**REPORTABLE: (100)**

**(1) ELFORD DUBE (2) FELIX FAMBI (3) ELASTOS MUKACHANA (4) DENNIS HOVE (5) BORN DAVISON (6) GIBSON MASHANDA (7) VUSA NCUBE (8) VALENTINE MURANDA (9) KASIRAI KUTONHO (10) PLIDIS GUMEDE**
**v**
**AWAKE GRACE MINISTRIES**

**SUPREME COURT OF ZIMBABWE**
**GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA**
**BULAWAYO: 19 JULY 2021**

*B. Dube* with *I. Mupfiga*, for the appellant

*B. Ngwenya*, for the respondent

**MATHONSI JA:** This is an appeal against the whole judgment of the Labour Court handed down on 18 June 2020 which declined jurisdiction over the parties' dispute but went on to dismiss the appellants' application for review with costs.

**THE FACTS**

The ten appellants were pastors in the respondent church having been ordained at different dates from 1994 to 2012. They served at the respondent's various churches around the country and in South Africa. They were all dismissed by letter dated 11 June 2019 written to them by Apostle Joyce Gombami, the respondent's senior pastor. The dismissal letters which are similarly worded read:

"Ref: DISMISSAL AS PASTOR FOR AWAKE GRACE MINISTRIES

Shalom Servant of God.

I acknowledge receipt of your letter of complaint dated 25 February 2019, wherein you raised a number of allegations against Pastor Mavondo and Pastor Alam and you were a signatory to in confirmation of the allegations coming from yourself.

The Executive led by me as the Founder Member of our church found no evidence to confirm your allegation but rather they are defamatory in nature and only seek to divide our church and pull down the spirit of unity and togetherness that we have, that has taken us this far.

What has concerned me more is the spirit within yourselves to arrange a meeting secretly against our church constitution more so in my absence to deliberate on the issues mentioned in the letter, you have reflected a high level of gross insubordination and disrespect for me as the Founder of the church.

In light of the above I believe we have differences in our beliefs and principles upon which our faith is built, it has been decide by the executive that we can no longer work with you Pastor in awake Grace Ministries and have freed you with immediate effect to join or start your own church with the ideologies that you are happy with.

Thank you for the time we were together." (The underlining is for emphasis)

The appellants were aggrieved by that turn of events. They brought a joint application for review against the respondent's decision to dismiss them. The basis of the application was that the dismissal was unlawful in that they had been summarily dismissed for raising a grievance without being charged with any misconduct and without any disciplinary hearing or without according them an opportunity to be heard.

The application was opposed by the respondent which raised three preliminary objections to the application. The first one was that the appellants had not exhausted domestic remedies before approaching the court *a quo*. In the respondent's view the appellants should have first approach a Labour Officer for redress before filing a review application in the court *a quo.*

The second preliminary objection raised by the respondent was that the application for the review was improperly before the court *a quo* by reason that "there were no proceedings to review." This was because no disciplinary proceedings were conducted.

Thirdly, the respondent objected to the jurisdiction of the court *a quo* on the basis that the matter was not a labour dispute as would fall under the purview of that court. In this regard, the respondent's case was that there was no employment relationship between the parties. The appellants were not employed by the respondent but were "moved by the spirit to offer their services on voluntary basis" in return for just allowances as opposed to salaries.

**FINDING OF THE COURT *A QUO***

The court *a quo* brushed aside the first two preliminary objections which were certainly not well taken. It zeroed in on the issue whether there was an employment relationship between the parties. It found that the appellants' ordination certificates did not create an employment relationship between the parties. By issuing them, the respondent did not intend to create a legally binding employment contract.

The court *a quo* found that the level of allowances paid by the respondent to the appellants was merely its contribution to enable its pastors to carry out their pastoral duties and not rewards for services rendered. In the court
*a quo*'s view the payment of allowances did not establish a contract of employment.

Regarding the reporting system that was in place in terms of which pastors were required to submit monthly reports to the respondent's headquarters, the court *a quo* found that

the reporting was aimed at enabling accountability. It did not point to control of the pastors amounting to the established of an employment relationship. By the same token, the court *a quo* was not swayed by the fact that the respondent maintained a high level of control over the appellants at it deployed and transferred them to its various branched around the country. Neither was the court swayed by the existence of disciplinary rules by which the pastors were subject to disciplinary action at the hand of the respondent.

The court *a quo* declined jurisdiction. Surprisingly, it went on to dismiss the application for review with costs. I mention in passing that if the court *a quo* had no jurisdiction to determine the merits of the application it could not posses jurisdiction to dismiss it. The order dismissed the application was clearly incompetent.

**THE APPEAL**

The appellants were disgruntled and noted the present appeal on the following grounds:

1. The learned judge in the court *a quo* erred a question of law by finding that there was no employment relationship when the evidence adduced pointed to the existence of an employment contract.

2. The learned judge in the court *a quo* erred on a question of law by finding that there was no employment relationship between the parties where the respondent failed to discharge the *onus* placed upon it to prove that the relationship between the parties was that of voluntary service.

3. The learned judge in the court *a quo* erred on a question of law by finding that by virtue of the appellants' office of pastors there was no contract of employment

when the relationship between the parties is determined by the dominant impression.

4. The learned judge in the court *a quo* erred on a question of law by placing the *onus* of proving the authenticity of the contracts of employment on the appellants whereas the duty lies with the respondent.

