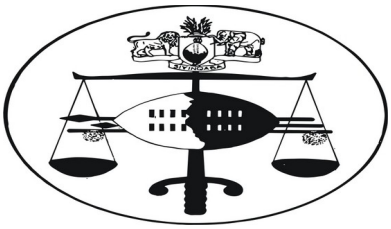

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 353/13

In the matter between:

SABATHA FAITH GUMEDZE **Applicant**

And

REGISTRAR OF THE HIGH COURT **1st Respondent**

CHAIRMAN OF THE CIVIL SERVICE COMMISSION **2nd Respondent**

THE ATTORNEY GENERAL **3rd Respondent**

Neutral citation: *Sabatha Faith Gumedze v Registrar of the High Court & Two Others(353/13 [2013]* SZIC 28 **(**SEPTEMBER 26 2013**)**

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

Heard : **9TH SEPTEMBER 2013**

Judgement Delivered: **27TH SEPTEMBER 2013**

Summary :
The Applicant is a civil servant. She was re-deployed to a new duty station by the head of department. She instituted urgent application to have the instruction set aside as she argued that she was never consulted before the final decision was implemented.

Held—In as much as the head of department had the power to re-deploy the Applicant, the head of department had a duty to consult the Applicant with a view to also take into account her representations on the matter before the final decision to re-deploy the Applicant was implemented.

Held—failure to invite the Applicant to make her representations on the intended course of action vitiated the implementation of the final decision for failure to observe the principle of *audi alteram partem.* The decision accordingly set aside by the court.

JUDGMENT 27.09.13

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[1] The Applicant is a female Civil Servant and is employed as a Court Interpreter/Clerk of Court. She is stationed at the High Court of Swaziland.

[2] The Applicant has been employed as a Civil Servant based at the High Court of Swaziland since 1st August 2006. She served a two-year probation period

and was confirmed in the Civil Service on 1st August 2008. (See Annexure "SFG1" of the Replying Affidavit).

[3] The Applicant continued to render service to the employer, the 2nd Respondent based at the High court of Swaziland until 16th August 2013 when she was served with a letter of deployment by the 1st Respondent. In terms of this letter, the 1st Respondent in his capacity as the Head of Department, purported to re-deploy the Applicant from the High Court to the Manzini Magistrate's Court with immediate effect.

[4] After receiving this letter, the Applicant did not report to the Manzini Magistrate's Court as directed, but instead she instructed her attorneys in a bid to resist the redeployment on the basis that she was not consulted by the 1st Respondent prior to being served with the letter of re-deployment.

[5] The Applicant's attorneys wrote a letter to the 1st Respondent dated 19th August 2013, advising the 1st Respondent to set aside the decision to re-deploy the Applicant as the Applicant had not been consulted before the decision to re-deploy her was taken.

[6] The 1st Respondent did not respond to this letter from the Applicant's Attorneys.

[7] The Applicant therefore instituted the present legal proceedings under a certificate of urgency as is seeking a relief in the following terms;

"1. Dispensing with the above Honourable Court's rules relating to time limits, manner of service and form and hearing this matter as one of urgency.

2. Condoning Applicant's non-compliance with the rules of this Honourable Court.

3. Ordering and directing that a rule nisi operating with immediate and interim effect be issued directing that the re-deployment of the Applicant be and is hereby stayed pending finalization of this application.

4. Ordering and directing that the re-deployment of the Applicant is unlawful and is set aside.

5. That the Respondents be ordered to pay costs of this application at an attorney and client scale.

6. That the Applicant be granted such further and/ or alternative relief as this Honourable Court deems fit."

[8] The Applicant's application is opposed by the 1st Respondent who duly filed an Answering Affidavit denying that the Applicant was not consulted prior to the decision to redeploy her was taken. The Applicant thereafter filed her Replying Affidavit. An interim relief was granted by the court in terms of prayer 3 of the application on 23rd August 2013. The court heard arguments on 10th September 2013 after both parties had filed their Heads of Argument. No papers were filed by the 2nd Respondent.

[9] **Question Arising:-**

The question for the court to decide is whether or not the Applicant was consulted prior to the decision to re-deployed her with immediate effect on 16th August 2013 to Manzini Magistrate's Court was taken. The essence of the Applicant's case is that she was not consulted by the 1st Respondent prior to the issuance of the letter of deployment. The 1st Respondent's case is to the contrary, being that the Applicant was consulted prior to the decision to re-deploy her was taken. It should follow therefore that once the court finds that there was proper consultation prior to the decision to re-deploy being taken, *cadit quaestio*, and the application will be dismissed. If, however, the court finds that the Applicant was either not consulted, or not properly

consulted prior to the decision to re-deploy her was taken, the re-deployment directive will be set aside by the court.

[10] **Analysis of the Evidence:-**

The Applicant stated in paragraph 7 of the Founding Affidavit that she was never consulted by the 1st Respondent or any other authority about her re-deployment. The 1st Respondent denied this and stated in paragraph 4 of the Answering Affidavit that he did hold consultative meetings with the Applicant and the other ten Clerks of Court/Interpreters and that there was no objection by any of the affected parties. The 1st Respondent stated further that thereafter, all the eleven officers concerned were taken to the office of the Chief Justice. The Chief Justice congratulated them on their appointments and then emphasized that they were not going to be stationed at the High Court but that they would be deployed to the various Magistrates' Courts in the country.

[11] The 1st Respondent stated in paragraph 4.2 that the officers were thereafter taken to the High Court Conference Room where the issue of their deployment was further deliberated upon in the presence of the High Court Deputy Registrar, Mr. Agrippa Bhembe, former Assistant Registrar of the High Court Mrs. Simangele Mbatha, the Human Resources Officer for the Judiciary, Mr Njabulo Tsabedze and his Assistant Mrs. Thabsile Mhlanga.

[12] In paragraph 5.2 of the Answering Affidavit the 1st Respondent stated that the First consultation was held on 04th February 2013. The 1st Respondent said this meeting took place in his office and that;

"… I first congratulated them on their appointment before explaining to them that they were to be deployed to the various Magistrates Courts in the country without there being an objection to same."

[13] In paragraph 4.9 the 1st Respondent stated that;

"May I also state that subsequent to the meeting of the 4th February 2013, I would occasionally remind the Applicant about her pending deployment to the Manzini Magistrate's Court each time I happened to meet her in my office."

[14] From the evidence of the 1st Respondent as contained in the Answering Affidavit there is no mention that during any of the meetings that the 1st Respondent had with the Applicant he invited the Applicant to make representations on the matter. The evidence revealed that all that the 1st 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.

[15] There is no doubt, and it is now trite that it is the prerogative of management to organize the workplace guided by the exigencies that may have developed at the workplace. The principles of good industrial relations however require that the employer or manager must first consult the employee who is going to be affected by any intended decision that has the potential of having adverse effects on the employee.

[16] Consultation is distinguishable from joint decision making and collective bargaining or negotiation. Consultation requires the employer no more than to notify the employee of any proposed action and, in good faith, to consider any suggestions that the employee may make. Consultation therefore must be *bona fide* and not merely a sham.

(See:- **John Grogan: Workplace Law, 8th edition p. 345.**

CF: **The Swaziland Agricultural Plantations Workers Union v. Usutu Pulp Company Ltd t/a SAPPI, case No. 423/06 (IC).**

[17] As already pointed out in paragraph 14 above, there is no evidence that in any of the meetings that the 1st Respondent held with the Applicant and her colleagues, that the Applicant was invited to make representations. In the two meetings held on 04th February 2013 and on 16th 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.

[18] One of the primary duties of the Industrial Court is to enforce the provisions of the **Industrial Relations Act of 2000** as amended. In **Section 4** the Act provides that;

"Purpose

4. (1) The purpose and objective of this Act is to-

a) promote harmonious industrial relations.

b) promote fairness and equity in labour relations."

It can hardly be argued that to transfer or re-deploy an employee without first consulting that employee and taking into account her representations on the

intended course of action promotes harmony, fairness and equity in labour relations.

[19] The evidence in this case showed that the Applicant has two children who attend school around Mbabane who suffer from different ailments. One attends pre-school and suffers from asthma and sinus allergies. The other suffers from autism and attends a special pre-school dedicated to teaching children with needs.

[20] In response to this evidence by the Applicant, the 1st Respondent stated in paragraph 10.1 that the issue of the medical condition of the Applicant's children has been brought to his attention for the first time in court yet when the Applicant was presented with the opportunity to make representation on the matter failed to do so.

[21] As already pointed out in the preceding paragraphs herein, there was no evidence before the court that the 1st Respondent did invite the Applicant to make her representations and that he did take these into account before he issued the letter of re-deployment to the Applicant.

[22] The conduct of the 1st Respondent was clearly short of consultation. I say this because in terms of labour law principles, the fundamental purpose of consultation with an employee against whom an adverse decision is to be made,

is to give that employee the opportunity to make representations with a view to influence the decision to be taken.

See: **Nhlanhla Hlatshwayo v. Chairman – Civil Service Commission & Two Others, Case No. 218/08 (IC).**

[23] The letter of re-deployment itself is also *prima facie* evidence that there was no prior consultation before the final decision was taken. The letter, Annexure "SFG1" of the Applicant's Founding Affidavit appears partly as follows;

"Re: Deployment Yourself

The above matter refers.

You are hereby re-deployed from the High Court to Manzini Magistrate's Court as a Court Interpreter/Clerk with immediate effect. Kindly report to the Principal Magistrate, for the Manzini Region.

We wish you well in your new assignment and hope that you will continue to be as dedicated to your work as you were at the High Court.

MPENDULO SIMEONE SIMELANE

REGISTRAR OF THE HIGH COURT

CC: Registrar of the Supreme Court

Principal Magistrate – Manzini

In this letter the 1st Respondent did not say that there was a prior consultation between the parties, and that the Applicant was being re-deployed after the 1st Respondent had taken into account all the representations made by the Applicant.

[24] Furthermore, the conduct of the 1st Respondent of failing to respond to the Applicant's letter of demand, Annexure "SFG2" of the Founding Affidavit, also constitutes *prima facie* proof that there was indeed no consultation prior to the re-deployment instruction.

[25] The Confirmatory Affidavits by the Deputy Registrar of the High Court Mr. Agrippa Bhembe, and that of the Assistant Human Resources Officer of the Judiciary, Mrs. Thabsile Mhlanga annexed to the Answering Affidavit do not take the 1st Respondent's case any further. Instead, they confirm the

Applicant's case that there was no prior consultation. In paragraph 4 of these affidavits the deponents stated that;

"In particular I confirm that I was present at the meeting that was convened by the Registrar at the High Court Conference Room on the 4th February 2013 wherein the Applicant together with ten other officers (Court Clerks) were informed of their deployment to the various Magistrate's Courts of the Kingdom of Swaziland."
(underlining for emphasis).

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There is nowhere in these Confirmatory Affidavits where it is stated that prior to the officers being ***"informed of their deployment"***, they were invited by the 1st Respondent to make representations on the subject matter or proposed course of action with a view to taking such representations into consideration.

[26] An employee has the right to both substantive and procedural fairness at the workplace. In *casu*, procedural fairness required that the 1st Respondent invites the Applicant to make her representations on the proposed course of action so that when the final decision is taken, the 1st Respondent would have taken the representations into consideration. In the case of **Ngema v. Minister of Justice, KwaZulu and Another [1992] 13 ILJ 663 (K)** the

court dealing with the right to be heard before a decision is taken stated as follows:-

"Officials entrusted with public power must exercise such power rationally and fairly. In order to act rationally and fairly, the decision maker would, of necessity have to apply his mind properly to all relevant aspects and circumstances pertaining to a decision and in order to do this he would, in most instances, be obliged to afford the person affected by the decision a hearing prior to coming to his decision…."

[27] This court is in agreement with the above position of the law.

[28] The Respondents' representative argued that an administrative officer has the right to adopt any form of consultation and that there was no prescribed form of consultation as long as the process complies with the rules of natural justice. The argument by the Respondents' representative was clearly misplaced. The Applicant's case before the court is not that the decision to re-deploy her was not adequately communicated to her. Her case is that when that decision was taken by 1st Respondent her views on the subject as the affected employee were never taken into account.

[29] It is not in dispute that the final decision to re-deploy rested with the 1st Respondent. The 1st Respondent was however enjoined to consider and respond to the representations of the Applicant before he made the final decision. The duty to consider in good faith the affected employee's views, did not divest the 1st Respondent of his power to make the final decision to execute the intended course of action.

[30] In the present case when the 1st Respondent first "consulted" with the Applicant and her colleagues on 4th February 2013, the decision had already been taken. The sole purpose of that meeting which the 1st Respondent decided to refer to as "consultation" was simply to communicate the decision that had already been taken. This was clear from paragraph 5.2 of the Founding Affidavit where he stated that;

> ***"The first consultation was held on the 4th February 2013 where I called the Applicant together with the other Clerks of Court who had been formally employed by the Swaziland Government to a meeting in my office where I first congratulated them on their appointment before explaining to them that they were to be deployed to the various Magistrate's Courts in the country without there being an objection to same."***

Consultation does not mean merely to afford an opportunity to comment on a decision that has already been taken and which is in the process of being implemented.

[31] The Applicant's representative also argued that the Applicant forfeited or waived her right to object as she had adequate opportunity to object to the re-deployment. This argument is also misdirected. The Applicant's case before the court is that she was not invited to make her representations on the matter so that her views could also be taken into account before the final decision was executed by the 1st Respondent. There was no evidence before the court that the 1st Respondent did invite the Applicant to make representations and the Applicant failed to do so.

