

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.: 44/2022

In the matter between:

**COMMISSIONER-GENERAL OF HIS
MAJESTY'S CORRECTIONAL SERVICES
THE ATTORNEY GENERAL**

1st Appellant

2nd Appellant

And

CLIFFORD STERGIS MAGONGO

Respondent

Neutral Citation: *Commissioner General of His Majesty's Correctional Services
and Another vs Clifford Stergis Magongo (44/2022) [2023]
SZSC 28 (05/07/2023)*

Coram: **J.P. ANNANDALE JA;
M.J. MANZINI AJA; AND
L.M. SIMELANE AJA.**

Date Heard: 24th April, 2023.

Date Delivered: 5th July, 2023.

SUMMARY : *Administrative Law – Judicial review of an administrative decision – Procedure for transfer of an officer in the Correctional Services – Requirement for consultation about the transfer – Officer challenging the decision to transfer him on the basis that he was not consulted and the transfer was not justified in view of his personal circumstances – Whether section 39 (3) of the Constitution is applicable.*

Held: *That the Court a quo correctly found that there was no meaningful consultation when the officer was transferred – There was also no justification for the transfer in view of the officer’s personal circumstances – Section 39 (3) of the Constitution not applicable in this matter – Appeal dismissed with costs.*

JUDGMENT

L.M. SIMELANE, AJA:

INTRODUCTION

[1] This is an appeal against the judgment of the Court *a quo* delivered by Mlangeni J on the 7th June 2022. The Respondent made an urgent application in the Court *a quo* challenging the decision taken by the 1st Appellant to transfer him without consulting him about the intended transfer.

[2] The Court *a quo* set aside the 1st Appellant's decision to transfer the Respondent from Bhalekane Prison to Nhlanguano Correctional Centre. The Appellants were ordered to pay costs. The Appellants were dissatisfied with the judgment of the Court *a quo*. They filed an appeal before this Court.

BACKGROUND FACTS

[3] The Respondent is an officer in His Majesty's Correctional Services. He is based at Bhalekane Prison Farm. On the 5th January 2022 the Respondent attended a meeting at Matsapha Correctional Training College. That meeting was attended by 136 other officers. The meeting was chaired by a certain Mr. Tfwala. In that meeting the Respondent was informed that he had been transferred from Bhalekane Prison Farm to Nhlanguano Correctional Centre. His transfer was with effect from the 28th March 2022. After the Respondent had been informed of the decision to transfer him, he was given an opportunity to voice out his concerns about the transfer to the Senior Officers led by Mr. Tfwala.

[4] The Respondent raised his concerns to the Senior Officers about his transfer. His main concern was his acute illness. The Respondent gave the Senior Officers a history of his health condition. He stated that the reason for his earlier transfer from Matsapha to Bhalekane Prison Farm was his health issues. He further stated that he was currently attending regular medical check-ups at Pigg's Peak Government Hospital. The medical check-ups were conducted by Dr. Mande who carried out two major operations on his stomach during the year 2015. The Senior Officers undertook to present his concerns to the office of the 1st Appellant. The Senior Officers promised to give Respondent feedback very soon.

[5] There was a delay in the office of the 1st Appellant in giving the Respondent feedback on the concerns he raised to the Senior Officers on the 5th January 2022. As a result of that delay, the Respondent wrote a letter dated 18th January 2022. He protested that it was not the appropriate time to transfer him from Bhalekane Prison Farm because of his health condition. He stated that he had two major stomach operations which were carried out by Dr Mande of Piggs Peak Government Hospital. He further stated that he was admitted in hospital for six (6) months. He stated that he was now doing light duty work. He cannot walk or stand for an hour. The Respondent stated that his doctor is still monitoring his health condition. He requested that his transfer be reversed. The Respondent's letter was submitted through the officer in charge at Bhelekane Prison Farm.

- [6] There was a delay at the office of the 1st Appellant to respond to the Respondent's letter. That delay made the Respondent to instruct his Attorneys V.Z Dlamini Attorneys, to write a letter to the 1st Appellant. The Respondent's Attorneys wrote a letter to the 1st Appellant dated 6th February 2022 pleading that the decision to transfer the Respondent be re-considered in view of his health condition.
- [7] The 1st Appellant responded to the letter from the Respondent's Attorneys. She wrote a letter dated 18th February 2022. In her response, the 1st Appellant disapproved the Respondent's conduct of resisting the transfer. She stated that the Respondent's conduct undermined and/or interfered with her administrative powers vested upon her office in terms of the Constitution of Eswatini and the Correctional Services Act. The 1st Appellant emphasized that she has powers to transfer Correctional Services officers from one duty station to another.
- [8] The 1st Appellant further stated in her letter that her office was fully aware of the Respondent's health issues. She stated that the Respondent's health condition was taken into consideration when the decision to transfer him was taken. The Respondent was still going to serve under general duty in his new duty station. The Respondent's request that the decision to transfer him be re-considered was rejected. He was advised that the transfer still stands.

[9] After the Respondent's request had been rejected by the 1st Appellant, he found himself with no other option but to launch an urgent application in the Court *a quo* challenging the decision to transfer him to Nhlanguano Correctional Centre.

PROCEEDINGS IN THE COURT A QUO

[10] On the 4th March 2022 the Respondent instituted motion proceedings on an urgent basis in the Court *a quo* seeking the following orders-

- 10.1 *That this Honourable Court dispense with the normal requirements relating to time limit, manner of service form and procedure in applications proceedings and deal with this matter as one of urgency in terms of Rule 6 (25) (a) and (b) of the High Court Rules.*
- 10.2 *That pending finalization of this application; the Commissioner General of His Majesty's Correctional Services be directed to stay the transfer of Clifford Stergis Magongo from Bhalekane Prison Farm to Nhlanguano Correctional Centre.*
- 10.3 *That the decision of the Commissioner General of His Majesty's Correctional Services; of transferring the applicant , from Bhalekane Prison Farm to Nhlanguano Correctional Centre be reviewed, corrected and or set aside.*
- 10.4 *That the Applicant be granted costs of this application.*

10.5 That the Applicant be granted any further and/or alternative relief which this Honourable Court may deem just.

[11] In his application before the Court *a quo*, the Respondent sought an order setting aside his transfer from Bhalekane Prison Farm to Nhlanguano Correctional Centre on the following basis. Firstly, the Respondent contended that he was not consulted before the decision to transfer him was taken. Therefore, his transfer was irregular. Secondly, he contended that the 1st Appellant acted arbitrarily and irrationally when taking the decision to transfer him. She failed to take into serious consideration his acute illness when the decision to transfer him was made. In his founding affidavit, the Respondent annexed his letter dated 18th January 2022, the letter from his attorneys dated 6th February 2022 and the medical report from Mbabane Government Hospital dated 2nd May 2014.

[12] The Respondent's Application in the Court *a quo* was vigorously opposed by the 1st Appellant. She filed a notice of intention to oppose, an answering affidavit and a confirmatory affidavit of Ephraem Tfwala. The 1st Appellant's grounds of opposing the application in the Court *a quo* are as follows- Firstly, the 1st Appellant stated that the Respondent was expected to take the lawful order and lodge his complaint later. She said that is the guiding principle in the armed forces. Secondly, there are good hospitals in Shiselweni Region where the Respondent can get medical treatment. Thirdly, the decision to transfer him was made after taking into consideration both operational and administrative interests of the Department and the interest of the Respondent.

Fourthly, the Respondent was consulted when the decision to transfer him was made. Fifthly, the decision to transfer the Respondent was not taken arbitrarily or irregularly. It is a lawful order.

[13] In her answering affidavit the 1st Appellant annexed the list of 137 officers who were also transferred to various stations. She also annexed the confirmatory affidavit of Ephraem Tfwala, who chaired the meeting held on the 5th January 2022 at Matsapha Correctional Services College.

[14] The Respondent filed a replying affidavit in response to the allegations in the answering affidavit. In his replying affidavit he reiterated that he was not consulted before the decision to transfer him was taken. Regarding his discussions with Mr. Tfwala and his team on the 5th January 2022, he outrightly refuted that it amounted to a consultation. He stated that Mr. Tfwala did not even record notes or minutes of their discussions. That was an indication that his representations about his health condition were not taken into serious consideration. He contended the 1st Appellant's failure to call him to further engage him about his health issues after receipt of the two letters sent to her office, is evidence that he was not consulted on his transfer.

[15] After hearing arguments from both sides and considering legal authorities, the Court *a quo* granted the relief that was sought by the Respondent. The Court *a quo* found that the Respondent was not meaningfully consulted on his transfer as per the requirement of the Common Law. The 1st Appellant also

failed to apply her mind to the special circumstances of the Respondent when she rejected his request to reverse the transfer.

[16] In its judgment which was delivered on the 7th June 2022, the Court *a quo* made the following orders-

“18.1 The decision of the Commissioner General of his Majesty’s Correctional Services transferring the Applicant from Bhalekane Prison Farm to Nhlanguano Correctional Centre is hereby set aside.

18.2 The Respondent is to pay the costs of suit”.

THE APPEAL

[17] The Appellants being dissatisfied with the judgment and the orders issued by the Court *a quo*, filed an appeal before this Court on the following grounds-

17.1 The learned Court a quo erred in law and fact by holding that the Respondent was not consulted on his transfer from Bhalekane Prison to Nhlanguano Correctional Centre.

17.2 The learned Court a quo erred in law and fact by not giving section 39 (3) of the Constitution its intended purpose that the transfer was not unlawful or irrational.

17.3 Alternatively the learned Judge failed to refer the determination of section 39 (3) of the Constitution to the Constitutional Court to determine its ambit.

17.4 *The learned Judge erred in law and fact that when the 1st Appellant expressed her position known that she was going to uphold the Transfer Committee decision based on the submission made by the Respondent to the committee, then that meant she had not taken the personal circumstances of the Respondent inclusive of his sickness.*

17.5 *The learned Court a quo erred in law and fact to uphold the Respondents application with costs.*

APPELLANTS' ARGUMENTS

[18] Mr. Simelane on behalf of the Appellants argued that the Court *a quo* erred in law and fact in holding that the Respondent was not consulted before his transfer from Bhelekane Prison Farm to Nhlanguano Correctional Centre. He argued that after the Respondent had been notified about his transfer on the 5th January 2022, he met the Transfer Committee which was led by Mr. Ephraem Tfwala and voiced out his concerns about the transfer. After considering his concerns, the Transfer Board found that there were no merits on his concerns. The decision to transfer the Respondent was then allowed to stand. Mr. Simelane argued that the discussions between the Respondent and the Transfer Board which were held at Matsapha Correctional College on the 5th January 2022 amounted to a consultation. He further argued that though the consultation was done after the decision to transfer the Respondent had been taken, it was a meaningful consultation and it is acceptable in the armed forces.

[19] In support of his argument Mr. Simelane relied on the case of **Jabulani Masimula vs The Commissioner General and 2 Others High Court No. 1956/2017** where Justice N.J Hlophe J. (as he then was) held that a Consultative meeting that was held after the decision to transfer a Correctional Services officer had been taken amounted to proper consultation. The decision to transfer an officer cannot be held unfair solely on the basis that the consultation was done after the decision had been made. His Lordship N.J. Hlophe J. cited with approval The Case of **Gurava vs Traffic Safety Council Case No. 73/2007 [2009] ZWSC 5 (26 January 2009)** of Zimbabwe where the Supreme Court of Zimbabwe confirmed the transfer of an employee of the Traffic Safety of Zimbabwe though he was consulted after the decision to transfer him had been taken and communicated to him. Mr. Simelane argued that the **Jabulani Masimula** case and the **Gurava** case were on all fours with this present matter.

[20] Another argument that was made by Mr. Simelane was that the Court *a quo* erred in holding that the 1st Appellant failed to take into account the Respondent's personal circumstances, inclusive of his sickness, when she upheld the decision of the Transfer Board to transfer the Respondent from Bhalekane Prison Farm to Nhlanguano Correctional Centre. He argued that the Respondent's health condition was well known to the 1st Appellant and was considered when the decision to transfer him was taken. Mr. Simelane argued that there are also hospitals in the Shiselwnei Region where the Respondent will get medical treatment for his illness. He also argued that the Respondent was not going to suffer any prejudice as a result of his transfer. Mr. Simelane submitted that there was no medical evidence which

was submitted by the Respondent in support of his contention that the warm climate at Bhelekane was suitable for his health condition.

[21] It was further argued on behalf of the Appellants that the Court *a quo* erred in law and fact by not giving section 39 (3) of the Constitution its intended purpose. Mr. Simelane argued that the decision to transfer the Respondent was taken in terms of section 7 (2) of the Correctional Services Act read together with section 39 (3) of the Constitution. He argued that the transfer of officers in the Correctional Services is the responsibility of the 1st Appellant. It is part of proper administration. He argued that the judgment of the Court *a quo* has the effect of limiting the authority of the 1st Appellant and was going to cause anarchy in the country. Mr. Simelane submitted that it is common cause that in the disciplined forces members are required to carry out an order without asking questions and then complain later. He further argued that if the Respondent's transfer was not effected it was going to create a bad precedent in the Correctional Services. Mr. Simelane submitted that in terms of section 39 (3) of the Constitution, the right to be consulted is not absolute in the armed forces. He further argued that the Court *a quo* erred by not referring of section 39 (3) of the Constitution to the Constitutional Court to determine its ambit if it felt that it was too wide. He argued that the determination of section 39 (3) was of utmost importance, because it affects the entire members of the disciplined forces

[22] Regarding the powers of the Transfer Board which was chaired by Mr. Tfwala, Mr. Simelane argued that it acts under delegated authority. The 1st

Appellant delegated her authority to the Transfer Board to deal with the transfers. Mr. Simelane argued that it is the Transfer Board that made the decision to transfer the Respondent and it maintained it after he had voiced out his concerns on the 5th January 2022.

22.1 During the appeal hearing a question was posed to Mr. Simelane as to what were the reasons for the Respondent's transfer from Bhelekane Prison Farm to Nhlanguano Correctional Centre. Mr. Simelane was at pains in trying to answer that question. His answer was that it was a periodic reshuffle for officers to other duty stations. The reshuffle was done from time to time. He further said the transfer was for various reasons related to the operations of the department and human resource needs. Mr. Simelane was further asked as to whether there was a specific reason for the Respondent's transfer to Nhlanguano Correctional Centre as he was on general and light duty due to ill-health. The Respondent was also due for retirement in the next period of five (5) years or there about. Mr. Simelane failed to give the Court a clear answer to that question.

[23] Lastly Mr. Simelane argued that the Court *a quo* erred in law and fact in granting the Respondent's application with costs. He prayed that the appeal be upheld to with costs.

RESPONDENT'S ARGUMENTS

- [24] Mr. Gumedze, on behalf of the Respondent, argued that there was no consultation before the decision to transfer the Respondent was taken. He argued that the Respondent got to know about his transfer on the 5th January 2022 at the meeting which was held at Matsapha Correctional Services. The Respondent was with other 136 officers at Matsapha Correctional Service when they were informed that they had been transferred to various work stations. Mr. Gumedze argued that the Respondent was never given an opportunity to make representations before the decision to transfer him was taken.
- [25] In support of his argument he cited two cases. He cited the case of **Hlobisile Ndzimandze vs Civil Service and Others High Court Case No. 449/15** where it was held that the purpose of consultation is to give both sides an opportunity to engage and exchange views before the intended action is taken. In the case of **Jabulani Masimula vs The Commissioner General and 2 Others** (*Supra*) it was held that the fundamental aim of consultation is to influence a decision that has not yet been taken, not to change a decision that has already been taken.
- [26] In response to the Appellant's argument that Respondent was consulted on the 5th January 2022, after the decision to transfer him had been taken and communicated to him, Mr. Gumedze argued the representations made by the Respondent were not taken into consideration. He argued that there are instances where the consultation is done after the decision to transfer had been

taken but before it is effected. In those instances the consultation is done for the purposes of maintaining the decision or varying it.

[27] In support of his contention Mr. Gumedze cited the case of **Jabulani Masimula vs The Commissioner General and 2 Others** which was also in the Appellants heads of Arguments. He referred us to paragraph [10] of that judgment which explains the procedure that is followed in the Correctional Services when officers are transferred to other work stations. According to the **Jabulani Masimula** judgment, the procedure is that a list of the transferred officers is published. Upon publication of the list, the affected officers may approach the officer in charge of the institution where he works to report his objections or grievances. The officer in charge then reports the objections or grievances to the office of the Commissioner General who then arranges for a consultative meeting with the officer aggrieved with the transfer. In that consultative meeting the grievances raised by the affected officer through the officer in charge are discussed. Following those discussions the decision to transfer is either maintained or reversed.

[28] Mr. Gumedze argued that since both sides cited the **Jabulani Masimula** case in their heads of arguments, that is an indication that both sides are in agreement that the transfer procedure stated in that judgment is proper.

[29] Mr. Gumedze then submitted that the normal procedure for the transfer of Correctional Services officers was not followed in this matter. He argued that the Respondent made representations to the Transfer Board on the 5th January 2022. The Transfer Board made an undertaking to forward them to the 1st

Appellant. In her answering affidavit, the 1st Appellant stated that the Transfer Board never said it was going to present the Respondent's concerns about his transfer to her. She further stated that even if they had, she was not going to consider them. She was going to uphold the Transfer Board's decision. Mr. Gumedze argued that the assertion made by the 1st Appellant in her answering affidavit confirms that there was no consultation. The representations made by the Respondent about his transfer were not forwarded to 1st Appellant and were not taken into consideration by the 1st Appellant.

[30] Mr. Gumedze further argued that the Court *a quo* was correct to hold that the decision to transfer the Respondent was irrational and unlawful. He argued that the 1st Appellant, throughout her answering affidavit filed in the Court *a quo*, she maintained that she issued a lawful order and she expected the Respondent to comply with it and complain later. Mr. Gumedze argued that the attitude of the 1st Appellant demonstrates that she did not seriously consider the Respondent's health issues. She wanted her order to be obeyed by the Respondent.

[31] In conclusion Mr. Gumedze prayed that the appeal be dismissed with costs.

THE POSITION OF LAW RELATING TO TRANSFER OF AN OFFICER

[32] It is settled law that an employee is entitled to be consulted before he or she is transferred to another duty station. Applying that same principle, an officer in the Correctional Services is also entitled to be consulted before he or she is

transferred to another duty station. The correct procedure is that the consultation should be done before the decision to transfer an officer is made. But, in the Correctional Services it is allowed that the consultation process can commence after the decision to transfer has been made and communicated to the affected officer, but before the actual transfer is effected.

[33] The transfer procedure in the Correctional Services was well stated in the matter of **Jabulani Masimula vs The Commissioner General and Others** (*Supra*). At paragraph [10] of the judgment, the transfer procedure was stated as follows-

“[10]Denying that the Applicant had not been consulted prior to the decision, the First Respondent sought to set out, in a detailed manner, the procedure followed at the Correctional Institution on transfers. He said upon publication of the list, each affected officer is called in by the officer in charge of the institution where the affected officer works, who explains to such an officer the procedure surrounding the transferred including the meaning of the decision taken and that it entailed that if he has an objection or grievance to with regard the transfer, he was welcome to raise it with the officer in charge. The officer in charge is then required to report the objections or grievances of the officer concerned to the First Respondent, who then arranges for a consultative meeting with the officer. It is in that meeting that the officer’s grievances as raised with the office in charge are the discussed culminating in whether the decision is maintained or is changed”.

