

Sneller Verbatim/HVR

## **REPORTABLE**

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT PORT ELIZABETH**

**CASE NO: P112/02**

In the matter between:

**TIELMAN NIEUWOUDT BASSON      Applicant**

and

**PROVINCIAL COMMISSIONER (EASTERN CAPE)**

**DEPARTMENT              OF**

**CORRECTIONAL**

**SERVICES**

**Respondent**

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**J U D G M E N T**

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## **NDLOVU AJ**

### **Introduction**

This review application was presented before me on 6 February 2003 for oral arguments by representatives of both parties. I delivered my judgment on the following morning, being 7 February 2003, in terms of which the application was dismissed and an appropriate costs order made. I reserved my reasons for judgment, which now follow hereunder.

The applicant is an employee of the Department of Correctional Services (the Department) and is currently serving under the provincial command of the Provincial Commissioner of the Eastern Cape Province (the respondent). He is stationed at the Kirkwood Management Area, outside Port Elizabeth, where he is designated as Divisional Head: Agriculture. He holds a B.Sc Honours degree in Agriculture.

In terms of the notice of motion, the applicant sought an order:

- "1. reviewing and setting aside the decision of the respondent taken on or about 27 July 2001 to finally transfer the applicant from the Kirkwood Management Area to the Umtata Management Area.
2. directing the respondent to adhere to the official transfer policy of the Department of Correctional Services, should the Department decide to continue with the transfer of the applicant, in the event of the above Honourable Court reviewing and setting aside the decision referred to in paragraph 1 above."

## **The Parties' Contentions**

The applicant alleged that the respondent's decision to transfer him was both substantively and procedurally unfair. He contended that the transfer was substantively unfair in that, from the respondent's own conduct, it was unclear whether or not the reason to transfer him was based on the Department's operational requirements or on equity. He claimed that it was procedurally unfair in that the respondent, in implementing the transfer, did not follow the guidelines as laid down in the respondent's own official transfer policy (the Transfer Policy). He further alleged that the transfer was tantamount to a demotion.

The respondent contended that the applicant's transfer was necessitated by a dire need of agricultural development and upliftment in the Umtata Management Area and that the applicant was, in the light of his qualifications and skills in the field of agriculture in the Province, the most suitable candidate to initiate and undertake the proposed agricultural project in Umtata. The project would enhance the Department's capacity of its self-sufficiency in the agricultural food production, intended to cater for the essential needs and obligations of the Department. For this reason, the respondent submitted that the transfer was based on the respondent's operational requirements and was in the interests of the Department.

## **The Legal Position**

This Court is empowered to entertain this review application, in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 (the Act).

The Department is established under section 7(2) of the Public Service Act, 1994 (Proclamation No. 103 of 1994) (the Public Service Act) and is, in terms of section 3(1) of the Correctional Services Act 111 of 1998, as amended (the Correctional Services Act), part of the Public Service, established under section 197(1) of the Constitution of the Republic of South Africa Act 108 of 1996, as amended (the Constitution). In terms of Section 7(3)(a) of the Public Service Act, read with section 3(5) of the Correctional Services Act, the Commissioner is designated as head of the Department.

A management area is defined in section 1 of the Correctional Services Act as “an area determined by a Provincial Commissioner, which consists of one or more prisons or offices and which is under the control of a correctional official designated as an Area Manager.” In turn, the area manager is defined, in the same section, as “a correctional official, appointed by the Commissioner, in charge of all correctional officials who are on the establishment of a management area or office or who have been attached thereto for duty.”

The transfer of officials of the Department is a matter within the domain and

competence of the Commissioner, by virtue of section 3(5)(g) of the Correctional Services Act. In terms of section 97(2) of the said Act the Commissioner has the power to “delegate any of the powers vested in him or her by this Act or any other Act to any correctional official or other person employed by the Department ... . “ Hence, by virtue of this section, the Commissioner promulgated and issued the Transfer Policy during the year 2000, in terms whereof all matters pertaining to transfers of officials below the rank of Deputy Director, were decentralised and delegated to the various provincial commissioners of the Department. *(See paragraph 7.1.1 of the Transfer Policy).*

I propose to refer specifically to some of the provisions of the Transfer Policy which, in my view, are more intimately pertinent to this application. Paragraph 3.1 of the Transfer Policy makes reference to regulation 2(3) of the Correctional Services Regulations, which provides that:

"Whenever the interests of the Department require, a member shall be liable to serve in any part of the Republic and he may be transferred from one prison to another, or from a prison to an office, or from an office to a prison, or from one office to another or from one branch of the Department to another."

*(The regulations were promulgated through Proclamation No. R1809 published in the Government Gazette No. 5151 of 27 September 1993).*

The Transfer Policy further provides, *inter alia*, as follows:

- "4.1 A transfer must be well considered in the public's interest and ought to be the result of careful human resources and/or career planning. Practices involving rotation of personnel are also transfers.
- "4.2 Transfers may not be used as a punitive measure."
- "4.3 ...
- "4.4 The transfer must take place in consultation with the officer as well as his/her supervisor. In specialised occupational classes, the relevant DC (presumably, the Deputy Commissioner) should also be consulted."
- "4.5 "An employee who is being considered for a transfer may be represented and assisted by a representative of his or her union at every stage of the process."
- "5. In considering a transfer, irrespective of the origin of the request, the following guidelines must be taken into account before a final decision is reached:
  - I. There must be a valid and sufficient reason to transfer or not to grant a transfer to an employee. Reasons to be supplied in writing to employee concerned.
  - (b) The interests of the Department and the broader State interest. Such interest to be motivated.
  - (a) The interests of the individual employee whose transfer is being considered, such as the personal circumstances of those affected.
  - (b) The employee's career development and utilisation.
  - (c) The availability of a suitable vacant post on the financed establishment into which the employee may be transferred.
  - (d) The availability of funds.

