IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: CA 9/06

In the matter between

Mnikelwa Nxele	**Appellant**
And	
The Chief Deputy Commissioner, Corporate Services, Department of Correctional Service	**1st Respondent**
The National Commissioner, Department of Correctional Services	**2nd Respondent**
Minister for Correctional Services	**3rd Respondent**
Kenneth Mthombeni	**4th Respondent**

JUDGMENT

ZONDO JP

<u>Introduction</u>

[1] This is an appeal from a decision of the Labour Court sitting in Johannesburg in a dispute between the appellant and the first up to the third respondents. For convenience I shall refer to the first,

second and third respondents collectively as “**the respondents**”. This will exclude the fourth respondent. When I refer to the fourth respondent, I shall refer to him by that term. The dispute was about the validity or lawfulness or otherwise of the second respondent’s decision to transfer the appellant from the position he occupied in the Department of Correctional Services to a different position at Pollsmoor Prison for about six months, and, thereafter, to yet another different position in Pretoria, Gauteng. The transfer to Pollsmoor was intended as an interim measure pending the implementation of the decision to transfer him from the Western Cape to Pretoria. The reason for the transfer to Pollsmoor seems to have been to make way for the fourth respondent who himself had been transferred from Pretoria to the appellant’s position in the Western Cape and to give the appellant more time to make whatever adjustments he may have needed to make regarding his personal and family matters before the decision to transfer him to Pretoria could be implemented.

[2] In the Labour Court the appellant had sought to in effect have the decision transferring him from his post and that of transferring the fourth respondent to his post in the Western Cape reviewed and set aside. He also sought an order that, pending the outcome of such review application, the first to the third respondents be interdicted:

(a) from implementing:

(i) the decision to transfer him,

(ii) the decision to transfer the fourth respondent to the appellant’s position in the Western Cape;

(b) from taking any disciplinary action against him for his failure to report for duty at Pollsmoor, and;

(c) from permanently appointing anybody to his post in the Western Cape.

[3] The application was brought on an urgent basis and a rule nisi with an interim order was sought. The respondents gave the appellant certain undertakings pending the hearing of the matter and the delivery of judgment which made it unnecessary for the appellant to seek interim relief. In due course the matter was argued. The Labour Court, through Freund AJ, subsequently handed down a judgment in which it dismissed the appellant's application with costs including the costs of two Counsel. The Labour Court later granted the appellant leave to appeal to this Court. Hence, this appeal.

The facts.

[4] The appellant is a senior employee or official employed by the Department of Correctional Services. As at the 13th December 2005 he occupied the position of Regional Head: Corporate Services in the Department of Correctional Services in the Western Cape. In that position he was in charge of various functions of human resources management, was responsible for recruitment of staff from entry to professional level, promotion of personnel, the management of bursaries, the development of human resources, training, the management of employer-employee relations and other functions.

[5] The first respondent, Mr Vivian Patrick Peterson, is the Chief Deputy Commissioner: Corporate Services of the Department of

Correctional Services. This post is at the level of Deputy Director-General and, therefore, falls immediately below that of the National Commissioner of the Department of Correctional Services which is at the level of Director-General. The position is based at the Head Office of the Department of Correctional Services in Pretoria. The second respondent is the National Commissioner: Correctional Services. At all times material to this matter the incumbent of the position of National Commissioner of the Department of Correctional Services was Mr L. Mti. The third respondent is the Minister of Correctional Services. The fourth respondent is Kenneth Mtombeni, another employee of the Department of Correctional Services, whose interest in this matter would have become apparent from what I have said above.

[6] On the 13th December 2005 the second respondent addressed a letter to the appellant bearing that date. That letter was not sent to the appellant on the same day. I shall deal with the contents of that letter in due course. On the 14th December 2005 a telephone conversation took place between the appellant and the first respondent in which, (according to the appellant and the first respondent accepts this), the first respondent informed the appellant that the second respondent was "**contemplating transferring him to the Head Office in Pretoria"**. The first respondent informed the appellant that there were prospects for the appellant's upward mobility. The first respondent also informed the appellant that there was a facsimile on its way to the appellant in this regard. The first respondent told the appellant to apply his mind to the contents of the letter once he had received it and

indicated that they would meet after he had thought about the contents of the letter.

[7] According to the first respondent, he tried to “**engage the [appellant] on the reasons for the proposed transfer**” but the appellant “**was adamant that he wished to see the formal letter of contemplated (sic) transfer before he would respond in any way.**” The first respondent states in paragraph 21 of his affidavit that “**this telephone call initiated the consultation process which emanated from the decision referred to in paragraph 6 above and contemplated in the Transfer Policy**”. The decision referred to in par 6 is the decision that **“(t)he Second Respondent on 13 December 2005 approved the horizontal movement of certain senior managers based on operational needs**” in terms of which the appellant was identified as one of the managers to be deployed.

[8] The second respondent’s letter of the 13th December 2005 to the appellant reached the appellant on or about 20 or 22 December 2005. The body of the letter read thus:

> “re: **HORIZONTAL PLACEMENT IN THE DEPARTMENT OF CORRECTIONAL SERVICES: YOURSELF**”
>
> **It is my pleasure to inform you that after consideration of the operational requirements of the Department as well as your personal position, I approved your horizontal placement to the post of Director: Aftercare: Head Office**

> **This placement will be on the principle of a horizontal placement with retention of your current salary and benefits.**
>
> **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.**
>
> **Please note that it is expected from you to sign a Performance Agreement with the relevant delegated authority after the transfer is effected in respect of the new position that is indicated above.**
>
> **It is trusted that you will regard this placement as a challenge and that it will provide a high level of job satisfaction".**

[9] It will be noticed that the letter gave the appellant a period of seven (7) days within which he was required to "respond accordingly **"(i)f there [were] any factors which [had] an influence on [his] placement**." In the letter the second respondent stated that the decision to transfer the appellant was taken "**after consideration of the operational requirements**" of the Department as well as the appellant's "**personal position**". However, he did not specify what those operational requirements of the Department were nor did he state what the appellant's "**personal position**" was to which he was referring. The contents of the letter of the 13th December 2005 reveal that in effect two decisions had been taken by the second respondent in regard to the appellant. The one was to move

him away from the Western Cape Province and place him in Pretoria. The other was to remove him from his position of Regional Head: Corporate Services, Western Cape to the position of Director: Aftercare, Head Office. The letter did not give any information about the status, functions, duties, responsibilities and benefits of the latter position.

[10] In par 28 of the first respondent's affidavit, the first respondent states that, although the wording of the letter of the 13th December could be interpreted as suggesting that a final decision had been made on the appellant's transfer, the decision was one in principle and the Department's Transfer Policy had "**always been adhered to and implemented."** He said in that paragraph that the letter evidenced a decision in principal (sic) by DCS to transfer subject to the consultative process envisaged in the Transfer Policy.

[11] The appellant complained in his affidavit that the decision to transfer him had been taken "**without any prior consultation with [him] beforehand**". He said that this was "**clearly contrary to the provisions of clause 4.4 of the Transfer Policy of the Department**". He said that he had not "**at any stage prior to the decision**" been "**given an opportunity to make representations in regard thereto, contrary to the provisions of clause 6.2.3. of the Transfer Policy**," nor had, to his knowledge, the Regional Commissioner, been informed beforehand. The appellant also drew the Court's attention to the absence or rather, "**a paucity**" of reasons "**supplied for the proposed transfer**." He pointed out that the Department's Transfer Policy provides that there has to be a

valid and sufficient reason for any transfer and such reasons must be supplied in writing to the employee sought to be transferred.

[12] The appellant also complained that such opportunity to make representations as the letter of the 13th December gave him was an opportunity to say why the decision should not prevail as opposed to giving him an opportunity to "**shape**" it. The first respondent stated in par 24 of his affidavit that the appellant was invited to make representations "**of any factors which may have an influence on his proposed transfer**." In the last sentence in that paragraph the first respondent stated that he was at all times aware that the appellant was entitled to submit representations "**regarding his personal circumstances and was satisfied that this had been conveyed to the [appellant] in the said facsimile**" In par 25 of his answering affidavit, the first respondent denied the allegation that there was "**a paucity**" of reasons supplied for the appellant's transfer but all he did in substantiation of his denial was to repeat the statement in the letter of the 13th December that the reasons were the Department's operational requirements. He did not add anything by way of substantiation.

[13] It is common cause that the appellant did not submit any representations to the second respondent or anyone else in the Department for that matter within the seven days referred to in the second respondent's letter of the 13th December. He explains in his affidavit why he did not do so but in the view I take of the matter it is not necessary to deal with that explanation and the interactions that took place between the appellant and the Department between the 14th December 2005 and the 13th January 2006. In par 33 of his

answering affidavit the first respondent states that, when no response to the letter of the 13th December 2005 was received from the appellant, he "**duly confirmed [the appellant's] transfer"** in a letter dated the 18th January 2006. The first respondent further says in par 33: "**In the absence of any further representations from the [appellant] I, considered his transfer as finalised.**"

[14] In the letter of the 18th January 2006 the first respondent informed the appellant *inter alia* that it was expected of the appellant to assume duty in the post of Director: Aftercare: Head Office on the 1st February 2006. As, according to the first respondent, the decision to transfer the appellant was "**finalised**" after he had failed to submit representations, it is necessary to refer to paragraph 44.2 of the first respondent's affidavit from which the scope that was required to be covered by the appellant's representations emerges. There the first respondent says in part:

> "**The Department may suspend or change the timing of a transfer after considering personal and other circumstances, but this would not change the decision itself**."

[15] On the 13th February 2006 the second respondent addressed a letter to the appellant. In the letter the second respondent confirmed, among other things, that he regarded the matter as finalised as, according to him, the appellant had, in a meeting with the first respondent on the 2nd February 2006, decided not to discuss "**the reason, or your personal circumstances, that may have a bearing on your transfer with Mr Peterson**". **(sic)** The second respondent then gave the appellant five days to report for duty in

Pretoria and to "**vacate**" his "**position**" by Friday 17 February 2006. The appellant denied the allegations that he had decided not to discuss his personal circumstances with the first respondent at the meeting of the 2nd February 2006.

[16] The appellant consulted his attorneys of record after receiving the second respondent's letter of the 13th February 2006. His attorney then addressed a letter to the second respondent dated the 16th February 2006. I do not propose to quote the contents of that letter. It suffices to simply say that the appellant's attorneys inter alia challenged the fairness of the decision to transfer the appellant and contended that no reasons had been furnished for it. The second respondent was urged to reconsider his decision to transfer the appellant failing which an application would be made to the Labour Court for an order reviewing and setting that decision aside with an order for costs. The appellant's attorneys also contended that the decision to transfer the appellant was in breach of the Department's Transfer Policy as well as the provisions of the Promotion of Administrative Justice Act of 2000 and that it was therefore "**unlawful**".

[17] On the 17th February 2006 the second respondent addressed a letter to the appellant's attorneys in reply to their letter of the 16th February 2006. In the letter the second respondent *inter alia* stated that the appellant had previously been afforded an opportunity to discuss his transfer with the first respondent. The second respondent also expressed the view in the letter that the appellant had been "**given a reasonable opportunity to discuss his personal circumstances**" with the Department's management but

had declined the offer. He also said: "**After satisfying itself that a reasonable and fair opportunity was given to [the appellant] to discuss his personal circumstances before his transfer, Management decided to confirm his transfer**".

[18] In the last paragraph of the letter the second respondent advised the appellant's attorneys that in the light of their letter, he had decided to give "**your client yet another opportunity"** to be heard. He went on to say:

(a) **your client is given an opportunity to meet our Chief Deputy Commissioner: Corrections on Thursday 23 February 2006 at our Pretoria office <u>to discuss all issues and personal circumstances surrounding the transfer to Pretoria.</u>**

(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 of seven days to allow the process of negotiation to be entertained. At the same time the transfer (sic) or his replacement (sic) is also suspended for the same period.

(d) No further delays will be entertained".

The second respondent concluded the letter by expressing the wish "**that this is final (sic) opportunity given to your client**."

[19] The appellant received the second respondent's letter of the 17th February on the same day. Shortly thereafter an arrangement was

made for a meeting to be held on the 23rd February 2006 at which the appellant was to be given the opportunity to make representations. The meeting was scheduled to take place at Leeukop prison in Gauteng. The appellant asked for a postponement of the meeting so as to have it on a day when his attorney or his internal representative could attend as well. This request was turned down. The appellant then travelled from Cape Town to Gauteng to attend the meeting at Leeukop.

The meeting of the 23rd February 2006

[20] A meeting was held on the 23rd February 2006 as previously arranged. The appellant attended the meeting. The Chief Deputy Commissioner: Corrections, Mr Motseki, and Mr Smalberger, the appellant's immediate superior, represented the Department at this meeting. Mr Smalberger was the Acting Regional Commissioner, Western Cape. The appellant started off by placing on record that he felt that he had been treated unfairly in being denied by the second respondent the opportunity of being represented by a union official or being assisted by his attorney at the meeting. He says in his affidavit that he also asked that the proceedings be recorded and this request was accepted. A tape recording machine was obtained which was used to make a recording of the proceedings.

[21] Since the proceedings of the meeting were recorded and a transcript thereof forms part of the record before this Court, it is not necessary to set out herein in detail what was discussed at that meeting. It suffices to say that the appellant did articulate at least some of the points that he wanted to articulate. Some of the points he made related to the fact that in the Western Cape he was doing a

good job in the Department, that the job that he would have to do in the position to which the second respondent sought to transfer him in Pretoria related to the administration of prisoners – something in which he said he had no experience as well as certain family and personal issues arising from his divorce two years earlier and issues relating to a sister of his and daughter. He also compared the second respondent’s decision to transfer him from his position in the Western Cape to the position of Director: After Care, Head Office to the second respondent instructing him to fly an aeroplane from Cape Town International Airport to London without first satisfying himself that he had a licence to fly an aeroplane. He also made it clear that he accepted that as a general proposition he was subject to transfer but he made it clear that he was not saying that he wanted to be transferred.

[22] At some stage during the meeting and after the appellant had been given an opportunity to state his case, Mr Motseki stated that it seemed to him that there were five issues that the appellant had raised to which, he said, if and when he was transferred, he would like the Department to seriously apply its mind. Mr Motseki then said:

> “**I want to suggest having to as a background that irrespective of what goes into the tape I want to ask you as you initially indicated that you would want to address the Commissioner direct on this specific set of issues I want to suggest that we’ll grant you an opportunity to put them down in writing as a follow up to this specific meeting for his consideration”**

The effect of what Mr Motseki was saying was that the appellant would be given another opportunity to put down in writing what he wished to say on certain specific issues and this would be given to the second respondent to consider. The appellant also asked to be furnished with the Department's written reasons for its decision to transfer him. He was given an undertaking that such reasons would be furnished to him. It would appear that at the meeting of the 23rd February 2006 an agreement was reached between the appellant and Mr Motseki that he should send his further written representations to Mr Motseki not later than the 27th February 2006. An extension of time was later given to the appellant to send his written representations by 12h00 on the 28th February 2006.

[23] After the meeting of the 23rd February 2006 the appellant was furnished with a document containing what the Department put forward as the second respondent's reasons for the decision to transfer him. In his founding affidavit the appellant took the view that **"(g)iven the subsequent turn of events in this matter**", it was not necessary for him "**to go into this document in any great detail".** On the 28th February 2006 the appellant transmitted to Mr Motseki by fax his further written representations at 16h15. This was after the expiry of the 12h00 deadline as Mr Motseki had only extended time for the appellant to submit his additional written representations to 12h00 on the 28th.

[24] About five minutes after the appellant had transmitted his additional written representations to Mr Motseki, he received a call from an assistant in the first respondent's office who told him that there was a fax on its way to him which had been signed by the

first respondent. The appellant asked whether the first respondent was available. He was told that the first respondent was available. The appellant then asked to be put through to him.

[25] In the telephone conversation which followed the appellant asked the first respondent whether he was aware "**of the processes which had been agreed upon in the meeting of 23 February 2006**" and in this regard he referred specifically to the fact that he was supposed "**to make a submission for consideration by second respondent 'before**" the second respondent could make up his mind. The appellant also asked the first respondent whether he had seen his fax containing his additional representations which he had sent to Mr Motseki shortly before that. The first respondent told the appellant that he had not seen the additional written representations and that they had not been considered.

[26] In his answering affidavit the first respondent states that he told the appellant that the second respondent's decision was not going to be dependent upon the appellant's additional representations but was based only on the discussion at the meeting of the 23rd February. The first respondent further states that this is what Mr Motseki had told him and that the purpose of the additional written representations "**was to ensure that the [appellant] complied with Departmental procedures and to further ensure that there was a written record [of] all of his representations on file**."

