



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGMENT**

Case NO. 166/2012

In the matter between:

**HOPSON DUMA GULE**

**Applicant**

And

**TEACHING SERVICE COMMISSION**  
**Respondent**

**1<sup>st</sup>**

**SWAZILAND GOVERNMENT**  
**Respondent**

**2<sup>nd</sup>**

**ATTORNEY GENERAL**  
**Respondent**

**3<sup>rd</sup>**

**Neutral citation:** *Hopson Duma Gule v Teaching Service Commission & Others (166/12) [2012] SZIC 20 (JULY 19 2012)*

**Coram:** NKONYANE J,  
*(Sitting with G. Ndzinisa & S. Mvubu  
Nominated Members of the Court)*

**Date of Submissions:** **5 JULY 2012**

**Judgment delivered:**

**19 JULY 2012**

**Summary:**

***The Applicant is a Head teacher currently based at Woodlands High School. When he was appointed to be a Head teacher, he was not posted to a particular school but his appointment was tenable at the Teaching Service Commission. The Teaching Service Commission decided to transfer the Applicant to another school other than the one that he is currently stationed. The Applicant challenged the transfer and asked the Court to set it aside. There was no evidence before the Court that it was impossible for the post to be created at Woodlands High School where the Applicant is stationed. The Court accordingly found that there was no valid operational reason for the transfer and the 1<sup>st</sup> Respondent's decision to transfer the Applicant was set aside.***

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**JUDGMENT 19.07.12**

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[1] This is an application brought by the Applicant against the Respondents under a certificate of urgency.

[2] The Applicant is seeking an order in the following terms;

“1. Dispensing with the normal and usual requirements set out in Rules of this

Honourable Court relating to time limits and service of documents and that this matter be heard as one of urgency.

2. That a *rule nisi* do hereby issue calling upon the Respondents to show cause why an order in the following terms should not be made final and returnable on a date to be fixed by the above Honourabel Court.

2.1 Reviewing and or setting aside the 1<sup>st</sup> Respondent's decision to transfer the Applicant from Woodlands High School.

2.2 Declaration that the Applicant's purported transfer is null and void and of no force and effect.

- 2.3 That prayer 2.1 above operate with immediate and interim effect pending final determination of this application.

3. Cost of application.

4. Further and or alternative relief.”

[3] The application first appeared before the court on 10<sup>th</sup> May 2012. On this day a consent order was granted in terms of prayers 1, 2 & 2.3.

[4] The court is therefore now being called upon to make a final order.

[5] The application is opposed by the Respondents. An Answering Affidavit was filed on their behalf deposed thereto by Mduzuzi Nkambule who stated therein that he is the Executive Secretary of the Teaching Service Commission.

[6] The Applicant thereafter duly filed his Replying Affidavit.

[7] **Background facts:-**

The Applicant is employed by the Swaziland Government as a Headteacher. This appointment was made on 21<sup>st</sup> July 2010 by a written instrument, **Annexure “A”** of the Applicant’s Founding Affidavit.

[8] The Applicant started to work for the Swaziland Government as a Teacher in 1979. He was stationed at Zombodze High School. He remained at this school until 1985 when he was transferred to Somnjalose High School. He taught for ten years at this school and he decided to enroll at the University of Swaziland in 1995 to study for a Bachelor of Education degree.

[9] After successful completion of his studies in 1999 he was posted to Woodlands Secondary School. The head teacher at Woodlands Secondary School at that time was a teacher by the name of Stanley B. Matsebula. Mr. Matsebula was suspended from duty and the Applicant was appointed to the position of Acting Headmaster by letter dated 08<sup>th</sup> August 2005, **Annexure B** of the Founding Affidavit.

[10] In the meantime, whilst Mr. Matsebula was on suspension, Woodlands Secondary School was upgraded to a High School in 2007. The High School held its first Form Five External Examinations in 2008. The Applicant was accordingly appointed to the position of Acting Headteacher for Woodlands High School by letter dated 05<sup>th</sup> July 2009 with effect from 06<sup>th</sup> May 2008 to 30<sup>th</sup> June 2009. The Applicant's appointment was confirmed on 07<sup>th</sup> August 2009 when he was appointed to the position of

Deputy Headteacher of Woodlands High School with effect from 05<sup>th</sup> August 2009.

[11] By letter dated 16<sup>th</sup> December 2011 the Applicant was transferred from Woodlands High School to Mdzimba High School. The Applicant however said he received this letter on 03<sup>rd</sup> April 2012. He objected to this transfer citing medical and personal reasons. The Respondents however insisted that the Applicant should heed transfer call. The Applicant has thus run to court to seek its intervention. .