(e) A reasonable notice from the date on which the transfer is approved, to the date before the physical relocation of the officer. A 30-working days' notice is regarded as reasonable, depending on the circumstances and merits of each case.

(f) There must be an induction/orientation programme for the transferee at the new station."

The transfers initiated by the Department are further governed specifically by paragraph 6.2 of the Transfer Policy, which provides, *inter alia*, as follows:

"6.2.5 If the employee makes representations, the person responsible for considering the transfer must consider the representations. After the representations of the employee have been considered, the employee concerned must be informed in writing that the representations were considered, and the outcome must be stated. If the representations were not favourably considered, the reasons why the representations were rejected must be set out in brief."

It would appear that the provisions of paragraph 6.2.5 of the Transfer Policy accord with the provisions of the Constitution, which, in this regard, stipulate that:

"33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights , and

must -

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an efficient administration.”

Pursuant to subsection (3) of section 33 of the Constitution, the Legislature enacted the Promotion of Administrative Justice Act 3 of 2000, in terms of which any administrative decision taken by an organ of state or any person (natural or juristic), in the exercise of a public power or performing a public function in terms of any legislation, is liable to judicial review, if such decision is found, *inter alia*, to be arbitrary or capricious, taken in bad faith or in a procedurally unfair manner, actuated by bias or reasonably suspected bias, or other ulterior or improper motive, (see: Sections 1 and 6). In *Simela and Others v MEC for Education, Eastern Cape and Another* [2001]

9 BLLR 1085 (LC), this Court (per Francis AJ, as he then was) held:

“In addition to fair administrative action, State employees are afforded a Constitutional right to fair labour practices. Although the unfair transfer of an employee is not catered for in the LRA, an employee is not precluded from relying directly on the Constitution to enforce his or her right not to be subjected to unfair labour practices.” (*at 1099, para 56*).

“A decision to transfer an employee without prior consultation amounts to an unfair labour practice. ...” (*para 57*).

(*See section 23(1) of the Constitution*)).

In *Matheyse v Acting Provincial Commissioner, Correctional Services and Others* [2001] 22 ILJ 1653 (LC), the applicant was employed by the Department as an Area Manager for the Allandale Management Area at



Paarl, in the Western Cape Province. He was transferred to Malmesbury against his will and he launched urgent application proceedings to this Court against the transfer decision. The Court granted him the *rule nisi*, incorporating interim relief, ordering, *inter alia*, that, pending the return date, the Department be interdicted and restrained from compelling the applicant to assume duties at Malmesbury with effect from 1 February 2001. On the return date the *rule nisi* was confirmed. The Department appealed against the Court's decision.

In the ensuing appeal, reported as *Acting Provincial Commissioner, Correctional Services and Others v Matheyse (1) [2002] 23 ILJ 2192 (LAC)*, the Labour Appeal Court upheld the decision of this Court and dismissed the appeal with costs, for the reasons alluded to hereunder.

### **Analysis and Evaluation of Evidence**

It seems to me that the facts in *Matheyse's* case are starkly distinguishable from the facts in the present case. In *Matheyse* the LAC found that, in transferring the respondent (the applicant in the Court *a quo*), the appellant (the Acting Provincial Commissioner) violated a written undertaking issued by the Commissioner in a letter dated 12 December 2000, addressed to the Public Servants Association (the PSA), in respect of all the Department's employees serving in the Western Cape, that transfers "shall not be forced on them". (*at 2199, para 15*). On the same date of the undertaking the Acting Provincial Commissioner of the Western Cape held a meeting with his senior officials at which he reiterated the Commissioner's undertaking that "no persons would be transferred against their will". (*at 2220, para 16*), The Labour Appeal Court, per Mogoeng JA, held :

"Any official statement from the commissioner, in respect of transfers in particular, must be taken seriously because he is not only the chief accounting officer of the national department, but he also has a final say in respect of the transfers. In this connection, it is also important to

bear in mind that his aforementioned undertaking was not just given on his own initiative. It was provoked by a complaint by the PSA, a trade union, that the transfers of its members in the Western Cape were marred by irregularities. They wrote to him expecting some intervention or assistance from his office. By virtue of the powers vested in him, and expecting his word to be taken seriously the commissioner assured the PSA, and by implication all the department's employees in the Western Cape, that no employee would be transferred against his/her will." (*at 2201, para18*).

