 In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC)* noted in this regard, amongst others, that self-determination "... clearly relates to what may be done by way of the autonomous exercise of these associational individual rights, in the civil society of one sovereign State" (see par 24). It further noted (at par 25) that this protective framework for civil society was enhanced by institutional structures such as, amongst others, the Human Rights Commission and the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities. The Court accordingly held that the requirement of Constitutional Principle XII had been met.

8 2000 (4) SA 757 (CC).

9 Par 26. The enquiry as to whether in this context an infringement of particular fundamental rights has occurred, would of course imply a proper interpretation of the scope and content of the constitutional religious rights in question, and the balancing of these rights against other constitutional rights. See the discussion below.

10 Section 23.

enquiry has not yet been attempted by our courts. There may be at least two reasons why this is so. In the first place, as will be discussed below, in view of the approach adopted at times by our courts, certain categories of persons working in a church environment, notably the clergy, may fall outside the normal labour relations framework. This, however, does not mean that compliance with other relevant fundamental rights is not required.¹¹

Secondly, in those cases where labour law may be applicable, a constitutional enquiry and balancing of different fundamental rights may not be necessary, given the vast statutory regulation of the employment relationship existing in this country. And yet, one could argue, even in these cases the particular church context of the employment relationship and the specific constitutional protection afforded to religious groups may have a bearing on the content of the very relationship and to the interpretation given to rights and obligations flowing from such relationship.¹²

From a legal perspective, investigating the imperatives of labour law and the implications thereof for the church and its relationship towards those working in the sphere of the church, is of course not the only relevant enquiry. Other branches of law, notably administrative law, also have a potential bearing in this context. The reason why administrative law may be applicable, flows from the fact that the relationship between ministers of religion (and also church office-bearers, officials, employees and members) and congregations, parishes and other church structures operates within the sphere of voluntary associations. The rules of administrative law, notably the rules of natural justice, are accordingly applicable to this kind of hierarchical relationship.¹³

2. THE LIMITED SCOPE FOR THE APPLICATION OF LABOUR LAW

On several occasions in recent years South African courts were grappling with the question whether labour law regulates the relationship between churches and clergy, in particular ministers of religion. In some of these judgements, given the nature of the particular relationship on which the courts were asked to pronounce, the answer was a resounding and unequivocal no. And yet, in other cases a diametrically different approach was adopted, and an employment relationship, which invited the application of labour law principles, was found to exist.

From those judgements, which found labour law to be inapplicable, it would appear that the decisive criterion is that an intention to enter into a binding contractual arrangement, in particular in the nature of an employment relationship, could not be said to exist. Particular emphasis has been placed on the special nature of the relationship between, in particular, ministers of religion and the church structures within which they operate. This peculiarity of this kind of relationship would flow from the combination of a non-exclusive and non-exhaustive range of factors, such as:¹⁴

11 Which could naturally, in appropriate cases, include a balancing of the constitutional religious rights enshrined in the Constitution and other applicable constitutional rights. See the discussion below.

12 This also appears to be the position in German constitutional jurisprudence. See the discussion below.

13 See *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* 1976 (2) SA 1 (A); *NGK in Afrika (OVS) v Verenigende Geref Kerk in Suider-Afrika* 1999 (2) SA 156 (A) 166G-J and authorities mentioned there; *Yiba and others v African Gospel Church* 1999 (2) SA 949 (C).

14 See in particular *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration and others* 2001 ILJ 2274 (LC); *Mankatshu v Old Apostolic Church of Africa and others* 1994 (2) SA 458 (Tk AD); *Smith v Die Ring van Amandelboom van die Verenigende Gereformeerde Kerk in Suider-Afrika (VGKSA) and others* Unreported case NHK11/2/5587 (IC); *GG Paxton v The Church of the Province of Southern Africa, Diocese of Port Elizabeth* Unreported case NH11/2/1985 (PE).

- that a minister is called by God to office;
- that the minister is not regarded as the servant of the church, despite the fact that the church provides the framework for the minister's work;
- that benefits received by the minister are regarded as the church's contribution to enable the minister to carry out his or her calling to the office, and not as a reward for services rendered;
- that the functions entrusted to the minister relate directly to spiritual matters, namely the proclamation of the Gospel and the care or cure of souls, and
- that the rights, duties and obligations applicable to ministers of religion are contained in church constitutions and canonical documents, which do not create rights outside the sphere of the church.

