

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0002 OF 2017

5 **REV. FR. CYRIL ADIGA NAKARI** **PLAINTIFF**

VERSUS

1. RT. REV. SABINO OCAN ODOKI

10 **2. REGISTERED TRUSTEES OF ARUA DIOCESE } DEFENDANTS**

Before: Hon Justice Stephen Mubiru.

RULING

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The plaintiff's claim against the defendants jointly and severally is for general damages for unlawful suspension from duty and defamation, interest and costs. The plaintiff was ordained priest in the Roman Catholic Church on 19th December, 1987 and has since then been involved in missionary work in the Diocese of Arua. He was on divers dates appointed by the second defendant as the curate of Adumi Parish, Chaplain of Muni National Teachers College and curate of Arua Town Parish. On or about 4th July, 2012 the first defendant reported a case to Arua Central Police Station by which he accused the plaintiff and three other priests in the Diocese of having hatched a plan to assassinate him. Investigations conducted into the accusation found it to be false and it was resolved that the first defendant makes a public apology to the three priests and their families. Instead the first defendant required the plaintiff and the other three priests to apologise to him. Amidst subsequent arrangements for the amicable resolution of the dispute, the plaintiff was surprised when on 22nd August, 2014 he was suspended from exercising his priestly ministry. He has since then been denied support and sustenance by the second defendant. He contends that the suspension is unlawful and the contents of the letter of suspension are defamatory of him. He prayed for judgement to be entered in his favour against the defendants.

In their joint written statement of defence, the defendants refuted the plaintiff's claim and contended instead that his suspension was lawful. The plaintiff breached his vows to be loyal to legitimate Church authority when he took a rebellious stance against the first defendant,

especially when he refused to take up his new posting as Chaplain of Micu Secondary School in Micu Catholic Parish. Reports to the police concerning an alleged assassination plot were made by independent third parties and not the first defendant. The complainants were found to be con-
5 men and there has never been any demand for the first defendant to apologise. The plaintiff was suspended in accordance with Canon Law, after repeated warnings, but the defendants are ready and willing to reinstate him to his priestly ministry upon his renunciation of the rebellious stance against them. The first defendant's communication of the plaintiff's suspension is not defamatory and was made under privileged circumstances. The plaintiff having appealed to higher authorities in accordance with Canon Law, the suit against them is premature and misconceived.
10 They thus prayed that the suit be dismissed with costs.

Attempts at mediation having been unsuccessful, the parties filed a joint memorandum of scheduling but on the date fixed for hearing of the suit, counsel for the defendants, Mr. Michael Ezadri Onyafio raised a preliminary objection by which he contended that the suit is incompetent
15 in so far as it is based on an alleged relationship of employment between the plaintiff and the defendants. In his submission, the plaintiff is not an employee but rather a person practicing an unremunerated vocation and calling with the Roman Catholic Church, whose relationship with the Church is governed by Canon Law. His calling involves a vow or oath of celibacy, obedience and chastity which was administered in accordance with that law. He underwent a period of
20 formation in various seminaries operated by the Church before he took those vows. He voluntarily submitted himself to the jurisdiction of the Church. The first defendant too belongs to that vocation in which he serves as the plaintiff's supervisor and administrator in the official capacity of Bishop Ordinary. He is not the plaintiff's employer. In suspending the plaintiff, the first defendant invoked relevant provisions of Canon Law and in the same vein, the plaintiff
25 being aggrieved by the decision invoked relevant provisions of the same law to appeal to the Holy See in Rome by way of "Hierarchical Recourse," where his appeal is still pending.

Invoking the provisions of articles 2 and 29 (1) (c) of *The Constitution of the Republic of Uganda, 1995*, Counsel submitted further that the Constitution protects religious laws which are
30 not inconsistent with it. The plaintiff was trained and joined his calling as a priest of the Roman Catholic Church under Canon law, observed and practiced that law, until differences arose

between him and the defendant that have resulted in this suit. In submitting themselves to Canon Law, the parties to the suit have not violated any provision of the Constitution and thus should be allowed to resolve their dispute in accordance with Canon Law, whose provisions entail adequate remedies for members of the Church who subscribe to it. In the alternative, he argued that the plaintiff ought to have proceeded by way of judicial review rather than ordinary suit since he is challenging an administrative decision of suspension. He cited the decision in *Rev. Fr. Boniface Turyahikayo v. Bishop of Kabale Diocese, H. C. Misc. Civil Application No. 60 of 2012* where it was held that such a remedy is available to challenge disciplinary decisions of the Church. He prayed that the objection be sustained.

In his response, counsel for the plaintiff Mr. Samuel Ondoma submitted that the plaintiff is an employee of the Arua Diocese, the second defendant and the relationship between him and the defendants is an employment relationship. He is serving under a contract of service as defined by *The Employment Act, 2006*. He was appointed a priest, Chaplain and curate in which capacity he agreed to work for remuneration, and remuneration is not necessarily a salary. Canon Law provides for the remuneration of priests, as per Canons 281 and 1350. Priests are not employees of God just doing voluntary work but they are employees of the Church which provides them with the tools of their work, posts them, and supervises them. In their own mind, they know and believe that they are employees of the Church. It is the Church which suspended the plaintiff and not God. Nothing in Canon Law prevents a priest from invoking and asserting his civil rights or the criminal law against the Church, Bishop or fellow priest since the Constitution is supreme to Canon Law. He submitted that the Church has in various jurisdictions been held to account vicariously for the crimes and torts committed by errant priests, especially in the area of sexual misconduct. This has been possible by courts imputing a relationship of employment between the clergy and the Church. He cited a host of internet-based scholarly articles in support of this argument. The Church having failed to be just, honest and open internally, it should be subjected to external scrutiny. He prayed that the objection be overruled.

The suit raises poignant issues concerning the extent to which secular institutions of state may interfere with the internal management of religious institutions. Religion is the belief which binds the spiritual nature of humans to a super-natural being. It includes worship, belief, faith,

devotion etc. and extends to rituals. By virtue of Articles 7 and 29 of *The Constitution of the Republic of Uganda, 1995* this country is exempted from adopting a State religion and every person is guaranteed freedom of thought, conscience and belief and the freedom to practise any religion and manifest such practice which includes the right to belong to and participate in the

5 practices of any religious body or organisation in a manner consistent with this Constitution. In light of these provisions, Civil courts have no jurisdiction to prescribe the modes of worship, prayers and religious precedence where no question of civil right really arises. However, the right to worship is a civil right which can be agitated in a civil court.

10 The Constitution guarantees the right to religious freedom as an individual right which may also be exercised in community with others. Individual rights of conscience are of course crucial and paradigmatic for religious freedom, but unless religious associations have autonomy, the meaning of religious freedom would be substantially diminished. In most religious traditions, there is clearly a communal dimension. Countless religious beliefs and activities are manifested

15 in teaching, practice, worship and observance, carried out by groups of believers. The freedoms are enjoyed both individually and in community with others, in public or private. Thus individual freedom of religion would be impoverished if the autonomy of religious organisations were left unprotected.

20 Under the guarantee of freedom of opinion and freedom of association, citizens sharing the same religious views may associate, as in this case, under an established Church or other religious organisation. "Religious communities.....provide the environment within which religious ideas and experience can be formed, crystallised, developed, transmitted, and preserved. Individual belief would lack its richness, its connectedness, and much of its character-building and

25 meaning-giving power if it were cut off from the extended life of religious communities..... Unless religious communities are free to worship, teach, expound, interpret and propagate their own teachings without governmental interference, the individual conscience is likely to feel alienated and cut off. It will not have a home." (See W. Cole Durham, Jr. *The Right to Autonomy in Religious Affairs: A Comparative View*, Gerhard Robbers, ed., in *Church Autonomy: A*

30 *Comparative survey*, Frankfurt am Main: Peter Lang, 2001).

Under Articles 7 and 29 of *The Constitution of the Republic of Uganda, 1995*, the relationship between Church and State is based on two principles. First: there is no State Church; Church and State are separated. This means on the one hand that the state should not identify itself with any ideology or religion, and, on the other hand, that it must not be institutionally attached to churches or to one single church. Second: “religious bodies” regulate and administer their affairs autonomously (independently but in cooperation with the state) within the limits of the law, i.e. the right of churches and other religious communities to conduct religious activities autonomously (e.g., build places of worship, conduct worship services, pray, proselytise, teach, select their own leaders, define their own doctrines, resolve their own disputes, etc.) Religious bodies may be founded for the purpose of pursuing any religious activity which is not contrary to the constitution and does not conflict with the law. Such religious bodies may acquire legal capacity according to the general provisions of civil law. Those religious bodies which fulfil the requirement of law may then conserve or may acquire the status of corporate bodies.

Those religious bodies which are “recognised by the law” may then arrange and administer their inner affairs autonomously, for the accomplishment of their declared mission in the world. They are entitled to organise themselves according to their own creed, own, acquire and administer property, movable or immovable, and maintain institutions for religious or charitable purposes. They are free to organise their own ceremonies, exercise worship, and undertake such other related activities. No public authority may interfere in the designation of their religious ministers. Neutrality of the state can be seen as the most important principle governing the state in regard to religious communities. The separation of Church and state not only means that the State should not interfere with the internal workings of any church, but also that no state pressure may be applied in the interest of enforcing the internal laws and rules of a church. Church autonomy means the right of religious communities to decide upon and administer their own internal religious affairs without interference by the institutions of government.

It should be noted that the relevant articles of *The Constitution of the Republic of Uganda, 1995* provide for the manifestation of religion without listing the possible actions that would be permissible for expressing the belief. In that sense, one of the most challenging issue of Church autonomy is certainly the question of their freedom to hire and fire persons who serve in

positions of substantial religious importance, persons that have a special ecclesiastical working relationship with their respective church. This in many instances fosters a clash between labour laws and the specific goals of the Church run institutions. Although Courts exist mainly to provide remedies for private wrongs, which are infringements or deprivation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries, by virtue of the constitutional guarantees, civil courts have no jurisdiction to decide questions of religious rituals, rites and ceremonies except in so far as the decision of such questions is incidental to a decision of civil rights.

- 10 Religious autonomy is vital because it "permits religious organisations to define a specific mission, to decide how ministry and ecclesiastical government fulfil their mission and to determine the nature and extent of institutional interaction with the larger society (see Craig B. Mousin, *State Constitution within the United State and the Autonomy of Religious Institutions, in Church Autonomy: A Comparative Perspective*, in Gerhard Robbers, Ed, *Church Autonomy: A*
15 *Comparative Perspective*, at p 401; Peter Lang Publishing (2001). For a variety of historical and doctrinal reasons, Catholics are more insistent on institutional autonomy with respect to the state (see Roland Minnerath, *Church Autonomy and Religious Liberty in Denmark*, *ibid* at p 382).

For purposes of preserving the autonomy of religious groups, Courts will exercise jurisdiction where they are not being asked to adjudicate on faith but are being asked whether the civil consequences of exercising a right in respect of faith are valid. For example the right to worship is a civil right, interference with which raises a dispute of a civil nature. A religious right is the right of a person believing in a particular faith to practice it, preach it and profess it. It may thus be civil in nature. *Prima facie* suits raising questions of religious rites and ceremonies only, are
25 not maintainable in a civil Court, for they do not deal with legal rights of parties. However, a dispute about a religious office is a civil dispute as it involves disputes relating to rights which may be religious in nature but are civil in consequence. It does not cease to be one even if the said right depends entirely upon a decision of a question as to the religious rites or ceremonies. Therefore, a suit by a person claiming to be entitled to a religious office, for a declaration of his
30 or her right to the office, calls for a decision on the civil consequences of religious belief or practice and is thus a suit of a civil nature which may be entertained by a civil court.

This distinction between a religious belief or practice and its civil consequences is demonstrated in the decision of an intermediate appellate court in New Jersey, in the case of *South Jersey Catholic School Teachers Association v. St. Teresa of the Infant Jesus Church Elementary School*, 290 N.J. Super. 359, 675 A.2d 1155 (App. Div. 1996), where it was stated that;

5 Courts can decide secular legal questions in cases involving some background issues of religious doctrine, so long as they do not intrude into the determination of the doctrinal issues.....In such cases, courts must confine their adjudications to their proper civil sphere by accepting the authority of a recognized religious body in resolving a particular doctrinal question, while, where appropriate, applying neutral
10 principles of law to determine disputed questions which do not implicate religious doctrine....“Neutral principles” are wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations.

The issue raised in that appeal was whether lay teachers in church-operated elementary schools
15 had an enforceable state constitutional right to unionise and to engage in collective bargaining respecting terms and conditions of employment without violating the Religion Clauses of the First Amendment of the United States Constitution. It was held that Lay elementary-school teachers employed by the Diocese of Camden had a state constitutional right to unionise and to engage in collective bargaining. The scope of that negotiation, however, was limited by the
20 Religion Clauses of the First Amendment to wages, certain benefit plans, and any other secular terms or conditions of employment similar to those that are currently negotiable under an existing agreement with the high school lay teachers employed by the Diocese of Camden.

The court stated that the standard for conducting an Establishment Clause analysis was based on
25 a three-pronged test: 1) the statute must have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster an excessive government entanglement with religion. To determine whether the government has coercively interfered with a religious belief, or has impermissibly burdened a religious practice, in violation of the Free Exercise Clause, compelling interest test was
30 established which asks whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling public interest or pressing social needs that are necessary in a democratic society and proportionate to the objectives sought to be furthered.

The test permits a state to burden the free exercise of religion if the burden imposed is in furtherance of a compelling public interest or pressing social need that is necessary in a democratic society and represents the least restrictive means of furthering that compelling public interest. In applying that test to the facts of the case, the Court found that the State of New Jersey
5 has a compelling public interest in allowing private employees to unionise and to bargain collectively over secular terms and conditions of employment. Bargaining over secular terms and conditions of employment could be achieved without either advancing or inhibiting religion. It emerges from this case that so long court relies on wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations, it is free to impose
10 regulatory burdens on a religious entity.

This distinction between a religious belief or practice and its civil consequences underlies the way that the English and Scottish courts have always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the
15 courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community
20 against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust (see *Shergill v. Khaira* [2014] UKSC 33 para 45).

The plaintiff in the instant suit on one hand seeks to enforce what he considers to be employment rights. Public interest in the enforcement of employment law is undoubtedly important, but so
25 too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a priest who has been fired or suspended sues his church alleging that his termination or suspension was unlawful, the courts are called upon to strike the balance between the two interests by examining whether the relationship between a priest and the church is bound by a contract of service. Fundamental rights can be limited only if this is
30 inevitable to ensure another fundamental right or constitutional interest. The limitation has to be proportionate to the goal that is intended to be achieved. With this balancing test, courts consider

whether a general law, if applied to a religious institution, would inhibit its freedom more broadly than justified and, in those circumstances, courts could exempt the church.

To succeed in his claim for unlawful suspension, the plaintiff must first establish the existence of
5 a contract of service between him and the defendants. A contract of service entails an obligation to serve, and it comprises some degree of control by the master (see *Chadwick v. Pioneer Private Telephone Co Ltd*, [1941] 1 All ER 522). Three conditions are required for a contract of employment: (i) the servant agrees, in consideration for a wage or other remuneration to provide his own work and skill in the performance of some service for his master, "mutuality of
10 obligation"; (ii) he agrees expressly or impliedly that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; and (iii) the other provisions of the contract are consistent with its being a contract of service (see *Montgomery v. Johnson Underwood Ltd*, [2001] EWCA Civ 318, [2001] Emp LR 405).

15 In the judgment of MacKenna J in *Ready Mixed Concrete (South East) Limited v. Ministry of Pensions* [1968] 2 QB 497 at page 515C, he stated:

A contract of service exists if these three conditions are fulfilled. (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees,
20 expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

In the determination of whether or not a person has entered into or works under a contract of
25 employment, the court may then have to ask whether the parties ever realistically intended or envisaged that its terms, particularly the essential terms, would be carried out as written. In essence there are four basic requirements that must be fulfilled before it can be said that there is a contract of employment and so a relationship of employer and employee. First, the employer must have undertaken to provide the employee with work for pay. Secondly, the employee must
30 have undertaken to perform work for pay. Those obligations are mutual. The third requirement is that the employee must have undertaken to perform the work personally; he is not entitled to sub-contract the work to another. Fourthly, it is also generally accepted that the employee agrees that he will be subject to the control of the employer to a certain minimum degree. Whether in a

given case there exists a relationship of employer and employee, is a question of fact to be decided by all the circumstances of the case. To determine whether there exists a relationship of employer and employee in a given case regard has to be had to the real relation between the parties as shown by all relevant facts taken together.

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Whether in a given case the relationship of master and servant exists is a question of fact, which must be determined on a consideration of all material and relevant circumstances having a bearing on that question. The starting point of any consideration of the relationship between a Church and its priests must be an examination of the faith and doctrine to which they subscribe and they seek to further. The law should not readily impose a legal relationship on members of a religious community which would be contrary to their religious beliefs. These beliefs and practices may be such, in the context of a particular church, that no intention to create legal relations is present.

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In general, it is characterised by selection by the employer coupled with payment by him or her of remuneration or wages, the right to control the method of work, and a power to suspend or remove from employment, which are considered to be indicative of the relation of master and servant. But co-existence of all these indicia is not predicated in every case to make the relation one of master and servant. In special classes of employment, a contract of service may exist, even in the absence of one or more of these indicia. But ordinarily the right of an employer to control the method of doing the work, and the power of superintendence and control may be treated as strongly indicative of the relation of master and servant, for that relation imports the power not only to direct the doing of some work, but also the power to direct the manner in which the work is to be done. If the employer has the power, prima facie, the relation is that of master and servant.

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Different jurisdictions have grappled with the question as to whether the relationship between a church and the ministers of its faith creates an employer-employee relationship and rights cognisable by the civil courts. In India, mainly because there are no Ecclesiastical Courts, every civil suit is cognisable by the secular civil courts unless it is barred. There is considered to be an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by

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statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit in which the right to property or religious office is involved it is a suit of civil nature. Where even a right to an office is contested then it would be a suit of a civil nature even though that right may entirely depend on the decision of a question as to religious rites or ceremonies. Though religious rites and ceremonies may form the basis of a right that is claimed, such right being a right to property or to office, a suit to establish such right is a suit of a civil nature. Suits filed for vindication of rights related to worship, of status, office or property are maintainable in civil courts and it is considered to be duty of the courts to decide even purely religious questions if they have a material bearing on the right alleged in the plaint regarding worship, status or office or property.

Consequently, there is nothing to prevent civil courts from entertaining disputes pertaining to religious office, including performance of rituals, which suits are always decided by the courts established by law (see *Krishname and others v. Krishnasamy and others*, 1879 ILR 2 Mad. 62; *Devendra Narain Sarkar and others v. Satya Charan Mukerji and others* AIR 1927 Calcutta 783; *Sri Sinha Ramanuja Jeer and others v. Sri Ranga Ramanuja Jeer and another* (1962) 2 SCR 509; *Srinivasalu Naidu v. Kavalmaru Munnuswami Naidu* AIR 1967 Madras 451; and *Most. Rev. P.M.A. Metropolitan and others v. Moran Mar Marthoma and another*, 1995 AIR 2001;). In India, the right to worship and the right to conduct worship are civil rights, interference with which raises a dispute of a civil nature, but also because there is no other forum where such dispute can be resolved. Maintainability of the suit should not be confused with exercise of jurisdiction because even there, the courts may refrain from adjudicating upon purely religious matters, save suits where the right to property or to an office depends on decisions of questions as to religious faith, belief, doctrine or creed, as the courts "may be handicapped to enter into the hazardous hemisphere of religion" (see *Most. Rev. P.M.A. Metropolitan and others v. Moran Mar Marthoma and another*, 1995 AIR 2001).

To the contrary, in the United States the establishment clause prevents courts from determining doctrinal disputes. As a result, American courts will not entertain religious disputes at all. Decisions of religious tribunals are subject only to such appeals as the religious body itself allows. In *Presbyterian Church v. Hull Church* 393 US 440 (1969) it was stated:

But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

In the United States, under the legal doctrine known as the “ministerial exception,” it is considered impermissible for the courts to contradict a church’s determination of who can act as its ministers (see *Watson v. Jones*, 13 Wall. 679; *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94; *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U. S. 696. Pp. 10–12). Courts have adopted the ministerial exception, not only in cases involving ministers, priests, rabbis and other clergy, but have also applied the exception to employees who are not clergy but perform functions “important to the spiritual and pastoral mission of the church.” Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions (see *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012)). In that case United States Supreme Court unanimously ruled that federal discrimination laws do not apply to religious organizations’ selection of religious leaders.

In south Africa, prior to the coming into force of the Constitution, under the principle of doctrinal entanglement, entailing a reluctance of the courts to become involved in doctrinal disputes of a religious character, the courts refused to adjudicate upon a doctrinal dispute between two schisms of a religious sect unless some proprietary or other legally recognised right

was involved. As J. Witte in "*The South African Experiment in Religious Human Rights*" (1993) Journal for Juridical Science, at 24-25, noted;-

- 5 Active religious rights require that individuals be allowed to exercise their religious beliefs privately and groups be allowed to engage in private worship assembly. More fully conceived, active religious rights embrace an individual's ability to engage in religious assembly, religious speech, religious worship, observance of religious laws and ritual, payment of religious taxes, and the like. They also embrace a religious institution's power to promulgate and enforce internal religious laws of order, organisation, and orthodoxy, to train, select, and discipline religious officials, to
- 10 establish and maintain institutions of worship, charity, and education, to acquire, use, and dispose of property and literature used in worship and rituals, to communicate with co-believers and proselytes, and many other affirmative acts in manifestation of the beliefs of the institution.
- 15 It would seem that even after the coming into force of the Constitution, the High court in its judgments such as that of *Taylor v. Kurtstag* and *Wittmann v. Deutsche Schulverein, Pretoria 1998 (4) SA 423 (T)*, appears to accept that individuals who voluntarily commit themselves to a religious association's rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies. The court has taken the position that a
- 20 proper respect for freedom of religion precludes the courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.

On the other hand, the position that has been taken by the courts in England is that by virtue of the spiritual nature of the functions of a priest, the spiritual nature of the act of ordination by the

25 imposition of hands, and the doctrinal standards of the Church which are so fundamental to the church and to the position of every priest in it, it is impossible to conclude that any contract, let alone a contract of service, comes into being between a newly ordained priest and the Church when the priest is received into priesthood. The nature of the stipend too supports this view. In the spiritual sense, the priest sets out to serve God as his master. It is not right to say that in the

30 legal sense that a priest is at the point of ordination undertaking by contract to serve the church or the Bishop as his master throughout the years of his ministry. There is a tendency to regard the spiritual nature of a minister of religion's calling as making it unnecessary and inappropriate to characterise the relationship with the church as giving rise to legal relations at all (see *Rogers v.*

Booth [1937] 2 All ER 751at754). There is a presumption that ministers of religion are office-holders who do not serve under a contract of employment.

