IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Case Number: C160/2006
Reportable

In the matter between:

MNIKELWA NXELE	Applicant
And	
THE CHIEF DEPUTY COMMISSIONER, CORPORATE SERVICES, DEPARTMENT OF CORRECTIONAL SERVICES	First Respondent
THE NATIONAL COMMISSIONER: DEPARTMENT OF CORRECTIONAL SERVICES	Second Respondent
THE MINISTER FOR CORRECTIONAL SERVICES	Third Respondent

JUDGMENT

Freund A.J.:

INTRODUCTION

1. The Applicant has for several years been employed by the Department of Correctional Services ("the Department") as its Regional Head: Corporate Services, for the Western Cape, stationed

at Cape Town. He holds the rank of Director.

2. On 13 December 2005 the Second Respondent, the National Commissioner of the Department of Correctional Services, addressed a letter to the Applicant informing him that he had approved his *"horizontal placement*" to the post of Director: After Care: Head Office (Pretoria) with retention of his current salary and benefits.

3. Various communications (which will be referred to below) passed between the parties. Ultimately, on 28 February 2006 the Applicant received a further letter from the First Respondent, the Chief Deputy Commissioner: Corporate Services, Department of Correctional Services. That letter was headed "*HORIZONTAL TRANSFER: WESTERN CAPE REGION TO HEAD OFFICE IN THE POST DIRECTOR: AFTER CARE"*. For present purposes, the most relevant portion of that letter reads as follows:

> *"Your discussions with Mr. Motseki and Mr. Smalberger on 24 February 2006 refers.*
>
> *By direction of the Commissioner of Correctional Services the following feedback can be provided:*
> *After considering your personal circumstances which you shared during the above-mentioned discussions, it was decided to temporarily place you in the vacant post of Area Co-ordinator: Corrections: Pollsmoor for a period of six (6) months.*
> *It is trusted that this period will allow you enough opportunity to address and solve any aspects which might still hinder your placement in the post of Director: After Care at the National Head Office."*

4. The Applicant is opposed to his temporary placement at Pollsmoor and his subsequent transfer to Pretoria. He brought an application in which he sought, initially, certain interim relief and, thereafter, more extensive final relief. The application for interim relief was resolved by agreement and this matter now comes before the Court as an opposed application for final relief. The Applicant seeks orders reviewing, correcting and/or setting aside the decisions of the First and/or Second Respondents to transfer him to the post of Area Co-ordinator: Corrections, Pollsmoor, with effect from 16 March 2006 and to transfer him thereafter to the post of Director: After Care, Pretoria.

THE FACTUAL BACKGROUND

5. The affidavits in this application, the annexures thereto and the record filed, are lengthy. Most, but not all, of the facts are common cause. Little purpose would be served by setting out the full factual background. I propose to summarise only those aspects which appear to me to be most material. Unless otherwise indicated the facts set out below are common cause.

6. The Applicant first joined the Department in 1986. He left it in 1995 to join the Police and Prisons Civil Rights Union (POPCRU), where he was employed for three years. He rejoined the Department in 1998 and, by the time that the present dispute arose, he served as the Regional Head: Corporate Services, for the Western Cape. He was in overall charge of the various functions of human resource management for the Department within the Western Cape.

7. In his founding affidavit, the Applicant alleges that a measure of conflict and personal tension arose over the last two to three years between himself and the Second Respondent. The Applicant raised complaints regarding the Second Respondent with the Third Respondent, the Minister for Correctional Services. It is his contention that the Second Respondent's decision to transfer him was influenced both by the personal tension referred to above and by the Applicant's association with POPCRU. The Second Respondent admits that the Applicant raised complaints about him with the Third Respondent but denies that this, or the Applicant's association with POPCRU, affected the decision to transfer him.

8. As referred to above, on 13 December 2005 the Second Respondent addressed a letter to the Applicant informing him that *"after consideration of the operational requirements of the Department as well as [his] personal position"* he had *"approved"* his *"horizontal*

placement" to the post of Director: After Care: Head Office. The Applicant was advised in the letter that:

> *"If there are any factors which have an influence on your placement, you are welcome to respond accordingly within seven (7) days after you received this letter."*

The decision communicated in this letter was arrived at without any prior consultation with the Applicant. He alleges that this was in breach of the Department's written "Transfer Policy".

9. It became common cause that the copy of the policy annexed by the Applicant to the founding affidavit was outdated and that the revised copy contained in the record was applicable at the relevant time. For present purposes it is, in my view, sufficient to quote the following extracts from the policy:

> *"**TRANSFER POLICY***
>
> ***1. BACKGROUND***
>
> *1.1 In order to ensure administrative efficiency and fairness in respect of the finalisation and dealing with transfers, it is necessary to decentralise the delegations of authority on transfers.*

1.2 In line with the principle of decentralisation, as contemplated in Public Service Regulation II / B, this policy should therefore-

[a] delegate the power to transfer an official in the interest of the Department, efficient utilisation of Human Resources and at an employee's own request; and

[b] set conditions for the exercise of this power.

2. PURPOSE

The purpose of this procedure is to-

[a] enable the Commissioner to effectively and efficiently manage transfers within the Department;

[b] empower employees, by means of appropriate delegations and authorisations, to transfer officials 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 or from one (1) work unit to another; and

[c] Ensure that transfers are dealt with in a fair and justifiable manner, by means of uniform control measures.

…

4. LEGISLATIVE FRAMEWORK

4.1 <u>Correctional Services Act</u>

In terms of Correctional Services Act 111 of 1998, Section 3(5)(g) and Section 96(3)(d),

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.

5. PRINCIPLES OF TRANSFERS

5.1 A transfer must be well considered in the public interest and ought to be the result of careful human resources and/or career planning. Practices involving rotation of personnel are also transfers.

5.2 Transfers may not be used as a punitive measure.

5.3 An official is not regarded to be transferred when he/she is sent temporarily to another Centre/ Management Area for official duties or any other reason. Such temporary measures must be reviewed every three (3) months.

5.4 The transfer must take place in consultation with the officer as well as his/her supervisor. In specialized occupational classes, the relevant DC/

Regional Commissioner should also be consulted.
5.5 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.
5.6 Transfers must be in writing to employee concerned and conducted through the official channels.
5.7 The decision on or notice of transfer must be in writing with reasons for such a transfer substantiated.
5.8 Copies of all documentation in this regard must be filed on the employee's personal file. The Human Resources-component must ensure that the employee's personal file is forwarded to the employee's new station at the time of the transfer.

6. GUIDELINES CONCERNING THE TRANSFER OF EMPLOYEES

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:

[a] 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 interest of the Department and the broader State interest. Such interest to be motivated.
[c] The interest of the individual employee whose transfer is being considered, such as personal circumstances of those affected.
[d] The employee's career development and utilization.
[e] The availability of a suitable vacant post on the financed establishment into which the employee may be transferred.
[f] The availability of funds.
[g] 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.
[h] There must be an induction/ orientation programme for the transferee at the new station.

7. PROCEDURE FOR CONSIDERING TRANSFERS

7.1 Transfers initiated by the employee

…

7.2 Transfers initiated by the Department

7.2.1 If a vacancy arises, and taking into consideration the recruitment policy of the Department, a potential pool of candidates who can suitably fill the vacancy must be identified.

7.2.2 The Area Commissioner/ Regional Commissioner/ DC Human Resources concerned must ascertain the reasons why a specific employee from the pool of candidates should be transferred.

7.2.3 The employee whose transfer is being considered and his or her supervisor must be informed that the transfer is being considered, and given the reasons for the proposed transfer. (S)he must be allowed seven (7) working days to make representations concerning the

transfer, if (s)he wishes to do so.

7.2.4 If the employee accepts the transfer and fails to make any representations, the necessary notice may be issued and the transfer carried out.

7.2.5 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.

7.2.6 The final decision must be communicated in writing to the

employee within seven (7) days after his/her representation, with detailed explanations of reasons.

…

10. DISPUTE RESOLUTION

Any dissatisfaction of an employee with regard to a transfer should be addressed through the Departmental Grievance Procedure before reverting to other remedies that exists."

10. The Applicant did not take up the opportunity to raise "any factors which had an influence on (his) placement" within seven days, as required by the letter. His explanation for this, which I find unconvincing, is that an arrangement already existed for him to meet with the Second Respondent on 21 November 2005 and he intended to use that opportunity. As it turned out, the intended meeting did not take place. It was rescheduled to take place some time before the end of the year, but again it did not take place. Still the Applicant made no representations. On the other hand, as will be elaborated on below, the letter of 13 December 2005 did not, as required by the policy, furnish proper reasons for the contemplated transfer.

11. On or about 30 December 2005 the Applicant received a telephone call

from Ms. J. Schreiner, who was then serving as the Acting Commissioner. She informed him that the Department had received responses from other people it intended transferring, but not from him. The Applicant complained, so he alleges, that he had not been provided with the full reasons for the decision to transfer him and asked for these. He alleges that Ms. Schreiner stated that she would get the First Respondent, the Chief Deputy Commissioner: Correctional Services of the Department, to get in contact with him. I shall deal further with this telephone call below.

12. On 20 January 2006, whilst the Applicant was on leave, he was informed that a letter had been received at his office which required him to take up the post of Director: After Care in Pretoria with effect from 1 February 2006. That letter, which was written by the First Respondent, stated that, in the absence of any response to the letter of 13 December 2005, it had been concluded that his transfer could now be finalised.

13. On 21 January 2006 the Applicant telephoned the First Respondent and informed him that he wanted an audience with the Second Respondent. The First Respondent offered to make himself available for this purpose but the Applicant declined this offer. I should mention that the First Respondent is, other than the Second Respondent, the most senior manager to whom the Applicant is subject. He holds the rank of Deputy Director-General.

14. On 31 January 2006 the Applicant sent an e-mail to the Second Respondent asking for an opportunity to meet with him and suggesting that they meet on 3 February 2006. The Applicant then received a letter from the First Respondent proposing that he meet with the Applicant on 2 February 2006. A meeting between them then took place on that date. The details as to what was discussed on that occasion are not common cause, but (as will be referred to below) the Applicant alleges that, amongst other things, he complained that he had not been informed of any detail as to why he was required to go to Pretoria.

15. On 13 February 2006 the Applicant received a letter from the Second Respondent in which he complained about the Applicant's failure to raise his concerns regarding the transfer and his personal circumstances with the First Respondent. He also complained about the Applicant's failure to raise his concerns in writing in response to the letter of 13 December 2005. He was informed that the matter was now regarded as finalised and he was instructed to report for duty in Pretoria within five working days.

16. The Applicant took legal advice and his attorney addressed a letter to the Second Respondent dated 16 February 2006 threatening urgent litigation if the Second Respondent adhered to his decision. The

Second Respondent responded in a letter dated 17 February 2006, disputing various allegations made by the Applicant's attorneys. However, he agreed to give the Applicant *"yet another opportunity"* as detailed below:

> *"(a) Your client is given an opportunity to meet our Chief Deputy Commissioner Corrections on Thursday, 23 February 2006 at our Pretoria office to discuss all issues and personal circumstances surrounding the transfer to Pretoria.*
>
> *(b) The CDC-Corrections will submit a response to the undersigned who will then consider the personal circumstances of your client.*
>
> *(c) The implementation of the decision to transfer your client to Pretoria is hereby suspended for period (sic) of seven days to allow the process of negotiation to be entertained. At the same time the transfer of his replacement is also suspended for the same period.*
>
> *d) No further delays will be entertained.*
>
> *In conclusion we wish to say that this is final opportunity (sic) given to your client."*

17. The Applicant sought a postponement of the meeting scheduled for 23 February 2006 but this was refused. He complains that the effect of this refusal was to deprive him of his right to be represented at the meeting by his attorney and by a suitably high-ranking official from POPCRU. The Respondents deny that the Applicant was entitled to be legally represented at the meeting (with which view I concur) and dispute that the Applicant was

deprived of his right to trade union representation because of the refusal to postpone the meeting. Again, I concur with the Respondents on this issue.

18. The meeting of 23 February 2006 was held at the Leeukop correctional facility and was attended by the Applicant; the Chief Deputy Commissioner: Corrections, one Mr. Motseki; and the Acting Regional Commissioner (Western Cape), one Mr. Smalberger. The meeting was lengthy and was tape-recorded. A transcript of the tape-recording was furnished to the Court. I shall revert below to certain aspects of this meeting. For present purposes it suffices to note that the Applicant was informed at the meeting in considerable detail as to the reasons for the proposed transfer and he made detailed representations as to why he contended that the transfer would be inappropriate. During the meeting Mr. Motseki gave an undertaking to furnish the Department's reasons for the transfer to the Applicant in writing. Reference was also made to the Applicant submitting further written representations by Monday, 27 February 2006. As will appear below, the details in this regard are a matter of controversy.

19. A day or so after the meeting, Mr. Motseki sent a document to the Applicant setting out the considerations taken into account by the Second Respondent in support of the transfer of the Applicant to the position of Director: After Care. In short, those reasons related to a proposed restructuring of the Department's management. It was contended that the Applicant had the skills and expertise necessary for the post to which the proposed transfer was to take place.

20. On Tuesday, 28 February 2006 the Applicant addressed a letter to Mr. Motseki setting out his representations regarding the proposed transfer and summarising his personal circumstances. This document was transmitted by fax from 16h12. Less than five minutes later the Applicant learned that a fax was being sent to him by the First Respondent. He immediately spoke to the First Respondent telephonically, from whom he learned that the First Respondent had not had sight of his (the Applicant's) very recent fax and that it had not been considered. The First Respondent told him that, in his view, the meeting that had been held on 23 February 2006 provided sufficient opportunity for the Second Respondent to obtain the necessary information he needed in order to arrive at a decision. The Applicant protested that it had been agreed at the meeting on 23 February that, after he had received the written reasons, he would be given an opportunity to make written submissions which were to be considered by the Second Respondent before reaching his decision.

21. Minutes later the Applicant received the letter from the First Respondent (quoted from in paragraph [3] above) in which he was informed that the Second Respondent had directed that he was to be temporarily placed in the post of Area Co-ordinator: Corrections: Pollsmoor for six months and was thereafter to be transferred to the post of Director: After Care in

Pretoria.

THE CASE MADE OUT IN THE FOUNDING AFFIDAVIT

22. In his founding affidavit, the Applicant complained that, in various respects, his transfer had been effected in a manner that was incompatible with the terms of the Department's Transfer Policy. He complained that the decision conveyed to in the letter of 13 December 2005 had not been preceded by consultation, as required by Clause 5.4 of the policy; that there was no valid and sufficient reason for the transfer and that reasons had not been supplied in writing to him, as required by Clause 6(a); and that the letter of 13 December disclosed that the decision to transfer him was a *fait accompli*. He alleged that his "sudden transfer" to the position at Pollsmoor was to punish him for objecting to his placement in the post of Director: After Care and to "soften him up" in order that he would accept such a placement in six months time. He complained that the transfer to Pollsmoor constitutes a demotion involving *"a gross and severe diminution of my status, responsibilities, prestige and authority"* and that there had been no consultation regarding that transfer. He contended that the manner in which the transfer was effected ran counter to the provisions of the Promotion of Administrative Justice Act, 3 of 2000, ("the PAJA") and that it was "also" unlawful on this basis. He alleged that the decisions to transfer him to Pollsmoor and to Pretoria were taken arbitrarily and

capriciously, in bad faith and for ulterior motives. As referred to above, he alleged that the real motivation for his transfer was because of a combination of a long-standing dislike of him by the Second Respondent as a result of previous disagreements, and the Second Respondent's decision to purge the Department of high-ranking and influential POPCRU office bearers.

THE CASE MADE OUT IN THE REPLYING AFFIDAVIT AND THE RESPONDENTS' APPLICATION TO STRIKE OUT

23. Apart from responding to certain factual allegations made in the answering affidavits, the Applicant sought in his replying affidavit to raise certain additional issues. This prompted the Respondents to apply for certain portions of the replying affidavit to be struck out. The application to strike out was argued together with the merits of the application. The application to strike out pertains to the entire content of paragraphs 8.4 and 8.5, and to parts of paragraphs 8.8, 8.10, 30.2 and 36, of the replying affidavit. The basis for the application is that the passages objected to constituted new matter raised in reply which improperly introduced new causes of action.

24. The generally applicable legal principles in relation to this issue are, in my view, correctly summarised in the following passage from Herbstein and Van Winsen "The Civil Practice of the Supreme Court of South Africa" (Fourth Edition) at 365 to 366:

"*The necessary allegations must appear in the supporting affidavits for the Court will not, save in exceptional circumstances, allow the Applicant to make or supplement his case in his replying affidavit and will order any matter appearing in it that should have been in the supporting affidavits to be struck out... It is well established that there exists a general rule that new matter may not be introduced by an applicant in his replying affidavit, but this is not an absolute rule and the Court may in an appropriate case allow an applicant to do so. In this context 'new matter' is not synonymous with a new cause of action."* (Footnotes omitted)

25. Paragraphs 8.4, 8.5 and the passages objected to in paragraph 30.2 of the replying affidavit raise the contention that the Second Respondent improperly delegated to the First Respondent the authority to deal with the Applicant's transfer. This contention is based on a statement made by the First Respondent in his answering affidavit in which, with reference to a telephone call between himself and the Applicant on 12 January 2006, he stated:

"I wish to emphasise that the Applicant was not entitled to an audience with the Second Respondent to discuss the proposed transfer. I had been delegated to deal with this by the Second Respondent."

In paragraph 30.2 of the replying affidavit the Applicant stated that:

"…it was not competent for Second Respondent to

delegate the authority to make a decision in regard to my transfer, to First Respondent, and on this ground alone, I submit the decision falls to be set aside."

26. It was submitted on behalf of the Applicant that the passages relating to the delegation issue in the replying affidavit should not be struck out because, when the founding affidavit was deposed to, the Applicant was not aware that the Second Respondent had purported to delegate the authority to make a decision in regard to his transfer to the First Respondent. It was further submitted that in a case where an answering affidavit reveals the existence or possible existence of a further ground for relief, the Court will more readily allow an applicant in his or her replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional grounds for relief as might arise therefrom (see Erasmus "Superior Court Practice" at B1-46, and the authorities there cited). I accept this and, on this basis, I propose to dismiss the application to strike out the passages in the replying affidavit (identified above), which deal with the delegation issue.

27. However, before dealing with the balance of the application to strike out, I wish immediately to make clear that it is my view that there is no merit in the point raised in reply by the Applicant. His contention is, in essence, that the decision to transfer him to Pretoria conveyed to him in the First Respondent's letter of 20 January 2006 is invalid because it was taken by the First, and not the Second, Respondent. Even if there were merit in that contention (of which I am not persuaded) the point is irrelevant, because it is common cause both that the Applicant was thereafter given further opportunities to make representations and that the Second Respondent reconsidered the matter. Ultimately the Second Respondent took the decisions conveyed to the Applicant in the letter to him of 28 February 2006. It is those decisions which are the subject of the present application and they were clearly taken by the Second Respondent. Even if the First Respondent had purported at an earlier date to take a decision in respect of the Applicant's transfer for which he lacked the requisite authority, this would not assist the Applicant. At best for the Applicant, the First Respondent's purported decision would be a nullity. What would remain is the Second Respondent's later decision, which he clearly had the authority to make.

28. The remaining paragraphs in the replying affidavit sought to be struck out allege that the Applicant's constitutional right to fair labour practices and/or that his rights in terms of the Labour Relations Act No. 66 of 1995 ("the LRA") have been infringed. In my view these constitute new causes of action pleaded without adequate justification for the first time in the replying affidavit, which should be struck out on that basis.

29. Mr. Arendse S.C who, together with Mr. Sher, appeared for the Applicant, submitted that these issues were not pleaded for the first time in the replying affidavit because, in the letter from the Applicant's attorneys to the Second Respondent of 16 February 2006 referred to in the founding affidavit, the allegation was made that the Applicant's proposed transfer had been effected in breach of the relevant provisions and prescripts of the LRA. Whilst I accept that that statement was made in the relevant letter, I do not accept that this, on its own, was sufficient to alert the Respondents that the Applicant's case in the present application includes a cause of action founded on alleged non-compliance with any provision of the LRA. It is, in my view, important to not overlook the fact that the letter relied upon by the Applicant was written on 16 February 2006. It is common cause that, thereafter, the Second Respondent agreed to suspend the Applicant's transfer, to give him an opportunity to make further representations and to reconsider the transfer. The decisions which the Applicant now seeks to attack were taken after the meeting held on 23 February 2006 and were conveyed to the Applicant in the letter of 28 February 2006.

Still less do I accept that the portion of the letter referred to above should have alerted the Respondents to the fact that, in addition, it is part of the Applicant's case that the decisions which he now attacks infringed his right to fair labour practices in terms of Section 23 of the Constitution. There is no reference to this in the letter or in the founding affidavit.

30. Once again, even if I had not struck out the allegations in respect of the LRA, I would have dismissed the argument on its merits. The only provision of the LRA which Mr. Arendse pertinently alleged had been infringed is Section 186(2)(a). That subsection defines as an *"unfair labour practice*" unfair conduct by an employer relating (*inter alia*) to demotion. Mr. Arendse submitted that the treatment of the Applicant

amounted to such an "unfair labour practice". Quite apart from the fact that this point was not even taken clearly in the replying affidavit, there is, in any event, no basis on which this Court could have entertained this complaint. This Court has no jurisdiction in terms of the LRA to determine disputes about "unfair labour practices". Such disputes are required, in terms of Section 191(5)(a)(iv), to be arbitrated by the Commission for Conciliation, Mediation and Arbitration, after they have been referred, in terms of Section 191(1), for conciliation. No such

conciliation has taken place. I should make clear that the Respondent has expressly declined to consent, in terms of Section 158(2)(b) of the LRA, to this Court sitting as an arbitrator and determining the unfair labour practice dispute raised in argument by Mr. Arendse.

31. In my view it would be prejudicial to the Respondents to permit the Applicant to pursue the cause of action that his right to fair labour practices in terms of Section 23 of the Constitution, has been infringed. The Respondents rely in this regard on the following passage from National Director of Public Prosecutions v Phillips and Others 2002(4) SA 60 (W) at paragraph 36:

> *"In motion proceedings the parties' affidavits constitute both their pleadings and their evidence… There is no*

reason why that rule should be mitigated in the context of an application which relies on the exercise of a statutory power.

Pleadings must be lucid, logical and intelligible. A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his opponent has failed to place before the Court because he was not sufficiently alerted to its relevance. …"

(See also Naude and Another v Fraser 1998(4) SA 539 (SCA) at 563E to 565D.)

32. The Respondents complain that they were not given fair notice of the Applicant's complaint of an invasion of his rights under Section 23 of the Constitution. They allege that they were not given the opportunity to set up evidence in regard to the potential limitation of such constitutional rights under Section 36 of the Constitution. In my view there is merit in this complaint. Had the Applicant alleged in his founding affidavit an infringement of his constitutional rights in terms of Section 23 of the Constitution it is by no means improbable that the Respondents might have pleaded that that right is limited by provisions of the LRA and pleaded that such limitation is justifiable. Evidence would have been admissible in respect of the justifiability issue. The belated manner in which the Applicant has raised this issue has

deprived the Respondents of the opportunity of placing such evidence before the Court. In these circumstances I think it is appropriate to strike out the paragraphs in the replying affidavit in which the Applicant alleged an infringement of his constitutional right to fair labour practices. (I make no finding as to whether it is open to a party in the position of the Applicant directly to enforce the constitutional right to fair labour practices without a constitutional challenge to the LRA. See e.g. NAPTOSA and Others v Minister of Education, Western Cape and Others (2001) 22 ILJ 889 (C) at 898A; National Education Health and Allied Workers Union v University of Cape Town and Others (2003) 24 ILJ 95 (CC) at paragraph [17]; Jones and Another v Telkom SA Limited and Others (2006) 5 BLLR 513 (T) at 515 to 516; Minister of Health and Another N.O. v New Clicks South Africa (Pty) Ltd and Others 2006(2) SA 311 (CC) at paragraphs [433] to [437]; compare J. Klaaren and G. Penfold "Just Administrative Action" in "Constitutional law of South Africa" (Second Edition) Volume 1, Woolman *et al* (eds) at 63-5 to 63-8).

33. I turn now to deal with the legal issues raised by the Applicant's founding affidavit.

THE FUNDAMENTAL LEGAL ISSUES

34. The fundamental contention advanced on behalf of the Applicant is that the Second Respondent's power to transfer employees such as the

Applicant is subject to legal constraints which entitle the Applicant to challenge both the substance of the decisions to transfer him and the procedural fairness of the manner in which these decisions were taken. In this regard, the Applicant relies principally on the following:

- Section 3(5)(g), read with Section 96(3)(d), of the Correctional Services Act, No. 11 of 1998, read also with Section 195(1) of the Constitution;

- The right to just administrative action conferred by Section 33 of the Constitution, read with the Promotion of Administrative Justice Act No. 3 of 2000 ("the PAJA"); and

- The Respondent's Transfer Policy.

35. The Respondents dispute that the decisions sought to be reviewed and set aside by the Applicant constitute "administrative action" as defined in Section 1 of the PAJA and dispute that the constitutional right to just administrative action has application at all. If this is accepted, they dispute that the relevant decisions are subject to <u>any</u> legal constraints entitling the Applicant to challenge either the substance of the decisions or the fairness of the procedure followed.

36. It is therefore fundamental to this application to determine whether or not the decisions sought to be reviewed and set aside are potentially susceptible to legal attack on one or more of the grounds relied upon by the Applicant.

(i) <u>The Statutory Framework:</u>

37. In my view the appropriate starting point is to consider the relevant provisions of the Correctional Services Act. Section 3(5) thereof provides (in the relevant parts) as follows:

> *"(5) The Department is under the control of the Commissioner, who must, without derogating from the generality of subsection (2)-*
>
> *…*
>
> *(g) appoint, remunerate, promote, transfer, discipline or dismiss correctional officials in accordance with this Act, the Labour Relations Act and the Public Service Act."*

38. Section 96(3) thereof provides (in the relevant parts) as follows:

> *"(3) Subject to the provisions of this Act and the provisions of the Labour Relations Act and having regard to the operational requirements of the Department, the Commissioner shall determine the qualifications for appointment and promotion and decide on the appointment, promotion and transfer of correctional officials, but-*
>
> *a) …*
>
> *b) all persons who qualify for appointment, promotion or transfer must be considered;*

c) the assessment of persons shall be based on level of training, relevant skills, competence, and the need to address the imbalances of the past in order to achieve a Department broadly representative of the South African population, including representation according to race, gender and disability;

d) despite the provisions of paragraph (c), the Commissioner may, subject to the conditions prescribed by regulation, approve the appointment, transfer or promotion of persons to promote the basic values and principles referred to in section 195(1) of the Constitution; and

e) …"

39. It will be observed that, in terms of Section 3(5)(g), the power of the Second Respondent to transfer officials is constrained to the extent that this must be done in accordance with the provisions of the Correctional Services Act itself, and in accordance with the provisions of the Labour Relations Act and the Public Service Act. Section 96(3) imposes certain legal constraints and obligations on the Second

Respondent when deciding on the transfer of correctional officials. It makes clear that a transfer decision must be taken having regard to the operational requirements of the Department. Section 96(3)(c) makes clear that the assessment of persons for the purposes (*inter alia*) of a transfer is to be based on the criteria set out in that provision. Of particular importance, Section 96(3)(d) permits the Commissioner to approve the transfer of persons *"to promote the basic values and principles referred to in section 195(1) of the Constitution"*.

40. The Labour Relations Act contains no provisions regulating transfers of employees (save for Section 186(2)(a) to the extent that it deals with demotions) and nothing more need be said about it.

41. Sections 14 and 15 of the Public Service Act, 1994, deal with transfers. Section 14(1) is of particular importance. It provides:

> "*Subject to the provisions of this Act, every officer or employee may, <u>when the public interest so requires</u>, be transferred from the post or position occupied by him or her to any other post or position in the same or any other department, irrespective of whether such a post or position is in another division, or is of a lower or higher grade, or is within or outside the Republic."* (My emphasis.)

Section 14(3) protects an officer against the reduction in his or salary or scale of salary without his or her consent. The balance of Sections

14 and 15 of the Public Service Act appear to have no direct application to this matter.

42. It may be noted that the Public Service Regulations, 2001 (published in Government Notice No. R1 of 5 January 2001, as amended) also deal *inter alia* with transfers of members of the Senior Management Service.

(ii) <u>Section 195 of the Constitution:</u>

43. Section 195(1) of the Constitution falls in the chapter thereof headed "Public Administration" and is headed "Basic Values and Principles Governing Public Administration". It provides that:

> *"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:"*

Nine separate principles are then set out, of which only the following, in my view, could have any possible application in the present circumstances:

> *"(a) A high standard of professional ethics must be promoted and maintained.*
>
> *(b) Efficient, economic and effective use of resources must be promoted.*
>
> *(c) …*
>
> *(f) Public administration must be accountable.*

(g) …

(h) Good human-resource management and career development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

44. Section 195(2) provides that the above principles apply *inter alia* to administration in every sphere of government. They therefore clearly apply to the Department.

45. Section 195(3) provides that national legislation must ensure the promotion of the values and principles listed in subsection (1).

46. As referred to above, Section 96(3)(d) of the Correctional Services Act permits the Commissioner to approve the transfer of persons "to promote the basic values and principles referred to Section 195(1) of the Constitution". In my view this necessarily implies that he or she may not do so if to do so would be incompatible with the basic values and principles referred to in Section 195(1) of the Constitution.

47. Although Section 195(3) of the Constitution requires the enactment of national legislation to ensure the promotion of the values listed in Section 195(1), it is my view that the effect of the reference in Section 96(3)(d) of the Correctional Services Act to Section 195(1) of the Constitution is to require compliance with the applicable values and principles contained in Section 195(1). Of particular present relevance, it appears to me that a transfer is required to comply with the principle that employment and personnel management practices must be based on ability, objectivity and fairness (in terms of Section 195(1)(i) of the Constitution).

48. It is my view, further, that this is a justiciable issue. On this issue I respectfully agree with the views expressed by Malan J. in Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others 2005(6) SA 273 (W) at paragraphs [16] and

[17]. At paragraph [17] the learned Judge held as follows:

> *"Section 195 expresses the broad values and principles upon which public administration is founded. This, however, does not lead to the conclusion that it does not also give rise to justiciable rights: the requirements of Section 195 are expressly incorporated into the Systems Act and they have been relied upon in several cases."*

Having regard to the manner in which Section 96(3)(d) incorporates the basic values and principles referred to in Section 195(1) of the Constitution, I believe that the same conclusion must be reached in the present case.

49. Malan J also pointed out at paragraph [17] that:

> *"The Constitution is the 'supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled' (section 2 of the Constitution). Thus, the Constitution applies to both law and conduct and, in terms of section 172(1), a Court must declare that any law or conduct that is inconsistent with it invalid to the extent of the inconsistency."*

50. The Respondents referred me to Institute for Democracy in South Africa and Others v African National Congress and Others 2005(5) SA 39 (C) in which the Court held that Section 195(1) of the Constitution conferred no justiciable rights on the Applicant in that case. In my view that case is distinguishable, inasmuch as the Applicant in that case was not seeking to enforce a statutory provision which expressly referred to the need, in making the relevant decision, to promote the basic values and principles referred to in Section 195(1) of the Constitution.

51. Mr. Gamble S.C who, together with Ms. T. Golden, appeared on behalf of the Respondents contended that, since Section 195(1) of the Constitution had not been expressly referred to in the founding affidavit, it was not open to the Applicant to rely on the basic values and principles contained therein in the present proceedings. I do not accept this. I cannot see that there is any prejudice to the Respondent in allowing the Applicant to argue, on the facts as disclosed in the founding affidavit, that the basic values and principles referred to in Section 195(1) of the Constitution have not been complied with. The Applicant's contention is that it is the Respondents' failure to adhere to its written Transfer Policy which establishes the infringement of the applicable Constitutional principles. Alleged non-compliance with various provisions of the Transfer Policy is expressly alleged in the

founding affidavit and has been fully dealt with on behalf of the Respondents in their answering affidavits. It may also be noted that it was the Respondents who alleged in their affidavits that the authority of the Second Respondent to transfer the Applicant was derived from Sections 3(5)(g) and 96(3) of the Correctional Services Act. It is Section 96(3) which expressly refers to the need to comply with the values and principles contained in Section 195(1) of the Constitution.

52. Whether or not any particular alleged infringement of the Transfer Policy offends any of the basic values and principles referred to in Section 195(1) of the Constitution is an issue to be decided, if it arises, in due course. As a matter of principle, however, it seems to me that a sufficiently egregious breach of the Transfer Policy might be incompatible with the constitutional principle that the employment and personnel management practices in the public administration must be based on ability, objectivity and fairness. The Transfer Policy purports (in Clause 1.2[b]) to *"set conditions for the exercise of"* the power to transfer an official. The purpose of the procedure set out in the policy is said (in Clause 2[c]) to be to *"ensure that transfers are dealt with in a fair and justifiable manner"*. In this context, it is my view that an infringement of the principles or procedures set out in the Transfer Policy which affects an employee in a materially adverse manner might well be incompatible with the Constitutional principle which requires fairness in the employment and personnel management practices.

(iii) "Administrative Action"

53. The next issue to be considered is whether the decisions attacked by the Applicant constitute *"administrative action*" in terms of the PAJA. This raises difficult questions on which diverse views have been expressed in recent decisions. Compare, for example, the recent decision by this Court in South Africa Police Union and Another v National Commission of the South African Police Service and Another [2006] 1 BLLR 42 (LC); (2005) 26 ILJ 2403, followed in this Court in Hlope and Others v The Minister of Safety and Security and Others [2006] 3 BLLR 297 (LC), but not followed by the High Court in POPCRU and Others v The Minister of Correctional Services and Others [2006] 4 BLLR 385 (E); see also Dunn v Minister of Defence and Others 2006(2) SA 107 (T) at paragraph [5]; and the Johannesburg Municipal Pension Fund decision (supra) at paragraph [14].

54. Mr. Gamble submitted that the proposed transfer of the Applicant does not constitute "*administrative action"* as defined in Section 1 of the PAJA. In particular, he submitted that I should follow the decision of this Court in the South African Police Union matter and hold that the Second Respondent's decision to transfer the Applicant was not a decision taken *"exercising a public power or performing a public*

function" in terms of any legislation (as contemplated in the definition of "*administrative action"* in the PAJA) because, so he argued, it formed part of the managerial prerogative of the Second Respondent in the conduct of labour relations. He submitted, further, that I should hold that the decision to transfer was not a decision *"which has a direct, external legal effect"* as required by the definition.

55. For the Applicant, Mr. Arendse submitted that I should decline to follow the decisions by this Court in the South African Police Union and Hlope matters, that I should follow the POPCRU decision and that I should find that the decisions attacked do constitute *"administrative action*" in terms of the PAJA. Mr. Arendse also submitted that I should follow a line of previous decisions by this Court and by the High Court in which it was held that decisions to transfer, or similar decisions by public sector employers exercising statutory powers, are susceptible to judicial review on the grounds well-known in our administrative law. He relied, for example, on Mbayeka and Another v MEC for Welfare, Eastern Cape (2001) 1 All SA 567 (Tk); Simela and Others v MEC for Education, Province of the Eastern Cape and Another [2001] 9 BLLR 1085 (LC); Matheyse v Acting Provincial Commissioner, Correctional Services and Others (2001) 22 ILJ 1653 (LC); Basson v The Provincial Commissioner (Eastern Cape) of the Department of Correctional Services (2003) 24 ILJ 803 (LC) and Dunn v Minister of Defence 2006(2) SA 147; (2005) 26 ILJ 2115 (T).

