

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: 970/2025

In the matter between:

GWENDOLINE NNYANA CLODIA MASENG

Appellant

AND

**DEPARTMENT OF PUBLIC WORKS
AND ROADS NORTH WEST**

First Respondent

**HEAD OF DEPARTMENT: DEPARTMENT OF
PUBLIC WORKS AND ROADS NORTH WEST**

Second Respondent

**MEC: DEPARTMENT OF PUBLIC
WORKS AND ROADS NORTH WEST**

Third Respondent

DATE OF HEARING

: **23 January 2026**

DATE OF JUDGMENT

: **24 March 2026**

FOR THE APPELLANT

: **Mr. W Scholtz**

FOR THE RESPONDENT

: **Adv. T.J Makgate**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives *via* email. The date and time for hand-down is deemed to be 12h00 on 24 March 2026.

ORDER

Resultantly, the following order is made:

- (i) The applicant's transfer from her position as a District Director for the Ngaka Modiri Molema District to the Provincial Coordinating and Reporting Directorate at the Head Office of the Department of Public Works and Roads: North West, is reviewed and set aside.
- (ii) The first and second respondents are ordered to reinstate the applicant in the position as District Director for the Ngaka Modiri Molema District, within ten (10) days from the date of this order.
- (iii) The first respondent is ordered to pay the cost of this application on a party-and-party basis on Scale B, to be taxed, in terms of Rule 67 A of the Uniform Rules of Court.

JUDGMENT

Summary

Transfer of public servant in contravention of Section 14 of the Public Service Act 103 of 1994 read with Clause 16 of the Recruitment and Selection Policy of the department - transfer reviewed and set aside - Cost on Scale B.

HENDRICKS JP

- [1] The applicant is an employee of the North West Provincial Government and occupy the position of District Director for Ngaka Modiri Molema District, in the North West Province since 01 February 2021. On 02 July 2024 a meeting was held between the Head of the Department (HOD) of Public Works and Roads: North West, the applicant, and the Chief Director: Infrastructure, Maintenance, Co-ordination and Implementation, Mr. Diko, who are the applicants' supervisor. This meeting is the central point of the present application, as a brief discussion regarding the possible transfer of the applicant was held.
- [2] On 4 August 2024 the applicant was notified of a managerial meeting to be held at the HOD's office on 05 August 2024, to be followed by a staff meeting thereafter. The purpose of these meetings were to discuss transfers and placements of official and acting arrangements. These meetings were indeed held and the applicant was verbally informed of the decision that she be transferred.

- [3] On 12 August 2024 the applicant received a letter issued by the HOD already on 02 August 2024, three (3) days before the meeting of 05 August 2024, informing her of the approval of her transfer. On 13 August 2024, the applicant was requested to sign the letter of transfer and to return same, upon her acceptance of the transfer. The applicant did not accept the transfer. Instead, she returned the letter of transfer unsigned and in manuscript wrote the following on it:

"In pursuance of the letter of transfer that I received on the 12th day of August 2024, I wish to state as follows:

- In 2019, a substantive position of the Director Ngaka Modiri Molema was advertised. I duly applied, was shortlisted, interviewed and wrote a competency test.*
- I was substantively appointed and started 1st February 2021 by Executive Authority, the former Minister of Public Works & Infrastructure, Me Patricia De Lille.*
- Since my appointment, I have been subjected to performance management as guided by the SMS Handbook/PMDS process.*
- On the 5th day of August 2024, I was called to a meeting by the HOD, Mr Kgantsi and was informed that I was being transferred to Programme 4: Community Based Programme. On the 12th day of August 2024, I received a letter that indicates that the EA has approved my transfer.*
- With this letter, I wish to understand the circumstances in light of the HOD's comments when he addressed the Ngaka Modiri Molema officials."*

- [4] A certain Ms. More was appointed as Acting Director in the stead of the applicant as announced at the meeting of 05 August 2024 and

in terms of the letter of the HOD dated 02 August 2024. On 16 August 2024 the applicant lodged a formal grievance with regard to her transfer. The grievance *inter alia* raised as issues the unfairness of the unilateral transfer without consultation; unfair transfer without having applied for it and without being given reasons for the transfer. This grievance was met with silence.

- [5] The applicant employed legal assistance and her attorneys addressed a letter of demand to the respondents dated 09 September 2024. In relevant part, this letter of demand stated unequivocal:

- "4. As a minimum, our client's transfer was executed in the absence of her consent and without any consultation, as contemplated by Section 14(3)(b) and (4) of the Act. Consequently, our client's transfer offends the constitutional principle of legality.*
- 5. Premised on the above, it is our instructions to demand that our client be reinstated as the District Director for the Ngaka Modiri Molema District within seven (7) calendar days hereof, failing which our client will approach a competent Court for the appropriate relief, which will include a prayer for a punitive order as to costs. In this regard, we remind you of your statutory obligations, as the Head of the Department, which includes your obligation to ensure compliance with the applicable legislative prescripts."*

- [6] Approximately three (3) hours after the above mentioned letter of demand was transmitted, the applicant received a letter, authored by Mr. Diko, dated 29 August 2024, titled "RESPONSE TO GRIEVANCE LAID BY MS G. MASENG DIRECTOR - NGAKA MODIRI MOLEMA DISTRICT". In this letter, Mr. Diko alleges that he initiated the necessary procedures to facilitate the applicant's transfer on account of a request that she made during the 02 July 2024 meeting.
- [7] By way of a letter dated 16 September 2024, in response to the letter by Mr. Diko's, the applicant's attorneys pointed out: the applicant's reservation regarding the timing of and motivation behind Mr. Diko's letter; that the so-called "Response to Grievance" relates to "allegations", which by no means informed the grievance; and in particular, the following, as per paragraph 3 of their letter:
- "3. That said, the allegation that our client has requested or proposed to be transferred to the Community-Based Programme is not only untrue but is not even supported by your contention as to what motivated the alleged request/proposal. Nonetheless, our client's transfer remains in contravention of the applicable legislation, and as a result, offends the principle of legality."*
- [8] On 20 September 2024, the applicant's attorneys received a response from the HOD to their letters of 9 and 16 September 2024, in terms of which he merely states:

"You are kindly informed that the department is currently dealing with the grievance lodged by your client and the issues raised are the same as the ones you are raising.

Your office is therefore requested to allow the internal process to unfold and your client will update you accordingly."

- [9] In the interim, and in stark contrast to the above, the applicant received confirmation that her grievance was regarded as "*finalized*" (resolved). On the same day, the applicant confirmed that she was dissatisfied with the outcome and insisted that the matter be escalated to the Executive Authority (Member of the Executive Council or MEC).

- [10] On 24 October 2024, the applicant received a letter from the MEC, dated 23 October 2024, in relation to her grievance. The relevant part of the letter by the MEC reads as follows:

"Kindly take note that I received your grievance for my intervention as you were aggrieved about unilateral transfer.

Please be advised that I discovered that the transfer was initiated at your request. You submitted a complaint to the HOD against your supervisor, Mr Diko, and subsequently sought a transfer to another directorate as a relief, which has been executed. Based on this information, I find your grievance to be unsubstantiated."

[11] In response, on 25 October 2024, the applicant's attorneys addressed a letter to the MEC, the relevant part of which reads as follows:

- “4. However, in your abovementioned letter you make reference to an alleged complaint which our client, according to your letter “submitted ... against ... Mr. Diko”. Premised hereon, you contend that our client sought to be transferred to another Directorate “as a relief in relation to the alleged complaint.
5. Our client bears no knowledge as to this complaint and has, therefore, instructed us to request you to furnish us with a copy of the same.”

[12] Section 14 (1) to (4) of the Public Service Act¹ states:

“14 Transfers within public service

- (1) Subject to subsections (2), (3) and (4), an employee of a department may be transferred-
- (a) within the department, by its executive authority;
 - (b) to another department by the executive authorities of the two relevant departments.
- (2) Such transfer shall be made in such manner and on such conditions as may be prescribed.
- (3) An employee may be transferred under subsection (1) only if-
- (a) the employee requests the transfer or consents to the transfer; or
 - (b) in the absence of such request or consent, after due

¹ 103 of 1994

consideration of any representations by the employee, the transfer is in the public interest.

- (4) *Before employees may be transferred in terms of subsection (3)(b) as a result of a determination regarding an allocation, abolition or transfer of a function, contemplated in section 3 (4) (b) or (c) or 3A (b), consultation shall take place in the applicable bargaining council established in terms of the Labour Relations Act for the public service as a whole or for a particular sector in the public service."*

This section cannot be read in isolation but must be read in conjunction with Clause 16 of the departments' Recruitment and Selection Policy, which reads thus:

"16. TRANSFERS

- 16.1 *A funded vacant post may be filled (before being advertised), through the transfer of an employee to that vacant post on the same level;*
- 16.2 *A transfer can either be employee initiated or employer initiated. In both instances the request must be supported and motivated for in writing by the employee/employer and approval must be obtained from the Delegated authority. If it is employer initiative, consent for the affected employee should be sought or it should be proven that the transfer is at the best interest of the Public Service (Ref. Sec 14.1 of the PSA)."*

- [13] From the respondents' answering affidavit, it is the stance of the respondents that it was an employee-initiated transfer, which was consensual. This response flies in the face of what the applicant

wrote in reply to the letter of approval of her transfer and the grievance that she lodged. She refused acceptance of her transfer. In terms of Clause 16 of the Recruitment and Selection Policy, a transfer can either be employee-initiated or employer-initiated, but in both instances the request must be supported and motivated for **in writing** by either the employee or the employer. It is quite apparent that the applicant as employee did not request a transfer **in writing**. If that was indeed the case, it would have been easy for the respondent to state as such but they do not. The answering affidavit is silent on this score. Also with regard to the converse: if the transfer was employer-initiated, it should have been supported and motivated **in writing**. This is not the case. This in actual fact put paid to the issue at hand as there was non-compliance with Clause 16 of the departments' policy.

- [14] Non-compliance of an organ of State with its own policy was considered in the case of **National Education, Health and Allied Workers Union (NEHAWU) and Another v National Home Builders Registration Council (NHBRC) and Others**², and it was found that such non-compliance violate the principles of good governance and amounts to a breach of the constitutional

² [2025] F BILLS 525 (LC).

imperative of Section 195³ of the Constitution⁴, which results in unconstitutional conduct and which is also inconsistent with the principle of legality. I echo the same sentiments.

[15] To reiterate, on the respondents' version, the transfer was at the behest of the applicant. However, in terms of Clause 16 of the department's policy, such a request must be supported and motivated **in writing**, which is not the case. On the contrary, the applicant did not accept her transfer from the onset. Not only did she not sign the acceptance letter, but she also lodged a grievance to demonstrate her resentment about her proposed transfer.

[16] According to the respondents, during the meeting of 02 July 2024, the applicant **verbally** requested that she be transferred, which was reduced into writing by the HOD through a submission to the MEC for approval. However, the HOD only made the submission to the MEC on 31 July 2024. The transfer was approved by the MEC on

³ "195. Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

⁴ Act 108 of 1996.

01 August 2024, the very next day. This was not supported nor motivated. There exists no documentary proof in this regard. The transfer is therefore void *ab initio* and should be reviewed and set aside.

[17] Insofar as costs are concerned, the applicant prays that an appropriate cost order be made in her favour in the event that she is successful. It is trite that costs should follow the event. Although this is an employee-employer relationship, the applicant was successful and costs should be awarded in her favour. I am of the view that it would be just, fair and equitable to award costs on a party-and-party basis on Scale B, to be taxed, in terms of Rule 67 A of the Uniform Rules of Court. I am of the view that no case is made out for the awarding of costs on a punitive scale as between attorney and client.

Order

[18] Resultantly, the following order is made:

- (i) The applicants transfer from her position as a District Director for the Ngaka Modiri Molema District to the Provincial Coordinating and Reporting Directorate at the Head Office of the Department of Public Works and Roads: North West, is reviewed and set aside.
- (ii) The first and second respondents are ordered to reinstate the applicant in the position as District Director for the Ngaka

Modiri Molema District, within ten (10) days from the date of this order.

- (iii) The first respondent is ordered to pay the cost of this application on a party-and-party basis on Scale B, to be taxed, in terms of Rule 67 A of the Uniform Rules of Court.

A handwritten signature in dark ink, appearing to be 'R D Hendricks', is written over a solid black rectangular redaction box. The signature is somewhat stylized with loops and a horizontal line at the end.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG