IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

Case No. 4/2019

In the matter between:

ANDRE BOTHA **Appellant**

And

SWAZI OXYGEN (PTY) LTD **Respondent**

Neutral citation: *Andre Botha v Swazi Oxygen (Pty) Ltd (4/2019) [2019] SZICA 08 (16 October 2019)*

CORAM: M.R. FAKUDZE AJA, T.L. DLAMINI AJA, M. LANGWENYA AJA

Heard : 19 September 2019

Delivered : 16 October 2019

Summary: *Labour law – The appellant was employed to work in a subsidiary company based in the Kingdom of Eswatini but whose parent company is in the Republic of South Africa – Later on, consultations were held with him regarding a transfer to another branch of the parent company – This other branch of the parent company is located in South Africa at a place called Trichardt – The consultations were unsuccessful as the appellant declined the transfer – Consequent upon the decline of the transfer, the appellant's employment was terminated - According to the evidence, the termination was based on business operational requirements.*

The appellant challenged the termination of his employment; first, via the Conciliation, Mediation and Arbitration Commission (CMAC) where the dispute was declared unresolved; second, at the Industrial Court which held that the termination of his employment was substantively fair, but procedurally unfair.

The appellant filed an appeal before this court against the finding that the termination was substantively fair – The respondent, on the other hand, filed a cross-appeal against the finding that the termination was procedurally unfair.

Held: *That on the evidence, the dismissal was both substantively and procedurally unfair, hence the appeal allowed and the cross-appeal dismissed.*

JUDGMENT

T.L. Dlamini AJA

[1] The appellant was employed by African Oxygen Limited, a South African company which operates businesses in several other African countries, including the Kingdom of Eswatini. The employment contract was signed on the 01 July 1996 and was to continue for an indefinite period. It was to continue to operate, in terms of clause 3 thereof, until it was deemed proper to terminate. (Contract is at p.481of the Record).

[2] A second contract of employment was signed between the appellant and Swazi Oxygen (the respondent herein) on the 03 July 1996. Swazi Oxygen is a subsidiary of African Oxygen Limited and is based in Matsapha in the Kingdom of Eswatini. In terms of this second contract, the appellant was deployed to be Manager at Swazi Oxygen with effect from 01 July 1996. The contract period was two (2) years and open to renewal by mutual agreement of the parties for further periods thereafter. The renewal,

however, was subject to meeting the company's performance requirements. (Contract is at pages 11 to 14 and 486 to 489 of the Record).

[3] The appellant worked as Manager for the respondent until 31 January 2006 when he was served with a letter of termination of his employment. In terms of the letter, the termination was with effect from 01 February 2006. (Letter is at page 600 of the Record).

[4] Consequent upon the termination of his employment, the appellant reported a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC). Following unsuccessful conciliation, CMAC issued a certificate of unresolved dispute. Thereafter, the appellant launched an application to the Industrial Court (the court *a quo*) and challenged the termination of his employment. In its judgment, the court *a quo* held that the dismissal was substantively fair, but procedurally unfair.

[5] The judgment of the court *a quo* culminated in the appeal before this court. Three grounds of appeal were filed, *viz*., (a) that the court *a quo* committed an error in finding that the appellant was instructed to relocate to Trichardt and that his refusal amounted to insubordination when the elements of insubordination were not present; (b) that even if the appellant was guilty of insubordination, the court *a quo* misdirected itself in finding the dismissal substantively fair because it was made outside the ambit of s.36 read with s.42(2) of the Employment Act, 1980; (c) and that the court *a quo* committed an error by failing to appreciate the defence of operational requirements which was pleaded by the respondent, hence it found that the dismissal was for insubordination.

[6] The grounds of appeal were stated as quoted below:

> 1. **The Honourable Court erred in law and fact in finding that the interactions between Appellant and Respondent amounted to an instruction to relocate to Trichardt and that the Applicant's [Appellant's] conduct amounted to insubordination, as the elements of insubordination were not present.**
>
> **2. Even in the event the Appellant was guilty of insubordination, as the court *a quo* found, which is denied, the court misdirected itself in finding that the Appellant's dismissal was substantively fair, as the Respondent failed to bring the Appellant's dismissal within the ambit of Section 36 of the Employment Act and therefore did not fulfil Section 42(2)(a) of the Employment Act.**
>
> **3. The court *a quo* erred in that it failed to appreciate the defence that was pleaded by the Respondent, in particular that it had terminated the Appellant's services because of operational requirements of the business and found that the Appellant had been dismissed for insubordination in terms of Section 36(j) of the Employment Act and Respondent had proven as much.**

[7] On the other hand, the respondent filed a cross-appeal against the finding that the dismissal was procedurally unfair. The cross-appeal grounds were stated as quoted below:

> **1. The Court below, with respect, erred in failing to have proper regard to the factual evidence to the effect that:**
>
> **(a) the Appellant was given adequate opportunity to know what was expected of him in relation to the transfer instruction and the reasons which justified it; and the consequences in the form of a possible dismissal if he refused to comply with the transfer instruction;**
>
> **(b) the Appellant was given an adequate and fair opportunity to make representations as to why he wished not to comply with the transfer instruction, and why he should not be dismissed in consequence of his refusal to comply;**
>
> **(c) in addition to the Applicant's [Appellant's] misconduct in refusing to comply with the transfer instruction,**

there were operational reasons that justified the requirement for him to be transferred and for him to be dismissed if he refused to comply with the transfer instruction, and the procedure followed was appropriate to dismissal for such operational reasons;

(d) the procedure that was followed was accordingly fair in the circumstances.

2. The Court accordingly, with respect, erred in failing to find that the dismissal was procedurally fair.

Appellant's arguments

[8] During arguments, Mr Sibandze who appeared for the appellant, first addressed the court on the third ground of appeal. He submitted that in terms of the letter which terminated the appellant's services, the respondent stated in clear terms that the termination is on account of "***inherent***" business or "***operational requirements***". He argued that there is no misconduct cited as a reason for the dismissal. Mr Sibandze referred this court to the **"Notice of Termination"** letter at p.600 of the Record, dated 31 January 2006, which states, *inter alia*, what is quoted below:

Dear Andre

Without prejudice

NOTICE OF TERMINATION

We refer to previous correspondence with regard to your employment with the Company and to various discussions including our consultations relating to discussions on termination of employment by mutual agreement and advise as follows:

1. Notwithstanding various offers made to you and the fact that certain conditions of termination were revisited in order to meet with your various requests and in order to accommodate you, we find that your response has not been to the extent where we could progress this matter in order to meet the inherent requirements of the Business.

2. Further, the said negotiations were held in good faith and without prejudice wherein certain generous offers in respect of a

> **termination package were presented to you. This notwithstanding, we find that there was very little response from your side.**
>
> **<u>In the circumstances and particularly in the interests of the inherent requirements of the Company</u>, we have no alternate but to terminate your services with effect from 1st February 2006. However, notwithstanding the fact that you will not be in employment with the Company with effect from 1 February 2006, you will be paid an amount that is equivalent to your salary for the month of February 2006. This can be construed as pay *in lieu* of Notice Pay.** (emphasis placed by Mr Sibandze)

[9] The respondent's plea of inherent business requirements, Mr Sibandze further submitted, is consistent with the respondent's reply at p.22 of the Record, particularly paragraphs 4.19, 4.20 and 4.21 where the following is stated:

> **4.19 The termination of the applicant's employment was justified in the circumstances, particularly on the basis that the applicant had unreasonably and unfairly refused to comply with the reasonable and lawful reassignment of the applicant.**
>
> **4.20 By refusing to accept his reassignment, the applicant repudiated, alternatively breached the material term of the employment contract as referred to above.**
>
> **4.21 There was no need for any formal disciplinary charge or disciplinary hearing for the termination of the applicant in the circumstances.**

[10] Mr Sibandze also submitted that the dismissal was not even brought within the ambit of sections 36 and 42(2)(a) of the Employment Act, 1980. Section 36 makes provision for fair reasons of terminating an employee's employment while section 42(2)(a) requires an employer to prove that the reason of terminating the employment relationship is one that is permitted in terms of section 36.

[11] It was further submitted on the appellant's behalf that operational requirements reason is a concept in the South African labour law statute and not one in terms of the Eswatini labour statute. Mr Sibandze argued that this concept is similar to that of redundancy in the Eswatini statute. He however stressed that even for redundancy reasons, there are statutory requirements which must be met before any contemplated dismissal. For that reason, he submitted that the respondent's case must fail even when looked at as a dismissal for redundancy. He cited in the heads these statutory requirements and are stipulated by s.40 of the Employment Act.

[12] On the first ground of appeal, *viz*., that the court erred in finding that the interactions between the appellant and the respondent amounted to an instruction to relocate, and that a refusal thereof constituted insubordination, Mr Sibandze submitted that the elements of insubordination are not present *in casu*. He argued that even if the court was entitled to hold a defence that was not pleaded, it was nonetheless wrong to find that there was insubordination. On the evidence, he submitted that nothing shows that an instruction was given to the appellant. Insubordination, he further argued, requires that there should be an instruction given to the appellant. An instruction is unilateral and does not require a response. He referred this court to an email sent on 13 July 2005 found at p.417 of the Record. Hereunder, the email is reproduced:

> **From:** **Narayadoo, Jonathan**
> **Sent:** **13 July 2005 17:46**
> **Subject:** **RELOCATION TO SOUTH AFRICA**
>
> **Hello Andre**

As per our numerous conversations over the last year, regarding your relocation to SA, I have a position available in Trichardt <u>that I would like to offer you</u>.

As discussed, you have been far too long in Swaziland (8 years) and the company would like to place a different manager in the business. The ideal time for a manager in a position of that nature is a maximum of 5 years. As previously discussed, since my appointment in April last year, that you should look out for a position within the group. You mentioned that it should also be the responsibility of the company to seek out suitable positions. Due to this request, I have looked around and <u>hence the offer</u>.

The Trichardt branch is a much bigger branch than Swaziland. It offers a very different dimension from a business perspective in that the customer base is different, the size of the turnover is much larger than Swaziland and that I think that you will be able to add value to the business due to your experience and seniority.

This position will also come with a company house which will attract the normal perk taxes etc.

<u>I would urge you to consider the position that is being offered</u> as it offers the diversity that you will need to keep you intellectually stimulated.

Please respond directly to me if you feel that you would want to discuss the offer etc.

Kind regards
Jonathan (underlining is on emphasis placed by Mr Sibandze)

[13] Mr Sibandze argued that the appellant was confronted with an offer. There is clearly no instruction from the above quoted correspondence. He also submitted that further discussions took place and he referred the court to another correspondence sent on 26 July 2005 at p.428 – 429 of the Record. The email is reproduced below:

From: **Narayadoo, Jonathan**
Sent: **26 July 2005**
Subject: **FW: Offer for Andre Botha**

Hello Andre

I have attached an offer for your consideration. The letter is not signed by myself as the offer is conditional on your acceptance. If the offer is acceptable to you, please let me know and we can then make you a formal offering. The attached document is for your consideration at this point in time. Having said that, the terms and conditions are what will be in the final document.

I feel that the offer is fair and should meet with your approval.

As the position of manager Trichardt is officially vacant (Dries leaves in a month's time), we would like to advertise the post. In view of this, I would appreciate an answer from you by the 1st of August at the latest. This will give me the opportunity to either interview or regret suitable candidates for the position, without making a mockery of the system.

This offer is to be treated in the strictest of confidence and may not be discussed with any of your colleagues. You may however want to clarify a few issues and you are therefore free to contact me, Michael Erasmus, Ruby Evrard, or Peter Betch.

Kind regards
Jonathan (underlining is on emphasis placed by Mr Sibandze)

[14] The court was further referred to a letter **dated 15 August 2005** at p.432 – 433 of the Record, titled **"Proposed Relocation to Trichardt in Terms of Employment Contract"**. The letter states, *inter alia*, what is quoted below:

> "**1. Following the restructuring of the Company's operations in Southern Africa, a formal proposal was put to you to consider a transfer to the Trichardt branch in the capacity of manager. A formal response has been received from you in terms of which the proposal was declined on the basis that you would be at a less advantageous financial position should you accept the offer. You also raised the question of the difficulty (that) your family would experience in relocating.**
>
> **2. The Company has given consideration to these representations and is pleased to advise you that it shall consider placing you in as near as possible the financial position you presently enjoy in Swaziland. In order to give proper consideration and possible effect to the proposal to**

relocate you to Trichardt we propose a further consultation on 18 August 2005 at Afrox head office immediately after the Planning session.

3. <u>The purpose of that consultation will be to hear</u> your specific representations in respect of:

(a) the effect <u>why the proposal should not be confirmed for your transfer to Trichardt</u> taking into account that it constitutes a specific contractual provision in terms of your employment with the company;

(b) <u>why the proposal should not be confirmed</u> in the light of the preparedness on the part of the Company to consider placing you in a similar financial position following the relocation;

(c) why sufficient notice to you should not accommodate any attendances in relation to the relocation of your family to South Africa;

(d) why in the circumstances, the proposal of the date on which the transfer will take place should not be 1 October 2005; and

(e) any other alternatives you consider appropriate and which will assist the Company in achieving its restructuring objectives.

4. In preparation for the consultation, please furnish a written proposed agenda from yourself in order that proper consideration be given to your proposals prior to the consultation taking place.

- **We look forward to a meaningful consultation and a joint effort to address this matter.**

Yours sincerely

Jonathan Narayadoo
General Manager Northern Region (underlining is on emphasis placed by Mr Sibandze)

[15] Mr Sibandze argued that all the above quoted correspondence does not constitute an instruction but are merely proposals that required the appellant's response. He further argued that these were merely consultations whose purpose was clearly to convince the appellant to accept.

[16] He also submitted that after the latter quoted correspondence, the appellant received a letter dated 20 October 2005 found at p.435 of the Record. The letter is titled "EMPLOYMENT RELATIONSHIP". It stated, *inter alia*, what is quoted below:

> **Private & Confidential**
>
> **Without prejudice**
>
> **Mr A.C. Botha**
> **20 October 2005**
> **…**
> **Dear Andre**
>
> **RE: EMPLOYMENT RELATIONSHIP**
>
> **We refer to previous discussions and communication between yourself and the writer, relating to your employment relationship with Afrox and would like to record the following:**
>
> 1. **We have, in the past, spent some time with you discussing your role in Swaziland going forward.**
> 2. **We further confirm having advised that the Company sends South African managers into subsidiaries within Africa with a service period that is generally between 2 to 5 years and that we use this practice to develop managers so that they would return to the organization within South Africa.**
> 3. **In previous discussions with you, we canvassed the possibility of you returning to South Africa. In this regard, we note that you have been in Swaziland for 9 years and that it would best suit the inherent nature and operational requirements of the business that you return to South Africa. With this in mind, the company offered you the following alternative position: A position in Trichardt (1 hour from Johannesburg). This is a larger branch than the one in Swaziland with a more favourable salary offer.**
> 4. **With due regard to previous discussions regarding your employment relationship and with specific consideration of the fact that we have, in the past, attempted to negotiate some sort of settlement by mutual agreement, we would like to renew our proposal as follows:**
>
> **4.1 That we discuss, strictly on a without prejudice basis, a separation agreement between yourself and the Company;**
> **4.2 That this agreement will be of an amicable nature and will be in full and final settlement of the matter;**
> **4.3 That due consideration will be given to the nature and extent of your service with the Company and the inherent**

nature and operational requirements of the business of the Company, specifically in Swaziland but also within the Republic of South Africa;

4.4 In the circumstances, and again, solely on a without prejudice basis, we attach hereto a proposal with regard to the monetary package for your consideration. Please note that this revised package was formulated based on Afrox policies, previous communication between yourself and the writer and applicable legislation. Notwithstanding the fact that we maintain that South African legislation is applicable in this matter, without admitting that we do acknowledge the applicability of Swaziland legislation, we have given due consideration of the current and applicable law in Swaziland.

5. We request that you kindly consider the content of this letter and that you review the proposed package that is attached to this letter and revert to the writer within seven (7) days from date hereof. Should this be acceptable, we will then prepare the appropriate termination agreement.

6. It must be noted that it is the intention of the Company to enter into an amicable separation in respect of the employment relationship. Therefore, we have proposed a settlement that we believe is fair and equitable under the circumstances. However, in the event that we are unable to settle this matter by way of a mutual separation agreement, the Company then reserves the right to institute alternate but lawful means of termination.

We look forward to hearing from you.

Yours sincerely

Jonathan Narayadoo (underlining is on emphasis placed by Mr Sibandze)

[17] Mr Sibandze argued that the words **"to institute alternate but lawful means of separation"** mean to commence a process for the separation. What followed instead was the *Notice of Termination Letter* dated 31 January 2006 found at page 600 of the Record. He submitted that the consultations for confirmation of the relocation or transfer never took place.

He argued that the respondent simply got fed up with the appellant and this culminated in the employer's failure to afford him his labour law rights.

[18] On the second ground of appeal, *viz.*, that the court *a quo* misdirected itself in finding the dismissal substantively fair because the respondent failed to bring the dismissal within the ambit of Section 36 of the Employment Act and thus did not fulfil Section 42(2)(a) of the Act, Mr Sibandze submitted that even if appellant was guilty of insubordination, the dismissal could not be substantively fair because insubordination is not covered by Section 36(j) as the court *a quo* found. It is covered by s.36(a) instead. He referred the court to a judgment in the case of **Oscar Z. Mamba vs Development and Saving Bank Case No. 81/1996 SZIC** and submitted that for a misconduct to result in dismissal, it must be so gross that the employer could not be expected to keep the employee. This, he argued, was not the case *in casu*, and the court erred in finding that the dismissal fell within Section 36 (j) of the Employment Act.

[19] His further argument was that for a misconduct that falls within Section 36 (a), there has to be a warning first and not an instant dismissal. In support of this argument, he referred the court to a judgment by **Nderi Nduma JP** in the case of **Johannes G. Hamman v Unitrans Swaziland Limited, Case No.143/2001**.

[20] On the cross-appeal, Mr Sibandze submitted that the court was correct to find that the appellant's dismissal was procedurally unfair. He argued that the procedure for dealing with dismissal on operational requirements is different from that of dismissals for insubordination.

[21] It is common cause between the parties that operational requirements is similar to redundancy. In terms of the Employment Act, submitted Mr Sibandze, a notice was to be first given to the appellant concerning the redundancy. It was however not given. He also argued that there was no commercial rational for dismissing the appellant. The respondent was merely enforcing a company policy that did not allow managers to be in one branch and position for more than 5 years.

[22] He therefore applied for an order allowing the appeal and dismissing the cross-appeal. He emphasized that the court should look at the reason for the dismissal and not to accept a reason or excuse that is later on given as that is nothing but an afterthought.

Respondent's arguments

[23] Counsel Paul Kennedy, SC, appeared on behalf of the respondent. As a background for his arguments, he correctly submitted that this court has been called upon to decide if the appellant's dismissal was indeed substantively fair. This concept, he submitted, speaks to good cause or good reason. It is a concept that is equally applicable, he submitted, to both the

Eswatini and South African labour statutes. It requires that the substance of the dismissal has to be fair and must follow the required procedures.

[24] Counsel Kennedy also submitted that it is common cause between the appellant and respondent's attorneys that the appellant's refusal to relocate could be dealt with in two ways. It could be dealt with as a disciplinary misconduct or as an operational requirement that results in a redundancy.

[25] Counsel conceded that the appellant's attorney correctly pointed out that the dismissal was on account of operational requirements. He submitted that the starting point is the contractual obligation of the appellant to be transferred. His contract of employment, amongst other conditions, provided as quoted below:

> **"Transfers**
>
> **The company may need to transfer you to another part of the business, and this will only be done for good cause, upon reasonable notice and following consultation with you"**

[26] Counsel Kennedy correctly pointed out that it is trite that the employer is in charge of its workplace. He has the prerogative to decide on how to organize the workplace and this include a deployment of the workers. He referred this court to the judgment of **Nkonyane J** in **Hapson Duma Gule v Teaching Service Commission and two others (166/12) [2012] SZIC 20 (July 10, 2012)** and stated that the court held, according to counsel's Heads: "that if there is a sound operational reason, the requirement of reasonableness and

substantive fairness is met, and the employee cannot legitimately resist redeployment. Procedural fairness requires the court to investigate whether the correct procedure were followed, including consultation with the applicant before the decision to transfer him was taken. (underlining is emphasis by this court)

[27] This court wishes, however, to quote verbatim what **Nkonyane J** stated:

> **[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 <u>a valid reason</u> 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.** (underlining shows the exact words used by Nkonyane J)

[28] The words "if *there is a sound operational reason, the requirement of reasonableness and substantive fairness is met"*, as submitted in the respondent's heads of argument, were not used by Nkonyane J in the judgment. This is important because Mr Sibandze submitted that the concept of operational reason is provided by the South African statute and is not listed as a fair reason by the Eswatini statute. He submitted however, that it is similar to redundancy in the Eswatini statute. The court will revert to this issue later in the judgment.

[29] Counsel Kennedy also referred to a judgment of the Zimbabwe Supreme Court in the Matter of **Gurava v Traffic Safety Council of Zimbabwe**

(73/07) [2009] ZWSC 5 (26 January 2009) where **Cheda JA** stated as follows:

> "**The employer's discretion in determining which employee should be transferred and to which point of the employer's operations is not to be readily interfered with except for good cause shown …**
>
> **The employee who undertake to work for an employer whose business is carried out at different places takes the risk of being sent to perform services for the employer where ever such services are required unless the employment contract stipulates that he is to be employed and remain at a specific place only. *See Ngema Chule v Minister of Justice: Kwazulu & Anor 1992 (4) SA 349."***

[30] Counsel Kennedy submitted that Mr Narayadoo who was the Afrox Regional Manager and to whom the appellant reported, testified in the court below that he was not satisfied with the manner by which the Eswatini branch was run and managed. It performed poorly. He was then asked by the court about why the appellant was then to be transferred to Trichardt because the Trichardt branch was bigger than the Eswatini branch yet the appellant is said to have performed poorly in the smaller Eswatini branch. His response was that the evidence given in the court a *quo* was that once an employee remains in the same branch and position for a long time, the employee then becomes complacent and relax, hence he becomes unproductive anymore.

[31] He also submitted that a restructuring took place and the appellant was to fill a vacancy in Trichardt because the Manager of the Trichardt branch was due to leave in a month's time. This evidence, he argued, was given in the court *a quo* and it was never challenged. In support of this submission, the court

was referred to the letter addressed to the appellant and dated 15 August 2005 at p. 432 of the Record.

[32] The letter dated 15 August 2005, *inter alia*, states what is quoted below:

> **"2. … In order to give proper consideration and possible effect to the proposal to relocate you to Trichardt we propose a further consultation on 18 August 2005 at Afrox head office immediately after the planning session.**
>
> **3. The purpose of that consultation will be to hear your specific representations in respect of:**
>
> **(a) the effect why the proposal should not be confirmed for your transfer to Trichardt taking into account that it constitutes a specific contractual provision in terms of your employment with the company;**
>
> **(b) why the proposal should not be confirmed in the light of the preparedness on the part of the Company to consider placing you in a similar financial position following the relocation;**
>
> **(c) why sufficient notice to you should not accommodate any attendances in relation to the relocation of your family to South Africa;**
>
> **d) why in the circumstances, the proposal of the date on which the transfer will take place should not be 1 October 2005; and**
>
> **(e) any other alternatives you consider appropriate and which will assist the company in achieving its restructuring objectives.**
>
> **4. In preparation for the consultation, please furnish a written proposed agenda from yourself in order that proper consideration be given to your proposals prior to the consultation taking place.**
>
> **We look forward to a meaningful consultation and a joint effort to address this matter.**

Yours sincerely

Jonathan Narayadoo

General Manager Northern Region

[33] Counsel Kennedy was asked by the court on how the transfer of the appellant was confirmed by the employer as contemplated in terms of the above quoted letter as Mr Sibandze submitted that the consultations never took place. In response, Counsel Kennedy submitted that evidence given in the court *a quo* shows that there were many other consultations that took place after the letter dated 15 August 2005 and that the transfer was confirmed. He referred this court to paragraphs 4.3 to 4.20 of the respondent's answering papers from p.19 to 22 of the Record. The court was also referred to the letter entitled EMPLOYMENT RELATIONSHIP, dated 20 October 2005 at p. 435 of the Record.

[34] Counsel Kennedy submitted that the above cited letter clearly states that the appellant was at that time required to move to Trichardt and if not then a separation with the company was to follow. Counsel then referred the court to the Zimbabwe Supreme Court judgment of **Gurava v Traffic Safety Council of Zimbabwe (supra);** the Canadian case of **Stefanovic v SNC Inc (1988**) **22 CCEL 82 (Ont H Crt).** In the Canadian case, the court held that:

> **"I do not believe that in law the plaintiff had the right to refuse the transfer under these circumstances. I find that the refusal of the plaintiff to accept either of the job offers was cause for termination of the employment. The dismissal was not wrongful."**

[35] The court was also referred to the case of **Agrippa Velaphi Bhembe v Chairman, Judicial Service Commission and others** where **Murphy AJ** stated that:

> **"An employer has the right to manage and deploy resources in its best interests and is thus entitled to transfer employees for operational reasons. A decision to transfer staff thus falls within the employer's prerogative and all that is required is a *bona fide* operational reason and consultation on the consequences of that decision."**

[36] In addressing the grounds of appeal, Counsel Kennedy conceded that with respect to the first ground of the appeal, the court erred in finding that the dismissal reason was insubordination. He submitted that management never dealt with the appellant's case as that of insubordination. He also submitted that the evidence shows that the dismissal was based on operational requirements. Furthermore, he submitted that this court must find that on the evidence, the dismissal was substantively fair.

[37] On the second ground of appeal, Counsel Kennedy referred this court to the case of **Swaziland Breweries Ltd t/a Swaziland Beverages v Christoffel R Delport (05/2012) [2013] SZICA 05 (20 March 2013)**. He submitted that in the present case the basis for dismissal was redundancy. The appellant became redundant because he refused to be transferred by management yet the transfer is recognized by his contract of employment. He further submitted that operational reasons is not mentioned in Section 36 of the Employment Act but it is the same thing as redundancy.

[38] On the third ground of appeal, Counsel conceded that the respondent pleaded operational requirements as the basis for the dismissal although there was, to some extent, insubordination as well. Based on the submissions and evidence that have been given, he urged this court to find that the dismissal was substantively fair.

[39] On the cross- appeal, counsel submitted that the court *a quo* was correct to find that the dismissal was substantively fair. He however submitted that the court erred in finding that the dismissal was procedurally unfair because there were adequate consultations, and that there was no other reason to engage each other anymore. The requirements for dismissal based on redundancy, were all covered, according to the respondent's counsel, during the consultations.

[40] An application was therefore made for an order dismissing the appeal and allowing the counter-appeal with an order for costs of the appeal including certified costs of senior counsel.

Appellant's replying arguments

[41] In reply Mr Sibandze submitted that notwithstanding the concession that has been made, that the respondent's defence was not insubordination, he argued that insubordination consists of a lawful instruction. In as much as counsel

for the respondent has now pleaded redundancy, this was never pleaded in the court *a quo*.