The learned Judge of Appeal proceeded in his judgment and concluded as follows:

"(The Acting Provincial Commissioner) committed a gross irregularity when he decided to transfer the respondent against his will, in total disregard of the express undertaking given or promise made by the commissioner and (the Acting Provincial Commissioner) himself that no employee would be transferred against his/her will. Since the promise in question has not yet been withdrawn, the respondent had a legitimate expectation of not being transferred against his will, at the time of this transfer. It is in the interests of good administration that the appellants as the functionaries of the department should act fairly and should honour the promise or undertaking they made or gave since it does not compromise or conflict with their statutory duty to transfer employees as and when the need arises. The undertaking, until properly revoked or withdrawn, effectively bars the appellants from acting contrary to its terms. The appeal, therefore, falls to be dismissed." (*at 2205, para 24*).

The *Matheyse's* decision is distinguished in the following respects:

(a) The question of the Commissioner's undertaking, as obtained in *Matheyse's* case, was never raised in the present case. Therefore, it can reasonably be assumed that no such undertaking applied in the Eastern Cape.

(b) Instead, in the present case the transfer of the applicant has a tacit approval of the Commissioner. In his representations dated 3 August 2001, the applicant forwarded a copy thereof to the Commissioner for his information and attention. In his letter reference S16/5 over 12286109 dated 26 September 2001, the Commissioner responded, *inter alia*, as follows:

"I have now had the opportunity to attend to the matter and can provide you with the following feedback:

"Firstly, I have to point out that the decision to transfer employees within provincial borders is within the delegated authority of the Provincial Commissioner. This office has no intention and reason to intervene with the delegated authority of the Provincial Commissioner. This office understands that there is a desperate need for your services in Umtata.

"The matter has therefore been referred back to the office of the Provincial Commissioner of the Eastern Cape from whom you can expect a further communication."

It is apparent that the developments that culminated in the applicant's transfer originated from an advice which the respondent obtained from Mr G

Letlole, the acting deputy commissioner of a division known as the Faculties Management of the Department.

The acting deputy commissioner, in his letter dated 20 August 2000, advised the respondent as follows:

- "1. My recent visit to your province has reference.
2. I have already forwarded my observation on the infrastructure (buildings) in your province to your good office. I however wish to bring to your attention the huge potential the Umtata Management Area possess insofar as agriculture is concerned. I would advise that you seriously consider transferring the necessary human and other resources from within your province to exploit and tap such great opportunity for the self- sufficiency of your province.
3. I hope and trust this will enjoy your positive approval."

Pursuant to this advice, the respondent instructed his provincial control officer, a Mr Mpolweni, to identify a suitable candidate for transfer to Umtata Management Area "with a view to developing agriculture in that area" (*see paragraph 3.2 of the respondent's answering affidavit*). Mr Mpolweni identified the applicant as the most suitable official to initiate and undertake the agricultural project in the Umtata Management Area. (See paragraph 3.3 of the respondent's answering affidavit). This then necessitated his transfer to Umtata.

It was further alleged by the respondent that a meeting was arranged with

the applicant during September 2000 at which the proposed Umtata agricultural project was discussed and an indication made to him that he was being considered as a suitable candidate to initiate and undertake that project. The respondent contended that the applicant showed not only his willingness to be transferred to Umtata but he was quite ecstatic about the idea and looked forward to the challenge.

However, the applicant vehemently denied that he ever showed interest, let alone the excitement, about the transfer at any stage. I propose not to make a credibility finding on this factual dispute, since the determination thereof will not be necessary for the outcome of this case. On 9 March 2001 and pursuant to the Faculties Management's advice, referred to above, the Area Manager of Kirkwood served the applicant with a letter of transfer, which read as follows:

"Re: Transfer to Umtata Management Area: Yourself

1. The Provincial Commissioner's letter S54/2 dated 2001.03.09 refers.
2. You are hereby informed that you have been identified as the most suitable official that will be able to uplift, develop and improve the standard of agriculture in the above-mentioned Management Area.
3. The Department of Correctional Services relies on your skills, knowledge and experience as far as Agricultural Practice is concerned and as such bestows upon you the task of building up a well trained highly disciplined and committed team that would put

your new Management Area in par with other farming Management Areas.

4. Your transfer is on state cost, time and accommodation. Please liaise with your new Area Manager in this regard.
5. The transfer is effective as from 2001.03.01.
6. Congratulation on your appointment."

It appears to me that the contents of this letter reflect the transfer having been based on operational requirements of the Department. There is nothing therein which suggests that it was based on equity.

In response to the transfer letter of 9 March 2001 the applicant submitted his written representations dated 22 March 2001, which were based on the following topics:

- (a) No opportunity was accorded to the applicant to make representations.
2. The transfer was not in the interests of the Department.
3. There were no challenges for the applicant in the Umtata Management Area.
4. The transfer was tantamount to a demotion.
5. There was no consultation conducted with, *inter alia*, his supervisor, his union representative, the Deputy Commissioner of Industries and himself, prior to the transfer being implemented.
6. There was no vacant post for the applicant in the Umtata

Management Area.

7. The applicant's personal circumstances were not taken into account, which included the following:

(a) That he had two children who were attending an Afrikaans school in Kirkwood and that there was no Afrikaans school in Umtata.

(b) That he had recently bought a house in Kirkwood and that reselling it would cause him to incur undue financial loss of about R100 000.00.

(c) That his wife had started a new business in Kirkwood, which contributed additional income to the family household.

Indeed, it seems to me, most of the applicant's representations involved matters which, in terms of the Transfer Policy, the respondent ought, indeed, to have taken into account before the letter of transfer was served on the applicant, in the first place.

On 22 March 2001 the respondent wrote a letter to the applicant whereby the applicant's transfer of 9 March 2001 was withdrawn. In the same letter it was indicated to the applicant that consultation meetings would be held with him within the next seven days. It is common cause that on 29 March 2001, presumably pursuant to this letter, a meeting was held between the applicant and the respondent's representatives. It was submitted to the Court, on behalf of the respondent, that this meeting was not a fruitful one because the

applicant said he would not participate in the meeting before his demand was met for a written response to his earlier representations. That was how the meeting was aborted.

On the same day (29 March 2001) the respondent delivered a letter to the applicant wherein he referred to the aborted meeting. In that letter the applicant was advised that it was still the respondent's "intention to utilise (the applicant's) services as Head of Agriculture: Umtata Management Area." The respondent proceeded and requested the applicant to file within seven days his response thereto. The seven-day period was to expire on 5 April 2001.

The applicant responded. In his further representations dated 3 April 2001 (albeit signed by him on 4 April 2001) he basically repeated his submissions of 22 March 2001, save that he then made some references to certain provisions of the Constitution.

It was noted that as at the time the applicant submitted his second representations (dated 3 April 2001) the applicant had not yet received a written response from the respondent as required in terms of the Transfer Policy.

On 27 July 2001 the Area Manager, on behalf of the respondent, delivered to the applicant the second letter of transfer which read as follows:

"Re: Transfer to Umtata Management area: Yourself

"1. With reference to the respondents's letter reference number S5/4/2



dated 2001/03/29 on the above matter, I have the pleasure to inform you that a decision has been made as follows;

- 1.1 Your transfer to the above Management Area as a Divisional Head Agriculture has been finally decided;
- 1.2 You are therefore expected to report to your new Area Manager on or before 1<sup>st</sup> August 2001;
- 1.3 Arrangements for your accommodation and transportation of your personal belongings must be made with your new Area Manager in advance.

“2. I wish you success in your new challenge in developing the agriculture section in UMTATA.”

In my view, paragraph 2 of this letter was yet another clear indication that the motive behind the applicant's transfer was based on operational requirements on the part of the Department, and not on equity.

The respondent's second letter of transfer was reacted to by the applicant *per* his further representations dated 3 August 2001, the copies of which he addressed to the Commissioner, the Director: Industries and the respondent. In his representations the applicant complained, *inter alia*, of short notice in that he had received the second letter of transfer only on 30 July 2001 which called on him to report for duty at Umtata on 1 August 2001.

A response from the Office of the Commissioner was only forwarded to the applicant on 26 September 2001, whereby the Commissioner appeared to defer to the decision of the respondent. The Commissioner preferred not to

interfere in the respondent's delegated powers of transferring members of personnel within the Province. The contents of the Commissioner's letter are cited elsewhere in this judgement.

There was a further lapse of time without the applicant's representations of 3 August 2001 being responded to by the respondent, until 10 December 2001 when the Area Manager delivered another letter to the applicant advising him that his transfer to Umtata had been postponed and that it was then to take effect on 1 December 2001. The applicant continued to resist the transfer and did not report for duty at Umtata as directed.

On 5 February 2002 this Court granted an interim order, by agreement between the parties, in terms of which the respondent was interdicted and restrained from refusing to allow the applicant to work in his post as Division Head: Agriculture at the Kirkwood Prison, pending the finalisation of a review to be launched in this Court. The applicant was further granted leave to launch the review proceedings within 10 days. Pursuant to this interim relief, the applicant instituted the present proceedings on 18 February 2002.

On 20 March 2002 (a month after the applicant instituted this application) the respondent, for the first time, responded to most of the applicant's grievances. Noticeably, however, was the omission to deal with the question of schooling of the applicant's children. It was only when the respondent filed his answering affidavit on 2 July 2002 that this aspect was responded to. In

other words, the respondent's combined responses, as found in his letter of 20 March 2002 and his answering affidavit filed on 2 July 2002, appear to me to have responded to virtually all of the applicant's grievances.

At this point in time the respondent's response to the applicant's complaints can be summed up as follows:

[1]. **That the applicant was not accorded opportunity to make representations.**

The letter dated 29 March 2001 (whereby the first transfer was withdrawn) called upon the applicant to submit his representations, if any, within seven days to the respondent's stated intention to utilise his services as Head of Agriculture for the Umtata Management Area. In my view, the applicant was thereby accorded opportunity to make representations. Indeed, he submitted his representations on 3 April 2001. (see also paragraph [5] below).

[2]. **That the transfer was not in the interests of the Department.**

In terms of the letter dated 20 August 2000 from the Department's Faculties Management it appears that the transfer of the applicant was considered in the best interests of the Department. It is further observed that in respect of both letters of transfer dated 9 March 2001 and 27 July 2001 the transfer of

the applicant was clearly based on the Department's operational requirements, and not on equity.

The respondent's motive, in this regard, was also confirmed in paragraph 12 of his answering affidavit where he deposed, *inter alia*, as follows:

"12.1 It is my intention to expand the infrastructure and the agricultural operation in Umtata. This will prove to be a massive and challenging project and accordingly I require someone with the greatest experience and expertise to head such a project. The Kirkwood operation is almost entirely self-sufficient. This is due almost entirely to the work of the applicant. It is my aim to ensure that the Umtata operation functions at a level equivalent to that of the Kirkwood operation. At this stage it has been neglected and is in dire need of attention in order to expand it and to lift its infrastructure to a level equal to that of the Kirkwood operation.

"12.2 The fact that Umtata is now the '*smallest prison farm*' is the exact reason why I require the transfer of the applicant to that area. The potential of that area simply has not been tapped." Again, the manner in which the respondent described the applicant, in paragraph 3 of his letter dated 20 March 2002, simply showed the high regard and esteem in which he placed the applicant and the accolades he bestowed upon him. The letter, *inter alia*, reads:

"3.2 The Umtata area is the largest area in the Province and certainly larger than the area where Mr Basson presently works (Kirkwood). It has a greater potential and is in dire need of agricultural upliftment in the form of a self-sufficiency project. At present the Umtata area purchases its supplies from the open market which has proved to be extremely expensive given the infrastructure in that area.

“3.3Mr Basson had (sic) proved himself to be an ideal candidate for such a project. He arrived at Kirkwood and developed the agricultural system in that area to an extent that the Department was extremely impressed by him. He has, in other words, proved himself to be an individual capable of performing the work, which is required at Umtata. He is also the only Senior Agricultural Officer in the Province and is therefore best qualified formally to do the job.

“3.4. Accordingly, it is in the interests of the Department that Mr Basson be transferred as soon as possible to Umtata.”

Indeed, at some point the issue of equity was mentioned, but it did not appear to me that the transfer was primarily actuated by that factor. For instance, in an internal memorandum reference S2/1/4 dated 26 February 2001 addressed by the Area Manager to the PCO (presumably, the Provincial Control Officer): Human Resources Management, the Area Manager made recommendations for the reshuffling of certain staff from within the Management Area. In terms of this memo five officials were to be affected, including the applicant, if the recommendations were approved. Under the applicant's name the following was stated:

“The transfer of Mr T Basson (Head: Agriculture) and be replaced by a member from disadvantaged groups to promote equity.”

Despite this memo I was not convinced, on a balance of probabilities,

that the applicant's transfer to Umtata was associated with the recommendation in the memo, for the following reasons:

1. The memo was dated 26 February 2001, more than six months after the advice of the Faculties Management (dated 20 August 2000) on the dire need for the initiation and undertaking of the agricultural project in Umtata.

(b) Both letters of transfer dated 9 March 2001 and 27 July 2001 specifically indicated the reasons for the transfer, which was clearly for the operational requirements of the Department, emanating from the Faculties Management's advice, referred to above.

(c) The internal memo of 26 February 2001 was responded to by the PCO: Corporate Services, per the replying memo dated 2 March 2001, whereby the idea of transferring the applicant "to promote equity" was evidently rejected. In his reply the PCO stated:

"The transfer of Mr Basson somewhere else is not possible at this stage due to the availability of posts at his level within the province unless another consideration can be made in terms of those places where there is a need of his skills within the province."

I also noted that no allegation or suggestion was made that the transfer was inspired by malice or other ulterior motives on the part of the respondent. Instead, Dr Erasmus appeared to concede that there was, indeed, no such allegation or suggestion by the applicant.

[3] **That the applicant would have no challenges in Umtata**

In terms of the respondent's explanatory statement of 20 March 2002 (paragraph 3.2 thereof), which was incorporated by reference in the respondent's answering affidavit (paragraph 4 thereof), the transfer proposes to send the applicant to a place far much bigger in size and agricultural potential than Kirkwood. This averment by the respondent was not disputed by the applicant. Indeed, it does not appear to be denied that Umtata is, or could be, smaller than Kirkwood in terms of the existing agricultural infrastructure and development in both areas. But the proposed agricultural restructuring of Umtata is intended precisely to put that situation right. The respondent is obviously concerned by the fact that Umtata, being a much bigger area in the aforesaid context than Kirkwood, is lagging far behind in terms of agricultural infrastructure and development.

There seems to be no doubt, therefore, that the Umtata project would present the applicant with a much bigger challenge than the one he might currently have, or ever have had, in Kirkwood.

In paragraph 3.8 of his explanatory statement of 20 March 2002 the respondent said:

“The Department remains hopeful that Mr Basson will see the move as a challenge and an opportunity to prove himself. If Mr Basson is able to perform similar work to that which he performed in Kirkwood, it will be even more of an achievement and certainly something, which the Department will take into account when

considering him for any further promotion.”

It would not be unreasonable of the applicant to regard the respondent's promise contained in this letter as an undertaking, which must be honoured.

*(see Matheyse, supra, at 2205, para 24)*

[4]. **That the transfer was tantamount to a demotion.**

A demotion is grammatically defined as a “reduction to a lower rank or class.”

*(The New Shorter Oxford English Dictionary, 1993 edition, Vol. 1, at 631).* I do not agree with the contention that the applicant's transfer constituted his demotion. He was assured that his rank and designation would be retained and, therefore, there would be no reduction in his remuneration or emoluments. His terms and conditions of employment with the Department would not change. Instead, he was to be accorded a further privilege of being accommodated in a house with his family, free of charge. The house would be rented by the Department from the public coffers. To me, this gesture was a further expression of good faith on the part of the respondent in this whole affair.

In any event, if the applicant felt that the transfer amounted to a demotion, he had a legal remedy at his disposal in terms of the Act. He could, for instance, declare a dispute and refer it to the relevant bargaining council, in terms of



section 191(1)(a)(i) read with section 35 and/or 36 of the Act, and thereby allege an unfair labour practice against him by the respondent. Be that as it may, I do not consider that the transfer constituted a demotion to the applicant for the reasons alluded to already.

[5]. **That there was no consultation held prior to the implementation of the transfer.**

In terms of paragraph 8.2 of the respondent's answering affidavit, an oral consultative meeting was held between the respondent and some of his senior officials, on the one hand, and the applicant, duly represented by his union official, Mr Piet van Aard of the Public Servants Association, on the other.

The respondent alleged that the consultation with the applicant aforesaid proceeded well. Further, that during the session the applicant even made certain additional representations to him (the respondent), including a request that the respondent employed the applicant's wife in Umtata.

The consultation took place some time prior to 27 July 2001. In other words, it was before the applicant was served with the second letter of transfer.

The applicant did not file a replying affidavit, as he was entitled so to do in terms of Rule 7(5), whereby he could, among other things, deny ever holding such a consultative meeting with the respondent and his delegation. He

ought to have challenged the respondent's allegation, in this regard, especially that he is now denying that such a consultation ever took place.

I note that on 16 May 2002 the applicant filed a supplementary affidavit, purporting to respond to the respondent's statement of 20 March 2002. In paragraph 2.8.4 thereof the applicant averred that the first consultative meeting with him was held on 13 March 2001, at which he was informed of his possible transfer. However, this averment was no answer to the specific and somewhat detailed allegations in paragraph 8.2 of the respondent's answering affidavit.

In the light of this apparent deliberate failure, on the applicant's part, to challenge paragraph 8.2 aforesaid, I am disposed to infer that the allegation contained in that paragraph reflects the true state of affairs on that point.

I am further inclined to hold that a pre-transfer consultation cannot reasonably be expected to receive the same level of scrutiny in a judicial review, as is the case with a consultation envisaged in section 189 of the Act, which precedes a dismissal based on operational requirements. In respect of a retrenchment, I am of the view that strict scrutiny should be applied in determining the propriety and regularity of the consultation, whereas in the case of a transfer the judicial scrutiny may be relatively lenient and still pass muster in the review process. The reason is clear. The incidence of total loss of employment is an absolute economic tragedy to the concerned employee

and his/her family and is incomparable and incompatible to the relative inconvenience of a transfer, where the employee concerned remains in employment and retains all benefits and privileges concomitant thereto.

On 3 September 2001 the Director: Industries, Mr F Bell, who was apparently the applicant's supervisor, submitted a memorandum whereby he expressed himself against the applicant's transfer, on the basis that Umtata was "the smallest prison farm" in the Province, compared to Kirkwood and that, therefore, it would not be desirable that the applicant, being the most qualified and skilled official in the Province, in the field of agriculture, should be transferred there.

It was submitted on behalf of the respondent that Mr Bell was a relatively junior official, in relation, for instance, to Mr G Letlole who came up with the idea of the project in question. In any event, any recommendation or suggestion made by the Director: Industries on the matter was still subject to the approval of the respondent, who had the final say in all provincial administrative matters, including transfers. In the present instance, Mr Bell's comments were considered by the respondent but rejected. The respondents's answering affidavit clearly demonstrates that Mr Bell's contribution was considered (*see para 12.3 - 12.5 of the respondent's answering affidavit*).

[6]. **That there was no vacant post for the applicant in Umtata.**

As stated already, it was the respondent's case and, indeed, unchallenged by the applicant, that the applicant's transfer to Umtata was without change in his rank (of Assistant Director) and designation (of Divisional Head: Agriculture), as was the case in Kirkwood, which meant that there would be no financial loss to be suffered by him.

It is within the Commissioner's prerogative to create and fill posts within the Department. Therefore, if a provincial commissioner (through his delegated powers) transfers an official to a place where there is no official post yet, it is up to the provincial commissioner to see how that situation is regularised, if at all one elects to describe it as irregular. Whether or not there was, officially, any vacant post in Umtata equivalent to the applicant's rank at the time of the transfer is, despite the Transfer Policy, a matter of no concern to the applicant. Indeed, I see nothing to preclude the Department from creating the post even after the applicant has assumed duty there. What matters here is the fact that the applicant's rank, designation, remuneration and status will not be reduced.

The evidence of the respondent was also unchallenged that the position of the applicant in Kirkwood would be taken up by Mr Anton du Toit, the applicant former assistant, who was a white person. (*see paragraph 16 of the respondent's answering affidavit*). In this regard, the respondent sought to

prove, and, indeed, succeeded, that the transfer was not necessarily based on equity or transformation, as claimed by applicant.

[7]. **About the applicant's personal circumstances.**

\_\_\_\_\_ (a) *The non-availability of a suitable school for the applicant's children*

The applicant alleged in his representations (both of 22 March 2001 and 3 April 2001) that his two children were attending an Afrikaans school in Kirkwood, which was not available in Umtata. As I pointed out earlier, this grievance was not responded to by the respondent in his letter of 20 March 2002. However, this question was adequately responded to in paragraph 13.1 of the respondent's answering affidavit. The respondent stated that, according to his information, Umtata did, in fact, have an Afrikaans school, known as "Die Umtata Hoërskool".

It was incumbent on the applicant to gainsay any suggestion about an Afrikaans school in Umtata, if he insisted that there was no such school in the area.

Therefore, without any gainsaying evidence from the applicant, the respondent's allegation remains undisputed that Umtata does have an Afrikaans school at which the applicant's children can attend.

I must point out that, in my view, this aspect alone was so crucially important that had the evidence shown that there was, indeed, no suitable school in Umtata for the applicant's children, that factor

would certainly have tipped the scale in the applicant's favour, under this particular sub-topic. It might as well probably have influenced the entire outcome of this matter. The issue was taken up with Dr Erasmus, who had nothing further to submit on the issue.

*(b) The loss of the applicant's wife's business in Kirkwood.*

In his averment that his wife had started a business in Kirkwood in 2000 from which the family derived further income, the applicant, unfortunately, chose not to furnish more details and particulars of that business undertaking. For instance, he did not allege that the type of business his wife was operating in Kirkwood was such that it was impossible or not feasible for her to start the same business in Umtata. In any event, it seems to me, that an employee's personal grievances of this nature are, by and large, not so fundamentally important that they should invariably stand on the way and prevent the Department from exercising its prerogative of transferring its employees in circumstances where, but for such grievance, the transfer would otherwise be in the interests of the Department.

*(a) The re-sale of the applicant's house and the possible incidental financial loss thereto*

According to the applicant he would lose up to R100 000.00 if he were to sell

his house. However, he also chose not to indicate how that estimate loss was computed to reach the sum of R100 000.00. In any event, the respondent, in his answering affidavit, made it clear that the accommodation of the applicant and that of his family in Umtata was to be a problem not of the applicant but of the Department. The Department was willing and intending to rent a house in Umtata in which the applicant and his family would stay, free of charge. This was yet another undertaking by the Department, which, I would consider, was a condition favourable to the applicant and which, as I have stated, manifested yet another *bonafides* on the part of the Department. Over and above this concession, the respondent further pointed out and suggested that whilst the applicant and his family were in Umtata the applicant could be renting out his house in Kirkwood, as an alternative to re-selling it.

In the light of the above, I am satisfied, accordingly, that the applicant's representations have now received the respondent's due consideration, to the extent that as at the present time all of his representations have been addressed, or responded to, in writing, as required in terms of paragraph 6.2.5 of the Transfer Policy. I am satisfied that the transfer process has now been undertaken in general compliance with the provisions of the Transfer Policy.

The mere fact that the respondent's responses are not embodied in a single document, but instead are found in two separate documents, does not, in my view, change the position that the applicant's representations have now genuinely been responded to and in the prescribed manner. I do not consider that the respondent's initial fault, in not following the guidelines of the Transfer Policy, rendered the whole process incurable.

Indeed, Dr Erasmus conceded that all of what the applicant complained about in his representations have now been responded to by the respondent, although he hastened to add that some of these answers were found by the applicant to be insufficient and inadequate. To this, I am not surprised. An official who is resisting a departmental transfer would ordinarily always not be satisfied with whatever explanation his or her employer gave as being the reason for the transfer. That sort of attitude is not uncommon and it is understandable. Indeed, an expression of satisfaction on the part of an

unwilling transferee would tend to compromise his/her point of resisting the transfer. Similarly, the applicant's stance here is to avoid, at all costs, this transfer, however reasonable and justifiable it may objectively be proved to be.

In his supplementary affidavit the applicant named four of his colleagues whom he submitted were equally suitable for the Umtata project, thereby suggesting that they could as well be considered for the Umtata transfer. However, the position was made clear, that only one official was required to take up this position and that such official must be the most senior and the best qualified in agriculture in the Province. In the respondent's opinion, the applicant best fitted that requirement and, therefore, was the most suitable candidate for the job. It was further noted that the applicant did not deny the fact that he was the most qualified and experienced agriculturist in the Province.

The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the courts should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or



administrative decisions must always be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the Law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the State's administrative machinery.

These administrative decisions shall only fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or improper motive.

In *Pharmaceutical Manufacturers Association of SA and Others: in re: Ex Parte Application of the President of the RSA and Others* 2000 (3) BCLR 241 (CC), the Constitutional Court held that:

"... [w]hat the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objective rational manner. ..."

"Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been

vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision. " (at 273/4, para 90).

The objective rationality theory expressed in the *Pharmaceutical Manufacturer's* case was cited with approval by Zondo JP in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* [2001] 22 ILJ 1603 (LAC), where learned judge president stated, *inter alia*:

"... one must bear in mind ... that a decision that is objectively irrational is likely to be made only rarely. Of course, I am saying this insofar as it seems that there is much commonality between justifiability and rationality. ..." (at 1631, para 82).

This principle, on administrative decisions, has long been recognised in our law. In *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642, (cited in *Pharmaceutical Manufacturer's* case, *supra*), Innes ACJ (as he then was) stated:

"Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will

not interfere with the result. Not being a judicial functionary, no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own... There are circumstances in which interference would be possible and right. If for instance such an officer had acted *malafide* or from ulterior or improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong." (at 651-2).

It seems to me that the respondent's decision to transfer the applicant from Kirkwood to Umtata was based on sound principles of state economic efficacy and a desire towards self-sufficiency, which accord with the object of the Correctional Services Act, section 3(2)(b), in particular. It is obviously the Department's sincere intention and earnest endeavour to boost and strengthen its capacity, in terms of self-sufficiency and cost effectiveness, in its agricultural food production. The food produced is, in the main, probably destined for the consumption of the ever-increasing prison population, in

respect whereof the State has the responsibility and the obligation to take care of and maintain.

In conclusion, I find that the applicant's transfer was, indeed, in the best interests of the Department. To my mind, it does not lie with this Court to interfere with the respondent's decision in this regard.

The transfer has been pending for nearly two years now. This delay is certainly not without serious negative economic and fiscal implications on the Department, in particular, and the State, in general, if viewed from the perspective of the respondent's apparent noble intentions and ambitions aforementioned.

In his second prayer, the applicant sought an order, directing that, upon the respondent's transfer decision being reviewed and set aside and the respondent still being desirous of transferring the applicant, the respondent must comply with the relevant provisions of the Transfer Policy in such transfer process. In my view, this would entail the whole transfer process being started *de novo*. I cannot comprehend what purpose that exercise would serve. To my mind, it would be next to useless, if not utterly futile. Instead, the applicant's second prayer tends to constitute, at least partly, a concession on the part of the applicant that his transfer is, after all, substantively fair, and that only its procedural fairness is placed in dispute.

It appears to me, therefore, that the respondent's decision to transfer

the applicant to Umtata was rationally justifiable, in relation to the candidature for the project, which was available to the respondent at the time he made the transfer decision. It is my finding, accordingly, that the applicant's transfer from Kirkwood to Umtata was both substantively and procedurally fair.

Concerning the question of costs, the general rule is that “costs follow the event “ or “costs follow the result”, which, however, does not detract from the fundamental notion that the Court retains its discretion. In this regard, the Appellate Division held that “the ordinary practice is, ... that costs follow the event, but that (practice) is subject to the general rule of our law that costs - unless expressly otherwise enacted - are in the discretion of the Judge.”

*(Union Government (Minister of Railways and Harbours) v Heiberg 1919 AD 477, at 484)* and further, “... that ethical considerations may enter the exercise of that discretion” *(Mahomed v Nagdee 1952 (1) SA 410 (A), at 420H)*. *(See also: Jonker v Schultz 2002 (2) SA 360 (O), at 364C-D )*). The circumstances of this case, I hold, justify a departure from the general rule and incline me to exercise my discretion otherwise, on the basis of the following considerations.

I am satisfied that the applicant was fully justified to institute these proceedings, in the light of the initial lack of co-operation on the part of the respondent, in terms of responding to the applicant's representations. As stated earlier, the first ever response by the respondent was made on 20 March 2002, almost a year after the applicant's second representations of 3

April 2001. The respondent's response came only after the applicant had launched this review, which was filed on 18 February 2002. A doubt exists, in the circumstances, whether the respondent would ever have responded to the applicant's representations, were it not for this litigation. It is precisely this apparent indifference and ambivalence on the part of the respondent, which has influenced the Court against awarding costs to him (the respondent) as the successful party.

I have already said that the respondent's explanation of 20 March 2002 did not address all of the applicant's year-old complaints, including, mainly, the issue of the schooling of his children. This issue was only covered in the respondent's answering affidavit, which was filed only on 2 July 2002. This sort of conduct was untenable and smacked of arrogance and, indeed, a degree of inefficiency and incompetency, on the part of the respondent's office. It is not, and should not be, expected of a government department to create norms and standards for general compliance, which the very same department flouts and undermines.

The transfer of an official under circumstances that involve a complete geographical relocation from one place to another, where, as in the present case, the official concerned has family responsibilities and commitments, such as the responsibility of ensuring that his/her children received the education of his/her choice, as a parent, is a matter which every government

department should treat with absolute decency, responsibility and respect, towards the official concerned. The content and spirit of the Transfer Policy appear to me to convey this important instruction to the delegated authority of all provincial commissioners of the Department in transfer matters.

In the light of the above, I am persuaded that, concerning the period commencing from the time this litigation was instituted, namely 18 February 2002, to the time the respondent filed his answering affidavit, namely 2 July 2002 (which was also the same date on which the applicant's attorneys were served with the said answering affidavit), the costs should be paid by the respondent. However, concerning the period starting after 2 July 2002 to the date of this judgment (that is, 7 February 2003), each party should pay its own costs.

In consequence whereof, I made the following order, which I handed down on 6 February 2003:

“1. The application is dismissed.

“2. Costs are ordered as follows:

(a) for the period starting 18 February 2002 to 2 July 2002 the respondent is ordered to pay the costs; and,

(b) for the period after 2 July 2002 to the date of this judgment (being 7 February 2003), each party is ordered to pay its own costs.”

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**SK NDLOVU**  
**ACTING JUDGE OF THE LABOUR COURT**

**Appearances:**

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**Date of Hearing:** 6 February 2003

**Date of Judgment:** 7 February 2003

**Reasons for**

**Judgment delivered:** 27 February 2003