

# THE PRECARIOUS EMPLOYMENT POSITION OF MINISTERS OF RELIGION: SERVANTS OF GOD BUT NOT OF THE CHURCH\*

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## 1 Introduction

South African courts have in recent years interpreted the meaning of “employee” to also include categories of persons not previously regarded as such. The effect is that a wider group of workers now enjoys protection by labour legislation. The following workers were recently seen as employees entitled to protection by labour legislation: A sex worker working in terms of an unlawful contract,<sup>1</sup> an immigrant with no valid contract,<sup>2</sup> persons whose written contracts indicated that they were not employees since they rendered services through a close corporation,<sup>3</sup> as well as persons described as independent contractors in terms of their contracts.<sup>4</sup> In reaching the decision that these persons should be regarded as employees, the courts had regard to, *inter alia*, the constitutional right to fair labour practices<sup>5</sup> as well as the definition of “employee” in labour legislation. The courts further focused on the substance rather than the form of the relevant contracts. The reality of the relationship and not the written contract was thus decisive. Despite this development, it seems as if courts are reluctant to extend labour law protection to ministers of religion, as was once again illustrated in *Universal Church of the Kingdom of God v Myeni* (“*Myeni LAC*”)<sup>6</sup>, a recent judgment of the Labour Appeal Court (“LAC”). The Commission for Conciliation, Mediation and Arbitration (“CCMA”) as well as the Labour Court (“*Myeni LC*”)<sup>7</sup>, the court *a quo* in this matter, held that the pastor was indeed an employee, but this decision was overturned by the LAC. This court found that the parties did not have the intent that legal consequences would flow from their relationship and that the pastor could thus not enjoy the protection of the Labour Relations Act 66 of 1995 (“LRA”), which is applicable only to employees.

\* I would like to thank the two anonymous referees for their valuable comments and guidance.

<sup>1</sup> *Kylie v Commissioner for Conciliation Mediation and Arbitration* 2010 4 SA 383 (LAC).

<sup>2</sup> *Discovery Health Ltd v Commissioner for Conciliation Mediation and Arbitration* 2008 29 ILJ 1480 (LC).

<sup>3</sup> *Denel (Pty) Ltd v Gerber* 2005 9 BLLR 849 (LAC); *State Information Technology Agency (Pty) Ltd v Commissioner for Conciliation Mediation and Arbitration* 2008 29 ILJ 2234 (LAC).

<sup>4</sup> See, eg, *Building Bargaining Council (Southern and Eastern Cape) v Melmon's Cupboard* CC 2001 22 ILJ 120.

<sup>5</sup> S 23 of the Constitution of the Republic of South Africa, 1996 (“Constitution”).

<sup>6</sup> 2015 36 ILJ 2832 (LAC).

<sup>7</sup> *Universal Church of the Kingdom of God v Commissioner for Conciliation Mediation and Arbitration* 2014 35 ILJ 1678 (LC).

In this article, I will argue that the main reason why the LAC denied that a contract had been concluded by the parties is that it gave too much weight to the autonomy of the church in a matter that did not involve a spiritual dimension. I will further argue that even if no common-law contract had been concluded, the pastor should, in line with jurisprudence extending the meaning of “employee” and the interpretation of relevant legislation by the courts in light of the Constitution, have been regarded as an employee.

## 2 Extended meaning of “employee”

The meaning of “employee” has in recent years been extended by jurisprudence interpreting the definition of “employee” in light of the Constitution, thus bringing more working people under the protective umbrella of labour legislation. A contract of employment was no longer seen as a requirement for protection.

This development is in line with the Constitution, which provides in section 23 that *everyone* has the right to fair labour practices. There is no requirement that there should be a contract between the parties. The LRA moreover gives effect to the constitutional right to fair labour practices by defining an employee as:

- “(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration, and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.”

Benjamin<sup>8</sup> emphasises that the definition does not mention a contract at all and that especially the second part of the definition should not be narrowly interpreted so as to “comply with the constitutional directive to construe labour legislation purposively”.<sup>9</sup>

In 2002, section 200A was included in the LRA to assist persons who earn under a certain threshold to prove that they are employees:

- “(1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
- (a) the manner in which the person works is subject to the control or direction of another person;
  - (b) the person’s hours of work are subject to the control or direction of another person;
  - (c) in the case of a person who works for an organisation, the person forms part of that organisation;
  - (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
  - (e) the person is economically dependent on the other person for whom he or she works or renders services;
  - (f) the person is provided with tools of trade or work equipment by the other person; or
  - (g) the person only works for or renders services to one person.”

The presumption is only applicable to persons earning below the threshold set by the Minister of Labour from time to time.<sup>10</sup>

<sup>8</sup> P Benjamin “An accident of history: Who is (and who should be) an employee under South African labour law” (2004) 25 *ILJ* 787 788.

<sup>9</sup> 804.

<sup>10</sup> Currently R205 433.30. See s 6 of the Basic Conditions of Employment Act 75 of 1997.

This section thus creates a presumption that a person is an employee if one of these factors is present. The onus then shifts to the employer to prove that the person is not an employee. Before this amendment, the onus was, right from the outset, on the person alleging that he or she was an employee.

Furthermore, in order to strengthen the position of persons in precarious employment, the Code of Good Practice: Who is an employee (the “Code of Good Practice”),<sup>11</sup> was adopted in 2006. Item 16 of this Code refers to the presumption created in section 200A of the LRA and repeats that it is applicable *regardless of the form of the contract*. A person applying the presumption must evaluate evidence concerning the *actual nature* of the employment relationship and

“the issue of the applicant’s employment status cannot be determined merely by reference to either the applicant’s obligations as stipulated in the contract or a ‘label’ attached to the relationship in a contract. *Therefore a statement in a contract that the applicant is not an employee or is an independent contractor must not be taken as conclusive proof of the status of the applicant*” [emphasis added].

Both section 200A and the Code of Good Practice mirror the International Labour Organization’s (“ILO”) Employment Relationship Recommendation 198 of 2006 (“Employment Relationship Recommendation”), which recognises:

“the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an *attempt to disguise* the employment relationship, [and] that situations exist where *contractual arrangements* can have the effect of depriving workers of the protection they are due” [emphasis added].

The Employment Relationship Recommendation requires that member states of the ILO adopt legislation to protect these workers and it is further emphasised that “such protection should be available to all, particularly vulnerable workers”.

As will be shown in the discussion of judgments below, the above instruments and legislation based on these instruments were applied in South African jurisprudence to protect workers who did not previously enjoy the protection of labour legislation.

### 3 Jurisprudence extending the meaning of employee

#### 3.1 Invalid and illegal contracts

In *Discovery Health Ltd v CCMA* (“*Discovery Health*”)<sup>12</sup> the Labour Court extended protection in terms of labour legislation to an immigrant who was fired by his employer when his work permit had expired. The court held that by adopting the Immigration Act 13 of 2002 (“Immigration Act”), which prohibits the employment of immigrants without work permits, the intention of the legislature could not have been to defeat the purpose of section 23 of the Constitution, which was to extend fair labour practices to everyone.<sup>13</sup>

<sup>11</sup> GN 1774 in GG 29445 of 01-12-2006.

<sup>12</sup> 2008 29 ILJ 1480 (LC).

<sup>13</sup> Paras 30-32.

More controversial is the protection granted to a sex worker who was dismissed in *Kylie v Commissioner for Conciliation Mediation and Arbitration*.<sup>14</sup> Both the CCMA and the Labour Court held that since her contract with the massage parlour was illegal in terms of the Sexual Offences Act 23 of 1957 (“Sexual Offences Act”), she could not enjoy the protection afforded by labour legislation. On appeal, the LAC held that the starting point should be that the fundamental rights in the Constitution are available to everyone. According to the court, the word “everyone” in section 23 of the Constitution includes criminals and sex workers. The court was of the view that the absence of an employment contract and the illegal activity of sex workers do not *per se* deprive them of constitutional rights, since the section was designed so that the dignity of all workers should be respected. The court moreover regarded sex workers as a vulnerable group, prone to being exploited and abused. In this regard Davis JA held that “[t]here is no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity and which protection by extension has now been operationalised in the LRA.”<sup>15</sup>

### 3 2 Substance over form: The reality of the relationship

South African courts have looked past the terms of contracts describing the agreement between the parties as a relationship not involving employment and gave effect to the true nature of the relationship. The labelling of a contract as something different to an employment contract to favour one of the parties has thus been rejected by the courts. In *Building Bargaining Council (Southern and Eastern Cape) v Melmon’s Cupboard CC (“Melmon’s”)*<sup>16</sup> the court regarded a contract portraying an unskilled labourer as an independent contractor, a sham,<sup>17</sup> because the facts pointed to an employment relationship. The court commented as follows on the freedom of contract of parties to an employment contract:

“The legislature, precisely because most employees have historically been the weaker party in bargaining their contracts of service, has seen it fit to prohibit an employee from contracting out of the Labour Relations Act.”<sup>18</sup>

The courts have further held that in certain circumstances persons who rendered their services through close corporations were in fact employees and entitled to protection afforded by the LRA. Also, in these cases the courts viewed the reality of the relationship and not the form of the contract as the determining factor.

In *Denel (Pty) Ltd v Gerber (“Denel”)*<sup>19</sup> a former employee of Denel established a juristic person of which she was the only member and concluded

<sup>14</sup> 2010 7 BLLR 705 (LAC).

<sup>15</sup> Para 44; see further C Bosch & S Christie “Are Sex Workers Employees?” (2007) 28 *ILJ* 804 and KJ Selala “The enforceability of illegal employment contracts according to the Labour Appeal Court: Comments on *Kylie v CCMA* 2010 4 SA 383 (LAC)” (2011) 14 *PER/PELJ* 207-266.

<sup>16</sup> 2001 22 *ILJ* 120.

<sup>17</sup> Para 21.

<sup>18</sup> Para 8.

<sup>19</sup> 2005 9 BLLR 849 (LAC).

a new contract with Denel in terms of which she would, in future, render services through the juristic person. The reason for concluding the new contract was that she could avoid the unfavourable pension fund benefits attached to married women. This arrangement also suited Denel because of a moratorium on new appointments at the time of the conclusion of the contract with Mrs Gerber. When Denel subsequently terminated the contract, Mrs Gerber alleged that she was unfairly dismissed. Denel argued that she was no longer an employee, because she rendered services through a close corporation, a juristic person that cannot be an employee. The court regarded the reality of the relationship as more important than the label attached to it by the parties and held that the “true and real position” indicated that Mrs Gerber was an employee.<sup>20</sup>

The judgment was criticised by Van Niekerk<sup>21</sup> on the ground that there is no reason why the court should not give effect to a contract (provided that it is not a sham) by parties who are in an equal bargaining position.<sup>22</sup> Likewise Benjamin,<sup>23</sup> although he also favours a characterisation of the employment relationship based on the underlying reality of the relationship, states that “the court is quite entitled to hold that the employee contracted out of the protection against unfair dismissal” and further “[in] making this assessment, a particular relevant factor would be the bargaining position of the employee concerned.”<sup>24</sup>

In spite of the above views, it seems as if courts do not leave any room for considering whether even parties in an equal bargaining position could have contracted out of labour legislation. As soon as the reality of the relationship is established as being one of employment, the employee will enjoy protection against unfair dismissal, even though he or she has chosen to conclude a contract in terms of which they would forfeit employee status to benefit them at the time of the conclusion of the contract. This was again made clear in *State Information Technology Agency (Pty) Ltd v CCMA (“SITA”)*<sup>25</sup> where the LAC held that a person who was described as the employee of a close corporation, which rendered services to the Department of Defence, was in fact an employee of the Minister of Defence.<sup>26</sup> The reason was that the close corporation was only a conduit established to circumvent a provision in an earlier contract to the effect that the employee could not work for the Department again after termination of the original employment contract. The court held that the test to establish whether someone is an employee of another person is threefold, namely whether the employer had supervision

<sup>20</sup> Para 19.

<sup>21</sup> A van Niekerk “Personal service companies and the definition of ‘employee’ – some thoughts on *Denel (Pty) Ltd v Gerber*” (2005) 26 *ILJ* 1904.

<sup>22</sup> 1908.

<sup>23</sup> Benjamin (2004) *ILJ* 787.

<sup>24</sup> 797.

<sup>25</sup> 2008 29 *ILJ* 2234 (LAC).

<sup>26</sup> R le Roux “The meaning of ‘Worker’ and the Road towards Diversification: Reflecting on *Discovery SITA and Kylie*” (2009) 30 *ILJ* 49 makes the point that “[t]here is evidence emerging from our jurisprudence that the identity of a worker should be established with reference to the broader notion of an employment relationship”.

and control over the person, whether the person formed an integral part of the organisation of the employer, and lastly, whether the person who worked for the employer was economically dependent on the employer.<sup>27</sup> The court found that in this case the three criteria were met and that the Minister did in fact employ the person who rendered the services.<sup>28</sup>

In *Peter Cooper Estates v Van Eeden*<sup>29</sup> the Labour Court agreed with the approach in *Denel* and *SITA* and found on the facts that an estate agent was an employee even though she signed a contract with a clause to the effect that the factors listed in section 200A of the LRA would not be applicable to her. The court stated that:

“Given that the right to fair labour practices is a fundamental right in terms of section 23 of the Constitution and that the LRA, which seeks to give legislative expression to that right, is similarly a fundamental right accruing to all persons who fall within the ambit of the definition of ‘employee’, the waiver signed by the first respondent is of no force and effect.”<sup>30</sup>