Therefore, being bound by the terms and provisions of church constitutions and canonical documents does not generally flow from a contractual arrangement to this effect,¹⁵ but from the fact that the minister voluntarily accepts and submits him/herself to the specific ecclesiastical legal framework applicable to the functioning of office-bearers in the particular church. That the relationship may have similarities akin to those usually associated with an employment relationship, such as the payment of a regular "salary", an appropriate travel allowance, and contributions to official (church) pension funds; the granting of leave; the deduction of employee's income tax; and the exercise of power of discipline, and the termination of service by competent church authorities, is of no avail. The basis of these employment-like incidents is not an employment relationship, but an essentially spiritual relationship. *Smith v Die Ring van Amandelboom van die Verenigende Gereformeerde Kerk in Suider-Afrika (VGKSA) and others*¹⁶ stated this in no uncertain terms,¹⁷

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.

When perusing the South African cases which follow this line of approach, one is left with the clear impression that it is in particular the overriding authority¹⁸ of the relevant church constitution

15 Although in *Smith v Die Ring van Amandelboom van die Verenigende Gereformeerde Kerk in Suider-Afrika (VGKSA) and others* Unreported case NHK11/2/5587 (IC) the presiding officer found that the relationship between the applicant, a minister who lost his status as a result of making himself available as a candidate in elections for a transitional local council, and the church was essentially of a contractual nature. This finding was made with reference to the unreported Cape High Court decision of *Verenigende Gereformeerde Kerk, Worcester-Suid and another v Botma and another* (case number 10635/96) where it was accepted that the relationship between the members of the particular congregation and the members thereof was of a contractual nature: "Dit is gemeensaak tussen die partye dat die verhouding tussen hulle 'n kontraktuele verhouding is wat beheer word deur die bepalings van die Kerkorde." It is submitted that although there may in a given case be a contractual basis for the relationship, this would normally not be present or required, given the voluntary association with and submission to the overriding ecclesiastical regime, which may be applicable. In any event, the existence of a contract does not necessarily imply that an intention to create legal relations is evident – see the discussion of the *Coker* (English Court of Appeal) case below.

16 Unreported case NHK11/2/5587 (IC).

17 P 22-23.

18 Which flows from the hierarchical nature of the church-clergy relationship and relationship between different spheres of church authority.

and other canonical documents emanating from the highest church institutions, which is decisive for purposes of regulating and giving content to the said relationship. They certainly have implications for purposes of the working relationship between clergy, on the one hand, and congregations and other church structures, on the other. For example, they could determine conclusively the rights, duties and obligations of all relevant parties, such as the (minimum level of) salary and other benefits payable, leave to be granted, and the circumstances under which the services of a minister of religion can be terminated or be regarded as terminated. In *Smith*, for example, the court found that the provision in the particular church constitution to the effect that a minister loses his/her status when he/she serves in the management structure of a political party or makes him-/herself available as a candidate for election purposes, is conclusive: the minister concerned lost his status by operation of (ecclesiastical) law.¹⁹ Reliance on or reference to the labour law of the country is, therefore, not only unnecessary, but also inapplicable.

Consequently, so we are told, while there may be a mutual commitment to the relationship between the minister or priest and the church, this is not a bilateral and enforceable civil contract, but rather an ecclesiastical or spiritual agreement regulated by the constitutional and canonical documents and not by secular law. Such a minister, therefore, is a holder of an ecclesiastical office whose rights are not defined by contract but by ecclesiastical law. In the recent Labour Court matter of *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration and others*²⁰ the court quoted with approval from the English Court of Appeal judgement in *Diocese of Southwark v Coker*,²¹

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.

In the latter case the applicant (Coker) was a clergyman with the Church of England who received a monthly stipend and certain benefits. He alleged that he had been dismissed and challenged the fairness of his dismissal on the basis of the provisions of the Employment Protection (Con-

19 P 19.

20 2001 *ILJ* 2274 (LC) (per Waglay J).

21 [1998] *ICR* 140 (CA) (per Mummery L J).

solidation) Act of 1978. The church contended that Coker was not an employee for the purpose of the said Act because there was no contract between Coker and the church.

That there may be some additional contract does not mean that an intention to create legal relations is evident, making it impossible to infer the existence of a contract of employment:²²

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 L J 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, intends 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.

This has been a long-standing approach of the British courts. Already in 1912 in the matter of *In re National Insurance Act 1911: In re Employment of Church of England Curates*²³ the court remarked,

[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.

A similar approach was adopted by the British House of Lords in *Davies v Presbyterian Church of Wales* in 1986.²⁴ In finding that the affected minister was not entitled to reinstatement on the basis that he was not a party to a contract of employment, the court reasoned as followed,²⁵

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 150E-151B (per Staughton L J, in a concurring majority judgement).

23 [1912] 2 Ch 563. See also *President of the Methodist Conference v Parfitt* (1984) ICR 176.

24 [1986] 1 All ER 705 (HL). A minister of the Presbyterian Church, whose ministry had been terminated, claimed reinstatement.

25 709G-J (per Lord Templeman).

Other jurisdictions also acknowledge the particular non-secular nature of the relationship between clergy and the church. In this regard the *Church of the Province* Labour Court judgement quoted with approval similar recent judgements emanating from Australia²⁶ and New Zealand.²⁷ It would also appear that in some continental European countries similar approaches are adopted.

In Germany, for example, based on the constitutionally protected sphere of self-determination or autonomy granted to the official churches,²⁸ churches remain free to regulate the relationship between themselves and those who work within their spheres in a way they deem appropriate – which leaves them with the option to regulate the said relationship outside the framework of the normal (labour) law of the land.²⁹ The position of clergy in particular is regarded as falling outside the boundaries of labour law, and covered by ecclesiastical law.^{30, 31} However, churches have the option of relying on private law mechanisms when regulating the relationship with church workers, including clergy. Even when acting thus, particular duties of loyalty and doctrinal obedience can be imposed on such workers by churches.³² The implication is that the employment relationship established in this way consequently acquires a particular church-oriented and church-infused content. These peculiarities embedded in the relationship must be properly considered by labour tribunals whenever they have to decide in matters affecting the said relationship – for example, in deciding whether sufficient reason to terminate the relationship exists.³³

Our case law also bears testimony to an approach, which recognises and respects the special nature of the relationship between a church and its clergy. In *Mankatshu v Old Apostolic Church of Africa and others*³⁴ the court held that the relationship between priests who had been excommunicated and their church was regulated by the church's constitution, which made no provision for a contract of employment between them. The constitution itself also did not constitute a contract. Similar findings based on the same line of thinking were arrived at by the Industrial Court in the matters of *G G Paxton v The Church of the Province of Southern Africa, Diocese of Port Elizabeth*³⁵ and *Smith v Die Ring van Amandelboom van die Verenigende*

26 *Knowles v The Anglican Church Property Trust, Diocese of Bathurst* (1999) 89 IR 47 (Industrial Relations Commission of New South Wales); *Greek Orthodox Community of SA Inc v Ermogenous* SCGR 99-653 (2000) SASC 329 (Supreme Court of South Australia). In the latter case the court held, "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."

27 *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 (New Zealand Court of Appeal).

28 Art 140 GG ("Grundgesetz" or Constitution).

29 For this reason church work in Germany is often regarded as a so-called *Tendenzbetrieb*.

30 Richardi, R 1992. *Arbeitsrecht in der Kirche*, 8, 56; Weiss, M 1979. *Die Kirche und ihre Einrichtungen als Tendenzbetriebe. Arbeit und Recht, Sonderheft Kirche und Arbeitsrecht*, 31; Kessler, R 1986. *Die Kirchen und das Arbeitsrecht*, 33.

31 Weiss, 28-33 argues that as far as other (non-clergy) church workers are concerned, a balancing of interests, involving the (competing) fundamental rights of these workers and the constitutionally guaranteed rights of self-determination or autonomy granted to churches, should take place.

32 According to the German Federal Constitutional Court the basis for being able to do so flows not only from the capacity of churches as employers, but also from the constitutionally guaranteed right of self-determination or autonomy: BverfG 70, 165.

33 BverfG 38, 165-168.

34 1994 (2) SA 458 (Tk AD).

Gereformeerde Kerk in Suider-Afrika (VGKSA) & others,³⁶ and by the Labour Court in *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration and others*.³⁷

The common thread which runs through all of these decisions, according to Waglay J in the recent *Church of the Province* case, 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**, i e 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”.³⁸ This, according to the court, is what distinguishes the matter before the court from the judgement by the Labour Court in *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit & andere*³⁹ (to be discussed below) – in the latter case a contract of employment was indeed found to be exist.

Waglay J also dealt with the question whether the wide ambit of the definition of “employee” in section 213 of the Labour Relations Act⁴⁰ could lead to a different conclusion. The definition, which includes within its scope the following as employees,

- (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

has generally been interpreted generously so as to give effect to the protective objective of the Act. In particular as far as the (b) part of the definition is concerned, it has been remarked that an employment relationship could be established even in the absence of a valid agreement, as long as the facts would point towards the existence of such a relationship.⁴¹ Even if somebody (such as a member of the SA National Defence Force) does not qualify as an employee in terms of the relevant labour legislation, a constitutional entitlement to labour rights may, according to the Constitutional Court in *South African National Defence Union v Minister of Defence*,⁴² still be possible. As is clear from several of the findings made on the basis of the (b) part of the “employee” definition and the approach adopted in the *Minister of Defence* case, the aim is to extend protection also to certain categories of non-standard workers. And yet, Waglay J argued, this should not be interpreted to mean that an employment relationship should be forced upon parties who did not intend one.⁴³

35 Unreported case NH11/2/1985 (PE).

36 Unreported case NHK11/2/5587 (IC).

37 2001 *ILJ* 2274 (LC).

38 Par 24.

39 1999 *BLLR* 713 (LC).

40 66 of 1995.

41 See the recent *Church of the Province* case par 29-31 and authorities cited there.

42 1999 *BCLR* 615 (CC).

43 Par 30. Recently, in *Lewis & another v Contract Interiors CC* 2001 *BLLR* 155 (LC) the Labour Court also found that the parties entering into a contract must have the intention to enter into an *employment* contract. In a case where persons rendered services to a closed corporation pending the formation of a company with the members of the CC the required *animus* (intention) to enter into an employment contract was found to be absent.

Could one look at the duties and obligations between the parties in order to determine whether a contract of employment (or the broader notion of an employment relationship) has come into being? While this sounds appealing, Waglay J opined that to do so would be to go against the very basic principle that governs our law of contract, namely that the parties must in the first place have intended to enter into a legally enforceable contract, because the enforceability of the duties and obligations is dependant upon it. Not all agreements constitute legally enforceable contracts.⁴⁴ Therefore, so the court found, the duties and obligations between the parties cannot create an employment contract where the parties themselves had not intended one to come into existence.⁴⁵

While one would generally agree with the approach adopted in this recent Labour Court matter, some caveats need to be expressed. In the first place, in circumstances such as those that the court had to pronounce upon, fundamental rights other than the labour relations fundamental rights remain applicable. The tenets of and implications flowing from constitutional supremacy, in particular the superior status of the rights entrenched in the Bill of Rights,⁴⁶ cannot be said to be impaired, despite the recognition accorded to the special relationship between clergy and their churches, and despite any measure of personal or institutional freedom of religion. Practically, for example, this would mean that unequal treatment on a prohibited ground could still be challenged by a minister of religion or other member of the clergy.⁴⁷

Similarly, where the human dignity of a church office-bearer is found to be impaired by the treatment meted out to such an office-bearer, it is highly unlikely that the church concerned will be allowed to shield itself and its actions from constitutional scrutiny by relying on, amongst others, the non-employment nature of the relationship, and/or its alleged sphere of autonomy. So much is apparent from the approach adopted by the Constitutional Court.⁴⁸ In a given situation, it might well be that a balancing exercise (i e balancing competing fundamental rights) has to be embarked upon by the Court in order to determine whether an unjustifiable infringement of any particular fundamental right has occurred.⁴⁹ Furthermore, given the long history of administrative law review of church tribunals in our case law, one could certainly foresee that our courts will remain willing to come to the rescue of a minister, any other member of the clergy or even a member of the congregation, where the administrative law principles contained in the Constitution,⁵⁰ administrative common law,⁵¹ and possibly also the implementing legislation have not been adhered to.⁵²

44 Par 32.

45 Par 35.

46 Ch 2 of the Constitution.

47 See section 9 of the Constitution.

48 See section 31(2) of the 1996 Constitution and the quotation from the *Christian Education* case referred to above, as well as par 26 of that case, where the Court further remarked, "These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to 'privatise' constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where s 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant."

49 For such an approach within the framework of determining whether the general legislative prohibition on corporal punishment constituted an infringement of the constitutionally protected religious rights, see the *Christian Education* case par 31 and further.

50 Section 33.

51 See the discussion above in relation to the applicability of administrative law in the church context.

52 The Promotion of Administrative Justice Act 3 of 2000.

Secondly, it remains possible that a minister or other member of the clergy can indeed be appointed as an employee – as is suggested by Waglay J happened in the *Schreuder* matter. In fact, it may not be too difficult to infer an (intention to enter into) an employment relationship, given the protective nature of our labour legislation and the equally wide approach adopted for purposes of determining who are being covered in terms of the Constitutional provisions relating to labour relations fundamental rights. Of course, such an intention could appear from the relevant church constitution and other ecclesiastical documents.⁵³

Thirdly, another possible approach that should enjoy strong appeal is to incorporate or introduce on a voluntary basis relevant labour law principles into the relationship between clergy and the relevant church structures, even though the basis of the relationship remains outside the realm of labour law. This has the advantage that the church and its office-bearers, in particular clergy, could rely on basic tenets of equity developed over years within the framework of labour law. This should contribute to a view that churches are seen to be sensitive to widely acceptable norms of what constitutes fair treatment of those who work.

Finally, it should also be clear that most⁵⁴ other (non-clergy) church workers would fall outside the ambit of those covered by the special (non-secular) relationship discussed above. In their case labour law principles would apply without restriction.

3. IMPLICATIONS AND IMPERATIVES FLOWING FROM THE APPLICATION OF LABOUR LAW

In the matter of *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit & andere* the Labour Court held, on the facts, that a minister in the Dutch Reformed Church 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 held,

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 ander kant 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.

It would appear that the 1998 Constitution of the Church (the “Kerkorde”) effectively strengthened the employee status of ministers of the Dutch Reformed Church. The present Constitution makes it clear that the congregation is deemed to be the employer of the minister in service of the congregation – as far as calling (“beroeping”), appointment, functioning and termination of service are concerned.⁵⁵

53 As was the case in the *Schreuder* matter – see the discussion below.

54 But not necessary all – one could conceivably, on the basis of accepting a primarily spiritual relationship between clergy and the church, argue that those who feel called to serve in, for example, a monastery should not be seen as employees (unless an employment-like contract has been entered into). This appears also to be the position in Germany: see Kessler, 33.

55 See art 7 (“beroeping” and “beroepsbrief”); art 12.1 (congregation as employer); art 12.3 (appointment and termination the responsibility of such employers), and art 12b 2 (church council managing the employment relationship can terminate the services of the minister on account of misconduct, incapacity or the operational requirements of the congregation).

In fact, upon perusing the judgement, one does gain the impression that the court was prepared to accept the existence of an employment relationship much more readily than happened in the recent *Church of the Province* case. In concluding that a minister of the church falls within the ambit of the (b) part of the definition of “employee” (as contained in the Labour Relations Act), the court remarked as follows, without reference to the extensive body of law, which indicates a different approach and relied upon by Waglay J,⁵⁶

Daar was naamlik deskundige getuienis dat die besigheid van die kerk as organisasie die verkondiging van die evangelie is. ’n Predikant is duidelik primêr hiermee besig ook waar hy of sy in diens staan van die ander kerkstrukture (die Ring en die Sinode) wat beheer uitoefen en ’n deurslaggewende rol speel by die aanstelling en ontslag van ’n predikant en gevolglik die sekondêre werkgewers van die predikant is.

Be that as it may, it has to be noted that there are several consequences, which could possibly flow from a finding that a minister of a church is an employee.