For example, in *Re Employment of Church of England Curates, [1912] 2 Ch 563* it was held that the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose rights and duties are defined by contract at all. The relation between a curate and his vicar, or between him and his bishop, or between him and anyone else, is not the relation of employer and servant.

10 In *Methodist Conference v. Preston, [2013] 2 WLR 1350*, the plaintiff asserted unfair dismissal. The Conference said that as an ordained minister she was not an employee, and the court was without jurisdiction over such a claim. It was held that;

15 The essence of the arrangement between the Conference and a minister lay in the constitution of the Conference, and not in a contract. The relationship was established at and derived from the act of ordination, and was lifelong. The question of 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. Three points were decisive: First, the manner in which a minister is engaged is incapable of being analysed in terms of contractual formation.....Secondly, the stipend and the manse are due to the minister by virtue only of his or her admission into full connexion and ordination.....Third, the relationship between the minister and the Church is not terminable except by the decision of the Conference or its Stationing Committee or a disciplinary committee. There is no unilateral right to resign, even on notice.

In that case, the Court held by four votes to one that a Methodist minister was not, in fact, an employee. The reasons advanced by the court were that under the Constitution and Standing Orders of the Methodist Church:- a minister's engagement was incapable of being analysed in terms of contractual formation and neither admission to full connexion nor ordination were themselves contractual; a minister's duties were not consensual but depended on the unilateral decisions of the Conference; a stipend was paid and a manse provided by virtue only of admission into full connexion or ordination; the stipend and manse were not pay for an employed post but "a method of providing the material support to the minister without which he or she

could not serve God"; disciplinary rights under the Church's Deed of Union were the same for ordinary members as for ministers; and the relationship between the Church and the minister was terminable only by Conference, its Stationing Committee or by a disciplinary committee and there was no unilateral right to resign, even on notice.

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In *President of the Methodist Conference v. Parfitt*, [1984] QB 368, [1983] 3 All ER 747, [1984] 2 WLR 84, the plaintiff sought to assert that he as a minister of the Methodist Church who had been received into full connection had a contract of employment with the church. Having that contract, he said that he had been unfairly dismissed. It was held that;

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The spiritual nature of the work to be done by a person and the spiritual discipline to which that person is subject may not necessarily, in an appropriate context, exclude a contractual relationship under which work which is of a spiritual nature is to be done for others by a person who is subject to spiritual discipline. On any view the spiritual nature of the work and the spiritual discipline under which it is performed must be very relevant considerations when it has to be decided whether or not there is a contractual relationship.....Nonetheless the courts have repeatedly recognised what is and what is not a contract of service and I have no hesitation in concluding that the relationship between a church and a minister of religion is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service.

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The spiritual nature of a priest's position and relationship with the church, the arrangements between the priest and the church in relation to his stationing throughout his ministry and the spiritual discipline which the church is entitled to exercise over the priest in relation to his career are more or less doctrinal rather than contractual. The relationship is non-contractual. Therefore, unless there was some special arrangement with a priest, that priest's rights and duties arise from his or her status under the Church's Constitution or doctrine rather than from any contract.

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In *Davies v. Presbyterian Church of Wales*, [1986] 1 WLR 32, a minister of the Presbyterian Church of Wales who had been inducted pastor of a united pastorate in Wales claimed unfair dismissal. Describing the role of a minister of the church, Lord Templeman said;

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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.

Similarly in the Australian case of *Ermogenous v. Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95, Archbishop Ermogenous had been engaged by the Greek Orthodox Community of SA Inc (an incorporated association) to undertake a range of duties, which included acting as Archbishop of the Greek Orthodox Church in South Australia, conducting religious services and carrying out other clerical duties. Having been removed from his position in 1994 after working in it since 1970, he claimed that he ought to have been paid annual leave and long service leave owed to him as an employee of the Association. The Industrial Magistrate at first instance found in favour of the Archbishop, and a judge of the Industrial Relations Court of South Australia upheld this decision. But on appeal to the Full Court of the Supreme Court of South Australia, the decision was overturned on the basis that there was a long-standing “presumption” that a church and clergyman did not have “intention to create legal relations” under contract law. The decision of the High Court was that in general it was no longer appropriate to rely on such a presumption (or indeed on other “presumptions” relating to “intention” in this area), and hence that the matter had to be sent back to the Full Court for further consideration of the actual intention of the parties in the relevant circumstances. There were a number of features of the case pointing to the parties all believing that legal obligations were involved, including PAYE deductions and reference to the Archbishop’s “salary.” In the end, having looked at the matter again, the Full Court on remittal from the High Court held that there was no sufficient reason to overturn the decision of the Industrial Magistrate at first instance, and hence the outcome of the litigation was that the Archbishop indeed was an employee of the Association.

The result of *Ermogenous* seems to be that in Australia, it will not normally be assumed that a clergyman simply has a “spiritual” and not legal relationship with the body that engages him or her, or controls their work. As Doyle CJ said, the facts of the particular case were fairly unusual,

and it would not be appropriate at all to conclude that henceforth all clergy in Australia were employees. Each case will turn on its own facts.

Nevertheless, a similar view can be found in subsequent decisions even in England. For example
5 in *Percy v. Board of National Mission of the Church of Scotland*, [2006] 2 AC 28, [2006] 4 All
ER 1354, the plaintiff was an “associate minister” of the Church of Scotland (which is something
like the “established” church in Scotland), and wanted to bring a sex discrimination claim under
the relevant legislation. The legislation did not hinge on the standard “employee” criterion, it was
a bit broader, referring to someone who “contracted personally to execute any work or labour”,
10 and so the decision could be confined to that specific phrase. It was accepted that she did not
have a contract of service. But the statutory test of “employment” for the purposes of sex
discrimination claims is broader than the test for unfair dismissal claims. Under *The Sex
Discrimination Act 1975*, it extended to those who “contract personally to execute any work or
labour.” Ms Percy claimed to come within that category. In spite of the difference between the
15 tests for unfair dismissal and sex discrimination, the House took the opportunity to revisit both of
the themes which had featured in the authorities to date on the question whether a minister was
employed under a contract of service. Nevertheless, the House of Lords reviewed the history of
the employment status of clergy and explicitly held that there should be no “presumption” that a
minister held a non-contractual position; that each case needed to be resolved by a careful review
20 of the specific arrangements. In Ms Percy’s case the details of her job offer and other conditions
meant that it was a contractual arrangement. This was because of the manner in which she had
been engaged. The relevant committee of the Church of Scotland had invited applications,
referring to the duties, the terms of service and the remuneration associated with the job. Ms
Percy had responded, was offered the job and sent a full copy of the terms. She replied formally
25 accepting it. These circumstances suggested a contractual relationship, and nothing in the terms
was inconsistent with that.

In *Davies v. Presbyterian Church of Wales* [1986] 1 WLR 323, the House of Lords held that the
mere fact that a relationship founded on the rules of a church was non-contractual did not mean
30 that that there were no legally enforceable obligations at all. But they were inclined to find those
obligations in the law of trusts, and adhered to the familiar distinction between an employment

and a religious vocation. At p 329, Lord Templeman, with whom the rest of the committee agreed, said:

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 applicant 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. The duties owed by the church to the pastor are not contractual. The law imposes on the church a duty not to deprive a pastor of his office which carries a stipend, save in accordance with the procedures set forth in the book of rules.

The ecclesiastical rules do not necessarily contain terms of employment capable of being offered and accepted in the course of a religious ceremony. This means that there is no employment capable of allowing an unfair dismissal or suspension issue to arise. An arrangement under which there is no obligation on the priest to do work or on the Church to provide work or even remunerate that work, cannot be a contract of service.