However, contrary to this line of judgments, the Labour Court recently held in *Vermooten v Department of Public Enterprises* (“*Vermooten*”)<sup>31</sup> that where parties are in a “relatively equal bargaining position and consciously elect one contract or relationship over another, legal effect should be given to their choice”.<sup>32</sup> This case could be distinguished on account of the fact that the public service cannot legally employ persons on a level higher than the prescribed salary scale, leading to the agency agreement being concluded.<sup>33</sup>

Also relevant to the current discussion is *South African National Defence Union v Minister of Defence* (“*SANDU*”)<sup>34</sup> in which the court held that even though soldiers cannot be regarded as employees because they are *members* of the South African National Defence Force, and explicitly excluded from labour legislation, their position mirrors an employment relationship. As *workers*, they are entitled to protection in terms of section 23 of Constitution.<sup>35</sup>

From the above it should be clear that South African courts progressively extended protection to persons who were previously excluded from protection because they were not regarded as employees, mostly because of the lack of an employment contract. This is true even of persons who are not vulnerable employees, who have contracted out of the protective provisions and who were ostensibly in an equal bargaining position with the employer.<sup>36</sup> What these cases have in common is that the courts focused not on the existence of an employment contract, but on whether there was an employment relationship between the parties.

<sup>27</sup> These are the criteria proposed by Benjamin (2004) *ILJ* 803.

<sup>28</sup> This test is aligned to the much-criticised dominant impression test, but regarded as more in line with international and domestic developments, especially regarding the economic dependence criterion. See *Pam Golding Properties (Pty) Ltd v Erasmus* 2010 31 *ILJ* 1460.

<sup>29</sup> LCPE case no PR 40/2013 of 24-04-2015.

<sup>30</sup> Para 12.

<sup>31</sup> LAC case no JA 91/2015) of 14-12-2016.

<sup>32</sup> Para 26.

<sup>33</sup> Para 24.

<sup>34</sup> 1999 6 BCLR 615 (CC).

<sup>35</sup> Para 27.

<sup>36</sup> The exception is *Vermooten*, discussed in the text to part 3 2 above.

#### 4 Jurisprudence on the employment status of ministers of religion prior to the *Myeni* case

A number of cases (some unreported) on whether ministers of religion are employees were decided by South African courts<sup>37</sup> prior to the *Myeni* case. A few of these will be discussed briefly.

In *Schreuder v Wilgespruit Dutch Reformed Church*<sup>38</sup> the court held that the minister was an employee since he had signed a letter of appointment (“*beroepsbrief*”) which contained details of reciprocal duties, which the court regarded as an employment contract. Yet, in *Church of the Province of Southern Africa v CCMA* (“*Church of the Province*”)<sup>39</sup> the court found that the minister of religion could not be regarded as an employee. Referring to the second part of the definition of an employee in the LRA, which is widely formulated to include anyone who assists the employer in conducting his business, the court stated that “while I accept that the protective objective of the Act requires a generous interpretation with regard to the meaning of ‘employee’, it cannot be interpreted to mean that an employment relationship should be forced upon parties who did not intend creating one”.<sup>40</sup> The court referred to jurisprudence in the United Kingdom (“UK”), in particular *Diocese of Southwark v Coker* (“*Coker*”),<sup>41</sup> to the effect that the spiritual background to the relationship between the parties precludes a conclusion that the parties intended to conclude an employment relationship.<sup>42</sup> The court in *Church of the Province* held that although there was compliance with the requirements for a valid contract, namely offer and acceptance, consideration paid for service, as well as reciprocal obligations, the parties never intended that the agreement would be enforceable.<sup>43</sup> A final argument was that “the church must be seen as providing the space for those called upon by God to give effect to that Calling. The fact that in providing that space it may be providing all the features of an employment relationship cannot make that relationship an employment one”.<sup>44</sup> For the same reasons the Labour Court, following the decision in *Church of the Province*, held that the minister of religion in *Salvation Army v Minister of Labour* (“*Salvation Army*”)<sup>45</sup> could not be regarded as an employee.

Jurisprudence in the UK is a rich source of decisions about the employment status of ministers of religion and South African courts often refer to and rely on these judgments, also in *Church of the Province* and *Myeni* (LAC). It will thus be informative to discuss the position in the UK briefly, before discussing

<sup>37</sup> See discussion in M Olivier “The South African Constitution and freedom of religion: Some labour law imperatives and implications” based on a paper presented at the Church and State Conference (Theme: Freedom of Religion under a new constitutional dispensation in SA), held at the Faculty of Theology, University of Stellenbosch, 24-25 Oct 2001. Available at <ajs.reformedjournals.co.za/index.php/ngtt/article> (accessed 14-12-2016).

<sup>38</sup> 1999 BLLR 713 (LC).

<sup>39</sup> *Church of the Province of Southern Africa Diocese of Cape Town v CCMA* LC case no C619/2000 of 07-09-2001 para 8.

<sup>40</sup> Para 30.

<sup>41</sup> 1998 ICR 140 (CA) 146-149.

<sup>42</sup> LC 07-09-2001 case no C619/2000 paras 21-22.

<sup>43</sup> Para 35.

<sup>44</sup> Para 37.

<sup>45</sup> LC 02-09-2004 case no J 464/02.

the *Myeni* case in more detail to establish whether UK judgments provide appropriate guidance on this matter.

## 5 The employment status of ministers of religion in the UK

Churches in the UK have certain unique characteristics arising from a long history. The Magna Carta, which was sealed in 1215 during the reign of King John, provided that the English Church should be free,<sup>46</sup> thus emphasising that the church would function separately from the state. Against this background it may seem contradictory that the Church of England is the “established” or state church,<sup>47</sup> signifying strong ties between the ecclesiastical and state authorities. These ties are further evident from the fact that the Church of England may pass “Measures” that become legally binding after being approved by Parliament and receiving royal assent.<sup>48</sup> However, the autonomy of the church is also respected by the state in that ecclesiastical courts have the jurisdiction to decide on spiritual issues concerning its members.<sup>49</sup>

A distinctive feature of ministers of religion of a number of churches in the UK is that they are regarded as office holders similar to certain types of public servants whose rights and duties are not defined by contract but by the status of the position. Security of tenure is one of the hallmarks of the position of office holders. The rights and duties flowing from such a position are the same for anyone who holds this position and are not dependent on the agreement between the parties.<sup>50</sup> Thus, the bargaining power of the parties does not play any role in establishing reciprocal rights and duties. As recently as 1998 the court in *Coker* held that there is a presumption in English law that ministers of religion are office holders who do not serve under a contract of employment. Mummery J held that the relationship between the parties in the particular case was governed by the laws of the Church of England, which are part of the public law of England, and not by a contract that was negotiated by the parties.<sup>51</sup> The court held that there was no intention to create a contractual relationship, since the nature of the calling of ministers of religion is spiritual, in terms of which they are regarded as servants only of God and not of their fellow men. Civil courts can thus not judge the appropriateness of the severing of ties between the minister and the church, and hence a decision about this should best be left to the ecclesiastical courts.<sup>52</sup> This view is in line with an earlier judgment in *Davies v Presbyterian Church of Wales* (“*Davies*”)<sup>53</sup> in which Lord Templeton made the following remarks:

“The duties owed by the pastor to the Church are not contractual or enforceable. ... [h]is duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If

<sup>46</sup> *Sharpe v The Bishop of Worcester* 2015 EWCA CIV 399 para 110.

