



REPORTABLE

CASE NO: SA 58/2017
CASE NO: SA 37/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**CHRISTIAN CONGREGATION OF JEHOVAH'S
WITNESSES OF NAMIBIA (INCORPORATED
ASSOCIATION NOT FOR GAIN)**

Appellant

and

SOCIAL SECURITY COMMISSION OF NAMIBIA

Respondent

Coram: DAMASEB DCJ, MAINGA JA and SMUTS JA

Heard: 7 March 2019

Delivered: 3 April 2019

Summary: This appeal concerns a group of Jehovah's Witnesses members belonging to an international religious order known as the Worldwide Order of Special Full Time Servants of Jehovah's Witnesses.

The court *a quo* dismissed the appellant's appeal in terms of the Social Security Act, 34 of 1994 against a decision taken by the Social Security Commission not to deregister it as an employer as defined in the Act because it contended that members of the Worldwide Order were not employees for the purpose of the Act. After conducting an investigation the Commission decided on 1 March 2016 that the definitions of employer and employee in the Act read with section 128A of the Labour Act, 7 of 2011 applied to the appellant and members of the Worldwide Order and declined to deregister the appellant as an employer. The appeal is in terms of section 45 of the Social Security Act (appealing against a decision of the Commission). Appellant filed an affidavit and 66 affidavits on appeal of Order members consenting to be bound by the judgment of the Labour Court and waiving the right to be joined and supporting the appeal. These affidavits did not serve before the Commission. They also did not disclose how many registered employees the appellant currently has and why all members of the Order had not deposed to affidavits. The affidavits do not explain how and why the appellant registered itself as an employer in the first place and which persons were registered as employees and why.

Held that, the Commission was correct in declining to deregister, even though its interpretation of section 128A is defective. The factual material put before the Commission was sparse and largely comprised a series of contentions in correspondence. There was no further documentation comprising the terms of appointment, rules and/or the constitution of the appellant or the order which govern appointments placed before the Commission.

Held that, section 128A should be accorded a meaning within the context of the section construed as a whole. It is not correct to first establish a legally enforceable agreement for the presumption to arise.

Further held that, section 128A presumption is intended to assist the trier of fact in resolving who is an employer and employee for the purpose of the labour legislation, including the Act, and ‘each case must be considered on its own facts and that the trier of facts must look at the substance of the relationship’ – see *Swart v Flex-O-Tube*.

It is further held that, to make an assessment as to whether the nature of the relationship is employment or not, each case is to be assessed with reference to the rules and practices of the specific religious order or church and any special arrangements made with minister(s) to determine ‘whether their actions were intended in any respect to give rise to contractual rights and obligations’ – see *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and another* and *Preston (formerly Moore) v President of the Methodist Conference*.

Held that, the court *a quo* was correct to dismiss the appeal.

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and MAINGA JA concurring):

[1] The appellant is the Christian Congregation of Jehovah's Witnesses of Namibia, a religious organisation incorporated as an association not for gain under s 21 of the Companies Act, 2004. The appellant has a membership of over 2500 active members in Namibia and is part of a religion active in most countries of the world. This appeal concerns a group of Jehovah's Witnesses who belong to an international religious order known as the Worldwide Order of Special Full Time Servants of Jehovah's Witnesses ('the Worldwide Order').

[2] The appellant applied to the respondent, the Social Security Commission (the Commission) established under the Social Security Act, 34 of 1994 (the Act) to be deregistered as an employer as defined in the Act because it contended that members of the Worldwide Order were not employees for the purpose of the Act.

[3] The Commission conducted an investigation and on 1 March 2016 determined that the definitions of employer and employee in the Act read with s 128A of the Labour Act, 7 of 2011 (the Labour Act) applied to the appellant and members of the Order and declined to deregister the appellant as an employer.

[4] The appellant appealed against that decision to the Labour Court in terms of s 45 of the Act which provides:

'45. (1) Any person aggrieved by any decision of the Commission taken in the performance of the Commission's functions in terms of this Act may, within a period of 60 days from the date upon which he or she was notified of such decision, appeal by notice in the prescribed form against such decision to the Labour Court established by section 15(1)(a) of the Labour Act.

(2) The Labour Court may, on good cause shown, allow an appeal to be noted in terms of subsection (1) notwithstanding the expiry of the said period of 60 days.

(3) An appeal to the Labour Court in terms of this section shall be subject to the provisions of the Labour Act and its regulations and such appeal shall, for the purposes of that Act, be deemed to be an appeal from a district labour court established by section 15(1)(b) of that Act.'

The appeal to the Labour Court

[5] The appellant's notice of appeal was stated to be against 'the whole of the decision' of the Commission dated 1 March 2016 in which the appellant's application for deregistration as an employer was declined. The appellant however sought the following order on appeal:

- '1.1 the appellant is not an employer in terms of the Social Security Act, 1994;
- 1.2 the Social Security Commission decision (hereinafter called the SSC decision) dated 1 March 2016 may be set aside;
- 1.3 the Respondent may be ordered to de-register the Appellant as an employer; and
- 1.4 the Respondent may be ordered to de-register the members of the Worldwide Order of Special Full-Time Servants of Jehovah's Witnesses performing religious duties for the Appellant.'

[6] Attached to the notice of appeal is an affidavit by the appellant's chairperson attaching affidavits, documents and correspondence. Certain affidavits and documents and some of the factual matter contained in the affidavit did not serve before the Commission and should not have served before the Labour Court in the appeal, including 66 affidavits from members of the Order consenting to the order sought and waiving the right to be joined.

[7] The Commission opposed the appeal and set out its grounds of opposition. The point was taken that the appeal was accompanied by material which did not serve before the Commission and it was also contended that the decision to decline to deregister the appellant was correct. Attached to the notice of opposition was the record of the decision. That record comprised an investigation by the Commissioner's Chief Compliance and Risk Officer which included interviews with five members of the Order, correspondence exchanged between the appellant and the Commission and documents provided to the Commission such as the vow of obedience and poverty made by members of the Order. In deciding the appeal before it, the Labour Court is to decide whether the ruling or decision is right or wrong according to the facts which served before the Commission. This court is in turn to determine the correctness or otherwise of the Labour Court's decision. An appeal is after all confined to the matter which served before the decision making body.

Ambit of the appeal under s 45

[8] The remedy contained in s 45 of the Act invoked by the appellant is an appeal against the Commission's decision. It is well established that an appeal is confined to the record of the decision including reasons given for it in determining whether the Commission came to a wrong conclusion on the facts or upon the law. The appellant does not seek to attack the method of the determination in which case a review would have been the appropriate course. Even though procedural matters may conceivably be raised in a statutory appeal of the kind contemplated in s 45, it is not necessary for present purposes to determine whether and the extent to which the method of proceedings can be raised in an appeal of this kind as the appellant does not raise procedural matters. As to the factual matter raised in the affidavit filed

in support of the appeal which did not serve before the Commission, this is not an instance where a party is not satisfied with the completeness of the record and intends to correct that upon notice to the Commission. Nor is it a case where further material is provided by agreement or is said to have arisen after the decision was taken. The Commission expressly objected to the further material being placed before the Labour Court and understandably so, because it had not served before it. It is accordingly not open to the appellant to seek a range of relief in the appeal which had not been sought or raised before the Commission or rely upon facts not put before it.

The record of decision making

[9] The appellant first approached the Commission in 2012, according to the record of the decision appealed against, expressing the view that it was not an employer for the purpose of the Act. This approach had followed a similar approach made to the Employment Equity Commissioner (EEC) in October 2009 in respect of the Affirmative Action Act, 29 of 1998 (the 'AA Act'). At that stage one of the criteria for 'relevant employers' for the purpose of that Act was the employment of 25 or more employees. The appellant's translators were then stated to number 27 and the appellant sought a ruling that it was not a relevant employer for the purposes of that Act. The EEC, after taking advice from the Attorney General, on 31 January 2014 decided that the AA Act did not apply to the Jehovah's Witnesses and that the appellant was not a relevant employer for the purpose of that Act.

[10] The appellant by way of a letter dated 20 May 2014 approached the Commission to be deregistered as an employer under the Act. In support of this application for deregistration, the correspondence to and the ruling of the EEC were

attached together with the contention that the definitions of employee and employer for the purpose of the AA Act and the Act were virtually identical and that deregistration under the Act should follow. In the attached correspondence to the EEC, it was explained that full time members of the Order must complete a course in bible studies and its teachings, dedicate their lives to their religion by way of a vow and then serve the religion full time in a variety of capacities. In terms of the vow, a member agrees to serve the Order without any expectation of remuneration or other financial reward from the Order. Members of the Order live in a monastery like community and receive a modest allowance of N\$940, as well as full board and medical care so that they can forego secular employment and attend to their religious duties on a full time basis. The allowance is paid regardless of the task assigned and also regardless as to whether they are unable to do so because of sickness or disability. The allowance is also not related to the performance of a service or the nature of assignments.

[11] The 2009 letter to the EEC referred to 27 'special religious ministers' at its translation office and elsewhere to 19 special ministers preaching full time. It is further stated in that letter that neither the appellant nor the religious ministers of the Order regard their relationship as employment and that:

'(A) member is at liberty to terminate his service at the translation office at any time. Preferably a person must give a month's notice so that we can locate and train another translator but that is not a requirement'.

[12] The Commission responded on 16 June 2014 referring to s 128A of the Labour Act¹ (introduced by Act 2 of 2012) – which was said to have come into

¹ Act 7 of 2011, as amended.

operation after the EEC made its determination. The Commission's position was that the presence of two or more of the factors referred to in s 128A would mean that the category of persons 'are presumed to be employees (of the appellant) . . . and must therefore be registered'.

[13] The appellant again addressed the Commission in January 2015 requesting the further consideration of the issue, arguing that the allowance of N\$940 to members of the Order did not constitute remuneration for the purpose of the Act. Following this request, the Commission's Chief Compliance Officer visited the appellant's premises on 19 October 2015 and conducted interviews with members of the Order and in his report set out in some detail the answers given to questions posed to them. The report included a reference to the vow made by members of the Order which was attached to the record. The report referred to s 128A and found that more than two of the factors listed in s 128A were present 'in terms of which an individual can be presumed to be an employee' and then concluded that the appellant 'is an employer for the purpose of the Act.'

[14] The Commission embraced that conclusion and its ruling was embodied in its letter of 1 March 2016. It referred to the investigation which found two or more of the factors to be present and that the individuals are presumed to be employees. The response also stated that the Commission is not empowered to exempt employers from the provisions of the Act and concluded:

'Therefore your request for exemption from the provisions of the Act cannot be entertained'.

[15] This is the ruling appealed against to the Labour Court.

The approach of the Labour Court

[16] In the grounds of opposition to the appeal, the point was taken that the notice of appeal was defective because it was not in accordance with the Labour Court Rules in that it was not accompanied by a duly completed form 11 as provided for in rule 17 of those rules. The Commission also opposed the appeal on the merits.

[17] As to this preliminary point, the Labour Court found that the appeal was not properly before it because the notice of appeal had not complied with the rules of that court as it did not comply with form 11. The court also referred to the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner which required that an appeal be noted on a form attached to those rules even though the decision appealed against did not relate to proceedings before an arbitrator or the Labour Commissioner. By not using those forms, the Labour Court found that the appeal was not properly before it. Yet, despite this ruling, the court proceeded to deal with the merits of the appeal and dismissed it.

[18] The preliminary point has correctly not been persisted with on appeal. There is an omission in the rules of the Labour Court to set out a procedure for appeals in terms of s 45 of the Act. Rule 22 of the Labour Court rules however provides:

‘(1) Subject to the Act and these rules, where these rules do not make provision for the procedure to be followed in any matter before the court, the rules applicable to civil proceedings in the High Court made in terms of section 39(1) of the High Court Act, 1990 (Act 16 of 1990) do apply to proceedings before the court with such qualifications, modifications and adaptations as the court may deem necessary.

(2) The judicial case management rules in terms of the rules of the High Court referred to in subrule (1) apply to proceedings before the court with such qualifications, modifications and adaptations as the managing judge may deem necessary.'

[19] Rule 119 of the rules of the High Court concerns appeals (to that court) from a decision of a statutory body and would thus find application to appeals in terms of s 45. It adequately address appeals of this nature.

[20] As to the merits of the appeal, the Labour Court referred to the presumption contained in s 128A of the Labour Act which it found arose because of the service rendered by and remuneration paid to members of the Order in the form of stipends as well as the degree of supervision and control, thus meeting three of the listed factors and giving rise to the presumption of employment which it found the appellant had not rebutted. The court further held that the appellant was seeking to evade the Act and rejected the main relief sought in the appeal.

[21] The court also found that the Commission had no power to deregister employers as a ground to decline the further relief sought in the appeal.

