IN THE INDUSTRIAL COURT OF ESWATINI

HELD IN MBABANE **Case Nos: 33/2023, 34/2023 & 35/2023**

(Consolidated)

In the matter between:

METROPOLITAN EVANGELICAL CHURCH INTERNATIONAL (PTY) LIMITED Applicant

and

NELISIWE NKABINDZE 1st Respondent

BEN TSABEDZE 2nd Respondent

SIMON MSHAYISA 3rd Respondent

Neutral citation: *Metropolitan Evangelical Church International (Pty) Limited v Nelisiwe Nkabindze and 2 Others* (33/2023, 34/2023 & 35/2023) [2023] SZIC 115 (9 November 2023)

Coram: **Muzikayise Motsa J**

(Sitting alone as the Members were not in attendance, the issues involved being questions of law and the parties to the dispute having consented in terms of section 6 (7) of the Industrial Relations Act of 2000 (as amended)

Date Heard: 25 September 2023

Date Delivered: 9 November 2023

Summary: *This is a consolidated application wherein the Applicant seeks an order for the eviction of the Respondents from the Applicant's properties, premises and dwelling houses at various branches of the church - the Respondents were pastors and rendering pastoral duties to the church before their platform to exercise their calling within the church was revoked pursuant to being found guilty on charges of misconduct – Applicant contending that the dispute emanates from an employer and employee relationship which endows this Court with jurisdiction to hear and determine the matter.*

Held: *Section 8 (1) of the Industrial Relations Act of 2000 (as amended) confers jurisdiction on the Industrial Court to hear, determine and grant appropriate relief only in respect of disputes between an employer and employee in the course of employment or between employer and employee organizations - The Respondents are not employees of the Applicant, hence this Court has no jurisdiction to adjudicate upon this application.*

Held further: *Rendering pastoral duties in a church is not proof of an intention to create a legally enforceable employment contract – as such in the absence of clear evidence to the contrary a priest is not regarded as an employee of the church.*

JUDGMENT

Salient facts to this matter

[1] This matter was argued on the 25 September 2023 at 0830hrs. It came before me as a single judge Court sitting without nominated members of the Court

as per tradition or practice of long standing. For reasons which are not related to this matter the nominated members were by coincidence unavailable on the date on of arguments. The Industrial Relations Act No. 1 of 2000 (as amended) gives powers to a judge of this Court to sit alone to hear and decide certain matters before the Court if the parties to the dispute agree. Section 6 (7) of the Act provides as follows:

> *Notwithstanding subsection (6), a judge alone may hear and decide on a matter before the court if the parties to the dispute so agree.*

[2] It became apparent and common cause that coming for determination before the Court were predominantly questions of law which were potentially capable of disposing of the matter. In light of the prevailing circumstances, there was general consensus that since the issues involved were strictly questions of law; henceforth the legal representatives of the parties to the dispute consented in terms of section 6 (7) of the Act that the judge should hear and decide the matter sitting alone.

Background facts

[3] The **Metropolitan Evangelical Church International** being a religious institution operating as a church is also duly registered as an association not for profit in terms of section 17 of the Companies Act of 2009 and having its principal place of business at Ikhwezi Mission in the Lubombo region. The Applicant has numerous branches throughout the country.

[4] The 1st Respondent is **Nelisiwe Nkabindze**, an adult female liSwati of Lubulini area in the Lubombo region. The 2nd Respondent is **Ben Tsabedze** an adult male liSwati of Mahlangatsha area in the Manzini region. The 3rd Respondent is **Simon Mshayisa** an adult male liSwati of Mbholweni area in the Shiselweni region.

[5] The Respondents are all ordained Pastors of the Applicant who for several years leading up to November 2022 were rendering pastoral work for the Applicant and based at the latter's different pastoral stations or branches within the Kingdom of Eswatini, *viz*; Lubulini, Mahlangatsha and Mbholweni respectively.

[6] As stated above all three (3) Respondents had been pastors of the Applicant and stationed at the respective branches stated hereinabove; all of which are affiliated to the Applicant. This obtained until 17 November 2022 when a disciplinary tribunal established in terms of the Applicant's Pastors Policy of 2015 found all three Respondents guilty on charges of misconduct.

[7] The disciplinary tribunal also in accordance with the Pastors Policy recommended the revocation of the platform to exercise their calling at Metropolitan Evangelical Church International for all the three (3) Respondents respectively. The Applicant's Board of Directors thereafter adopted the disciplinary tribunal's recommendation and accordingly revoked the Respondents platform to exercise their calling within the church with effect from 21 November 2022. This effectively revoked their licenses and banned them from holding any office or performing any ministry within the church.

[8] Pursuant to the revocation of the Respondents platform to exercise their calling within the church, it would appear from the pleadings and the prayers that it is common cause that notwithstanding such revocation; two (2) of the Respondents (namely, 2nd and 3rd Respondents) continued to perform pastoral functions and duties at their respective branches. Furthermore, it also appears that all three (3) Respondents also continued to occupy Applicant's premises and dwelling houses at their respective branches despite lawful demand to vacate those premises.

[9] In an effort to enforce its rights on 16 February 2023, the Applicant launched the present proceedings against the Respondents. The proceedings were instituted by means of three (3) separate urgent applications and by way of a notice of motion in accordance with Rule 15 of the Rules of this Court. In the application against the 1st Respondent, the Applicant sought the following orders:-

1. *Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the above Honourable Court and directing that the matter be heard as one of urgency.*

2. *That a rule nisi hereby issue calling upon the Respondent to show cause on a date to be determined by the above Honourable Court why an the order in the following terms should not be made final:*

   2.1 *Eviction of Respondent and all those claiming occupation under it, from the Applicant's Property/Premises and Dwelling House at* ***Mahlangatsha in the Manzini Region****, Swaziland.*

3. *That prayers 2.1 operates with immediate and interim effect.*

4. *Costs of Suit at attorney and client scale.*

5. *Further and/ or alternative relief.* [Sic]. **(Highlighted text is ours).**

[10] With the benefit of hindsight and having perused the pleadings in this matter we must mention that under prayer 2.1 hereinabove in respect of the prayers sought against of the 1st Respondent, 'Mahlangatsha in the Manzini Region' as highlighted above ought to have been Lubulini in the Lubombo Region. The founding affidavit of the deponent deposing on behalf of the Applicant refers to the 1st Respondent as having been performing her pastoral duties at Lubulini area in the Lubombo region and not in Mahlangatsha. It is the 2nd Respondent who is stationed at Mahlangatsha area.

[11] As against the 2nd and 3rd Respondents, the Applicant sought orders in the following terms:-

1. D*ispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the above Honourable Court and directing that the matter be heard as one of urgency.*

2. *That a rule nisi hereby issue calling upon the Respondent to show cause on a date to be determined by the above Honourable Court why an the order in the following terms should not be made final:*

   2.1 Interdicting the Respondents from exercising , and within the applicant's premises and property at Mahlangatsha in the Manzini Region Swaziland, any Pastoral functions and Duties, previously exercised by it under the terminated employer/employee relationship between it and the Applicant;

   2.2 Eviction of Respondent and all those claiming occupation under it, from the applicant's Property/Premises and Dwelling House at Mahlangatsha in the Manzini Region, Swaziland.

3. *That prayers 2.1 and 2.2 operates with immediate and interim effect.*

4. *Costs of Suit at attorney and client scale.*

5. *Further and/ or alternative relief.* **[Sic].**

[12] The three (3) separate applications were duly instituted under **Case Nos. 33/2023. 34/2023 and 35/2023** respectively. Full sets of affidavits and book of pleadings were filed in each application. An application for the consolidation of the applications was made by consent of the parties. As the facts essential to the cause of action and defence are identical in each case,

we determined that the matters can be argued together and may conveniently be dealt with in one judgment.

[13] The application for consolidation of the matters was therefore granted. The applications were henceforth duly consolidated to be heard simultaneously by this Court. The consolidated application was then allocated a date for arguments and it was ultimately heard on 25 September 2023 at 0830hrs.

Applicant's case

[14] The Applicant contends that this Court has jurisdiction to hear and determine this matter firstly by virtue of the fact that the cause of action arose wholly within the court's area of jurisdiction and secondly because this matter emanates from an employer–employee relationship.

[15] In this context it was averred on behalf of the Applicant that the Respondents have at all material times been employees of the Applicant and governed, inter alia, by the Applicant's Pastors Policy. It was further submitted that at all material times the Respondents were appointed as pastors of the church and stationed at the Lubulini, Mahlangatsha and Mbhololweni respectively to be spiritual leaders there.

[16] It was submitted further that the above three (3) stations are local branches of the Applicant and have no autonomy independent of the Applicant. According to the Applicant, the local branches of the Applicant inclusive of the three mentioned above are governed in terms of the Applicant's Memorandum and Articles of Association and not through their constitutions as voluntary associations as alleged on behalf of the Respondents. In this regard, it was submitted therefore that all branches of the Applicant are a responsibility of the Applicant.

[17] It is Applicant's contention that Respondents as former employees of the Applicant are aware of the Applicant's Pastors Policy as the policy was

adopted by the Applicant and has not only always been enforced but was also presented to the Respondents before and/or during the tenancy of their employment relationship with the Applicant. It is contended further on behalf of the Applicant that the said Pastors Policy is binding to every employee of the Applicant and/or pastor or member ministering and discharging pastoral duties at the Applicant's branches.

[18] It was contended for the Applicant that all the Respondents held the positions of pastor and spiritual leaders within the church until 21 November 2023 whereupon pursuant to a formal disciplinary process sanctioned in accordance with the Pastors Policy had their respective mandates to exercise such pastoral functions and duties in the church revoked.

[19] The import of Applicant's contention therefore is that following allegations of misconduct against the Respondents (who are employees of the Applicant), the Applicant as their employer exercised its prerogative to discipline them and ultimately they were found guilty and sanctioned with the revocation of the platform to exercise their calling within the church.

[20] Essentially, the Applicant is saying that the decision of the Applicant's Board of Directors to revoke the platform for the Respondents to exercise their calling within the church is tantamount to and/or resulted in the termination of their employment.

[21] According to the Applicant, pursuant to the Respondents termination of employment they were accordingly requested in writing to vacate the Applicant's residential houses and properties situated at the respective branches which they were only entitled to occupy whilst the tenancy of their employer-employee relationship subsisted. It was submitted that the Respondents remained in occupation and refused to vacate the respective residential houses. At the time of initiating these proceedings, it was averred

that all the three (3) Respondents remained in unlawful occupation of the houses.

[22] It was submitted that the Applicant required physical possession and control of the respective premises for its own benefit and interest, which it was argued has a right to exercise as the lawful holder of the limited usufruct over the properties in question. This right it was contended makes the Applicant entitled to occupation of the properties to the exclusion of anyone else.

[23] The contention went on to say that Respondents' refusal to vacate the premises was hindering Applicant's right to use and exercise control upon the premises which is also to its prejudice. In this context it was submitted that Respondents right to occupy the said premises ceased to exist immediately the employment relationship among the parties was terminated. In the circumstances it was argued strongly that the Respondents cannot continue to occupy the properties of the Applicant wherein the underlying relationship has been terminated.

[24] Applicant contends therefore that as the lawful holder of the real rights of use and enjoyment over the said premises and properties, it has the right to evict the Respondents since they have no right to continue occupying the Applicant's properties. It was submitted that they were only entitled to utilize the properties whilst they were employed and conducting pastoral duties henceforth the termination of their employment by the Applicant disentitles them from occupation of the properties and premises.