<sup>47</sup> Para 106.

<sup>48</sup> Para 12.

<sup>49</sup> RH Helmholz “Conflicts between religious and secular law: Common themes in the English experience 1250-1640” (1991) 12 *Cardozo L Rev* 707.

<sup>50</sup> *Methodist Conference v Preston* (rev 1) UKSC 29 (15 May 2013).

<sup>51</sup> *Diocese of Southwark v Coker* 1998 ICR 140 (CA) 147.

<sup>52</sup> 146-149.

<sup>53</sup> 1986 1 All ER 705 (HL).

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 ... [and] an industrial tribunal cannot determine whether a reasonable church would sever the link between minister and congregation.”<sup>54</sup>

After the UK adopted protective labour legislation, dismissed ministers of religion argued in the highest courts that they are employees and not officers, as will be seen in the discussion of jurisprudence below. Previously, officers enjoyed security of tenure, which had the effect that they were in a more advantageous position than employees, but this position has now been reversed, with employees being in the more advantageous position. “Employee” is defined as follows in section 230 of the Employment Rights Act 1996 (ERA):

“(1) In this Act ‘employee’ means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.  
(2) In this Act ‘contract of employment’ means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.”

Employees are protected by section 94 of the Employment Rights Act of 1996 (“ERA”), which provides that “(1) An employee has the right not to be unfairly dismissed by his employer.”

It is noteworthy that while the definition in the South African LRA does not refer to a contract at all, a contract of employment is central to the ERA definition of an employee. This difference is an important factor when the appropriateness of English jurisprudence for the South African situation is considered.

In 2005, in *Percy v Board of National Mission of the Church of Scotland* (“*Percy*”),<sup>55</sup> the House of Lords moved away from the approach followed in *Coker* (referred to above) according to which priests as a professional group were seen as office holders and not as employees. The associate minister of religion in *Percy* brought a claim under the Sex Discrimination Act of 1975 (“SDA”) against the Church of Scotland. Unlike the ERA, the SDA does not necessarily require an employment contract for a person to be protected in terms of its provisions. However, a contract to perform personal services or a contract to perform work is still needed for protection under the SDA. The majority in the House of Lords agreed that a salary and accommodation in exchange for performing the duties of an associate minister created legal obligations between the parties, although the church argued that this was only for subsistence to enable her to work for God.<sup>56</sup> The following words of Lady Hale dispel the notion that servants of God cannot simultaneously be employees:

“Judges are servants of the law in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God’s word as interpreted in the doctrines of their faith, governs all that they practice, preach and teach. This does not mean that they cannot be ‘workers’ or in the employment of those who decide how their Ministry should be put to the service of the Church.”<sup>57</sup>

<sup>54</sup> Para 709.

<sup>55</sup> 2006 2 AC 28.

<sup>56</sup> Para 137.

<sup>57</sup> Para 146.

The majority in the House of Lords in this case held that the fact that someone holds an office does not mean that the person cannot also be an employee.<sup>58</sup> Furthermore, the mere fact that an employer labelled the post as an “office” was not regarded as sufficient to take the matter outside the ambit of the SDA.<sup>59</sup>

Sex discrimination was furthermore not regarded as a spiritual matter falling within the exclusive jurisdiction of the church in terms of section 3 of the Church of Scotland Act of 1921 (“Church of Scotland Act”), but a civil matter falling within the jurisdiction of civil courts.<sup>60</sup> Lady Hale remarked that section 3 of the Church of Scotland Act has the implication that the church is free to decide what its members should believe, what the qualifications for membership should be *etcetera*, but not *how* they decide about membership, which should be a process subject to the laws of the land.<sup>61</sup> The church can thus not contract out of these laws.

The principle that ministers should not automatically be regarded as non-employees was endorsed by the Supreme Court in a case decided after *Percy*, namely in *Methodist Conference v Preston* (“*Preston*”).<sup>62</sup> The court emphasised that the question of whether a minister is an employee should be decided on the terms of the specific agreement between the minister and the church. After analysing the agreement between these parties in *Preston*, the court disappointingly held that the parties had no intention to conclude a legally binding agreement. The reason was that the rights and duties of the parties were to be found in the constitutional provisions of the church, which did not constitute a contract between the parties.<sup>63</sup> The court acknowledged that the minister did receive a stipend and that a manse was made available, but this was not seen as a salary, merely as support offered to the minister to fulfil his spiritual calling to do the work of God. Although the court stated that the spiritual background of the duties of priests should not be regarded as the sole determinant of the type of relationship with the church, it is clear that this dimension played a decisive role.<sup>64</sup>

In a minority dissenting judgment, Lady Hale held that *Preston* was indeed an employee. Regarding the stipend and manse made available to *Preston*, she pointed out that the minister would clearly be able to bring legal proceedings in a civil court had these been withheld. She stated:

“Everything about this arrangement looks contractual, as did everything about the relationship in the *Percy* case. It was a very specific arrangement for a particular post, at a particular time, with a particular manse and a particular stipend, and with a particular set of responsibilities.”<sup>65</sup>

The majority decision in *Preston* is criticised by Butlin, who argues that the court should not only have looked at the documents relevant to the relationship,

<sup>58</sup> Para 21.

<sup>59</sup> Para 147.

<sup>60</sup> Para 133.

<sup>61</sup> Para 152.

<sup>62</sup> *Methodist Conference v Preston* (rev 1) UKSC 29 (15 May 2013).

<sup>63</sup> Para 151.

<sup>64</sup> Paras 10, 33.

<sup>65</sup> Para 49.

but that the court should have placed much more emphasis on the reality of the relationship.<sup>66</sup> This view is in line with the approach of South African courts in, for example, *Melmon's*, *Denel* and *SITA* discussed above.

The most recent case on the employment position of a minister in the UK is *Sharpe v The Bishop of Worcester* (“*Sharpe*”).<sup>67</sup> The court in *Sharpe* followed the judgment in *Preston*, indicating that there was no presumption against an office holder also being an employee and that the facts of each case must be examined to establish whether there was indeed a contractual relationship. The court stated (also in line with *Preston*) that the spiritual context is nevertheless one of the factors that should be taken into account. Again, the spiritual background seems to have played the major role in establishing whether there was a contract and the court found that the minister was not an employee for the following reasons:

“[B]y accepting office as rector he or she agrees to follow their calling. They do not enter into an agreement to do work for the purposes and benefit of the Church as a commercial transaction. On the facts as found by the employment judge, the Church, personified in these proceedings by the Bishop (in his corporate capacity), provides the institutional structure in which the incumbent can indeed follow his or her calling to be part of the ministry. The office of rector is governed by a regime which is a part of ecclesiastical law. It is not the result of a contractual arrangement.”

Davies opines that the underlying reason why courts are reluctant to enter the domain of spirituality is because courts respect the autonomy of religious groups.<sup>68</sup> He points out that this could be justifiable in terms of Article 9 of the European Convention on Human Rights, which provides for freedom of religion, including the autonomy of religious groups.<sup>69</sup> However, this right played no role in any of the UK judgments discussed above. The question posed by Davies is whether this regard for the autonomy of churches should be a reason to deny a minister of religion any protection against unfair treatment especially where the conduct of the minister is unrelated to a spiritual matter.<sup>70</sup> This seems to be a crucial question that the courts did not consider.

It would without doubt in some cases be difficult to establish whether a matter is spiritual or not. A way of dealing with this question could be to regard only the core tenets of the faith related to the doctrine of the church as a spiritual issue. This aspect will be examined below.

In light of the above discussion, English jurisprudence may not be appropriate for comparison when answers are sought to establish whether ministers of religion should have employee status in South Africa. The reasons are as follows: there is no constitutional right to fair labour practices in the UK; the ERA’s definition of an employee requires a contract; and the history

<sup>66</sup> SF Butlin “The Missed Opportunity of *President of the Methodist Conference v Preston*” (2014) 43 *ILJ* 485.

<sup>67</sup> [2015] EWCA Civ 399.

<sup>68</sup> ACL Davies “*Sharpe v Bishop*: The employment status of clergy revisited: *Sharpe v Bishop of Worcester*” (2015) 44 *ILJ* 551-565, 556.

<sup>69</sup> See Council of Europe/European Court of Human Rights “Guide to Article 9: Freedom of thought, conscience and religion” (2015) *ECHR* <[http://www.echr.coe.int/Documents/Guide\\_Art\\_9\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf)> (accessed 11-01-2017).

<sup>70</sup> Davies (2015) *ILJ* 556.

and background of churches in the UK contain aspects which are foreign to South African law.

The only case that could provide guidance to South African courts in this matter is the *Percy* case, where the court held that the minister was indeed an employee. Similar to the LRA, the definition of an employee in the SDA (on which the case turned) does not require an employment contract. *Percy* also involved a human rights issue,<sup>71</sup> while in South African cases on employee status, human rights issues will be relevant in terms of the Constitution. *Percy* is also the only case in which the court analysed crucial issues such as whether parties can contract out of labour legislation and whether a minister of religion can be a servant of God and simultaneously be an employee of the church.

## 6 *Universal Church of the Kingdom of God v Myeni*

The services of Myeni, a pastor of the Universal Church of the Kingdom of God, was terminated by the Board of the Church because he accepted money from members of the congregation, which was a contravention of the rules contained in the “Declaration of Voluntary Service” signed by Myeni. When he referred a case of unfair dismissal to the CCMA, the church maintained that Myeni did not have the status of an employee, because he was a voluntary worker, and that the CCMA thus had no jurisdiction. However, after considering all aspects of the relationship, the commissioner’s ruling was that Myeni was indeed an employee and that he was unfairly dismissed.<sup>72</sup>

On review, the Labour Court agreed with the CCMA that the facts indicated that Myeni was an employee.<sup>73</sup> A fixed stipend and accommodation to the amount of R12 000 per month were provided to him. He thus earned less than the threshold amount required in terms of section 200A of the LRA. He paid tax and both he and the church contributed to the Unemployment Insurance Fund. He conducted three to four services a day, had to prepare a work schedule<sup>74</sup> and was supervised by the regional pastor.<sup>75</sup> His services could be terminated if he contravened the rules contained in the Declaration of Voluntary Service.<sup>76</sup>

The Labour Court emphasised that section 213 of the LRA does not require a contract for someone to be considered an employee and further quoted section 4 (b) of the ILO Employment Relationship Recommendation, which provides that: “a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee”. Against this background and in light of the facts, the court held that a presumption that Myeni was an employee was created in terms of section 200A of the LRA. Since the church could, in Steenkamp J’s

<sup>71</sup> Percy alleged that the Church discriminated against her on account of her sex.

<sup>72</sup> *Universal Church of the Kingdom of God v CCMA* 2014 35 *ILJ* 1678 (LC) para 2.

<sup>73</sup> See a discussion of this case by B Khumalo & L Kubjana “Servants of God or employees of the church? – Reflections on *Universal Church of the Kingdom of God v CCMA and Others*” (2015) 27 *SA Merc LJ* 338-347.

<sup>74</sup> *Universal Church of the Kingdom of God v CCMA* 2014 35 *ILJ* 1678 (LC) para 9.

<sup>75</sup> *Universal Church of the Kingdom of God v Myeni* 2015 36 *ILJ* 2832 (LAC) para 9.

<sup>76</sup> Para 7.

view, not rebut the presumption, the decision of the CCMA that the pastor was an employee was confirmed. The court distinguished the decision in *Church of the Province* on the ground that this decision was handed down before section 200A was inserted into the LRA. The decision in *Salvation Army* was distinguished by the court on the ground that the court in that case did not entertain the provisions of section 200A.

On appeal, the LAC overturned the Labour Court's decision on the ground that the parties had no intention to conclude any kind of contract. The court held that there must at least be some kind of contract for section 200A, the Code of Good Practice<sup>77</sup> and even the ILO Employment Relationship Recommendation<sup>78</sup> to be applicable.<sup>79</sup>

The above view is pedantic and formalistic. A purposive interpretation of these instruments would have made it clear that portraying an agreement as something, which is not a binding contract, is one of the types of mischief that these instruments aim to expose. Moreover, regarding the Employment Relationship Recommendation, the court's view that at least some kind of contract is required is not correct, since it provides as follows in article 9:

"For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, *contractual or otherwise*, that may have been agreed between the parties" [emphasis added].

Further, the court's conclusion that the church and Myeni had no intention to conclude a contract was based on the constitution of the church, the fact that the church *said* that it had no intention to conclude a contract, and also the fact that in all documents signed by Myeni he acknowledged that he was a voluntary worker and not an employee. It seems as if he sealed his fate by answering in the affirmative when asked if he was a servant of God.<sup>80</sup> This apparently excluded him from being in an employment relationship with anyone, including the church. The LAC adhered to a narrow view that the terms of a contract consist only of the written agreement between parties and not their *de facto* relationship. The court did not refer to the possible influence of the Constitution and the effect given to section 23 of the Constitution by the LRA. The LAC in *Myeni* accepted that there was no contract because the parties agreed in the signed document that there was no contract. The respective bargaining positions of the parties were not taken into consideration, which would have indicated that Myeni hardly had a choice about agreeing that he was a voluntary worker. The question arises whether the right to freedom of contract is sufficiently wide to allow parties the freedom to decide that their "agreement" or "understanding" or "document" (which exhibits all the characteristics of a contract) is not a contract and that no legal consequences will flow from it. This question must be answered against the background of

<sup>77</sup> GN 1774 in GG 29445 of 01-12-2006.

<sup>78</sup> Referred to in *Universal Church of the Kingdom of God v Myeni* 2015 36 ILJ 2832 (LAC) para 39.

<sup>79</sup> Paras 36-40.

<sup>80</sup> Para 45.

section 5 of the LRA, which prohibits employers from preventing employees to exercise their rights. The Labour Court interpreted this section to mean that parties cannot contract out of the protective measures of the LRA.<sup>81</sup>

Whether the church calls the pastor's remuneration a stipend or not, it is clear that this was a fixed amount, paid on a monthly basis for as long as he complied with his duties. Myeni had to pay tax and unemployment insurance, an indication that the church regarded him as an employee in all respects. Towards the end of the judgment the LAC remarked that Myeni was disingenuous and opportunistic to argue that he was an employee,<sup>82</sup> but it seems as if it was in fact the church that could be blamed for being disingenuous and opportunistic to argue the opposite in light of all the evidence pointing to an employment relationship.

In this judgment it seems as if the consideration of the spiritual background placed the pastor in a detrimental position *vis-à-vis* other workers. As discussed above, the courts have extended protection to a person depicted as an independent contractor, persons rendering professional services through a juristic person, a sex worker and an illegal immigrant, but not to a minister of religion. It could in certain circumstances be accepted that parties only intended a gentleman's agreement, but in the *Myeni* case it is quite clear that the party in the stronger position (the church) stipulated that although there was no intention that legal consequences should flow from the "agreement", there would be certain consequences for the pastor should he not adhere to the agreement. The irony is that there would apparently be no consequences should the church not pay the pastor for services rendered or fail to provide the agreed accommodation.

For its view that there was no intention to conclude a contract, the LAC relied on the *Preston* case, where the spiritual background was decisive in pointing towards a lack of intention of parties to conclude a contract. Similar to the decision in *Preston*, the LAC found that the church's documents governing the relationship between the parties (in *Myeni's* case the Regulations and Declaration) did not constitute a contract.<sup>83</sup>

Significantly, the LAC concluded with the following words:

"I think it is high time that the resolution of disputes of this nature, with religious spiritual connotations or arising from internal doctrinal governance, be left to the leadership of the church concerned, unless there is a real compelling reason for a court to get involved. In my view, the constitutional rights to freedom of religion and of association would be better served and enhanced if that were to happen."

The court relied on a passage from *De Lange v Presiding Bishop, Methodist Church of SA* ("*De Lange*")<sup>84</sup> in which Ponnar J warned that courts "should refrain from determining doctrinal issues to avoid entanglement".<sup>85</sup> This remark was based on a discussion of the reluctance of churches in different

<sup>81</sup> S 5(2)(b) of the LRA; see *Glass Group v Molapo NO & others* 2103 34 ILJ 2662 (LC) and *Chilliebush v Johnston* 2010 6 BLLR 607 (LC).

<sup>82</sup> *Universal Church of the Kingdom of God v Myeni* 2015 36 ILJ 2832 (LAC) para 54.

<sup>83</sup> Para 47.

<sup>84</sup> 2015 1 SA 106 (SCA).

<sup>85</sup> Para 3.

countries to become involved in spiritual issues.<sup>86</sup> The *De Lange* case involved such an issue. A minister of religion who was dismissed because of her marriage with her same-sex partner alleged, among other things,<sup>87</sup> discrimination by the church on the ground of sexual orientation. Same-sex marriages (regarded as a doctrinal issue)<sup>88</sup> were not recognised by the church. The reliance on the *dictum* in *De Lange* seems to be inappropriate, since no doctrinal issues were involved in *Myeni*. The reference to the constitutional rights of the church (freedom of religion and freedom of association) and the warning about involvement in doctrinal issues were only raised in the LAC's conclusion and almost as an afterthought, but may provide an important clue to the reason for the court's reluctance to accept Myeni's status as an employee. The next section will discuss the interplay between the constitutional rights of the church and the pastor as well as the doctrine of entanglement.

## 7 Constitutional rights and the avoidance of doctrinal entanglement

Surprisingly, the LAC in *Myeni* only referred to the individual right to freedom of religion in section 15 and the right to freedom of association in section 18, and not to the collective right to freedom of religious groups in section 31 of the Constitution. Section 31(1) provides that persons who belong to a religious community may not be denied the right, together with other members of the community, to practise their religion and to form, join and maintain religious associations. In terms of section 31(2) these rights may not be exercised in a manner inconsistent with any provisions of the Bill of Rights. The LAC also did not refer to the constitutional rights of the pastor, namely the right to fair labour practices in section 23 and the right of access to the courts in section 34. These rights could have been infringed by the church's insistence that it should have the final decision about the termination of the relationship with Myeni without interference by a civil tribunal.

A proper analysis of the constitutional rights of both parties would have involved the scope of the autonomy of religious groups. The Constitutional Court commented as follows on this aspect in *Christian Education v Minister of Education* ("*Christian Education*"):<sup>89</sup>

"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land."<sup>90</sup>

<sup>86</sup> Paras 30-40.

<sup>87</sup> Of interest is that the Appellant advanced a case based on an entitlement to just administrative action and renounced her unfair discrimination claim before the High Court and was therefore not entitled to raise the claim for the first time on appeal.

<sup>88</sup> *De Lange v Presiding Bishop, Methodist Church of SA* 2015 1 SA 106 (SCA) para 21.

<sup>89</sup> 1999 2 SA 83 (CC) para 26.

<sup>90</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 35.

Regarding the limitation in section 31(2), the Constitutional Court explained in *Christian Education* that the aims of section 31(2) are firstly to “prevent protected associational rights of members of communities from being used to ‘privatise’ constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control”,<sup>91</sup> and secondly to prevent “oppressive features of internal relationships” in the religious communities.<sup>92</sup>

Bilchitz points out – albeit in another context, namely the discrimination of the church against gay persons – that John Stuart Mill said that the limits of liberty lie where conduct exercised in the enjoyment of liberty causes harm.<sup>93</sup>

“The central question that must be engaged within this legal (and political and philosophical) debate is whether discrimination in employment by private associations on prohibited grounds in the Constitution (and statute) constitutes harm of such a nature that it justifies restricting the liberty of such associations.”<sup>94</sup>

Religious associations will undoubtedly suffer harm if a spiritual leader acts against the core tenet of the faith, but it is hard to see how the religious group will suffer significant harm if the acts of a spiritual leader do not relate to the core values of the group. A minister of religion will, however, suffer significant (if not irreparable) harm if his or her right to fair labour practices is infringed. If a minister is dismissed, he or she will be unemployed and the opportunity of finding another job as a minister of religion may be slim. For good reason, dismissal has been referred to as the equivalent of capital punishment in the workplace, emphasising the dire consequences for an employee who has lost his or her employment.<sup>95</sup>

In *Myeni* the rights of the minister of religion to fair labour practices and access to the courts were never mentioned. It seems as if the regard for the autonomy of the church is the true basis for the finding by the court that there was no intention to create legal relations as well as the reason for disregarding jurisprudence which extended labour law protection to a larger group of employees. There is no doubt that had the same facts been applicable to a secular employer, *Myeni* would have been regarded as an employee.

As mentioned above, it is essential for the coherence of the religious group that they can terminate the services of a minister of religion who is not true to the core values or basic tenets of their faith. A civil court cannot and should not judge the validity of these beliefs. The warning of Ponnann J in *De Lange* against entanglement of courts in doctrinal issues<sup>96</sup> is valid in this context. However, reliance of the court in *Myeni* on the *dictum* in *De Lange* is not appropriate, since the issue of misconduct regarding acceptance of money from members of the church did not involve a doctrinal issue. It was

<sup>91</sup> Para 26.

<sup>92</sup> Para 26.

<sup>93</sup> D Bilchitz “Why courts should not sanction discrimination in the private sphere: A reply” (2012) 28 *SAJHR* 296-325, 299.

<sup>94</sup> 299. In this brief reference, I cannot do justice to the different ways in which “harm” could be interpreted in the context of the impact on specifically religious institutions, but here the focus will be on one specific interpretation as explained above.

<sup>95</sup> *Steenkamp v Edcon Limited* 2016 3 SA 251 (CC) para 47.

<sup>96</sup> *De Lange v Presiding Bishop, Methodist Church of SA* 2015 1 SA 106 (SCA) para 39.

simply a question of the contravention of a rule that could exist in any secular environment as well. In this case, the group right to freedom of religion in section 31 should not trump the right to fair labour practices, especially since section 31(2) places an internal limitation on the right by providing that it should not be exercised in a manner inconsistent with any provision in the Bill of Rights. The church could, however, still have argued that higher ethical standards are required of ministers of religion in comparison to employees in other environments and that the trust relationship between the church and the minister of religion had been breached.<sup>97</sup> Such a breach has been regarded by the courts as a substantively fair reason for dismissal. The breakdown of the trust relationship is a factual question and will depend on the gravity of the misconduct, which is linked to the nature of the job.<sup>98</sup>

## 8 The weak bargaining position of ministers of religion

The ILO Employment Relationship Recommendation referred to above provides in the preamble that special attention should be given to the position of vulnerable groups. The vulnerability of sex workers, combined with the infringement of their constitutional right to dignity,<sup>99</sup> was an important consideration in the LAC's decision to extend labour law protection to Kylie.<sup>100</sup> Davis JA warned that courts should be "at their most vigilant to safeguard those employees who are particularly vulnerable to exploitation in that they are inherently economically and socially weaker than their employers".<sup>101</sup> It may be going too far to say that ministers of religion should be regarded as a vulnerable group, but they are certainly in a particularly weak bargaining position for the reasons discussed below.

As spiritual leaders, ministers of religion are servants of God, as Myeni acknowledged in court when asked about this.<sup>102</sup> This was held against him, since it was taken as proof that he was a servant of no man, and also not a servant of the church. Myeni hardly had a choice in answering that question. In effect, he was damned if he said yes and damned if he said no.

The characteristics associated with ministers of religion are those that Jesus emphasised in the Beatitudes, for example, "blessed are the meek"<sup>103</sup> ... and "blessed are the peacemakers".<sup>104</sup> Jesus further instructs his followers not to concern themselves with earthly things, since God will provide.<sup>105</sup> It is expected of ministers of religion to set an example to their congregation and a stricter standard will be applied in evaluating the adherence of ministers of religion to these biblical teachings. As the meek and the peacemakers, they

<sup>97</sup> *Edcon Ltd v Pillemer NO 2009 30 ILJ 2642 (SCA)*.

<sup>98</sup> *De Beers Consolidated Mines Ltd v CCMA 2000* 21 ILJ 1051 (LAC) para 23.

<sup>99</sup> S 10 of the Constitution.

<sup>100</sup> 2010 7 BLLR 705 (LAC) para 44.

<sup>101</sup> *Kylie v Commissioner for Conciliation Mediation and Arbitration 2010 4 SA 383 (LAC)* para 41.

<sup>102</sup> *Universal Church of the Kingdom of God v Myeni 2015 36 ILJ 2832 (LAC)* para 45.

<sup>103</sup> Matthew 5: 5.

<sup>104</sup> Matthew 5:9.

<sup>105</sup> Matthew 6:25-26; Luke 12:22-32.

are not supposed to fend for themselves or to be in confrontation with other people, especially not with their church.<sup>106</sup>

For these reasons, the idea of a trade union for ministers of religion, which would place them in a stronger bargaining position, is almost unthinkable. The Grand Chamber of the European Court of Human Rights (“ECrHR”), that bastion for the protection of human rights, recently held that the state authorities in Romania who refused to register a trade union for priests of the Romanian Orthodox Church did not infringe the right of freedom of association of priests.<sup>107</sup> The court held that the autonomy of the religious community would be at risk if trade unions for priests were to be registered.<sup>108</sup> The Grand Chamber overruled the decision of the Third Chamber, which found that the right to freedom of association of the priests had indeed been infringed.<sup>109</sup> The decision of the Grand Chamber will probably be followed in tribunals in other regions as well, continuing the weak bargaining position of ministers of religion. They will thus be unable to address their position collectively against churches, which are often mighty organisations wielding immense power.

The era of the high status of ministers of religion, when they were often the only learned people in a community, is long gone. In a study of the prestige of different professions on a scale for measuring the prestige of occupations in different countries, a minister of religion would score a percentage of 60, while lawyers would score 73, university professors and physicians 78, high school teachers 64, physiotherapists 66, airline pilots 66, ship’s engineers 60 and postmasters 58.<sup>110</sup> A study in the United States indicated that although in terms of level of education, clergy are in the top 10% of the population, they are only 325th on a scale of remuneration for 452 professions.<sup>111</sup>

Ministers of religion provide counselling for a variety of personal problems and are often on call for 24 hours.<sup>112</sup> They play an invaluable role in society, since they are usually the first port of call for persons with marital and family problems as well as mental health problems.<sup>113</sup> Because of the severe emotional impact of the constant involvement in people’s sadness and bereavement, ministers of religion often suffer from stress and burnout.<sup>114</sup>

<sup>106</sup> In *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC* 597 F 3d 769, one of the reasons for a teacher being dismissed was given as “damage she had done to her ‘working relationship’ with the school by ‘threatening to take legal action.’” Available at <<https://www.law.cornell.edu/supremecourt/text/10-553#>> (accessed 14-12-2016).

<sup>107</sup> *Sindicatul Pastoral cel Bun v Romania* [GC] no 2330/09, ECHR 2013 para 162 as discussed in ECJ Research Report: Overview of the Court’s case law on Freedom of Religion.

<sup>108</sup> 14.

<sup>109</sup> S Raduletu “The Right of Members of the Clergy to form and join Trade Unions and the Autonomy of Religious Organizations – A Recent case of the European Court of Human Rights” (2013) 3 *Oxford Journal of Law and Religion* 1-5.

<sup>110</sup> DJ Treiman *Occupational Prestige in Comparative Perspective* (1977) 239-271; E Brooks Holifield *God’s Ambassadors: A History of the Christian Clergy in America* (2007) 3-4.

<sup>111</sup> AJ Weaver, DB Larson, KJ Flannelly & CA Stapleton “Mental Health Issues among clergy and other Religious Professionals: A Review of Research” (2002) 56 *J Pastoral Care Counsel* 394.

<sup>112</sup> 394.

<sup>113</sup> 395.

<sup>114</sup> CA Lewis, DW Turton & LJ Francis “Clergy work-related psychological stress and burnout: An introduction” (2007) 10 *Mental Health, Religion and Culture* <<http://www.tandfonline.com/doi/abs/10.1080/13674670601070541>> (accessed 17-01-2017).

It is, moreover, against convention that spiritual leaders should take a dispute with the church for which they work to court. This view is borne out by the fate of a teacher at a religious institution, namely Hosanna Tabor Evangelical Lutheran Church and School in Michigan. The teacher, who was also involved in religious instruction, threatened to lodge a complaint against the church. The church dismissed her on the ground of “insubordination and disruptive behavior” as well as for the damage she had done to her “working relationship” with the school by “threatening to take legal action”.<sup>115</sup> Her action was regarded as against the church’s belief that Christians should not take one another to court.<sup>116</sup>

In light of the above, it will be argued that ministers of religion are in such a weak bargaining position that they should be protected alongside other vulnerable groups of employees. The tendency of churches to deny that they had the intention that legal consequences should flow from their arrangement with the minister of religion should be seen against the background of the ILO recommendation dealing with disguised employment relationships. Courts should give special consideration to this aspect when deciding whether a minister of religion is an employee entitled to the protection of the Constitution and the LRA.

## 9 Conclusion

The LAC’s decision in *Myeni* could be criticised for several reasons. The decision is based on the view that the parties did not intend concluding any contract, because they had no intention that any legal consequences would flow from the agreement. The court chose form above substance by basing its finding on the say-so of the church, the documents stating that Myeni was a voluntary worker, and his admission that he worked for God. The court’s view that the ILO recommendation on disguised employment, the presumption created in section 200A of the LRA and the Code of Good Practice, do not have application, since there was no contract, is formalistic. This approach leaves room neither for balancing the constitutional rights of the church and the pastor, nor for considering jurisprudence interpreting labour legislation in the light of section 23 of the Constitution. The court did not consider the reality of the relationship to establish whether there was a *de facto* employment relationship, as the court did in *Melmon*, *SITA* and *Denel*, nor did it consider whether ministers of religion could – even if they cannot be regarded as

<sup>115</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* 132 S Ct 694 (2012).

<sup>116</sup> 700; See further MA Helfand “Litigating Religion” (2013) 93 *BU Int’l LJ* 493 494. In the USA the first amendment, which provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, has been interpreted by the courts to insulate the church from anti-discrimination legislation in that a “ministerial exception” applies. In terms of this exception churches are free to decide whom they want to employ as ministers and may dismiss them even if in doing so they discriminate against the person. In order to ensure that this immunity could be used as widely as possible, a church has argued that even a teacher devoting only 20% of her time to spiritual teaching is also a minister. The Supreme Court agreed with the church that the dismissal of the teacher fell within the “ministerial exception.”

employees – be regarded as persons in an employment-like relationship, as in *SANDU*. To hold that no legal action could be taken if one of the parties did not adhere to the terms of their agreement is to ignore reality. As Lady Hale said in *Preston*, it is hardly feasible that the priest would not turn to a court of law if his stipend or manse had been withheld.<sup>117</sup> The LAC in *Myeni* further over-emphasised the spiritual context of the relationship and did not draw a distinction between acts related to the doctrine of the church and those without a spiritual dimension.

There was, furthermore, no acknowledgement that ministers of religion are in a weak bargaining position *vis-à-vis* churches because of expectations of how they should behave, the high moral ground of the church and the demands made on ministers of religion. It should be acknowledged that they can simultaneously be servants of God as well as employees of the church, as was done in the *Percy* case in the UK. Certainly, if there are reciprocal rights and duties, and the relationship between ministers of religion and the church can be terminated on the ground of misconduct, this is an indication of an employment relationship. Courts should not become involved in doctrinal issues when the behaviour of the minister of religion impacts on a core value of the religion, but when conduct does not relate to doctrinal issues, there is no reason why civil courts should not become involved.

Legal comparison with the UK should be approached with caution, because of the history of the relationship between the church and the state, and the unique characteristics of churches in the UK. The security of tenure of ministers of religion who are regarded as officers is, for example, foreign to South African churches.

Lastly, no person and no institution, not even the church, should be above the law in the sense that they are allowed to infringe on human rights. Atrocities such as the Inquisition and the recent sexual abuse of children in the Roman Catholic Church, which were at first covered up and addressed internally,<sup>118</sup> are examples of the disregard for people's rights when the church is allowed to, in an absolute sense, be the judge in its own case.

## SUMMARY

South African courts have in recent years progressively extended protection against unfair dismissal to categories of persons not previously regarded as employees. Courts interpreted labour legislation in light of the Constitution to include persons with illegal and invalid contracts, as well as persons who were described as independent contractors. Despite this development, the LAC in *Church of the Universal Kingdom of God v Myeni* held that the minister of religion could not be regarded as an employee because in the court's view the parties had no intention to create legal relations. This judgment can be criticised on the ground that the court regarded the form of the agreement, which described the service of the minister of religion as voluntary, as the only determining factor and did not take the *de facto* relationship between the parties, which pointed to an employment relationship, into account. The LAC insisted that there must be a contract for the minister of religion to be regarded as an employee, while the Constitution and the LRA do not require a contract. Reliance on English jurisprudence by the LAC is further not appropriate because of certain peculiarities regarding the history of churches in England which are not shared by South African churches. The LAC did not

<sup>117</sup> *Methodist Conference v Preston* (rev 1) UKSC 29 (15 May 2013) para 49.

<sup>118</sup> K Calitz "The liability of churches for the historical sexual assault of children by priests" (2014) 17 *PER/PELJ* 2472.

take the unequal bargaining position of ministers of religion nor the relevant constitutional rights of the parties into account. The spiritual dimension of the minister's service seems to be decisive in the court's decision, although the misconduct was not a spiritual matter falling within the domain of the church's own decision-making powers. This matter should have been dealt with by civil courts since there was no danger of doctrinal entanglement.