In the first place, apart from the constitutional provisions relating to labour relations fundamental rights referred to above, the whole spectrum of protective labour legislation becomes applicable to the relationship – including the minimum conditions set in the Basic Conditions of Employment Act,⁵⁷ the dismissal and unfair labour practice protection contained in the Labour Relations Act,⁵⁸ and the anti-discrimination and affirmative action provisions of the Employment Equity Act.⁵⁹

Secondly, a provision of the constituting church documents, which is in conflict with the existing South African labour legislation, will be declared invalid from a statutory perspective – as happened in the *Schreuder* case with reference to an exceptionally broad removal from office provision contained in the previous Constitution of the Dutch Reformed Church. For the rest, however, this issue (i.e. invalidity of provisions in church documents) should be treated with great caution. It is clear, with reference to the experience elsewhere,⁶⁰ that even where the church treats ministers of religion as employees, the way in which the relevant church constitution and other official documents describe, regulate and give content to the said employment relationship, should be highly relevant whenever a competent tribunal has to make a finding – such as whether, for example, a dismissal was fair or unfair.

Thirdly, several levels of church structures could be regarded as together constituting the employer vis-à-vis the minister. This flows from the hierarchical nature of certain church structures, and the fact that more than one of these structures could be involved in decisions which potentially impact negatively on a minister. So much was accepted in the *Schreuder* case.⁶¹ This notion is often referred to as the composite employer concept, and has also been found to be present in other contexts involving labour matters.⁶²

56 718G-I.

57 Act 75 of 1997.

58 Act 66 of 1995, Chapter VIII and items 2-4 of Schedule 7 of the Act respectively.

59 Act 55 of 1998.

60 For example in the German system – as discussed above.

61 718G-I.

62 *SAAPAWU v Premier (Eastern Cape) and others* 1997 ILJ 1317 (LC); *Boumat v Vaughan* 1992 ILJ 934 (LAC); *Botha & another v Department of Education, Arts, Culture & Sports, Northern Province Government & others* 1999 ILJ 2590 (LC).

Finally, given the hierarchical nature of a given church structure, and the role that these structures could play in, for example, the removal from office of a minister, the said structures could be held liable jointly and severally if the removal were to be found to be in conflict with the dismissal provisions of the Labour Relations Act. In fact, in the *Schreuder* matter the court held the presbytery and the synod jointly liable for the reinstatement of the minister, in view of the fact that the relationship at congregational level had broken down.⁶³ The court also held the three church structures (congregation, presbytery, synod) jointly and severally liable for the payment of the costs order awarded by the Court.⁶⁴

4. CONCLUDING REMARKS

Despite the fact that the 1996 Constitution provides for certain constitutional religious rights both at the individual and the collective level, it is clear that the development of the constitutional status of churches, their office-bearers, clergy and employees in South African law is still in an embryonic stage. This is true in particular of the status of those who work for or in the church and their relationship with the relevant church structures. The balancing of competing fundamental rights in this sphere, such as the said religious rights, on the one hand, and other potentially applicable fundamental rights, such as equality or the dignity of an individual, on the other hand, presents problems of some magnitude. The provisions of the 1996 Constitution do not give conclusive guidance in this regard.

Some guidance may be obtained from principled approaches adopted in comparative jurisdictions, and increasingly also in the South African jurisprudence, to clarify and explain the nature of the relationship between the church and those that work within the sphere of the church. It is now generally accepted that certain church “workers”, notably clergy or ministers of religion, render services not on the basis of being employees of the church, but on the basis of a particular spiritual relationship. In these cases labour law would, as a matter of principle, not find application. Church law, as reflected in the constitution of the church and other ecclesiastical documents, constitutes the primary source for determining and regulating the status, rights and obligations of the parties vis-à-vis each other. It is also argued, however, that for practical and pragmatic reasons, churches may wish to make use of the rich tapestry of labour law tenets, in particular equity principles, to give content to the said relationship.

Of course, it remains possible that churches may choose to avail themselves of the contract of employment construction to determine the nature of their relationship with clergy. Other church workers, such as administrative personnel, would in any event be regarded as employees. In these cases labour law would find application although, so it is argued, the specific church context of the relationship, as it is reflected in the applicable church documents, should have an important bearing on how the relationship is understood and the respective rights and obligations of the church and those who work for the church are enforced in labour tribunals.

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