

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT DURBAN**

CASE NO: D601/2023

In the matter between:

THE KWAZULU-NATAL OFFICE OF THE PREMIER

Applicant

and

ARUMUGAM GOVENDER

First Respondent

THE SHERIFF OF THE LOWER COURT

PIETERMARITZBURG

Second Respondent

---

**CERTIFICATE OF URGENCY**

---

I, the undersigned,

**SIPHOKAZI JIKELA SC**

an Advocate of the above Honourable Court, practising at 73 Old Main Road Kloof, Durban hereby certify that I have read the Application papers in this matter and that I am of the view that the matter is of sufficient urgency to warrant it being placed on the Motion Court Roll on the **7<sup>th</sup> day of November 2023**.

**DATED at DURBAN on this 6<sup>th</sup> day of NOVEMBER 2023.**

**S JIKELA SC**

Cell: 083 2427 616

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN**

CASE NO: D601/2023

In the matter between:

THE KWAZULU-NATAL OFFICE OF THE PREMIER

Applicant

and

ARUMUGAM GOVENDER

First Respondent

THE SHERIFF OF THE LOWER COURT  
PIETERMARITZBURG

Second Respondent

---

**NOTICE OF MOTION**

**(In an Application to Stay Execution)**

---

**S I R S,**

**TAKE NOTICE** that the Applicant herein intends bringing an application on an urgent basis at 10h00 (or soon thereafter) on the **07<sup>th</sup> day of November 2023** as the Honourable Court may hear the matter for an Order in the following terms:

1.

That this Honourable Court condones the non-compliance by the Applicant with the Rules of Court regarding the form and time limits and manner of service stipulated therein and hear this application as one of urgency.

2.

Suspending the operation of the Arbitration Award issued by Commissioner V. Mthethwa under the auspices of the General Public Service Sectoral Bargaining Council, in case number GPBC 3086/2018 dated 16 August 2023 pending the outcome of the Review Application lodged by the Applicant on 19 October 2023 before this Honourable Court registered as case number D 601/2023.

3.

Staying the execution of the said Arbitration Award number GPBC 3086/2018 dated 16 August 2023 pending the outcome of the Applicant's Review Application.

4.

That the Applicant be exempted from furnishing security in terms of section 145 (8) of the Labour Relations Act.

5.

Costs reserved.

6.

Granting to the Applicant further or alternative relief.

**TAKE NOTICE** that the accompanying Affidavit of **KARL-HEINZ W. KUHN** and confirmatory affidavits will be used in support of this Application.

**TAKE FURTHER NOTICE** that the Applicant has appointed the State Attorney KwaZulu-Natal as its legal representatives in these proceedings and will accept delivery of all further Notices and papers in this matter at the address detailed below.

**KINDLY TAKE NOTICE** that if any party intends opposing this Application they are required to:

- (a) inform Applicant's attorneys in writing of their intention to oppose this Application, and Answering Affidavits and appoint in such notification an

**JAY REDDY ATTORNEYS  
FIRST RESPONDENT'S ATTORNEYS**

21 Larch Road

Morningside

**DURBAN**

Tel: 031 2024151

Email: [reddyattorney@telkomsa.net](mailto:reddyattorney@telkomsa.net)

REF: JR/G315

**AND TO: THE SHERIFF OF THE LOWER COURT**

**PIETERMARITZBURG**

**MR NTOKOZO NHLABATHI**

**(SECOND RESPONDENT)**

Pietermaritzburg

Email: [manager@sheriffpmb.co.za](mailto:manager@sheriffpmb.co.za)

[sheriffpmb@web.co.za](mailto:sheriffpmb@web.co.za)

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN**

CASE NO: D601/2023

In the matter between:

**THE KWAZULU-NATAL OFFICE OF THE PREMIER**

Applicant

and

**ARUMUGAM GOVENDER**

First Respondent

**THE SHERIFF OF THE LOWER COURT**

**PIETERMARITZBURG**

Second Respondent

---

**FOUNDING AFFIDAVIT**  
**(In an Application to Stay Execution)**

---

I, the undersigned,

**KARL-HEINZ WALDEMAR KUHN**

do hereby make oath and say:

1.

- 1.1 I am employed by the KwaZulu-Natal Office of the Premier as the Chief Director: State Law Advisory Services and occupy offices at Moses Mabhida Building, 300 Langalibalele Street, Pietermaritzburg.

RP/ 

1.2 I am duly authorised to institute this Application on behalf of the Applicant.

2.