[25] With respect to prayer 2.1 which seeks to interdict the 2nd and 3rd Respondents from exercising any pastoral functions and duties within the church which they previously exercised prior to the revocation of their platform to exercise their calling and/or termination of their employment with the Applicant,

there is not a single averment in the Applicant's founding affidavit in support of this prayer hence this prayer shall not receive any further attention from this Court.

[26] To buttress its point that this Court is vested with jurisdiction to determine this matter, Applicant relied on **section 8 (1) of the Industrial Relations Act of 2000** (as amended)[1] which reads thus:

> *8. (1) The Court shall, subject to section 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this,* ***the Employment Act****, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the Court,* ***or in respect of any matter which may arise at common law between an employer and employee in the course of employment*** *or between an employer or employer's association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof.* **(Underlining is my added emphasis).**

[27] In this regard the Court was also referred to the case of ***Adventures in Missions Swaziland v Wisile Langwenya***[2] where it was stated that the Industrial Court is vested with exclusive jurisdiction to hear all matters, be it arising out of an enactment or the common law, where the dispute pertains to an employer–employee relationship.

[28] In support of its case as it pertains to the eviction and/or ejectment of the Respondents from the Applicant's premises and properties at the three (3) aforementioned respective branches of the church, this Court was referred

[1] Act No.1 of 2000
[2] (18/2019) [2020] SZICA 18 (8 May 2020]

to the case of ***Cargo Carriers (Pty) Limited v Jerry Dlamini***[3] where the Applicant was the owner of the premises in question and pursuant to an employment contract entered between the parties the Applicant had offered the Respondent accommodation which the latter had accepted as part of his terms and conditions of employment with the Applicant.

[29] When the Respondent's services were ultimately terminated by the Applicant, the former was given a requisite notice of thirty days to vacate the premises. Upon the expiry of the said notice the Respondent had not vacated the premises. The Applicant contended that as from the last day of the notice period, Respondent's occupation of the premises had become unlawful as his right to occupy the same had ceased on that date. The Court held that an erstwhile employee may not continue to occupy the former employer's house once the contract of employment has been terminated. The Court added that this is the position despite that there may be pending issues relating to unfair dismissal. *Vide:* ***Joseph Nhlanhla Gwebu v Singleton and Another,***[4] ***Royal Swaziland Sugar Corporation Limited v Simon Nhleko and 9 Others***[5] *and* ***Royal Swaziland National Airways Corporation Limited v Lynnette.***[6]

[30] In the end, the Applicant prayed for orders as spelt out in the notice of motion.

Respondents' case

[31] Prior to pleading over on the merits of this matter, the Respondent raised a host of preliminary points of law, *viz*:-

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[3] (2053/1999) [1999] SZHC 136 (9 September 1999)
[4] (123/2019) [2019] SZIC 46 [3 May 2019]
[5] (2785/1998 – 2794/1998) [1999] SZHC 17 (per Sapphire CJ) [25 January 1999]
[6] (201/1990) [1990] SZHC (Unreported)

[31.1] That a wrong litigant has instituted the present proceedings and on that basis the application must fail. The basis being that the Applicant is not registered as Metropolitan Evangelical Church International (Pty) Limited which suggests that it is a public or private company with a share capital, because as a matter of fact the Applicant was incorporated and registered by limited guarantee in accordance with section 17 of the Companies Act of 2009.

[31.2] The application as it stands is defective owing to the fact that the Applicant and/or the deponent has not attached any resolution from the other directors of the company authorizing him to move the present application. Furthermore, and even worse there is no allegation in the founding affidavit that the deponent is authorized to move the present application.

[31.3] The urgent application is also defective for non-compliance with the peremptory provisions Rule 15 of the Rules of this Court in that it has not been stated why Part VIII of the IRA of 2000 (as amended) should be waived.

[31.4] Lack of urgency and/or urgency having been self-created by the Applicant. The urgent application seeking the eviction of the Respondents was served upon the Respondent on 17 February 2023 yet the Respondents were allegedly dismissed on 21 November 2022. The contention on behalf of the Respondents was that Applicant cannot wait for full three (3) months then claim that the matter is urgent as doing so amounts to an abuse of the Court process.

[31.5] Lack of jurisdiction: That the Industrial Court has no jurisdiction to hear and determine the present matter as there was and/or there is no

employer and employee relationship between the Applicant and the Respondents. The contention here is that the dispute before this Court is not one emanating from an employer and employee relationship but one between the church and its pastors. The contention in this regard is that the Respondents have no employment relationship whatsoever with the Applicant but they are all employed full time elsewhere and only render pastoral services to the Applicant – hence this Court has no jurisdiction whatsoever to deal with a matter of such a nature.

[31.6] The Industrial Court has no primary jurisdiction to hear and determine an application pertaining to the eviction of the Respondents on premises and properties situated on Swazi Nation Land but only the relevant traditional structures being the Chief's Royal Kraal (*Umphakatsi*) is vested with such jurisdiction.

[32] With regards to the issue of urgency, that subject is already academic at this point in time because the Court has already opened the doors for the pleadings to be filed. Moreover, there is no indication from the Court record that the Respondents applied to have the question of urgency reserved for argument even after the parties have filed all pleadings before the Court.

Concessions and consensus reached at the hearing of the matter

[33] At the commencement of the arguments there was consensus between the parties that while most of the preliminary points raised on behalf of the Respondents were individually and independently not without merit of their own, nevertheless, the arguments on the day should focus on substance rather than technical issues. Essentially that the attention of the arguments must be directed to issues which are potentially dispositive of the matter. This is what the superior courts have consistently referred to as substance over mere form. The universal trend being towards substantial justice.

[34] This Court was in full agreement with the parties more so because indeed our Courts have adopted the approach of ensuring that matters are not easily disposed of on points of law without the merits being adopted. In ***Savannah N. Maziya Sandanezwe v GDI Concepts and Project Management (Proprietary) Limited***[7] inter alia **Her Lordship Ota J.** had the following to say:

> *...Courts have long departed from the era when justice was readily sacrificed on the altar of technicalities. The rationale behind this trend is that justice can only be done if the substance of the matter is considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potential of occasioning a miscarriage of justice.*

[35] **Her Lordship Ota** once again dealt with the same issue in the case of ***Phumzile Myeza and others v The Director of Public Prosecutions and another***[8] where she stated that:-

> *...The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities, nor in technicalities nor is the triumph of the administration of justice is to be found in successfully picking one between the pitfalls of technicalities. Justice can only be done if the substance of the matter is considered.*

[36] The Industrial Court of Appeal in dealing with the issue of urgency in the case of ***Emmanuel L Maziya v Eswatini Revenue Authority and 4 others***[9] pronounced itself along the same lines when it held that '[t]he determination of urgency is related to form and not substance. The position of the law that

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[7] (905/2009) [2009] SZHC (Unreported)
[8] (728/2009) [2011] SZHC 79 (28 February 2011)
[9] (16/2019) [2020] SZICA 19 (8 May 2020)

it is undesirable that matters be decided on technicalities than their merits must find place in industrial matters...'

[37] The Supreme Court had already affirmed the same position in the case of ***Shell Oil Swaziland Limited v Motor World (Pty) Limited t/a Sir Motors***[10] where it ruled as follows:-

> *...The Learned Judge a quo also appears to have overlooked the current trend in matters of this sort, which is now well recognized and firmly established, viz, not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and if possible, inexpensive decisions of cases on their real merits.*

[38] In another judgment of the Supreme Court which was eventually set aside on review by the same Court *albeit* on other grounds, this approach was undisturbed as it was already firmly established as demonstrated hereinabove, **His Lordship Ramodibedi CJ** in the case of ***Impunzi Wholesalers v Swaziland Revenue Authority***[11] had this to say:-

> *We deem it necessary to comment in the forefront of this judgment upon a disturbing trend which is seemingly on the increase in this jurisdiction. This is in the form of an unacceptable practice of some courts in willy-nilly deciding matters of the so-called preliminary points at the drop of a hat without so much as a thought for the wider interests of justice. We caution that while preliminary points may serve a legitimate purpose such as expediting proceedings and saving costs, they should be resorted to only in fitting cases. Each case will of course depend on its own peculiar circumstances.*

[39] In light of this recognized and established universal trend that courts are interested in substance rather than mere form and the consideration that it is

[10] (23/2006) [2006] SCSZ 11 (21 June 2006)
[11] (6/2015) [2016] SZSC (Unreported)

most desirable that matters be decided on their merits rather than on technicalities; there was therefore consensus between the parties and the Court that from the preliminary points of law raised on behalf of the Respondent at least two of them stand out and require a judicial pronouncement by this Court as they may just as well dispose of the matter.

[40] The points in *limine* standing out in this regard are:

[40.1] Firstly, that this Court lacks jurisdiction to hear and determine the present matter because there is no employer and employee relationship between the Applicant and the Respondents, owing to the averment that they are employed elsewhere as full time teachers and that the dispute before this Court is not one emanating from an employer and employee relationship but one between the church and its pastors who only render pastoral services to the Applicant.

[40.2] Secondly, whether the Industrial Court has primary jurisdiction to hear and determine an application pertaining to the eviction of the Respondents on premises and properties situated on Swazi Nation Land. The contention being that only the relevant traditional structures being the Chief's Royal Kraal (*Umphakatsi*) is vested with such jurisdiction.

[41] There was general consensus therefore that if upon determining the first point of law this Court finds that it has power to exercise jurisdiction in this matter; the Court will then proceed to decide whether or not it can evict the Respondents (who at that moment would be regarded as employees of the Applicant) from the properties and premises in question which are situated on Swazi Nation Land. However, in the event that the Court finds that it has no authority to exercise any jurisdiction whatsoever in this matter, it will automatically be barred from venturing into the second point *in limine*.

[42] In the case of ***Impunzi Wholesalers v Swaziland Revenue Authority*** referred to hereinabove, the Supreme Court stated that '[w]hile preliminary points may serve a legitimate purpose such as expediting proceedings and saving costs, they should be resorted to only in fitting cases. Each case will of course depend on its own peculiar circumstances.' **(Underlining is my added emphasis).**

[43] After having alluded to the now firmly entrenched approach and or trend by our courts of ensuring that matters are not easily disposed of on points of law without the merits being considered, **His Lordship Fakudze J**, in his judgment in the case of ***Swazi MTN Limited v The Presiding Judge of the Industrial Court and 3 others***[12] made the following equally important observation about the significance of raising preliminary points of law in fitting cases, *viz*:-

> *Before I conclude, I must point out that the judgment that favour the modern approach that discourage the disposal of a case on preliminary points are not a total bar to the raising of points of law where appropriate.* ***The test is that the preliminary points should be of such a nature and magnitude that the court determining them is convinced that they are addressing serious and solid issues of law, for example, the issue of jurisdiction and the legal capacity to sue and be sued and the issue of functus officio, just to mention a few. A decision by a court in dismissing a case on a point of law should***
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> ***be resorted to in a fitting case****. The circumstances of each case is the determining factor.* ***(Highlighted text is my own emphasis).***

[44] It is my determination in this matter therefore that the two (2) points of law which have been identified hereinabove and which the Court will go on to

[12] (325/2016) [2016] SZHC 33 (23 February 2016)

decide in the subsequent paragraphs of this judgment, address serious and solid issues of law.

Does this Court have jurisdiction to determine this matter?

[45] It was contended on behalf of the Respondents that section 8 (1) of the IRA of 2000 as amended is clear that the mandate of this Court is to hear and determine disputes arising from an employer and employee relationship. Put differently, that this Court is a specialized Court set up to deal strictly with labour related issues and that the present matter pending before this Court is not one envisaged under section 8 (1) of the Act.

[46] The Respondents argue that the dispute before this Court is not one emanating from an employer and employee relationship but one between the church and its pastors. In this context it was submitted that the Industrial Court has no jurisdiction to deal with ecclesiastical issues where they do no arise from an employment relationship.

[47] All three (3) Respondents contend that they are not employees of the Applicant. They submit that they are not paid any salary by the Applicant, instead they are responsible for their expenses and transport as pastors of the church. They argue further that Applicant neither controls nor supervises them in the execution of their duties as pastors of the church.

[48] In actual fact, it is the Respondents submission, which has not been denied by the Applicant, that they are employed fulltime as teachers by the Teaching Service Commission tenable under the Ministry of Education within the Government of Eswatini. Accordingly and by implication here the submission is that they preach the word of God as a calling when not executing their full time duties and that they do not preach to make a living.

[49] For the reasons stated above therefore the Respondents contend that they are not dependent on the Applicant to carry out their mandate which is to preach the word of God hence therefore there are no factors warranting the intervention of this Court in this matter since the dispute does not emanate from an employer-employee relationship.

[50] In this context the Court was referred to the case of ***Percy Lokotfwako v Swaziland Television Broadcasting Corporation t/a as Swazi TV***[13] in which this Court per **P. R. Dunseith JP** stated that:

> *The Industrial Relations Act 2000 defines an 'employee' as a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person.*

[51] It was contended therefore for the Respondents that this Court in the above stated case made it succinctly clear that for a person to qualify as an employee in terms of the IRA 2000 and at common law such person must work for pay or other remuneration, under a contract of service (*location conductio operarum*) which involves the right of the employer to supervise and control the employee and that there must be sustained dependence of the employee upon the employer for work.

[52] The submission stated further that the Court in the above case also stated that the IRA 2000 also extends the common law concept of an employee to other forms of contract such as the contract of work (*location conductio operis*), agency, partnership and *mandatum*, provided that the element of control or sustained dependence for work is present.

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[13] (151/2007) [2007] SZIC 4 (1 January 2007)

[53] In light of the foregoing submissions and position of the law it was contended in the end that the Respondents are neither employees nor independent contractors of the Applicant, *inter alia*, because they are not employed by the Applicant but employed as full-time teachers by the Eswatini Government and they are not paid any salary by the Applicant. With regards to rendering pastoral services to the Applicant at their respective branches, it was submitted that the Applicant does not supervise or control the Respondents and that they are not dependent on the Applicant for preaching the word of God.

[54] In the circumstances it was submitted for the Respondent that in the absence of facts justifying the existence of an employer and employee relationship between the Applicant and the Respondents this Court lacks jurisdiction to intervene in this matter hence the application must be dismissed with costs. The argument was that the jurisdiction of this Court emanates only and strictly speaking from the provisions of section 8 (1) of the IRA 2000 and with that said there was nothing which empowers this Court to invoke its jurisdiction in the circumstances of this matter.

[55] It was further argued for the Respondents that after all the dispute presented for determination before this Court is not an employer and employee issue but one emanating from a relationship between a church and its pastors and that this Court has no jurisdiction to deal with such a matter, because such a relationship do not necessarily create a legally enforceable contract of employment between the two parties.

[56] In this context the submission proceeded to say that notwithstanding that the Respondents may have been ordained within the Applicant's church and/or rendered pastoral services to the church, however, that did not in itself result in the creation of an employer and employee relationship between the parties. Instead the basis of such a relationship is a calling from God and the

church simply provided a platform to the Respondents to give effect to their calling. In this context the Court was referred to the judgment in the case of ***Church of the Province of Southern Africa Diocese of Cape Town v Commissioner, Mediation & Arbitration & Others***[14] wherein the Labour Court *inter alia* stated thus:

> '*Ordainment is not proof of an intention to create a legally enforceable contract of employment. The basis of the relationship between the church and the pastor is a calling from God, the church only provides a platform for those called by God to give effect to their calling.* **(Underlining is my own emphasis).**

[57] It was contended that there is ample, uncontroverted and irrefutable evidence in this matter which has not been denied by the Applicant showing that the Respondents were only rendering pastoral work to the Applicant and nothing more, this being a clear affirmation that they were not employed under any contract of employment. They only held an ecclesiastical office and to do their pastoral work, their mandate was not defined by any contract of employment but ecclesiastical law. It was submitted further that the Applicant failed to produce any proof of the Respondents employment contracts or at least any evidence to that effect as proof of the existence of any employer and employee relationship between the parties.

[58] On behalf of the Respondent the Court was also referred to the case of ***Davies v Presbyterian Church of Wales***[15] which was quoted with approval in ***Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others*** referred to hereinabove where it was stated that:

> *A minister of religion serves God and serves his congregation, but does not serve an employer. The duties owed by the pastor to the Church are not contractual or enforceable. A pastor is called and*

[14] (2001) 22 ILJ 2274 (LC)
[15] [1986] 1 All ER 705 (HL)

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. ***(Underlining is my added emphasis).***

[59] Finally the Court was further referred to the judgment in the case of ***The Alliance Church in Swaziland vs Judge Kenneth Nkambule N.O. and Meshack Zwane.***[16] In the end it was submitted that by rendering pastoral work to the church, no employment contract and/or contract of service was created between the Applicant and the Respondents, consequently there was no employer and employee relationship which would justify the intervention of this Court in this matter. This Court was then implored to find that it has no jurisdiction to determine this matter, pursuant to which it must dismiss the application with costs.

[60] In response to this point of law, that this Court lacks jurisdiction in this matter since there is no employer and employee relationship between the parties, the submission on behalf of the Applicant was that the Applicant is a company registered in accordance with the company laws of the Kingdom of Eswatini and therefore holds an employer status over the Respondents. It was submitted further that the legal effect of converting the then status of the church into a company changed the operations and status of the then structures and it was now governed by its memorandum and articles of association.

[61] The Applicant contended further that at all material times the Respondents had been employees of the Applicant exercising pastoral duties at the

[16] (1936/2004) [2007] SZHC (Unreported) (23 March 2007)

various branches where they were placed by the Applicant. It was argued that by virtue of the Respondents being employees of the Applicant they were now in unlawful occupation of the Applicant's fixed properties and premises by reason of their mandate to exercise their pastoral function and duties having been revoked following the disciplinary action taken by the employer against them.

[62] It was argued further that the Respondents cannot on the one hand deny that they are employees of the Applicant yet at the same timer remain reluctant to vacate the Applicant's property and premises at the various branches where they were stationed.

Question for determination before this Court

[63] The question for determination before this Court is whether this Court has jurisdiction to hear and determine this matter for purposes of deciding whether or not the Respondents should be evicted from the Applicant's properties and premises?

Analysis of arguments, applicable law and findings

[64] The Respondents' contention is that this Court has no jurisdiction hear and determine the present matter as there is no employer and employee relationship between the Applicant and the Respondents. In essence, the Respondents argue that they are not, and have never been employees of the Applicant and that the Industrial Court may only exercise jurisdiction in respect of matters arising between an employer and employee in the course of employment.

[65] The Respondents also contend that the dispute before this Court is not emanating from an employer and employee relationship but one between the church and its pastors and may only be resolved through the constitution or other similar rules of the church and its structures and not by this Court.

[66] The Applicant on the other hand argues that by virtue of its status of being a company which is registered in accordance with the company laws of the Kingdom of Eswatini it necessarily holds an employer status over the Respondents. The Applicant also argues that by exercising their pastoral duties under the Applicant, the Respondents were at all material times employees of the Applicant.

[67] The jurisdiction of this Court vests in terms of section 8 (1) of the IRA as amended, which read thus:

> *8. (1) The Court shall, subject to section 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement* ***of any of the provisions of this, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment*** *or between an employer or employer's association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof.* **(Underlining is my added emphasis).**

[68] It is common cause that the matter serving before this Court is not an application, claim, complaint or infringement in respect of any of the provisions of the IRA of 2000, the Employment Act, the Workmen's Compensation Act, nor any other legislation which extends jurisdiction to this Court. The only question remaining now is whether this application can be in respect of any matter which may arise at common law between an employer and employee in the course of employment?

[69] In this matter it is common cause that in providing the description of the Respondents, the Deponent to the Applicant's respective founding affidavits

neither averred nor asserted that the Respondents are employees of the Applicant. The Deponent only described each of the Respondents as 'an adult male or female Swazi of .....' and not as an employee or erstwhile employee of the Applicant. This Court does not take this description for granted in a case purportedly dependent on the existence of an employer and employee relationship.

[70] It was only under the paragraphs justifying the jurisdiction of this Court that the Deponent for the first time averred that this matter emanates from an employer and employee relationship and in the body of the founding affidavit that it was alleged that the Respondents at all material times have been employees of the Applicant and governed *inter alia* by the Applicant's Pastors Policy.

[71] However, this Court finds it extremely perplexing that notwithstanding the allegation that 'the Respondents were at all material times thereto employees of the Applicant' still no copy and/or proof of their employment contracts were annexed to the court papers. Neither was an allegation that such contracts, if any, were not written but oral in nature and the terms and conditions thereof then stated.

[72] It is also common cause and this was also confirmed by the representatives of both parties during the arguments that notwithstanding the fact that the Respondents rendered pastoral duties to the Applicant, they were nonetheless gainfully employed elsewhere. For the record, it was common cause and confirmed by both representatives that 1st and 2nd Respondents were full time teachers employed by the Eswatini Government. Whilst it was not immediately clear where the 3rd Respondent was employed, however, there was consensus from both sides that he was also employed on a full time basis elsewhere.

[73] It is not in dispute that Applicant neither paid any salary nor stipend to the Respondents, rather they were paid salaries at their respective places of full

time employment and with which they paid for their expenses and transport for discharging their pastoral work to the Applicant.

[74] To buttress the point that they are not employed by the Applicant, it was submitted on behalf of the Respondents that the Applicant does not supervise or control them and that they are not even dependent on the Applicant for executing their pastoral duties. In response to this contention Applicant's answer was that the Respondents would not refuse to vacate the Applicant's property and premises if they were not its employees during the lawful tenure of their employment.

[75] Regarding the aspect of the lack of supervision and control over the Respondents and the latter not being dependent on the Applicant for executing their pastoral duties, Applicant's answer was simply that Respondents were under its direct control and supervision and there was nothing further said to substantiate this allegation. This response is clearly too shoddy and fails to demonstrate how the control and supervision was executed, if any.

[76] **His Lordship P. R. Dunseith JP** in the case of ***Percy Lokotfwako v Swaziland Television Broadcasting Corporation t/a Swazi TV***[17] at paragraph 5 of his judgment had the following to say:

> *It is common cause that section 8 of the Industrial Relations Act 2000 confers jurisdiction on the Industrial Court to hear, determine and grant appropriate relief only in respect of disputes between an employer and employee in the course of employment, or between employer and employee organizations. If the Applicant has never been an employee of the Respondent, then the Court has no jurisdiction to adjudicate upon the application.*

[77] Following a careful analysis of the definition of an employee as given in the IRA 2000, this Court in the abovementioned matter held that '[a] person

[17] (151/2007) [2007] SZIC 4 (1 January 2007)

who works for pay or other remuneration under a contract of service *(location conductio operarum)* is an employee at common law. A contract of services involves the right of the employer to supervise and control the employee and the sustained dependence of the employee upon the employer for work.'

[78] The Court further noted that the IRA 2000 also extends the common law concept of an employee to include persons working for pay or other remuneration under other forms of contract, such as a contract for work (*location conductio operis*), provided that the element of control or sustained dependence for work is present.

[79] In the present matter it is common cause that not only has the Applicant failed to produce copies of contracts of employment it may have had (if any) with the respective Respondents, but it also did not even make any averment in this regard. The Applicant also did not even allege the existence of any verbal employment contract between itself and the respective Respondents including its purported terms and conditions. It is therefore without a doubt that no contracts of employment existed between the Applicant and the Respondents.

[80] The Respondents have contended that they were not paid any salary by the Applicant instead they were responsible even for their expenses including transport when travelling to render pastoral duties. Notwithstanding the fact that such an averment was critical for the Respondent's case, it was not denied by the Applicant. As such it is our finding that the Applicant did not pay the Respondents any salary.

[81] Respondents further submitted that in the course of executing their pastoral functions the Applicant did not supervise or control them and that they are not dependent on the Applicant for the provision of work. In response to this very crucial averment, the Applicant could only say that Respondents were under its direct control and supervision and no further substantiation was

provided. In other words, it was not demonstrated to the Court as to how Applicant supervised and/or controlled the Respondents as well as how they were dependent on the Applicant for the work they did (preaching the word of God).

[82] It follows therefore that the Respondents in rendering pastoral duties to the Applicant they were not working for pay or other remuneration and were not under any contract of service. There is further no evidence for supervision and control of the manner in which the Respondents were to carry out their work. Moreover there is no evidence showing that the Respondents were dependent on the Applicant for the provision of work. In the circumstances, the Court is satisfied that the relationship between the Applicant and the Respondents cannot be categorized as a contract of service.

[83] It is also incorrect and for obvious reasons misleading for the Applicant to simply assert as it was done here without any evidence that simply because the Applicant is a company or juristic person, then naturally every person who renders some form of service to the Applicant is automatically an employee. There are various arrangements through which a person can render a service to another without the former necessarily becoming an employee of the latter.

[84] The intention of the parties to create a legally enforceable employment contract must be expressed or be ascertained from the facts of the matter and not from the status of one of the parties. The Applicant herein could not point to any contract of employment between itself and any of the Respondents. Neither could the Applicant point to any conduct between the parties from which such alleged employment relationship could be inferred from the facts of this case.

[85] As if the foregoing on its own was not enough, what compounds things further for the Applicant's contention that Respondents are its employees, is

the uncontroverted fact that the Respondents are all employed full-time elsewhere where they are paid a salary and only render pastoral services to the Applicant. Not a single attempt was made by the Applicant to deny this contention by the Respondents.

[86] It is a completely untenable contention that the Respondents can on the one hand be full-time employees elsewhere (as has been established through consensus as matter of fact), yet at the same time still be full-time employees of the Applicant. It is my finding therefore that the Respondents are not employees at common law and neither are they employees of the Applicant.

[87] The other leg to the contention that this Court lacks jurisdiction to adjudicate over this matter is the argument that the dispute before us is not one emanating from an employer and employee relationship but one between the church and its pastors and thus not within the province of this Court to determine primarily because the pastors (Respondents) were not employees of the Applicant.

[88] The Labour Court in South Africa provided a definitive answer to the inquiry whether or not a priest is an employee of the church. This was in the case of ***Church of the Province of Southern Africa Diocese of Cape Town v Commissioner, Mediation & Arbitration & Others.***[18] The Canon in that case had been found guilty for misconduct by an ecclesiastical tribunal, he was however not fired but his license was revoked. He was also banned from holding any office or performing any ministry within the Church for at least five (5) years, pursuant to which he filed for unfair dismissal.

[89] His main contention was that being licensed to perform pastoral duties within the church was proof of an intention to create a legally enforceable employment contract. Similarly in the present matter the Respondents were found guilty of misconduct and pursuant to that their platform to exercise

[18] See (n14 above)

their calling within the Applicant's church was revoked. The Court in that matter essentially and *inter alia* held that the fact that a priest is licensed to preach in a church or render pastoral duties is not proof of an intention to create a legally enforceable employment contract.

[90 The Court stated further that the basis of the relationship between the church and a priest is a 'calling from God' and the church only provides space for those called upon by God to give effect to their calling. The Court also observed that the definition of an employee cannot be interpreted to mean that an employment relationship should be forced upon the parties who do not intend creating one. As such a priest is not regarded as a servant of the church in the absence of evidence to the contrary.

[91] In the case of ***Diocese of Southwalk v Coker***[19] a decision of the Court of Appeal in England (quoted with approval in the **Church *of the Province of Southern Africa Diocese of Cape Town*** case referred to hereinabove), where a clergyman challenged the fairness of his dismissal, the Court upheld a decision of a tribunal *aquo* which had found that the clergyman had not been employed under a contract of service but was a holder of an ecclesiastical office and as such his rights were confined not by contract but by ecclesiastical law. In this regard the Court Appeal stated as follows:-

> In ***President of Methodist Conference v Parfitt [1984] ICR 176, 183***, **Dillion LJ** said: *The Court 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...*

[19] [1998] ICR 140 (CA)

[92] Moreover, in ***Davies v Presbyterian Church of Wales***[20] (also quoted with approval in ***Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others***), the House of Lords found that a minister of the Church whose ministry had been terminated was not entitled to reinstatement on the basis that he was not a party to a contract of employment. *Inter alia*, the Court stated that:

> *A minister of religion serves God and serves his congregation, but does not serve an employer..... The duties owed by the pastor to the Church are not contractual or enforceable.....His duties are defined and his activities are dictated not by contract but by conscience..... 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.* ***(Underlining is our emphasis).***

[93] The court in the above case noted though that it is possible for a man of the cloth to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. However, as it is in the present matter serving before us, there was no evidence of a contract of employment between the Church and the Applicant which served as proof that relationship between the church and the pastor was regulated by a contract of service. The same holds true in the present matter.

