IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 1956/2017

In the matter between

JABULANI MASIMULA **Applicant**

And

THE COMMISSIONER GENERAL **1ST Respondent**

HIS MAJESTY'S CORRECTIONAL SERVICES **2ND Respondent**

THE ATTORNEY-GENERAL **3RD Respondent**

Neutral Citation: *Jabulani Masimula vs The Commissioner General & 2 Others (1956/2017) [2018] SZHC 66 (10 April 2018)*

Coram: Hlophe J.

For the Applicant: Miss B. Ngwenya

For the Respondent: Miss B. Mkhonta

Date Heard: 6th March 2018

Date Judgement Delivered: 10th April 2018

Summary

Application Proceedings –Review of an order or decision of the Respondents transferring applicant laterally from one Correctional Insititution to another – Whether Applicant consulted or given a hearing before such a decision was taken –Meaning of the term "hearing of a party" including its nature and effect –Whether a case made for the review of the decision of the Respondent.

JUDGMENT

[1] The Applicant instituted these proceedings seeking an order couched in the following terms:-

(a) 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.

(b) Condoning Applicant's non-compliance with the rules of this Honourable Court.

(C) Ordering and directing that a rule nisi operating with immediate and interim effect be issued directing that the

transfer of the Applicant be and is hereby stayed pending finalization of this application.

(D) Ordering and directing that the transfer of the Applicant is unlawful and is set aside.

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

(F) That the Applicant be granted such further and/or alternative relief as this Honourable Court may deem fit to grant.

[2] The application is founded on an affidavit deposed to by the applicant. The case made by the applicant, who is an employee of His Majesty's Correctional Services is to the effect that he was returning from leave on or around the 6th of November 2017 when he received notice that his name was listed among several names of officers employed by the same Institution as him, who were being transferred laterally from the certain Correctional Institutions to others spread through out the country. The Applicant was in fact being transferred from The Criminal Mental Health Centre (Matsapha) to Mankayane Correctional Institution. When this decision to transfer

applicant was taken he said he had not been consulted prior thereto, which he says meant that he had not been heard before same was taken. Otherwise although the notice itself was issued on or around the 5th September 2017, it was meant to take effect on the 1st of January 2018, some three months and a fern weeks before it was implemented.

[3] Given that the decision to transfer him had allegedly been taken without him being consulted, the applicant took the view that he had to engage his employer and he objected thereto. He upon return from leave consulted with his attorney who wrote a letter to the First Respondent, objecting thereto on mainly two guards. These were that he had not been consulted and therefore had not been heard before the transfer concerned was effected. In this sense he was contending that his said transfer was unfair.

[4] The second ground was that because he had not been consulted and therefore had not been heard before the decision transferring him was taken, his peculiar circumstances namely that he had children who in 2018 would be doing crucial grades or classes had not been taken into account. He contended that his said children would be doing Standard 5 and Form 111

from January 2018. By virtue of this, he contended that his said children would be sitting External Examinations at the end of 2018 and as such it was not practicable or fair to transfer them to new schools. Even on an argument they could still reach Manzini from Mankayane, the argument apparently took note of the fact that it would not be easy for them to arrive.

[5] For these reasons the Applicant contended that the transfer had to be set aside. In fact before the decision could even be set aside, it was prayed that its implementation be stayed pending the finalization of the application. In otherwords that there issued a rule staying the implementation of the decision pending the finalization of the matter. It is important to record that the latter order was granted by the consent of the parties, with the result that that until the finality of the said matter the applicant was to remain at the station from which he was meant to be transferred.

[6] The Respondent's version is that whereas the applicant was on leave when the transfer notice was issued on the 25th September 2017 and eventually reached his station on the 7th October 2017, the officer in charge of the Correctional Institution he was based at had, upon receipt of same, gone to

the applicant's taken it to his house where upon he had met him and brought to his attention the developments about the transfer. In this sense it was disputed that the applicant had only got to know about his transfer when he came back from leave. It was contended that as a matter of fact he had got to know about his transfer just as he was proceeding on leave.

[7] What I can see from the papers filed of record is that after the Applicant's return from leave he through his attorneys exchanged correspondence with the First Respondent. This exchange kicked off with the applicant requesting that his transfer from the Matsapha Correctional Institution to the Mankayane Correctional Institution be withdrawn because his circumstances had not been considered given that he was neither consulted nor was he heard prior to the decision being made. He contended that at his old work station, he occupied a 3 bedroom house which enabled him bring up his children under conducive conditions which allowed the observance of privacy by him as a married family man. This he contended was not the case at Mankayane where he was being transferred to. He also contended he was a sickly person who needed to be closer to his Doctor who was based at Mkhiwa Clinic in Manzini. He raised therein the other grounds referred to above.

[8] The First Respondent responded thereto by means of its letter dated the 15th November 2017. In this letter detailed reasons were given why it was considered proper to transfer the Applicant. The First Respondent stated therein that he had taken into account the applicant's peculiar circumstances particularly that he was married at the time he decided to transfer him. He clarified he had done this by ensuing that the Applicant gets the notice of transfer three months before the transfer itself. This he said was aimed at giving applicant sufficient time to prepare as well as to ensure that if he has children, he can make suitable arrangements for their school as the new year would begin in January.

[9] The First Respondent also clarified that even in 2007, the applicant had done the same thing when he objected to a transfer taking him to Bhalekane Prison from Manzini Prison. He had taken the factors raised then including the issues of illness into account when making the current transfer; which took into account his ill-health as well, hence his allowing him to remain within the Manzini Region which not only took him to within reach by his chosen Doctors but as well, his being transferred to Mankayane where there

was a hospital nearby and within reach on foot from his work station. It was also argued that it was in the nature of the work performed by officers like the Applicant that they had to be rotated and made to each have a feel of all the conditions experienced by all officers in the department concerned.

[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 regards 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 officer in charge are the discussed culminating in whether the decision is maintained or is changed.

[11] It was contended that in the present matter, although the applicant was asked whether he had any objections or grievances he responded that he had nothing to say, which meant, that he registered neither objections nor grievances in line with the applicable procedure in such matters.

[12] It is stated that he only made known the grievances referred to above in the letter he wrote through his attorneys after the expiry of his leave whose contents are referred to above. This was several weeks after his having met the officer in charge, where he was called upon to register his objections, grievances or concerns. This letter it is contended, led to the consultative meeting of the 15th November 2017, attended by the Applicant in the company of his officer in charge, Paulose Dlamini

[13] It is important for me to record, even at this stage, that other than First Respondent's say so on this procedure, there was nothing placed before Court to confirm that indeed this was the procedure and that such a procedure was followed in all transfers at the Respondent's Institution and above all, that it was known to the Applicant and all the other officers meant

to be affected by it. I make this observation being fully aware that for purposes of the matter before me it was not made an issue that this indeed was the procedure being followed in such matters which would have necessitated that this aspect of the matter be decided.

[14] The Applicant responded to the letter referred in the foregoing paragraphs by one dated the 28th November 20117, in terms of which he persisted in his request that the transfer be withdrawn. He maintained he had not had sufficient time to make preparations because he was on leave when the notice first issued. The main issues set out in this letter were the old ones, namely that he had not been consulted prior to the decision and that he had thus not been heard as well as that his children's situation did not allow them to change schools, at that point nor could they afford to attend new schools at that level of their education. Once again the Respondent had, through a detailed letter, dated 21 December 2017, responded and maintained that the applicant had been sufficiently consulted on the transfer facing him as well as on the peculiar issues concerning him.

[15] As a basis for this contention the First Respondent said the following at Paragraphs 2-6 of his said letter:-

> *"2. It is important that we reiterate our earlier submission that the publishment of transfers was made by way of a memorandum dated 25th September, 2017. We further confirm that your client, S/No.1798 Warder Jabulani Masimula was duly notified of his transfer to Mankayane Correctional Centre immediately after the transfers had been published, through his officer in charge. Just to bring you up to speed, Jabulani Masimula started his leave on the 2nd October, 2017 until the 2nd November 2017. When the transfers were published Jabulani Masimula was still working, before going on leave but as soon as the transfers reached his work station, his officer in charge, Mr Paulos Dlamini, dully called the officer to inform him about the transfer as the officer was still around camp. In a nutshell Jabulani Masimula was informed well in good time of his transfer hence the allegation that he only got to know about his transfer to Mankayane Correctional Centre in November 2017,*

when he came back from leave is not true. Furthermore we are of the view that Jabulani Masimula, just like all the other officers, has had enough time to make arrangements for the pending transfer.

3. *Regarding the issue of children who are going to Grade 7 and Form 3, we believe that our previous correspondence addressed this concern as well as we stated that the early publishing of the transfers was also made in light of such eventualities whereby officers would also wish to secure spaces for their school-going children. When the Commissioner General published transfers in September, he also wanted to have sufficient time to make these and other arrangements in light of the transfers.*

4. *Generally there is an acute shortage of accommodation in the service and this malady is well established. To try and mitigate this condition, the Commissioner General has even been willing to allow officers to stay outside camp because of this challenge. If Jabulani Masimula, on the other hand, has been privileged to have a spare*

bedroom in the three bedroom house that you allege he has at his disposal, the office of the Commissioner General is of the considered view that such a privilege should not only be a reserve for Jabulani Masimula as there are other officers who are not so privileged. It is that spirit since he has enjoyed the benefit of such luxury for a period of ten (10) years whilst at the Criminal Mental Health Centre, such privilege should also be enjoyed by other officers who are also being transferred to the other centres.

5. *On the subject of consultations with his Medical Doctor, we feel that same also goes for the issue of consultations which your client alleges that he only got to hear about it when he was invited to the headquarters on the 15th November, 2017. We still maintain that Jabulani Masimula was consulted by the officer in charge and he made no submissions regarding the transfer or raised any objections. The consultative meeting on the 15th November 2017, was a follow-up on the previous*

consultative meeting he had with his officer in charge at station level.

6. *The office of the Commissioner General notes your assertion that your client is not against the transfer and believes that you will also advise your client to comply with the transfer as published. The office of the Commissioner General is also ready to listen to the grievances and/ or complaints that officers may wish to raise, Jabulani Masimula included but, in addressing such appeals the Commissioner General also strives to treat all the officers equally. Transfers, by their nature, present opportunities for our officers to learn something new from a different environment, it helps them grow, and further presents an opportunity to add value in another Centre and another geographical location. All this is done in line with the nature of our job,that we are transferrable and liable to serve anywhere in the country or even outside the country, when the job calls for that."*

[16] It does not seem to be in doubt that the engagements referred to in the foregoing correspondence were held. Otherwise the applicant's case as I understand it, is that all these engagements were held after a decision to transfer him had already been taken. The extended argument from this is that it was very unlikely that any representation he made after the decision had been reached could have made any difference because as at that point, and I assure true to human nature, the First Respondent would only concern himself with defending his decision than taking into account, even favourably to the applicant, any representations made by him.

[17] There is a basis in laws for the applicant to think like that. A consultation is fundamentally aimed at influencing the decision to be taken and not to change a decision that has already been taken. I agree this is because it is often is difficult for a decision maker to accept a change to his decision, particularly if it has to be at the instance of somebody else. The reason for this is that it is in the nature of a human being to want to defend a decision he had taken earlier. Whereas this could be the result of a genuine but mistaken belief that the decision taken was the best that could be taken, it is not unknown that in other instances it would be because there is a belief in

certain other people that to change their decision at the instance of some interventions by third parties is a sign of weakness.

[18] It is for this reason therefore that a consultation should be prior to decision making. This can be best underscored in the case of termination of employment as a result of retrenchments. It is true that in such instances a termination would be procedurally unfair where the decision to terminate was taken before consultation. This would be the case even where the retrenchments would be substantively fair. It may well be that the same situation may not apply in the other spheres of law, where fairness may have to be viewed from the substantive perspective. I must say that unlike where the both procedural and substantive fairness are provided for by statute it may well be that where substantive fairness is apparent, the procedural one, if it has merely a non-compliance on a technical basis than one that is prejudicial. I shall revert to this point later on.

[19] The same considerations taken with regards consultation should apply equally with regards a hearing. The applicant's contention was that he was neither consulted nor heard before the decision to transfer him was taken.

The considerations with regards a hearing prior to taking a decision, particularly if it is prejudicial to the applicant, are similar to those of a consultation having to be embarked upon prior to a decision being taken.

[20] The broad principle of our law on the significance of hearings prior to a prejudicial decision being taken has been a subject of numerous decisions of this Court and the Supreme Court. These judgements include **David Bhutana Dlamini V The Commissioner of His Majesty's Correctional Services and Another, Civil Case No.470/2008 (unreported) Administrator, Transvaal and Another Vs Zenzile and Others, 1991(1) SA 21**; **Sibiya and Another V Administrator, Natal and Another, 1991 (2) SA 591 (D), Sikhatsi Dlamini and Others V Minister of Housing and Urban Development and Others High Court Civil Case No.**

[21] The applicable principle was couched in the following words in the Administrator, Transvaal and Another V Zenzile and Others (Supra) Judgement, as quoted from the David Bhutana Dlamini Vs The Commissioner of His Majesty's Correctional Services and Another (Supra):-

> "*When a statute empowered a public body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision was taken, unless the statute expressly or by implication indicated the contrary."*

[22] The applicant submitted that a transfer by its nature had the effect of adversely affecting him in his rights and he therefore deserved to be heard prior to the decision to transfer him being taken. From the facts of the matter, however, one can see that the procedure set out by the First Respondent as the one governing the transfer of officers at the Respondent's institution does not express that the decision to transfer should be taken after a hearing.

[23] Not only does it not say this expressly, we see in it on an in-depth discussion of the pros and cous of the transfer albeit after the decision had already been taken. This is justified through the fact that transfers in the Respondents institution involve large numbers of officers which make it difficult if not

impossible to effect the transfers in a case where one person was for instance being transferred.

[24] The procedure adopted was also justified on the grounds that the officers who felt that the transfers were prejudicial to them were welcome to raise their objection with the officers in charge of their institutions which would lead to the final consultation meeting between the First Respondent and the officer affected.

[25] A further justification in the matter at hand is that the decision to transfer the officer concerned was communicated some three months prior to its taking effect. This period it was argued enabled the affected officers to have their objection determined timely and where necessary for the preparations including securing alternative schools for their children or even making arrangements how their children would be accommodated after the transfers if they would continue in their initial schools.

[26] I emphasize my earlier observations that this procedure has not been disputed by the applicant; who as observed earlier, only contended herself with saying that the consultation had followed the decision to transfer when according to him that decision should have been preceded by the consultation. This seems a very formalistic position which may not be unfair on the overall.

[27] What cannot be denied is that when the Respondent conducted what from his point was consultation, he went into an in-depth process in terms of which he gave serious thought to every objection and concern raised by the applicant. It seems to me that the question to be answered in this matter is whether it can be said in the final analysis and from the facts of the matter that the applicant was treated unfairly. This is to say if he was treated unfairly in the overall, there would be reason to set aside the transfer and the opposite should also be true if this Court found otherwise.

[28] Although in **David Bhutana Dlamini V The Commissioner of His Majesty's Correctional Services and Another High Court, Civil Case No.470/2008,** the High Court came to the conclusion that a transfer against

the applicant therein had to be set aside because there had not been consultation before the decision transferring him was taken. That case is distinguishable from this one. Glaringly, there was in that matter no consultation prior or after the initial decision to transfer the applicant was taken. In fact according to the Learned Judge who heard the matter (at least as set out in his reasons), the First Respondent (then the Commissioner of His Majesty's Correctional Services the equivalent of the Commissioner General today) did not believe he had to consult the affected officer. Ofcourse this is not the case in this matter. The Commissioner General does not now only believe that he has the duty to consult but he is shown by the facts as having done it in a serious in-depth manner, albeit after the applicant (and many others adding up to 68 or so in number) had already been notified of the impending transfers. The distinguishing factor is therefore that unlike what happened in the Bhutana matter where consultation was an evert, in this matter it is revealed as a process.

[29] It is true in the present matter that although it was after the decision to transfer him had already been taken, the applicant in this matter was engaged and allowed to raise whatever objections he needed to which he did and these were attended to in a detailed manner. It came as no surprise that,

when the matter was argued in court, the issues were at that point only limited to two points, namely that the consultation happened after the decision was taken and was therefore a nullity and that the applicant had children who were doing critical grades where it would be difficult to have them start at a new school.

[30] Dealing with an almost identical situation as that in the present matter, the Supreme Court of Zimbabwe came to the conclusion that although realistically consulted after the decision to transfer him had been taken, the applicant in that matter was found not to have been treated unfairly and as such the transfer could not be set aside. This was in **Gurava V Traffic Safety Council of Zimbabwe Case No.73/2007 [2009] ZWSC 5 (26 January 2009**).

[31] Because of the somewhat striking similarities between these two matters, it is imperative that I state a summary of the **Gurava V Traffic Safety Council of Zimbabwe (Supra).** An employee of the Traffic Safety of Zimbambwe was transferred from its Gweru offices to the Masvingo offices. When this happened he had not been consulted. In fact this transfer was

communicated to the applicant on the 14th November 2003 when the transfer was meant to take effect on the 1st January 2004. After communicating the transfer to the applicant, there ensued engagements between the parties which resulted in the decision to transfer applicant being confirmed. The matter was referred to arbitration where the arbitrator held that the dictates of the *audi alteram partern rule* had not been observed. It for this reason declared the transfer unlawful and ordered that it be reversed. After the Traffic Safety Council had appealed the matter to the Labour Court, the latter upheld the appeal and confirmed the transfer of the appellant. The Labour Court's decision was appealed to the Supreme Court. The Supreme Court dismissed the appeal to it and indirectly confirmed the transfer of the appellant.

[32] On its way to the Judgement dismissing the appeal, the Supreme Court expressed itself as follows:-

> *"The appellant does not dispute the contents of the letter addressed to him on 20 November 2003. His contention is that the original decision of the 10th November 2003 should never have been made without him being granted a hearing. He*

referred this Court to the respondent's conditions of service, and to the case of ***Taylor V Minister of Higher Education and Another 1996 (2) ZLR 772(5)***.

It is conceded and rightly so, by the respondent, that the appellant should have been granted a hearing before the decision to transfer him was made. Indeed that is the principle laid down in Taylor's case.

The appellant's attitude in his submissions is that once that decision was unlawful it should be set aside. If the matter had ended there with that decision made in that manner I would have no hesitation in holding that it was improper, to handle the transfer in that manner although declaring it unlawful would remain an arguable issue depending on the circumstances of the case.

However, that is not the position in this case. To begin with, the appellant made submissions, detailed submissions, in writing against the transfer. As a result, the respondent's directorate held a meeting to deliberate on his submissions. It is not as if, the Respondent refused to hear him.

Can it be said that once the appellant made representations the employer should necessarily have made a different decision?

I do not believe that to be the position and the appellant cannot say that is the position either.

Secondly it has not been shown that the respondent made its original decision on the basis of grounds which have since been proved to be incorrect. It was still open to the respondent to arrive at the same decision even after hearing the appellant.

It must be accepted that the right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. 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.

Good cause in the circumstances, while not easy to define, would include such matters as unfounded allegations, victimization of the employee and any action taken to disadvantage the employee."

[33] Further on in the Judgement that is on the 22nd paragraph, the court had the following to say which explains that the initial failure to consult with an affected employee depending on the circumstances off the case is not the all and everything. In other words, it could happen that where there was no such consultation or hearing initially or before the decision, the *audi alteram partern rule* could still be met, where the applicant was nonetheless allowed to discuss the matter with the employer, including his raising whatever issue that needed to be raised which was itself genuinely and conclusively discussed. The Court said the following to capture this point:-

> *"While the respondent may have erred in not giving the appellant a hearing in the very first place, I am satisfied that since the respondent did not compel the appellant to go on transfer before he was heard, but deliberated on the issue before reaffirming its previous decision the requirement of the audi alteram partern rule was complied with."*

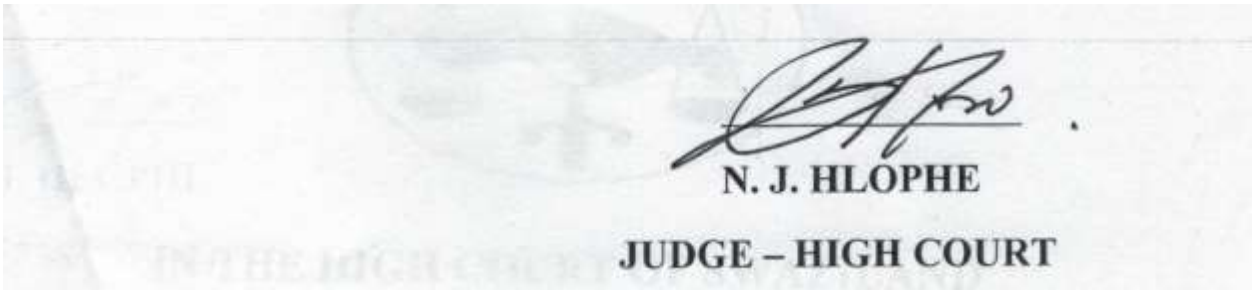
[34] Returning to the facts of this matter, I am convinced that as happened in the **Zimbabwean Supreme Court Judgement of Gurava V Traffic Safety**

Council of Zimbabwe (Supra), although the decision to transfer the applicant from his current place of work at the Matsapha Mental Criminal Correctional Institution to the Mankayane Correctional Institution, the audi alteram partern rule cannot be faulted when considering that the applicant was engaged at length and in great detail before the decision earlier taken was confirmed. Furthermore whatever issue applicant had raised, it had been dealt with fairly and genuinely on the face of it.

[35] I am therefore convinced that the applicant's application cannot succeed, which means that the transfer implemented by the Respondents should proceed. On the issue of what happens to the children of the applicant, I think that the applicant was required from the moment he was notified of the transfer to make alternative arrangements. I was informed that the parties were discussing possible accommodation of the children which would be highly appreciated if it happened even though it will be very difficult for this Court to order such on its own.

[36] For the foregoing considerations I make the following order:-

1. The applicant's application cannot succeed, it is dismissed with costs.



N. J. HLOPHE

JUDGE – HIGH COURT