

# **THE LICENSING OF ACSA CLERGY**

## **Vocation, Ordination and Engagement, NOT EMPLOYMENT**

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**ANGLICAN CANON LAW COUNCIL  
SOUTHERN AFRICA**

# THE LICENSING OF ACSA CLERGY

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By Bishop Peter Lee, Bishop of Christ the King and  
Henry Bennett, Provincial Registrar

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VOCATION, ORDINATION AND ENGAGEMENT - NOT  
EMPLOYMENT**

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# FOREWORD

By

The Most Reverend Dr. Thabo Makgoba  
Metropolitan and Archbishop of Cape Town

Since being translated to Cape Town in 2008, I have been acutely aware of the number of cases referred to me under the Canons that concern issues arising from the licensing of clergy to minister and the withdrawal of such licenses. In fact, records kept by the Provincial Executive Officer indicate that the number of such cases continues to rise rather than decline. Against that background, I am very pleased that Henry Bennett, Bishop Peter Lee and the Canon Law Council have produced this monograph outlining in some detail the theology and practice surrounding the selection, ordination and licensing of clergy. Of particular value are the explanation of the distinction that the courts draw between licensing clergy and employing staff, and the highlighting of the need to adhere carefully to the rules laid down in the Canons when considering the withdrawal of a license. Through this and a good deal of other work, the Canon Law Council, is fulfilling the purpose set out for it upon its establishment: to promote a good understanding of Canon Law and its right use, thus helping us to know when and how to apply and implement it. The Council has also helped us to assess the need for and draw up new legislation, not only for the good of the Province, but also relative to the laws of the six countries in which we are represented. So I welcome this publication and hope it will be used not to pursue legalistic processes for their own sake but rather to enable grace to flourish through better understanding of our Canons.

*+ Thabo Cape Town*  
**Bishopscourt, Cape Town.**

# PREFACE BY AUTHORS

This monograph seeks to set out in some detail the legal position as at January 2016 and the Courts' reasoning behind the distinction drawn between the licensing of clergy and the employment of staff, in order that this may be understood by all those concerned with the issue. This discourse is preceded by an exposition which seeks to show this as being complementary with the theological basis for this distinction. In the latter regard attention is drawn to the licensing of clergy, which is discretionary, and the withdrawal of such licenses, which is not. This distinction has been upheld by South African courts over many years, as it has in other jurisdictions with an English common law connection. However, the South African Supreme Court of Appeal and the Constitutional Court have not yet been called upon to consider the issue. The authors do not speculate on what might be found to be the case in Angola and Mozambique, which have different jurisprudence. It is suggested that Swaziland, Lesotho and Namibia could well follow South Africa, bearing in mind some of the missing fundamentals of "employment" in the "licensing" relationship and the historical jurisprudential connection with South Africa.

*Bishop Peter Lee and Henry Bennett*

# MONOGRAPH INTRODUCTION

It is a Bishop's role to manage the process of ordination. As such, it is an aspect of episcopal responsibility to be taken deeply seriously : the Charge at the Consecration of a Bishop (APB, p598) reads - ".....it is your responsibility and your joy to ordain deacons and priests ....". These words reflect a process of reflection, discernment, prayer and the development of a relationship with the ordinand. This is the spirit in which the process is held. It is in this light that the Canons provide the juristic structure for granting and withholding a licence to minister, which the Courts have upheld in a number of judgments.

There is uncertainty in the minds of a number of us as to whether or not our clergy are employees of the Church, and so we find from time to time that some clergy, whose licenses have been withdrawn, take their challenge to the CCMA in terms of labour legislation. This has resulted in considerable expenditure of time and money by both parties. Where the CCMA finding is taken on appeal, the courts have held that labour legislation does not apply to the relationship of a cleric to the Church because the agreed and structured relationship is not one of employer/employee. Increasingly, the CCMA itself is making such findings at the very initial stages of the enquiry. It is for this reason that it is felt a detailed explanation of the canonical and present legal position in South Africa is appropriate. The position in other Provincial jurisdictions with an historical English common law influence in their jurisprudence (i.e. Swaziland, Lesotho and St Helena, and possibly also Namibia on the basis of its long association with South Africa) may well be found by the courts in those countries to be the same. At this stage we have no knowledge of what may be, or be found to be, the position in either Mozambique or Angola, whose jurisprudence could be significantly different in this matter.

The issue of whether or not a licensed cleric is an employee of the Church is, on the face of it, difficult to comprehend at first glance because of certain of the outward appearances. We are all familiar with the employer/employee relationship, and in that context some, but by no means all, of the outward signs of the cleric/church relationship are familiar. That said, a number of critical aspects of employment are missing. However, the sum of a number of outward manifestations is not

what constitutes the relationship; it is what the parties intended and actually created that constitute the relationship.

For over 100 years the courts in the United Kingdom have found, on proper examination, that the cleric's relationship with the church is not that of employer/employee. The courts in Australia and New Zealand have followed suit, as have those in South Africa. Two of the South African cases that have examined the issues involved in great detail are Paxton's Case and Mathebula's Case, both involving clerics and the Anglican Church.

As mentioned, it is important to distinguish outward appearance from substance. Certain similarities with the contractual relationship of employer/employee (as in the payment of a stipend, the deduction of tax, etc.) can create an illusion of employment, but this is misleading: hence the consistent findings of the courts to the contrary, sometimes mystifying those who have been – perhaps understandably – misled. Brief, but clear, expositions of the position are set out in the judgments in Sharpe's Case (United Kingdom Court of Appeal 2015) and Felix's Case (CCMA 2011), both of which can be found in part C below.

This paper deals first with the ordination and licensing of clergy to ministry, and second with issues pertinent to the “employee or licensee” debate. The first aspect is covered in sections A to C and the second in sections D to J, largely by extracts from the judgments. The sections that follow are:

- A. Vocation and Ordination:** to show the impact and consequences of ordination and licensing, relative to the issues in question;
- B. The Meaning of Vocation:** to show the theological justification of the legal position and the need to recover the sense of vocation.
- C. Expositions of the Anglican Cleric's Relationship with the Diocese:** to understand the difference between a licensee and an employee.
- D. The Meaning of “Employee”:** to show the understanding in law of an employment relationship;
- E. The Church's “Engagement” or “Licensing” of a Cleric:** to show in detail the distinct features of ordination and licensing which make the relationship different from that of employment;

- F. Court Decisions in Other Jurisdictions:** to show the wide acceptance of this difference;
- G. The Intentional Creation of a Contractual Relationship (Cleric/Church):** to show that it is possible for a church and cleric to structure their relationship as one of employment;
- H. The Salvation Army Case:** to show how far the statutory consequences of this difference can go;
- I. The Luvuyo Case (2011):** to show how critically necessary it is for the Church to apply its own Canons correctly to the termination of the engagement; and
- J. The Church's Employment of a Cleric:** to show that it is possible to have in place concurrently both a licensed and an employment relationship;

The law reports references or case numbers of cases dealt with in this monograph are set out in Annex "A". An appropriate starting point is the entry into the licensed ministry (sections A and B), followed by matters relating to understanding the differences between employment and licensing, including a theological exposition (sections C to F), and finally by the question of employment (sections G to J). When looking at the judgments of the court in sections G to H we have left the judges to speak for themselves, in the printed word from their judgments, with simply one or two introductory or concluding sentences from us in italics: the rest is from the judges. The main points of the judgments, for our purposes, are in the text, and extracts from some referring to overseas cases are in annex "C".

# A VOCATION AND ORDINATION

## 1. Selection and Episcopal Discretion

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The new 2014 Canons (i.e. Canon 25 and Canons 36 to 41 in Chapter VII) sharpen the existing requirements of Bishops, to ensure that screening, references, training and so forth are all scrupulously attended to ahead of the ordination or licensing of a cleric. Before ordination the Bishop has immense power and discretion not to act. If the Bishop does not want to ordain someone, for whatever reason, it is to all intents and purposes impossible to compel this to happen. Hence the oft-quoted message to ordinands: 'Until the Bishop's hands land on your head, nothing is certain'. It is also true that until that point, the rights of the ordinand are severely limited. What the Canons seek to do is to set out the respective rights and responsibilities of the parties after ordination and licensing. The Bishop has virtually total discretion up to that point. Therefore the Bishop is under particular obligation to foresee difficulties with individuals and to be completely satisfied that it is wise to ordain or license an individual. Once ordained, however, the cleric is quite entitled to assert the rights that belong with his/her ordained/licensed status.

## 2. Stipendiary and Non-Stipendiary Ministers

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In the past there has been a tendency to regard stipendiary clergy as 'the real thing' and others as "high-octane" lay ministers. However, *ordination* is the real distinctive of the clergy, not financial and other assistance. Self-supporting clergy are 'in the same frame' as stipend ones. Thus, while the Bishop has extensive discretion in not licensing a person, once done the Canons grant certain protections to the licensed person, including a right of not being treated arbitrarily by said Bishop. A Bishop who regards his power to license as an episcopal prerogative might equally assume that withdrawing it falls within the same prerogative; but that is an unwarranted assumption and wrong.

## 3. Agreement to License

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ACSA's latest documents speak of licensing for ministry, and the terms and conditions upon which that is done. In the Agreement to License for Ministry (which is in secular terms a form of individual charter) the Bishop can insert any conditions he decides, as long as they do not contravene the Canons. So there is nothing to stop a Bishop inserting a period of time,

a requirement of review, or a lapse on the happening of certain events, into the Agreement to Licence. That reclaims a degree of discretion, openly and at the outset, effectively giving the Bishop a right to reappoint or not in certain defined circumstances. Outside anything in the license itself, the Bishop must act in terms of the Canons. The forms of licences, as templates, approved for use by the Synod of Bishops in 2012 are annexed marked “B1” to “B3”, and cover stipendiary and self-supporting ministries as well as permissions to officiate. These templates can be developed and modified as may be appropriate or needed, with care taken to remain within the principles set out in this monograph.

#### 4. Withdrawal of a License

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We know that in the Anglican Church a cleric is not an employee of the Bishop, so that labour law requirements do not apply. Nevertheless, we are bound by our own rules, as evidenced in the Constitution, Canons and Diocesan Rules/Acts, read with the Book of Common Prayer. Becoming an ordained minister is a question of vocation, training, ordination and licensing: the cleric in question becomes one of a team, of which the Bishop is the senior member to whom in certain stated respects the minister is answerable. Certain declarations on ordination and an oath of canonical obedience to the Bishop are made. Canon 16(3) provides *inter alia* that the minister will accept any sentence of deprivation of office passed after due examination by a Tribunal of the Church – that is the business of Chapter VII of the Canons. The pastoral course is laid out in Canons 25(6) to (8), which specify the course to be followed in the circumstances set out in those Canons. If it is found that the problem at the heart of the matter in fact lies in acts or omissions which could form the basis of charges under Canon 37(1), then the pastoral process must be deferred or abandoned and the disciplinary Canons in Chapter VII applied. Nothing entitles a Bishop to withdraw a licence on a discretionary basis. Considering the position and role of a minister in our Church, this is appropriate.

## B The Meaning of Vocation

At about the time the judge in Luvuyo's Case was delivering his judgment, Bishop Brian Germond would have been preparing his September 2011 Ad Clerum for the Diocese of Johannesburg, which by coincidence was on the subject of a vocation or calling, as opposed to a contract of employment. The terms of the Ad Clerum have resonance with those of the judgments in the Paxton and Mathebula Cases. The relevant portion of the Ad Clerum is set out immediately below:

### **Bishop Germond's Ad Clerum**

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"It was a chance remark that got me thinking. I was with two other bishops and we were discussing the fact that an increasing number of clergy are lodging appeals with the CCMA even though clergy are not employees in the eyes of the law and therefore outside the jurisdiction of the CCMA. One of the bishops then commented that one of his clergy who had lodged an appeal with the CCMA had told him that he was a member of a trade union and that the bishop had no right to take action against him as he had done. To which the bishop replied that, had he known that the priest was a member of a trade union, he would have withdrawn his license as soon as he had heard of it.

A great deal of discussion followed that statement, but what stuck with me was what the bishop said when I asked him why he had been so vehement in his statement. His response was simple. He said, "Priesthood is a calling from God. The language of trade unions has no place in such a call."

That comment got me thinking. We talk so easily and freely about the priestly ministry being a vocation, but what does it really mean? What is the nature of that "call"? How is it heard? How does it shape our thinking; or the way we live? And, given the fact that since the 16<sup>th</sup> century the word "vocation" has been used in a generalized way to refer to all professions and jobs, does our sense of "vocation" differ in any way from the calling to any other profession or work?

The word "vocation" derives from the Latin word "to call" and in its earliest usage referred quite specifically to a call from

God. So it is not surprising then that in the first instance it came to be seen as synonymous with a call to the religious life: whether as bishop, priest or deacon, or as a member of a religious order. The first word belongs to God: "Who will go for me? Whom shall I send?" Our word is always in response to the grace of God: "Who am I that you should choose and call me ... but .... Here I am, Lord, send me."

Like the call to the first disciples, "Follow me," God's word is both gracious call and command. "If you obey my voice and keep covenant with me, then you will be my treasured possession." Like the pearl of great price it is a call to let go of all things so that, in Him, we might receive everything. When God calls, our answer is unconditional: "Here I am, Lord, send me." We can never say, "Yes, Lord, but ....." To set conditions is a denial of God's Lordship over our lives.

I think that it is this sense of vocation that lay behind the bishop's comments. Trade unions are about protecting the interests of the worker, of ensuring reasonable working conditions and maximum reward for their members - a formulation of terms and conditions at variance with the call to unconditional obedience. In saying this, I am not in any way justifying poor labour practice or the abuse of Episcopal power. What I am trying to do is to challenge us to reflect on our vocation and to ask whether the practice of our ministry is indeed an unconditional giving of ourselves to God, or whether our ministry has been so compromised by limits, expectations and even demands that it has ceased to be a vocation at all and has become simply the plying of a trade.

The call of every Christian is to follow Christ unconditionally, but our calling as priests is a calling to share in a special way in the ministry (diaconia) of Christ. "You yourselves know how I lived among you ... serving the Lord in all humility" (Acts 20:19). Paul's ministry was incarnational - a continuation of the incarnational ministry of Christ. And so strong is Paul's sense of this calling that the word he uses to express his service for the Lord is rooted in the language of slavery. And the particular quality in that sense of call has a priestly dimension in that it not only makes visible God's ongoing incarnate ministry, but also animates and activates God's transforming power in the lives of those whom he serves. Paul is "called" as every baptized Christian is "called", but his "vocation" is to live and work among them so that they all are reminded of what it means to be a Christian and are drawn into the renewing power of the Holy Spirit so that they, in their lives, might be all that they are called to be.

In our modern world, as I have said, the use of the word “vocation” has lost its meaning and it is important that we recover our sense of “vocation” as a call by God to a radical obedience that is world transforming. As we live among our people ...”serving the Lord in all humility” so our people will be able to look at us and see what they themselves have been called to be. We will not only be indicators of God’s incarnate grace, but also animators of that grace.”

# C. Exposition of the Anglican Cleric's Relationship with the Diocese

## 1. Felix's Case

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The differences between the legal relationships of a cleric in a Diocese and of an employee to the employer are succinctly set out in judgment of Commissioner Brummer in Felix's Case in 2011, who compared employment with licensing, as follows:

"The following process would normally precede the creation of an employment relationship (in summary)

1. A vacancy is advertised and suitably qualified candidates apply for the position which is then followed by a process of interviews and an offer of employment made to the successful candidate resulting normally in a contract of employment as both parties are *ad idem* that the intention to do so was apparent right from the beginning of the process, i.e. to create an employment relationship.
2. Job or task descriptions are normally issued and conditions of employment are applicable to employees within the context of all relevant labour legislation.
3. The supervisor or manager instructs his/her employees and ensures that the employee maintains an acceptable level of work and competence.
4. Working hours are determined by the employer in relation to customer requirements.
5. It is accepted that there are three ways of terminating the contract i.e. through misconduct, incapacity (including incompatibility) or operational requirement.

6. Taxation is payable accordingly to the guideline of SARS and the Department of Labour requires additional contributions, e.g. UIF.

When this process is compared to the matter before me [*i.e. the CCMA Commissioner Brummer*], then the differences are already apparent (and summarized) as follows

7. The Applicant did not respond to a vacancy for employment. He had a vocational calling and approached the Church to be considered for firstly the position as a Deacon and later that of Rector.
8. The observation and assessment of the Applicant's strength of beliefs and commitment to the Church is guided by the Canons.
9. If it is found that the candidate indeed is ready to be accepted into this different position, then the Canons guide the rituals which need to be observed and a licence is issued to enable the candidate (Applicant) to minister to the congregation.
10. The Deacon (Applicant) is further assessed, guided again by the Canons, for his/her readiness and apparent commitment to the Church to be considered for the position as a Rector, which again follows a ritual which is clearly stipulated in the Canons as has been the case through the ages. At this stage a licence is issued with the title "Rector".
11. A stipend is paid to allow the Rector to enable him to fulfill his Canonical duties as are expected in terms of the licence issued.
12. The intention to conclude an employment contract is clearly not present with reference to the issues set out above.

The only common ground between the two sets of relationships as set out above is that of the payment of some form of compensation (including a stipend and allowance) which in turn is taxed by SARS and UIF is deducted and also includes access to accommodation.

It appears to me that when assessing the above, that the relationship is more akin to that between a Medical Practitioner and the Health Professional Council, or an Advocate and the Bar Council or an attorney and the Law Society and the like. In all of these instances a “licence” is issued to enable the particular professional to be deemed competent to practice under any of these guiding bodies which set *inter alia* the ethical standards which are to be observed. In the event of misconduct, it is the prerogative of any of these entities to hear submissions as to why the “licence” of such a practitioner should not be suspended or revoked. The resultant effect would be that the practitioner no longer be legally allowed to continue with his/her practice in the event of the “licence” being revoked. At no stage could any employment relationship be inferred with reference to any of these examples.

This then leads to the matter of whether the payment of some form of compensation and taxation to the Applicant is a convincing and compelling legal argument that his relationship is that of employment and that parties have intended it to be legally enforceable employment relationship.