[22] The appellant has, with the leave of the Labour Court, appealed against its judgment and orders.

Submissions on appeal

[23] In detailed written and oral argument, Mr Tötemeyer, SC, who together with Mr Denk, appeared for appellant, argued that a religious calling does not constitute

employment. His well-researched argument included extensive reference to the decisions of other jurisdictions including from England, South Africa, Canada and Swaziland. He also argued that the approach of this court in *Petrus v Roman Catholic Archdiocese*² and the High Court in *New African Methodist Episcopal Church in the Republic of Namibia v Kooper & others*³ was to the effect that ecumenical issues fell outside the court's jurisdiction. English and South African cases were cited where employment remedies were found not to apply to clergy.⁴

[24] Mr Tötemeyer also referred to a decision of the Labour Court of South Africa where that court ruled that members of the Worldwide Order in South Africa were not employees for the purpose of similar legislation in South Africa.⁵

[25] Mr Tötemeyer argued that Art 21 (1)(c) which protects the right of persons to practise any religion supports an approach where courts should decline to interfere with the practising of religion.

[26] Turning to the definitions of employee and employer in labour legislation and the Act, Mr Tötemeyer argued that the presumption of employment in s 128A of the Labour Act did not apply, given the fact that there was not any form of employment contract between members of the Order and the appellant. He argued that the vow which members make is one to their religion (to the Almighty) and not to the appellant and that there was no intention to enter into a contractual relationship of

² 2011 (2) NR 637 (SC).

³ 2015 (3) NR 705 (HC).

⁴ *Preston v President of the Methodist Conference* [2013] UKSC 29 (15 May 2013); *Church of the Province of SA (Diocese of Cape Town) v CCMA and others* [2001] 11 BLLR 1213 (LC); *Universal Church of the Kingdom of God v Myeni and others* [2015] 9 BLLR 918 (LAC) amongst others.

⁵ *Watch Tower Bible & Tract Society of Pennsylvania and Watch Tower Bible Tract Society of South Africa v Minister of Labour* Case No 747/06 Labour Court unreported 16 March 2009.

any kind. The relationship in pursuing that calling on a full time basis, he contended, was ecclesiastical in nature and not a commercial or employment one. Mr Töttemeyer also argued that the amount received by members of the Order together with full board and lodging did not arise from an employment relationship but is based upon that member's commitment to the Order and not for services rendered. Mr Töttemeyer also argued that the Commissioner had the power to deregister an employer as this power would be inherent in and implied to the power to register.

[27] Mr Tjombe, who appeared for the Commission, argued that the relationship between members of the Order and the appellant was one of employment. He argued that the appellant, an incorporated legal entity, must comply with the laws of the land, including the Act. Doing so would not, so he contended, infringe upon freedom of religion embodied in Art 21(1)(c) of the Constitution. Mr Tjombe stressed that the determination as to whether an employment relationship exists is objective and not what the parties believe their relationship to be. Mr Tjombe argued that the guidelines set out in *Engelbrecht v Hennes*⁶ apply, even though decided before the introduction of s 128A. He submitted that the most pertinent factor in *Engelbrecht* is that of remuneration. He referred to the amount received by members of the Order (N\$940 per month) in addition to full board, lodging and medical care, paid at the end of each month. Mr Tjombe referred to the factors listed in s 128A(d) of working at least an average of 20 hours per week and the fact that members of the Order performed duties from 7h45 to 16h45 daily from Monday to Friday. He also argued that the presumption in s 128A(a) arose, given the degree of control the appellant

⁶ 2007 (1) NR 236 (LC) at 238E-239H.

exercised over members of the order. Mr Tjombe argued that the appellant was thus an employer for the purpose of the Act.

[28] As to the issue of deregistration, Mr Tjombe correctly conceded that although not expressly provided for, the Act afforded the Commission the power to deregister an employer provided that that entity ceased to employ any employees.

[29] Mr Tjombe submitted that the approach of the appellant was misconceived. Given the relief sought by it on appeal, the proper remedy would instead have been to apply for a declaratory order supported by all relevant facts such as the full value of full board and lodging and medical expenses to members. Mr Tjombe criticised the procedure followed by the appellant in approaching the Commission to deregister as an employer without qualification and without the support and consent of the affected employees. He also argued that the appeal is confined to what served before the Commission and that the further factual matter included in the affidavit to the Labour Court is to be disregarded.

