IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 1036/2004

In the matter between:

THE ALLIANCE CHURCH IN SWAZILAND AND **APPLICANT**

JUDGE KENNETH NKAMBULE N.O.
MESHACK ZWANE

1st RESPONDENT 2nd RESPONDENT

CORAM **MAMBA J**

FOR APPLICANT **MR. Z. JELE**

FOR RESPONDENT **MR A. LUKHELE**

JUDGEMENT 23rd March, 2007

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[l]The applicant is the Alliance Church in Swaziland, an association operating as a church having its Headquarters at Magubheleni in the District of Shiselweni, Swaziland.

[2]The first respondent is the late Judge of the Industrial Court cited herein in that capacity.

[3]The second respondent is Meshack Zwane an adult male of Ngwane Park, Manzini and is an ordained Pastor of the applicant. He was

ordained on the 1st day of January 1978 and between that date and the 19th day of April 1998 he was doing pastoral work for the applicant and was based at Ngwane Park in Manzini. He was relieved of his status or role as a pastor in 1998 and consequently lost the benefits associated with his pastoral duties. Chief amongst these benefits was a sum of El800-00 he used to receive monthly from the applicant.

[4]The second respondent took up the issue of his removal as a pastor with the Industrial Court alleging that he had been employed by the applicant and was earning a salary of El800-00 per month and his removal as a pastor was a dismissal from employment and such dismissal was unlawful and unfair. He sought an order reinstating him "to his employment with payment of all arrear wages, allowances and other benefits he was entitled to by virtue of being in respondent's employ, failing which payment of maximum compensation for unfair dismissal"

[5]In its defence the applicant stated that the second respondent had not been employed by it but merely served the church as a pastor "and lived on donations of the congregation instead of a salary" and that his disengagement as a pastor was not a dismissal from employment as defined in the employment legislations in Swaziland.

[6]The defence failed and the 1st respondent awarded the second respondent a composite sum of E97,752.18 as compensation for unfair dismissal.

[7]The applicant has filed this review application seeking an order

> "reviewing and or correcting and or setting aside the decision of the 1st respondent

on the grounds that the judgement of 1st respondent is "grossly unreasonable as to lead to the inference that the court did not apply its mind to the evidence before it and accordingly made a finding that no reasonable court could have come to ... and the court totally ignored the evidence of the applicant regarding the circumstances, factors and considerations which gave rise to the disengagement of the [2nd respondent] as a pastor," which proved that, even assuming for the moment that he had been employed, he had been fairly and lawfully dismissed.

[8]The second respondent has countered that argument by stating *inter alia* that;

(1) the grounds relied on for review are grounds for appeal and "a party cannot ask for review on grounds that would support an appeal [moreso because] there is a specialized tribunal for hearing an appeal from the Industrial Court.

(2) the applicant did not lead any evidence of misconduct by the 2nd respondent in the court *a quo* and is not entitled to do so in this review (without leave of the court) and

(3) the evidence led by the 2nd respondent in the court *a quo* proved the existence of a contract of employment between the applicant and the 2nd respondent and the 1st respondent was justified in coming to that conclusion.

[9]The applicant runs several schools in Swaziland and in 1998 there were about seventeen (17) such schools and they were managed by the 2nd respondent. This was an additional function that the 2nd Respondent performed for and on behalf of the applicant, over and above his normal religious or pastoral duties. The position of the school grantee would rotate from time to time amongst the pastors of the church.

[10]When the 2nd Respondent was stopped from doing his pastoral duties for the church, it is I think, logical to say, he was also removed from his position as the Grantee of the said schools although he was not defrocked. His position as the Grantee was dependent on him remaining as an active pastor of the church and his disengagement as a pastor automatically relieved him of his granteeship.

[ll]This court has been called upon, in effect, to hold that, the evidence led before the court *a quo* established that there was no employer -employee relationship between the applicant and the second respondent and for the 1st respondent to hold that there was such a relationship, was grossly unreasonable and that decision must be set aside and corrected. I turn now to examine that evidence.

[12]Chronologically the evidence is that :

(4) Before being ordained as a pastor, the 2nd respondent received what is referred to as a calling, to be such a pastor for the church.

(5) He informed the church elders about his calling. The church was satisfied about it and sent the 2nd respondent to Bible school for training as a pastor.

(6) He successfully completed his Training and was ordained as a pastor.

(7) After his ordination, the Church Board, which runs the day to day affairs of the applicant, assigned and posted him (2nd respondent) to start and run or manage the pastoral affairs of the applicant at Ngwane Park. This was in 1982 and the 2nd respondent agreed to this.

(8) Whilst at Ngwane Park he was under the direct authority of the Ngwane Park District Church Committee.

(9) Later he also became the grantee of the applicant's schools on a rotating bases.

(g) The said Committee gave him a sum of El800-00 per month from the donations made to the church. In 1978 it was E350.00 and was gradually raised and in 1998 it was E1800-00.

(h) The Committee provided him with accommodation.

(i) He was entitled to 30 days annual leave and was also entitled to sick leave.

(j) The constitution of the applicant refers to "the employment of pastors" and other categories of workers, (k) Some of the statutory payments required of employees such a PAYE and Swaziland National Provident Fund Contributions were not deducted from the 2nd respondent's monthly payments or forwarded to the relevant bodies by the applicant (1) The agreement between the parties was verbal.

(m) The 2nd Respondent, one would expect, was bound to conduct his pastoral work within the ideological perimeters approved by the applicant. When irreconcilable differences came - he was relieved of his duties.