[32] The re-deployment directive therefore ought to be set aside by the court. If however there still exists any need to re-deploy the Applicant, the 1st Respondent can only lawfully do so after proper consultation with the Applicant.

[33] The Applicant has asked that the directive be set aside with costs on the punitive scale. The court has a discretion on the question of costs. In the circumstances of this case, the court is of the view that because of the existing employer/employee relationship between the parties, an order for costs could

have the potential of creating a hostile environment. That is clearly not in the interest of the Applicant.

[34] Taking into account all the evidence and also all the circumstances of this case, the court will make the following order;

a) The rule nisi is confirmed.

b) The re-deployment directive issued by the 1st Respondent dated 16th August, 2013 is hereby set aside.

c) There is no order as to costs.

[35] The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

For Applicant: **Mr. X. Mthethwa**
(Bhembe Attorneys)

For Respondents: **Mr. S. Khuluse**
(Attorney-General's Chambers)

“If the Minister considers that the interests of the service require that an officer should cease forthwith to exercise the powers and functions of his office, he may interdict him from the exercise of those powers and functions, if disciplinary proceedings are being taken or are about to be taken or if criminal proceedings are being instituted against him.”

Regulation 39 (4) provides that :

“If the disciplinary proceedings do not result in the officer’s dismissal or other punishment he shall be entitled to the full amount of the emoluments which he would have received if he had not been interdicted.”

Mr. Vilakati argued that **sub-regulation 4** does not apply the Applicant as he was not disciplined by the employer, but was facing a criminal charge.

[14] The argument is clearly casuistic. The interdiction of the Applicant by the employer was the start of the disciplinary process at the workplace. That the Applicant was facing a criminal charge did not bar the employer from conducting its own investigations and thereafter subjecting the Applicant to a disciplinary hearing if there was evidence that the Applicant had committed an offence. The employer in this case decided to abandon the disciplinary process and did not subject the Applicant to a disciplinary hearing. The disciplinary process which was initiated by the employer by interdicting the Applicant did not result in the dismissal of the Applicant. **Regulation 39(4)** is therefore applicable to the present situation.

[15] It was further argued on behalf of the Respondents that the Limitation of Legal Proceedings against the **Government Act, No.21 of 1972** was applicable in this case. It was argued that in terms of **Section 2 (1) (c)** of the Act, no legal proceedings shall be instituted against the Government in respect of any debt after the lapse of a period of twenty-four months as from the day on which it the debt became due.

[16] The next inquiry therefore is when did the debt become due? The evidence before the court revealed that the suspension of the Applicant was lifted by the employer on 03rd December 2012. The lifting of the suspension by the

employer meant that the disciplinary process had come to an end. From this period, the monies that were being deducted by the employer from the Applicant's salary became due because the disciplinary process did not result in the dismissal of the Applicant. It is therefore clear that the period of twenty-four months had not lapsed when the Applicant instituted the present proceedings taking into account that his suspension was lifted on 03rd December 2012.

[17] It was also argued on behalf of the Respondents that the money cannot be paid to anyone other than the Applicant in terms of the Government Accounting Procedures. There was no counter argument on this point. The court will therefore assume in favour of the Respondents that in terms of the Government Accounting Systems, the amount owed is payable only to the employee.

[18] As an aside, it was clear to the court that the Respondents had no valid defence to the Applicant's claim. The need to defend the claim may have been caused by the amount claimed by the Applicant. If Government is of the view that it will not be able to pay the amount due at once, the parties can negotiate and reach an agreement to repay the amount by instalments equal to

the amount that the Government was deducting from the salary of the Applicant when he was on suspension.

[19] On the question of costs, the attitude of this court is that, generally, it will not award costs where the employer/employee relationship still exists in order to preserve harmonious industrial relationship. The present case however is an exception in that the employer set out to defend the indefensible, to the prejudice of the Applicant. There was no need for the Applicant to even seek the court's intervention. After the suspension was lifted, by operation of the law the monies that were deducted during the suspension period became due and payable to the Applicant.

[20] Taking into account all the factors and circumstances of this case, the court will make the following order;

a) The 1st – 4th Respondents are jointly severally ordered to pay to the Applicant the monies deducted from the Applicant's salary during the suspension period. The one paying, the others to be absolved.

b) The 1st – 4th Respondents are jointly and severally ordered to pay the costs of suit. The one paying, the others to be absolved.

[21] The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT: **MR L.N. MZIZI**
(LLOYD MZIZI ATTORNEYS)

FOR RESPONDENTS: **MR. T. VILAKATI**
(ATTORNEY-GENERAL'S CHAMBERS)