The statutory framework

[30] The Act's purpose is to provide for the payment of certain employment benefits such as maternity leave, sick leave, death and other benefits to employees. It does so by requiring employers to register with it and to pay contributions to the funds created by the Act by collecting and paying over contributions levied from employees and paying its own prescribed contributions. The Act constitutes protective social legislation to facilitate the payment of certain minimum benefits to employees.

[31] All employers are required to register under s 20. That section not only requires employers to register themselves but every employee employed by them as an employee. The obligation to so register is at pain of criminal sanction. The Act defines both employers and employees in its definitions section.⁷ An employer is defined as:

‘Any person, including the State –

- (a) who employs, or provides work for, any person and who remunerates or expressly or tacitly undertakes to remunerate that person;
- (b) who permits any person to assist him or her in any manner in the carrying on, or conducting of, his or her business’.

An employee is in turn defined as:

‘Any person younger than 65 years, other than an independent contractor, who –

- (a) is employed by or working for any employer and who is receiving or entitled to receive any remuneration in respect thereof; or
- (b) in any manner assists in the carrying on or the conducting of the business of an employer,
- (c) and includes, in the case of an employer who carries on or conducts business mainly within Namibia, any such natural person so employed by, or working for, such employer outside Namibia or assisting such employer in the carrying on or conducting of such business outside Republic of Namibia if such person is a Namibian citizen or lawfully admitted to Namibia for permanent residence therein, and ‘employed’ and ‘employment’ shall have corresponding meanings’.

⁷ Section 1.

[32] Also relevant to these proceedings is s 128A of the Labour Act which provides:-

‘For the purposes of this Act or any other employment law, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors is present:

- (a) the manner in which the individual works is subject to the control or direction of that other person;
- (b) the individual's hours of work are subject to the control or direction of that other person;
- (c) in the case of an individual who works for an organisation, the individual's work forms an integral part of the organisation;
- (d) the individual has worked for that other person for an average of at least 20 hours per month over the past three months;
- (e) the individual is economically dependent on that person for whom he or she works or renders services;
- (f) the individual is provided with tools of trade or work equipment by that other person;
- (g) the individual only works for or renders services to that other person; or
- (h) any other prescribed factor.’

[33] As was pointed out by this court in *Swart v Tube-O-Flex Namibia (Pty) Ltd and another*,⁸ this provision was enacted by way of amendment⁹ following the judgment of this court in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*.¹⁰

[34] This court in *Swart* held that the dominant purpose discernible from s 128A read with the definitions of employer and employee in the Labour Act is 'the protection of workers from contrivances aimed at circumventing the protection afforded by labour legislation'. Turning to the presumption created in s 128A, this court in *Swart* stated:

'There is a rebuttable presumption of employment if any of the factors set out in s 128A are present. It is rebuttable because the parties may choose that there be no employment relationship even when one or more of the factors giving rise to a particular presumption are present. The consequence of a rebuttable presumption is to cast the onus on the person who wants to avoid an employer/employee relationship to show that, irrespective of the presence of the factors giving rise to the presumption of employment, the parties did not intend same and none in fact arose.'

[35] The presumption itself furthermore only arises if an individual works for or renders services to another by virtue of the introductory portion to s 128A. Once that is shown as well as the presence of one or more of the listed factors, then the presumption arises and then it is open to a party to rebut the presumption by showing that an employment relationship was not intended despite the presence of one or more of the factors and regardless of the form of contract between the parties and a person's designation. The presumption in s 128A has plainly been inserted to

⁸ 2016 (3) NR 849 (SC) at para 15.

⁹ Act 2 of 2012.

¹⁰ 2009 (2) NR 596 (SC).

‘assist the courts guard against ruses aimed at evading the protection afforded by a worker being an employee’.¹¹

[36] Mr Tötemeyer argued that there would first need to exist an employment contract or another form of contractual relationship before the listed factors can give rise to the presumption of being an employee. In support of this contention, he referred to a decision of the South African Labour Appeal Court in *Universal Church of the Kingdom of God v Myeni and others*.¹² The court in that matter held that in the similarly worded s 200A of the South African Labour Relation Act¹³ the phrase ‘regardless of the form of the contract’ meant that it presupposed establishing in evidence the existence a legally enforceable contract between the parties. Despite similarities, the wording of s 128A does however differ from that of s 200A. In s 128A, the phrase is ‘regardless of the form of the contract or designation of the individual’.