- [34] Both Counsel for the Appellants and the Respondent were in agreement that the transfer procedure stated in the case of **Jabulani Masimula** was the correct one. They both cited that case in their heads of arguments. In my view the transfer procedure stated in the **Jabulani Masimula's** case is the one that is normally followed in the Correctional Services in instances where the affected officers have objections to the transfer.
- [35] In this matter it is common cause that the Respondent was not consulted before the decision to transfer him was taken. The Respondent got to know about his transfer in the meeting that was held at Matsapha Correctional College on the 5th January 2022. He was informed about his transfer together with the other 136 officers who were also in that meeting.
- [36] The Appellants' contention is that after the Respondent had been informed that a decision had been taken to transfer him, he had discussions with Mr. Tfwala who was the chairman of the Transfer Board. In those discussions, the Respondent voiced out his concerns about the transfer. The Appellants contended that those discussions, for all intents and purposes, amounted to a consultation. On the other hand, Counsel for Respondent argued that those discussions did not amount to a consultation, because the representation made by the Respondent were not taken into consideration.
- [37] The legal issue for determination is, whether or not the discussions between the Respondent and Mr. Tfwala amounted to a consultation. To determine the legal issue, reference shall be made to definitions of consultation given by Courts and learned authors.

[38] In the case of **Swaziland Government and Other vs Swaziland National Association of Civil Servants SMACS** (On behalf **Swaziland National Fire Emergency Employees**) and **Others case No 4279/2010** His Lordship M.C.B. Maphalala J. (now Chief Justice) defined consultation as follows-

“The Courts pointed out that consultation involves seeking information or advice on or reaction to a proposed cause of action.....”

[39] The learned author **John Grogan** in his book entitled **“Dismissal”** Juta & Company at page 362 defined consultation as follows-

“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.....”

[40] The learned author **John Grogan** at page 387 (*Supra*) stated as follows-

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

[41] The definitions of consultation I have referred to above were cited with approval in the case of **The Registrar of The High Court and 2 Others vs Sabatha Faith Gumedze Industrial Court of Appeal Case No: 5/2013.**

[42] In the case of **Hlobisile Ndzimandze vs Civil Service Commission and 4 Others High Court** (*Supra*) Mlangeni J. held as follows-

“The purpose of consultation is to give both sides an opportunity to engage and exchange views on the subject matter... The employee is

given an opportunity to make representations on relevant matters such as prejudice that is likely to result from the intended action”.

[43] In the case of **Jabulani Masimula vs The Commissioner General & 2 Others** (*Supra*) N.J Hlophe J. (as he then was) held as follows-

“A consultation is fundamentally aimed at influencing the decision to be taken and not to change a decision that has already been taken.....”.

[44] After having carefully considered the definitions and purpose of consultation given by the Courts and the Learned Author, I confirm the finding of the Court *a quo* that the Respondent was not meaningfully consulted on the decision to transfer him from Bhalekane Prison Farm to Nhlanguano Correctional Centre. The discussions the Respondent had with Mr. Tfwala on 5th January 2022 do not establish that he was meaningfully consulted on his transfer.

[45] The reasons for my conclusion that the Respondent was not properly consulted are as follows-

45.1 The representations that were made by the Respondent to the Transfer Board on the 5th January 2022 were not taken into consideration. There was no exchange of views between the Transfer Board and the Respondent on the issue of the transfer. The Transfer Board merely listened to the Respondent’s representations and undertook to forward them to the 1st Appellant for consideration and decision. There was no subsequent meeting held between then Respondent and 1st Appellant to discuss and exchange views on the concerns he raised. Even after receiving two letters from the Respondent, the Appellant did not call him to a consultative meeting.

45.2 The representations made by the Respondent were not forwarded to the office of the 1st Appellant for consideration. In her answering affidavit the 1st Appellant stated that the Respondent's concerns were not communicated to her by the Transfer Board. She went further to state that even if they were communicated to her she was not going to consider them, but she was to uphold the decision of the Transfer Board.

In paragraph 20 of her answering affidavit at page 34 of the record the 1st Appellant said-

"...They never said that they were going to present his concerns to me as mentioned in paragraph 7 above, our guiding Principles state that you take the order first and complain later. I would in any event uphold the Transfer Board decision as it will be apparent below".

That clearly demonstrates that the 1st Appellant never considered the Respondent's representations on the transfer. That also indicates that the procedure for transfer as stated in the judgment of **Jabulani Masimula** was never followed at all.

45.3 The attitude of the 1st Appellant clearly indicates that the representations that were made by the Respondent were outrightly rejected without any consideration at all. In her answering affidavit, she stated that since the Respondent is a member of the armed forces he was expected to comply with the order and lodge his complaint later. The 1st Appellant was more concerned about the interference with her administrative authority. The 1st Appellant viewed the Respondent's representations as a violation of her administrative authority.

45.4 The Transfer Board did not record the representations that were made by the Respondent on the 5th January 2022. Mr. Tfwala

who chaired the meeting on the 5th January 2022 failed to furnish the Court *a quo* with minutes or notes that were recorded in that meeting. The minutes would have given the Court a reflection of what was discussed with Mr. Tfwala.

45.5 The 1st Appellant did not take into consideration the representations that were made by the Respondent. In her answering affidavit filed in the Court *a quo*, she stated that she only took into account the Respondent's medical records which are contained in his personal file. The representations the Respondent made to the Transfer Board were not forwarded to her.

At paragraph 19 of 1st Applicant's answering affidavit page 34 of the record she said "..... in this case the Department is aware of the medical records of the Applicant as they are contained in his personal file and were taken into account before engagement".

[46] In light of the above reasons, I am of the view that the Court *a quo* correctly found that the Respondent was not meaningfully consulted when the decision was made to transfer him from Bhalekane Prison Farm to Nhlanguano Correctional Centre. The conduct of the 1st Appellant when handling the Respondent's transfer fell far short from what was required from her as per the definitions and the purpose of consultation given by the Courts.

[47] I have also come to the conclusion that the Court *a quo* was correct in holding that the 1st Appellant's decision to transfer the Respondent was irrational. The 1st Appellant failed to give the Court cogent reasons for the Respondent's transfer from Bhalekane Prison Farm to Nhlanguano Correctional Centre. In the 1st Appellant's answering affidavit filed in the Court *a quo*, she stated that Respondent was transferred for various reasons. She stated that Respondent

was transferred for operational reasons and human resource needs. She also stated that it was a periodic reshuffle for officers.

[48] It is common cause that Respondent is a sickly person. In view of his acute illness he is confined to light duty. His health condition has been improving ever since he was transferred from Matsapha to Bhalekane Prison Farm. His current work station is closer to Pigg's Peak Government Hospital, where he regularly goes for doctor's review. He collects his medication from Mkhuzweni Health Centre. The Respondent is due for retirement in about five (5) years' time. It is also common cause that the Respondent has worked in the Correctional Services for about thirty (30) years. He diligently carries out his duties at work. During his years of service he has been transferred to various work stations and he has not resisted his transfers in the past. In the 1st Appellant's papers, it has not been alleged that Respondent has special skills which are desperately needed at Nhlanguano Correctional Centre.

[49] The 1st Appellant failed to give the Court *a quo* compelling reasons why the Respondent had to be transferred from Bhalekane Prison Farm to Nhlanguano Correctional Centre in light of his critical health condition. The 1st Appellant's contention that in the Shiselweni Region there are good hospitals where the Respondent can go to for medical check-ups, does not justify the transfer. It does not justify that the Respondent's life be put on a serious risk by taking him to be far away from the Doctor who carried out two major operations on his stomach and who continues to monitor him. It has not been disputed that ever since he was transferred to Bhalekane Prison Farm his health condition has improved. I fully agree that a human being has only one life, which has to be considered when he has to be transferred from one workstation to another, especially so when medical conditions also come into play.