56. In my view the decision to transfer the Applicant constituted "*administrative action"* as that term is defined in the PAJA. To the extent, if any, that this conclusion is incompatible with the views expressed in the South African Police Union and Hlope decisions, I am respectfully of the view that those decisions are erroneous and I decline to follow them. I have reached this conclusion for the reasons which follow.

57. The definition of the term *"administrative action*" in Section 1 of the PAJA includes the following:

> *"…any decision taken or any failure to take a decision, by-*
>
> *a) an organ of State, when-*
>
> *i) exercising a power in terms of the Constitution or a Provincial constitution; or*
>
> *ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *b) …*
>
> *which adversely affects the rights of any person and which has a direct, external legal effect".*

Various specific exclusions follow, none of which are presently in point.

58. For the reasons which follow, I do not accept the submission advanced by Mr. Gamble that the decisions in issue in this case are not decisions taken *"exercising a public power or performing a public function"* in terms of any legislation.

59. The Second Respondent's power to transfer correctional officials in terms of Section 3(5)(g) of the Correctional Services Act is required by that provision to comply with the Public Service Act. As referred to above, Section 14(1) of the Public Service Act permits the transfer of an officer or an employee *"when the public interest so requires"*. By implication, a transfer is not permissible when the public interest does not so require. (See Saloojee v McKenzie N.O. and Others (2005) 26 ILJ 330 (LC).) That is no doubt why, in this very matter, the Second Respondent stated, in defending his decision to transfer the Applicant, that he was satisfied that this transfer was *"in the public interest"*. In my view this makes it clear that, when the Second Respondent exercised his power to transfer, he exercised a public power or performed a public function. A power conferred by statute on a public official which is required to be exercised in the public interest is, in my view, manifestly a *"public power"* – Institute for Democracy in South Africa and Others v African National Congress and Others 2005(5) SA 39 (C) at paragraph [27].

60. The manner in which Section 96(3) of the Correctional Services Act circumscribes the Second Respondent's power to effect a transfer should also not be overlooked. For example, the Second Respondent is obliged by that provision, when deciding on a possible transfer, to consider all persons who qualify for such transfer, and is obliged to assess such persons *inter alia* on the basis of their levels of training, relevant skills and competence. The Second Respondent is required to act, not in accordance with his personal interest, but on the basis of the operational requirements of a department of the State and having regard to criteria set out in a statute.

61. It is convenient to illustrate this point by reference to an example. Assume, for the moment, that there is merit in the Applicant's complaint that the Second Respondent decided to transfer him, not on the basis of the of his level of training, skills and competence, but on the basis of personal animosity towards the Applicant or dislike for POPCRU. In my view a transfer for such reasons would be impermissible in terms of Section 96(3). A question which arises is whether the Court would be entitled to grant a remedy in respect thereof in terms of the PAJA, e.g.

in terms of Section 6(2)(e)(i) thereof (which applies where the action was taken *"for a reason not authorised by the empowering provision"*). This will depend on whether the decision to transfer was a decision taken exercising a *"public"* power or performing a *"public"* function in terms of any legislation. In my view it would be.

62. Before the South African Police Union decision, a long line of decisions had held that particular employment-related decisions taken by public sector employers in the exercise of statutory powers involved the exercise of a public power. Probably the best-known of these is the decision by the Appellate Division (as it then was) in Administrator, Transvaal and Others v Zenzile and Others 1991(1) SA 21 (A). Zenzile concerned a decision to dismiss. At 34B to D, Hoexter J.A. held:

> "*One is here concerned not with mere employment under a contract of service between two private individuals, but with a form of employment which invests the employee with a particular status which the law will protect. Here the employer and decision-maker is a public authority whose decision to dismiss involved the exercise of a public power."* (My emphasis)

Similarly in Administrator, Natal and Another v Sibiya and Another 1992(4) SA 532 (A), a retrenchment decision, it was held (at 539C):

> "*As in the Zenzile case, here too, the employer was a public authority whose decision to dismiss involved the exercise of a public power*." (My emphasis)

In Mbayeka (supra), a suspension case, Jafta J. (as he then was) held as follows:

> "*It is clear from the facts of the present case that when the respondent suspended the Applicants she exercised a public power derived from Section 22(7) of the Public Service Act."* (My emphasis)

It is also clear that in Gemi v the Minister of Justice, Transkei 1993(2) SA 276 (TkGD), a case dealing with a transfer effected in terms of Section 14(1) of the Public Service Act, 43 of 1978 (Transkei), the Court was of the view that the decision to transfer had been taken by an official *"entrusted with public power"* (at 288D).

63. These decisions all precede the enactment of the PAJA. In my view the law-giver must be taken to have been aware of this line of decisions in which employment-related decisions taken by public sector employers in the exercise of statutory powers had been held to involve the exercise of public powers. There is nothing in the definition of *"administrative action"* which suggests an intention to alter the principle established by these decisions. I therefore believe that it is appropriate to follow this principle, notwithstanding the contrary view adopted by this Court in the South African Police Union and Hlope decisions.

64. I agree with the views expressed by Plasket J. in the POPCRU matter (supra) at paragraphs 55 to 64. I agree in particular with the following (at paragraph [56]):

> "*Zenzile was not, as some have suggested, an artificial extension of administrative law and an aberration – albeit a welcome one – created by the circumstances of the time which should now be consigned to the scrap-heap of history. It was a case upholding the general principle, recognised and applied in this country at least since Central Road Board v Meintjies, that one of the important roles the Courts play in societies such as ours, and in our legal tradition, is to ensure that when statutory powers (and other public powers sourced in common law or in customary law) are given in trust to public functionaries for the purpose of furthering the public interest, those public functionaries do not abuse the trust reposed in them, remain within the bounds of their empowerment and exercise their powers reasonably and in a procedurally fair manner."* (Footnotes omitted; my emphasis)

65. I also agree with the following views expressed by the learned Judge at paragraph [54] of his judgment:

> *"In my view, the statutory basis of the power to employ and dismiss correctional officers, the subservience of the Respondents to the Constitution generally and section 195 in particular, the public character of the Department and the pre-eminence of the public interest in the proper administration of prisons and the obtainment of the purposes specified in section 2 of the Correctional Services Act all strengthen my view that the powers that are sought to be reviewed in this matter are public powers as envisaged by the common law, the Constitution and the PAJA.*

66. In the South African Police Union matter the dispute concerned a decision by the National Commissioner of Police to change police members' 12-hour working shifts to 8 hours. An applicable collective agreement permitted both of these shift patterns. Certain regulations promulgated by the Minister bestowed upon the Commissioner the prerogative to determine working hours. The Court commented (at paragraph [51]) as follows:

> *"…the Minister has bestowed the prerogative upon the Commissioner to determine working hours, which*

prerogative he may exercise unilaterally, or bi-laterally, in terms of existing contracts of employment or collective agreements, depending on the circumstances. Hence the power is indeed derived from a public source, but, as the Constitutional Court has indicated, the source of the power, while relevant, is not necessarily decisive. Equally, if not more, important are the nature of the power, its subject matter and whether it involves the exercise of public duty. There is nothing inherently public about setting the working hours of police officers. Nor is there any public law concern here, the matter falls more readily within the domain of contractual regulation of private employment relations. The nature of the power exercised and the function performed in the setting or agreeing of shift times does not relate to the government's conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance. The powers and functions concerned derive from employment law and are circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining. One is instinctively drawn to the conclusion that the concept of administrative action is not intended

> *to embrace acts properly regulated by private law. To render every contractual act of an organ of state a species of administrative action carries the risk of imposing burdens upon the state not normally encountered by other actors in the private sphere."*

The Court went on to hold (at paragraph [53]) that:

> *"… the adjustment of shifts in terms of a collective agreement ought not to be considered as administrative action, for, amongst other reasons, in this instance it was done under a contract concluded on equal terms between equal parties 'without any element of superiority or authority' deriving from SAPS's public position."*

67. In my view the facts and the applicable legal instruments in the South African Police Union matter are so different from those applying in the present case that that decision is distinguishable. In the present case the Second Respondent exercised a discretionary power conferred by a statute which is required to be exercised *"in the public interest"*. The present case does not pertain to the execution of a contractual right. Furthermore, in my view, the present case does relate to an *"element of superiority of authority"* deriving from the powers conferred by

statute. It is instructive, in this regard, to note the manner in which in

Logbro Properties CC v Bedderson N.O. and Others 2003(2) SA 460 (SCA) the Supreme Court of Appeal distinguished its earlier decision in Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001(3) SA 1013 (SCA). In Logbro the Court (per Cameron J.A.) held as follows (at paragraph [10]):

> **"***The case* [i.e. Cape Metropolitan Council] *is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of a cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power."* (My emphasis)

In the present case there is, in my view, an element of superiority or authority deriving from the Second Respondent's public position and deriving from the statutory power conferred on him in relation to

transfers of employees.

68. In Hlope, Van Niekerk A.J. followed the South African Police Union decision and held, without pertinently considering the statutory source of the power in issue, that a decision to transfer SAPS officers did not involve the exercise of a public power or the performance of a public function. He referred to Murphy A.J's conclusion in the South African Police Union matter that disciplinary or operational transfers and suspensions are employment or labour-related matters, not administrative acts. He continued (at paragraph [13]):

> *"I agree with Murphy A.J's conclusions, and they are obviously apposite in this matter, being a challenge to an employment-related decision by the Fourth Respondent, a Commissioner of Police. To the extent that the Courts previously extended the reach of administrative law to ensure fairness in the exercise of employment discipline in the public sector, the extension of the Labour Relations Act to that sector now guarantees labour rights to public sector workers. The approach adopted by Murphy A.J., as he notes at paragraph [55] of the Judgment acknowledges this development and gives effect to the important policy consideration that the resolution of*

employment disputes in the public sector should be accomplished by the same mechanisms that apply in the private sector."

69. I respectfully disagree with this approach. In this regard I refer, first, to the comments by Plasket J. at paragraph [56] in the POPCRU matter, quoted above. Second, I do not agree that the extension of the Labour Relations Act to the public sector demonstrates an intention by the law-giver to remove rights that public sector employees already had within the realms of administrative law. See in this regard Section 157(2) of the LRA, which demonstrates an assumption that the State in its capacity as an employer may execute *"administrative acts"* or conduct which may violate fundamental constitutional rights. See also Section 158(1)(b) of the LRA, which permits the Labour Court to *"review"* any decision taken or any act performed by the State in its capacity as employer. In my view this implies an assumption that the principles of administrative law govern such decisions or acts.

70. It should also not be overlooked that, as this very case demonstrates, the rights conferred on public sector employees (together with other employees) by the LRA are not in all respects as extensive as the rights that public sector employees already enjoyed in terms of administrative law

principles established by the common law and now contained in the PAJA. As referred to above, there is no provision in the LRA of which I am aware which protects employees against being transferred without any prior consultation. One possible reason for this might be that the question of transfers of employees is left to be regulated by contract. Yet that approach is of little assistance to public sector employees who, by operation of various statutes, cannot protect themselves against transfers contractually and can be transferred against their will wherever the public interest or operational requirements of the State may dictate. I do not believe that the enactment of the LRA, which was clearly intended to extend rights, must be taken impliedly to have removed existing rights enjoyed by public sector employees.

71. Before the establishment of a constitutional right to just administrative action it was, in my view, already settled law that public sector employees transferred pursuant to statutory powers were entitled, if their rights or legitimate expectations were affected, to the protection of the principles of administrative law. See in particular Hlongwa v Minister of Justice, Kwa-Zulu Government (1992) 13 ILJ 338 (D); 1992 (3) SA 269 (D); and Gemi v Minister of Justice, Transkei 1993(2) SA 276 (Tk GD). In Hlongwa and Gemi the doctrine of *"legitimate expectation"* was invoked in reaching the conclusion that the employees being transferred were entitled to be heard before a decision was taken.

72. The same doctrine was applied by the Labour Appeal Court in Acting Provincial Commissioner, Correctional Services and Others v Matheyse (1) (2002) 23 ILJ 2192 (LAC). That was a case in which an employee was transferred, in terms of Section 3(5)(g) of the Correctional Services Act, in breach of an undertaking given to his union that its members would not be transferred against their will. The Labour Appeal Court held that the affected employee had a legitimate expectation that he would not be transferred against his will and that the decision to transfer him in total disregard of the undertaking given was a reviewable gross irregularity.

73. Section 3(1) of the PAJA now requires administrative action which materially and adversely effects the rights or legitimate expectations of any person to be procedurally fair. In my view the Applicant in the present case has a legitimate expectation that the Department will comply with the undertakings given by it in its Transfer Policy. (See Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999(2) SA 91 (CC) at paragraphs [32] to [36].) I do not accept that, by framing the definition of "*administrative action"* in the way that it did, (i.e. by including a requirement that the decision in issue must be taken in the

exercise of a public power or the performance of a public function), the law-giver intended to exempt an employer in the position of the Second Respondent from having to comply with undertakings of the sort contained in the Department's Transfer Policy.

74. I am also of the view that the challenged decisions have "a direct, external legal effect" as referred to in the applicable definition. In this regard I respectfully disagree with the construction of this requirement

adopted in the South African Police Union case (supra). There it was held that, in order to have an *"external effect"*, a decision must affect *"outsiders"* and that decisions only affecting employees within a departmental administration do not have this effect. Reliance was placed by the Court on Grey's Marine Hout Bay (Pty) Ltd and Others v The Minister of Public Works and Others [2004] All SA 446 (C) at 458. That decision was taken on appeal and the Supreme Court of Appeal's decision is reported in Grey's Marine Hout Bay (Pty) Ltd and Others v the Minster of Public Works and Others 2005(6) SA 313 (SCA). At paragraph [23] of the latter decision, Nugent J.A. expressed the view that the requirement of a *"direct, external legal effect"* (as well as the requirement that the administrative action *"adversely affects the rights of any person"*) was probably intended to emphasise that administrative action *"impacts directly and immediately on individuals"*.

In my view this is the correct approach. There can be no doubt that the decisions attacked by the Applicant impact directly and immediately on him.

75. J. Klaaren and G. Penfold express the following views (in their chapter on *"Just Administrative Action"* in "Constitutional Law of South Africa" (2nd ed) Volume 1, Woolman *et al* (eds) at 63-22) in respect of the requirement for *"a direct, external legal effect"*:

> *"The most important implication of this definitional element is that, together with the phrase 'adversely affecting rights', it introduces the concept of finality. A decision will have a direct legal effect only if it has an actual impact on a person's rights or interests. It therefore appears that preparatory steps and recommendations without such impact will not amount to administrative action. The phrase 'external effect' implies that the decision must have a direct impact on a person or entity other than the administrative actor. It would therefore exclude a decision of a subcommittee which makes a recommendation to the final decision-making body. The phrase should not be taken literally as excluding actions which affect the members of (or the*

persons within) the public body itself. The disciplining of a public servant or the internal transfer of a prisoner to a higher level of security has a direct, external legal effect on the relevant person and should constitute administrative action."

I agree with this approach, which, in my view, is consistent with the approach taken by the Supreme Court of Appeal in the Grey's Marine matter.

76. For the reasons set out above, therefore, I reject the arguments raised on behalf of the Respondents in support of their contention that the decisions which the Applicant seeks to review do not constitute "administrative action" in terms of the PAJA.

THE APPLICANT'S SUBSTANTIVE COMPLAINTS

77. The Applicant recognises that the Second Respondent is legally empowered to transfer him in terms of Sections 3(5)(g) and 96(3)(d) of the Correctional Services Act. His principal substantive attacks on the decisions he challenges are the following:

77.1 He contends that the decisions were actuated by malice or

ulterior motives;

77.2 He attacks the Pollsmoor placement decision as a demotion, which he contends the Second Respondent was not empowered to effect; and

77.3 He attacks the Pollsmoor placement decision as irrational.

78. In my view there is no merit in any of these complaints.

79. In assessing the Applicant's entitlement, in motion proceedings, to a final order I am required to apply the principles laid down by the Appellate Division in Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634E to 635C,in which the Appellate Division (per Corbett J.A., as he then was) held as follows:

> **"***Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957(4) SA 234*

(C) at 235E – G, to be:

> *"…where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order… Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."*

This rule has been referred to several times by this Court (see Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd 1976(2) SA 930 (A) at 938A – B; Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd 1982(1) SA 398 (A) at 430 – 1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1982(3) SA 893 (A) at 923G – 924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if

those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T) at 1163-5; Da Mata v Otto NO 1972(3) SA 858 (A) at 882D – H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983(4) SA 278 (W) at 283E – H). Moreover, there may be

exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra at 924A)."

80. Subject to what is stated below, I believe that I must decide this case on the assumption that the facts stated by the Respondents are correct.

81. The Second Respondent denies in his affidavit that he harbours any grudges or grievances against the Applicant. He denies, in terms, that the decision to transfer the Applicant was in any way an act of revenge or retaliation on his part, as has been suggested by the Applicant. I can see no basis for rejecting this evidence. Furthermore, the operational considerations taken into account when making the decision to transfer the Applicant have been furnished in detail, and I can see no basis upon which I am entitled to reject these considerations as fictitious and a mere charade. In my view the aforegoing is fatal to the Applicant's complaint of malice or ulterior motives.

82. The First Respondent has pertinently and, in my view, persuasively denied that the placement of the Applicant at Pollsmoor can be

regarded as a demotion. The Applicant has not alleged that he will not continue to hold the rank of Director whilst temporarily occupying this post, nor has he alleged that his remuneration or other benefits are to be reduced. In my view the temporary placement at Pollsmoor must therefore be regarded as a *"transfer*", as contemplated in Sections 3(5)(g) and 96(3) of the Correctional Services Act, which the Second Respondent is empowered to effect. There is no basis for holding that it is a demotion which the Second Respondent has no power to effect.