In *Preston (formerly Moore) v. President of the Methodist Conference* [2013] 2 AC 163, the plaintiff was ordained as a Minister (or, to use the correct terms, received into full connexion with) the Methodist Church in 2003, following a period of time as a Probationer Minister. In 2006 she was appointed to the post of Superintendant Minister to the Redruth Circuit in Cornwall. On 10th June 2009, she submitted a letter of resignation. On 9th September 2009, she commenced proceedings in the Employment Tribunal alleging unfair constructive dismissal. Her claim raised a preliminary issue: was she an employee of the Church within the meaning of section 230 of *The Employment Rights Act 1996*. The Conference replied that she was not an employee entitled to make such a claim. It was held that the plaintiff did not have a contract of

employment with the Church. The court explained that the modern authorities made clear that the question whether a minister serves under an employment contract can no longer be answered by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor can it be answered by any presumption against the contractual character of the service of ministers.

5 The primary considerations are the manner in which a minister is engaged, and the rules governing his service. This depends on the intentions of the parties and, as with all such exercises any such evidence of the parties' intentions falls to be examined against the factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.

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In that case, the constitution and standing orders of the Methodist Church showed that: (1) A minister's engagement is incapable of being analysed in terms of contractual formation. Neither admission to full connection nor ordination are themselves contracts. (2) A minister's duties thereafter are not consensual. They depend on the unilateral decisions of the Conference. (3) The stipend and manse are due to a minister by virtue only of admission into full connection or ordination, and while a minister remains in full connection and in active life, these benefits continue even in the event of sickness or injury. (4) The disciplinary rights under the Church's Deed of Union, which determine the way a minister may be removed, are the same for ordinary members as well as ministers. (5) The relationship between the Church and the minister is only terminable by the Conference or its Stationing Committee or by a disciplinary committee, and there is no unilateral right to resign, even on notice. The ministry described in the constitution and standing orders is a vocation, by which candidates submit themselves to the discipline of the Church for life. Absent special arrangements with a minister, a minister's rights and duties arise from their status in the Church's constitution and not from any contract.

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The standing orders showed that a circuit's invitation is no more than a proposal to the Conference's Stationing Committee that they should recommend the candidate to the Conference for stationing in their circuit. While every effort is made to meet the preferences of circuits and ministers, the decision is reserved to the Conference. It may be delegated only to the President of the Conference, not to the circuit, and then only if the appointment has to be made between Conferences. The relevant relationship is between the minister and the Conference, and the

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Conference can move a minister from one circuit to another even before the end of the period for which the circuit invited the candidate to serve. There is no fresh relationship with each invitation or with each appointment. Ms. Preston was serving as a minister at Redruth not pursuant to the five-year relationship envisaged in the exchange of letters, but pursuant to the
5 life-long relationship into which she had already entered when she was ordained.

It is clear from the foregoing decisions that historically, the courts have tended to regard clergy as office-holders rather than as employees. Whereas debate exists as regards personnel who are not themselves in ministerial positions but whose work furthers the mission of the religious
10 organisation, or lay personnel who perform essentially secular tasks for religious organisations or one of its affiliated entities that is secular to a greater or lesser degree, there is a high degree of convergence to the extent of almost being universally accepted that matters involving the appointment, discipline and removal of personnel performing the functions of ministers or those involved in representing the group or in teaching doctrine, are generally acknowledged as
15 exclusively religious matters and thus enjoy the protection of religious autonomy with respect to civil laws. The status of the clergy has traditionally been regulated by the internal canonical regulations of the denomination concerned. The courts have tended to proceed on three principles:

1. That clergy are normally to be regarded as ecclesiastical office-holders whose rights and
20 duties are defined not by an employment contract but by the law relating to the office held, which exists independently of the person occupying that office;
2. That the functions of a minister of religion are vocational and spiritual in nature and therefore incompatible with the existence of a contract (on this view ministerial functions arise by way of a religious act such as ordination, not as the result of a contractual
25 agreement between parties); and
3. That even if there is evidence of some kind of contract, such evidence has to point to it being a contract of employment.

The question whether a minister of religion serves under a contract of employment can no longer
30 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. In *Preston*, the primary considerations in deciding whether the individual is employed under a contract of employment include; (a) the manner in which the individual was engaged and the character of the rules and terms governing their service; (b) the intentions of the parties, and the fact that the arrangements included the payment of a stipend, the provision of accommodation and the performance of recognised duties did not without more resolve the issue; (c) the constitution and standing orders (of the Methodist Church) which showed that the manner in which the minister was engaged was incapable of analysis in terms of contractual formation; (d) the rights and duties of the minister arose from the constitution of the church and not from contract; (e) the relationship was not terminable at the will of the parties.

The effect of the majority of authorities cited above, which is I believe equally applicable in this country, is that in each case the court must examine the rules and practices of the particular church and any special arrangements that have been made with the minister or priest to determine whether their actions were intended in any respect to give rise to contractual rights and obligations. In making that assessment the court cannot disregard either the religious background to the relationship or the fact that for doctrinal reasons the church and the minister do not regard contractual arrangements as necessary and organise their relationship accordingly.

The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister. The spiritual nature of the work and the spiritual discipline under which it is performed must be very relevant considerations when it has to be decided whether or not there is a contractual relationship. Some arrangements, properly examined, might well prove to be inconsistent with contractual intention, even though there is no presumption to that effect. The Court should carefully analyse the particular facts, which will vary from church to church, and probably from religion to religion, before reaching a conclusion. It is open to a court to find, provided of course a careful and conscientious scrutiny of the evidence justifies such a finding, that there is an intention to create legal relations between a Church and one of its Ministers.

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In the individual case, whether or not an employer / employee relationship exists will depend on the Court's reading of the specific facts and to some extent on the ecclesiology and doctrine of ministry of the Church concerned. In *Sharpe v. Worcester Diocesan Board of Finance Ltd and another* [2015] IRLR 663; [2015] ICR 1241, it was held that is now abundantly clear that cases concerning the employment status of a minister of religion cannot be determined simply by asking whether the minister is an office holder or is in employment. As the Employment Judge recognised in this case, an individual appointed to work in a particular post may be both the holder of an office and an employee working under a contract of service. Whether there is payment of a salary, whether it is fixed, and whether the worker's duties are subject to the control of the employer are important matters to be considered in determining this issue.

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. In modern times, against the background of the broad schemes of statutory protection of employees, it should not readily be assumed that those who are engaged to perform work and receive remuneration intend to forgo the benefits of that protection, even where the work is of a spiritual character. Ministers of religion should, in appropriate cases, have the benefit of modern employment legislation.

Where there is a dispute as to employment status, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the court will have to examine all the relevant evidence. That will, of course, include the written terms themselves, read in the context of the whole agreement. It will also include evidence of how the parties conduct themselves in practice and what their expectations of each other are. Evidence of how the parties conduct themselves in practice may be so persuasive that the court can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conduct themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. The question is whether the incidents of the relationship described in the documents, properly analysed, are characteristic of a contract and, if

so, whether it is a contract of employment. Mutuality of obligation where there were mutual obligations, namely the provision of work in return for money. One for the personal performance of work or services.

- 5 Whether or not clergy of a religious organisation in pastoral charges are “employed” appears to depend on the ecclesiology and self-understanding of the particular Church in question. State acknowledgment of Church autonomy is acknowledgement of the potential of the churches for making and enforcing internal laws. Under the principle of separation, churches administer the issues they regard to be within their competence independently.

10

In the Roman Catholic Church, candidates for priesthood are ordained by a Bishop of the Diocese within which they are ordinarily resident and are then by appointment stationed where the Church needs them to operate. They can be sent anywhere they are required, the Church not needing their consent to the posting. They cannot resign at will, needing permission of the Pope.

