

**FORM A**  
**FILING SHEET FOR EASTERN CAPE JUDGMENT**

**ECJ NO: 82**

PARTIES:

- Registrar CASE NO: **1251/06**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **ECD OF THE HIGH COURT**

DATE HEARD: **03 August 2006**

DATE DELIVERED: **04 December 2006**

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES -

*Appearances:*

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): **Adv Zilwa**
- for the accused/defendant(s)/respondent(s): **Adv Brooks**

*Instructing attorneys:*

- Plaintiff(s)/Applicant(s)/Appellant(s): **Malusi & Company**  
**c/o Mili Attorneys**
- Respondent(s)/Defendant(s): Attorneys: **Mlonyeni & Lesele Inc**

CASE INFORMATION -

- *Nature of proceedings* : **DECLARATORY ORDER**
- *Topic:*

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION)**

**CASE NO: 1251/06**

In the matter between:  
**REPORTABLE**

**“NOT**

**LITHALELANGA MARSHARIAN GIYOSE  
APPLICANT**

and

**THE MEMBER OF THE EXECUTIVE COUNCIL  
FOR THE DEPARTMENT OF ROADS AND  
TRANSPORT-PROVINCE OF THE EASTERN CAPE FIRST  
RESPONDENT**

**DR MARIE ANANDALE DE VILLIERS SECOND  
RESPONDENT**

**NOMPUCUKO SKWEYIYA THIRD  
RESPONDENT**

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**JUDGMENT**

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**DAMBUZA J:**

1. In this application the applicant seeks an order:
  - 1.1 declaring a decision by the respondents or any one of them, to transfer the applicant to **Aliwal North**, to be unlawful, unconstitutional, void and of no legal force and effect;
  - 1.2 declaring the abovementioned decision to have been arbitrarily taken and to be not rationally connected to information placed before the respondents when they considered the transfer; and
  - 1.3 that the respondents, or anyone of them, pay the costs of the application.
2. The applicant is employed as a Director by the Department of Roads and Transport, Eastern Cape (the Department), a government department of which the first respondent is the provincial head.
3. The second respondent is sued in her capacity as an employee of the department in **King William's Town**. A letter purported to have been signed by her, attached to the founding papers, refers to her as the "*Head of the Department*." Another letter addressed to her, refers to her as the "*Superintendent General*".
4. When these proceedings were instituted the applicant worked in the **King William's Town** offices of the Department. By the time the matter came before me, she was working in the **Aliwal North** offices of the Department, subsequent to dismissal of her urgent application to have the transfer under consideration herein, stayed, pending finalization of this application.
5. The background to this application is that on 27 October 2005 the

applicant received a letter signed by the second respondent. The relevant portions thereof read as follows:

“Dear Ms Giyose

TRANSFER FROM TRAFFIC SAFETY TO UKHAHLAMBA DISTRICT:  
YOURSELF

1. In terms of powers vested in him by Section 14 of the Public Service Act, 1994, as amended, read with III.D.1(c) of the Public Service Regulations, 2001, the Executing Authority intends to transfer you from your present post of Director: Traffic Safety at Head Office to the post of District Manager in Ukhahlamba District, Aliwal North with immediate effect;
  2. Before the transfer is implemented please indicate if you have any objection to such transfer and if so to furnish reasons for the objection. The Executing (Authority) will then consider your reasons with the operational needs of the department and will make his decision.
  3. Your response is required to reach Mr. Reynolds before or on 01 November 2005 and it is trusted that you will view the action to the best interest of the department.”
6. In response to this letter, the applicant wrote back to the Department (in a letter addressed to the second respondent) raising objection to the intended transfer and pointing out, amongst others, that:
- 6.1 The Department had not explained to her why the transfer was necessary at all;
  - 6.2 The intended transfer was never discussed with her;

6.3 She would have difficulty in communicating in the Sotho language; that being the main spoken language in **Aliwal North**;

6.4 She would have to leave her 80 year old mother, who was reliant on her, in **Zwelitsha Township, King William's Town**;

7. Further correspondence was exchanged between the parties subsequent to the applicant's response. The final decision, however, was that the applicant would be transferred despite the representations she had made. There was an attempt at arranging a meeting between the applicant and **Xola Bekebu**, an Acting Chief Director in the Department, with the aim of discussing the then impending transfer. The meeting, however, never took place. The parties' versions on why the meeting did not take place, differ. As it is my view that the proposed meeting was irrelevant for purposes of this application because the final decision to transfer the applicant had already been taken, I do not propose to deal any further with the issue.

8. Three days subsequent to the day arranged for the meeting, the department wrote to the applicant, responding to the representations made or objections raised by her as stated above. In this letter, the department advised the applicant that her representations had been considered and the Department had decided that the applicant should be transferred to **Aliwal North**. It is at this stage that the applicant, according to the founding papers, instructed her attorneys to handle the matter.

9. In a letter to the Department, the applicant's attorneys sought:

9.1 written reasons for the applicant's transfer;

- 9.2 to be advised whether the then impending transfer had been discussed in a management meeting and if so, requested the minutes of such a meeting; and
- 9.3 advising that legal proceedings would be instituted, should the requested reasons not be furnished.
10. Further correspondence was exchanged between the applicant's attorneys and the Department subsequent to this letter.
11. The application to have the transfer reviewed is founded on several grounds. The applicant contends that she should have been consulted prior to the decision to transfer her being taken. As neither she nor anyone in the department was consulted, so the argument on her behalf goes, the procedural requirements were not met prior to the decision being taken. The applicant contends further that the decision to transfer her was taken arbitrarily and is not connected to the information available to the first respondent (when it was taken).
12. The applicant also takes issue with the late filing of **Bekebu's** answering affidavit and has submitted that it should not be admitted to the record as there is no application for condonation of the late filing thereof. It was further submitted, on behalf of the applicant, that even if the answering affidavit is admitted, certain portions thereof constitute hearsay evidence. The applicant has, on this basis, brought an application to have these portions struck out from the answering affidavit.

**LATE FILING OF ANSWERING AFFIDAVIT:**

13. This application was instituted on 23 March 2006, simultaneously with and on the same founding papers as an urgent application for interim

stay of the transfer pending finalization of this application. The urgent application, which was opposed, was dismissed on 6 April 2006. **Bekebu** deposed to a (first) answering affidavit to the application (including the urgent application). On 19 June 2006, the applicant filed an amended notice of motion together with a supplementary affidavit. The purpose of the amendment to the notice of motion was, amongst others, to join the third respondent, who had replaced the applicant in the office of the Department in **Bisho**. A notice to oppose on behalf of the first and second respondents was filed on 24 July 2006. On 28 July 2006 the matter came before **Schoeman J** and was postponed sine die, with the “*respondent*” to “*pay the costs of the application.*” **Bekebu’s** second answering affidavit was filed on 8 September 2006, about a month and a half subsequent to the filing of the notice to oppose. The amended notice of motion had provided for filing, within 15 days of receipt thereof, of a notice to oppose the application and for filing of affidavit(s), within 30 days of the filing of notice to oppose.

14. I am not persuaded to exercise my discretion in favour of excluding the answering affidavit. In my view, apart from the fact that the delay by the respondents was relatively short, it is not the applicant’s contention that she suffered prejudice as a result of the late filing and I can find no evidence on the papers on which I can conclude that the applicant suffered such prejudice. In the interests of having the issues between the parties fully and finally ventilated I condone the late filing of the answering affidavit of **Bekebu**.

#### **APPLICATIONS TO STRIKE OUT:**

15. The applicant seeks to have paragraphs 15, 18, a portion of paragraph 22, paragraphs 24 and 29.1 struck out from **Bekebu’s** affidavit on the basis that the contents thereof constitute inadmissible hearsay.

16. The respondents have brought an application to have paragraphs 12 and 13 of the applicant's supplementary affidavit and paragraph 22 of the founding affidavit, struck out on the basis that the allegations contained therein are argumentative and irrelevant.

17. The relevant paragraphs in **Bekebu's** affidavits read as follows:

"15. During October 2005, the Department contemplated transferring Ms Skweyiya to the Head Office at King William's Town to head the Directorate of Traffic Safety and Education and transferring the Applicant to head the Ukhahlamba District Office. The public interest required the contemplated transfer. The motivation was to get the Applicant to transfer her skills in traffic safety and education to officials at the Ukhahlamba District Office where there was a need for such transfer of skills. It was also to expose the Applicant to other disciplines of a district office, for example human resource management, human resource development, provisioning, financial management, public transport, transport planning, etc. at the same time the motivation was to expose Ms Skweyiya to head the directorate of Traffic Safety and Education.

18. The First Respondent considered the Applicant's representations contained in Annexure "LG3". After such consideration he decided to order the Applicant's transfer to the Ukhahlamba District Office because the public interest so requires.

22. On 26 January 2006 I had a meeting with the Second Respondent and Mr Fonte, the Department's Human Resource Director, regarding the Applicant's transfer. At that meeting the Second Respondent informed Mr Fonte and me about the need to implement the Department's rotation policy and why the First Respondent had decided, after considering the contents of the Applicant's letter dated 1



November 2005 (Annexure “LG3”), to transfer her. After that meeting I wrote Annexure “LG4” to the Applicant wherein I called her to a meeting on 6 February 2006 at 14h00 to enable me to explain to her why it was necessary to transfer her.

24. Since the meeting did not materialise on 6 February 2006, I wrote a letter dated 9 February 2006 (Annexure “LG5”) to the Applicant, wherein I gave the main reason for her transfer. My secretary, NOMAKOLWA LAMANI, handed that letter to the Applicant’s secretary, CHUMA NOMBEMBE, on 13 February 2006. The Applicant was on leave from 6 to 13 February 2006. Mr Nombembe handed the letter to her on 14 February 2006.

29.1 The averments contained in Annexure “LG2” have been dealt with above. I deny that the Applicant was asked if she had any objection to the contemplated transfer after a decision had been taken to transfer her. The First Respondent took a decision to transfer the Applicant only after he had considered her representations, inclusive of the representation regarding her sickly mother.”

18. Confirmatory affidavits by **Chuma Nombembe**, the first and second respondents are attached to **Bekebu’s** first answering affidavit. The contents of the first answering affidavit pertain to the general functioning, administration and circumstances surrounding the intended transfer. The second answering affidavit also alludes to these factors.

19. While it is true that confirmatory affidavits should have been obtained from the parties who had personal knowledge of the facts mentioned in the second answering affidavit, the absence, thereof, does not, in my view, necessarily render the contents of the second answering affidavit, hearsay evidence. Such facts were already confirmed in the first answering affidavit. **Bekebu** states, in the second answering affidavit, that he was duly authorised to depose to the contents thereof on behalf

of the respondents. I am also satisfied that, by virtue of the position he holds within the department (Director of Traffic Control and Acting Chief Director), he would be privy to the information contained in the second answering affidavit.

20. The contents of paragraph 15 of the second answering affidavit pertain to a decision taken by the Department based on a policy of the Department. These allegations are contained in **Bekebu's** first answering affidavit. I can find no basis on which to conclude that **Bekebu** does not have personal knowledge of these allegations. I am also of the view that the applicant stands to suffer no prejudice as a result of the inclusion thereof in the answering affidavit. In terms of **Rule 23 (1) of the Rules of this Court:**

“... the court shall not grant the same (the application) unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.”

21. Regarding paragraphs 18, 22, 24 and 29.1 it is, in my view, clear from the papers that, having received the applicant's representations, the first respondent was still intent on transferring the applicant. Consequently I am of the view that the applicant stands to suffer no prejudice in the conduct of her application as a result of the allegations contained in these paragraphs. For these reasons the applicant's application to strike out cannot succeed.
22. Paragraphs 12 and 13 of the applicant's supplementary affidavit and paragraph 22 of the founding affidavit (which the respondents seek to have struck out) state that:

“12. with regard to the contents of annexure “TM5” I respectfully contend

that the contentions in that letter to the effect that the 1<sup>st</sup> Respondent did not consult with any other person in deciding my transfer, serves as confirmation of my contentions in my founding affidavit that his decision in those circumstances was arbitrarily made and it is unlawful, unconstitutional, void and without legal force or effect.

13. The 1<sup>st</sup> Respondent is the political head of my Department and I contend that for him to take valid, proper and rational decisions such as the one regarding the propriety or otherwise of my transfer in issue herein, he, of necessity, would need to consult extensively with the Administrative Head and other relevant functionaries in the Department. The fact that he is on record as stating that he never held any such consultations, clearly bears out my point that the decision is arbitrary, not supported by valid reasons and is, as such, unreasonable, unlawful and worthy of being set aside as such. I sincerely hope that in his answering affidavit the 1<sup>st</sup> Respondent will not attempt to summersault or try to run away from the contentions in "TM5" that he took the decision without consulting any other person. If he should try to do so, I will urge this Honouarble Court not to allow such tactics;" and
22. I state that the very fact that the First and Second Respondents regard my move to Aliwal North as a cross transfer, indicates that there is no operational requirement such as might enhance service delivery that will be served through this action."
23. My view is that while the contents of these paragraphs may be viewed as argumentative, they are also conclusions drawn from stated facts. I am not satisfied that there are sufficient reasons to strike these portions out from the applicant's affidavits.
24. I now turn to deal with issues raised in the main application.

**FAILURE TO CONSULT THE APPLICANT PRIOR TO THE  
DECISION TO TRANSFER HER:**

25. The applicant's case is that when the first letter was written to her, advising her of the intended transfer (letter referred to in the papers as "LG2"), the decision to transfer her had already been taken, without consulting her. In letter "LG2" the second respondent states that the intended transfer was motivated by public interest as set out in **Section 14**, read with **Section 9 (1) of the Public Service Act, 1994** (Proclamation 103 of 1994). These provisions state that:

"(14)(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;"

(9)(1) The appointment of any person or the promotion or transfer of any officer or employee in the employ of a department shall be made by the relevant executing authority or by an officer or officers to whom the said authority has delegated his or her power of appointment, promotion or transfer."

The Courts have held that a decision to transfer a state official must not only comply with relevant regulations and agreements, but also with the requirements of fair and lawful administrative actions. **See: Simelela & Others v Member of Executive Council for Education, Province of the Eastern Cape & Another 2001 (22) ILJ 1688 (LC).** In **Simelela's** case, **Francis AJ**, as he then was, held, at **24** that:

"In addition to fair administrative action, State employees are afforded a

Constitutional right to fair labour practices. Although the unfair transfer of an employee is not catered for in the LRA, an employee is not precluded from relying directly on the Constitution to enforce his or her right not to be subjected to unfair labour practices.

A decision to transfer an employee without prior consultation amounts to an unfair labour practice. In this regard, **See: Howell v International Bank of Johannesburg Ltd (1990) 11 ILJ 791 (LC) and Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO & Another 2000 (21) 940 (LC)**. In such cases, the unfairness of the employer's conduct lies in the failure to consult with the employee prior to taking the decision to transfer."

26. It was submitted, on behalf of the applicant, that the first respondent's decision to transfer the applicant was made contrary to the **Public Service Regulations of 2001**, promulgated in terms of the **Public Service Act** which provide that transfer of members of Senior Management (of the Department) shall be made after consultation with the official(s) affected thereby.
27. The first and second respondents contend that the applicant was afforded opportunity to make representations prior to the decision to transfer her being made and that pursuant to considering the representations made by the applicant, the first respondent decided to transfer her.
28. It appears to me that letter "LG2" was aimed at informing the applicant that the first respondent intended to transfer her and at inviting her to indicate, prior to the final decision being taken, any objection(s) she might have to the proposed transfer. In this sense the intention to transfer the applicant was still subject to the first respondent's view on considering objection(s) raised by the applicant, if any. In this regard the letter states that:

“The Executing (Authority) will then consider your reasons with the operational needs of the department and will make his decision.”

29. I do not agree with the applicant’s contention that this letter invited her to make representations at implementation stage rather than decision stage. Unlike in the case of **Basson v Acting Provincial Commissioner (Eastern Cape), Department of Correctional Services 2003 (4) BLLR 341 (LC)**, where the applicant, had, at first, not been afforded opportunity to make representations, in this case the applicant was invited to raise objections, if she had. In **Basson’s** case, (on which the applicant largely relies), transfer of the applicant in terms of a first letter had to be withdrawn as the letter stated that a final decision had been taken to transfer the applicant. This had been done without the applicant having been afforded opportunity to make representations.
30. In order for the applicant to be invited to make representations prior to the decision being made, the applicant had to be identified as the person suitable for the post necessitating the transfer. It is only in this sense that a decision (the initial decision) was made regarding the identity of the applicant as the person earmarked for the position and therefore, the transfer. This preliminary decision was subject to the representations made by the identified person. The fact that the letter inviting the applicant to make representations states that the transfer would take place “*with immediate effect*” takes the matter no further. The letter invited the applicant to submit her representations by 1 November 2005. Transfer could therefore not take place with “*immediate effect*.”

**B. THAT THERE WAS NO CONSULTATION HELD WITH OTHER**

**OFFICIALS OF THE DEPARTMENT PRIOR TO THE  
IMPLEMENTATION OF THE TRANSFER:**

31. This contention is founded on the contents of a letter dated 3 June 2006 addressed to the applicant's attorneys by the respondents' attorneys (and referred to in the papers as "TM5"). **TM5** states that *"the decision to transfer your client to Ukhahlamba District was a decision within the sole discretion of the respondent as the executing authority and he did not consult with any other person. We are therefore instructed that there is no record in this matter relating to the said transfer."* (My emphasis).
32. The applicant contends that the first respondent's failure to consult with relevant functionaries within the department, prior to making the decision to transfer her, amounted to an irregularity in that the first respondent failed to comply with **the Public Service Regulations of 2001** promulgated in terms of the **Public Service Act**.
33. **Mr Zilwa** submitted, on behalf of the applicant that as the first respondent was not privy to information on which to found the decision to transfer the applicant, he needed to consult with other officials within the department in order to make an adequately informed decision on the applicant's suitability for the proposed transfer. In the absence of such consultation, **Mr Zilwa** argued, the decision could only have been made arbitrarily.
34. **Mr Brooks** who appeared for the first and second respondents submitted that **TM5** should be interpreted in the context that it was primarily a response to the applicant's request for a record of proceedings of the meeting at which the decision to transfer the applicant was taken. This submission finds support in applicant's

supplementary affidavit in which she states that:

- “6. Indeed an Interlocutory Application to that effect was launched on my behalf on 11 May 2006 and an order was granted by this Honourable Court in my favour on 18 May 2006, calling upon the Respondents to dispatch the required record and to notify me that they have done so, within five (5) days of the grant of such order;
  7. The order was served on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 18 May 2006. A copy of the return of service is enclosed as “LG1”. The Respondents failed to furnish the required record within the prescribed period set out in the order of 18 May 2006.
  8. On 3 June 2006, upon learning that the Respondents had failed to comply with the Court Order referred to above, and since I was keen to proceed with the Application, I instructed my Attorneys of record to launch contempt of Court proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for their failure to comply with the aforesaid Court Order of 18 May 2006;
  9. Indeed the Application papers for such contempt of Court proceedings against those Respondents were duly drawn but before they could be issued and served on the Respondents my Attorneys received a letter from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Attorneys on 5 June 2006, wherein it was stated that the decision to transfer me to Ukhahlamba District was a decision *“within the sole discretion of the Respondent (sic) as the executing authority and he did not do consult (sic) with any other person. We are therefore instructed that there is no record in this matter relating to the said transfer.”* I annex hereto a copy of such letter marked “TM5”.
35. My view is that although **TM5** states that the first respondent did not consult with anyone prior to or when making the decision, the evidence



indicates that the issue of the applicant's transfer was handled and her representations were considered by a number of senior personnel within the department. The first letter advising the applicant of the intended transfer and inviting her to make representations was written by the second respondent. The letter states that the representations were to be submitted to "*Mr Reynolds*" who, according to the answering affidavits, was the Chief Director and to whom the applicant and **Bekebu** reported. Further, the applicant's letter dated 1 November 2005, in which she sets out the reasons for her objection to the transfer, is addressed to the second respondent and "*copied*" to **Reynolds**. In a letter attached to the founding papers **Bekebu** states that on 26 January 2006, he, **Fonte**, the Department's Human Resources Director and the second respondent discussed the issue of the applicant's transfer and he (**Bekebu**) was informed that **Reynolds**, who was then on leave, had been handling the matter.

36. This, in my view, is evidence that the applicant's transfer was, handled by and discussed between various members of the senior personnel of the Department, although the final decision was taken by the first respondent.
37. In **Basson's** case (*supra*) **Ndlovu AJ**, as he then was, held at **352 J to 353 B** that:

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

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

38. I align myself with the sentiments expressed by the Learned Judge in this regard. Consequently I am satisfied that adequate consultation occurred prior to the decision to transfer the applicant being taken.

**COMPLIANCE WITH THE SUBSTANTIVE FAIRNESS:**

39. **Section 33 (1) and (2) of the Constitution of the Republic of South African Act, Act No 108 of 1996** (the Constitution) provides that:

“everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

40. The general principle is that the courts will not intervene in decisions by the executive arm of government unless those powers are exercised irrationally, unfairly or in bad faith. It is the first respondent’s responsibility to prove that the decision to transfer the applicant was effected in accordance with fair procedures and that it was done for a valid reason(s). **See: Matheyse v Acting Provincial Commissioner, Correctional Services & Others 2001 (22) ILJ 1653 (LC).**

41. The first and second respondents contend that the decision to transfer the applicant was taken in terms of a policy adopted by the department during 2005. According to **Bekebu**, the policy entails rotation of the managers of the Department within the Eastern Cape Province, with the aim of motivating and developing them. In this way the managers

are exposed to various sections of the department, thereby acquiring skills. The first and second respondents contend that the motivation behind transferring the applicant, in particular, was to get her to transfer her skills in traffic safety and education to officials at the **Ukhahlamba District Office**, and to expose her to other sections of a district office, such as human resource management and development, provisioning, financial management, public transport, transport planning and others.

42. On the other hand, the applicant disputes the existence of this policy and contends that, as a senior functionary within the department, she would know of such a policy if it existed. She raises the fact that, apart from the allegation by **Bekebu** that the first respondent alluded to the alleged policy in a presentation that he made to the Provincial Parliament, the policy is not documented. The minutes of the meetings at which the policy was allegedly discussed have not been attached to the papers. Consequently the terms of the policy cannot be ascertained. I find merit in the applicant's contention. I also find merit in her contention that she was not advised of the reasons for her transfer.

43. The onus on the first respondent to prove that the transfer was done for a valid reason requires that he proves the existence of the policy and set out the facts of which he concluded that the transfer would be in the interests of the public and/or is in terms of the rotation policy.

44. In **LG5** the second respondent informs the applicant of the final decision to transfer her (subsequent to consideration of her representations) as follows:

“• The transfer is not related to discipline or performance but it has been

an employer initiative with an aim to expose and develop managers to the different fields within the department;

- The department has undergone major restructuring which necessitates rotating managers to different work environments which will eventually enhance service delivery;
- The strategy of the department has been widely discussed with all managers in the department and as provided in Part III.B.3 of Chapter 1 of the Public Service Regulations, 2001 as amended, it is the competency of the Head of Department to promote efficient, economic and effective use of resources in the implementation of the strategy;
- There is no doubt about the correctness of the Performance Agreement you have signed with your supervisor. However, as the SMS Handbook clearly defines the system in Section 6 of Chapter 4 that it needs to be integrated with all other organizational processes and systems and to focus on continuous improvement of performance;
- The point you have raised that the reason you did not apply for the post of District Manager: Ukhahlamba District is not in dispute. However, as explained above and in the letter dated 18 October 2005 from the department, the transfer has culminated from the operational needs and implementation of the strategy of the department;
- The post of Director: Traffic Safety is, indeed, not abolished as that of District Manager: Ukhahlamba is also not vacant but the transfer is a horizontal cross-transfer;
- The department has taken note of your personal matter of a sickly mother and deeply sympathises with you. In this regard, it is advised that you relocate with her as the resettlement policies allow and it is trusted that the town is equipped with medical facilities;
- Having considered all your concerns which have been addressed above, the department has arrived at the decision to transfer you to Ukhahlamba District as a District Manager in terms of Section 14 of the Public Service Act, 1994 as amended, as from 01 April 2006.”

45. In my view the letter “LG5” does not inform the applicant as to the reason(s) for her transfer. Words and phrases such as “*with the aim to*

*expose and develop managers to the different fields within the department” and restructuring which necessitates rotating managers to different work environments which will eventually enhance delivery,”* neither set out the factual reasons which motivated the transfer nor state the particular aspect(s) in which the applicant would be developed. The fairly extensive background to the restructuring of the department set out in the second answering affidavit also does not set out the reasons for the applicant’s transfer.

46. The only reasons **Bekebu** gives regarding the transfer are that:

“The motivation was to get the Applicant to transfer her skills in traffic safety and education to officials at the Ukhahlamba District Office where there is need for such transfer of skills. It was also to expose the Applicant to other disciplines of a district office, for example human resource management, human resource development, provisioning, finance management, public transport, transport planning etc.”

47. The particular skills that the applicant would impact to the officials at **Ukhahlamba** are not stated. There is no allegation that the applicant lacked in particular disciplines. The applicant was entitled to this information so that she would understand the reasons for her intended transfer and so that she would be able to discharge her duties at **Ukhahlamba** appropriately and relevantly.

48. Whilst I agree that there might be need for employees to be transferred for exposure to different areas within the employer’s institution, my view is that the motivation behind the transfer must be set out in clear terms. This is more so when the transfer entails relocation of the employee from one town or district to another. The need for the transfer should be seen to have been considered against

the disruption to the life of the employee and his or her family. An employer cannot be allowed to only advance conclusive terms such as *“public interest”* and *“rotation aimed at development”* without stating the factual aspect on which the conclusion is founded. Mere use of these terms might open the process of transfer of employees to abuse, confusion and misunderstanding. In **Basson’s** case, for example, the main reason for the applicant’s transfer was stated as his *“skills, knowledge and experience as far as Agriculture Practice is concerned.”* There was a need for establishment of a prison farm in **Mthatha**; hence the applicant was being transferred there. The applicant had proved to be effective in establishing and managing such a farm. The court held, in **Basson’s** case that the respondent had proved that the transfer was motivated by genuine operational requirements. I am unable to reach that conclusion in this case on the available evidence. It is for this reason that the application must succeed.

Consequently:

- (a) The applicant’s application to strike out is dismissed;
- (b) The first and second respondent’s application to strike out is dismissed;
- (c) The decision of the first respondent to transfer the applicant from the post of **Director: Traffic Safety Head Office, King William’s Town** to the post of **District Manager, Ukhahlamba District, Aliwal North** with effect from 1 April 2006 is declared unlawful and is hereby set aside; and
- (d) The first and second respondents, in their official capacities, shall pay

the costs of the main application, jointly and severally, the one paying the other to be absolved; such costs to exclude the costs relating to the applications to strike out.

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**N DAMBUZA**

**JUDGE OF THE HIGH COURT**

27 November 2006