When assessing all the relevant facts, including the guidelines of the Labour Relations Act, the Anglican Canons, Prayer Book and the Bible, then the matter of taxation as determined by a totally unrelated entity such as the South African Revenue Services with its particular assessments and definitions as to when taxation is payable or not, cannot override the fact that there was never an intention to create a secular relationship but that the relationship is governed purely by the guidelines applicable and available to the Anglican Church.”

Commissioner Brummer concludes by saying that she is in absolute agreement with Waglay J’s judgment in the Mathebula Case.

## **2. Sharpe’s Case**

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The approach outlined in Felix’s Case was elaborated in a different jurisdiction in 2015, in the judgment of the United Kingdom Court of Appeal, in the case of Sharpe v The Bishop of Worcester in 2015 in the following terms:

“108. ....a rector assumes office not simply because he or she is selected at interview but because he or she is installed as rector. That is not to be discounted as just another ceremony. As a clergymen, Reverend Sharpe must as part of his installation demonstrate his commitment to follow his calling by making the oath of Canonical obedience in the presence of the Bishop and his parishioners. In exchange for that, the Church provides him with the facilities to discharge his calling - stipend, housing, assistance with cars, and guidance on holidays and so on: there is an open offer by the appropriate organs of the Church to make those facilities available so there is no need for them to be discussed. They are taken as read. Any incumbent is expected to behave responsibly and given considerable freedom to take care of the souls of his parishioners in the way he considers appropriate. But, for a mixture of historical and ideological or theological reasons, the Church has little power of control over the way an incumbent discharges his functions or to remove him from his post. The reality is that that is not the point of the appointment. Put another way, by 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.

109. .... The opportunity for the hierarchy of the Church to intervene in the performance of duties ..... is reduced in practice to ..... the minimum. I have found it impossible to think of a professional person in an employment situation who would have the same level of security of tenure and independence of action, and certainly none has been suggested in the course of this argument.”

### **3. The Synod of Bishops and Provincial Trusts Board ("PTB")**

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After Felix's Case the PTB and Synod of Bishops considered the issue in 2012, the relevant extracts of their policy pronouncements being as follows:

#### **"Clergy Licensing - Recommendations from the Provincial Trusts Board**

In the course of 2011 there have been two important developments for ACSA.

Firstly the courts and the CCMA have continued to uphold the traditional position that, however the Church may use instruments from the world of labour such as payslips, UIF or medical aid to provide care for its clergy, the relationship between clergy and their work is NOT the relationship envisaged in South Africa's Labour Relations Act. Most usefully, the Commissioner's judgement in the case of Rev C Felix affirms the Waglay Judgement specifically and is very well worth studying.

Secondly the whole matter came up for debate at the Synod of Bishops and the Provincial Trusts Board in September 2011, with the question 'Do we WANT to stay as we have historically been, or do we WANT to explore the possibility of changing to an explicitly 'employer-employee' relationship between the clergy and the Church?'

Both bodies emphatically agreed that we should stay as we are - thereby affirming the position maintained at Provincial Synod 2010."

**"The Policy on Licensing Clergy to Ministries in the Anglican Church of Southern Africa** (Adopted by Synod of Bishops, February 2012)

The licensing of clergy to ministries in The Anglican Church of Southern Africa is governed by the Prayer Book and the Constitution and Canons of the Church.

The ..... Preamble to Chapter VII of the Canons, with its Affirmations and Clarifications, is of particular importance.

As the Fifth Clarification asserts in section (iv), the secular courts have repeatedly acknowledged the 'unique and spiritual nature' of the Church's ordained ministry, together with the distinctive nature of the arrangements by which the Church's ministry is managed.

The special, *sui generis* nature of the ordained ministry in some ways resembles voluntarism, and in some ways resembles employment. This does not mean that its essentially voluntary and sacrificial nature can be exploited by the church at diocesan or local level, for 'the worker deserves his keep' (Matt 10:10); nor does it mean conversely, that disputes can be resolved in terms of employment legislation. The courts have repeatedly affirmed this.

Nor does any of this mean that the relationship of clerics to the Church, the Diocese or Bishop are undefined; this relationship is defined in the Prayer Book, the Constitution and Canons, the Rules of various Dioceses, the Oaths and Declarations taken at the time of Ordination or Licensing to any ministry, and by any supplementary agreements made at the time of licensing (of which this present document is a part). These agreements are not 'letters of appointment' in the secular sense. Their language should be taken in a general sense, rather than as connoting any meaning it may acquire in the context of employment legislation. However the network of mutual obligations laid upon dioceses and clergy in these documents is clear, and should be observed by all parties.

While it is *sui generis*, meaning 'a thing of a unique kind', ordained ministry in fact resembles voluntarism more than it resembles employment. This is seen most clearly with self-supporting ministers who, in terms of the Rules of many Dioceses, may claim out-of-pocket expenses and may receive legitimate gifts, but are otherwise not entitled to remuneration. In this sense self-supporting clergy are exactly in the same position as parish councilors or lay ministers.

The term *stipend* reinforces this understanding; it means a living allowance donated to an individual to enable them to subsist while offering service. It contrasts with a *salary* which implies remuneration proportional to the qualifications and experience of an employee or professional person, paid in respect of work delivered, and in proportion to the value of that work.

The fact that the Church formalizes its stipendiary system with a pension, UIF payments or medical aid does not compromise the principle that all these are elements of a stipendiary subsistence allowance, made in a caring and organized manner, as opposed to remuneration for services rendered. The use of salary slips, tax returns, UIF forms or medical aid membership which may contain language drawn from the world of secular employment does not in any way compromise this principle; these are mechanisms used to provide security and well-being to clergy, not means of undermining the unique status of clergy as inherited from the historic church and repeatedly reaffirmed by the courts in South Africa.

In most Dioceses, stipends are set annually by Diocesan Council at the time. Medical aid, pension and UIF are part of the stipendiary 'package', as may be other modest contributions to assist clergy with books and vestments, or with providing retirement housing for their families. Local parishes are expected in terms of the Rules of most Dioceses to provide accommodation, transport and working expenses for stipendiary clergy, according to circumstance.

Some Dioceses also conclude a memorandum of agreement between an incoming cleric and the parish they are to serve, in order to clarify mutual responsibilities and protect the clergy. These can be incorporated into the set of documents envisaged in this policy .....

While no-one can deny clergy access to the legal system in defence of their rights, in any of the countries in which ACSA works, one consequence of the above is that both Diocese and cleric are bound to seek to resolve disputes through the canonical procedures of the Church at least in the first instance, recognizing that the structures of the Labour Court and the CCMA of South Africa in particular are not currently recognized by either the Church or the courts as competent to adjudicate in these issues."

## D The Meaning of “Employee”.

**[Authors’ note: In sections D to H the authors’ comments are in italics and the judges’ words are in plain typeface.]**

1. *The judgment of Le Roux J in Paxton’s Case dealt with this issue as follows:*

*Section 1 of the Labour Relations Act (the “Act”) defines “employee” as:*

‘any person who is employed by or working for any employer and receiving or entitled to receive remuneration and ..... any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer’

The first portion of the definition, i.e. “any person who is employed by ... any employer ..” takes the matter no further and borders on being tautologous. Regarding the construction to be based upon the rest of the definition, it is useful to turn to the analysis of this question in ***Liberty Life Association of South Africa Ltd v Niselow (1996)*** ..... Nugent J identifies as the essence of the concept of employment that it requires one person to have placed his productive capacity at the disposal of another, whereas the independent contractor, by contrast, commits himself only to deliver a product, or the end result, of that capacity. After referring to various tests which have vied for prominence in pointing to whether that has occurred, he goes on to say the following:

‘Once it is accepted, as I think it must be, that what is essential to the relationship of employment is that one person’s capacity to work must have been placed at the disposal of another, it seems to me most unlikely that this will be found to have occurred in practice without the recipient at the same time having assumed some measure of control over the manner in which that capacity is to be deployed, for that is the very thing for which he contracted ...’.

*He then goes on to examine ..... the limits of the statutory definition of employee, which at first glance appears to be extremely wide indeed:*

“The latter part in particular may seem to extend the concept of employment far beyond what is commonly understood thereby. To adopt a literal interpretation though would clearly result in absurdity. I think that the history of legislation which has culminated in the present statute, and the subject matter of the statute itself, lend support to a construction which confines its operation to those which place its productive capacity to work at the disposal of others, which is the essence of employment. It is not necessary in this case to decide where the limits of the definition lie. It is sufficient to say that in my view the ‘assistance’ which is referred to in the definition contemplates that form of assistance which is rendered by an employee, though the person he assists may not necessarily be his employer. In my view it does not extend to assistance of the kind which is rendered by independent contractors. That seems now to be well accepted. Nugent J then indicated..... that what was central to his enquiry was whether the relationship was one in which the Respondent ..... had placed his productive capacity at the Appellant’s disposal. As a result the enquiry was directed towards the Respondent’s obligations rather than his rights, and the extent to which the Appellant acquired rights relating to the use to be made of the Respondent’s productive capacity.”

2. *The employee “issue” was amplified in the judgment of Waglay J in Mathebula’s Case as follows:*

In our law the principles that are applicable to contracts generally are also applicable to contracts of employment. Grogan, in his book “Workplace Law” ..... Sets out the requirements for a valid contract to come into being *inter alia* as follows:

“There must at the time of contracting have been a consensus between the parties in the sense that they had the serious intention to create mutual rights and duties to which they would be legally bound, and they must have each been aware of such intention. .... In the case of an employment contract Grogan ..... quite correctly states that what is required between the parties is a voluntary agreement with one party agreeing to perform certain specified and/or implied duties for the other for an indefinite period, and commanded to carry out such duty in a particular way for a fixed or ascertainable wage .....

There are no formalities that are required to be complied with for the formation of an employment contract.”

While it is generally accepted that the first leg of the definition of employee refers to the common law contract of service ....., the second leg of the definition has proved to be somewhat contentious with arguments being made that the definition does away with the need for a valid agreement between the parties to create an employment relationship. Du Toit et al, in their book “The Labour Relations Act of 1995”, state that the purpose of the second leg of the definition is:

“..... to make clear that in certain circumstances a person may be employed by another within the meaning of the Act even in the absence of an employment contract between them.”

I cannot accept that the definition of an employee seeks to enforce employment contracts where this was not intended by the parties. In interpreting provisions similar to the definition as presently exist in the LRA the old Labour Appeal Court in the matter of Liberty Life Association of Africa Ltd v Niselow ..... Recognized the need to restrict the apparent scope of the wording to avoid absurd consequence ..... However, 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. ....

The duties and obligations together with the other factual issues that are applicable between parties *inter se* can only help to determine the nature of the contract once it has been established that there is a legally binding agreement between them. In this matter, the [claimant cleric] argued that what is decisive in determining whether or not a legally binding contract of employment exists is to look at the duties and obligations that one has to the other in a holistic manner. This sounds appealing. It is patently easier to gather whether or not there is an employer and employee relationship by reference to the duties and obligations, but to do so would be to go against the very basic principle that

governs our law of contract, and that is that the parties must have intended to enter into a legally enforceable contract, because the enforceability of the duties is dependent upon it. ....

In the circumstance, while it is so that the duties and obligations of one to the other could be interpreted as constituting an employment contract, the duties and obligations, like the offer, acceptance and consideration cannot create an employment contract where the parties themselves had not intended one to come into existence.

## E. The Church's "Engagement" or Licensing of a Cleric

1. *This issue was dealt with by Le Roux J in Paxton's Case as follows:*

In the present matter it is clear that no written contract of employment was concluded between the parties. Similarly the evidence before the Court does not point to a verbal contract [or] of service of employment having been concluded. Instead the source of the parties' rights and obligations are to be found in the provisions of Constitution and Canons of the [Anglican Church], together with the Acts of the Diocese of Port Elizabeth. Therefore I now turn to a consideration of these.

The Church's Canons, and in particular Canon 24, sets out the duties of the clergy. *Inter alia* a clergyman is required to say the daily Morning and Evening Prayer; to devote himself to regular study of Holy Scripture and other studies relevant to his work; to work together with the parish Council in carrying out the educational, evangelistic and pastoral work of the pastoral charge; and to celebrate the Holy Communion and other Great Festivals, to administer the Sacraments and other rites prescribed by the Book of Common Prayer, to preach a sermon at least once on each Sunday, to assume responsibility for the organization and training of all who instruct children in the Christian faith, to be available to counsel and advise, and to administer pastoral discipline in accordance with Canon 35.

It must be said that there appears to me to be no reason why these duties could not conceivably also be contained in a contract of service. At the same time I must accept that the mere fact that the [Church's] Constitution and Canons contain an exposition of the duties of the clergy, does not *ipso facto* imply that a clergyman stands in an employment relationship vis-à-vis the [Church].

Neither the Constitution, nor the Canons, nor the Acts of the Diocese contain anything further to suggest that the [claimant cleric's] capacity to work was to be at the disposal of the Church. The formal relationship between the parties commenced with the [claimant cleric] taking the prescribed oath of canonical obedience, in accordance with Canon 16. On the contrary, it appears that the [claimant cleric] was left to his own devices regarding the manner in which he went about his work. There appears to be no supervision or control over the manner in which he would spend his time, other than the requirement that he be available for counsel and advice, a requirement which by itself suggests very little by way of control. The claimant cleric appears to have been free to choose his own hours, without having to report to anyone in relation to his daily activities.

There are several features of the relationship between the parties which are similar to those normally encountered in an employment relationship, such as the provisions dealing with leave, sabbatical leave, the provision of housing and transport, payment of a stipend to the claimant cleric on a monthly basis, deduction from stipend towards unemployment insurance contributions and taxation, etc. However, the remarks of Nugent J in the *Niselow case* ..... apply equally here, namely, that if these terms create an impression of employment, they do no more than that, in that they shed no light on the essential enquiry, which relates to the fate of the claimant cleric's capacity to work. As the facts of the *Niselow* matter show, terms such as these do not necessarily indicate the existence of an employment relationship.

In my view, therefore, an employment relationship cannot be inferred from the provisions in the Acts [of the Diocese] dealing with the claimant cleric's entitlement to leave, sabbatical leave or sick leave, nor from other features of the relationship between the parties which closely resemble those normally encountered in an employment relationship.

The picture which emerges both from a study of the relevant provisions of the Constitution and Canons, and Acts, and the actual features of the relationship between the parties, is not one of employment. Rather, it is a picture of

spiritual relationship, commencing in formal terms with the [claimant cleric] taking an oath of canonical obedience to the Bishop, being invested with the spiritual office of a priest, being licensed to officiate as a priest and authorized to administer the sacraments and perform various other ministrations and duties in accordance with the Canons of the Church. Certainly the [claimant cleric] was subject to the authority and discipline of the [Church], but such authority and discipline are derived not from any employment relationship between the parties, but from the ecclesiastical authority of the [Church], as exercised by its institutions and office bearers in positions of ecclesiastical superiority in relation to the [claimant cleric].

I do not think that it has been shown that the [claimant cleric] was “receiving or entitled to receive remuneration” as contemplated in the definition. “Remunerate” is defined in the Concise Oxford Dictionary as “Reward, pay for service rendered”. Remuneration has a corresponding meaning. Inherent in the concept is the notion that the money accruing to the recipient is given as a reward for services rendered, in the sense of a counter-performance for such services. I do not think that the stipend received by the [claimant cleric] in the present matter falls to be treated as such, its similarity received by an employee notwithstanding. The stipend appears to be intended as a non-negotiable means of subsistence, and admittedly a modest one at that, for a person who has devoted his life to the service of God. Indeed, the [claimant cleric] admitted, with understandable reluctance, that that was how it was viewed by the Church.

The Constitution and Canons, it is said, constitute an elaborate code of practice containing a wide spectrum of rules, recommendations and exhortations which are addressed not only to the clergy, but also to a variety of subsidiary organizations and officials, such as parish councils, church wardens and chapel wardens. There are also Canons on matrimony, pastoral discipline and on the operation of ecclesiastical tribunals. The provisions of the

Constitution and Canons thus constitute the legal framework of the Church of the Province in Southern Africa.

Certain duties are laid down for the clergy in the Constitution and Canons, They are required (under paragraph XXIV(5) of the Constitution) to “exercise their spiritual function under the authority and spiritual jurisdiction of any Bishop of the Province or any Missionary Bishop sent forth under the authority of the Bishops of this Province, according to the Laws, Rules and Usages of the said Church”. Canon 23 provides that every parish can only be under the care of an incumbent duly licensed by the Bishop. Canon 24 provides that incumbents are under the authority of the Bishop and clearly sets out the duties to be performed by a clergyman, while Canon 25 provides that no clergyman may take on the pastoral charge of any congregation unless with the consent of the Bishop of the Diocese. The Bishop may also under Canon 25 revoke the licence without offering other work, as was done in respect of the [claimant cleric].

On behalf of the [Church] it was submitted that a clergyman may have one kind of duty to his parishioners and another kind of duty to the Bishop of the Diocese as his ecclesiastical superior. The one may have greater control over his actions than the other, but whatever authority either exercises over him is an authority which can be exercised by way of ecclesiastical jurisdiction, not being an authority which depends on contract.

Mr Gauntlett for the [Church] argued that the conclusion to be drawn from the foregoing was that the position of a clergyman was 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 subject to the control and direction of any particular master. Thus the Constitution and Canons amount to an agreement between all members of the Church to perform and observe their provisions. The agreement is however not enforceable on the basis that it constitutes a contract of service between a clergyman and the Church.

In addition it was submitted on behalf of the [Church] that the Court is duty-bound to uphold the Constitution and Canons, not only because they amount to an agreement, but also because to do so would respect the rules of a religious organization and give effect to the principle of freedom of religion enshrined in article 14(1) of the interim Constitution (which applies *in casu*).

Mr Gauntlett conceded at the outset that the [Church] acknowledged that it was not the [Church's] case that the [claimant cleric] was an independent contractor; that an element of control over the actions of the [claimant cleric] existed; that he had to achieve certain results; and that he received a regular income from the coffers of the Respondent.

Mr Oosthuizen for the [claimant cleric] indicated at the outset that the [claimant cleric] had no difficulty with the contention that he was invested with an office. However, on behalf of the [claimant cleric] it was asserted that being the holder of an office in no way precluded [him] from also being an employee for purposes of the Act .....

He also noted that had it been the intention of the legislature to exclude the clergy from the ambit of the Act that could readily have been done, as was the case of other categories of employees who were excluded from the protection of the Act. Case law originating in other jurisdictions fell to be treated with caution, it was argued, since the jurisdictional prerequisites applying in English law, for instance, might well be different, since these required the existence of a contract of employment, in the case of the Industrial Conciliation Act. Neither could it be said that all religions and officeholders within various religions fell to be treated alike, since each had to be considered independently.

Mr Oosthuizen laid emphasis on various aspects of the benefits accruing to the Applicant by virtue of his position, such as regular income originating from the [Church], provisions relating to leave and long leave, fringe benefits such as free housing and use of a vehicle, a prohibition on

doing other work without permission, the deduction of unemployment insurance contributions and income tax, and the rights of the Bishop to exercise control over the discipline of the [claimant cleric], all of which were arguably *indicia* of the existence of an employment relationship. Moreover, the work of the [claimant cleric] amounted to personal services rendered to the [Church], rather than the delivery of a finished product. Hence the answer to the question of whether the [claimant cleric] assisted the [Church] “in the carrying on of its business” could be said to be almost of *res ipsa loquitur* [i.e. the thing speaks for itself].

*2. This issue was dealt with by Waglay J in Mathebula's Case as follows:*

The Constitution and Canons constitute the legal framework within which the Applicant operates. While the Constitution sets out the principles that underlie the functions of the church and the manner in which it is structured by, for example, providing for, the establishment of Dioceses and Synods and the powers and duties of such bodies – the Canons give substance to the principles contained in the Constitution. The Canons relate not only to the appointment and tenure of the clergy, the election of bishops but various other matters such as matrimony and pastoral discipline. The Canons also deal with the disciplinary proceedings of priests and bishops. The rules and regulations that constitute the Canons are applicable not only to the clergy within the Applicant church but also to Applicant's parish councils, church wardens, chapel wardens and the general public who are members of the [Church].

The Anglican Church is divided into various dioceses and, while each is independent and autonomous, they are all bound by the same Constitution. The Canons may, however, differ from diocese to diocese depending on the peculiarities of the area in which they are based. Whatever the difference, if indeed any, all the Canons must be in line with the Constitution and therefore principally the Canons are similar, if not the same, at every diocese.

The [Diocese] is part of the Southern African Anglican Church which not only has close links to the Church of England but with Anglican churches worldwide, and together form part of the Anglican Communion subscribing to the same principles of faith as set out in Scripture and Book of Common Prayer and of Ordering of Bishops, Priests and Deacons. The [Diocese] is organized and operates almost identically to the Church of England and with regard to the relationship between the church and the clergy, there is no difference.

The [Diocese] – like its equivalent elsewhere – has three levels of clergy: bishops, priests and deacons. The position of Canon Pastor is that of a priest. Matters relating to the appointment, removal and co-ordination of the clergy are a Diocesan responsibility which is carried out by the Bishop (or Archbishop as in the present matter) of that Diocese.

In order for a person to become a priest within the Anglican Church generally, the person must demonstrate a clear vocation. This does not mean a wish of desire to be a priest, but a calling from God to the priestly office. The Church does not allow a person to proceed towards priesthood until the truth of his calling is tested and confirmed by the Church. Once the calling is confirmed, the Church provides the necessary training at the end of which the candidate is ordained – first as a deacon and later as a priest.

At the time the candidate is ordained as a priest ( which is done at a service of ordination) he or she is required to publicly and in the affirmative answer certain standard questions which, *inter alia*, confirms that he or she was “called by God and his Church to the life and work of a priest” and that he or she accepts “the discipline of this Church and [will] reverently obey [his or her] Bishop and other ministers set over [him or her] in the Lord.”

Once ordained as a priest, a priest is not able to carry out any specific ministry: to be able to do so he or she must be licensed by the Bishop of the Diocese in which he or she is asked to carry out an active ministry. The licensing is a ritualistic process done either at the Eucharist or at the Morning or Evening Prayer service.....

The oath of “Canonical Obedience” is an oath of obedience to the priest’s ecclesiastical superior to the extent that the superior acts in accordance with the Canons. The Bishop, therefore, cannot expect obedience from the priest outside the framework of the Canons.

Once licensed, his duties and obligations are defined and described in the ..... Constitution and Canons. While the Bishop generally exercises supervision and control over the

priest, this appears to be done through motivation, guidance and encouragement rather than command and control. The system according to both the [Diocese] and the [claimant cleric] operates largely on trust.

The installation of a priest into a ministry carries with it certain financial benefits. ....

According to the [Diocese], the benefits recorded above, including the stipend, are regarded by it as its contribution to enable its licensed priest to carry out his or her calling to the priestly office and is not a reward for services rendered.

The Constitution and the Canons set out the circumstances in and the procedure by which, a priest's licence may be revoked. One of the ways in which this may happen, as happened to the [claimant cleric], is that a licence may be revoked where a member of the clergy is charged with a disciplinary offence, brought before an ecclesiastical tribunal and found guilty after being heard.

It was [Diocese's] evidence that a priest is not regarded as the servant of the Church: while the Church provides the framework for the priest's work (through the Constitution and Canons), the priest is regarded as working for God, i.e. the relationship between the priest and the Church cannot be regarded as one of employment. The Applicant simply, according to it, provided the sphere within which the priests serve God arising out of their calling. It is for that reason, so Applicant argued, that priests are said to be called of God and serving God and offering their lives to God - this precludes the Anglican Church generally, and the [Diocese] in particular, from speaking of employing priests.

[Diocese] then argued that, while there is a mutual commitment to the relationship between the priest and the Church, this is not a bilateral and enforceable civil contract; it is a commitment by the priest to serve God through the ministry and office of the priest, and a commitment by the [Diocese] to support the priest in that ministry. Further that the material benefits attached to the office of the priest was not

remuneration but the provision by the [Diocese] of means to support the priest in order for him to carry out his calling. The amount of stipend that is paid to a member of the clergy is the same irrespective of ability, capability or experience and, in any event, the clergy has no entitlement thereto.

The [claimant cleric's] evidence was that the licence to hold office constituted the employment contract as it was the culmination of negotiations that preceded its grant. According to the [claimant cleric], he was invited to join the [Diocese's] staff, informed about the financial benefits attached to the position offered, he accepted the position and, once licensed, that concluded an agreement between [Diocese] and him. What was agreed was nothing other than a contract of employment.

[Claimant cleric] further argued that the stipend was in fact a salary, that he was entitled to it and that his entitlement was supported by biblical text. In his evidence, [claimant cleric] conceded that there was a fundamental difference between the relationship of a priest with a church and a secular relationship because, according to him, there was no entitlement between the parties in the former case.

In essence, [claimant cleric's] evidence and argument was to the effect that, having regard to the process that preceded the licensing (the correspondence containing an offer to join [Diocese's] staff and the benefits that were attached to the post offered) the licensing itself, the factual position that he is required to fulfill certain obligations in return for which he receives certain benefits, and that he is answerable to a superior, demonstrates that his position vis-à-vis the Church is that of employee and employer.

Based on all of the above, the [CCMA] concluded that the [claimant cleric] was in fact an employee and the [Diocese] his employer as defined by the [Labour Relations Act]. In arriving at his decision, the [CCMA] examined the common law position as well as the statutory definition of an employee and applied the test which is now commonly referred to as the "dominant impression test" ..... The [CCMA] specifically took into account that the [claimant cleric]:

- (a) was paid a regular amount every month, which amount was subject to income tax and other deductions for staff benefits;
- (b) was eligible for participation in the car loan / travel allowance scheme;
- (c) was bound to minister within the confines of the Applicant and in a manner determined by the Applicant, as set out in the Canons and the Constitution of the Applicant;
- (d) was subject to the authority of the Bishop, through an oath of obedience, without which he could not hold office; and
- (e) was bound by Church practices and was expected to perform his duties personally and to make his time available to the [Diocese].

According to the [Diocese], what existed between the [claimant cleric] and it, was not a civilly enforceable contract but an ecclesiastical or spiritual agreement, an agreement that was regulated by its Constitution and Canons and not by secular law. This argument is based on the following:

- (a) no person can enter the priesthood within the [Diocese's] communion without being called by God, which calling is tested by the Church;
- (b) that ordination to the priesthood does not guarantee office, yet an oath of obeisance is required before ordination;
- (c) the licensing process was ritualistic and merely confirmed, yet again, the oath taken when admitted to priesthood and entrusted the priest with the "cure of souls" in respect of the licensed area;
- (d) the rights, duties and obligations as contained in the Constitution and Canons, while regulatory, did not create rights outside its confines;
- (e) that since the function of the priest is to spread the word of God, the priest is therefore not a "servant" of the church but a servant of God. i.e. As a priest is one who takes up the position because he is "called" upon to do so by God and is a person who serves and offers his life to God, it cannot

be said that he is an employee of the Church - the Church does not employ priests but merely facilitates their calling by providing the framework within which a priest can serve God. The only regulatory framework that governs their relationship, therefore, is the Constitution and Canons.

The unchallenged evidence led by the [Diocese] was that the [Diocese], as a member of the Anglican Communion, shares fundamental characteristics with the Church of England - in particular the way the clergy relate to the Church, and contended that it, like the Anglican Churches worldwide, do not enter into any contract of employment with its clergy. This contention is supported in a number of decided cases.

The licensing ritual on which [claimant cleric] relies as proof of the intention to create a legally enforceable employment contract does not provide any support for [claimant cleric's] contention. The very basis of the licensing process is religious: the oath, declaration and "parting" words remove it from the realm of creating civil obligation. The oath of obedience taken by the [claimant cleric] is no different to the oath he took when admitted to priesthood without being given any ministry or benefits. Committing him to "cure the carer of souls" can hardly be seen as a welcome to an employment relationship.

The licensing process is no more than a formal entry of a priest to the ministry, to put his calling - which comes from God - into action. While it may be difficult to comprehend a "calling from God", the [Church] and the [claimant cleric] agree that the very basis upon which their relationship exists is that "calling". This being so, 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.

## F. Court Decisions in Other Jurisdictions

*These are set out in Annex "C", and show the widespread acceptance of the principles outlined in sections C, D and E, regardless of the different legal systems and histories involved.*

## G. The Intentional Creation of a Contractual Relationship (Cleric/Church)

1. *Of course, it is always open to parties, intentionally and deliberately to enter into an employment contract, parties, intentionally and deliberately, to enter as a parish or diocese would with office staff. This was found to be the case with the NGK in an unreported case in 1999, to which Waglay J in the Mathabula's Case referred to in the following terms:*

*This Court had to decide a similar point in limine as raised by the Applicant in the matter of Noel Schreuder v Nederlandse Gereformeerde Kerk. In that matter the Court held, on the facts, that a 'predikant' in the 'Nederlandse Gereformeerde Kerk' was an employee because he had been required, at the commencement of his appointment, to sign a letter of appointment setting out his duties and providing for his receipt of a salary. The Court there held as follows:*

*"Die beroepsbrief bepaal dan verder wat die predikant in ruil vir die vervulling van hierdie pligte ontvang. .... Daar is gevolglik volgens Dr Scholtz 'n plig op die predikant om sy ampspligte soos uiteengesit te vervul. Die predikant verkry aan die anderkant in ruil hiervoor weer 'n salarier en verlof - en pensioenvoordele asook lidmaatskap van 'n mediese fonds en assuransiedekking. Die beroepsbrief is dus die dienskontrak tussen die predikant en die gemeente (kerkraad)..... In lig van hierdie getuienis is ek oortuig dat die bedoeling van die beroepsbrief is om kontraktuele verpligtinge in die vorm van 'n dienskontrak te skep tussen die predikant en sy of haar gemeente."*

2. *The relationship of employment can also arise, less deliberately, out of the way the parties structure their relationship. This is illustrated in the case of the Universal Church of the Kingdom of God v CCMA and Others.*

*The critical issue is to determine the real intent of the parties when contracting as they did. The essentials of employment are the “hiring” of a person’s time and services for a particular function and period or periods of time, which services are to be rendered under the direction of the employer concerned. In the list set out by Steenkamp J in his judgment, these essentials are reflected in items 1, 2 and 4 of his list of factors corresponding with those set out in s.200A of the Labour Relations Act, the list being:*

1. The manner in which the pastor worked was subject to the control or direction of the church. He had to complete a weekly work schedule. If he was unable to conduct sermons, he needed to report to his senior, the regional pastor.
2. The pastor’s hours of work were subject to the control or direction of the church. He had to conduct three or four sermons per day.
3. The pastor formed part of the Universal Church of the Kingdom of God. He did not present sermons in the name of any other church or simply on his own, albeit “in the name of God”.
4. The pastor worked for the church for at least 40 hours per month.
5. The pastor was economically dependent on the church. He earned no other income.
6. The pastor only worked for or rendered services to the church.

*The judge’s reference to the duck analogy (i.e. “if it looks like a duck and quacks like a duck, it probably is one”) was arrestingly colourful and apt, but was intended to deal only with the external manifestations of that relationship (i.e. a prima facie finding) when he was talking of PAYE, UIF, misconduct, etc. Compare this with a similar summary of factors set out by Commissioner Brummer in Felix’s Case, in section C.1 above.*

## H. The Salvation Army Case

*In this 2004 application to the Labour Court, the conclusion reached in the Paxton and Mathebula Cases was taken to its logical conclusion, in excluding the licensing of clergy from the ambit of a number of statutes. Relevant extracts of the judgment are as follows:*

The Applicant is a world wide church organization operating also in South Africa. .... Its primary objective is to advance the Christian religion and, in pursuance thereof, to carry out acts of charity and humanitarian relief, to aid suffering humanity. Its leadership is carried out by its clergy, called officers who are ordained and commissioned ministers of religion. It also engages a number of employees, a majority of whom are unionized under various trade unions in the country, who do not necessarily have religious ties to it, but perform specific duties in the conduct of its affairs in terms of the contracts of employment it concludes with them.

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

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

“I give myself in response to the call of God and on my own free will to the ministry of the Salvation Army, and in doing so I acknowledge that as an officer I regard the fundamental nature of my

relationship to the Army as spiritual ..... I understand that there is neither a contract of service or employment nor a legal relationship between me and the Army, and accordingly I shall have no legal claims upon the Army or the Army upon me. I understand and agree that, although I may expect to receive allowances according to an official scale, no allowance is guaranteed to me. I accept that any such allowance is not a wage, salary, reward or payment for services rendered.”

The Applicant does not therefore implement and comply with the above labour legislation on behalf of the officers.

It now remains to determine the nature of the relationship which exists between the Applicant and its officers. Section 213 of the Act, as amended by section 51 of the Labour Relations Amendment Act 42 of 1999, defines the term “employee”. ..... . The term is similarly defined in the BCEA and EEA. The definitions in the SDA and UIA are structured differently but carry substantially the same meaning as those set out in the former Acts.

Commenting on the nature and meaning of employment, Myburgh JP said in the case of *SA Broadcasting Corporation v McKenzie (1999)*.....:

“The legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded ....., ‘although the parties’ own perception of their relationship and the manner in which the contract is carried out in practice may, in areas not covered by the strict terms of the contract, assist in determining the relationship ..... In seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it ..... As Brasseley “The Nature of Employment’ at 921 points out, the label is of no assistance if it was chosen to disguise the real relationship between the parties, but when they are *bona fide* it surely sheds light on what they intended”.

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

(a) The relationship between the applicant and the officers is spiritual and is governed by religious conscience and the officers' covenant with God; the officer responds to a call of God to spiritual ministry and the applicant merely provides the sphere within which the officers serve God;

(b) An officer does not sell his services nor does the applicant buy such services; no salary nor allowance is guaranteed to the officers who only receive a living allowance to enable them to forgo secular employment and carry out a Christian spiritual ministry through the applicant;

(c) An officer's leisure pursuits must be in keeping with his spiritual calling;

(d) An officer does not retire from his calling; devotes his entire life to God and the applicant remains a minister of religion until death;

(e) Save for direction in respect of administrative matters there is no control over the manner in which an officer fulfills his spiritual calling and ministry; he then chooses where and when to pray, the style of preaching, his pastoral care and other aspects of the ministry.

In [Mathebula's Case], Waglay J collected and analysed the relevant authorities decided by South African courts and courts in other jurisdictions on the nature of the relationship between a church minister and his church. He concluded at 2285E;

"The common thread that runs through all these decisions is that, in a church and clergy relationship the crucial question is whether, at the time the parties concluded the offer and acceptance, they intended to create a legally binding contractual relationship ....."

The learned Judge continued thus at 2287G:

“The duties and obligations together with the factual issues that are applicable between parties *inter se* can only help to determine the nature of the contract once it has been established that there is a legally binding agreement between them.”

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

The following order is accordingly made:

The officers of the applicant are declared not to be employees as defined in the LRA, the BCEA, the ECA, the SDA or the COIDA, and the said Acts are not applicable to such officers.

## I The Luvuyo Case (2011)

Kgomo J in the South Gauteng High Court delivered a judgment on 19 August 2011 in a matter in which Revd. Luvuyo challenged, and sought a review of, the decision of the Diocese of the Highveld to withdraw his licence, although no alternative posting could be found in the Diocese or Province, in terms of Canon 25(8). Perhaps based on some of the confusing facts, the judge (with respect) himself seems to have conflated the pastoral provisions of Canon 25(6) and (8) with those of the Disciplinary Canons (36 to 41) in Chapter VII. As a result he ordered that the termination of Revd. Luvuyo’s pastoral services “in the Holy Name Church is declared unfair and unprocedural”; was set aside on the basis that the procedure followed was found to be irregular for lack of compliance with the Canons of the Church; and that the matter be

referred back to the Diocese for a fresh consideration or inquiry before a new panel. Although the principal issue of interest and importance in this case is the need to be absolutely certain that there is and can be no confusion in any party's mind as to a process in terms of Canon 28(6) and in (8) and one in terms of Chapter VII, it is interesting to note that the High Court and parties to the application focused only on the proper implementation by the Church of its own Rules in relation to its withdrawal of a licence, without any mention being made by either party to employment law and remedies. This might indicate an implied acceptance by them of the absence of an employment relationship in the engagement of a cleric.

## J The Church's "Employment" of a Cleric

As shown in the Schreuder Case, it is always possible to so construct the relationship as to create an employment contract.

It is also possible to have a cleric employed in the normal way, for example, as an administrator or diocesan secretary. If the cleric is also licensed as a minister concurrently with the lay appointment as an administrator, then the cleric is both (a) engaged and licensed as a minister in a particular office of the church (to which relationship what has been said in section B above applies) and (b) employed as an employee in a particular post in the administrative hierarchy (to which relationship all the provisions of the labour legislation and of the common law apply). Thus, a bishop may withdraw a licence from a cleric, but still have the cleric remain in the lay post with all the reciprocal rights and obligations applicable to both the cleric (as employee) and the diocese (as employer) under labour law in place.

There can also be "grey areas" in the engagement of a cleric, where the facts of the particular case, although not as clear and straight forward as in the Schreuder Case (where the parties actually entered into a written contract of employment, framed as a letter of appointment), they may in their totality and in the circumstances constitute, not a licensing but an employment of the cleric concerned. Thus the decision of the Australian lower court in *Knowles v The Anglican Church Property Trust, Diocese of Bathurst* (referred to in Annex "B") was overturned on appeal on a review of the facts: the archbishop in that case had been head-hunted by the leaders of the local Greek Orthodox community and promised a whole raft of benefits if he agreed to go to Australia to take up the post. Also, in 2005 the House of Lords on appeal held on the facts that in that case the engagement of the cleric amounted in the particular circumstances to a contract of employment (*Percy v Church of Scotland Board of Mission*).

# CONCLUSION

**The first lesson** to be taken from this is that the bishop and cleric must be clear as to what it is they are about and ensure that what they commit to, and the documentary evidence of that commitment, correctly reflects their common understanding. The approved templates in annexes “B1” to “B3” can be used as the basis for drafting the documents. The drafting needs to be assessed in relation to suitability for purpose and any canonical or secular legal changes that may have occurred. Advice from diocesan or provincial legal offices must be sought if there is any doubt or other uncertainty.

**The second** is that great wisdom and care must be exercised by the bishop in the process and in the decisions leading to the ordination of a candidate coming forward for ordination.

**The third** is that the bishop must be diligent in determining a minister’s suitability for licensing and meticulous in making the enquiries as to fitness laid down in Canon 25(3). Once a licence is given, it cannot be withdrawn other than in accordance with its own terms, or for real pastoral reasons if the circumstances are appropriate, or for disciplinary causes where a sentence of deposition is fitting. In this regard, there can be a temptation to deal with redundancy or “scaling down” as a pastoral issue : it is not, and there is no provision in the Canons for this. It is suggested that where a diocese is short of funds to pay stipends, the biblical approach might well be that the stipends of all ministers in the diocese should be trimmed in a fair and reasonable fashion to cope with such a corporate financial crisis.

**Finally, the fourth** is for the bishop to be clear on the crucial difference between a pastoral process in terms of Canons 25(6) to (8) and the disciplinary process in terms of Canons 37 and 39, to apply their requirements as appropriate and to implement each precisely as laid down.

# ANNEXURES

Annex "A"

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## **Case Numbers and Law Report References**

Paxton's Case is formally referred to as G.G. Paxton v Church of the Province of Southern Africa (Anglican), Diocese of Port Elizabeth (Case No NHE 11/2/1985 P.E.) and was heard in the Industrial Court.

Mathebula's Case is formally referred to as The Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration, G Galant N.O. and L Z Mathebula (case No C 619/2000) and was an appeal from the CCMA to the Labour Court.

The first is referred to in this paper as Paxton's Case and the second as Mathebula's Case.

There is also reference to:

(a) an interesting consequential finding by the Labour Court (Johannesburg Division) in 2004 in the case of Salvation Army (SA Territory) v Minister of Labour (2004 JOL 12975 LC), referred to in this paper as the Salvation Army Case;

(b) the 2011 judgment, unreported, in the case of Luvuyo v The Church of the Province of Southern Africa, Diocese of the Highveld (Case No.49468/2010 in the South Gauteng high Court) referred to in this paper as the Luvuyo Case; and

(c) the 2011 *in limine* judgment in the case of Cliff Felix v Diocese of False Bay (Case ref. WEB 125-11 of 09.09.2011).

- The most recent case is that of Sharpe v Bishop of Worcester in the United Kingdom Court of Appeal (2015 EWCA Civ399).

Examples of instances where the cleric was found to be an employee, because of the relationship contractually created, were

- ❖ Noel Schreuder v Nederduitse Gereformeerde Kerk (1999 20 ILJ 1936 LC) and
- ❖ Universal Church of the Kingdom of God v CCMA and Others (2014 3 BLLR 295 LC).

*LICENSING CLERGY AGREEMENT TEMPLATE (A) – STIPENDIARY*

*To:*

*Date:*

*Agreement in regard to licensing as a stipendiary cleric in the Diocese of .....*

*Dear*

*Your licensing as a Deacon/Priest in the Parish of .....*

*All clergy ministering in the Diocese of ..... on the authority of the Bishop are licensed in terms of the Prayer Book, the Constitution and Canons of the Anglican Church of Southern Africa, the Rules of the Diocese, the attached policy, the Oaths and Declarations made by the cleric at the time of licensing, and this letter of agreement.*

*This letter is set in the context of the attached policy and both documents should be signed by the cleric in acknowledgement of the terms and conditions contained herein. I am hereby inviting you to accept licensed ministry in the Diocese as set out above, on a stipendiary basis, with effect from .....*

*Your office will be stipendiary, which means that you will be entitled to the usual package offered by this Diocese consisting of (??? For example - monthly stipend, pension contribution, medical aid in full, and a contribution to your savings for retirement housing). You will also be entitled to free housing, water and light in the parish at their expense, together with such allowances, transport and other costs as may be paid by agreement with the Parish Council.*

*(Diocese to insert any local additions, conditions etc applicable to the individual – e.g. participation in post ordination training, requirement of relinquishing licence on reaching age of XYZ, etc.)*

*Please sign one copy of this letter to confirm your acceptance of these arrangements and return it to my office. Thank you, and do be sure of my prayers and support for you at this stage of your ministry.*

*Signed: Bishop*

*Cc Archdeacon  
Diocesan secretary*

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*LICENSING CLERGY AGREEMENT (b) - SELF-SUPPORTING*

*Agreement in regard to licensing as a SELF-SUPPORTING cleric in the Diocese of .....*

*To:*

*Date:*

*Dear.....*

*Your licensing as Priest in Charge/ Assistant Priest/ Deacon etc of/in the Parish of.....*

*All clergy ministering in the Diocese of ..... on the authority of the Bishop are licensed in terms of the Prayer Book, the Constitution and Canons of the Anglican Church of Southern Africa, the Rules of the Diocese, the attached policy, the Oaths and Declarations made by the cleric at the time of licensing, and this letter of agreement.*

*This letter is set in the context of the attached policy and both documents should be signed by the cleric in acknowledgement of the terms and conditions contained herein.*

*I am hereby inviting you to accept licensed ministry in the Diocese as set out above, on a non- stipendiary basis, with effect from .....*

*Your office will be non-stipendiary, which means that you will be entitled only to (XYZ in terms of the Diocesan Rules - here spell out any other terms and conditions applicable in the particular Diocese)*

*Please sign one copy of this letter to confirm your acceptance of these arrangements and return it to my office.*

*Thank you, and do be sure of my prayers and support for you at this stage of your ministry.*

*Yours sincerely in Christ*

*Bishop*

*Cc Archdeacon  
Diocesan Secretary*

*LICENSING CLERGY TEMPLATE (3) - Letter of Permission to Officiate*

*Date*

*To:*

*Dear .*

*Letter of Permission to Officiate*

*Thank you offering your services now that you have retired from your previous ministry.*

*This letter constitutes your permission to officiate under the authority of the Rector of your Parish/the archdeacon of xxx/my direct Episcopal oversight for the 12 months until your next birthday, namely 45<sup>th</sup> January 2078.*

*Please note that this permission does not entitle you to any remuneration save that of out-of-pocket expenses and the normal relieving fee applicable in the diocese for any service you undertake. You may also receive direct personal gifts at the time of marriages and funerals but you should not expect any parish to give you regular or ongoing support, unless this is negotiated with the Archdeacon prior to its implementation.*

*While you are welcome at diocesan events, this letter does NOT carry an obligation to attend synods or other meetings.*

*Your permission to retain you licence as a Marriage Officer is hereby confirmed until the next review date of this letter/OR/ hereby withdrawn; you should return your licence and books to the local office of The Department of Home Affairs, and I will write to them to advise them that you no longer have our authority to exercise this ministry.*

*Yours etc.*

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# Court Decisions in Jurisdictions Other than South Africa

## **Paxton Case**

1. *Paxton's Case* referred to the following:

In *In re National Insurance Act 1911 : In re Employment of Church of England Curates*..... the question which fell to be determined at the instance of the Insurance Commissioners, was whether the status of *inter alia* stipendiary assistant curates in the Church of England was "employment" within the scope of the National Insurance Act, 1911. At 568 Parker J held as follows:

"I have come to the conclusion 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 duties and rights are defined by contract at all. It appears that there can be no preference in reality for arguing that the relationship between him and his vicar, or between him and anyone else, is the relation of employer and servant. As I understand, nobody can assume the office of curate, or can fulfill the duties ordinarily exercised by curates in a parish, without the consent or licence of the bishop. If a stipendiary is to be appointed, this may in some cases be done, as in the absence of a vicar if a vicar is not carrying out his duties properly, by the bishop on his own initiative. If, on the other hand, the vicar requires assistance, it is open to him to ask the bishop to licence his nominee for the purpose of assisting him. But in neither one case nor the other do I think it can properly be said that the vicar appoints the curate. He nominates him, and, if the appointment is made at all, it is made by the bishop and it is contained in the bishop's licence....."