[13]The 2nd respondent argued that the above listed facts were all the elements that were necessary to establish a contract of employment between the parties. In other words, these satisfied the "dominant impression test" referred to in SMIT v WORKMEN'S COMPENSATION COMMISSIONER 1979 (1) SA 51 (A). The court *a quo* agreed and dealt with the issue as follows : (at page 4 of the judgement)

> "In the instant case the applicant was under the control of the Church Board who had delegated their supervisory authority to the Ngwane Park District Church Committee. This Committee saw to it that the applicant was paid his remuneration for services rendered. It further saw to it that the applicant went on leave. It further provided the applicant with Accommodation befitting his status as a pastor.

> As already mentioned ... the constitution of the respondent refers to pastors as employees of the organization. It would be a contravention of the constitution to regard them as something else other than the employees as stated by the constitution...For the foregoing the applicant has been able to prove that he was employed by the respondent ..."

[14] The constitution of the applicant does not, with due deference to the first respondent, refer to pastors as employees of the church. It merely lays down that their terms of employment, in the event a pastor is employed, shall be determined by the Board.

[15]The transcribed court record that forms part of the court record herein and on which this court has been asked to hear this application is incomplete. Two or three tapes are missing or inaudible but both Counsel were in agreement that the available record was sufficient for purposes of this application.

[16]One of the essential elements of a contract of employment is the intention of the parties that such agreement be a contract of employment, as opposed to any other agreement such as for example a memorandum of understanding. Such an intention may either be expressed or be ascertained from the facts of the case.

[17]The applicant denies that there was ever such an intention in this case to enter into a contract of employment with the second respondent. Even the money given to each pastor per month depended on contributions or donations made by the parishners in a particular parish. If for instance, the donations on any given month fell short of the pastor's monthly entitlement, the parishners, and not the church, would

be expected to make good the shortfall in the following month. This suggests to me that the applicant was not civilly liable to the Pastor for this money.

[18]In argument before me the applicant adopted as its central argument what was contended in the case of THE CHURCH OF THE PROVINCE OF SOUTHERN AFRICA DIOCESE OF CAPE TOWN v COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION AND TWO OTHERS case no. C619/2000 (Labour Court of South Africa) namely that:

(10) A pastor takes up that position as a calling from God to act as a servant of God to spread the word of God and therefore he is not employed by the church but the church facilitates and provides him with the framework to carry out his calling.

(11) The relationship between the pastor and the church is defined and governed or regulated by the constitution of the church and is not civilly enforceable as it is not secular but excclesiatic.

[19]I have noted above that all the pastoral work that the second responded carried out at Ngwane Park - first organizing the youth group and eventually setting up the church premises there, was done for and on behalf of the church. This applies with equal force, in my opinion, to the quasi secular work he did on behalf of the applicant as the Grantee of the applicant's schools. His position as Grantee did not require any specialized training beyond being a pastor within the church.

[20]Whilst reference is made in the applicants' constitution to "the employment of pastors" within the church, this is a general reference to the powers and responsibilities of the church Board. I am unable to read this as prescribing that all acts or deeds performed on behalf of the

church by a pastor qua pastor such as for example delivering a sermon, or ministering the word of God constitutes work performed in the course of employment as defined in the labour laws of Swaziland.

[21]In THE CHURCH OF THE PROVINCE case *(supra)* @ 19-22 WAGLAY J quoting from the case of DIOCESE OF SOUTHWALK v COKER [1998] ICR 140 (CA) which in turn referred to the case of PRESIDENT OF METHODIST CONFERENCE v PARFITT [1984] ICR 176 at 183 the court stated that

> "The courts have repeatedly recognized what is and what is not a contract of service and I have no hesitation in concluding that the relationship between a church and a minister is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service.
>
> 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...
>
> In my judgement, the legal position is as follows:

(12) Not every agreement constitutes a binding contract. Offer, acceptance and consideration must be accompanied by an intention to create a contractual relationship giving rise to legally enforceable obligations.

(13) That intention is to be objectively ascertained. In the case of an ordinary commercial transaction, it will be for the person who contends that there was no contract to establish that the intention to create a binding contract has been negatived.

(14) In some cases, however, there is no contract, unless it is positively established by the person contending for the contract

> that there was such an intention to create a binding contractual relationship. This is such a case ...
>
> The legal implications of the appointment of an assistant curate must be considered in the context of that historical and special pre-existing legal framework or a church, or an ecclesiastical hierarchy established by law, of spiritual duties defined by public law rather than by private contract and of ecclesiastical courts with jurisdiction over discipline of clergy. In that context, the law requires clear evidence of an intention to create a contractual relationship in addition to the pre-existing legal framework.
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> 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... On 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..."

And at page 26 paragraph 24 the court stated that

> "The common thread that runs through all of 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,* ie. 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 cotract."

[22]I have not been able to find anything in this case suggesting that both parties ie the applicant and the 2nd respondent intended to create a legally enforceable contract of employment. It is perhaps unfortunate that the 1st respondent did not deal with this aspect of the case in his judgement. In view of the nature of the applicant's defence to the application the court *a quo* had to deal with it. It failed to do so and such failure is in my view, an irregularity, sufficient enough in its nature and gravity to warrant the setting aside of the decision of the court below.

[23]The court *a quo* came to a wrong conclusion in holding that there was an employer-employee relationship between the parties. However, the court came to this destination because it took the wrong way (process). In its brief analysis of the evidence before it, it ignored completely, the issue of the intention of the parties. It was a relevant consideration and the court failed to apply its mind to it and the decision is thus reviewable on this ground.

[24]In the result, I make the following order:

(15) The judgement of the court a quo delivered on the 4th day of March 2004 under case number 41/1999 is hereby set aside.

(16) The second respondent is ordered to pay the costs of this application.

..AMBA J