**ISSUE FOR DETERMINATION**

Only one issue commends itself for determination from the four grounds of appeal. It is whether the court *a quo* erred in finding that there was no employment relationship between the parties.

**THE LAW**

In terms of s2 of the Labour Act [*Chapter 28: 07*].

> "employee means any person who performs work or services for another person for remuneration or reward on such terms and conditions that the first mentioned person is in apposition of economic dependence upon or under an obligation to perform duties for the second – mentioned person and includes a person performing work or services for another person-
>
> (a) in circumstances were even if the person performing the work or services supplied his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the understanding; or
>
> (b) in any other circumstances that more closely resemble the relationship between an employment and employer that that between an independent contractor and hirer of service."

Regarding what an employer is, s2 of the Act states:

> "employer means any person whatsoever who employs work for another person and remunerates or expressly or tacitly undertakes to remunerate him…"

It is trite that the existence of an employment relationship can also be assessed through what has been referred to as the control test. This test is premised on the level of control the alleged employer has over the alleged employee. In addition, jurists have made reference to what is called ”the dominant impression test”, which weighs a variety of factors that tend to point to the existence of an employment contract. See generally *L. Madhuku, Labour Law In Zimbabwe, Directory Publishers*, 2015 pp 25-27.

In the present case, the court *a quo* made a factual finding that no employment relationship existed between the parties. It is a salutary principle in this jurisdiction that an appellate court will not easily interfere with factual findings of the lower court. It will only do so where there has been such a gross misdirection on the facts, so as to amount to a misdirection in law in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the conclusion reached by the lower court. See *Chiodza v Siziba* SC-16-11; *Hama v National Railways of Zimbabwe* 1996(1) ZLR 664 (S).

**APPLICATION OF THE LAW TO THE FACTS**

As already stated above, what this Court is called upon to decide is whether the court *a quo* misdirected itself in finding that there was no employment relationship between the parties and as a consequence, that it had no jurisdiction to hear the review application.

In arriving at that conclusion, the court *a quo* examined the evidence placed before it, including the certificates of ordination, the allowances paid to the appellants, the reporting system governing the appellants and the control the respondent had on them. It occurs to me that the court *a quo* grossly misdirected itself in the assessment of evidence.

Indeed, in order to arrive at a fair and just decision the court *a quo* ought to have applied both the control and dominant impressed tests. Had it done so, the court *a quo* would have realised that the dominant impressed created by the facts is that an employment relationship existed between the parties.

This is a case in which the respondent not only ordained the pastors, it did not release them to the world to pursue their own endeavours, but it deployed them to its own churches, Apart from deploying them, the respondent sustained a very high level of control over them. It required them to submit monthly reports on their activities. From time to time respondent would promote the pastors or transfer them to other provinces. They subordinated themselves to the disciplinary authority of the church.

More importantly, the respondent remunerated the pastors. It matters not, in my view, that the remuneration was small. Evidence presented to the court *a quo* showed that the pastors received 30% of the monthly tithes as allowances which, by any account, qualifies as remuneration as required by s2 of the Labour Court Act. Clearly, the benefits and burdens of the ministry which rested on the appellants point to a legally binding agreement between the parties.

To cap it all, the conduct of the respondent, when it sought to disengage from the relationship, completes the picture created. I have already cited the contents of the letter dismissed earlier in this judgment. It is the respondent itself which gave the healing of the letter as “Dismissal as pastors for Awake Grace Ministries.”

Not only that, it is the respondent itself which gave the reason for disengagement as "gross insubordination and disrespect." If the relationship was not of an employment nature, there would have been no need for "dismissal." The respondent would not have been offended by what it regarded as gross insubordination.

The burden of proof resting on the appellants was on a preponderance of probabilities. As stated in *Miller v Minister of Pension* [1947 ALLER 372 at 371 (quoted with approval in *British American Tobacco Zimbabwe v Chibaya* SC – 30-19) the burden is discharged:

> "If the evidence is such that, the tribunal can say 'we think it more probable than not, the burden is discharged but it the probabilities are equal it is not."

The evidence which the appellants placed before the court *a quo* which is delt with above, discharged the *onus* resting on them to prove on a balance of probabilities that there was an employment relationship. Notwithstanding all the evidence, the court *a quo* still concluded:

> "The dominant impression created for me following a perusal of the respondent's constitution, the certificates of ordination, the reporting systems, the submissions of the parties and sworn evidence is that it was never the intention of the parties to create an employment relationship. The emerging picture is one of a spiritual relationship in which the court is not qualified to meddle. It is my finding that there was no employment relationship between the parties and consequently this Court has no jurisdiction to hear the application for review."

In my view, such a conclusion could only be arrived at by a court which had ignored all the evidence before it as adverted to above. A reasonable tribunal which had applied its mind to the facts would not have arrived at such conclusion. It was a gross misdirection

entitled this court to interfere with the final factual findings of the court *a quo.* The appeal has merit and ought to be allowed.

On the aspect of costs, the general rule is that they follow the result. The appellants have been successful and are entitled to their costs. The matter has to be remitted to the court *a quo* for a different judge to determine it on the merits.

In the result, it is ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

   "The preliminary objection on lack of jurisdiction is dismissed."
3. The matter is remitted to the court *a quo* for determination by a different judge on the merits.

GWAUNZA DCJ : I AGREE

CHITAKUNYE JA : 1 AGREE

*Dube, Gundu & Pamacheche Legal Practitioners,* appellants legal practitioners

*B. Ngwenya Legal Practitioners,* respondent's legal practitioners