[94] Similarly, in ***Knowles v The Anglican Church Property Trust, Diocese of Bathurst***[21] held 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.

[95] This Court agrees in *toto* with all the conclusions reached in the judgments referred to hereinabove. This Court is satisfied that there was no intention

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[20] See (note 16 above)
[21] (1989) 89 IR 47

on the part of either the Applicant or the Respondents in this matter to enter into a legally enforceable employment contract.

[96] Courts within our jurisdiction have similarly had occasion to deal with this subject-matter and they have been decisive regarding the legal position with respect to the relationship between the church and its pastors or priests. In the case of ***The Alliance Church in Swaziland v Judge Kenneth Nkambule N .O. and Another***[22] faced with the same question and relying predominantly on most of the authorities cited by this Court hereinabove, that court per **His Lordship Mamba J** stated, *inter alia,* that:

> *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 be expressed or be ascertained from the facts of the case.*

[97] The court then went on to hold that it could not find anything in that case suggesting that the Church (Applicant) and the pastor (2nd Respondent) had intended to create a legally enforceable contract of employment. The essence of that finding being that there was no employer and employee relationship between the parties.

[98] This Court (Industrial Court) has also had an opportunity to deal with the subject matter in the case of ***The Swedish Free Church v Reverend Simon J. Manana.***[23] The Court in that matter found that it had no jurisdiction to hear and determine any suit which is not based on an employer and employee relationship. The Court granted an order of absolution from the instance in favour of the Respondent, the latter having contended that he was not an employee of the church. The Court held that the Applicant had failed to

[22] (1936/2004) [2007] SZHC 23 (23 March 2007)
[23] (308/2005) [2010] SZIC(14 May 2010)

demonstrate that there was an employer and employee relationship between the parties. Henceforth on the same principles ventilated in the ***Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others*** case, the Court found that it lacked the requisite jurisdiction to hear and determine the matter.

[99] Similarly in this matter the Applicant has dismally failed to prove that the Respondents were employed by the Applicant under a contract of service. In the circumstances we can only conclude that as holders of an ecclesiastical office their relationship and rights vis-à-vis the Applicant were not defined by any contract of employment but by ecclesiastical law and on that basis this Court is prohibited by law to hear any matter which does not emanate from an employer and employee relationship.

[100] The second preliminary point of law which we had indicated earlier will be dealt with by the Court is the question whether the Industrial Court has primary jurisdiction to hear and determine an application pertaining to the eviction of the Respondents on premises and properties situated on Swazi Nation Land. It was contended on behalf of the Respondents that only the relevant traditional structures being the Chief's Royal Kraal (*Umphakatsi*) is vested with such jurisdiction. Pursuant to our finding that this Court is not endowed with jurisdiction to hear and determine this matter since there exists no employer and employee relationship between the parties, it follows necessarily that embarking on this point of law would without a doubt be an exercise in futility as such analysis will be a typical moot and/or academic exercise.

Costs

[101] The basic rule is that an award of costs is in the discretion of the court. Even the general rule that costs follow the event is subject to this overriding principle. **Innes CJ** in ***Kruger Bros and Wasserman v Ruskin*** stated that:

The rule of our law is that all costs - unless expressly otherwise enacted - are in the discretion of the Judge. His discretion must be judicially exercised ...

[102] In ***Marks v Estate Gluckman***[24] the Appellate Division laid down the principle that the court's discretion must be exercised judicially upon a consideration of the facts of each case and that in essence it is a matter of fairness to both sides. In ***Leuben Products (Pvt) Limited v Alexander Films (SA) (Pty) Limited***[25] **Murray CJ** held that '[t]here is a general rule that costs should be awarded to the successful party, a rule which should not be departed from without good reasons.

[103] Despite our ruling against the Applicant in this matter as reflected in the preceding paragraphs, we are nonetheless of the firm view that the Applicant may have believed it had a genuine and *bona fide* cause of action against the Respondents. Even in the face of the obtaining legal authorities on the subject matter, it is very much possible that the Applicant may still have genuinely believed that a different court may come to a different conclusion.

[104] To that extent the Applicant's approach to this Court can neither be viewed therefore as either unreasonable, frivolous or vexatious to justify that it be mulcted with an order for costs. On that basis and in the exercise of the Court's discretion, the general rule of our law that in the absence of special circumstances costs should follow the event will not apply in this matter.

[105] To that extent therefore and taking into account that the purpose of objective of this Court is to promote fairness and equity, the general rule of our law that in the absence of special circumstances costs should follow the event will not apply in this case.

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[24] 146 AD 289 at 314-315
[25] 1957 4 SA 225 (SR) 227

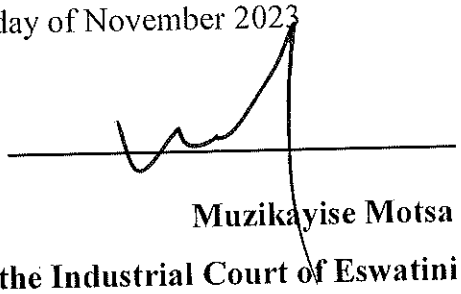
Conclusion and Order

[106] In exercise of the Court's discretion and in light of the facts of this matter, the foregoing considerations, reasons and findings, the Court makes the following orders:

(a) **The Industrial Court has no jurisdiction to hear and determine this matter on the basis that there exists no employer and employee relationship between the parties and consequently the application is hereby dismissed.**

(b) **No order as to costs.**

Pronounced in an open court sitting on the 9th day of November 2023



Muzikayise Motsa

Judge of the Industrial Court of Eswatini

For Applicant: *Ms V. Ntshangase* *(MTM Ndlovu Attorneys)*

For Respondents: *Ms Z. Nsibande* *(Robinson Bertram Attorneys)*