[12] **Arguments by Applicant:-**

The Applicant argued before the court that the purported transfer was substantively and procedurally unfair and should be set aside by the court. The Applicant argued that;

12.1 There was no substantive reason necessitating the transfer.

12.2 He was not consulted before the decision to transfer him was taken.

12.3 The purported transfer was in violation of **Circular No.1 of 1995** which regulates the transfer of teachers in the country.

[13] **Arguments by the Respondents:-**

It was argued on behalf of the Respondents that;

13.1 The decision to reorganize the workplace is the employer's prerogative the guiding factor being the exigencies that arise in the operations of a particular organization.

13.2 The Applicant's position was out of the ordinary in that he was a Head teacher whose post was tenable at the Teaching Service Commission and not at a High School and that this had to be normalized.

13.3 The Applicant was consulted prior to the decision to transfer him was taken.

13.4 The regulations under **Circular No. 1 of 1995** are not mandatory but merely directory, and that there existed, in the present application, exceptional circumstances that warranted non - observance of these regulations.

[14] **Analysis of the evidence and the law applicable:**

The evidence before the court revealed that the Applicant was stationed at Woodlands High School since 1999. He stays in Mbabane, Dalriach East with his children. His wife serves in the army and is based at Lozitha Barracks. At the time of the institution of these proceedings he had twenty four months left before retirement. Now he is left with about twenty one months before retirement. He has a medical condition as he suffers from arthritis, rheumatism and high blood pressure. During arguments, the Respondents' Counsel told the court that the Applicant would be allocated a house at Mdzimba and that he should not therefore worry about driving to and from Mbabane.

[15] The court is being called upon to consider whether the transfer was substantively and procedurally fair. Substantive fairness requires the court to consider whether there was a valid reason for the transfer. Procedural fairness requires the court to investigate whether the correct procedures were followed, including consultation with the Applicant, before the decision to transfer the Applicant was taken.



[16] There was clearly a dispute of fact whether or not the Applicant was consulted before the decision was taken. The Respondents' Counsel therefore asked the court not to grant the final order as the Respondents have denied all the averments of the Applicant in this regard. The court was asked to invoke the rule formulated in the case of **Plascon - Evans Paints Ltd. V. Van Riebeeck Paints (Pty) Ltd 1984 (3) S.A. 623 AD.** In that case the court held that;

**“... It is correct that where in proceedings on Notice of Motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confirmed to such a situation. In certain instances the**

**denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact .... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far fetched or clearly untenable that the court is justified in rejecting them merely on the papers.”**

[17] It was argued accordingly by the Respondents’ Counsel that it has not been shown, in the present application, that the denials of the Respondents were so far fetched or clearly untenable that the court would be justified in rejecting them merely on the papers.

[18] None of the parties applied to the court that disputed facts regarding the consultation be referred to oral evidence. The dispute therefore remains unresolved on the papers before the court.

[19] The enquiry before the court however is twofold: namely; was procedure, including consultation, followed and two; was there a fair and just reason for the transfer. The court will therefore proceed to deal with the second enquiry whether there was any operational reason justifying the decision to transfer the Applicant.

[20] There is no doubt, and it is now trite that the employer is in charge of the workplace, and that the re-organization of the workplace is the employer's prerogative;

See:- **Mkhosi Khumalo v. the Senior Health Administrator & Two Others case No. 142/08 (IC)**

[21] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are public entities. An official who is entrusted with public power must exercise such power rationally and fairly. In order to act fairly and rationally, the decision maker would of necessity have to apply his mind properly to all relevant aspects and circumstances of the matter at hand.

See:- **Gemi v. Minister Justice, Transkei 1993 (2) SA 276**

**Timothy Bheki Simelane v. Teaching  
Service Commission and Two Others,  
case No. 1101/95 (HC)**

[22] The decision to transfer an employee therefore can be justified if it is taken for sound operational reasons. If there is such a reason behind the transfer, the requirements of reasonableness and substantive fairness is met and the employee cannot resist such redeployment by the employer.

[23] The Respondents proffered various reasons as to why the Applicant had to be transferred from Woodlands High School to Mdzimba High School. The reasons were as follows:-

23.1 In paragraph 6 of the Answering Affidavit the Respondents stated that the Applicant is not a Head teacher of any school as his post is at the Teaching Service Commission.

23.2 The Respondents also stated that the Applicant performed the duties of Headteacher at

Woodlands High School because the substantive Headteacher was facing criminal charges hence he was suspended. They stated that the substantive Headteacher was acquitted of the criminal charges and his suspension has come to an end.

23.3 Since the Applicant's post was tenable at the Teaching Service Commission and not a particular school, the Respondents wanted to normalize things.

23.4 The Applicant has no post at Woodlands High School.

23.5 The Respondents had to weigh the interests of the Applicant against that of the substantive Head teacher.

[24] The evidence before the court however established that it is not correct that the Applicant had to be transferred in order to allow the substantive Head teacher to return to his position. The substantive Head teacher was the head of the school when the

school was still a Secondary School. During his suspension the school was upgraded to a High School in 2007. This much was admitted by the Respondents when the Principal Secretary of the Ministry of Education wrote a letter to Mr. Stanley B. Matsebula dated 03<sup>rd</sup> December 2008. The relevant parts of the letter appear as follows:-

- '2. Following the judgment of the Industrial Court in your matter against Swaziland Government where under paragraph (a) it was ordered that your suspension be uplifted forthwith, the Schools Manager wrote you a letter uplifting your suspension.
3. Under normal circumstances uplifting the suspension would mean that you resume your duties at Woodlands High School. However, your case is different in that there is still part (b) of the judgement which has to be dealt with. Part (b) states that as to whether you should go back to Woodlands as Head teacher has to be argued in court on a date to be agreed by the parties.
4. In the circumstances the Ministry is prepared to post you on any other school pending determination of part (b) of the judgment and as such unless an until such has been deliberated you cannot resume your duties at Woodlands High School.
5. Further, there is still the criminal matter against yourself which is still pending at the Mbabane magistrates Court, which also involves the misappropriation of school funds when you were still a Head teacher at Woodlands Secondary School (as it was then.)

6. Further take notice that Woodlands has been upgraded, meaning that it is no longer a Secondary School but a High School. This means that even if the court can rule that you go back to Woodlands you no longer qualify to go there as Head teacher.
7. The Ministry will await your response in respect of our proposal to post you to another school in the meantime.”

[25] From the letter, it is clear that the Respondents are fully aware that Mr. Stanley B. Matsebula does not qualify to be the Head teacher at Woodlands High School since he used to be the Head teacher there when the school was still a Secondary School. The argument therefore that the reason behind the transfer of the Applicant is so that the Head teacher whose suspension had been uplifted could resume his duties was therefore clearly not correct and had no substance.

[26] It was also argued on behalf of the Respondents that there was a need to transfer the Applicant because he has no post at Woodlands High School. What became clear to the court was that the Respondents intended to make a cross transfer. From **Annexure “R4”**, the Respondents by letter dated 16<sup>th</sup> December 2011 had also transferred the Headteacher of Mdzimba High School, Mr. Sigwili Dlamini to Woodlands High School.

[27] There was no evidence before the court, nor was it suggested by the Respondents' Counsel that it was impossible for the Respondents to create the post of Head teacher at Woodlands High School, the school where the Applicant is currently stationed and had previously acted as the Head teacher of the school. It clearly defies logic and common sense that the Respondents would rather bring a Head teacher from another school instead of creating the post and confirming the teacher who is already based at that school.

[28] There being no evidence on the papers before the court that it is impossible to create the post of Head teacher at Woodlands High School, it cannot be said that the purported transfer is reasonable in the circumstances of this case.

[29] The Respondents have therefore failed to prove on a balance of probabilities that the decision to transfer the Applicant was taken for sound operational reasons.

[30] The Respondents argued that they wanted to normalize the Applicant's appointment because he was appointed to the position of Head teacher without a school. As already pointed



out in this judgement, it has not been demonstrated or proved to the court that it is impossible to normalize the Applicant's appointment by creating the post at Woodlands High School where the Applicant is currently stationed and has even acted as the Head teacher of that school on previous occasions.

[31] The Respondents having failed to show on the papers before the court that there was a sound operational reason for the transfer, it follows therefore that the transfer was unreasonable and falls to be set aside.

[32] Taking into account all the evidence before the court, the submissions by both Counsels and also all the circumstances of this case, the court will make the following order;

**a) The 1<sup>st</sup> Respondent's decision to transfer the Applicant from Woodlands High School is reviewed and set aside and is declared null and void and of no force and effect.**

- b) To preserve good employment relations between the parties, the court will order each party to pay its own costs.**

[33] The members agree.

**N. NKONYANE J**

**For the Applicant : H. Mkhabela  
(Mkhwanazi Attorneys)**

**For the Respondents : N. Nkambule  
(Attorney-General's  
Chambers)**