83. There is, in my view, equally little merit in the Applicant's complaint that there is no rational basis for the decision to require him to transfer temporarily to Pollsmoor, pending his later transfer to Pretoria. The Second Respondent states as follows in this regard:

> *"Having regard to the personal circumstances raised by the Applicant with Mr. Motseki, and in particular the prejudicial effects that an immediate transfer would have on his domestic and personal life, after further*

consideration I decided that the Applicant should be given an opportunity to remain in the Western Cape for a period of six months to enable him to attend to his affairs. The Fourth Respondent had been earmarked to be transferred into the Applicant's position at Edgemead and, in the circumstance, I

considered it fair to all concerned to temporarily place the Applicant in the post of Area Co-ordinator: Corrections at Pollsmoor in the Cape Peninsula. This correctional facility is about 20km away from the facility at which the Applicant was stationed and would have meant only that he would be required to drive from Edgemead to Pollsmoor and back every day to attend work. Any additional expenses incurred by the Applicant in this regard would have been adequately covered by the Transfer Policy.

I considered the placement of the Applicant at Pollsmoor to be fair in the circumstances, both to the Applicant, to the Fourth Respondent and to the Department…."

84. The First Respondent also states as follows:

> *"The Applicant's placement at Pollsmoor correctional facility is a temporary one to allow him the opportunity to obtain exposure to some of the activities relating to After Care at operational level and to afford him an opportunity to make arrangements regarding his personal circumstances."*

85. I see no reason to reject any of the aforegoing evidence which, in my view, is destructive of the Applicant's case on this point.

PROCEDURAL FAIRNESS

86. The Applicant made a number of procedural complaints. His principal complaints in this regard were that:

- The Second Respondent's letter of 13 December 2005 demonstrated that the decision to transfer him to Pretoria was a *fait accompli* as at that date;

- He had not been given the reasons for the proposed transfer, as required by the Transfer Policy;

- In breach of an undertaking given by Mr. Motseki at the meeting on 23 February 2006, the Second Respondent had failed to take account of the written representations subsequently furnished by the Applicant; and

- There was a complete absence of consultation in respect of the "transfer" to Pollsmoor.

- The ultimate decision was tainted by the failure to give reasons for rejecting the submissions made by the Applicant.

87. Whilst I accept (as did the Respondents) that the wording of the Second Respondent's letter of 13 December 2005 was unfortunate, I do not accept that the decision to transfer the Applicant to Pretoria was a *fait accompli* as at that date. The letter itself invited the Applicant (albeit somewhat clumsily) to raise *"any factors which have an influence on your placement*". In my view this implied that such factors would be taken into account before the *"placement*" was finalised. It should also be noted that, on the Applicant's own version, he was informed by the First Respondent, before he received the aforementioned letter, that the Second Respondent was *"contemplating"* transferring him to Head office in Pretoria and that he would receive a fax in this regard. He was told by the First Respondent that he should apply his mind to the contents of the fax and that the First Respondent would meet with him after he had thought about it. In my view this would have made clear to the Applicant that the decision was not a *fait accompli* and that representations which he wished to make in this regard would be entertained. Finally, and most importantly, the subsequent developments pertaining to the Applicant's transfer made it quiet clear to him that the Second Respondent was prepared to entertain representations from him before making a final decision. Of particular importance in this regard are the undertakings set out in the Second Respondent's letter of 17 February 2006, which

have been quoted above.

88. As regards the Applicant's complaint that he was not given reasons for the transfer to Pretoria, Clause 7.2.3 of the Transfer Policy provides:

> *"The employee whose transfer is being considered and his or her supervisor must be informed that the transfer is being considered, and given the reasons for the proposed transfer. (S)he must be allowed seven (7) working days to make representations concerning the transfer, if (s)he wishes to do so."*

Clause 7.2.5 of the policy provides:

> "*If the employee makes representations, the person responsible for considering the transfer must consider the representations."*

89. As referred to above the first written communication received by the Applicant in respect of his transfer was the letter from the Second Respondent of 13 December 2005. In this letter he was informed that *"after consideration of the operational requirements of the Department as well as your personal position"*, the Second Respondent had

"approved" his *"horizontal placement"* to the post of Director: After Care: Head office.

90. In my view this letter did not comply with the requirements of the Transfer Policy insofar as that policy requires an employee whose transfer is being considered to be given the reasons for the proposed transfer. Mere reference to consideration of *"the operational requirements of the Department"* and of the employee's *"personal position"* does not adequately discharge the obligation to give the reasons for the proposed transfer. The purpose for giving such reasons is to enable the employee to make representations, if so minded, as to why the contemplated transfer should not be effected. The *"reasons"* given in the letter to the Applicant, if they can be regarded as such, fall short of what is required to give the Applicant a fair opportunity to make representations as to why the transfer should not be effected.

91. In his founding affidavit the Applicant alleged that, at his meeting with the First Respondent on 2 February 2006, he complained that he had not been informed in any detail as to why he was required to go to Pretoria. He also alleged that he had requested the First Respondent to provide him with full reasons for this decision. He alleged that that, when the acting commissioner, Ms. Schreiner, telephoned him on 30 December he informed

her that he expected to be furnished with reasons in writing. Neither the First Respondent nor Ms. Schreiner have pertinently denied these allegations. It is true that the First Respondent has deposed to a version in respect of the meeting 2 February 2006 which makes no mention of a request from the Applicant for full reasons. It is also true that Ms. Schreiner has deposed to a version in respect of her telephone conversation with the Applicant which does not mention a request from the Applicant for reasons. However, in my view if the First Respondent or Ms. Schreiner had intended to dispute the allegation that the Applicant had requested full reasons for the decision to transfer him they should have said so. In the absence of a pertinent denial in this respect, I accept the Applicant's evidence on this issue.

92. In my view the Applicant was not given proper reasons for the proposed transfer to Pretoria until the meeting held at Leeukop prison on 23 February 2006. The furnishing of these reasons, confirmed within a day or so in writing, discharged the obligation to give reasons. What remains to be considered, however, is whether the Second Respondent's failure to take into account the written representations furnished by the Applicant on 28 February 2006 is a sufficient basis to set aside his decision.

93. The transcript shows that, immediately after Mr. Motseki had finished orally furnishing the Applicant with the reasons for his proposed transfer to Pretoria, he offered the Applicant a break to apply his mind

to what he had been told before responding. The Applicant declined this offer and immediately made a number of representations as to why, in his submission, the proposed transfer was inappropriate. Thereafter Mr. Motseki said that the Department would apply its mind to the issues that had been raised by the Applicant and suggested that, since the Applicant had stated that he had wished to address the Second Respondent directly, *"…. we'll grant you an opportunity to put them down in writing as a follow-up to the specific meeting for his consideration"* (my emphasis).

94. The transcript of the meeting is far from perfect but there are a number of other indications in it that Mr. Motseki encouraged the Applicant to put his submissions in writing to the Second Respondent and undertook (expressly or impliedly) that they would be taken into account by the Second Respondent. For example, the transcript shows that Mr. Motseki stated as follows:

> **"***I really want to hear you on the issue around the Peninsula whether I heard you correctly that in general you are saying you want to be heard which is why I am saying lets just make sure that we don't report these specific circumstances ourselves. That's the reason why I am saying I would appreciate it if you do put that in writing over and above over what could be in the tape*

> *because I would really myself want… which is what I think you're entitled to you'd want the commissioner to apply his mind to these specific issues…let's use every avenue possible. He [the Commissioner] may still ask for a meeting but not conditional. He may still ask for a meeting but I think its important for him to hear (sic) this written. I think by your own admission you would still want to address him directly on this."* (My emphasis)

Immediately after this the Applicant and Mr. Motseki agreed that the Applicant would address the Second Respondent in writing.

95. The transcript shows that, later in the meeting, the Applicant requested that the reasons given to him orally at the meeting should be furnished to him in writing:

> *"… I would want to get those reasons basically in writing that you give to me so that I can be able to apply my mind and respond to that because I think that's an important part…"*

Mr. Motseki thereafter undertook to give to the Applicant a copy of the document setting out the relevant considerations that day or the following day.

It was agreed that at the end of business on the following Monday, i.e. 27 February 2006, the Department would get a written response from the Applicant.

96. In his founding affidavit the Applicant alleged that, at the meeting, it had been agreed that he would send his representations to Mr. Motseki in order that he could put these before the Second Respondent for his consideration.

97. In his answering affidavit Mr. Motseki stated that he had agreed with the Applicant that he would submit written representations to him by Monday, 27 February 2006. He then stated, however, that these representations *"were intended to serve as a written recordal on the Applicant's file of the reasons advanced by him for objecting to the transfer"*. He stated that after the tape had been turned off at the end of the meeting:

> *"…I expressly told the Applicant that although he was afforded the opportunity to submit the aforesaid written representations regarding his personal circumstances, the Second Respondent's decision was not dependant on him (Second Respondent) receiving such written*

submissions. I had been tasked by the Second Respondent to report to him personally regarding the Applicant's position and objections."

He also stated:

"It is expressly denied that I made an "arrangement " with the Applicant (as alleged at paragraph 60,62 and 65 of the founding affidavit) at Leeukop that he would submit written representations to me in order for me then to put before the Second Respondent for his consideration of the matter afresh. I refer this Honourable Court to the transcript of the Leeukop meeting, which evidences that no such arrangement and/or agreement was concluded."

98. In his replying affidavit the Applicant stated that he was "utterly stunned" by the allegation that, when the tape had already been turned off, Mr. Motseki had told him that the Second Respondent's decision was not going to be dependant upon him having received and/or having considered his written submissions. He said that this was *"an utter lie"*.

99. Mr. Motseki's denial that an arrangement was concluded during the meeting that the Applicant's written submissions would be put before the Second Respondent for his consideration must, in my view, be rejected. It is, in my view, simply not compatible with the transcript.

100. Neither party requested the Court to refer the factual dispute as to what was said after the tape had been turned off to evidence. Mr. Arendse submitted that Mr. Motseki's version was "fanciful in the extreme" and submitted that this Court was entitled to adopt a robust approach and to reject his version on this aspect. He referred the Court to authorities such as Soffiantini v Mould 1956(4) SA 150 (E); Ndhlovu and Another v Minister of Justice and Others 1976(4) SA 250 (N) at 252A; Truth and Verification Testing Centre v PSE Detection CC and Others 1998(2) SA 689 (W) at 698F to 699F; and McCain Frozen Foods (Pty) Ltd v Beestepan Boerdery (Pty) Ltd 2003(3) SA 605 (T) at 610I to J. There is, in my view, considerable force in Mr. Arendse's argument on this aspect. I have already rejected, on the basis of inconsistency with the transcript, Mr. Motseki's denial that it was arranged that the Applicant's written submissions would be put before the Second Respondent for his consideration. This raises serious doubts about Mr. Motseki's reliability and credibility. I also agree with Mr. Arendse's argument that Mr. Motseki's version as to what happened after the tape-recorder was switched off is inherently improbable. It is common cause that the

meeting was tape-recorded at the request of the Applicant. If such a material statement had been made after the tape-recorder had been switched off, I agree with Mr. Arendse that it is highly probable that the Applicant would have protested. It is relevant, in my view, that that it is common cause that the Applicant both requested, and was granted, a brief extension for the filing of his written representations. This brief extension would have made little sense if it were understood both by the Applicant and by Mr. Motseki that no regard was going to be had to his written representations. I also take note that it is common cause that, on 28 February 2006, the Applicant protested to the First Respondent that it had been agreed that his written representations would be taken into consideration. To my mind this supports the view that he had not been told after the tape-recorder was switched off that his written representations were not to be taken into account. Despite all this it is, in my view, unnecessary to make a finding in relation to this issue because I am persuaded that, even if I should make a finding in favour of the Applicant, his case nonetheless falls to be dismissed.

101. It should be noted that it is common cause that the original arrangement was for the Applicant to furnish his written representations by Monday, 27 February 2006. In his answering affidavit Mr. Motseki states that, on that day, the Applicant called him to request more time to submit his written representations. He mentioned that his office was experiencing

difficulties caused by the power outages in the Western Cape. Mr. Motseki gave the Applicant until 12h00 the following day, Tuesday, 28 February 2006, to submit his written representations. In his replying affidavit, the Applicant admits this. He goes on to state that the representations "could not be sent through by 12h00 on the Tuesday, as a result of power outages in Cape Town" and states that they were sent through by 16h15 on that same day. He does not allege that he sought a further extension as a result of the power outages on the Tuesday.

102. It appears to me that the factual dispute referred to above is rendered irrelevant by the fact that the Applicant's written representations were only sent to the First Respondent after the expiry of the agreed, extended deadline of 12h00 on Tuesday, 28 February 2006. In my view the Applicant's failure to meet this deadline absolved the Second Respondent from any obligation which might otherwise have existed to take the Applicant's written representations into account when making his final decision.

103. I say this notwithstanding the fact that the Second Respondent appears to have taken his decision prior to the expiry of the extended deadline. It may be – I express no view in this regard – that if the Applicant had furnished his written representations before the expiry of the extended deadline, the Second Respondent's decision would be susceptible to being set aside on the basis of the failure to take the Applicant's written representations into account.

I cannot see, however, how this can be so if it transpires that the Applicant failed in any event to furnish his written representations timeously.

104. I have given consideration to the argument that the Transfer Policy entitles the affected employee to a seven working day period after being furnished with the reasons for the proposed transfer to make representations. That was, however, not the case made out by the Applicant. Furthermore, in my view, the arrangement between the Applicant and Mr. Motseki as to the extended deadline by which his written representations were to be furnished superceded the relevant term in the Transfer Policy. It should also be borne in mind that this arrangement as to the deadline was concluded with knowledge that the Second Respondent had stated, in his letter of 17 February 2006, that the decision to transfer the Applicant to Pretoria was suspended for a period of seven days and that no further delays would be entertained. In that context it is my view that the arrangement between the Applicant and Mr. Motseki in respect of the deadline was reasonable. I do not think that, in these circumstances, the failure to take into account the written representations disclosed unfairness incompatible with the principles set out in Section 195(1) of the Constitution. Nor do I believe that any procedural unfairness incompatible with Section 3 of the PAJA has been shown.

105. I turn to consider the Applicant's complaint about a complete absence of consultation in respect of his six-month placement at Pollsmoor. I accept

that the Applicant was not informed that this placement was under consideration; was not given reasons for this before the decision was taken; and was not invited to make representations in relation to this issue. I do not accept, however, that this placement was governed by the terms of the Transfer Policy. Nor am I persuaded that the decision falls to be set aside on any other basis.

106. Clause 5.3 of the Transfer Policy provides:

> "*5.3 An official is not regarded to be transferred <u>when he/she is sent temporarily</u> to another Centre/ Management Area for official duties or any other reason. Such temporary measures must be reviewed every three (3) months."* (My emphasis)

It is clear that the Pollsmoor placement is intended to be temporary. Not only was it intended to apply only for six months, but it is also intended to operate only until the Applicant is transferred (in the proper sense of the word) to Pretoria. It is therefore not governed by the Transfer Policy at all.

107. I am also not persuaded that the Pollsmoor placement decision was

procedurally unfair. Whilst it is true that the Applicant was not consulted about the proposal to place him temporarily at Pollsmoor, it is important to note that this placement took place in response to his complaint that, for pressing personal reasons, he would be prejudiced by the proposed transfer to Pretoria, which the Department was at the time requiring him to take up almost immediately. The Second Respondent took these personal circumstances into account and, for this reason, decided to temporarily place the Applicant in a vacant post at Pollsmoor. He trusted that this would allow the Applicant enough opportunity to address and solve any aspects which hindered his transfer to Pretoria. In my view, this was a reasonable response to the representations made by the Applicant and a response which did not require the Second Respondent to start consulting all over again in respect of the proposed temporary placement at Pollsmoor.

108. Section 3(1) of the PAJA provides:

> *"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."*

In my view the temporary placement at Pollsmoor did not *"materially and adversely affect the rights or legitimate expectations"* of the Applicant. The provisions of the Correctional Services Act referred to

above made clear that he had no right not to be transferred. Nor, in my view, did the temporary placement adversely affect any of his legitimate expectations. Inasmuch as I believe that the Transfer Policy does not apply, I do not see on what other basis any of the Applicant's legitimate expectations were materially and adversely affected.

109. The final procedural complaint with which I propose to deal is the Applicant's complaint that he was not furnished with reasons for the Second Respondent's failure to accept his submissions as to why he should not be transferred at all. Clause 7.2.5 of the Transfer Policy requires that, if the affected employee's representations *"…were not favourably considered, the reasons why the representations were rejected must be set out in brief"*. In the letter of 28 February 2006, in which the Applicant was informed of the Second Respondent's final decision, brief reasons were given for the decision temporarily to place the Applicant in the Pollsmoor post, but no reasons were given for the decision to persist with the transfer to Pretoria (albeit at a later date than initially proposed). I believe that the Applicant was entitled to such reasons but I do not accept that the failure to furnish such reasons renders the decision invalid or reviewable. The proper remedy, if the Applicant is aggrieved in this regard, is to require further and more detailed reasons. That is not a remedy sought by the Applicant in these proceedings and therefore nothing more need be

said about this issue.

110. I therefore conclude that none of the Applicant's procedural complaints cannot be sustained.

CONCLUSION:

111. For the reasons set out above, it is my view that the application falls to be dismissed.

112. I can see no reason why costs should not follow the cause. Both parties were represented by two counsel and I accept that the use of two counsel was justified.

113. I make the following order:

> The application is dismissed with costs, such costs to include the costs of two counsel.

FREUND, A.J.

APPEARANCES:

FOR THE APPLICANT: Mr. N. Arendse S.C and Mr. M.L. Sher,

Instructed by Parker and Khan Incorporated

FOR THE RESPONDENT:	Mr. P.A.L. Gamble S.C and Ms. T.J. Golden Instructed by The State Attorney, Cape Town
DATE OF ARGUMENT:	12 May 2006
DATE OF JUDGMENT:	15 June 2006