IN THE INDUSTRIAL COURT OF SWAZILAND

HELP AT MBABANE CASE NO. 41/99

In the matter between;

THE ALLIANCE CHURCH IN SWAZILAND	APPLIC	CANT
And		
MESHACK ZWANE	RESPO	NDENT
CORAM:		
NKOSINATHI NKONYANE : ACTING JUDGE DAN MAN	IGO	: MEMBER
GILBERT NDZINISA		: MEMBER
D. S. MADAU		: FOR APPLICANT
P. R. DUNSEITH		; RESPONDENT

RULING - 2 SEPTEMBER 2004

The Applicant brought this matter to court on a certificate of urgency. The Applicant is seeking an order staying the execution of this court's judgement granted on the 4* March 2004 pending the finalization of a review application under High Court Case No. 1936/2004 instituted by the applicant.

The matter was argued on its merits on the 27th July 2004. There is therefore now no need for the court to make a ruling on the question of urgency.

It was argued on behalf of the Applicant that it would suffer irreparable harm and/or prejudice if the order for stay is not granted. In its founding affidavit, the Applicant averred in paragraph sixteen that the respondent has income and is a pastor of his own church. The Applicant further said that the Respondent's

Income would be inadequate to re-imburse it (the applicant) if the review application were to succeed.

It was not, however, stated by the applicant how much was the Respondent's income or salary per month. It is not clear therefore what is the basis for the argument that the Respondent's income would be inadequate to re-imburse the Applicant if the review application were to succeed. This ground in support of the stay of execution is accordingly dismissed.

It was further argued on behalf of the Applicant that it (the applicant) has good prospects of success on review. The grounds in support of that argument are stated in paragraphs 17.1 to 17.4 of the Founding Affidavit. The court need not reproduce those paragraphs in this ruling as it became apparent during the arguments that those grounds could properly be relied upon by the Applicant on appeal and not in review proceedings.

It is important that litigants be alive to the distinction between appeal and review. Herbstein and Van Winsen in "the Civil Practice of the Supreme Court of South Africa 1974" (4th edition) at page 932 pointed out the following on this subject,

"The reason for bringing proceedings under review or appeal is usually the same, to have the judgement set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where however, the real grievance is against the method of the trial, it is proper to bring the case on review".

In the present application it is clear that the Applicant is not happy about the findings of this court. It is not challenging the method or procedure of the trial, It is also worth noting that the applicant's

2004 marked "NM1" attached to the Applicant's Replying Affidavit, sought counsel's opinion after the judgement was delivered and instructed counsel to draft a notice of appeal.

It was also argued by the Applicant's attorney that this court misdirected itself in that it delivered a final judgement during an application for absolution from the instance. The Respondent's attorney narrated to the court what transpired during the trial. He told the court that that mistake was cured by the attorneys abandoning that judgement by consensus and the court delivered a judgement dismissing the application for absolution from the instance. The Applicant's attorney did not challenge the version by the respondent's attorney of what transpired during the trial of the case.

It seems therefore that the procedural mistake is not in issue now as it was rectified. It cannot be allowed to be resuscitated and be made a ground for review.

In the light of the above observations it cannot be said that the Applicant has made out its case for an order to be made in terms of prayers 2.1, 2.2 and 2.3 of the Notice of Motion.

The application is therefore going to be dismissed with costs. That is the order that the court will make. The members agree.

NKOSINATHI NKONYANE

ACTING JUDGE - INDUSTRIAL COURT