

IN THE LABOUR COURT OF SOUTH AFRICA

CASE No: C82/2001

In the matter between:

Applicant

and

THE ACTING PROVINCIAL COMMISSIONER,
First Respondent

THE NATIONAL COMMISSIONER, CORRECTIONAL
Second Respondent

Third Respondent

JUDGMENT

FRANCIS AJ

Introduction

1. The applicant is employed by the Department of Correctional Services (“the Department”) as an Area Manager in the Allandale management area for the past 3 years. The applicant has 19 years services with the Department.
2. On the 23 January 2001 the applicant was notified that he was going to be transferred from Allandale to the Malmesbury Correctional Facility with effect from 1 February 2001.
3. The applicant challenged his transfer in this Court and, on 1 February 2001, obtained an interim interdict restraining the first respondent from transferring him. A rule *nisi* was issued calling upon the respondents to show cause why the first respondent’s decision to transfer him, should not be set aside. On 8 March 2001 after the matter was argued before me, I extended the rule *nisi* to the 23 March 2001. On 23 March 2001 the rule was extended further to the 30 March 2001.

Background facts and circumstances

4. On 14 November 2000 the applicant was informed in writing by the first respondent that his transfer to Malmesbury was being considered in the interest of the Department.
5. In his reply on 20 November 2000 the applicant requested reasons for the proposed transfer and demotion, as well as the criterion upon which he, amongst others, had been identified for the proposed transfer.
6. On 12 December 2000 the first respondent informed the applicant that the transfer was being considered in the interest of the Department, as well as in the applicant's own interest since the transfer would ensure that his scope of responsibilities would be widened, and in the process it would prepare him for bigger responsibilities".
7. The applicant wrote back on 22 December 2000, pointing out that the criteria upon which he had been identified for the proposed transfer, had still not been set out in writing. He complained that the first respondent had not furnished any reasons at all as to why his transfer was not a demotion.
8. The first respondent replied to this letter on 16 January 2001, setting out the reasons for the transfer. These reasons are that the applicant's personal development needed to be taken into account to prepare him for a post with bigger responsibilities. The Department had considered it desirable to place the applicant in an area with a larger functional and managerial responsibilities. The first respondent referred the applicant to the greater number of staff posts and inmates housed by or on the books of the Malmesbury facility. Further that it was made clear during the Provincial Management Board meeting held at Ceres, that the Department would have to redeploy managers who were for a lengthy time at the same management area. This position was confirmed in the first respondent's letter of 20 October 2000. That letter stated that career planning was one of the benchmarks of the exercise and that it would be necessary to consider the length of time that a

manager was occupying a specific post.

9. Another reason given by the first respondent to justify the applicant's transfer to Malmesbury, was that it would expose the applicant to the concept of unit management. This was a new management system in terms of which prisons would be managed by decentralising power to so-called unit heads. The idea was to divide the prison into units each with a number of small cells (housing one or two inmates) instead of large mass cells housing many prisoners. Each unit would have its own management structure and programmes; determined by its own educationist, psychologist, social worker and other support workers. The Malmesbury prison is one of the few prisons where this system has already been implemented. Furthermore, according to the first respondent, the unit management system would be implemented in all prisons throughout the country by the end of next year. As a result, the applicant would of necessity have obtained the necessary exposure to the system within one year at the latest, at Allandale. Malmesbury receives many visitors from abroad and elsewhere, that needed to be addressed and accompanied.

10. The applicant met with the first respondent on 19 December 2000. That meeting was only attended by the two of them. Certain discussion ensued, the exact contents of which are in dispute.

11. The applicant was formally notified of his transfer on 23 January 2001, which was to take effect on 1 February 2001. This prompted the applicant to bring the current proceedings

The Review Application

12. This Court is empowered to review the first respondent's decision in terms of section 158(1)(h) of the Labour Relations Act, 66 of 1995 ("the LRA") on such grounds that are permissible in law.

13. In *Pharmaceutical Manufacturers of SA: In Re Ex Parte President of the RSA* 2000

(2) 674 CC at page 692 E it was held:

“The control of public power by the Courts through judicial review is and always has been a constitutional matter.”

At page 696 paragraph 44:

“I cannot accept this contention, which treats the common law as a body of separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”

At page 698 paragraph 50:

“What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the common law in respect of the validity of administrative decisions within the purview of s 24 of the interim Constitution. What is lawful administrative action, procedurally fair administrative action and administrative action justifiable in relation to the reasons given for it cannot mean one thing under the Constitution and another thing under the common law.”

14. The first respondent is a functionary within a governmental department, acting in an administrative capacity.

15. As grounds of review in this matter the applicant contends that:

15.1 the first respondent’s decision to transfer him was vitiated in that it was affected arbitrarily, and/or indiscriminately and/or on the basis of ulterior motives.

15.2 the purported transfer constitutes a residual unfair labour practice within the meaning of Schedule 7 item 2(1)(b), alternatively Item 2(1)(c) of the LRA. The transfer amounts to a demotion and a drop in status.

15.3 the transfer was both procedurally and substantively unfair.

16. The first respondent contends that the principles governing the decision to transfer the applicant are the following:

16.1 the desirability of transferring Area Managers who had spent a long period of time in a particular area in order to broaden their experience, expose them to other management situations and thereby assist in their career development.

- 16.2 the utilisation of transfers to achieve employment equity targets.
- 16.3 the applicant had admittedly acquitted himself well of his tasks in the Allandale management area. It is precisely for the aforementioned reason that it was also considered to be in the Department's interest that the applicant is transferred to the Malmesbury management area, not only for him to gain experience but also to impart his skills in an area where same are required.
- 16.4 the applicant was earmarked for transfer also on the basis of exposing him to the new Unit System which is currently in operation in Malmesbury.
- 16.5 the applicant would be second in command to the current Area Manager at Malmesbury, and will consequently be eased into the working of the new Unit System at a very modern and much bigger prison facility along with all the attendant experiences, so as to expand the Department's available resources of qualified personnel.

The Requirements of a Transfer

17. The applicant's transfer must be evaluated in the context of the provisions of the Correctional Services Act, 111 of 1998, as amended, certain Departmental Regulations, the provisions of the LRA, and the Constitution. Correctional Services Regulations 2(3) provides that whenever the interests of the Department require, a member may be transferred. However, the LRA and section 23(1) of the Constitution provide that the applicant is entitled to fair labour practices, and fair and lawful administrative action. Section 210 of the LRA provides that its provisions prevail over any other law in conflict with it.
18. In addition to these legislative provisions, the validity of the first respondent's exercise of power must be tested against the Department's own laid down Transfer Policy, as supplemented by a directive from the National Commissioner on 12 December 2000 to the effect that no employee would be forced to accept a transfer against his/her will, and the first respondent's public undertaking to adhere thereto. The undertaking was given at a meeting held in Ceres.

19. On 24 July 2000 the first respondent's office circulated per facsimile, a copy of the Department of Correctional Services' then newly formulated Transfer Policy, as received from the Director, Human Resources Management, of the office of the National Commissioner.

20. The National Commissioner's directive states in clear and unequivocal terms that:

"In order to make sure ... transfers are dealt within a fair and justifiable manner, it is necessary to implement strict uniform control/application measures in line with the relevant policies within the Department."

The directive sets out clear procedural and substantive criteria to be followed in order to affect a valid transfer.

21. This phrase is repeated in paragraph 2(a) of the Policy Document, as a stated purpose of the policy. In addition the Policy Document spells out certain guidelines which must be taken into account in considering a transfer. One of it is that there must be a valid and sufficient reason to transfer an employee. The provisions referred to in the preceding paragraphs, have been repeated in the final Transfer Policy which was issued in October 2000. The Department has specifically stipulated that the measures contained in the Transfer Policy must be followed uniformly and strictly, before a transfer can be said to have been dealt with fairly and justifiably.

22. On a proper reading of the relevant provisions of the Correctional Services Act, the relevant regulations promulgated thereunder, the LRA, and the Constitution, and moreover binding Departmental Policy Directives, it is manifest that:

22.1 the transfer of any employee by a Provincial Commissioner must meet the standards of both procedural and substantive fairness i.e. it must be affected fairly in accordance with the strict (procedural) requirements of the transfer policy, and it must be justifiable i.e. must be affected for valid and sufficient reasons (in the substantive sense); and

22.2 a transfer must be applied to employees consistently and uniformly i.e. not in a selective, arbitrary or

capricious manner.

23. The applicant's transfer must therefore be both procedurally and substantively fair. The first respondent bears the onus to prove that the transfer was effected in accordance with fair procedures and that it was done for a valid reason. Where it has failed to do so, the review application will succeed.

24. I will now proceed to examine first the substantive grounds of the transfer and thereafter the procedural aspects of it.

(1) **Substantive unfairness**

(a) *The issue of demotion*

25. In *Taylor v Edgars Retail Trading* supra (1992) 13 ILJ 1239 (IC) at 1242 J - 1243 A, the court referred to the concept of demotion as formulated by Scoble in *The Law of Master and Servant* at 176, as being:

"Where a servant is employed to perform a particular class of work and contracts to perform work of a particular character, is thereafter instructed to perform work of a more menial nature, he may be said to have been degraded in his status, and ... such act by his employer may in certain circumstances be regarded as tantamount to a dismissal."

26. The court also referred with approval to the ordinary grammatical definition of demotion as being '*to reduce to a lower rank or class*'. The 10th edition of the Concise Oxford Dictionary describes to demote to mean to '*give a lower rank or less senior position, often as a punishment*'.

27. In a series of decisions (which predated the LRA) the civil courts have gone further and applied a wider definition to the concept of demotion in the labour relations context, holding that it applies even where employees retain their salaries, attendant benefits, and rank, but have suffered a reduction or diminution in their '*dignity, importance or responsibility*' or in their '*power*' or '*status*'.

28. Mr Oosthuizen who appeared for the first respondent submitted that the applicant's transfer is no demotion. He submitted further that neither his salary nor rank was going to be affected. The applicant would be the

second in command of a far bigger and innovative prison facility which attracts international attention. I am unable to uphold Mr Oosthuizen's submissions for reasons stated below.

29. The applicant is the Area Manager of Allandale Management Area. It is apparent from his job description that:

- 29.1 the applicant reports and answers directly to the Provincial Commissioner in respect of his area;
- 29.2 various departments heads are subordinate, and report, to him, namely the Head: Resource Management, the Heads of Prison, the Head: Community Corrections, and the Chairperson of the Institutional Committee;
- 29.3 the applicant's principal function is to manage correctional services within his area. As such, he is responsible for:
 - 29.3.1 administrative services such as admissions, releases, custody, treatment and rehabilitation of offenders;
 - 29.3.2 resource management within the area including maintenance/production workshop, agricultural production, human resources, financial resources and management, logistical control, information technology etc.
- 29.4 the applicant in his capacity as the Area Manager is the Chief Accounting Officer for the area, accountable for the budget, funds, staff, facilities and equipment of the Departments in his area;
- 29.5 the applicant has his own office with a full time secretary;
- 29.6 the applicant is expected to liaise directly with the Provincial Control Office, Provincial Heads, SA Police Services, the Department of Justice, other State departments and NGOS', the CCMA, Parole Boards and sundry persons;
- 29.7 his work is audited by the Provincial Commissioner, the Auditor General, the Inspecting Judge and others; and his performance is measured against the core duties and performance areas set out in his performance agreement signed by him.
- 29.8 he is expected to visit various facilities within the Province, and to be involved in negotiations/encounters with '*interest groups*.'
- 29.9 his work is subject to public scrutiny.

30. As Area Manager, the applicant serves on the Provincial Management Body of the Department of Correctional

Services, a body on which all incumbent Area Managers serve together with first respondent and the Provincial Commissioners. This body is responsible for the collective management of the Department's affairs in the Province, at the highest level. Membership of the body carries with it certain prestige and status.

31. By way of comparison to the job description pertaining to the applicant's post as Area Manager, first respondent has annexed a similar '*duty sheet*' pertaining to the post of Head: Resource Management. It is immediately apparent therefrom that the person occupying such a post is responsible for only one part of the various components for which an Area Manager is ultimately responsible. The incumbent answers and report (and is therefore subordinate) to the Area Manager and serves as a second in charge.

32. In essence the Head: Resource Management's functions concern issues of personnel (training, evaluation and promotion), resources (such as stocktaking, equipment etc.), and finance. Included on the duty sheet are menial tasks such as 'investigating absurdity' at clubs, and controlling and evaluating "requirement forms for the perishable dinnerware".

33. However even in regard to these stated functions, his delegation of authority as the Head: Resources Management and his powers are circumscribed, and are far less than those of the Area Manager. For example, he cannot approve promotions but can only recommend same, nor can he grant special remission of sentences to prisoners or order their releases. In addition, only certain personnel and line functions report to him.

34. From a comparison of the duties, responsibilities and powers that enure to the two posts, there can be little doubt that a transfer to Malmesbury as Head: Resource Management, would result in substantially reduced or diminished authority, power status and responsibilities for the applicant. This constitutes a demotion. The transfer thus amounts to a unilateral and unfair altering of the terms and conditions of the applicant's

contract of employment, and thus constitutes an unfair labour practice.

(b) *Valid and sufficient reasons?*

35.Paragraph 5(a) of the Transfer Policy provides that:

“There must be a valid and sufficient reason to transfer ... an employee”.

The clear implication of this provision is that the onus is on the employer to justify the transfer.

36.In addition, the Transfer Policy provides that in considering a transfer, certain guidelines must be taken into account before a final decision is reached, notably:

36.1 the interests of the Department and the broader State interest;

36.2 the employee’s career development and utilisation; as well as

36.3 the interests (generally) of the employee, which includes *“the personal circumstances of those affected”* (i.e. not only the personal circumstances of the employee but also his dependants and family, who may be affected by the decision).

37.As a basic principle, every transfer *“must be well considered in the public interest and ought to be the result of careful human resources and/or career planning”*, and a transfer *“may not be used as a punitive measure”*.

38.The two types of transfers namely those initiated by the employee, and those initiated by the Department are dealt within some detail. In regard to transfers initiated by the Department, both the Interim and Final Policies are identical in regard to the procedures to be followed, save that the Final Policy provides that the final decision must be communicated to the employee in writing, within seven days from the date of the employee’s representations (if any) with *“a detailed explanation of reasons”*.

39.Paragraph 4.7 provides that as a basic principle *“the decision on or notice of transfer must be in writing, with reasons for such a transfer substantiated.”* The policy provides that a transfer can only be initiated by the

Department, when a vacancy arises. In such an event a potential pool of candidates who can suitably fill the post must be identified. It is apparent from the facts of this case that no vacancy exists at the moment in Malmesbury in the post to which the applicant has been transferred. There is someone occupying the post at present. There is no allegation that this person is not performing the tasks required of him/her. It is simply alleged that this person has an incorrect rank. Furthermore no potential pool of candidates for the post was ever drawn up.

40. It is not contended by the first respondent that the applicant's appointment was effected pursuant to, or to further the objectives of the Employment Equity Plan. In this regard, and as part of Resolution 4/99 of the Departmental Bargaining Council, the Department has stipulated that "*staff members should not be transferred*". Provinces are required instead to "*manage the gaps (vertically) - if for instance numbers need to be reduced, natural attrition should apply*".

41. In regard to the reasons why the applicant's transfer is alleged to be justified, the following are pointed out:

41.1 On 14 November 2000 the applicant was informed in writing that his horizontal transfer to Malmesbury was being considered in the interest of the Department. No reference was made at all to the applicant's interests, (nor was it even suggested that the transfer would serve his interests or that these were even considered at that stage).

41.2 In his reply on 20 November 2000 the applicant requested reasons for the proposed transfer and demotion, as well as the criterion upon which he amongst others had been identified for the proposed transfer. This is clearly a reference to the policy requirement of establishing a pool of candidates for any vacancy.

41.3 On 12 December 2000 the first respondent replied, alleging that the transfer was being considered in the interests of the Department, as well as in the applicant's own interest since the transfer would 'ensure that your scope of responsibilities will be widened, and in the process it will prepare you for bigger responsibilities. This is the only reason given.

41.4 The applicant wrote back on 22 December 2000, pointing out that the criteria upon which he had been

identified for the proposed transfer, had still not been set out in writing, and complained that the first respondent had not furnished any reasons at all as to why the transfer was not a demotion.

41.5 The first respondent in turn replied to this letter on 16 January 2001, the same day apparently that he made a final decision to go ahead with the transfer. The first respondent's reason for the transfer are set out in this letter. These reasons are repeated and elaborated upon in paragraph 17 of the opposing affidavit. It is necessary to consider these reasons in some detail.

1. The so-called 'personal development' of the applicant

42. In the letter of 16 January 2001, the first respondent alleged that the applicant's personal development needed to be taken into account to prepare him for a post with bigger responsibilities. This was not elaborated upon in any way. This aspect is dealt with in more detail in paragraph 17.2 of the opposing affidavit. It is alleged therein that the Department considered it desirable to place the applicant in an area with larger functional and managerial responsibilities. None of these alleged greater functional and managerial responsibilities are set out, even by name. Instead the first respondent simply refers to the greater number of staff posts and inmates housed by or on the books of the Malmesbury facility. As pointed out by the applicant, the fact that there are more prisoners and more staff within an area does not necessarily mean that there are larger functional and managerial responsibilities attached to a particular post. It may well be that the Area Manager has larger functional and managerial responsibilities at Malmesbury. However, by being demoted to the post of Head: Resource Management at Malmesbury, the applicant would not have larger functional and managerial responsibilities, as has already been stated above.

(2) Redeployment of lengthy service

43. In the first respondent's letter of 16 January 2001 it is alleged that it was made clear, during the Provincial Management Board meeting held at Ceres, that the Department will have to redeploy managers who are at the same management area for a lengthy time. This was confirmed by the first respondent's letter of 2 October 2000. This is however not borne out by that letter, which states that career planning is one of the

benchmarks of the exercise, and that it will thus be necessary to consider the length of time that a manager is occupying a specific post. It is thus not the length of time that an official has served in a particular area that was identified as a criterion, but the length of time that the official has occupied in a particular post. In this regard, the applicant has occupied the post of Area Manager for three years only, whereas there are numerous Area Managers who have held this position for a longer period of time.

(3) Exposure to the unit management concept

44. Another reason given to justify a transfer to Malmesbury was that it will expose the applicant to the concept of unit management, a new management system in terms of which prisons are to be managed by decentralising power to so-called unit heads. The idea is to divide the prisons into units each with a number of small cells (housing one or two inmates) instead of large mass cells housing many prisoners. Each unit in turn will have its own management structure and programs, determined by its own educationist, psychologist, social worker and other support workers. It is alleged by the first respondent that Malmesbury is one of the few prisons where this system has already been implemented.

45. However, the area manager for Malmesbury a Mr L Venter, has indicated that with the staff shortages, services are not decentralised and the Malmesbury prison does not properly apply the unit management system at present. Furthermore, according to the first respondent, the unit management system will be implemented in all prisons throughout the country by the end of next year.

46. As a result, the applicant will of necessity obtain the necessary exposure to the system within one year at the latest, at Allandale. In addition, and inasmuch as this concept introduces a new management system, it is a function exercised by, and the responsibility of, the Area Manager, and not the Head: Resource Management. In fact, the Head: Resource Management has absolutely nothing to do with the implementation of this system.

(4) Exposure to visitors

47. According to the first respondent, Malmesbury receives many visitors from abroad and elsewhere, that need to be addressed and accompanied. As the Area Manager is allegedly not always available, it will be the applicant's responsibilities to perform this task. No indication is given of what this means i.e. when and how often such unavailability will arise, if at all. There is no suggestion that the present incumbent in the post to which applicant was transferred, is either unable or incapable of performing his task. Why the applicant needs to be transferred there to do so, is not dealt with or explained at all. In addition, as the applicant points out, it is usually the Area Manager who as the commanding authority, receives and entertains visitors.

(5) Visitors

48. It was not suggested in the first respondent's letter of 16 January 2001, as a reason for the transfer, that it would provide the applicant with more experience. This reason first surfaces in first respondent's opposing affidavit. It is alleged there that the Department has an obligation to ensure that its staff will receive as wide a range of experience as possible within their job descriptions, in order to facilitate the development and diversification of their skills. Moving the applicant out of his current job description, to a post with lesser duties, responsibilities and authority, is not going to broaden his range of experience but diminish it. This aspect has also not been explained at all in the opposing papers. The suggestion is also made that the experience required in a large management area such as Malmesbury will far better equip the applicant for promotion. This proposition has also been controverted. As the applicant pointed out, if anything, were he to be demoted to occupy the post of Head: Resource Management at Malmesbury, he would find it harder to apply for and be promoted either to (a) the position of Area Manager in another area (he would stand a better chance as Area Manager applying for another post as Area Manager in a larger area), or b) to the rank of Director - the larger areas are managed by Area Managers of the rank of Director.

49. In any event, although the post of Head: Resource Management can theoretically be filled by an official of the

rank of Senior Correctional Officer upwards (i.e. Assistant and Deputy Director) the post cannot be held by an official of the rank of Director, as it is not possible to have two officials of that rank where the one (Head: Resource Management) is subordinate and answers to the other (the area Manager). Of necessity therefore, the applicant would not be able to be promoted to the rank of Director whilst stationed at Malmesbury. To achieve a promotion, he would have to take a further transfer.

50. The applicant alleges that on various occasions when he expressed his reservations about going to Malmesbury, the first respondent offered him posts or positions at other areas such as Voorberg and Pollsmoor (this was allegedly offered to him on 6 November 2000) and at Goodwood (an offer allegedly made on 19 December 2000). He complains that this is an indication that his transfer to Malmesbury was not to serve any need, interest or requirement of the Department; and that it indicates that the first respondent's actions were motivated by control of Allandale, and not the interests of Malmesbury. The first respondent has flatly denied that the applicant was ever offered alternative posts at any of these areas.

51. The first respondent admits however receiving a letter from applicant dated 22 December 2000. In that letter reference is also made to an alternative transfer offer to serve as the Head: Resource Management at Goodwood, made by the first respondent during the course of a meeting held between him and applicant on 19 December 2000. That meeting was only attended by the two of them. The only logical and acceptable explanation for the applicant's statement in this regard in the letter, must be that such an offer was in fact made to him by first respondent's version, I find that such an offer was indeed made by first respondent - at least on 19 December 2000. I find that the various reasons, listed above, are spurious reasons and the decision to transfer the applicant was motivated by ulterior motives.

The failure to have regard for applicant's personal circumstances

52. As stated above, the Transfer Policy provides in peremptory terms that before a final decision is reached, the

interests of the employee whose transfer is being considered, such as the personal circumstances of those affected, must be taken into account. The effect of this is to place a duty on the employer to elicit any personal circumstances from the employee, or at least attempt to do so. It is apparent, from the first respondent's own version, that he did not take into account any personal circumstances from the applicant. He claims that he was unaware of them. He made no attempt to elicit any such circumstances from the applicant during any of the meetings held with him, nor did he call for such circumstances to be provided to him in any of the letters he directed to the applicant. He did not warn the applicant in any of the letters of the consequences should applicant fail to provide him with any relevant personal circumstances. It appears that the first respondent did not even attempt to elicit what personal circumstances he could find, from applicant's personal file.

53. The first respondent's decision fails on this ground as well. Had he had any regard for the applicant's circumstances, the first respondent could not reasonably have concluded that the transfer was in the applicant's interest. He has two dependent children - a son of 14 who is attending school in Paarl, and a daughter who lives with him and commutes to the University of Stellenbosch every day. He also has an aged and ill mother in Paarl, and is not possessed of a vehicle and driver's licence. Effectively a transfer to Malmesbury would prevent him from being able to see his mother. The applicant's son has just started a new school year at Laborie High in Paarl and would find it extremely difficult to be placed in a good school in Malmesbury at this stage of the year.

Procedural unfairness

54. Mr Oosthuizen submitted that the first respondent complied with the provisions of the Correctional Services Regulation 2(3) as well as the Transfer Policies. There was further proper consultations with the applicant.

55. In terms of both Transfer Policies, an employee who is transferred must be given "*a reasonable notice from the date on which the transfer is approved, to the date before his physical relocation*". Whereas the interim

Policy provides that a month's notice was to be regarded as reasonable (depending on the circumstances and merits of each case); the final policy extended this to 30 working days notice.

56. It is common cause that despite the applicant first being informed of a possible transfer in November 2000 he was never appraised of any date for the implementation thereof until 16 January 2001, when he received a letter from the first respondent referring to 1 February 2001 as the date. In this letter he was given five days i.e. until 21 January 2001 to submit reasons why he should not be transferred.

57. On 23 January 2001 the applicant was told summarily to report for duty on 1 February 2001 i.e. in nine days time. It is obvious, given the applicant's personal circumstances, that the notice given to him was unreasonable in the extreme, and failed to comply with paragraph 5(g) of the Transfer Policy. In addition the Transfer Policy provides that where an employee makes representations against the proposed transfer, these representations must be considered, and thereafter the "employee must be informed in writing that the representations were considered" and if they were rejected, reasons therefore "must be set out in brief".

58. The requirements of this provision of the transfer were not met. The applicant was at no stage formally informed in writing that his representations were considered and rejected, nor were the reasons for rejecting these set out in brief. In the circumstances the first respondent's actions were also procedurally unfair on this ground.

59. The first respondent bears the onus to prove that the transfer was affected in accordance with fair procedures and that it was done for a valid reason. The overwhelming probabilities point to the fact that the applicant's transfer was both procedurally and substantively defective, and falls to be reviewed and set aside. The respondent has failed to discharge the onus. The Department has specifically stipulated that the measures contained in the policy must be followed uniformly and strictly, before a transfer can be said to have been dealt with fairly and justifiably. The first respondent acted irrationally, indiscriminately and therefore unfairly.

60. Accordingly the first respondent's decision to transfer the applicant to Malmesbury constitutes an unfair labour practice as defined and is reviewed and set aside.

61. I see no reason why according to the requirements of law and fairness costs should not be awarded to the applicant.

62. In the result I make the following order:

(a) The rule nisi is confirmed.

b) The first respondent is directed to pay the applicant's cost of suit including the costs of two counsel.

FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: N M ARENDSE SC WITH HIM M L SHER
INSTRUCTED BY M K PARKER ATTORNEYS

: A C OOSTHUIZEN SC WITH HIM J VAN DER SCHYFF INSTRUCTED BY STATE
ATTORNEY

: 8 MARCH 2001

: 30 MARCH 2001