[42] He further submitted that redundancy is specifically defined in the interpretation section of the Employment Act. The definition is reproduced below:

> **Interpretation**
>
> **2. For the purposes of this Act –**
>
> **"redundant employee" means an employee whose contract of employment has been terminated –**
>
> **(a) because the employer has ceased, or intends to cease to carry on the business or activity in which the employee was employed; or**
> **(b) because the employer has ceased or intends to cease to carry on the business in or at the place in which the employee was employed; or**
> **(c) because any of the following reasons connected with the operation of the business –**
> **(i) modernization, mechanization, or any other change in the method of production which reduces the number of employees necessary;**
> **(ii) the closure of any part or department of the business;**
> **(iii) the marketing or financial difficulties;**
> **(iv) alteration in products or production methods necessitating different skills on the part of employees;**
> **(v) lack of orders or shortage of materials;**
> **(d) because of a natural disaster if the termination is wholly or mainly attributable to the destruction of, or damage caused to, the employers place of business by fire, hurricane, earthquake or other act of God, whether or not similar to any of the foregoing causes;**
>
> **"redundancy and redundancies" shall be construed in the context of "redundant employee";**

[43] Mr Sibandze argued that a refusal to transfer is not a reason for redundancy in the Eswatini statute. He submitted that none of the grounds stipulated in the definition relates to the issues of the present case. He further submitted that there is also nothing close to financial marketing difficulties *in casu.* He then referred to the evidence of Mr Narayadoo at p. 340 to p.343 of the Record where the following is recorded:

> **RC: Mr. Narayadoo, let's turn now to why; not why you wanted to move Mr. Botha, but why you in the Group would want to move employees from one location to another in general? In general what sort of reasons would there be typically for moving people out?**
>
> **RW1: Mr. Kennedy, in management you find that a person comes into a position and he doesn't add value in the first year. He understands the business, finds his feet. In the second year he has consolidated some of the ideas he has garnered in the first year and he probably adds value in the second year to about the third or the fourth or the fifth year. After which it will be the same experience that will be regurgitated all the time; you need to move people around so that you inject new blood, you bring new thinking into the business to improve the business. And so therefore it is good business practice to move people out of positions so that you can grow the business (and) and take it to a different level. And in this particular case, we felt that Mr. Botha having been in the business for such a long time was not adding any new value into the business. He was doing the same things that he was doing for the past few years and we needed to move him out of that position into a new position, and at the same time create an opportunity for a young engineer that we needed to move out of the business in South Africa into Swaziland.**
>
> **RC: You said it was good business practice to move people on this basis; does that apply generally, or only when you've got somebody, whether it be Mr. Botha or somebody else, is not impressing you in the business. In other words, is it the only underperforming employees that you would transfer or would**

you, as a matter of general business practice move everybody on routine?

RW1: I try and move people on routine; not necessarily Mr. Botha in this particular case. And you will find that during my tenure in the region that I looked after, I had moved all the managers around, including people that didn't necessarily want to move. We had another case in the same region – there was an individual that we moved afterwards – but I moved a lot of people and I think in fact, all of the people during my tenure in that region.

RC: Now let's look specifically at Mr. Botha's case: what seems to have been suggested or understood by Mr. Botha's attorney, my learned friend Mr. Sibandze, is that you moved Mr. Botha for a number of reasons; we are going to deal with reasons relate (sic) to your brother and so forth at a later stage. Let's just look at the business reasons given for moving Mr. Botha: it seemed to be suggested that our case is that Mr. Botha was underperforming and that because he was not doing an acceptable job in Swaziland, he was going to be sidelined to Trichardt, and it seems to be suggested that if he hadn't been underperforming in your view, you would have kept him in Swaziland. In other words, was Mr. Botha targeted because he was underperforming and that's why you moved him?

RW1: No. I wanted to move Mr. Botha because the length of time that he was based in Swaziland and the fact that he had been there, there was no new ideas coming through – and in fact if you go back to the performance review that I mentioned, I gave some reasons that he was missing some opportunities in pricing, and in some of the areas, he had actually performed very well and that was reflected in the document, and in some areas he hadn't performed as well as was expected; but there was no new thinking coming through. And it's generally you find managers that had been very long in a particular position tend to rationalize their mistakes. And that was one of the reasons why I needed to move Mr. Botha out of that"

[44] Mr Sibandze argued that the alleged under performance by the appellant is an afterthought. He was, as a matter of fact, doing well in the Eswatini branch. He submitted with emphasis, that the evidence quoted in the paragraph above, doesn't come close to redundancy.

[45] He further argued that it is a fact that the appellant was consulted regarding the transfer. He however, was to be consulted on the redundancy as well, if he was to be made redundant. This is in terms of the Employment Act, section 40 thereof. He emphasized that instead of the employer confirming the transfer as per the letter dated 15 August 2005, it simply gave the appellant (through letter dated 20 October 2005) the option of a separation agreement without having confirmed the transfer.

[46] Mr Sibandze also submitted that ground of appeal number 3 has been conceded to by the respondent's counsel and he therefore applied that it should be upheld by this court, and that the appeal be upheld with a finding that the dismissal was both substantively and procedurally unfair.

First ground of appeal

[47] The appellant states that the court below erred in finding that the interaction between him and the respondent amounted to an instruction to relocate to Trichardt. He also contends that his conduct did not amount to insubordination, as the court below found, because the elements of insubordinate were not present.

[48] Insubordination is defined in the **Black's Law Dictionary, 10th ed**., as:

> ***1.*** *A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment.* ***2.*** *An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give***.**

[49] **Molahleli J** of the Johannesburg Labour Court of South Africa in **Lynx Geosystem SA (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration, Raynold Bracks N.O., Bemawu obo Krishna Govinder and six others, Case No. JR 1935/05**, stated that as *a general rule, for insubordination to constitute misconduct justifying a dismissal it has to be shown that the employee deliberately refused to obey a reasonable and lawful order by the employer.*

[50] The court *a* quo correctly states in paragraph 70 of its judgment (see p.729 of Record) the following concerning insubordination:

> **70. Insubordination has been defined in various authoritative sources as follows:**
>
> **70.1 "Insubordination … presupposes a calculated breach by the employee of the duty to obey the employer's instructions."**

[51] From the above definitions, it is clear that for conduct to amount to insubordination, there must be a willful disregard of an employer's instruction.

52] From the evidence in the Record, it does not appear that the appellant was ever given an instruction to relocate to Trichardt. It appears from the

correspondence exchanged with him that the appellant was merely offered and persuaded to accept the transfer. As correctly pointed out by Mr Sibandze, an instruction is unilateral and does not require a response.

[53] Correspondence that was sent to appellant by email on 13 July 2005 states that "*I have a position available in Trichardt that I would like to offer to you. … I would urge you to consider the position that is being offered*,.." This correspondence does not, in our view, constitute an instruction that directs the appellant to transfer or relocate to Trichardt.

[54] Correspondence that was again sent to the appellant dated 26 July 2005 states that "*I have attached on offer for your consideration*. ... *the offer is conditional on your acceptance. If the offer is acceptable to you, please let me know.* ... Again, this correspondence does not constitute on instruction directing the appellant to relocate to Trichardt.

[55] In a letter dated 15 August 2005, the employer states that "*a formal proposal was put to you to consider a transfer to the Trichardt branch in the capacity of manager*". This confirms, in the view of this court, that the appellant was not being given an instruction to transfer to Trichardt but was merely being persuaded to consider and accept the contemplated transfer.

[56] The letter dated 15 August 2005 also informs the appellant that a consideration has been given to the representations he made. It proposed a further consultation to be held on 18 August 2005 at the Afrox head office. The purpose of the consultation, according to the latter, was to hear the appellant's representations on "***why the proposal should not be confirmed for your transfer to Trichardt***". There is still no instruction given at this date, directing the appellant to relocate to Trichardt. He was only asked to consider the transfer and was entitled to decline. His right to decline stops the moment he is directed to relocate and not when he is still permitted to consider it.

[57] On the 20 October 2005 a letter was directed to the appellant and it states, *inter alia*, that:

> *3.* *…we canvassed the possibility of you returning to South Africa."*
>
> *4.* *… we have, in the past, attempted to negotiate some sort of settlement by mutual agreement, we would like to renew our proposal as follows:*
>
> *4.1* *That we discuss, strictly on a without prejudice basis, a separation agreement between yourself and the company;*
>
> *4.2* *…*
>
> *4.3* *…*
>
> *4.4* *… we attach hereto a proposal with regard to a monetary package for your consideration. …*
>
> *5.* *We request that you kindly consider the content of this letter and that you review the proposed package that is attached to this letter and revert to the writer within seven (7) days from date hereof. Should be this be acceptable, we will then prepare the appropriate termination agreement."*

[58] There is clearly still no instruction given to the appellant to transfer to Trichardt. He was merely given a monetary package proposal for his consideration as a separation or termination agreement.

[59] In terms of the judgment of the court *a quo*, in paragraph 54 at p.722 of the Record, "*there is no formula or special word that is prescribed in law which an employer ought to use in order to convey to its employee an instruction to transfer from one business branch to another. What is required is that the communication from employer to employee must be clear and unequivocal – to the effect that the employee is being called upon to perform a particular exercise.*" (emphasis of the court)

[60] With due respect, the communications exchanged with the appellant do not constitute a clear and unequivocal instruction directing him to transfer to the Trichardt branch. These communications were merely invitations that required his consideration and response or his position towards them.

[61] For the above reasons, the court *a quo* erred in finding that the appellant was guilty of insubordination. This is notwithstanding the fact that insubordination was not even pleaded by the respondent. For this reason, the first ground of appeal must succeed and is hereby upheld.

Second ground of appeal

[62] The appellant states that even if he was guilty of insubordination, the court *a quo* misdirected itself in finding that his dismissal was substantively fair as such dismissal was not brought within the ambit of section 36 of the Employment Act and therefore did not fulfil section 42(2) of the Act.

[63] The appellant, before dismissal, was an employee to whom section 35 of the Employment Act apply. According to the evidence, he had worked for the respondent a period of about nine (9) years at minimum.

[64] In terms of section 35, no employer is permitted to terminate the services of an employee unfairly. Section 36 sets out fair reasons for which an employee's services may be terminated. Section 42 (2) places the *onus* upon the employer to prove that the employee's services were terminated for a reason permitted by section 36. It also places upon the employer the *onus* of proving that in taking into account all the circumstances of the case, it was reasonable to terminate the employee's services.

[65] The court was referred to the judgment in the matter of **Johannes G. Hamman v Unitrans Swaziland Limited, Case No. 143/2001 ICSZ** which appears in the Swazi Legal Information Institute (Swazilii) as **Hamman v Unitrans Swaziland Ltd (NULL) [2003] SZIC 34 (08 December 2003)** where **Nderi Nduma JP**, as he then was, stated that:

> **"… willfully disobeying instructions of a superior is misconduct or gross misconduct depending on the facts of the case. Both offences fall under Section 36(a) in terms of which the offence only becomes actionable after a written warning."** (see paragraph at the top of p.14 of judgment)

[66] Section 36(a) provides as quoted below:

> **"36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons –**
>
> **(a) <u>because the conduct</u> or work performance <u>of the employee</u> has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him;"** (emphasis by this court)

[67] Insubordination, as defined in paragraphs [48], [49] and [50] above, entails a disobedient conduct of an employee, to a lawful and reasonable instruction of his / her employer.

[68] Counsel Kennedy argued that the basis for the appellant's dismissal was redundancy. He submitted that the appellant became redundant because he refused to be transferred by management yet that was provided for in his contract of employment. He conceded that operational reasons for which the appellant was dismissed in not stipulated in s.36 but argued that it is the same thing as redundancy.

[69] Regarding operational requirements (or reasons) which was pleaded by the respondent, **Molahleli J** in **Lynx Geosystem SA (Pty) Ltd** (supra) confirms

that **s.188** of the **South African Labour Relations Act 66 of 1995** provides that an employee's employment shall not be terminated unless the reason for such termination is fair and related to conduct, capacity or operational requirements. (court's emphasis)

[70] It is common cause that the concept of operational requirements is stipulated in the South African statute. It is also common cause between the attorneys that operational requirements is similar to redundancy in the Eswatini statute. In terms of the Eswatini statute, a dismissal founded on redundancy (in terms of **s.40 of the Employment Act)** can be lawfully invoked where five or more employees are affected, by first, amongst other things, giving written notice of not less than one month to the Labour Commissioner. The notice is to be also given to the employees who are to be redundant. They must be further given the reasons for the redundancy, and the date when the redundancies are likely to take effect.

[71] The spirit of s.40 is that the affected employee is to be given notice of any contemplated redundancy that is to affect the employee. The employee is to be also given the reason for the redundancy, and the date when the redundancy is likely to take effect.

[72] The court concurs with Mr Sibandze's argument that a refusal to accept a transfer does not meet the requisites of redundancy as defined in the Eswatini Employment Act (see: paragraph [42] above for definition). Mr

Sibandze is correct that the reasons furnished to justify the transfer **(see: paragraph [43] above)** are not reasons for redundancy under the Eswatini statute. Even when looked at from the financial marketing difficulty component, they still do not satisfy the definition of the local statute.

[73] For the above stated reasons, the court is of the view and finding that the dismissal was not brought within the ambit of s.36, and the respondent did not therefore discharge the *onus* imposed upon it by s.42(2) of the Employment Act. The second ground of appeal therefore succeeds and is upheld.

Third ground of appeal

[74] The appellant states that the court *a quo* failed to appreciate that the respondent pleaded that it terminated the appellant's services because of operational requirements of the business. Notwithstanding the reason stated by the respondent, the court however found that the dismissal was for insubordination. This ground of appeal was rightly conceded to by counsel for the respondent. As a matter of fact, the evidence on the Record is in favour of the appellant on this issue. The court therefore upholds this ground of appeal.

Cross – appeal

[75] The respondent submitted that the appellant was given adequate opportunity to know what was expected of him in relation to the transfer; was given reasons which justified the transfer; was informed of a possible dismissal if he refused to comply; was given a fair and adequate opportunity to make representations on why he declined to accept the transfer and on why he should not be dismissed for his refusal to transfer; was informed of the operational reasons that justified the transfer or to be dismissed should he decline the transfer; that the procedure followed was appropriate to dismiss for operational reasons and that the procedure followed was fair in the circumstances.

[76] It is the court's view that the appellant was incorrectly held to have committed insubordination by the court *a quo*. Even if this court may accept that the appellant was dismissed for insubordination, the court *a* quo correctly held that –

> **80. A dismissal of an employee without a disciplinary hearing has foreseeable detrimental consequences to the employee concerned. The conduct of the employer (in bypassing the disciplinary hearing), has the effect of depriving the employee his right to present evidence, and also to make submission, on extenuating circumstances and/or mitigation of sentence. The extenuating circumstances and the mitigating factors are part of '*the circumstances of the case*' which have to be taken into account when the Applicant's fate is determined.**
>
> **81 In the absence of a disciplinary hearing it cannot be said that the employer took into account '*all the circumstances of the case*' when it dismissed the employee. Consequently, in the present case, the employer has failed to comply with the mandatory**

provision of Section 42(2) of the Employment Act (see: p.738 of Record)

[77] Section 42(2)(b) of the Employment Act requires the employer to prove that '*taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee*'.

[78] This court therefore concurs with the court *a quo* that the dismissal of the appellant was procedurally unfair and confirms the finding of the court *a quo*.

[79] Even when looking at the case from a redundancy dismissal position, the court arrives at a similar conclusion, *viz*., that the dismissal was procedurally unfair. The requirements to be met, per s.40 of the Employment Act, were not satisfied by the respondent. The appellant ought to have been given notice, of not less than one month, informing him that his position has become redundant. He ought to have been given a reason or reasons for the redundancy and the date when the redundancy was likely to take effect. This was not the case *in casu*. The appellant was given an offer to relocate to another branch of the company, an offer which he declined to accept. He was eventually given the option of a separation agreement, an option that was followed by his dismissal. For these reasons, amongst others, the dismissal was procedurally unfair.

[80] The cross-appeal is therefore dismissed.

[81] **Nkonyane J**, in the case of **Hopson Duma Gule (supra)** states that "*substantive fairness requires the court to consider whether there was a valid reason for the transfer.*" (see: paragraph 15). This court has made a finding that even when looking at the case from a redundancy dismissal position, which is a fair reason in terms of section 36, the reasons for the appellant's transfer do not meet the requisites of redundancy as defined in the statute (Employment Act). The reasons furnished by the respondent are therefore not fair reasons in terms of the local statute. For this reason, the dismissal was substantively unfair.

[82] The court therefore makes the following order:

1. The appeal is allowed and the cross-appeal is dismissed.

2. The order of the court *a quo* declaring the dismissal substantively fair is set aside and substituted for an order declaring the dismissal substantively unfair. For the avoidance of doubt, it is declared that the dismissal of the appellant was both substantively and procedurally unfair.

3. Costs of the appeal are granted in favour of the appellant.

_____

T.L. DLAMINI AJA

I agree

_____
M.R. FAKUDZE AJA

I agree

_____
M. LANGWENYA AJA

For appellant: **Mr. M. Sibandze**

For respondent: **Adv. Paul Kennedy, SC**
Instructed by K. Motsa (Robinson Bertram)