

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE CASE NO. 41/99

In the matter between:

MESHACK ZWANE

APPLICANT

And

THE ALLIANCE CHURCH IN SWAZILAND

RESPONDENT

CORAM

K.P.NKAMBULE

: JUDGE

D.P. M. MANGO

: MEMBER

G.NDZINISA

: MEMBER

FOR APPLICANT

: P.R. DUNSEITH

FOR RESPONDENT

: D.MADAU

JUDGEMENT 4/3/04

The applicant seeks an order directing the respondent to pay him maximum compensation for unfair dismissal, terminal benefits in the form of notice pay, additional notice pay, severance allowance and leave pay.

Applicant gave evidence under oath. He told the court that he was employed by the respondent as a pastor on the 1st day of January 1978 and was based at Ngwane Park. He was in continuous employ of the respondent until the 19th April 1998 when his services were terminated by the respondent.

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According to Annexure 'A' of applicant's application the applicant was dismissed because there were differences that had arisen between the applicant and the church. Annexure 'A' which is the letter of dismissal reads in part:

"For the reasons of the differences that have arisen between yourself and the church regarding your role as the leader of Ngwane Park Alliance, the church board has found it impossible to retain you as the pastor in the Alliance Church in Swaziland.

Therefore, your services as the pastor in the Alliance Church in Swaziland are hereby disengaged with effect from 19th April, 1998."

Applicant told the court that at respondent's undertaking pastors are employed under specific conditions of the church and under fixed salary structures. Further that to be a pastor in the church you have to be considered on basis of certain qualifications, one of which is bible school training. In addition to this there are fixed conditions laid down by the church.

Applicant told the court that he attained training in the Republic of South Africa in 1975 to 1977. On his return after completing training he was then employed in terms of Article (iii) of the constitution. This Article provides as follows:

"1. CONDITIONS OF EMPLOYMENT AND MATTERS INCIDENTAL THERETO OF PASTORS, EVANGELISTS AND ASSOCIATE WORKERS:

(a) Conditions of employment and matters incidental thereto of pastors, evangelists and

associate workers shall be laid down and be regulated through the activities of the church board.

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- (b) The employment and matters incidental thereto of pastors, evangelists and associate workers shall be the sole and absolute function of the church board who shall, however, have the right to delegate such powers to the District church committee."

According to the applicant as a pastor you serve a two-year probationary period and thereafter you serve as a full time pastor. You are entitled to 30 days annual leave with full pay. There is also sick leave with full pay. There is a retirement age at 65 years.

At the end of the applicant's case Mr. Madau for the respondent moved an application for absolution from the instance. His contention was that the applicant fell short of proving that he was employed by the respondent.

Mr. Madau stated that applicant was a pastor who was engaged to lead a flock. He submitted that a calling is distinguishable from employment. He contends that the applicant was not dismissed by the respondent as he was never employed at the first instance.

The court found that the applicant was indeed employed by the respondent and the application for absolution from the instance failed.

The court looked at the question whether one can call the relationship between the applicant and the respondent a contract of employment.

According to Grogan's Workplace Law (1966) at page 20 "a contract of employment is an agreement between two legal personae (parties) in terms of which one party (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return to a fixed or ascertainable wage, and which entitles the employer to define the employee's duties and usually to control the manner in which the employer discharges them".

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The essential elements are therefore as follows:

- a) An agreement.
- b) In terms of which services are rendered.
- c) Under the authority of the employer.
- d) For remuneration.

For the purposes of ascertaining whether a specific contract is indeed a contract of employment it should be determined first whether any of the essential elements of the contract of employment mentioned above are part of the contract or are otherwise identifiable from the facts.

Special attention should be given to the question whether a relationship of authority exist between the employer and the employed. The courts have attached particular importance to the question whether such a relationship exist or not. See SMIT V WOKKMENS COMPENSATION COMMISSION 1979 (1) SA 51 at 63 - 64. See also state VAMCA SERVICES LTD 1959 (4) SA 207 at 213 -214.

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 Article (iii) of the constitution of respondent refers to pastors as employees of the organisation. It would be a contravention of the constitution to regard them as something else other than the employees as stated by the constitution.

If therefore the applicant was the employee of the respondent, it is clear that Section 35 of the Employment Act applies to him. For the foregoing the applicant has been able to prove that he was employed by the respondent and that the respondent terminated applicant's services.

Regarding whether the applicant's services were fairly terminated, the court will have to find out if such termination is justified in terms of the provisions of Section 36 of the Employment Act. In the *University of Swaziland V The President of the Industrial Court and Vusie Hlatshwayo C.A. 16/02 per Beck J.A.* where the learned judge of appeal stated as follows:

"The operation of Section 36 (F) is qualified by the provisions of Section 42 (2) (a) and (b) of the Employment Act, These provisions read thus:-

'42 (2) The services of an employee shall not be considered as having been fairly terminated unless the employer proves-

- a) That the reason for the termination was one permitted by Section 36, and
- b) That taking into account all the circumstances of the case it was reasonable to terminate the services of the employer,"

It is clear from the evidence that the respondent has not succeeded to prove that the dismissal of the applicant is one permitted by Section 36 of the Employment Act. For the foregoing it is the opinion of this court that the dismissal of the applicant was unfair both procedurally and substantively.

The dismissal took place in 1998 when the 1996 Industrial Relations Act was operative. We will grant the applicant compensation in terms of the said Act which

provides a maximum compensation of 24 months' salary. We award Mm a 20-month salary as compensation for unfair dismissal in the sum of:

36,000-00

Notice pay 1,800-00

Additional notice 5,261.48

Severance pay 13,153-70

Leave pay 41.538-00

TOTAL 97,752-18

No order as to costs. Members agree.

K.P. NKAMBULE

JUDGE