

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**  
**(HELD AT BRAAMFONTEIN, JOHANNESBURG)**

**Case no: CA 75/05**

**In the matter between:**

**MINE WORKERS SOLIDARITY' UNION**

**ON BEHALF OF**

**IAN MURRAY MACGREGOR**

**Appellant**

**and**

**SOUTH AFRICAN**

**NATIONAL PARKS**

**Respondent**

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| <b>Judgment</b> |
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**Tlaletsi AJA,**

**Introduction**

1. Mr Ian Murray Macgregor (hereinafter referred to as the employee), who was in the respondent's employ was dismissed by the respondent with effect from 31 July 2001 for operational requirements. The appellant disputed the fairness of his dismissal and contended that the dismissal was both

substantively and procedurally unfair. The respondent maintained that the dismissal was fair both procedurally and substantively. A dispute arose between the two parties about the fairness or otherwise of the dismissal.

2. The dispute was ultimately referred to the Labour Court for adjudication. The Labour Court, per Ravelas J, found that the dismissal was both substantively and procedurally fair and made an order on 20 May 2005 dismissing the appellant's claim. Full written reasons for the order were made available on 7 November 2005. The Labour Court subsequently gave leave to appeal. This is an appeal from that order of the Labour Court. The appeal is opposed.

### **The facts**

3. In the Labour Court, Mr J Smal, the respondent's Director: Human Resources, Mr Hector Magome, the Executive Director: Conservation Services and Dr Peter Alexander Novellie, the Co-ordinator: Conservation Services who was the employee's direct supervisor, gave evidence on behalf of the respondent. The appellant testified on his own behalf and did not call any witnesses.
4. The respondent is a national organization which at the relevant time was managing twenty national parks within the republic. Its main business is that of nature conservation. The employee was employed by the respondent with effect from 10 March

1996 in the position of Manager: Environmental Policy. He was appointed pursuant to an independent audit on the technical capacity of the respondent. That audit had been done in 1996 by an international consultant, H. Eidsvik. His report is commonly referred to as the Eidsvick Report. The report recommended that the environmental capacity of the respondent be addressed urgently. Prior to his employment by the respondent, the employee had been employed in the mining sector. The respondent employed him because of his unique qualifications and experience in mining and environmental science. The employee regarded himself as one of few persons with overarching knowledge of mining and environmental science.

5. Magome, who was the head of the department in which the employee was employed, commenced employment with the respondent on 21 February 1996 in the position of General Manager responsible for the Parks Planning and Development Department. He was later appointed as Head of Social Ecology. From 1 September 2000 he was promoted to the position of Executive Director of the Department of Conservation Services which was a new department.
6. The main function of the employee as Manager: Environmental Policy was to design general environmental policy guidelines for the National Parks Board with respect to Integrated Environmental Management (IEM), Environmental Management Systems (EMS), Environmental Impact Assessment (EIA) and

Environmental Auditing (EA). He was also to facilitate the execution of relevant procedures in accordance with policy guidelines for both existing and developing parks. Furthermore, he was also a spokesperson for the respondent on environmental issues and attended meetings at Ministerial level. During 1997 his job description was realigned so that he could deal with the Environmental Impact Assessments in compliance with some new regulations. He testified that during the duration of his employment at the respondent his duties were hampered by insufficient personnel in his unit. He said that, as a result of this, he could not fully comply with legislative requirements. He said that he brought this to the attention of senior management but nothing was done about it.

7. During September 2000 there was restructuring within the respondent. This resulted in a merger between the Social Ecology Department and the Conservation and Development Department. The resultant department was called the Conservation Services. The new department's primary function was to service the respondent and its 20 national parks all over the country.
8. Magome convened a workshop for the staff during October 2000. The workshop was attended by various heads of sections who reported to him. It was chaired by the chairperson of the Conservation Committee. The reason for the latter to chair the workshop was to enable free participation by all employees in addressing the needs of the department. The Chairperson of the

Committee was regarded as an independent person for this purpose.

9. The organogram that was in place at the time when Magome took over had the positions of General Manager: Scientific Services, General Manager: Park Policy Development (which was the position to which Magome was appointed when he joined the respondent), General Manager: Social Services (which was the new position of social ecology after the departments had merged) General Manager: Air Services and Manager: Environmental Policy. The last mentioned position was occupied by the employee since 1996.
10. The employee also made a presentation at the workshop. An agreement was reached in the workshop on key functions to be carried out by the Conservation Services. These were park planning and development, acquisition of new land to expand the national parks system and lastly, research and the monitoring of the different eco-systems within the parks.
11. Various heads of the units, including the employee, presented various models of organograms for the department as suggestions for consideration. The model that was presented by the employee was for the creation of a unit to be called General Manager: Environmental Services. He was proposing to have a secretary, an administration clerk and three environmental co-ordinators for Kruger Park, Cape Peninsula and other parks respectively. This model was seen as an upgraded version of the

position occupied by the employee. The model, was not accepted in the workshop.

12. In the workshop there was agreement on broad strategies as well as the functions of directorates within the department. It was agreed that the General Manager: Scientific Service operate as a support unit for the department and remain in the organisation at head office. It would also be responsible for other scientific service functions throughout the organisation. The position of General Manager: Air Services became redundant and the incumbent took a severance package. The position of General Manager: Park Planning and Development was regarded as important and was retained though it was vacant at the time. The position of General Manager: Social Ecology was also confirmed and retained at that level. The position of Manager: Environmental policy occupied by the employee was not confirmed. This meant, that if the new structure was adopted and implemented, the employee's position would no longer exist.
13. The employee's position of Manager: Environmental Policy had three components. These were Environmental Impact Assessment (EIA), Environmental Policy (EP) and Environmental Management Systems (EMS). Heads of units felt that the employee focused exclusively or mainly on Environmental Impact Assessment. According to Magome the function that the organisation required most was EMS as it would put systems in place to assess whether the organisation was complying with

environmental requirements. At the time the respondent did not have a system in place to do that and, as a result, it was difficult to determine whether the organisation was performing well or badly environmentally.

14. The heads of units believed that an environmental impact assessment did not require a full time position within the respondent. Their opinion was that it was supposed to be an independent function performed by external service providers so that it could reflect an independent and objective assessment of their activities and to avoid the respondent and the parks being 'judge in their own cause'. Magome also believed that it would be cost-effective if the environmental impact assessment was done by consultants as the respondent would not have to carry the administrative costs associated with producing the reports.
15. The employee also believed that in terms of the environmental legislation, environmental impact assessment had to be performed by independent people and this meant that this position had to be based at head office and be independent of the Parks as well as the Conservation Services Department. He accepted that an Environmental Management System was lacking in the respondent which was also an important function. It is for this reason that the employee had previously requested increased capacity from senior management. This request was also made at the workshop. He disputed that it was cheaper to outsource EIA to consultants because, in his view, consultants

were by far too expensive and that he could in addition do other peripheral functions which were also of importance.

16. It is common cause that there were several meetings between October and December 2000 between Magome and the employee regarding the issue of focusing on EMS. The employee maintained that Magome had no clue of what his major function was all about and continued to focus on EIA. He regarded the situation as a professional disagreement and, for that reason, he requested that the respondent commission an audit by someone totally independent to look at the situation and advise the respondent accordingly. He believed that his functions had been created by way of an international audit and were, therefore, unique and important.
17. In the meantime the position of General Manager: Park Planning which had been vacant was advertised during October 2000. The employee testified that he applied for this position towards the end of the closing period. Both Magome and Smal, testified that they had no knowledge of his application. However, Magome noted that the letter of application produced by the employee was not addressed in accordance with the requirements of the advertisement, but was addressed to the Director of Conservation Services and that the employee also indicated that his application was provisional. The employee also indicated in the application that he believed that he did not require any formal introduction and that he would submit his Curriculum Vitae upon request. As suitable candidates from



among those who applied for the post could not be found the position was later left vacant. Magome testified that this position was higher than the one that the employee occupied at the time but that the employee was suitably qualified to 'deal' with it.

18. About the end of 2000 or the beginning of 2001, the Kruger National Park experienced major floods. Roads, bridges and chalets were destroyed. This park is the central pillar that holds the survival of the respondent and was at the time providing close to 70% of the income required by the respondent. It employed about 3 000 employees. As a result of this disaster, the respondent experienced a serious financial difficulty. The government had also previously stopped funding the Kruger National Park through road grants.
19. During January 2001 the respondent's then Chief Executive Officer, who was on sick leave, called all the executive heads of the departments to his residence for a meeting. The appellant also attended that meeting. The critical financial situation of the respondent was discussed. The heads were instructed to come up with plans to ensure that the organisation was going to survive. A decision was taken to cut down on expenditure. A moratorium was put on employing permanent staff as well as consultants. Other interventions agreed upon were to put a moratorium on overtime, training for the specific year and staff travelling. The staff compliment throughout the organisation was to be reviewed. Each Head of Department or Director through his/her management team had to revisit the structure

of his or her department and ascertain whether the positions in the department could be justified and whether there was a possibility of combining certain functions and also the elimination of duplication of certain functions and redeployment of other officials. The entire remedial action was code-named "*Operation Prevail*".

20. On 9 February 2001 the Chief Executive Officer addressed the entire staff on the respondent's financial position and the need to take certain remedial steps. The employees in Cape Town and other staff viewed the address on television. The employees at centres where there was no television connection were addressed through recorded video tapes and an abridged copy of the speech was also circulated. During his address the Chief Executive Officer requested employees to submit suggestions as to how the situation could be improved. He said that, if need be, there could be submitted directly to him.
21. A letter by the Chief Executive Officer outlining the key objectives of Operation Prevail was issued to the staff. It was expected that each single director would go to his/her department to review all positions and take the necessary steps to meet the overall objectives of making sure that the organisation would "prevail". There was to be a consultative process and the expectation was that the exercise would be finalised by 31<sup>st</sup> March 2001. In the process about 660 posts became redundant. The total included posts that were not yet filled.

22. According to Magome he had already started re-looking at his own department as far back as October 2000 and, when Operation Preval was introduced, he simply had to speed up the process. After 31 March 2001 two consultation meetings were held between Magome and the employee. In the first meeting Magome informed the employee that the function of EIA was no longer required within the organisation and that the function required to be performed were those of EMS and EP. He said that these two functions, which were a part of the employee's job functions had been neglected. The employee was not prepared to stop the EIA as required.
21. In the second consultation meeting the employee was requested to come up with suggestions as to how best the EIA function could be accommodated without being seen as part of the respondent and therefore not objectively independent. The employee insisted on having the audit done and stated that he believed that his position had to be retained within the respondent but independent of Department of Conservation Services as he had previously suggested. The dates of the two meetings have not been provided. In response to the statement of claim the appellant has not denied an allegation that these two meetings were held. The employee also did not dispute in his evidence that these meetings took place.
22. On 15 May 2001 a meeting of the Board of the respondent was held. After the meeting Magome met the employee and told him that he had bad and good news for him. He told him that

the good news was that the audit had been approved. Magome explained that in this regard he was referring to the State of the Environment Audit Report. He was not referring to the audit that the employee had suggested. For the latter audit the employee had already worked out terms of reference and it was estimated that it would cost in the region of R100 000.00. Magome testified that he abandoned this suggestion when Operation Prevail set in. He said that he was no longer going to allow consultants to come and dictate to him and the respondent on what functions the employee was to carry out and at what level. He also expressed the view that such an audit would also be contrary to cost savings objectives.

23. What Magome referred to as the bad news was a letter dated 17 May 2001 from Johan Van der Merwe, the respondent's Director of Parks. The letter was addressed to Magome. In this letter it was stated, *inter alia*, that the Parks Department would not be requiring the services of Conservation Services with regard to the environmental management in general, and EIA's in particular. The letter further stated that the park managers would be responsible for the EIA process pertaining to the development in their parks, and that all future visits by the employee to the parks would have to be cleared with Van der Merwe and the respective park manager as to the exact nature and purpose of such visit to avoid confusion. The employee testified that this letter effectively nullified his position and that it was in contravention of the provisions of the EIA Regulations with regard to independence by involving park managers in EIA

processes. The letter also made reference to the Directorate's decision on 15 May 2001. The letter did not provide further details of the decision taken at this meeting. Magome was also not asked any the details regarding this decision, except what he told the employee about the good and the bad news on his return from the board meeting.

24. On 5 June 2001 the employee was handed a letter in terms of Sec 189(3) of the **Labour Relations Act, 1995** (Act 66 of 1995) ("the Act") dated 29 May 2001 declaring his position as redundant. The letter was written by Magome but was delivered by Dr Novellie to the employee. The first paragraph of the letter stated that:

*"As you are aware, SANParks has embarked on an intensive programme to scale down on certain of its operational functions in order to reduce operational expenses and to improve its overall efficiency. The first phase of this exercise which was announced by the Chief Executive in his address on 09 February 2001 affected head Office and the Regional Office in Cape Town".*

The letter further stated:

*"SANParks has consulted with organised labour in order to minimise the effect of this action on employees and to ensure that the Organisation's operational requirements are met. In the light of the above, we regrettably have to inform you that your position has been declared redundant and you may be retrenched, should no viable alternatives be found. This is due to our contention that the functions, which you are*

*currently performing, will no longer be operationally required. Should you not become successful in any of the advertised positions, your services will be terminated with effect from 30 June 2001, with July being paid in lieu of notice"*

25. The appellant testified that when Dr Novellie handed him the redundancy letter, he, (Dr Novellie) appeared shocked and not to know what was going on. Dr Novellie's evidence on this aspect is that he was not shocked at the declaration of the appellant's position as being redundant. He said that he was not party to that decision which was made at director level. He said that he was, however, fully aware that a process was in place to restructure and that an effort was being made to find a solution to certain difficulties that the employee was experiencing in his position within the environmental services function.
26. The employee testified that he went to see the director of human resources on 6 June 2001 who referred him back to Magome after remarking that there was possibly no compliance with procedures in the respondent's declaration of his position as redundant. In his evidence Smal confirmed that the employee came to him with the letter stating that he was shocked and that he was not consulted and that he then advised him to take it up with his director because there had to be a consultation process. Smal denied that he was the one who suggested that there had been no consultation with the employee.

27. The employee forwarded a memorandum to Magome dated 7 June 2001 to Magome. In the memorandum the employee recorded, *inter alia*, certain historical facts relating to his appointment, the difficulties he had encountered in implementing various environmental management practices and his assumption that his position and others within the Department of Conservation services would not be affected. He concluded thus:

*"With the above in mind the sudden declaration of my position as redundant comes as a "bolt out of the blue" and the statement of the fact that it is the SANP "contention that the functions, which you (I) are currently performing, will no longer be operationally required" is somewhat puzzling to say the least as is the timing of this declaration. I would therefore respectfully request a detailed written explanation for this sudden action to afford me the opportunity of possibly understanding the reason for this action and giving me the opportunity of discussing the matter with you at your earliest convenience".*

28. On 8 June 2001 Magome went to see the employee in his office after the Conservation Services meeting as he had promised the employee earlier that morning. The appellant asked Magome why he had made him redundant and he replied that "they" had redefined his position and they were now going to concentrate on EMS only. He also said that he would revisit the employee's job description and that the latter's function would entail new job description requiring to concentration on EMS. He is also said to have undertaken to do it over the weekend and promised to

give it to the employee during the course of the following week, which never happened. The employee testified further that he asked Magome whether he would get the job and if it was on the same grading. He testified that Magome answered in the affirmative to the both questions. However, the employee said that instead of getting the job, the position was advertised. This evidence was not put to Magome during cross-examination and his version on this aspect is only as reflected in the correspondence.

29. On 14 June 2001 Magome responded to the memorandum of 7 June 2001. In his response he stated, *inter alia*, that:

*"I was appointed to this position on 1 September 2000 and in October 2000 we had a departmental workshop which drafted a new vision and strategies for CS. It became apparent from the workshop that the focus of the Environmental Services function that you perform had to be substantially refocused to concentrate on developing Environmental Management System (EMS) for SANParks. Your previous focus on Environmental Impact Assessments (EIAs) a completely independent function was no longer required in CS. Despite this, you have always shown me piles and piles of documentation on outstanding EIAs in National Parks (NPs) to try and convince me otherwise. Logically, I had to wait for our two operational directors, Messrs. David Mabunda and Johann van der merwe, to complete restructuring of their functions. They have independently concluded that the credibility of EIAs can only be maintained by engaging the services of external consultants. As a result, some EIA functions in NPs were declared redundant. This*



*exercise completed by the middle of May 2001 precipitated the letter declaring your position redundant. The letter only formalised months and months of my insistence that you dump EIA's for the much required EMS."*

In the Memorandum Magome confirmed further that the respondent was desperately in need of an EMS and that the Directorate approved that an Independent Environment Audit be conducted as a matter of urgency. He concluded thus:

*"I informed you of this decision a month ago and even showed you confirmation of funding from the Ford Foundation for EA. I asked you to obtain two additional quotations for EA, but you have not (in my opinion) attached the same significance to the EMS and the EA as I do. I have now drafted the advertisement of the Environmental Services function which will focus on developing an EMS that will in time lead to an Environmental Management Policy (EMP). I will indeed have an acceptable EMP by the Johannesburg 2002 Earth Summit."*

30. On 18 June 2001 the employee wrote to Dr Novellie who was in charge of the department in the temporary absence of Magome. In the letter he gave the historical background as to how the environmental management function within the respondent came about and its importance. He expressed his concerns about the declaration of his position as redundant and what alternatives were available. He recorded that he was participating in various committees and structures representing various constituencies within the environmental field. He

wanted to know what he should do about the meetings he had already scheduled. He finally requested that major decisions and the restructuring process be deferred pending the outcome of the audit that he had requested.

31. Dr Novellie responded by way of a letter dated 20 June 2001 and advised the employee that he was not party to the decision to declare his position redundant and could not add anything to the discussions he had already had with Magome. He further advised him to cancel the scheduled meetings and that the position of Manager: EMS was to be advertised shortly and, to his knowledge, it represented the "*alternatives*" under consideration. He advised that all the parks were represented at the meetings at which the future of Environmental Services was decided and were aware of their obligations in terms of the Regulations and will take steps to deal with their own EIA matters.
32. On 22 June 2001 the position of Manager: EMS was advertised internally with the closing date being 29 June 2001. On 27 June 2001 the employee wrote to Smal requesting all the details pertaining to the advertised position. These details were provided by Smal. On 28 June 2001 the employee wrote an urgent five pages memorandum to Smal, inter alia, confirming the previous discussions and correspondence relating to the declaration of his position as redundant. He confirmed his commitment to the respondent, and listed his functions in accordance with his job description and requested to know what

would happen to his functions. He further challenged the advertisement of the position of Manager: EMS if his functions were said to be redundant. He also demanded full reasons for the declaration of his position as redundant. He stated that there had not been compliance with sec 189 of the Act. He referred to historical problems that he had experienced in his unit as well as the audit he had long requested. He demanded a response by 12 noon on 29 June 2001. He sent a copy of the memorandum to Dr Novellie.

33. On 29 June 2001 Magome replied to the letter. He contended, *inter alia*, that the respondent had complied with sec 189 of the Act. He also set out the reasons why the employee's position had been declared redundant which he said had been after various meetings and discussions. The employee was further advised that, if he was interested in remaining within the respondent, the position of EMS would represent an alternative. He was further invited to propose any other alternatives. The memorandum dealt with other specific matters raised by the employee in his memorandum of 28 June 2001.
34. On 29 June 2001, the employee wrote to Dr Novellie informing him that he was applying for the position of Manager: EMS as advertised *under protest* and that all his rights were reserved. He further stated that he did not include his Curriculum Vitae as he believed that his expertise was well known within the organisation but, would avail it, if necessary. On the same date Dr Novellie wrote to the employee advising him that his position

would not be prejudiced by the fact that his application was received late. This was in response to a handwritten note by the employee requesting this assurance.

35. On 3 July 2001 the employee wrote to Dr Novellie attaching five proposals relating to an independent audit of the environmental management function within the respondent and suggesting that a consultant be appointed as a matter of urgency. On 6 July 2001 Magome replied and advised the employee that the responsibility to "action" the audit rested with his office and he would conduct the audit when he returned from leave. He further advised that there was no link between the audit and the declaration of his position as redundant. He further recorded as he had already informed him in his letter dated 29 June 2001, that the prerogative to assign functions to employees rested with the respondent and not with consultants.

36. On 13 July 2001 the employee wrote to Magome and continued to challenge the declaration of his position as redundant and stated, in part:

*"1. In my correspondence of 28 /06/2001 under point S.4 I requested details of all alternatives including the possibility of a contractual position as raised on various occasions by yourself and mentioned to Dr Novellie. These have not been adequately addressed in your correspondence of 29/06/2001. Towards the end of last year you mentioned in passing the possibility of outsourcing the environmental management function including EIA's and if I would consider accepting this on a contract basis. Is this option still regarded as an alternative?"*

He further referred to other alternatives that included retaining the unit without any changes and employing additional staff and consultants to perform some of the functions. He expressed the view that the declaration of his position as redundant was misguided and not properly thought out. On 16 July 2001 the employee wrote to Dr Novellie applying for the position of Manager: EMS "*under protest* and reserving his rights with regard to the *declaration of his position as redundant*" and that he was only applying to preserve employment for himself and to ensure that he continued to receive income. He further recorded that by applying he did not concede or accept that his application condoned or accepted any action by respondent which might or did prejudice his rights relating to his retrenchment. He further stated that with the information available he enjoyed the status of a retrenchee for the purpose of assessing his situation in comparison to other applicants for the position.

37. It is common cause that on 20 July 2001 there was a meeting between the appellant, Magome, Smal and Dr Novellie. The meeting discussed the reasons for redundancy, the alternatives such as consulting, and the position of Manager: EMS and the audit.
38. It is common cause that on 23 July 2001 there was a meeting between Magome, Smal, Novellie and the employee. Subsequent to the meeting, employee's Magome responded to the letter

dated 13 July 2001 dealing with proposed alternatives. The first two paragraphs, which are, in my view, of importance to this matter, read thus:

*"Thank you for your response, dated 13 July, to my invitation to submit alternatives for consideration. What follows is a summary of our meeting earlier today with Jan Smal and Peter Novellie during which I gave a verbal response to the alternatives in your letter of 13 July. The numbered points below correspond with the points in your letter. **1. The possibility of a contractual position?** This is indeed a possible alternative. The offer is for SANParks to pay you a monthly retainer (the exact sum to be negotiated) up until the end of the current financial year (31 March 2002). The details of the arrangement are open to discussion and we invite proposals from your side. Provisionally we envisage that in return for the retainer you will perform specified tasks during a certain work period each month (the tasks and the duration of the work period decided mutually between yourself and the Director: Conservation Services). The tasks could be anything that is in the interests of SANParks in the general field of environmental impact assessment, whether this relates to external or internal development projects or peripheral threats. Outside the specified work period you would be at liberty to conduct private work, or to undertake work for organisations other than SANParks. Depending on needs and subject to mutual agreement, SANParks could engage you to do certain additional projects out of work period specified in terms of the retainer, for which you would be paid an additional fee. The arrangement will be reviewed in March 2002. Provided it is acceptable mutually to yourself and SANParks, the arrangement, or variant thereof, could be extended. However, there will initially be no commitment from either party beyond 31 March 2002.*

*Should you choose this option, the benefits of a severance package will apply."*

Magome went on to state that the other options from the employee relating to employment of additional staff and or consultants would not be viable. This left the employee with either entering into a consultancy agreement with the respondent or letting his application for Manager: EMS be considered. However, in the letter Magome warned the employee that the respondent *could not consider* his application of 16 July 2001 submitted "*under protest*" as the respondent required full commitment from the incumbent of a permanent position. Magome concluded the letter by stating that:

*"if you insist that we have unjustly made your previous position redundant, and intend to pursue actions against SANParks in this regard, it will be difficult to consider you for the alternative position of EMS manager. Should you wish to be considered for this position we strongly recommend that you re-apply, with no conditions attached, by 26 July."*

39. On 27 July 2001 a meeting was held between the employee and Dr Novellie in connection with the employee's redundancy. In this meeting the employee requested more information on the contractual option and raised his concern at the short duration of the proposed contractual agreement and he suggested that it should rather run for the same duration as other consultancy contracts relating to other outsourced functions. The duration of other consultancy agreements was not disclosed by either the employee or Dr Novellie. Dr Novellie undertook to take the matter further with Magome. Dr Novellie enquired from the

employee whether he was going to attend interviews for the position of Manager: EMS scheduled for Monday 30<sup>th</sup> at 12:30. The employee confirmed that he would attend but it would be under the condition stated in his letter of 16 July 2001 (*"i.e under protest and with reservation of his rights in terms of the Labour Relations Act-this matter was relayed to Mr Magome"*). The minutes of this meeting recorded further that no clarity was reached on the consultancy position as Dr Novellie could not reach Magome telephonically at that stage. It was recorded that the employee requested further time to 'clarify certain issues pertaining to the contractual option'. It was then indicated to him that Magome would deal with the matter. Dr Novellie and the employee signed the minutes of that meeting as a true reflection of what had transpired in that meeting.

40. On 30 July 2001 the employee attended a meeting for an interview for the position of Manager; EMS. Present were Magome, Smal and Dr. Michael Knight. It is common cause that at some stage during this meeting the employee requested a meeting with and met privately with Dr Knight for discussions. It is also common cause that during these discussions Dr Knight mentioned to the employee that there would be a lot of work if he opted for the consulting route and that he mentioned the expansion of the Elephant National Park as an example. They thereafter returned to the meeting. It is also common cause that, when the meeting resumed, the employee was not interviewed for the position of Manager EMS. Instead the consultancy option was pursued. There was common



understanding that discussions on this option would be continued the following day.

41. The respondent's case is that the interview was not proceeded with because the employee elected to pursue the consultancy route. However, according to the employee, he was advised at this meeting that he would not be interviewed if he applied "*under protest*" and that he was left with no option but to explore the consultancy option for which, even at that stage he had no details. Both Magome and Smal testified that after having discussions with Dr Knight the employee voluntarily chose this route when it was made clear to him that work would be channelled to him. Both testified further that the condition on the application letter had already been resolved by then. It is common cause that the employee was ultimately not appointed to the position. The position was later filled by the appointment of an external candidate, Mr Spies. It is further common cause that the employee's last day of employment was 31 July 2001.
42. The employee's version differs from that of the respondent as to why he was not interviewed at this meeting. In my view, this is the most critical aspect of this case. It is important that at this stage I set out the versions of the witnesses who were present at the interview.
43. The first witness to testify on this aspect was Smal. On those who attended he mentioned that Dr Novellie was also present and not Magome. This version is not correct because all the

witnesses including the employee, confirmed that Magome attended but that it was Dr Novellie who did not attend. Smal's version on this aspect is, in my view, a bona fide mistake and no adverse credibility inference need be drawn against him. This contradiction, in my view, does not strengthen either party's version and is immaterial. Smal testified that, when the employee sat in the interview, they discussed the possibility of the vacant position of EMS with the employee. The employee had certain reservations relating to the grading of the position and the effect it would have on his salary and benefits. He said that they explained to the employee that his salary and benefits would not be affected. He testified that the respondent had a policy that they were implementing during the entire process of restructuring which was to the effect that, where alternative positions were identified and affected employees applied, their salaries were not to be tempered with if they were higher than the positions applied for. On the employee's own version this explanation had already been given to the employee by Magome when Magome made a promise to provide the employee with a redrafted job description of his position. Smal confirmed that during the interview the employee requested that he and Dr Knight be excused from the interview because he and Dr Knight they wanted to have a separate discussion.

44. Smal testified that Dr Knight and the employee were allowed to have their discussion privately. On their return, they made it very clear that, having assessed the situation, the employee would be more interested in pursuing a consultancy option

rather than EMS position. He testified, that at that point the interview was stopped. He therefore understood this to mean that the employee withdrew his application for the position of Manager: EMS. He said that it was then agreed that the employee would have discussions with Magome and Dr Novellie to finalise the contractual arrangement.

45. The employee's attorney put to Smal under cross-examination that the employee's version was that he was given an "either /or" situation. It was explained that what was meant was that it was put to the employee that he could either apply for the EMS position or go for the option of the independent consultancy and that, and if he was unsuccessful in his application for the EMS position, he would not be considered for the consultancy option. In other words the two were mutually exclusive. This was also denied by Smal. He said that, as with all other affected employees, they explored all suitable alternatives and in this case the employee opted for the consultancy route. In an effort to demonstrate that the panel refused to interview the employee, the employee's attorney put it to Smal that the employee refused to re-apply without the condition that his application was "*under protest*" as stated in his letter dated 23 July 2001. Smal testified that the interview panel did indicate to the employee that it was difficult to pursue the interview if it was "*under protest*" because, should he be appointed in that position, the appointment would be permanent. He said that they informed the employee that they would not like to appoint to that kind of a position someone who did not feel comfortable

about such an appointment. Smal testified that it was at that point that the employee requested to have a private meeting with Dr Knight. Smal conceded that at no stage did he receive a document from the employee that indicated that he was no longer applying "*under protest*".

46. Magome confirmed Smal's version that the employee voluntarily chose the consultancy option. He confirmed that this was after he had discussions with Dr Knight outside of the meeting. It was put to Magome under cross examination that they did not consider the employee's application for the post of Manager: EMS due to the fact that the application was done "*under protest*". His reply was that the employee on his own accord withdrew his application after he had had discussions with Dr Michael Knight. At that stage, Magome testified, the employee had no fear and no insecurity as he would also receive early retirement and still be engaged as a consultant. On the question that his application was not considered because it was still under protest, Magome testified that on the day that the employee attended the interview, the condition of "*under protest*" was no longer an issue because he was convinced that now that the employee had attended he had come to apply for the position because he was interested in the position. He testified that what had to be clear to the employee was that, if he accepted the new position there would no longer be a debate about the terms of reference for consultants and the functions in the new position. He was expected to forget about the past. He denied that the panel refused to interview the employee.

47. The employee's evidence on what happened at the interview was that he reiterated that his application was still under protest and that *'they would not interview'* him under those conditions. He said that he requested a *'caucus'* with Dr Michael Knight and they had a discussion outside the meeting. He testified that he told Dr Michael Knight that what was going on was not fair as he was put in a position in which could not make a "valued decision". He said that Dr Michael Knight then indicated to him that there should be quite a lot of work if he opted for the consultancy route and mentioned the expansion of the Elephant National Park as an example. The employee said that he and Dr Knight thereafter returned to the meeting. In his evidence in chief the employee was asked by his counsel what was then indicated to the other members of the panel when he and Dr Knight returned to the interview. The employee's reply went as follows:

*"Well I did not withdraw my application under protest. So I was forced to go down the contractual route, and I met with him the following day to initiate that process."*

He was then asked whether he indicated to the other panel members that you would rather opt for the consultancy. His answer was:

*"No I did not. I had no option, because I did not withdraw. I made it very clear at that meeting that was going under the conditions that I was applying under protest and they put it in*

*writing that they would not interview me. In fact I was surprised I actually was asked to go to that meeting because as I repeated, they asked me to reapply by the 26<sup>th</sup> which I did not do, and I reiterated on the 27<sup>th</sup> that I was only going there under protest. So frankly I think with the greatest of respect to my colleagues in National Parks it was a scam to draw me where in fact there was no consultation. I did not opt for the contractual route. It was my only option that was left to me."*

48. The employee testified further that after the interview he met one Dr Maree (an Industrial Psychologist) who asked him what was wrong with him and called him to his office. The employee testified that, after he had explained to Dr Maree what had happened, Dr Maree asked him why he could not accept the EMS position and withdraw his application under protest. He said that Dr Maree explained to him that in that way he would guarantee himself a permanent position. He heeded the advise and Dr Maree volunteered at his own request to go to the interview panel and put that proposition. He testified that when Dr Maree returned he reported that he was unsuccessful.
49. Unfortunately Dr Maree was not called to testify about his discussions with the employee and what happened if he, indeed, went to the interview panel. This version was put to Smal. Smal denied that Dr Maree ever came to the interview meeting that day. This version was however not put to Magome who was part of the interview panel. An opportunity to do so arose when Magome testified that in one of the various discussions he had

with the employee he at some stage advised him to consult Dr Maree. The evidence that Dr Maree went to the interview panel to withdraw the "*under protest*" clause is therefore not admissible as it is hearsay evidence and does not conform to the exceptions to the rule.

50. Subsequent to the day of the interview, Dr Novellie was asked by Magome to negotiate with the employee a contract for the provision of services to the respondent. This was in pursuance of the employee's decision to pursue the consultancy option. It is common cause that a number of meetings between Dr Novellie and the employee were held in which they sought to agree on various details of the consultancy agreement. The employee made his own contribution to the negotiations. Indeed some draft agreements were produced in the process.
51. On 23 August 2001 the employee placed Dr Novellie on terms to send him a 'Memorandum of Intent' as well as a final draft before he went, that is the employee overseas. He requested that the final draft be faxed by no later than 29 August 2001. He was due to leave the country on 24 August 2001 and it was to be faxed to a Johannesburg fax number. Dr Novellie advised him that the people from legal and financial services who had to approve the contract and Magome, were not available, and, that he would prepare another draft for Magome. This response was made on 29 August 2001. On the same date and whilst the employee was still overseas a dispute concerning the fairness of the employee's dismissal was referred to the Commission for

Conciliation Mediation and Arbitration ("CCMA") by his union. The referral done was on the specific instruction of the employee.

53. On the 10<sup>th</sup> September 2001 Magome wrote to the employee in response to the employee's request made to Dr Novellie for a "Memorandum of Intent". In the letter Magome informed the employee that in view of his referral of a dispute concerning his dismissal to the CCMA he was reluctant at that point to provide such a memorandum of intent or to further pursue the finalisation of a fixed term contract. Magome proposed that they should, instead, meet upon the employee's return to South Africa in an attempt to resolve the dispute. In response to this letter, a letter was forwarded to the respondent on behalf of the appellant on 10 October 2001 arranging a meeting. Magome testified that he telephonically discussed the contents of the letter with a representative of the employee's union. He said that he advised him that the respondent was still prepared to give the employee the consultancy contract. The union representative's employee undertook to revert back to him after taking instructions from the employee. Magome testified that the union representative never reverted to him and the matter took its course at the CCMA. In the end the consultancy agreement was not finalised.
54. The employee was paid his salary for a period of three months after his last day of employment by the respondent. Magome testified that this was due to human error. The payment was



discontinued thereafter. It is not known if the money was refunded.

### **Proceedings in the Labour Court**

55. In the Labour Court the appellant contended that the dismissal of the employee was both substantively and procedurally unfair and sought reinstatement, alternatively compensation and costs. It disputed that the employee's position had become or should have become redundant. The respondent contended that the employee's dismissal was based on its operational requirements and, more particularly, that the position had become redundant.
56. The Labour Court found that on the evidence presented by the respondent's witnesses, there was 'a strong' commercial rationale for the restructuring of the respondent's operations and to reduce its "wage bill". The Labour Court held that it was up to the respondent to decide how the functions of the employee should be performed and that the respondent did not require the employee's 'permission and blessing' to make policy shift to accommodate its operational requirements' for financial survival. The Labour Court found that, on the evidence, the decision to declare the employee's position redundant was a bona fide one, despite the fact that the employee believed that his function should continue. The court reasoned that the employee knew very well that he had to leave EIA'S and that he had since October 2000 known that his position was threatened.

57. With regard to the contention on behalf of the appellant that the respondent should have instituted disciplinary proceedings once it became clear that the employee was refusing to change his focus as instructed, the Labour Court recorded that the argument was not pursued with much vigour. However, the Labour Court accepted Magome's version of his style of management when dealing with senior management and held that no inference should be drawn from his failure to discipline the employee. The court reasoned that it was clear that the employee did not have the intention to be deliberately insubordinate.
58. The Labour Court further found that the employee was genuinely assured of a position in the proposed structure, but that all those affected accepted the new changes and that it was only the employee who was adverse to any changes to his position. The Court held that, if the employee had followed the instructions of Magome, he would have been retained in the employ of the respondent in the position of Manager: EMS. His 'intransigence', the Labour Court held, caused the respondent to advertise that position internally and treat all the applicants the same. The Court found further that the respondent was entitled to decide not to accept an "under duress" application given the fact that a long consultation process which included meetings and correspondence had taken place. The employee, the labour court held, would have withdrawn the condition if he was interested in the position of Manager:EMS. The court stated that

it was because of the employee's his own actions that Spies was appointed to that position.

59. The Labour Court consequently found that the respondent was entitled to declare the employee's position redundant and that a fair procedure was followed on dismissing him.

### **The Appeal**

60. In the view that I take of the matter, the point which counsel for the respondent took is fatal to the appellant's contention that the dismissal of the employee was both substantively and procedurally unfair. That is the point that the employee made an election at a certain stage to go the consultancy route and, once he had made that election, he could not subsequently complain that he had been dismissed unfairly. The employee made that election on the 30<sup>th</sup> July 2001. This is how he made that election:

60.1 Prior to the 29<sup>th</sup> July 2001 he had applied for the position of Manager:EMS "under protest" because, it would seem, he still wanted to reserve his right to challenge either the respondent's decision to declare his post redundant or because he still wanted to challenge his dismissal which appeared to be imminent.

60.2 On the 30<sup>th</sup> July an interview had been scheduled when the employee would be interviewed for the position of Manager:EMS.

60.3 The employee came to the meeting that was meant to be his interview for the above position.

60.4 On the employee's version the first respondent's attitude at the interview was that his application for the position of Manager:EMS would not be considered unless he withdrew the "*under protest*" part of that application and, if he withdrew that part, then he would only be considered for that position if he was not going to pursue the consultancy route and vice versa. On the employer's version, the first respondent was prepared to consider the employee for the position of Manager:EMS if he did not pursue the consultancy route and vice versa. The first respondent's version was that the "*under protest*" part of the employee's application was no longer an issue at that stage and, provided that he was not pursuing the consultancy route, they would consider his application for the position of Manager:EMS.

60.5 The employee decided to go the consultancy route and to that end, subsequently held negotiations with the first respondent's representative aimed at the conclusion of an agreement in terms of which the first respondent would

give him some work as a consultant and not as its employee.

60.6 The employee became impatient with the first respondent's representatives and ended the negotiations before the negotiations could reach finality.

60.7 When the employee had ended the negotiations relating to the consultancy, he then sought to revert to the dismissal issue and referred an unfair dismissal dispute to the CCMA.

61. On the above facts there can be no doubt that the employee could not pursue both the option of appointment as a full-time Manager: EMS and the option of being a consultant because the consultancy route necessarily required that the employee be an independent contractor. There can be no doubt that if, the negotiations relating to the consultancy option had resulted in an agreement, the employee would not have referred the dismissal dispute to the CCMA and, ultimately, to the Labour Court. He referred it because his election did not work out the way he may have wanted it to work out or simply because he changed his mind about the wisdom of his election. His remedy lay elsewhere but not with pursuing an unfair dismissal claim. In the meantime the first respondent had relied on the election that the employee had made.

62. Although the employee sought to argue that he was pressured into pursuing the consultancy option, there is no doubt that whatever pressure, if any, may have been put on him, it did not amount to duress in law. The decision to go the consultancy route was voluntary and, therefore, completely valid in law. Even if the employee's dismissal was unfair, it seems to me that this is a case where he would not have been entitled to any relief because whatever financial loss he suffered might not have occurred if he had not prematurely ended the negotiations for a consultancy agreement.
63. In the light of the above, the appeal should not succeed. With regard to costs I am of the opinion that the requirements of the law and fairness do not dictate that an order of costs should be made in this case.
64. In the result the following is the order of the Court:
- (i) The appeal is dismissed.
  - (ii) There shall be no order as to costs.

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Tlaletsi AJA

I agree.

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Zondo JP

I agree.

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Waglay JA

For the Appellant: Mr Van der Riet SC

Instructed by: Willem Koekemoer Attorneys

For the Respondent: Mr R Sutherland SC

Instructed by: David Short Attorneys

Date of Judgment: 11 December 2007