- 15 Their ordination is to a life-long ministry of word, sacrament and pastoral responsibility. The duties of parish clergy are set out in ecclesiastical legislation, particularly in the Canons and the Ordinal. The benefits and terms associated with the office of priest include a "stipend" but there is no provision for determining any particular sum. Each parish has a discretion to fix the amount paid. There is no opportunity for an individual to negotiate the level of stipend. There is no scale
- 20 rising with experience, service, or size of the parish. The stipend is not regarded by the Church as the consideration for the services of its priests. It is regarded as a method of providing the material support to the priest without which he could not serve God (see Herbermann, Charles, ed. (1913). *"Priesthood" Catholic Encyclopedia*. New York: Robert Appleton Company).

- 25 In the Church's view, the sale of a priest's services in a labour market would be objectionable, as being incompatible with the spiritual character of their ministry. By virtue of the oath of canonical obedience, the Bishop is in a position of supervisory authority over the priest. The role of the priest in charge of a local congregation is simply not intended by either party to create obligations that are enforceable by the “secular” legal system at all. The “spiritual” nature of the
- 30 duties concerned mean that, on the classic contractual analysis, there is no intention to create legal relations. A correct appreciation of the spiritual nature of the relationship between a priest

and the Church shows that the arrangements between the priest and the Church in relation to his stationing throughout his ministry, and the spiritual discipline which the Church is entitled to exercise over the priest in relation to his cases, were non-contractual.

- 5 If there is a religious belief that there is no enforceable contractual relationship, then that is a factor in determining whether the parties must be taken to have intended to enter into a legally binding contract. Therefore, a priest is not employed by the Church under a contract of service and, accordingly, the court has no jurisdiction to consider a priest's claim of unfair dismissal (see *President of the Methodist Conference v. Parfitt* [1984] 1 QB 368; *Rogers v. Booth* [1937] 2 All
10 *ER* 751, and *Davies v. Presbyterian Church of Wales* [1986] 1 WLR 323).

In *Davies v. Presbyterian Church of Wales* [1996] ICR 280 Lord Templeman reiterated the “servant of God” approach and concluded that;

- 15 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
20 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.

- 25 In *Buckley v. Cahal Daly* [1990] NIJB 8, a Roman Catholic priest in Northern Ireland sought a declaration that he had been removed unlawfully from his position, Campbell J held that since the Roman Catholic Church was a voluntary association its canon law relating to the status of clergy existed as the terms of a contract. Applying Canons 265 to 275 (on incardination) of the Codex Iuris Canonici 1983 he concluded that “there is no direct power in the courts to decide
30 whether A or B holds a particular station according to the rules of a voluntary association.”

Similarly in *JGE v. The Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 (12 July 2012), it was held that a Roman Catholic priest was not an employee of the local bishop.

The court considered that (1) each case must be judged on its own particular facts; (2) there is no general presumption of a lack of intent to create legal relations between the clergy and their church; (3) a factor in determining whether the parties must be taken to have intended to enter into a legally binding contract will be whether there is a religious belief held by the church that there is no enforceable contractual relationship; (4) it does not follow that the holder of an ecclesiastical office cannot be employed under a contract of service. Having done so, the court then decided that "applying those principles to the facts in this case, I am completely satisfied that there is no contract of service in this case: indeed there is no contract at all. The appointment of Father Baldwin by Bishop Worlock was made without any intention to create any legal relationship between them. Pursuant to their religious beliefs, their relationship was governed by the canon law, not the civil law. The appointment to the office of parish priest was truly an appointment to an ecclesiastical office and no more. Father Baldwin was not the servant nor a true employee of his bishop."

In the instant case, the majority of annexures attached to the plaint and the written statement of defence indicate that the relationship between the plaintiff and the defendants was initiated and maintained under the "*Codex Juris Canonici*," the official code of canon law in force in the Roman Catholic Church, introduced in 1918 and revised in 1983, otherwise referred to as Canon Law. A Canon is explained in *Black's Law Dictionary* as "a law, rule or ordinance in general, and of the church in particular. An ecclesiastical law or statute. A rule of doctrine or discipline. A criterion or standard of judgment. A body of principles, standards, rules, or norms." Canon means both a norm and attribute of the scripture. Canons are the principal scriptural bases for the religious practices observed in a Church. Canon law is thus drawn from sources in scripture, custom, and various decisions of church bodies and individual church authorities. Over the centuries these have been gathered in a variety of collections that serve as the law books for the church. Canon law refers to the law internal to the church.

Canons are the principal scriptural bases for the religious practices observed in a Church. Annexure "A" to the plaint, the letter by which the plaintiff was admitted to the Holy Order of Diaconate in the Roman Catholic Church, cites several provisions of the 1983 edition of the "*Codex Juris Canonici*." According to Canon 1025 thereof, it is required that a candidate for the

Diaconate must have completed the period of probation according to the norm of law, is endowed in the judgment of his own bishop or of the competent major superior with the necessary qualities, is not prevented by any irregularity or impediment, and has fulfilled the prerequisites according to the norm of Canons 1033-1039 (the prerequisites for ordination), has
5 provided the necessary testimonials and documents mentioned in Canon 1050 (relating to receipt of specified sacraments and attestations about the sound doctrine of the candidate, his genuine piety, good morals, and aptitude to exercise the ministry, as well as, after a properly executed inquiry, about his state of physical and psychic health), and proof that the investigation as regards suitability mentioned in Canon 1051 has been completed (by public announcements, or
10 other sources of information).

According to Canon 1031 thereof, the Diaconate may only be conferred on a person who has completed the twenty-fifth year of age and possess sufficient maturity; an interval of at least six months is to be observed between the diaconate and the presbyterate. Those destined to the
15 presbyterate are to be admitted to the order of deacon only after completing the twenty-third year of age, must have completed the fifth year of the curriculum of philosophical and theological studies (see Canon 1032), must undergo a retreat of at least five days (see Canon 1039), and must make a profession of faith according to the formula approved by the Apostolic See (see Canon 833.6).

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Annexure "A" to the plaint, indicates that the process of initiating the plaintiff into priesthood began with his compliance with canon 1036, which provides as follows;

Can. 1036 In order to be promoted to the order of diaconate or of presbyterate,
25 the candidate is to present to his bishop or competent major superior
a declaration written in his own hand and signed in which he attests
that he will receive the sacred order of his own accord and freely
and will devote himself perpetually to the ecclesiastical ministry and
at the same time asks to be admitted to the order to be received.

30 The plaintiff made that declaration in his own handwriting on 29th April, 1986 (see annexures "A" and "B" to the written statement of defence), requesting the then Bishop Ordinary of Arua Diocese, to be ordained Deacon in the Catholic Church, stating therein that "I make this request of my free will....and by so doing I sincerely offer myself to serve God in (sic) his people."

According to Canon 1026, a person must possess due freedom in order to be ordained. It is absolutely forbidden to force anyone in any way or for any reason to receive orders or to deter one who is canonically suitable from receiving them. The Rite of Ordination is what makes one a priest, having already been a deacon (see Canons 1010 - 1017). The three main roles of
5 priesthood are; offering the Eucharist, hearing confessions, and counselling (see

The Rite of Ordination occurs within the context of Holy Mass. After being called forward and presented to the assembly, the candidates are interrogated. Each promises to diligently perform the duties of the Priesthood and to respect and obey his ordinary. Then the candidates lie
10 prostrate before the altar, while the assembled faithful kneel and pray for the help of all the saints in the singing of the Litany of the Saints. The essential part of the rite is when the bishop silently lays his hands upon each candidate (followed by all priests present), before offering the consecratory prayer, addressed to God the Father, invoking the power of the Holy Spirit upon those being ordained. After the consecratory prayer, the newly ordained is vested with the stole
15 and chasuble of those belonging to the Ministerial Priesthood and then the bishop anoints his hands with chrism before presenting him with the chalice and paten which he will use when presiding at the Eucharist. Following this, the gifts of bread and wine are brought forward by the people and given to the new priest; then all the priests present, concelebrate the Eucharist with the newly ordained taking the place of honour at the right of the bishop. If there are several
20 newly ordained, it is they who gather closest to the bishop during the Eucharistic Prayer (see Herbermann, Charles, ed. (1913). "*Priesthood*" *Catholic Encyclopedia*. New York: Robert Appleton Company).

In offering himself to serve God, the plaintiff did not negotiate or anticipate a salary. Clerics are
25 required to foster simplicity of life and to refrain from all things that have a semblance of vanity (see Canon 282.1). Accordingly, Canon law requires them to use for the good of the Church and works of charity, those goods which come to them in the course of exercise of their ecclesiastical office and which are left over, after provision has been made for their decent support and for the fulfilment of all the duties of their own state (see Canon 282.2). They have no specific
30 remuneration for their services but live on such stipends as come to them in the course of performance of their ecclesiastical ministry. The arrangement includes the payment of a stipend

and the provision of accommodation. This is apparent from Canon 281.1 which provides as follows;

Can. 281.1 Since clerics dedicate themselves to ecclesiastical ministry, they
deserve remuneration which is consistent with their condition,
5 taking into account the nature of their function and the conditions of
places and times, and by which they can provide for the necessities
of their life as well as for the equitable payment of those whose
services they need..

10 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 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 priest, does not without more resolve the issue. Upon review of the
15 relevant provisions of the "*Codex Juris Canonici*," it becomes apparent that the duties of a priest
are derived from his priestly status and not from any contract. Priesthood is not employment but
an office of a public nature, filled by successive incumbents, whose duties are defined not by
agreement but by the rules of the institution. The lifelong commitment of the priest and the
characterisation of the stipend as maintenance and support, all point to the fact that the status of a
20 priest in the Roman Catholic Church is not that of a person who undertakes work defined by
contract but of a person who holds an ecclesiastical office, and who performs the duties of that
office subject to the laws of the Church to which he belongs and not because of being subject to
the control and direction of any particular master.

25 A priest of the Roman Catholic Church is engaged or called to serve on a "spiritual basis" (see
Canon 232.2). The concept of a priest as a person called by God, a servant of God and the pastor
of God's local church members seems to me to be central to the relationship. The notion of being
"called" has deep roots in Christianity. It refers to the belief that certain individuals are chosen
by the church to perform religiously important tasks or roles. The priest is supposed to perform
30 sacramental duties and to provide spiritual leadership. The clergy thus enjoy only a "spiritual"
and not a legal basis of engagement. In general the circumstances leading to ordination, the
duties and privileges of a priest in the Roman Catholic Church are inconsistent with an intention
to create contractual relations.

The plaintiff in the instant suit has obligations, flowing from ecclesiastical law, but no contractual obligations. Hence he is unable to rely on the provisions of unfair dismissal in *The Employment Act, 2006* or other legislation relating to employees and “workers” in complaining about events which led up to his suspension from his ministry. Apart from his ordination, the plaintiff does not point to any other occasion on which any specific terms were accepted by him, acting with the intention to bring about a contractual relationship with the defendants. The basis of the entire process was religious. His status as priest flowed from his understanding that he was called of God to a spiritual ministry and the relationship between him and the Church is a spiritual one governed by religious conscience (See also *Rogers v. Booth* [1937] 2 All ER 751).

As Wallis JA (Fourie AJA concurring) of The Supreme Court of Appeal of South Africa in *Ecclesia De Lange v. The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151 at para 56, (29 September 2014) observed; "It is difficult to discern in this any intention to create a contractual relationship between the minister and the church, anymore than it is possible to discern an intention by a member or the church to enter into contractual relations when the member is confirmed. The nature of the process, its origin in the ordinand's sense of divine call, the manner in which ordination occurs and the description of the task undertaken by the minister once admitted to full connexion, is wholly inconsistent with the minister and the church, at the point of ordination, separately having an intention to enter into a contractual relationship (the *animus contrahendi*)."

Moreover, the suspension complained of too is *prima facie* rooted in the "*Codex Juris Canonici*." It is stated in annexure "C" to the written statement of defence dated 28th February, 2013 and annexure "G₁" to the plaint dated 25th May, 2013 that the plaintiff was posted to Micu Secondary School as Chaplain, resident at Micu Parish, in accordance with Canons 564 - 565 (relating to the appointment of Chaplains). He did not take up the position as instructed and in warning letters dated 15th June, 2013 (annexure "G₂" to the plaint), 20th September, 2013 (annexure "G₂" to the plaint) and 7th July, 2014 (annexure "G₂" to the plaint) respectively, was warned that his conduct contravened Canons 273 and 274.2 (relating to refusal of appointment); Canon 1371.2 (relating to disobedience to legitimate Church authority; and Canon 1373 (relating to incitement of priests and laity against the Bishop). The plaintiff not having heeded the reminders and warning, was

subsequently on 11th August, 2014 (annexure "J" to the plaint) suspended from the exercise of his priestly ministry. Consequently, the plaintiff invoked Canon 1737.1 and appealed the administrative decree of suspension (annexure "K" to the plaint). Under that Canon, a person who claims to have been aggrieved by a decree can make recourse for any just reason to the hierarchical superior of the one who issued the decree. In the appeal, the plaintiff challenges the validity of the administrative decree of suspension as contravening the provisions of a multiplicity of Canons cited therein. In essence the plaintiff contends that his suspension was motivated by bad faith on the part of the first defendant and was executed arbitrarily.

It is clear from the above exposition that resolution of the dispute between the parties to this suit is solely dependent upon canonical laws and it necessarily involves an adjudication of what are the applicable canons, what their correct interpretation is and the corresponding religious beliefs, practices, customs and usage in the church which pertain to the ecclesiastical jurisdiction of the first defendant. A civil court cannot embark on such an enquiry. Where the right asserted depends on decisions of questions as to religious faith, belief, doctrine or creed, such as determining what is the correct interpretation of church doctrine in disciplining a priest considered to be errant, the court may refrain from adjudicating upon purely religious matters as it may be handicapped to enter into the hazardous, hemisphere of religion. This is a suit in which deference to organs of governance within the religious community of the Church ought to be observed. The Court should use restraint and be slow to intervene in the internal affairs of the Church whenever it is still possible for the Church to correct its errors with its own institutional means.

On the other hand, the determination of who is morally and religiously fit to conduct pastoral duties or who should be excluded for non-conformity with the dictates of the religion, falls within the core of religious functions. Civil courts will defer to a religious organisation's good-faith understanding of who qualifies as its minister. Where resolution of the dispute cannot be made without extensive inquiry by the civil court into religious law and polity, the court will not intervene. For civil courts to analyse whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive

criteria by which they are supposedly to decide the ecclesiastical question. In order to probe the real reason for plaintiff's suspension, this court as a civil court would be required to make a judgment about church doctrine. The mere adjudication of such questions would pose grave problems for religious autonomy. This kind of second-guessing of ecclesiastical decisions would constitute a clear affront to rights of religious autonomy. The church must be free to choose those who will guide it on its way.

Upholding the autonomy of legally recognised religious organisations should not imply a permission for authoritarian internal functioning since “autonomy” is not “autocracy.” Those organisations are subject to reasonable restrictions in the larger interest of the society and for the sake of better management. It means that courts will use restraint and be slow to intervene whenever it is still possible for the organisations to correct any errors complained of by their members, within their own institutional means. The courts should not use their discretion to whittle down that autonomy unless there is no other way of protecting a right in jeopardy. But once it appears that the organisation has neglected or refused to perform a duty, under the law or its own statutes, to a person entitled to call for its exercise, the courts may intervene.