[50] The Court *a quo* was correct in holding that the 1st Appellant failed to apply her mind to the personal circumstances of the Respondent. The 1st Appellant failed to seriously consider the Respondent's health condition when she made the decision to transfer him. In the 1st Appellant's papers filed in the Court *a quo* she made it manifestly clear that she expected the Respondent to comply with her order and then lodge a complaint later. She also demonstrated that she was more concerned about the violation of her administrative authority. Her concern was that the Respondent's conduct of resisting his transfer was going to create a bad precedent in the Correctional Service. In her affidavit, the 1st appellant stated that the Respondent was resisting the transfer on flimsy reasons.

The Application of Section 39 (3) of the Constitution

[51] The Appellants argued that the Court *a quo* erred in law and fact by not giving section 39 (3) of the Constitution its intended purpose. Section 39 (3) of the Constitution provides as follows-

“39 (3) In relation to a person who is a member of a disciplined force of Swaziland, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this chapter other than section 15, 17 or 18”.

[52] My understanding of section 39 (3) of the Constitution is that, save for section 15, 17 and 18, the other sections under chapter 3 may be suspended when exercising authority under the disciplinary law of that force.

When the 1st Appellant made a decision to transfer the Respondent, she was not exercising her authority under the disciplinary law of the Correctional service. There is nothing in the Court record which indicates that the Respondent's transfer was for disciplinary purposes. In 1st Appellant's answering affidavit, she stated that Respondent was being transferred for operational and human resource needs. She further stated that it was a

periodic reshuffle for officers. There were no issues of discipline that were alleged. Instead, she alleged that the Respondent executed his duties diligently at Bhalekane Prison Farm from 2016 until the time the application was launched in the Court *a quo*.

[53] It is my considered view that section 39 (3) of the Constitution is not applicable in this matter. The Respondent's transfer had nothing to do with the disciplinary law of the Correctional Services. Section 7 (1) **The Correction Service Act No: 13 of 2017** Provides as follows-

“7 (1) The Commissioner General may issue or approve such orders including standing orders, directives, for the general control, administration discipline, regulation and orderly conduct of the Correctional Services as the Commissioner General may consider appropriate”.

The nature of the directive or order that was issued by the 1st Appellant for the transfer of the Respondent does not fall under discipline. It falls under general control or administration. Therefore section 39 (3) of the Constitution is not applicable in this matter.

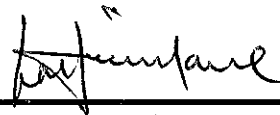
[54] The Court *a quo* was correct in its finding that the provisions of the Constitution do not justify the 1st Appellant's failure to consult the Respondent in a meaningful way. The Respondent was entitled to administrative justice in terms of section 33 (1) and (2) of the Constitution. The 1st Appellant's failure to consult the Respondent in a meaningful way about his transfer violated his right to be heard and to be treated justly and fairly. The 1st Appellant's failure to consult the Respondent was in violation of the rule of natural justice- the *audi alteram partem* rule, which is part of our common law.

[55] For the reasons stated above, this Court finds that the appeal has no merits. The following order is hereby made-

55.1 The appeal is dismissed.

55.2 The order issued by Mlangeni J. in the Court *a quo* is hereby confirmed.


55.3 The Appellants are ordered to pay costs on the ordinary scale.



L.M SIMELANE

ACTING JUSTICE OF APPEAL

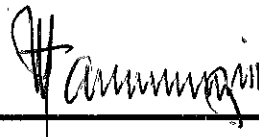
I agree



J.P ANNANDALE

JUSTICE OF APPEAL

I agree



M.J. MANZINI

ACTING JUSTICE OF APPEAL

For the Appellant:

M.E. SIMELANE (Attorney General's Chambers)

For the Respondent:

S. GUMEDZE (V.Z. Dlamini Attorneys)