[37] Section 128A it is to be accorded a meaning within the context of the section construed as a whole. I do not agree that s 128A requires that legally enforceable agreement is first to be established before the presumption can arise. What first needs to be established is that a person works or renders a service to another. The quoted phrase in the context of the purpose of the section means that once that (rendering a service or working for another) is established it matters not what form of contract or designation is used if the listed factors in s 128A are present. The

¹¹ Swart at para 52.

¹² [2015] 9 BLLR 918 (LAC) at 930-931.

¹³ 66 of 1995.

presumption of employment would then arise. The interpretation contended for is not only contrived but would severely undermine the purpose intended by s 128A.

[38] The phrase in question thus rather means that s 128A envisages that regard is to be had to substance rather than the form of the contract or a person's designation. This was made clear by this court in *Swart*¹⁴ in order to advance the statutory purpose for which it was enacted, namely to combat the use of disguised contracts by unscrupulous employers to avoid labour legislation intended to protect and safeguard vulnerable employees.¹⁵ Section 128A serves to ensure that the courts will carefully scrutinise any arrangement to avoid the application of the Act and Labour Act. As was stressed in *Swart*,¹⁶ the s 128A presumption is intended to assist a trier of fact in resolving who is an employer and employee for the purpose of the labour legislation, including the Act, and 'each case must be considered on its own facts and that the trier of facts must look at the substance of the relationship'.¹⁷

Was the Commission's decision correct?

[39] The Commission declined to deregister the appellant as an employer, having found the appellant to be an employer because three of the factors referred to in s 128A were found to exist.

[40] In reaching its decision, the Commission would appear to have assumed that once one or more of the listed factors in s 128A exist, then an employment

¹⁴ At para 38.

¹⁵ *Swart* at para 40.

¹⁶ *Swart* at para 34, *Smith v Workman's Compensation Commissioner* 1979 (1) SA 51 (A) at 61A-B.

¹⁷ At para 38.

relationship is established, without considering whether or not the presumption had been rebutted which it should have done. The Labour Court found the presumption arose but held that it had not been rebutted, although without specifying in what respects the appellant had failed to rebut the presumption.

[41] The nature of the enquiry before this court is the correctness or otherwise of the Commission's decision appealed against. I have in some detail set out the nature of the decision – an application for deregistration as an employer – to the Commission and the documentation which served before the Commission in reaching its decision (to decline the appellant's request to deregister it as an employer).

[42] The starting point is s 20 of the Act which deals with registration. It provides:

's 20. (1) Subject to subsection (3), every employer shall, in the prescribed manner and within the prescribed period, register –

- (a) himself or herself with the Commission as an employer; and
- (b) every employee employed by him or her, as an employee, for the purposes of this Act.

2)

(3) The name and such other prescribed particulars of every employer and employee registered under this section shall be recorded in a prescribed register to be kept by the Commission, and a prescribed certificate of registration, which shall, in the case of an employee, be known as a social security card, shall be issued to every employer and employee so registered.

(4) Any person who fails to comply with subsection (1) shall be guilty of an offence.'

[43] This provision requires that not only every employer – at pain of criminal sanction – must register itself as an employer but also must register every employee employed by it as an employee.

[44] In its letter of 20 May 2014 to which a letter to the EEC was attached the appellant refers to 27 special religious ministers at its translation office who are referred to separately from 19 special ministers who preach full time in congregations who are stated to be ‘special ministers serving God and not employees’. It is however stated in the same letter that all the members of the Order take the vow.

[45] It is not stated in the request which category of members of the Order are registered as employees by the appellant. Mr Tjombe correctly accepted that the power to register would include the power to deregister if an employer ceased to employ employees. That would be an implied power and inherent in the structure of the registration scheme contemplated by the legislature. But that scheme cannot in my view contemplate deregistration whilst employees remain registered. The Commission was thus in my view correct to decline to deregister the appellant. Its decision arrived at cannot be faulted on the basis of what was placed before it. It would certainly not be competent for the Commission to deregister an employer whilst its employees are registered as employees. Nowhere in the appellant’s application for deregistration is this issue addressed. Nor is it stated if it has employees apart from members of the Order. Nor was there any statement to the effect (and proof of this) that members of the Order had received notice of the application to deregister. That would in any event have been necessary and the Commission would also have been justified to refuse the application for this reason.

[46] Mr Töttemeyer argued that members of the Order had filed affidavits on appeal consenting to be bound by the judgment of the Labour Court and waiving the right to be joined and supporting the appeal. 66 affidavits to this effect were filed. Quite apart from the fact that these affidavits did not serve before the Commission, the affidavits in support of the appeal not only do not disclose how many registered employees the appellant currently has and why not all members of the Order have deposed to affidavits. No explanation is provided in these respects. Nor is any given as to how and why the appellant registered itself as an employer in the first place and which persons were registered as employees and why. On the basis of the foregoing the Commission was correct in declining to deregister, even though its interpretation of s 128A is defective. An appeal is after all against the order given and not the reasoning supplied for it. The appeal against that ruling did not succeed even though the Labour Court approached the matter on the basis that the presumption in s 128A had not been rebutted. The dismissal of the appeal was the correct outcome.

[47] When it was put to Mr Töttemeyer that deregistration was sought without any statement as to whether it had other employees, he argued that the appellant had established that it was not an employer for the purpose of members of the Order and sought an order to that effect. Whilst it is correct that the Commission misconstrued s 128A, several obstacles would prevent any order to this effect. Firstly this was not the ruling sought from the Commission. Deregistration as an employer was sought. Furthermore there was the failure to disclose the number and identity of persons registered as employees of the Order and whether there are any other employees in addition to members of the Order.

[48] Quite apart from these shortcomings, it is moreover clear to me on the basis of the material provided to the Commission, that it would have been justified to decline an application for deregistration. The mere assertion of following a calling in a religious order and taking a vow would in my view be insufficient to avoid the definition of employee or employer for the purpose of the Act. This is the trend of recent jurisprudence in both England and South Africa. The approach of Lord Sumption in the UK Supreme Court in *Preston* and Wallis JA in his concurring judgment in the SCA in *De Lange*¹⁸ have much to recommend themselves to this court.

[49] Although the question as to whether ordained persons in religious orders in full time religious work are employees for the purpose of labour legislation has not served before Namibian courts, the issue is by no means novel in other jurisdictions. A survey of English and South African cases would indicate that the question has mostly arisen when a member of clergy seeks to invoke a remedy in employment legislation against his or her religious order.

[50] In England, it was not until relatively recently that ministers of religion could, depending upon the factual context, be regarded as employees of their religious organisation. The reasons for the previous position related to their spiritual duties or that there was a presumption that the parties did not intend to create a contractual relationship of employment or that duties arose from a special institutional framework of religious law. But, as was recently pointed out in *Sharp v Bishop of*

¹⁸ *De Lange* in para 50.

Worcester,¹⁹ by the Court of Appeals, the law gradually underwent development because it was difficult to justify the exclusion of religious ministers from protective employment legislation. The courts had earlier held that ministers of religion could not be employees because of the spiritual nature of their functions in the absence of clear indications to the contrary.²⁰ A series of cases which followed included one before the Court of Appeals which upheld a finding that a minister was an employee,²¹ emphasising that each case turned on its own facts. Then followed the seminal case in the UK Supreme Court of *Preston (formerly Moore) v President of the Methodist Conference*²² where Lord Sumption for the majority held in a case where a minister sought to challenge her dismissal in an employment tribunal:

‘It is clear from the judgments of the majority in *Percy*’s that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister’s occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally: see, in particular, Lady Hale at [151]. The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties’ intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.’

[51] After analysing the rules and standing orders of the church in question and the facts of that matter, Lord Sumption concluded:²³

¹⁹ [2015] EWCA Civ 399 at para 60.

²⁰ *President of the Methodist Conference v Parfitt* [1984] QB 369, as discussed in *Sharpe* at para 60.

²¹ *New Testament Church of God v Steward* [2008] ICR 282.

²² [2013] UKSC 29 [2013] 4 All ER 477 (SC).

²³ In para 26.