[27] In his affidavit Mr Motseki says the same thing with regard to the purpose of the additional representations. It must be noted that in paragraph 7 of his answering affidavit Mr Motseki *inter alia*

emphasises that the written representations that the appellant was required to submit by, initially, the 27th February and, later, 12h00 on the 28th February, "**were in addition to the representations made by the [appellant] during the course of the Leeukop meeting …".** The appellant says that the first respondent told him that in his view the Leeukop meeting had provided a sufficient opportunity for the second respondent to obtain the necessary information he had needed in order to apply his mind and to arrive at a decision. The appellant says that he responded to this by informing the first respondent that, as the Department had been unable to supply him with written reasons for the second respondent's decision on the 23rd February, it was agreed between himself and Mr Motseki that such written reasons would be provided thereafter.

[28] The appellant said that he also informed the first respondent that it was also agreed that he would be furnished with a copy of the transcript of the discussion at the Leeuwkop meeting and he would then have an opportunity to make submissions in regard to the transfer whereafter the second respondent would consider the matter afresh. The appellant says that he informed the first respondent that in terms of the agreement the second respondent would indicate whether, as requested, he would see the appellant or would make his decision without seeing him. The appellant says that he informed the first respondent that, as he had now sent him a letter containing the decision without a consideration of his additional representations, the first respondent had gone outside the agreement reached at the Leeukop meeting. The appellant says that he pointed out that this was an indication that the appellant's

attendance at that meeting was a sham as the decision had already been taken beforehand.

[29] At about 16h30 on the 28th February 2006 the appellant received the letter that the first respondent and an assistant in his office had told him was on its way. The letter was from the first respondent. It was dated 28 February 2006. The first respondent said in the letter that he wrote the letter "**by direction of the Commissioner of Correctional Services**", the second respondent. In the letter the first respondent referred to the discussion that he said had taken place between, on the one hand, the appellant and, on the other, Mr Motseki and Mr Smalberger. He said that that discussion had taken place on the 24th February. This must have been an error because the discussion had been held on the 23rd February.

[30] The first respondent informed the appellant in the letter of 28 February that it had been decided, after a consideration of the appellant's personal circumstances which he had related at the Leeukop meeting, "**to temporarily place you in the vacant post of Area Co-ordinator: Corrections: Pollsmoor for a period of six (6) months.**" The first respondent said that he trusted that this period of six months would allow the appellant enough time "**to address and solve any aspects which might still hinder your placement in the post of Director: After Care at the National Head office of the Department…"** The appellant was also requested "**to ensure the smooth handing over"** of activities relating to the post of Regional Co-Ordinator: Corporate Services, Western Cape. The first respondent said in the letter that this handing over could be finalised by the 15th March 2006 in order for

the appellant to assume duty in the post of Co-Ordinator: Corrections: Pollsmoor. The appellant was surprised when he learnt from the letter of the 28th February that he was being "**transferred**" to Pollsmoor Prison as he had never been consulted about the possibility of being transferred to Pollsmoor pending his transfer to Pretoria.

<u>The Labour Court</u>

[31] The appellant was aggrieved by his transfer both to Pollsmoor and to Pretoria. Accordingly, he brought an urgent application in the Labour Court challenging the validity or lawfulness of such transfer and asking for the orders referred to earlier. Before the Labour Court one of the issues that were argued was whether or not the decision of the Department to transfer the appellant constituted an "**administrative action**" as defined in the Promotion of Administrative Justice Act of 2000 ("**PAJA**"). The appellant argued that it did whereas the respondents argued that it did not. After considering and analysing a number of decisions, the Court a quo came to the conclusion that the transfer did constitute an "**administrative action**" as defined in PAJA.

[32] The Court a quo rejected the appellant's contention that the second respondent's decision to transfer him was actuated by malice or ulterior motives. The Court a quo also rejected the appellant's contention that his placement at Pollsmoor Prison was a demotion. In support of this the Court a quo relied on the fact that the appellant was going to retain his rank as a director, his

remuneration and benefits. In par 82 of the judgment the Court a quo said in part:

> **"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."**

The Court a quo also rejected the appellant's contention that his temporary placement at Pollsmoor was irrational.

[33] The Court a quo also dealt with the appellant's challenge of the second respondent's decision to transfer him on grounds of procedural fairness. In this regard the Court a quo stated that the appellant had argued that the second respondent's letter of the 13th December 2005 demonstrated:-

- that the decision to transfer the appellant was a *fait acompli* as at that date;
- that he had not been given the reasons for the decision to transfer him as required by the Transfer Policy of the Department;
- that his written representations of the 28th February 2006 were not taken into account;
- that there was completely no consultation at all with him on his placement at Pollsmoor, and,
- that the ultimate decision to transfer him was tainted by the failure to give reasons for rejecting his written representations of the 28th February 2005.

The Court a quo rejected all the appellant's contentions and dismissed his application with costs, such costs to include the costs for the employment of two Counsel.

The appeal

Statutory provisions

[34] Before us the appellant challenged the judgment of the Labour Court on a number of grounds. In considering this matter it may be necessary to have a good understanding of the law which governs transfers in the Department of Correctional Services including the relevant statutory provisions. I propose to consider the relevant statutory provisions before considering the grounds upon which the transfer is challenged.

[35] Persons employed by the Department of Correctional Services form part of the public service. Sec 195(1)(a) to (i) of the Constitution constitutes the basic values and principles which govern public administration. Sec 195(1)(b) requires that **"(e)fficient, economic and effective use of resources must be promoted**". Sec 195(1)(f) provides that "**(p)ublic administration must be accountable**." Sec 195(1)(h) provides that "(**g)ood human-resource management and career-development practices to maximise human potential must be cultivated**." Sec 195(1)(i) enjoins inter alia that "**employment and personnel management practices [be] based on ability, objectivity, fairness …**". Sec 13 of the Public Service Act, 1994 ("**the PSA**") contains some provisions relating to, among others, transfers but none of those provisions are pertinent to the present case. Section

14 of the PSA deals with transfers in the public service. Sec 15 deals with the transfer and secondment of officials but is of no application to the present case.

[36] Sec 14(1) and (3)(a) are relevant to the present case. Sec 14(1) of the PSA reads:

> "**(1) Subject to the provisions of this Act, every officer or employee may, when the public interest so requires, 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."**

Read on its own sec 14(1) gives a public service employer the power, when the public interest so requires, to transfer an employee:

(a) from one position to another;

(b) from a higher position to a lower position

(c) from one place inside the country to another place inside the country;

(d) from one place in the country to another country.

The requirement that an employee or officer may be transferred "**when the public interest so requires**" is of the utmost importance because it qualifies or limits the power to transfer so that it cannot be exercised at the whim of some or other official or functionary when the public interest does not require it.

Sec 14(3)(a) of the PSA, in so far as it is relevant to the present matter, provides as follows:

> **"(3) An officer-**
>
> **(a) shall not upon transfer suffer any reduction in his or her salary or scale of salary without his or her consent, except in accordance with the provisions of section 38 and any collective agreement contemplated in section 18(b) of the Public Service Laws Amendment Act, 1998."**

It is interesting to note that, whereas in sec 14(1) and (2) reference is made to both an officer and an employee, sec 14(3) is restricted to an officer. On the face of it this seems to suggest that the protection against a reduction of salary which the PSA affords to an officer is not extended to employees.

[37] The word "**transfer**" is defined in sec 1 of the PSA as follows:

> "**transfer" includes a change-over to a regraded or renamed post, or from one grade to a higher grade connected to the same post, or from one rank to a higher rank;"**

This definition does not include an employee being moved from his or her position to a lower post or position. It also seems that the definition of the word "**transfer**" does not relate to a physical relocation but it is about being transferred from one position or post to another post or position. However, sec 14(1) covers the transfer from one geographical place to another and specifically provides for a transfer from a higher position to a lower position. From sec 14(1) it seems that the transfer of an employee or officer is only authorised by the PSA "**when the public interest so**

requires." Where it is not shown that the pubic interest requires a certain transfer, such transfer would be unauthorised by the PSA.

[38] It is also necessary to have regard to the provisions of sec 3(4), (5)(g) and 96(1), (2) and (3) of the Correctional Services Act NO 111 of 1998 ("**the CSA**"). Sec 3(4) of the CSA reads:

"**The Department [of Correctional Services] consists of the Commissioner, other correctional officials appointed by the Commissioner in terms of this Act and other employees appointed in terms of the Public Service Act**."

Sec 3(5)(g) of the CSA reads:

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

The term "**correctional official**" is defined in sec 1 of the CSA to mean "**an employee of the Department appointed under section 3(4)."**

[39] Sec 96(3) of the CSA was also relied upon as part of the statutory provisions which gave the second respondent the authority to transfer the appellant as he did. However, that provision must be read together with sec 96(1) and (2). The heading to sec 96 is: "**Powers, functions and duties of correctional officials**". Sec 96(1) enjoins "**every correctional official**" in the service of the

Department "**to strive to fulfil the purpose of this Act and to that end every correctional official must perform his or her duties <u>under this Act"</u>** (my underlining). Sec 96(2) provides as follows:

> **"Subject to the provisions of subsection (1), the relationship between the Department as employer and every correctional official in the service of the Department is regulated by the provisions of the Labour Relations Act."**

In so far as the provisions of sec 96(3) of the CSA are relevant to transfers, they read as follows:

> **"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 decide on the ….. <u>transfer</u> of correctional officials, but –**
>
> **(a) ……**
>
> **(b) all persons who <u>qualify for</u> appointment, promotion or <u>transfer must be considered</u>.**
>
> **(c) the assessment of persons shall be based on level of training, relevant skills, competence, and the need to redress 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, <u>transfer</u> or promotion of persons to**

> **promote the basic values and principles referred to in section 195(1) of the Constitution;"** (my underlining).

Sec 195(1) has been dealt with above in so far as it is relevant to the present matter.

[40] Special note must be taken of sec 96(3)(b) of the CSA. It requires that all persons who qualify for a transfer must be considered. Obviously what this provision contemplates is that, if there is a vacancy to which some or other employee of the Department must be transferred, all those who qualify to fill such a post must be identified and the selection of the one to be transferred to such a post or position must then take place. Sec 96(3)(c) enjoined the second respondent to assess persons who qualified to be transferred to the position of Director: Aftercare, Head Office on the basis of the "**level of training, relevant skills, competence and the need to redress 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."**

[41] The definition of "**dismissal**" in sec 186(1)(e) of the Labour Relations Act, 1995 ("**the LRA**") relating to constructive dismissal is also relevant to transfers under the CSA because of sec 3(5)(g) and sec 96(2) of the CSA. Sec 186(1)(e) defines "**dismissal**" as meaning that –

> "**an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee**".

The relevance of this part of the definition of "**dismissal**" is that, in my view, it places an obligation on an employer not to do anything that would make an employee's "**continued employment intolerable for the employee**". Sec 186(1)(e) of the LRA may come into play where an employee's transfer renders the employee's continued employment intolerable.

[42] Sec 186(2)(a) of the LRA is also relevant. In so far as it is relevant herein, it provides as follows:

> "(2) "'**Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving –**
>
> (a) **unfair conduct by the employer relating to the promotion, <u>demotion</u>, … of an employee or relating to the provision of benefits of an employee.**"

The relevance of this provision lies in the fact that, in my view, if an employee's transfer constitutes a demotion, the employer's conduct in transferring the employee may well constitute an unfair labour practice in a particular case. In my view sec 186(2)(a) of the LRA places an obligation on an employer not to engage in any unfair act "**relating to [the] demotion**" of an employee. The demotion of an employee without his consent would, generally speaking, constitute an unfair labour practice in our law.

[43] In this matter reliance was placed by the respondents upon sec 3(5)(g) and sec 96(3) of the CSA and on the Department's Transfer Policy for the proposition that the second respondent had power or authority to transfer the appellant. In this regard it must be borne in

mind that the CSA does not spell out the terms and conditions under which an employee of the Department may be transferred other than that it requires such transfer to be "**in accordance with [the CSA], the Labour Relations Act and the Public Service Act."** It also provides that the employment relationship between the Department as employer and its employees is regulated by the LRA. The effect of this requirement is that, if the transfer of an employee which purports to be in terms of sec 3(5)(g) of the CSA is in fact not in accordance with the LRA and/or PSA, it would fall outside the ambit of sec 3(5)(g) of the CSA and would, therefore be, unlawful. The onus would, of course, be upon the second respondent to show that he had authority or power under sec 3(5)(g) to transfer the employee in a particular case. In other words the onus would be on him to show that the transfer fell within the ambit of sec 3(5)(g) of the CSA. If he failed to discharge that onus, the transfer would fall to be set aside.

[44] What does it mean to say, as does sec 3(5)(g) of the CSA, that the second respondent "**must**" transfer an employee or a correctional official "**in accordance with**", among others, the LRA? It seems to me that this means that in making the decision to transfer an employee, the second respondent is obliged to act in accordance with any obligations that he may have under the LRA. In this case it must be pointed out that the obligations that the second respondent would have under the LRA that relate to the transfer of an employee would be sec 186(1)(e) and sec 186(2)(a) of the LRA. That means that the transfer of an employee must not constitute a demotion without the employee's consent and that the employer's conduct in transferring the employee in a particular case must not

amount to the employer making that employee's "**continued employment intolerable for the employee**".

[45] What does it mean to say, as does sec 3(5)(g) of the CSA, that a transfer of an employee or correctional official of the Department of Correctional Services must be "**in accordance with"** the PSA? This requirement enjoined the second respondent in this case to only make transfers that would be in accordance with the PSA in addition to being in accordance with the LRA. Sec 14(1) of the PSA only authorises the transfer of an employee or official where "**the public interest so requires**." Accordingly, an employer in the public service who decides to transfer an employee must show that the public interest requires the transfer of such employee. This is obviously aimed at protecting employees from transfers that may be decided upon at the whim of a senior official of a government department. The employer in a public service bears the onus to show that an employee's transfer is required by the public interest-and not by the individual interest of that senior official.

[46] Although what is required by the interests of the government department which employs a particular employee would usually fall within the ambit of what public interest requires, this will not always be the case. There will be cases – albeit probably few – where the public interest would require that the employee should not be transferred while the interests of the Department require that he be transferred. The two must not be conflated and the focus should always be on what the public interest requires. The public interest will have a much broader scope or focus than what the departmental interest requires. Furthermore, the employer will not

discharge the onus by its *ipse dixit* that the public interest requires a particular employee's transfer but will be required to take the Court into its confidence and substantiate that statement.

The Transfer Policy of the Department

[47] Quite apart from the fairness which provisions of legislation such as the PSA, CSA and the LRA may require to be observed with regard to the transfer of employees within the public service in general and within the Department of Correctional Services in particular, the Department itself has a Transfer Policy which enjoins that transfers be dealt with "**in a fair and justifiable manner by means of uniform control measures." (**see clause 2(c) of the Transfer Policy). In my view this means that a functionary of the Department of Correctional Services who exercises the power to transfer an employee must deal with the transfer in a fair and justifiable manner. If he fails to do so, the transfer is contrary to the Transfer Policy of the Department.

[48] Clause 4 of the Transfer Policy sets out the principles upon which transfers must be effected within the Department. Clause 4.1 reads:

> "**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."**

[49] Clause 5 of the Department's Transfer Policy provides guidelines for the transfer of employees within the Department. Clause 5(a) reads:

> "**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.**"

Clause 5(b) of the Transfer Policy requires that it be shown that an employee's transfer is required by the interests of the Department and "**the broader State interest.**" It requires that "(**s)uch interest be motivated**." Clause 5(d) requires that **"(t)he employee's career development and utilisation"** be considered.

[50] The requirement of the Transfer Policy that there must be fairness in the manner in which transfers are dealt with should be borne in mind at all times. It provides a rationale for certain provisions of the policy. In this regard I think of the requirement provided for in clause 6.2.1 of the policy that **"(i)f 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. I also think of the requirement in clause 6.2.2 that **"(t)he Area Commissioner / Regional Commissioner / DC Human Resources Management concerned must ascertain <u>the reasons why a specific employee</u> from the pool of candidates should be transferred**" (underlining supplied).

[51] The requirement of the Transfer Policy that a "**potential pool of candidates who can potentially fill the vacancy must be identified**" and that, when a specific employee from that pool is selected for a transfer to fill the vacancy, reasons should be furnished as to why that specific employee is selected are obviously aimed at ensuring not only that there is fairness in the selection of employees to be transferred but also that justice can be

seen to be done and that the Department should justify why a particular employee is selected and not any one else of those in the pool. In other words, if in the pool there were Messrs Nxele, Smith, Pretorius, Mrs Dlamini and Miss Jones and Mr Nxele was selected, the official who selected Mr Nxele must be able to satisfactorily answer the question : why Mr Nxele? Why not Miss Jones? Why Mr Smith? Why not Mrs Dlamini? Why not Mr Pretorius? If he cannot satisfactorily explain that selection, the transfer cannot be said to comply with the Transfer Policy and cannot stand.

[52] In making a selection of which one of the employees in a pool should be transferred, the official concerned would look at the respective qualifications of all the candidates in the pool, the public interest, the needs of the Department, the qualifications required for the position and, very importantly, the question of how such transfer would adversely affect each one of the candidates in the pool if he or she was the one selected for a transfer. In other words consideration would be given to the question of how much hardship or inconvenience the transfer would cause to each one of the employees in the pool if he or she was the one ultimately transferred. The hardship or inconvenience that a particular candidate would suffer will not be the decisive factor in every case but there will be cases where it could be decisive. The official who makes the decision to transfer would be enjoined to take into account all relevant factors and then make his decision.

[53] It seems to me that the potential pool of candidates required by clause 6.2.1 means that, for example, where it is sought to fill a certain vacant position, the "**candidates who can suitably fill the**

vacancy” may include employees of the Department who are based in different provinces. If in such a case an employee based in Gauteng could suitably fill a vacancy in Gauteng without any inconvenience, it would be unfair to transfer an employee from far away, e.g. Kwa-Zulu Natal to fill that position when this would cause him a lot of hardship. This does not mean that the selection of a candidate from a province other than the province where the vacancy is and despite the fact that such candidate’s transfer will cause more hardship than the transfer of a candidate from the province where the vacancy is will never be in order. It may well be in order where the public interest requires it but I think such cases would be few and far between and would only be in order if cogent reasons were shown to exist as to why that candidate as opposed to another candidate was selected.

[54] Those parts of the Department’s Transfer Policy which require the identification of a potential pool of candidates who can suitably fill a vacancy and the requirement that reasons should be furnished as to why a particular employee is selected constitute good policy aimed at ensuring fairness, good governance, transparency and accountability. They also seek to avoid a situation where senior officials can transfer employees of the Department as and when they please, at their whim and for no rhyme or reason. They seek to outlaw arbitrariness, irrationality and the use of transfers by senior officials of the Department to settle any personal scores with subordinates.

[55] There are also the provisions of clauses 6.2.3, 6.2.4, 6.2.5 and 6.2.6. of the Transfer Policy of the Department. These provisions read:

> "**6.2.3.The employee <u>whose transfer is being considered</u> and his or her supervisor must be informed that <u>the transfer is being considered,</u> and <u>given</u> 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.**
>
> **6.2.4 If the employee accepts the transfer and fails to make any representations, the necessary notice may be issued and the transfer carried out.**
>
> **6.2.5 If the employee makes representations, the person responsible for considering the transfer must consider the representations. After the representations of the employee have been considered, the employee concerned must be informed in writing that the representations were considered, and the outcome must be stated. If the representations were not favourably considered, the reasons why the representations were rejected must be set out in brief.**
>
> **6.2.6 The final decision must be communicated in writing to the employee within seven (7) days after his/her representation, with detailed explanations of reasons."**

The provisions dealt with in this paragraph and those of clause 6.2.3 reflect good policy to some extent at least. However, it will be cold comfort to many employees of the Department who have been promised that transfers in the Department will be dealt with on the basis of this policy if it is not complied with or observed when they are transferred. You cannot have a government Department tell its employees and the world in its policy that it will deal with certain matters on the basis of a certain policy but then have the same Department acting in breach of its own policy. Its employees and the world at large are entitled to expect that, when a government department has adopted a certain policy on certain matters, it will observe and comply with such policy. When it fails to do so, those who are aggrieved are entitled to have recourse to courts and to seek to hold the department to its own policy. Government departments should not act in breach of their own policies because, when they do so, they show disrespect for their own policies. And, if they show disrespect for their own policies, how can they expect employees and others to show respect for such policies?

The audi alteram partem rule

[56] One of the appellant’s complaints about his transfer is that the Department did not comply with the *audi alteram partem* rule before it could make the decision to transfer him. He submitted that the second respondent first made the decision to transfer him and then purported to invite him to make certain representations. In this regard the appellant drew attention to the fact that the second respondent’s decision was conveyed to him by way of the latter’s letter dated 13 December 2005 which has been reproduced above. It is not in dispute that that is what happened. Although in his address Counsel for the respondents initially seemed to argue that

the *audi alteram partem* rule was not applicable, once he was questioned on this, he, quite rightly, was quick to concede that the Department was obliged to observe the *audi alteram partem* rule. However, he submitted that it did observe the *audi alteram partem* rule. In this regard he relied on the opportunity to make representations which the second respondent gave to the appellant as contained in the letter of the 13th December 2005 and the opportunity to be heard which the second respondent gave to the appellant by way of his letter of the 17th February 2006.

[57] My difficulty with reliance upon those opportunities to say that the Department did observe the *audi alteram partem* rule is that those opportunities were given after the second respondent had made the decision to transfer the appellant on the 13th December 2005. In the record there is an internal Departmental memorandum dated 13 December 2005. It appears in Volume 7 page 648 of the record and is addressed to "**Commissioner: Correctional Services**" by a Mr G P Mathibela. Mr G P Mathibela is there described as "**DC Human Resource Management"** which must be a reference to the Deputy Commissioner: Human Resource Management. In paragraph 1 of that memorandum, Mr Mathibela stated: "**The purpose of this memorandum is to obtain approval for the horizontal movement and placement of Senior Managers**". He stated in paragraph 2, which dealt with legal authority, that in terms of sec 3(5)(g) and 9 6(3) of the CSA "**the transfer of officials from the level of Director and higher is vested in the commissioner of Correctional Services."** Paragraph 3 of the memorandum bears the heading "**discussion**". In paragraphs 3.1 and 3.2, the memorandum reads thus:

"**3.1 Due to functional needs experienced Nationally (sic), within the Department of Correctional Services it is necessary to consider the movement and placement of Senior Managers on a horizontal basis.**

3.2 Against this background and after consultation with the relevant Regional Commissioner the following movement of managers is recommended:"

and thereafter follows a list of names of such managers in the Department of Correctional Services, their positions at the time, the places where they were based and the new positions to which they were recommended to be transferred, the place where they would be based and the persons whose positions they would be taking. The last person on that list was the appellant. After the appellant's name on the list was a recommendation for the transfer of such managers including the appellant. That was under paragraph 4. Paragraphs 5 and 6 of the memorandum read thus:

"5. **Attached hereto please find placement letters for signature by the commissioner subject to approval of the above movements.**

6. Forwarded for your <u>decision</u> please" (my emphasis).

After paragraph 6 appeared Mr Mathibela's signature, position and his name. It will be seen from this memorandum that Mr Mathibela's recommendation was not that the second respondent should approve that a proposal be put to the appellant that he be transferred but it was a recommendation that he approve the transfer of the appellant. Indeed, paragraph 6, quoted above, makes it clear that Mr Mathibela was asking the second respondent for a "**decision**" on the transfer. Par 6 says: "**For your decision please**."

[58] After Mr Mathibela's memorandum referred to above is a page in which Mr Peterson, the Deputy Commissioner: Corporate Services signed to signify that he was also recommending the transfer of the senior managers concerned including the appellant. He indicated next to his signature that he signed that page on the 13th December 2005. After that page comes a similar page signed by the second respondent – also on the 13th December 2005 - in which the word "**approved**" was used to indicate that the second respondent approved Mr Mathibela's recommendation. Once again there is no indication that that decision was provisional or was anything other than a final decision. Indeed, after the page which contained proof of the second respondent's approval is a page on which the third respondent as Minister also signed to signify his approval of the transfers including that of the appellant. After the page containing the Minister's signature and approval came the letter from the second respondent to the appellant dated 13 December 2005 referred to earlier informing the appellant that, after consideration of the operational requirements of the Department and "**your personal position, I approved your horizontal placement to the post of Director: Aftercare: Head Office**".

[59] There can be no reason why all approvals including that of the Minister would have been secured for a provisional as opposed to a final decision. The decision to transfer the appellant was made on the 13th December 2005. The documentation that I have referred to above does not anywhere suggest that the second respondent

should make a decision that is not final e.g a provisional decision pending representations to be made by the appellant or any of the other employees whose transfer he approved. I have no doubt that, if Mr Mathibela had intended to ask the second respondent to make a decision that was provisional and not final, he would have said so quite clearly. The reason why he did not ask the second respondent to make a provisional decision was because he was not asking for a provisional decision. He was asking for a final decision and was provided with a final decision by the second respondent. I have no doubt that the content of the documentation to which I have referred above looks exactly the same as it would look in the case of a final decision.

[60] The appellant also referred to the fact that, subsequent to his receipt of the letter of transfer, he was contacted by the fourth respondent who informed him that he had been instructed to take up the appellant's position in the Western Cape as his replacement. The appellant says that, after taking legal advice, he informed the fourth respondent that, whilst he would not stand in the fourth respondent's way, he would not relinquish his position and would challenge the Department's decision to transfer him in court. The appellant also annexed annexure "**MN22A**" to his founding affidavit which he said was received at "**the office of the Regional Commissioner a day or two before the 1st March 2006**." Annexure "**MN22A**" was a circular containing what appears to be advertisements of various positions including one of "**Director: Employee Relations: National Head Office: Pretoria**". The appellant states that, even before his meeting with Messrs Motseki and Smalberger on the 23rd February 2006, the fourth respondent's

post of Director of Labour Relations at Head Office was scheduled to be advertised. As there is no post of Director: Labour Relations: Head Office which appears in annexure "**MN222A**", the appellant's reference to such a position must be a reference to the position of "**Director: Employee Relations: National Head Office: Pretoria**" which does appear therein. In the light of this the appellant contended that his transfer was a foregone conclusion. Against this background there can, in my view, be no doubt that the decision to transfer the appellant was taken on the 13th December 2005 and that he was not consulted or given an opportunity to be heard before such decision was taken. The attempts made to give him an opportunity to be heard afterwards were, in this case, not acceptable in law.

[61] In our law the general rule is that, where a body or state functionary is obliged to observe the *audi alteram partem* rule in a particular case, it is required to observe that rule before it can take the decision in issue. (see **Administrator of the Transvaal and others v Traub & others 1989 (4) SA 731 (A) at 750C**). In Traub's case the learned Chief Justice explained the rationale for the requirement that the audi rule should, generally speaking, be observed before an adverse decision is taken against a subject. He said at 750C **"… that is, while [the body or official or functionary who is to make such a decision] still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken**."

[62] There are exceptions to this general rule where the audi rule can be observed after the decision has been taken but none of those

exceptions has been relied upon in this case by the respondents. In the light of the fact that in this case the decision to transfer the appellant was made on the 13th December 2005 which, even on the respondents' own version, was before the appellant could be given an opportunity to be heard, and since this was not one of those exceptional cases where the audi rule could be observed after the decision had been taken, the decision to transfer the appellant violated the audi rule, is bad in law and falls to be set aside on this ground alone.

[63] The respondents also sought in their affidavits to justify their giving the appellant the opportunity to make representations after the decision had been made on the 13th December 2005 on the basis that that decision was only a decision in principle. The simple answer to this contention is that a decision in principle does not fall outside the ambit of the word "**decision**" in the rule that before making a decision that may adversely affect the rights or interests of a subject, a state functionary is obliged to observe the *audi alteram partem* rule. The *audi alteram partem* rule must be observed even before a decision in principle is taken. I am of the view that the respondents have not shown any justification for their failure to give the appellant the opportunity to be heard before the decision was taken. Such non-compliance with the *audi alteram partem* rule vitiates the decision to transfer the appellant and such decision is invalid, void and of no legal effect.

[64] Even if it were to be said that the second respondent was entitled to make the decision to transfer the appellant and only thereafter invite him to make representations, I am of the view that such

opportunity was fundamentally flawed in that the decision to transfer the appellant was a *fait accompli* as was argued by Counsel for the appellant.

[65] In terms of the letter of the 13th December 2005 the appellant was not invited to make representations for the reversal or withdrawal of the decision to transfer him but he was invited "**to respond accordingly**" "**if there [were] any factors which have an influence on [his] transfer**". This seems to suggest that the invitation envisaged factors that could affect the timing of the implementation of the decision to transfer him. Indeed, the first respondent said in his affidavit, and the second respondent confirmed, that, once the Department of Correctional Services has made a decision to transfer an employee, it does not change that decision but only suspends it or changes the timing. Unbelievable as this may be, I have to accept that this is the approach or policy of the Department of Correctional Services when it deals with the transfer of its employees because it is very high ranking officials of that Department who have said under oath in this case that this is how the Department deals with transfers. The official who says so in his affidavit is the first respondent – a man who occupies a position that is at the level of Deputy Director-General. The other one, the second respondent – who was at the time the accounting officer of the Department and, effectively, the Director-General of the Department and the highest ranking officer of the Department - has confirmed under oath what the first respondent says in his affidavit in this regard.

[66] In par 44.1 of the first respondent's answering affidavit, the first respondent denies that the invitation to the appellant to a meeting with the Chief Deputy Commissioner: Corrections, Mr Motseki, "**constituted a reconsideration of the [appellant's] transfer …**" The second respondent says in his affidavit that he read the first respondent's affidavit and confirmed it as true in so far as it referred to him "**and/or steps taken by**" him. One of the steps that the second respondent took was to invite the appellant to have a meeting with Mr Motseki. This was by way of a letter that he wrote to the appellant's attorneys dated the 17^{th} February 2006. That letter is in terms that suggest that the second respondent was going to reconsider the decision to transfer the appellant. However, since the first respondent says that that invitation to the appellant by the second respondent did not constitute an opportunity for a reconsideration of the appellant's transfer – and the second respondent confirms this in his affidavit as true–the matter must be approached on the basis that the decision to transfer the appellant was made much earlier and it was a *fait accompli*.

[67] Just in case one doubts the first respondent's statement in par 44.1 of his affidavit that the second respondent's invitation to the appellant was not an opportunity for a reconsideration of his decision to transfer him, the first respondent effectively says in par 44.2: Look at whether the second respondent changed his decision to transfer the appellant after the meeting at Leeukop! I say that this is what the first respondent says in effect because in par 44.2 of his affidavit he says:

> **"It will be noted that notwithstanding the fact that the [appellant] was invited and was granted a further**

> **opportunity to address his transfer and to discuss his personal and other circumstances, the decision to transfer him stands."**

As if this did not make it clear enough that the Department had not intended to reconsider its decision, the first respondent says in the next sentence:

> **"The Department may suspend or change the timing of a transfer after considering personal or other circumstances, but this would not change the decision itself."**

This is fatal to the respondents' case against the appellant. The revelation that this is how the Department deals with transfers means that, once it is shown to have taken a decision to transfer without affording an employee concerned an opportunity to be heard, any subsequent attempt to hear the employee can be disregarded altogether because it would be a sham as the Department would never change the decision to transfer the employee.

[68] This practice or policy of the Department of Correctional Services is wrong in law and should be stopped because the Department is obliged to observe the *audi alteram partem* rule in regard to transfers of employees. The observance of that rule means that the affected employee has a right to make representations – verbal or written – directed at showing that no decision should be made to transfer him in the first place. By adopting the policy or practice that it will not change its decision to transfer an employee once it has made it, even if the employee was not heard before the decision was made, the Department is rendering the employees' right to be

heard in such cases illusory. Indeed, it is opening itself up to legal challenge that could be avoided if it were to deal with these matters in the correct manner.

[69] A decision to transfer an employee that is made before the employee can be heard is, generally speaking, unlawful and invalid in law. However, in certain limited circumstances it may be justified to make the decision first and give the employee the opportunity to be heard after the decision has been made. That would be in cases where it can be shown that the Department was dealing with an emergency situation and it would have been impracticable or impossible to delay the making of the decision until the employee had been heard. However, where the decision is taken first and the employee is only given the opportunity to be heard afterwards because, for example, there is an emergency, the opportunity to be heard that is given to the employee must be on the basis that the decision to transfer him can be reversed. If it is on the basis that such a decision cannot or will not be reversed once made and that the employee is to be heard only in respect of a possible suspension of the decision or on the possible change of the timing of its implementation, then that opportunity to be heard is not a proper one in law and is fundamentally flawed. The result thereof would be that the decision to transfer the employee is unlawful, invalid and of no legal effect and can be set aside.

[70] Even the opportunity to be heard which the second respondent gave the appellant after the intervention of his attorneys cannot be relied upon by the respondents as constituting compliance with the *audi alteram partem* rule because the Department had a policy or

practice that, once a decision to transfer an employee had been taken, it could not be reversed.

[71] Even if it could be said that the fact that the second respondent made the decision on the 13th December 2005 without affording the appellant the opportunity to be heard is irrelevant because he did later invite him by way of the letter of the 17th February 2006 to make representations and the appellant made use of that opportunity upto a point, I would say that, even with that opportunity, the second respondent failed to observe the *audi alteram partem* rule. I explain below why this is so.

[72] It emerges from the last page of the letter of the 17th February 2006 which the second respondent wrote to the appellant's attorneys that he invited the appellant to a meeting with the Chief Deputy Commissioner. It also emerges that the purpose of that meeting was to "**discuss all issues and personal circumstances surrounding the transfer to Pretoria**" and that the Chief Deputy Commissioner would then "**submit [the appellant's] response to [the second respondent] who [would] then consider the personal circumstances [of the appellant]**." The meeting that ultimately occurred pursuant to the second respondent's letter and invitation of the 17th February 2006 took place at Leeukop Correctional facility on the 23rd February 2006.

[73] It is common cause between the parties that it was agreed at the Leeukop meeting that in addition to the oral representations which the appellant had made in that meeting, he would submit written representations. The dispute between the parties is that, on the

appellant's version, the purpose of the written representations was that the second respondent would consider them before he could make the decision whether or not to go ahead with the decision to transfer the appellant whereas the respondents' version is that such written representations would not be forwarded to the second respondent nor would they be considered before the second respondent could make his decision. The respondents' version was that the appellant's written representations were intended "**to serve as a written recordal on the [appellant's] file of the reasons advanced by him for objecting to the transfer.**" (see Motseki's affidavit, par 7 which is confirmed by the second respondent in his affidavit).

[74] It is also common cause that the second respondent made his final decision to have the appellant transferred or to have that decision implemented before the expiry of the extended period that had been given to the appellant to submit his written representations. Quite correctly, the Labour Court rejected the respondents' version that the appellant's written representations were not intended to be considered before the final decision was made. The respondents' version makes absolutely no sense and is in conflict with a statement in the last page of the second respondent's letter of 17 February 2006 to the appellant's attorneys that the appellant's response at the meeting contemplated in that letter – which ultimately was the Leeukop meeting – would be sent to the second respondent for consideration.

[75] It was accepted by all concerned that the verbal representations which the appellant made at the Leeukop meeting did not represent

everything he had to say about why he should not be transferred. That being the case, why would his verbal representations be considered but not his written representations submitted by agreement between the parties? Why would it have been necessary to give the appellant such tight deadlines as he was given to submit his written representations if the purpose was not to avoid the further delay of the final decision? And why would the appellant file representations simply for recordal purposes?

[76] It is common cause that the second respondent made the final decision to transfer the appellant or to implement the decision to transfer him before the expiry of the extended period that had been given to him to submit his written representations. The Court a quo held that in law there was nothing wrong with this since the appellant filed his written representations outside the extended period that he had been given. My view on this point is different from that of the Court a quo. Whether or not the second respondent's decision to transfer or to implement the decision to transfer the appellant is valid or lawful or not must be assessed as at the time when it was made and not before or after. The question is whether or not the second respondent had a right to make that decision at the time that he made it – which was before the expiry of the extended period given to the appellant to submit his written representations.

[77] In my view there can simply be no doubt that the second respondent had no right to make that decision at the time that he made it. This is because through his officials who had met with the appellant at the Leeuwkop Correctional Facility the second

respondent had in effect agreed not to make that decision before the expiry of such extended period. This was so that the appellant could submit his written representations which the second respondent was to consider or which he wanted everyone to believe he would consider. If, as at the time at which the second respondent made his decision, he had no right to make it, that is the end of the inquiry and it matters not that, subsequently, the appellant failed to submit his written representations within the extended period afforded to him. Indeed, once or if the appellant was told, before the expiry of the extended period, that the second respondent had already made his decision, he would even have been entitled not to proceed to submit such written representations on the basis that submitting them would serve no purpose anymore as the decision had already been made. Obviously, if, despite all that, he went on to submit his representations, whether inside or outside the extended period, this would not render valid and lawful a decision that was otherwise invalid and unlawful.

[78] To my mind that what I have said above is the correct legal position is very obvious and should not require any further explaining. However, just in case it is not as obvious to the respondents as it is to me, let me make one illustration of the point. If, within the context of a disciplinary hearing, an employer informed an employee to come to a disciplinary inquiry at a certain time but, before that time, he made the decision that the employee is guilty of the misconduct alleged against him and dismissed him, it would be difficult to find anyone who would say that such a dismissal was in order. If, in the middle of a disciplinary hearing, the hearing had to be adjourned before the employee could

complete giving his evidence and it was agreed that he would give the rest of his evidence on a later date and the employer made the decision that he was guilty of misconduct and dismissed him before the appointed date for the continuation of the disciplinary hearing, it would be difficult to find anyone who would say that that dismissal was in order. There is no difference in principle between that scenario and what the second respondent did in this case.

[79] Another example is that, if an employer in the public service gave striking employees an ultimatum to return to work by a certain time failing which it would dismiss them, it has no right to dismiss such employees prior to the expiry of the deadline if the employees return to work within the stipulated time. **(Administrator, Orange Free State v Mokopanele (1990 (3) SA AD at 787 D-H.)** Undertakings and agreements between parties mean something in our law. And failure to honour them has consequences. Just like an employer cannot dismiss striking employees who come back to work before the expiry of an ultimatum after he has called upon them to return to work by a certain date failing which they would be dismissed, an employer cannot implement a transfer of an employee prior to the expiry of the time given to the employee to make representation. In conclusion on the point of the observation of the audi rule, the second respondent's decision to transfer the appellant to Pollsmoor and to Pretoria was taken without any compliance with the audi rule and is, for that reason, unlawful, invalid and of no legal effect.

<u>The transfer to Pollsmoor</u>

[80] One of the appellant's complaints about his transfer from his position as Regional Head: Corporate Services, Western Cape to the position of Area Co-Ordinator: Corrections, Pollsmoor was that that transfer constituted a demotion. I use the term "**transfer**" in this regard deliberately. I am aware that the first to the third respondents contend that that was not a transfer. The basis for their stance in this regard is that in terms of the Department's Transfer Policy, if an employee or officer is moved from one locality to another one on a temporary basis, that is said not to be a transfer. The answer to this is that the Transfer Policy is not an Act of Parliament. If in terms of the CSA and / or PSA conduct constitutes a transfer, it cannot cease to be a transfer simply because the Department finds it convenient to label it as something other than a transfer in the Transfer Policy. In terms of the CSA and PSA this is also a transfer and it is governed by the relevant statutory provisions on the transfer of employees.

[81] The appellant contended that his transfer from the position he was occupying of Regional Head: Corporate Services to the position of Area Co-Ordinator: Corrections in Pollsmoor constituted a demotion. The respondents disputed this contention and maintained that such transfer did not constitute a demotion. In support of their contention that such transfer did not constitute a demotion the respondents pointed out that the appellant's rank and salary rate were to remain the same. The appellant did not deny the statement that his rank and salary rate were going to remain the same. However, he contended that simply because there was to be no change to his rank and salary rate did not necessarily mean that his transfer was not or could not be a demotion. The appellant stated

that other factors such as the status, authority, prestige and the responsibilities of the two positions had to be taken into account as well in the determination of the question whether or not the transfer to Pollsmoor constituted a demotion. The appellant then went on to give details relating to the status, authority, prestige and responsibilities of the two positions.

[82] The appellant stated in his affidavit that the position of Area Co-ordinator: Corrections, Pollsmoor was a position at local level and that it was “**subservient**” to the position of Regional Head: Corporate Services, Western Cape in terms of responsibilities, status, job description, “**powers and capacities**”. In this regard the appellant stated that in the position that he was occupying, he served “**on the Regional Executive together with the Regional Commissioner and his deputy and three other Co-Regional Heads.**” He said that he also served on the Regional Management Board together with “**10 (ten) Area Commissioners, the Regional Commissioner and his Deputy and his four Regional Heads”.** The appellant explained that the Regional Management Board is responsible for the management of all of the Department’s correctional facilities in the whole of the Western Cape. The appellant says that at regional level there were seven Deputy/Assistant Directors reporting to him. He says that those deputy directors/assistant directors were in charge of the directorates of Human Resources Support, Human Resources Development, Performance Management, Labour (Employee) Relations, Special Programmes, Legal Services and Occupational Health and Safety. He said that he was also the line manager for ten Area-Co-Ordinators: Corporate Services each of whom was

situated in one of the ten management areas where correctional facilities are maintained by the Department.

[83] The appellant said that in contrast the position of Area Co-ordinator: Corrections (Pollsmoor) was a far more "**limited position**" which is involved in the day to-day control of prisoners and prisons. He said that this was something in which he had no experience and in which he had not been involved for the previous eight to ten years. The appellant set out his qualifications to show that there was no connection between such position and his qualifications. He said that he had

(a) a certificate in labour law from the "**University of Pietermaritzburg",**

(b**)** a diploma in advanced Human Resources from the Wits Technikon,

(c) a B.A degree in political science and sociology from the University of South Africa and had enrolled for a Master's degree in Public Administration at the University of Stellenbosch in the Western Cape at the time of the institution of these legal proceedings in the Labour Court.

[84] The respondents only deny that the appellant is the line-manager of the Area Co-Ordinators and they clarify that he is in charge of a number of sub-directorates. Having noted what the respondents say in this regard, it is interesting to note that the respondents admit the statements made by the appellant in par 72 of his founding affidavit that in his position in the Western Cape he supervised some 10 Area Co-Ordinators: Corporate Services and seven deputy/assistant directors. The appellant also said in par 73 of his founding

affidavit that in his position as Regional Head: Corporate Services, Western Cape, he had overall responsibility for the management of the entire portfolio of human resources functions for the Department's staff in the Western Cape which ran into some 6 000 personnel members. The respondents admit this.

[85] The appellant also says in par 73 of this founding affidavit that at his offices "**at the Regional Commissioner alone**" there were some 30 staff members who fell under him. He then says "**It will be clear, if one compares the wide and extensive authorities (sic), responsibilities and powers which I currently enjoy with the post to which I have purportedly been transferred that such transfer constitutes a demotion and a gross and severe diminution of my status, responsibilities, prestige and authority. This is evident even if one simply compares the job descriptions of the two posts, copies of which are annexed hereto marked annexures 'MN23' and 'MN24' respectively**." In par 55 of the first respondent's answering affidavit in which the first respondent purports to answer the appellant's version as contained in paragraphs 70 – 73 of his founding affidavit, all that the respondents deny is that the position they wanted the appellant to occupy in Pollsmoor constituted a demotion. And even that denial is a bare denial. This must be viewed against the fact that the appellant did not just state that this was a demotion. He substantiated that contention by setting out in great detail what his powers, duties, responsibilities and authority were in his position in the Western Cape. He also said that, when one has regard to that and the job description of the other position that he would occupy in Pollsmoor, it was clear that the transfer to the position in

Pollsmoor constituted a demotion. The respondents did not put up anything to substantiate their denial that this was a demotion.

[86] In par 75 of his founding affidavit the appellant said that the position at Pollsmoor was "**nothing more than an administrative or functional position as opposed to the executive position I currently hold which requires the kind of sophisticated skills and abilities which are needed to successfully manage HR issues such as benefits and promotions, salaries, workplace discipline and legal services, on a provincial level, for some 6000 employees**." The respondents did not deny this part of par 75 of the appellant's founding affidavit.

[87] In par 77 the appellant stated that "**it is apparent from the provisions of the Transfer Policy the transfer is clearly irregular and unlawful in that it was effected without consultation with me beforehand.**" He continued: "**As I have already pointed out, at no stage was any mention made of a possible transfer to a position at Pollsmoor and the only discussions which took place centred around a transfer to the post of Director: Aftercare at Head Office in Pretoria."**

[88] I agree with Counsel for the appellant that the mere fact that the appellant's rank and remuneration were not going to change does not mean that that the transfer to Pollsmoor could not or did not constitute a demotion. I agree, too, that the status, prestige and responsibilities of the position are relevant to the determination of whether or not a transfer in a particular case constitutes a demotion. As can be seen above, the appellant in this case has set

out in great detail a number of matters which go to the status, prestige and responsibilities of his then position and the position he was to occupy in Pollsmoor. Largely, the respondents have not challenged the appellant's version on many aspects of his evidence in this regard. All of these have been referred to above. In the light of the largely uncontradicted evidence that the appellant has adduced in regard to the status, prestige and responsibilities of his position in Cape Town, I have no hesitation in concluding that such position was of a higher status, prestige and responsibilities than the position he was to occupy in Pollsmoor. That being the case, I also have no hesitation in concluding that the appellant's transfer to Pollsmoor constituted a demotion.

[89] The appellant also did not consent to such demotion. In terms of the common law a demotion without the employee's consent is unlawful. In terms of the Labour Relations Act the demotion of an employee without his consent would be unfair. That means that the transfer of an employee which constitutes a demotion is not in accordance with the LRA and, therefore, is contrary to the provisions of sec 96(2) and (3) of CIS and, therefore, unlawful. At any rate, to the extent that the CSA or the PSA may permit the demotion of an employee by his employer without his consent, it would be in conflict with the LRA which does not allow that and in terms of sec 210 of the LRA, the LRA would prevail over the PSA or the CSA.

[90] Furthermore, the decision to transfer the appellant to the position of Area Co-ordinator: Corrections, Pollsmoor was made without the appellant being consulted first or being given an opportunity to be

heard. That is fatal to the transfer and renders it invalid, void and of no legal effect.

[91] In the result, I am satisfied that the second respondent's decision to transfer the appellant was unlawful, void and of no legal effect and should be set aside. In the light of the conclusions I have reached above with regard to the appellant's challenge of the validity of the appellant's transfer on the basis of the *audi alteram partem* point/consultation point with reference to the transfer to Pollsmoor and the transfer to Pretoria and also on the basis of the demotion point with reference to the transfer to Pollsmor, I find it unnecessary to consider other grounds upon which the transfer could possibly be invalid. Tempting as it may be to deal with these other grounds, it seems to me that I should not do so because the points were not argued. The points whether the transfer constituted an administrative action or not was argued but in the light of the conclusion I have reached above, it is not necessary to decide it.

[92] Lastly, I note that, while in this case the appellant complained that he was a victim of someone else's decision to transfer him that:

(a) was actuated by ulterior motives,

(b) constituted an unfair administrative action, and,

(c) was contrary to the Department's Transfer Policy,

similar accusations were made against him by another employee or official of the Department of Correctional Services in the matter of **Acting Provincial Commissioner, Correctional Services & others v Matheyse (1) (2002) 23 ILJ 2192 (LAC)** which came before this Court in 2002. When one has regard to all of this, it is difficult not to be reminded of the biblical instruction: Do unto others as you would have them do unto you! (Original King James Version :Matthew 7:12).

[93] The appellant has also sought the setting aside of that part of the fourth respondent's transfer which required him to take his position in the Western Cape. Such an order would only relate to that part of the decision to transfer the fourth respondent to the appellant's position and would not in any way affect the decision to transfer the fourth respondent away from the position he occupied in Pretoria before the implementation of the decision to transfer him to the appellant's position in Cape Town. The fourth respondent has not opposed such relief. That order can and should also be granted. There were also other orders which the appellant asked for in his Notice of Motion which can and should be granted.

[94] In the light of the above the appeal should succeed. With regard to costs both Counsel submitted that this is a matter in which it would not be appropriate to make an order of costs either way. Accordingly, I do not propose to make an order of costs.

[95] In the result I make the following order:

1. The appeal is upheld.
2. No order is made as to costs on appeal.
3. The order of the Labour Court is set aside and, for it, the following order is substituted;

"(a) The decision made by the second respondent to transfer the applicant to Pollsmoor Prison, is

hereby declared unlawful, invalid and of no legal effect and is set aside.

(b) The second respondent's decision to transfer the applicant from the position he occupied in the Western Cape to the position of Director: Aftercare: Head Office in Pretoria is invalid, void and of no legal effect and is hereby set aside.

(c) The first and/or second respondents' decision transferring the fourth respondent to the position of Regional Head: Corporate Services, Western Cape, is hereby reviewed and set aside.

(d) The order in (c) above does not affect the validity of the decision to transfer the fourth respondent from the position that he held in Pretoria but only affects his transfer in so far as it affected the appellant's position of Regional Head: Corporate Services, Western Cape.

(e) There is to be no order as to costs"

Zondo JP

I agree.

H.M Musi JA

I agree.

Tlaletsi AJA.

Appearances:

For the Appellant	:	Mr M L Sher
Instructed by	:	Parker & Khan
For the 1st to the 3rd Respondents	:	Mr P Gamble SC (with T Golden)
Instructed by	:	State Attorney
For the 4th Respondent	:	No appearance.
Date of Judgment	:	31 July 2008