IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2783/2004

In the matter between

FREE EVANGELICAL ASSEMBLIES	Applicant
And	
EDWARD AUSTIN MAPHUMZANE DLAMINI	Respondent
Coram	Annandale, ACJ
For Applicant	Mr. Mazibuko
For Respondent	Mr. Dunseith

RULING ON APPLICATION TO FILE A SUPPLEMENTARY

AFFIDAVIT

20th AUGUST 2004

This application concerns a most unfortunate and ongoing strife between two worship leaders and their supporting followers. It commenced

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in the form of a spoliation application brought as one of urgency outside normal court hours and the two attorneys were told in no uncertain terms that their clients were to settle their differences along Christian principles instead of resorting to the secular courts. In order to facilitate reconciliation an interim order was issued in the evening of the 31st October 2003 whereby the respondent was restrained from preventing access to the disputed church building during stipulated days and hours of the week and leave was granted to file opposing papers.

Since then, the applicant has withdrawn its spoliation application, stating in the notice of withdrawal that the applicant has been restored possession of the church building and that the respondent has complied with the order applied for. That was however not the end of the matter as the respondent had included in its opposing papers a counter application for a declaratory order that the respondent be declared the lawful possessor of the disputed building and to seek a restraining interdict against the initial applicant.

In its answering affidavit the respondent ('Pastor Dlamini') levels all sorts of allegations against the applicant ('Assemblies') which relate to the

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spoliation application. It also raises legal points on the locus standi of the persona of the applicant, represented in the application by the deponent of the founding affidavit. Issue is also taken with the correctness of what is termed the Court Order, with an allegation that it is not the same as what was ordered by the court at the initial proceedings. There are also allegations that the issued Order was abused by the Assemblies to gain an unfair advantage by its members when the intervention of the police was sought by pastor Dlamini and his group, by telling the police that the matter is sub judice and that they should leave it alone. These are but a few of the issues.

There are various disputes of fact which arise from the papers on diverse issues, which are not necessary to mention at present.

The matter has been set down on the court rolls at diverse times prior to the present hearing without any significant relief or direction by the court. The present application to be decided is whether the respondent, pastor Dlamini, should be granted leave to file a supplementary affidavit or not, and if granted, for the applicant (Assemblies) to respond thereto.

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The reason for the current application is to bring it to the attention of the court that certain new and material developments have taken place in the interim period, which could affect the ultimate outcome of the matter.

For the sake of brevity and due to the ruling made hereunder, it is not necessary to mention all the issues raised at the hearing of argument. Suffice to say that there are two opposing views which can be summarised as follows:

The applicant's attorney, Mr. Mazibuko, argues that it is trite law that in spoliation proceedings, no counterapplication for a declaratory order concerning lawful possession or ownership can be countenanced. He refers to Willowdale Estate CC and Another v Bryanmore Estates Ltd 1990(3) SA 954 (W) and Van Rooyen and Another v Burger 1960(4) SA 356(0) as authorities. The position as stated is correct and need not be delved upon.

The argument continues on the basis that it therefore cannot be that there is a counterapplication before court to seek a declarator that the despoiler has a right to possession of the property, since such an application is not competent as counter application, further that because of this, there

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also is no supporting affidavit to justify the application which can now be sought to be supplemented.

The counter argument of Mr. Dunseith for the respondent is that since the spoliation application has been withdrawn, it cannot now be held that the (counter) application for a declarator is not properly before court since it is not a 'counter' application anymore - it is a proper and substantive application supported by the founding affidavit of the pastor, which he now seeks to supplement. Otherwise put, it is that although it may be so that a counterapplication by an alleged despoiler to seek a declarator in spoliation proceedings as to lawful ownership might not be competent, such a bar has fallen away after the spoliation application has been withdrawn, which now leaves only the application for a declarator before the court. The latter is supported by an affidavit, which it is competent to supplement.

Both lines of argument has some merit. The balance of convenience favours the respondent. But if it is now determined that all proceedings were terminated at the time when the spoliation proceedings were withdrawn, it would require the institution of fresh proceedings, de novo. If ruled to the contrary, it may then be construed that an application which was

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incompetent at the time it was made is now given the go-ahead due to the withdrawal of spoliation proceedings, the very same proceedings which at first militated against it.

I have given careful thought to the arguments placed before me and also to the issues at hand. It is my considered view that it would not be equitable and just to order a directive strictly along the lines of either argument. This is fortified by the various factual disputes that have been raised by each of the

litigants in their papers before me.

The proper direction to be taken , in my view, is that the matter be referred for oral evidence. The Notice of Counter-application dated the 20th February 2004 is deemed to be the application which is to be considered, not as counter application in spoliation proceedings, which have been withdrawn, but as a substantive application instead of an action, which if it is to be brought as a new action will cause unnecessary delay in bringing finality to the dispute, over and above unnecessary costs for each litigant. The affidavits which have been filed by both litigants may be supplemented and replied to after which a pre-trial conference is to be arranged whereat the

judge will endeavour to assist the parties to find common ground and to limit the issues in dispute, prior to the hearing.

Costs are ordered to be costs in the main application.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE