



**IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND**

**JUDGMENT**

HELD AT MBABANE:

Case No. 5/2013

In the matter between

**REGISTRAR OF THE HIGH COURT**

**First Appellant**

**CHAIRMAN OF THE CIVIL SERVICE COMMISSION**

**Second Appellant**

**THE ATTORNEY GENERAL**

**Third Appellant**

**And**

**SABATHA FAITH GUMEDZE**

**Respondent**

**Neutral Citation:** *Registrar of the High Court & 2 Others v Sabatha Faith Gumedze (5/2013) [2012] SZICA 9 (29<sup>th</sup> October 2013)*

**Coram:** **M. M. Ramodibedi JP; M.C.B Maphalala AJA; M. Dlamini AJA**

**Heard:** **24<sup>th</sup> October 2013**

**Delivered:** **29<sup>th</sup> October 2013**

*Plascon-Evans rule – applicable in motion proceedings where denials or defence is not bona fide – consultation differentiated from negotiations – administrative functionaries not court of law – bound by their own rules of procedure – procedural fairness at workplace has no definite, rigid descriptive words – what is paramount is whether from a given set of circumstances the spirit of procedural fairness can be said to be available.*

Summary: The Appellants seek to have the judgment of the court *a quo* set aside on the basis that the respondent was consulted before serving her with notice of transfer from her duty station to another - The court *a quo* failing to follow the Plascon-Evans Rule – Appeal upheld – Respondent ordered to pay cost.

### **The Parties:**

[1] The first appellant is the Registrar of the High Court and the supervisor of respondent. The second appellant is the chair of a body within government responsible for appointment, promotion and transfer of government employees while the third appellant is the government legal representative, representing first and second appellants. The respondent is a civil servant attached to the judiciary and performing duties and functions as assigned to her by the first appellant.

### **Brief resume:**

[2] Under a certificate of urgency, the respondent filed an application for a *rule nisi*, setting aside a notice of transfer served upon her by the first Appellant for a transfer from the High Court, Mbabane to the Magistrate Court in Manzini. The basis for the order sought was that she was not consulted prior to the notice. The appellants ferociously refuted such claims and deposed that the respondent was consulted accordingly. On the return date, the court *a quo* found in favour of the respondent and confirmed the *rule nisi*. The appellants, aggrieved by the decision of the court *a quo*, have noted the present appeal.

### **Grounds of Appeal:**

[3] The appellants have raised the following grounds of appeal:

“1. *The Court a quo erred in fact and in law by holding that the rule nisi it granted on the 23<sup>rd</sup> August is confirmed.*

- “2. *The Court a quo erred in fact and in law by holding that the re-deployment directive issued by the first Appellant dated 16<sup>th</sup> August, 2013 is hereby set aside.*
3. *The Court a quo erred in holding that the decision to re-deploy respondent had already been taken by or before the 4<sup>th</sup> February, 2013.*
4. *The Court a quo erred in holding that there was “no consultation” or “proper consultation before the redeployment directive was issued on 16<sup>th</sup> August, 2013.*
5. *The Court a quo erred in holding (by implication) that the decision to re-deploy Respondent had adverse effect on Respondent.”*

**Parties’ Contentions in the court a quo:**

[4] It is important to note that the appellants subsequently filed amended grounds of appeal. The pertinent ground which calls for a determination in this appeal is to the effect that the *court a quo* “*erred in fact and in law in deciding the matter on the version of the respondent in total disregard of the first appellant’s version.*”

[5] The Respondent averred in the *court a quo* that:

*“I point out that before I received the letter from the First Respondent informing me that I was being deployed from the High Court to the Manzini Magistrates Court, I was never consulted by the First Respondent or any other authority with regards to my re-deployment to the Manzini Magistrates Court.*

[6] On the other hand, the appellants had contended through the first appellant’s answering affidavit:

“4. *However, I wish to bring to the attention of the above Honourable Court that prior to the issuance of the letter of deployment, on the 4<sup>th</sup> of February 2013, I personally held consultative meetings with the applicant and the other ten court clerks/interpreters who were also affected by the deployment wherein the issue of their deployment to the various Magistrates’ Courts of the country was discussed without there being any objection.*

- 4.1 *Thereafter, all eleven officers including the applicant were taken to the Chief Justice, his Lordship Michael Ramodibedi, who first congratulated them on their appointment before re-emphasising that they were not to be stationed at the High Court but were to be deployed to the various Magistrates' Courts in the country.*
- 4.2 *May I also state that from the Chief Justice's Chambers I together with the eleven Court Clerks/Interpreters, and in the company of the High Court Deputy Registrar Mr. Agrippa Bhembe, the then Assistant Registrar of the High Court Mrs. Simangele Mbatha, the Human Resource Officer for the Judiciary Mr. Njabulo Tsabedze and his assistant Mrs. Thabsile Mhlanga proceeded to the High Court Conference room wherein the issue of the deployment of these officers to the various Magistrates' Court was further deliberated upon without anyone raising an objection.*
- 4.6 *May I further state that on the 16<sup>th</sup> August 2013 prior to the issuance of the letter of deployment I advised the applicant together with the other two officers who were still based at the High Court that they have been deployed to their various Magistrate's Courts with the applicant being posted to the Manzini Magistrate's Court."*

### **Adjudication:**

- [7] The respondent has raised a point *in limine* in her heads of arguments. She states that the appellants ought to have filed a review rather than an appeal. Respondent supports this by showing that the question before court is one on fact and not on law.
- [8] We must point out from the onset that in as much as at first sight the question as to whether there was consultation or not appears to be one of fact, the matter raises a point of law in the circumstances of this case. It is our considered view that the Honourable Judge in the court *a quo* failed in law when he overlooked the principle of our law as laid down in the **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) 623**

(A) at 634-635 as fully demonstrated later in this judgment. The question before court therefore is ultimately one of law and the appellant adopted a correct procedure by appealing.

[9] The court *a quo* after correctly identifying the issues arising, concluded as appears at page 7 paragraph 14 of the impugned judgment:

*“From the evidence of the First Respondent as contained in the Answering Affidavit there is no mention that during any of the meetings that the First Respondent had with the Applicant he invited the Applicant to make representation on the matter. The evidence revealed that all that the First Respondent did was merely to convey the decision that had already been taken that the Applicant would be re-deployed to the Manzini Magistrate’s Court.”*

[10] Our task is to ascertain whether the totality of the pleadings before the court *a quo* point to the conclusion as highlighted above. The approach to this enquiry is guided by the *Plascon-Evans* rule as laid down in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** (*supra*) at 634-635 as follows:

*“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 confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination .....and the Court is satisfied as to the inherent credibility of the applicant’s(or respondent’s) factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. ... 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.”* (words underlined our emphasis and in brackets our own).

[11] In this jurisdiction, it is important to recall the apposite remarks of the Supreme Court of Swaziland in **Khumalo v Attorney General, Civil Appeal No. 20/2010** at par [8] per Ramodibedi CJ with Moore and Dr Twum JA concurring, namely:

*“Now, as the Court stated in such cases as **VIF Limited v Vuvulane Irrigation Farmers Association (Public) Company (Proprietary) Limited and Another, Appeal Case No. 30/2000** it is well-established that where there is a dispute of facts on the papers, as here, a final interdict should only be granted on notice of motion proceedings if the facts as stated by the respondent together with the facts in the applicant’s affidavits justify such an order. See also **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635.** On this principle, therefore, and there being a dispute of facts in the matter, the learned Judge a quo was justified in accepting respondent’s version and dismissing the appellant’s application on that basis.”*(underlining our emphasis)

[12] We now embark on the determination of the credibility of the averments of the parties herein as per the *dictum (supra)*. The respondent having averred that she received a letter of transfer without prior consultation, she states immediately thereafter at the preceding paragraph at 8:

*“After receipt of the letter from the First Respondent I approached my attorneys who wrote a letter to the First Respondent advising him to set aside my redeployment with immediate effect failing which an application to set aside the re-deployment will be instituted.”*

[13] The respondent says nothing further on this matter except to advance reasons for resisting transfer. In her reply however, the respondent states as follows at paragraph 9 page 43 of the record of pleadings:

*“We were then taken to the Chief Justice’s Chambers where the First Respondent introduced us to the Chief Justice and told him we were to be transferred. The Chief Justice then thanked us on accepting the transfers and wished us well. He stated that he hoped that we had been consulted about the transfers and our personal circumstances taken into consideration when the*

*decision to transfer us was taken as this was an important factor to be considered when transfers are made.”*

[14] Clearly from respondent’s own averment above, if it could be assumed for a moment that the first respondent did not consult with her, the Chief Justice who is first appellant’s superior did extend an invitation to her for consultation. That she did not use such an invitation when availed to her should not be laid at the doorsteps of the first appellant. On her own version there was no objection raised before the Chief Justice concerning the alleged failure to consult her. Lack of consultation was never an issue at all.

[15] At paragraphs 15 of the founding affidavit, the respondent stated:

*“I aver that the re-deployment will affect me financially as I would be required to now commute to Manzini every working day a thing I had not anticipated and would necessitate that I find an alternative place to stay around Manzini and find alternative schools where the children would attend in that my salary would not enable me to commute daily from where I presently stay.”*

[16] The first appellant deposed in answer at paragraph 10:

*“The contents of these paragraphs are noted. However, I wish to bring to the attention of the above Honourable Court that I offered the applicant alternative transport that is utilized by some staff members that are based at the office of the Master of the high Court until such time that she finds accommodation and she had no qualms with this arrangement.”*

[17] The respondent replies to the above as follows at paragraph 9:

*“I point out that at the First Respondent’s offices I told the First Respondent that I had a problem regarding transport as I could not afford to commute to and from Manzini where I had been deployed and the respondent by telling me that there was a travelling allowance and that it was not the department’s responsibility to organize transport for workers.”*

[18] From the discussions highlighted above, it is clear that the respondent was not only consulted but actively and manifestly engaged in consultation with the first appellant. That the decision of the first appellant was not favourable to her does not in any way detract from the fact that consultation took place. One may safely infer that that is the reason when in the office of the Chief Justice who according to respondent stated that he hoped she had been consulted and that the procedure of consultation was important, we do not hear that respondent informed the Chief Justice otherwise.

[19] Of note in this appeal is that the respondent in her founding affidavit deposed that as soon as she was served with the notice of transfer, she proceeded to her attorney. No discussions are alluded to between her and the first appellant in regard to her transfer. However, when in answer, the first appellant informs the court of discussions pertaining to transport, the respondent confirms the same in her replying affidavit. This goes to the credibility of the respondent, a factor which must be considered in applications of this nature according to *Plascon-Evans* rule (*supra*). Further, the first appellant mentioned a number of persons who were present at various places and times during consultation. These officers who are senior administrators confirmed under oath the first appellant’s contentions.

[20] Lastly on this ground, the respondent deposed in paragraph 17 of her founding affidavit:

*“I point out that I am not opposed to my employer and/or department head re-deploying me as such but could have appreciated being consulted prior to the decision being taken so that I could have made my representations regarding the proposed action.”*

[21] One should compare this with first appellant's deposition that at all material times, the respondent did not object to the re-deployment. This finds support in the confirmatory affidavits. The first appellant's version, as the respondent in the court below, obviously stands to be accepted in the face of the Plascon-Evans rule.

[22] For the above reasons, the learned judge in the court *a quo* erred in finding that the respondent, as applicant *a quo*, was not consulted. The learned judge in the court *a quo* stated as appears at paragraph 17 of the judgment:

*“As already pointed out in paragraph 14 above, there is no evidence that in any of the meetings that the First Respondent held with the Applicant and her colleagues, that the Applicant was invited to make representations. In the two meetings held on 04<sup>th</sup> February 2013 and on 16<sup>th</sup> August 2013 the Applicant and her colleagues were called to the meetings to be told that a decision has been made to have them re-deployed to the various Magistrates' Courts in the Country.”*

[23] From the above it is apposite to point out that consultation must be distinguished from negotiations. S.A. Moore JA, in a unanimous decision of the Supreme court in the case of **Swaziland National Association of Civil Servants (SNACS) on behalf of Swaziland National Fire and Emergency Services Employees v Swaziland Government Civil Appeal No. 20/2011** paragraph 25 states:

*“The Oxford Concise defines “consultation” as the action or process of finally consulting or discussing – ... a meeting in which parties consult or confer; the interactive methods by which states seek to prevent or resolve disputes.”*

[24] At paragraph 24 the learned Judge of Appeal points:

*“The oxford Concise Dictionary Eleventh Edition (revised) 2008, ... defines the noun “discussion” as “the action or process of discussing – a debate about or detailed written treatment of a topic. The verb*

*“discuss” is defined thus: “talk about (something) so as to reach a decision – talk or write about...”(my emphasis)*

[25] The Honourable Judge of Appeal proceeds to define negotiation at page 21 paragraph 26.

*“The oxford Concise defines the verb ”negotiate” as “to try to reach an agreement or compromise by discussing with others-... Black’s defines “negotiations” as “A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation usually involves complete autonomy for the parties involved, without the intervention of third parties.”*

[26] The author John Grogan, Dismissal, Juta & Co. at page 362 writing on the subject “What is consultation?” points:

*“...the courts drew a distinction in this context between consultation and negotiation. Consultation requires the employer to do no more than bona fide consider suggestions from the employees or their representatives; negotiations entails a willingness on the part of the parties to compromise in order to reach agreement.*

[27] The learned author then cites Metal & Allied Workers Union v Hart (1985) 6 ILJ 478 (IC) as follows:

*“There is a distinct and substantial difference between consultation and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement in terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise and agreement.”*

[28] MCB Maphalala J (as he then was) in **Swaziland Government and Others v Swaziland National Association of Civil Servants (SNACS) (On behalf of Swaziland National Fire and Emergency Employees) and Others Case No. 4276/2010** para [18] citing **Usuthu Pulp Company t/a Sappi Usuthu v Swaziland Agricultural Workers union & Another case**

**No. 16/2006; Swaziland National Association of Civil Servants (SNACS and Two Others v Swaziland Government case No. 331/02** eloquently points as follows:

*“The courts pointed out that consultation involves seeking information or advice on, or reaction to a proposed cause of action and that negotiation is used synonymously with collective bargaining and refers to the voluntary process whereby management and labour endeavour to reconcile their conflicting interests and aspirations through the joint regulation of terms and conditions of employment. In case 331/02 the Court held on page 6 that:*

*‘The distinguishing mark between the two terms is that in negotiations the parties work towards an agreement or compromise, whereas in consultation, though advice, permission or approval is sought, parties need not agree or reach compromise.’”*

[29] At page 387, the learned author John Grogan (*supra*) states:

*“The ultimate test is whether the employees were given a reasonable opportunity to make representation on the issues over which they are entitled to consult. Consultation will seldom be deemed sufficient when it is rushed and perfunctory.”*

[30] *In casu*, even the period, i.e 4<sup>th</sup> February 2013 when consultation commenced and eventually when the notice to relocate was communicated on 16<sup>th</sup> August, 2013, demonstrates that there was consultation as per the definition highlighted above. Otherwise had the first appellant intended that there be no consultation, one may reasonably conclude that there would have been no need for the series of meetings held since the 4<sup>th</sup> February, 2013.

[31] It appears from the impugned judgment that the learned judge in the court *a quo* seemed to operate under the notion that the first appellant ought to have uttered specific words indicating that the respondent may now table her views or grievance towards the transfer. The learned judge carries this notion further by pointing out that even the notice of 16<sup>th</sup> August 2013 is

silent on the fact that the respondent was invited to make representation. That is not the position of the law. Like commissions of enquiry, administrative functionaries may adopt their own procedures in such processes. They are not to be treated as courts of law and be expected to observe certain, legalistic procedures. Farlam J citing with approval the English *dictum* on this subject, in **Van Huyssteen and Others NNO v Minister of Environmental Affairs & Tourism and Others 1996(1) SA 283 (C)** at page 305(F) stated as follows on this position:

*“The correct interpretation of the meaning of ‘the right to procedurally fair administrative action’ entrenched .....must be a ‘generous’ one avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights..referred to”...(underlining our emphasis)*

[32] The above *dictum* by his Lordship Farlam J emanates from English *dictum* by Tucker LJ in **Russell v Duke of Norfolk and Others [1949] All ER 109 (CA)** at 118D-E where it reads:

*“There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.”*

[33] Lord Morris of Borth-y-Gest in **Wisemann v Borneman [1971] AC 297 (HL); [1969] 3 All ER 275** at 308H-309B (AC) and 278C-E (All ER) eloquently wrote:

*“We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only “fair*

*play in action*". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles J called "*the justice of common law*". (words underlined our emphasis)

[34] From the totality of the parties' contentions herein, it is our considered view as demonstrated above that the "*spirit and aspiration of fair play in action*" as per Lord Morris (*supra*) prevailed before the letter of transfer dated 16<sup>th</sup> August, 2013. The requirements of consultation, to wit, adequate notice of intended administrative action and a reasonable opportunity to make representation were observed by the first appellant in the present matter. It is needless to point out that the silence of the letter of transfer on the question of consultation cannot by any stretch of imagination be indicative of the failure to consult even in the face of an objection taken on the transfer.

[35] The learned judge *a quo* also makes an adverse finding against the appellants for failure to respond to correspondence by the respondent's attorney on the question of consultation. Surely, the appellants had a right in law to remain silent if they were so inclined especially now that the matter had found its way towards the corridors of the courts.

[36] In the result, the appellants' appeal is upheld and the following orders are entered:

- (1) The appeal succeeds.
- (2) The order of the court *a quo* is set aside.
- (3) Respondent is ordered to pay costs.

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**M. M. RAMODIBEDI JP**

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**M. C. B. MAPHALALA AJA**

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**M. DLAMINI AJA**

**For Appellants: S. Khuluse**

**For Respondent: X. Mthethwa**