‘The question whether an arrangement is a legally binding contract depends on the intentions of the parties. The mere fact that the arrangement includes the payment of a stipend, the provision of accommodation and recognised duties to be performed by the minister, does not without more resolve the issue. The question is whether the parties intended these benefits and burdens of the ministry to be the subject of a legally binding agreement between them. The decision in *Percy* is authority for the proposition that the spiritual character of the ministry did not give rise to a presumption against the contractual intention. But the majority did not suggest that the spiritual character of the ministry was irrelevant. It was a significant part of the background against which the overt arrangements governing the service of ministers must be interpreted. Nor did they suggest that the only material which might be relevant for deciding whether the arrangements were contractual were the statements marking the minister’s engagement, although it so happened that there was no other significant material in Ms Percy’s case. Part of the vice of the earlier authorities was that many of them proceeded by way of abstract categorisation of ministers of religion generally. The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister. What Lord Nicholls was saying was that the arrangements, properly examined, might well prove to be inconsistent with contractual intention, even though there was no presumption to that effect. He cited the arrangements governing the service of Methodist ministers considered in *Parfitt* as an example of this, mainly for the reasons given in that case by Dillon LJ. These were, essentially, the lifelong commitment of the minister, the exclusion of any right of unilateral resignation and the characterisation of the stipend as maintenance and support. There is nothing inconsistent between his view on these points and the more general statements of principle appearing in his speech and in the speeches of those who agreed with him.’

[52] In his concurring judgment in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and another*,²⁴ Wallis JA provided a useful summary of the position in South Africa, also referring with approval to the approach of the UK Supreme Court in *Preston*. Wallis JA referred to a trilogy of

²⁴ (726/13) [2014] ZA SCA 151 (29 September 2014).

cases in the Labour Court in South Africa. In *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit*,²⁵ a minister had been given a letter of appointment by a congregation which set out his duties and his salary and other benefits due to him in return for his performance of those duties. The court held that this amounted to a contract of employment. In another matter concerning a challenge to the dismissal of an Anglican priest, the Labour Court held that the ordination of the priest in accordance with the rites and canons of that church, did not constitute a contract of employment, finding that the basis of the process was religious.²⁶ The third matter involved an officer of the Salvation Army where the Labour Court found that the relationship was a spiritual one governed by religious conscience (because it flowed from an understanding of being called of God to a special ministry) and not a contract of employment.²⁷

[53] Wallis JA in *De Lange* stressed – as did Lord Sumption in *Preston* – that in making an assessment as to whether the nature of the relationship is employment or not, each case is to be assessed with reference to the rules and practices of the specific religious order or church and any special arrangements made with the minister to determine ‘whether their actions were intended in any respect to give rise to contractual rights and obligations’. That would also be the approach to be followed in Namibia. Each case would need to be considered on its own facts as to how a minister is engaged, the character of the rules or terms for his or her service and then determining whether these documents and the evidence of the parties would give rise to an intention to form a contract of employment or not.

²⁵ *Church of the Province of Southern Africa Diocese of Cape Town v CCMA and others* (2001) 22 ILJ 2274 (LC).

²⁶ (1999) 20 ILJ 1936 (LC).

²⁷ *Salvation Army (South African Territory) v Minister of Labour* (2005) 26 ILJ 126 (LC). The approach in this matter was followed by the Labour Appellant Court in *Mwenyi*.

[54] In this instance, all the appellant put before the Commission were sparse factual assertions and a series of contentions in correspondence and the vow. No further documentation comprising the terms of appointments, rules and/or the constitution of the appellant or the Order which govern appointments were placed before the Commission. As against this paucity of material is the fact that the appellant had previously itself regarded itself as an employer and that it should register and did so, and provided no explanation as to the change in its stance.

[55] It would follow that on the material placed before the Commission, the appellant would in any event not have been entitled to the order proposed by Mr Tötemeyer.

Costs

[56] During oral argument, the court raised several unsatisfactory features in the preparation of the record with a view to considering whether an adverse costs order in respect of the preparation of the record should be made in the event of the appeal succeeding. Given the outcome of this appeal, that issue no longer arises. It is however appropriate to sound a warning about the consequences of records not conforming to the rules – an all too frequent occurrence in the appeals serving before this court. The inclusion of a matter which does not form part of the record, such as transcripts of oral argument and written argument in the court below and unduly repetitious documentation which can easily be avoided can and may result in adverse costs orders.

Conclusion and order

[57] This appeal is dismissed with costs.

SMUTS JA

DAMASEB DCJ

MAINGA JA

APPEARANCES

APPELLANTS:

R Tötemeyer SC, with A Denk

Instructed by Dr Weder, Kauta &
Hoveka Inc

RESPONDENTS:

N Tjombe

Instructed by Tjombe-Elago Inc