In Uganda, there is no court practice established yet as to how far courts may intervene in ecclesiastical matters. I have read and considered the decision in *Rev. Fr. Boniface Turyahikayo v. Bishop of Kabale Diocese, H. C. Misc. Civil Application No. 60 of 2012* where it was held that Judicial Review as a remedy is available to challenge disciplinary decisions of the Church. With utmost respect, I find myself unable to agree entirely with the conclusion reached in that application. The decision is couched in terms so wide that when applied in that manner it risks creating inroads of state interference with the autonomy of religious organisations over their internal affairs. In my view, the remedy should be available only in so far as it is justified by a compelling public interest or pressing social need that is necessary in a democratic society and proportionate to the objectives sought to be furthered so as not to interfere unnecessarily with the freedom of worship in its collective sense, since fundamental rights can be limited only if this is inevitable to ensure another fundamental right or constitutional interest, and only to a proportionate extent. No wonder therefore that at the conclusion of that proceeding, the court commented on the futility of a court decision reversing the decision of the Pope on matters

concerning the tenure in office of any member of the clergy in the Roman Catholic Church, and declined to grant any relief. There is clearly a limit to which courts may intervene in such matters.

5 I have considered at length the considerable volume of internet-based scholarly articles and other forms of publications that were furnished by counsel for the plaintiff. The thrust of that material is that Churches can be held vicariously liable for the crime and torts of their errant clergy on the basis of construing the relationship between the individual members of the clergy and the Church as being akin to a relationship of employment and that individual members of the clergy may sue
10 the church for wrongs committed against them. Although I am in agreement with the latter part of counsel's postulations, I find the idea of the relationship between Church and clergy being akin to that of employment to be in its very nascent stages even in those jurisdictions where it has been introduced. This body of opinion is yet to concretise into a common law principle. In any event, it is developing mainly in the area of tortious and criminal liability, within the context of
15 the principles of agency rather than in the law of contract generally or employment in particular. I also find the nature of the sources cited not to be authoritative enough to be persuasive in our jurisdiction. I am grateful nevertheless for counsel's industry in drawing them to my attention.

Comparatively, in the United States, the First Amendment guarantees freedoms concerning
20 religion, expression, assembly, and the right to petition. It forbids Congress from both promoting one religion over others and also restricting an individual's religious practices. It guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely. It also guarantees the right of citizens to assemble peaceably and to petition their government. Its provisions are similar to the combined effect Articles 7 and 29 (1)
25 (c) of *The Constitution of the Republic of Uganda, 1995*. It was held in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012) that the First Amendment guarantees religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organisation's right to choose its ministers would be hollow, however, if secular courts
30 could second-guess the organisation's sincere determination that a given person is a "minister" under the organisation's theological tenets. The Constitution guarantees religious bodies

“independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine” (see *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

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The right to organize voluntary religious associations, such as Churches, to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed" (see *Watson v. Jones*, 13 Wall. 679, 728–729 (1872)). Without the ministerial exception, religious organisations could be forced to make employment decisions that run counter to their core beliefs and doctrines. For instance, if Roman Catholics, Orthodox Jews and other religious groups with a tradition of an all-male clergy were successfully sued for gender discrimination, they would be forced to accept women into their clerical ranks. Different religious communities structure their affairs in very different ways, and the texture of religious life takes on very different contours as a result. For the courts to impose pressures for a religious community to organise in a particular way, particularly if this is inconsistent with the religious community’s religious beliefs about how it should be organised, would invariably alter the nature of the community, and cause it to be something other than it would be under conditions of freedom.

25 In his opinion, Justice Alito, with whom Justice Kagan joined, concurring, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012) commented that;

30 Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith. When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the

content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful." *Petruska v. Gannon Univ.*, 462 F. 3d 294, 306 (CA3 2006). A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.

That statement underscores the fact that a religious organisation's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents. There are difficulties inherent in separating the message from the messenger. I am persuaded by the interpretation and application given to the First Amendment by the Courts in the United States to hold that Articles 7 and 29 (1) (c) of *The Constitution of the Republic of Uganda, 1995* protect the roles of religious leadership, worship, ritual, and expression; the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith.

Religious organisations have substantial autonomy to engage, discipline, fire and take other employment decisions that take into account both religious beliefs and religious conduct of employees. Religious autonomy means that religious authorities must be free to determine who qualifies to serve in positions of substantial religious importance. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions. If a Church believes that the ability of a priest to conduct worship services or important religious ceremonies or rituals, or to serve as a messenger or teacher of its faith or perform such other key functions has been compromised, then the constitutional guarantee of religious freedom protects the Church's right to remove the priest from his position. The Constitution creates a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs. "forcing a group to accept certain members may impair its ability to express those views, and only those views, that it intends to express" (*Boy Scouts of America v. Dale*, 530 U. S. 640, 648 (2000)). The Constitution leaves it to the collective conscience of each religious group to

determine for itself who is qualified to serve as a teacher or messenger of its faith. In the result, all church offices ought to be filled by the exclusive decision of the church concerned. No state body (including the courts) is entitled to rule over the canonical aspects of church offices.

5 The plaintiff's other claim is in defamation. He pleads that he was defamed by the defendants. In a suit for defamation, the exact words or their substance, in case of slander, should be set out in full in the plaint (see *Nkambo Samuel N. v. Rev. Daudi Kibirige*, [1973] H.C.B.2; *Otim Kezekia v. Akillenge George and Others* [1982] H.C.B.42). For a statement complained of as being defamatory, the actual words must be set forth verbatim in the plaint and the persons to whom
10 publication was made have to be mentioned in the plaint (see *Rutare S. Leonidas v. Rudakubana Augustine and Kagame Eric William* [1978] H.C.B. 243). A plaint in a defamation suit that does not allege persons to whom publication was made nor that the words uttered were false and were published maliciously, which are matters essential in a plaint, does not disclose any cause of action and is bad in law (see *Karaka Sira v. Tiromwe Adonia* [1977] H.C.B. 26).

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In *Collins v. Jones* [1955] 2 All E.R 145, [1955] 1 QB 564, Lord Denning quoted with approval the observations of Lord Coleridge. C. J. in *Harris v. Waree*, [1879] 4 C.P.D. 125 as follows :

20 In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends.

The object of having the actual words before the court is to enable it to consider whether the words are defamatory. From the point of view of the defendants it is also necessary that the
25 matters alleged to be defamatory in the plaint must be so stated as to enable them to know the nature of the allegations they have to meet. It is necessary to distinguish between cases in which the words complained of are alleged to be defamatory in their natural and ordinary meaning, whether the literal or the inferential, or by innuendo and the facts and matters supporting innuendo all of which should be pleaded and is to be proved. That purpose is served if the
30 plaintiff reproduces in the plaint the exact words in case of libel or in a substantial measure, their substance in case of slander, the words of imputation alleged to have been uttered or published.

In conclusion, with regard to the claim for unlawful suspension from duty, I find that there is no enforceable employment contract existing between the plaintiff and the defendant the breach of which can be tried by this court. As regards the claim for defamation, the plaintiff did not plead any of the words he considers to be defamatory. The plaint does not allege persons or at least the category of persons to whom the publication complained of was made nor that the words uttered were false and that they were published maliciously.

In the final result, the preliminary objection is sustained. I find that suit is incompetent and it is hereby struck out. The dispute between the parties being steeped in matters of church doctrine and administration, which may have to be resolved internally within the Church, it is fitting that each party bears their own costs of the suit. It is so ordered.

Dated at Arua this 11th day of January, 2018

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Stephen Mubiru
Judge,
11th January, 2018.