At 569 he went on to say:

“Further, when I came to consider the duties of the curate, it appears to me that those duties are in no way defined by any contract of employment between him and anyone else. He owes, no doubt, a certain amount of obedience to the vicar, as to the precise extent of which there may be some question - at any rate into that part of the case I do not intend to enter at length - but the duty which he owes to the vicar is not a duty which he owes because of a contract, but a duty which he owes to an ecclesiastical superior. He may owe one kind of duty to the bishop and another kind of duty to the vicar, and one may have greater control over his actions than the other, but whatever authority either exercises over him is an authority which can be exercised by virtue of the ecclesiastical jurisdiction, and not an authority which depends in any case upon contract. If I were to hold that the vicar and his curate were in the position of master and servant, I might be imposing on the vicar at common law very serious liabilities, from which I think, in all common sense, he ought to be exempt.

It appears to be, therefore, that if I test the question, as to whether there is a contract of service, by any of the three methods suggested - the appointment, the power of dismissal, and the duty owed by curate to vicar - there is no such contract of service as the Act seems to contemplate.”

A similar conclusion was arrived at in the matter of *Scottish Insurance Commissioners v Church of Scotland 1914 .....*, in relation to the question whether assistant ministers and student missionaries of the Church of Scotland and the United Free Church were employees.

In *President of the Methodist Conference v Parfitt (1984).....* a minister in full connection of the Methodist church was relieved of his clerical duties, upon which he complained to an Industrial Tribunal that he was unfairly dismissed. The Court of Appeal held that the Industrial Tribunal had no jurisdiction to determine the matter, since the minister was not employed under a contract of service. At pages 182-183 Dillon L J said the following:

“.... in my judgment, the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination by the imposition of hands and the doctrinal standards of the Methodist Church which are so fundamental to that church and to the position of every minister as to make it impossible to

conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church when the minister was received into full connection. The nature of stipend supports this view. In the spiritual sense, the minister sets out to serve God as his master; I do not think that it is right to say that in the legal sense he is at the point of ordination undertaking by contract to serve the church or the conference as his master throughout the years of his ministry.”

In *Davies v Presbyterian Church of Wales* 1986 ..... G-J Lord Templeman described the relationship between a pastor of the Presbyterian Church of Wales and the Church in the following terms:

“My Lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. But in the present case the Pastor of the Church cannot point to any contract between himself and the Church. The book of rules does not contain terms of employment capable of being offered and accepted in the course of religious ceremony. The duties owed by the pastor of 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 the pastor is not deprived of his salaries 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.”

A similar question fell to be considered by the Transkei Appellate Division in the matter of *Mankatshu v Old Apostolic Church of Africa and Others* 1994 ....., where a non-stipendiary priest of the Old Apostolic Church of African was removed from office by the Apostolate of his church.

Dumbutshena JA said the following:

“If a member does not behave in a manner acceptable to the church, he can be dismissed in accordance with the provisions of the constitution. I repeat that the constitution of the Old Apostolic Church is not a contract of service between the church and the appellant.”

## **Mathebula Case**

2 *Mathebula's Case added the following:*

In the most recent case that has been reported – *Diocese of Southwalk v Coker [1998]* ....., a decision of the Court of Appeal in England – Coker, a clergyman with the Church of England who received a monthly stipend and benefits similar to those received by the Third Respondent, alleged that he was dismissed and challenged the fairness of his dismissal. The Church contended that Coker was not an employee for the purpose of the Employment Protection (Consolidation) Act of 1978 because there was no contract between Coker and the Church. .... The Court of Appeal concluded that he could not be held to have entered into a contract with the Church at all and it was therefore unnecessary to decide whether he was party to an employment contract or some other type of contract.

In reaching this conclusion, the Court of Appeal stated as follows .....

“Although not explicitly analysed in these terms in the authorities, the simple reason, in my view, for the absence of a contract between the church and a minister of religion is the lack of intention to create a contractual relationship”.

The critical point in this case is that an assistant curate is an ordained priest. The legal effect of the ordination of a person admitted to the order of priesthood is that he is called to an office, recognized by law and charged with functions designed by law in the ordinal, as set out in the Book of Common Prayer. The ordinal governs the form and manner of ordaining priests according to the order of the Church of England. Those functions are also contained in the Canons of the Church of England and are discharged by a priest as assistant curate. It is unnecessary for him to enter into a contract for the creation, definition, execution or enforcement of those functions. Those functions embrace spiritual, liturgical and doctrinal matters, as well as matters of ritual and ceremony, which make what might otherwise be regarded as an employment relationship in the secular and civil courts more appropriate for the special jurisdiction of ecclesiastical courts. ....

Mummery LJ went on to say that he saw no reason why an ordained priest, licensed by his bishop to assist the incumbent in his cure of souls, is under contract with the bishop, by whom he is licensed, or with the incumbent he is assisting, or with anyone else, in the absence of a clear intention to create a contract. He agreed with the following dictum from *In re National Insurance Act 1911: In re Employment of Church of England Curates* [1912] .....:

“[the position of an assistant curate is] not the position of a person whose rights are defined by contract at all. It appears to me that there can be no pretence in reality for arguing that the relationship between him and his vicar, or between him and his bishop, or between him and anyone else, is the relation of employer and servant.”

Staughton LJ, in concurring majority judgment, stated the following .....:

“One can say that a minister of religion serves God and serves his congregation, but does not serve an employer. That seems to me to be accurate in general terms .....I agree with the analysis of Mummery LJ and his conclusion that in general the duties of a minister of religion are inconsistent with an intention to create contractual relations. There may be some subsidiary contract as to a pension, or the occupation of a house; but there is not a contract that he will serve a terrestrial employer in the performance of his duties.....If a curate or his bishop, or incumbent, intend to create legal relations, then there will be a contract between them ..... But if, as I would hold in the ordinary way, no intention to create legal relations is to be inferred, there is no contract of employment between them ....”

A similar approach was adopted by the House of Lords in *Davies v Presbyterian Church of Wales* 1986. In this case, the ministry of a minister of the Presbyterian Church had been terminated. He claimed reinstatement. Lord Templeman found that he was not entitled to such relief on the basis that he was not a party to a contract of employment.

In *Knowles v The Anglican Church Property Trust, Diocese of Bathurst*, (1999) .....the Industrial Relations Commission of New South Wales, Australia, followed the English line of decisions in finding that the relationship between a priest and the Anglican Church was a religious one,

based on a consensual compact to which the parties were bound by their shared faith, and not based on any common law contract. This was followed by the Supreme Court of South Australia in *Greek Orthodox Community of SA Inc v Ermogenous*, ..... where the majority of the Court held the English and other Commonwealth case law to be persuasive, and that the intention of the parties to enter into contractual relations was the decisive factor. This factor, due to the spiritual nature of the relationship between a priest and his Church, could not be presumed and was ultimately found to be lacking. The Court held that:

“.....the spiritual character of the relationship, the fact that it is ecclesiastical authority which may be exercised over the person, the nature of the duties of a priest or a minister, the commitment and decision to the service of God, the fact that the position may also be regarded as an office and the fact that there is a submission to a set of pre-determined rules and conditions or orders and to a set of ecclesiastical discipline will generally militate against a finding that the necessary intention [to enter] into contractual relations has been formed.”

However, it is important to note that this decision was overturned on appeal by the High Court of Australia on a review of the facts (not the law) - see section H above.

The New Zealand Court of Appeal followed roughly the same route in its 1998 decision in *Mabon v Conference of the Methodist Church of New Zealand*, ..... which held that no employment relationship existed because the priest had failed to prove that an intention to create a legal relationship existed.

The common thread that runs through all these decisions is that, in a church and clergy relationship, the crucial question is whether, at the time the parties concluded the offer and acceptance, they intended to create a legally binding contractual relationship, i.e. the mere fact of an offer and acceptance did not equate to a binding contractual relationship: the offer and acceptance had to be accompanied by the intention to create the contract.