2.1 The facts stated herein fall within my personal knowledge save where the contrary appears from the context and are to the best of my belief both true and correct.

2.2 Where I make legal Submissions, I do so on the advice of my legal representatives, which advice I accept.

**[A] THE PARTIES**

3.

The Applicant is a Government Department established in terms of the provisions of the Constitution of the Republic of South Africa read with the Public Service Act, 1994, whose primary role is *inter alia* to co-ordinate the functions of the Provincial Administration and its Departments including the managing of administrative processes of appointing Heads of Department in the Province.

4.

4.1 The First Respondent is Mr Arumugam Govender, the former Head of Department of the Provincial Department of Public Works (HoD), whose responsibilities entailed *inter alia*, the effective, efficient, economical, and transparent use of the Department's resources. The First Respondent was appointed in terms of a fixed term Contract of Employment, which he concluded with the then Premier of KwaZulu-Natal.

4.2 The First Respondent is the beneficiary of the Arbitration Award sought to be reviewed and set aside by the Applicant herein.

RP/ 



4.3 The First Respondent has attempted to enforce the said Arbitration Award.

5.

The Second Respondent is the Sheriff of the Lower Court, Pietermaritzburg, Mr Ntokozo Ntlabathi whose physical address is unknown to me. Service to him would be effected by email at [manager@sheriffpmb.co.za](mailto:manager@sheriffpmb.co.za) and [sheriffpmb@web.co.za](mailto:sheriffpmb@web.co.za)

**[B] THIS APPLICATION**

6.


6.1 This is an urgent Application for the suspension of the operation of the Arbitration Award issued by Commissioner V. Mthethwa under the auspices of the General Public Service Sectoral Bargaining Council in case number GPBC 3086/2018 dated 16 August 2023, and the execution thereof and the exemption of the Applicant from furnishing security in terms of Section 145 (8) of the Labour Relations Act.

6.2 Annexed hereto marked "KHK 1" is the Arbitration Award sought to be enforced.

**[C] URGENCY**

7.

7.1 On 6 November 2023 at about 14h30 the Second Respondent (the sheriff of the lower court in Pietermaritzburg) approached the offices of the Applicant at 3<sup>rd</sup> Floor Moses Mabhida Building, 300 Langalibalele Street, Pietermaritzburg with a writ of execution seeking to attach property belonging to the Applicant. The Sheriff purported to act on instructions of the First respondent and / or the First respondent's attorneys. I am advised that the Sheriff spoke with Mrs

R.P. 

Gladys Zondo, an Administrative Assistant in the Directorate: Legal support Services; KZN OTP. Zondo has deposed to a Confirmatory Affidavit in this regard.

7.2 I am advised further that Zondo was shown a document purporting to authorise the Second Respondent to attach the property. However, the Second Respondent did not allow Zondo to make a copy of such document, thus, I do not know whether the Arbitration Award has been certified by the CCMA and is thus capable of execution.

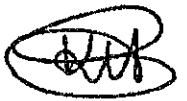
7.3 The Second Respondent advised Zondo that he is authorised to attach property to the value of Ten Million Rand therefore, he would return the following day, 7 November 2023 before the Applicant's vehicles leave to premises and attach same.

8.

It is apparent that prior to the sheriff approaching the Applicant's offices, Ms Carol Coetzee the Head of Department of Finance in KwaZulu-Natal Treasury, was informed that the First Respondent obtained certification of the Arbitration Award on 13 October 2023, and that a Writ of Execution had been issued against the Applicant on 17 October 2023. To that end, on Thursday, 2 November 2023 Ms Coetzee enquired from me to establish the circumstances surrounding the looming Execution on the property belonging to the Applicant.

9.

This was the first time I was made aware of the First Respondent's intention to enforce the Arbitration Award, and I immediately attempted to establish the veracity of this information. I became even more concerned about the threat of execution after receiving a message from the Honourable Premier, Ms. Nomsa Dube-Ncube, who had attended a Provincial Legislature meeting where a Democratic Alliance Member of the

HP/ 

Legislature announced that the property of the Applicant would be attached, as the Applicant had failed to honour its debts.

10.

On the same day, 3 November 2023 the Applicant's Attorneys were made aware of apprehension of execution. To that end, the Applicant's attorney addressed a letter to Jay Reddy Attorneys, the First Respondent's attorney per email [reddyattorney@telkomsa.net](mailto:reddyattorney@telkomsa.net), advising the First Respondent's attorney that the Office of the Premier has been made aware of the Execution process, which had been commenced by the First Respondent in an attempt to enforce the Arbitration Award. The Applicant's attorney enquired from the First Respondent's attorney whether the Arbitration Award had been certified and whether the Notice of such certification had been served on her. To that end, the First Respondent's attorney was asked to confirm whether the Award had been certified and whether instructions had been issued to the Sheriff to enforce the Arbitration Award. There has been no response to the Applicant's letter dated 3 November 2023. In this regard I attach hereto marked "KHK2" the Applicant's attorney's letter dated 3 November 2023 addressed to Jay Reddy Attorneys.

11.

On the same day, in the evening I convened a meeting with the legal team representing the Applicant in the Review Application and instructed them to lodge this Application.

12.

On Monday, 6 November 2023 the State Attorney made further telephonic enquiries at the First Respondent's attorney's office however, she has not been able to reach Mr Reddy.

Handwritten signature and initials in the bottom right corner of the page. The signature appears to be 'KHK' and the initials are 'RP'.

13.

The First Respondent has not served any Notice, either to the Applicant nor to the State Attorney regarding certification of the Award or intention to execute on the property of the Applicant. What I know is that both Ms Coetzee and the DA MPL are not involved in the dispute between the First Respondent and the Applicant thus, have no interest in the matter therefore, they have no reasons whatsoever to mislead me and/or the Applicant.

14.

Accordingly, the Applicant has advanced compelling reasons for this matter to be heard on an urgent basis.

15.

The Honourable Premier Dube and Ms will depose to Confirmatory Affidavits in this regard.

[D] **BRIEF BACKGROUND FACTS**

16.

I fully appreciate that it is not appropriate to explore the merits of the Review Application in a Stay Application and what is important is that there is an ongoing dispute between the parties with reference to the Arbitration Award that is capable of being implemented.

17.

Briefly, the First Respondent is a recipient of the Arbitration Award where the Commissioner found that he had been substantively and procedurally unfairly dismissed from employment by the Applicant, thus the Applicant was ordered to

RP/ 

reinstate the First Respondent by no later than 15 September 2023 with no loss of income and benefits and on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to the "dismissal." The reinstatement had retrospective effect to the date of dismissal up until 30 September 2021, the date on which the First Respondent would have retired.

18.

The Applicant was ordered to pay back the First Respondent's monies, which were said to have accrued to him because of his reinstatement in the amount of **R9 449 977,48** (Nine Million Four Hundred and Forty-Nine Thousand, Nine Hundred and Seventy-Seven Rand and Forty-Eight Cents), minus such deductions as the Employer is in terms of the law entitled or obliged to make by no later than **30 September 2023**.

19.

On 19 October 2023 the Applicant filed an Application to Review and Set Aside the Arbitration Award in terms of Section 145 of the Labour Relations Act ("LRA"). The Review Application was delayed by a few days thus, that Application was accompanied by a complete Condonation Application.

20.

I fully appreciate that in terms of Section 145 (7) of the LRA the Institution of Review Proceedings does not suspend the operation of an Arbitration Award unless the Applicant furnishes security to the satisfaction of the Court in accordance with Sub-Section (8).

[E] APPREHENSION THAT THE EXECUTION WILL TAKE PLACE

R.P./ (P.W.)

21.

- 21.1 Applicant has received information from two different sources that the First Respondent would enforce the Arbitration Award.
- 21.2 Yesterday, the second respondent attempted to attach the Applicants tools of trade and vehicles.

22.

Therefore, I submit that the Applicant has a well-grounded apprehension that the Execution, at the instance of the First Respondent, will take place and will cause irreparable harm if it is not stayed.

---

**[F] IRREPARABLE HARM TO BE SUFFERED BY THE APPLICANT**

23.

As the debt is for a considerable amount therefore, it can be expected that the Sheriff would attach items of sufficient value in order to satisfy the Judgment debt. To that end, I believe that the high-end IT equipment, vehicles, and office furniture belonging to the Applicant would be items of interest to the Second Respondent if the stay of execution is not granted.

24.

Such Execution would without a doubt render the Applicant and its staff incapable of performing their daily duties. This will impede the Applicant's monitoring and evaluation function on the Government Departments within the Province. Further, the execution would have a negative effect on the broader governance of all the Provincial Departments.

RP/ 

25.

- 25.1 Further, the Executive Council will be negatively affected. Therefore, the attachment of Applicant's property would have catastrophic consequences on the entire Provincial Government Administration.
- 25.2 The government departments under the Applicant have no relationship with the First Respondent and the Arbitration Award is not binding on them regrettably, if the operation of the award is not suspended, they would be adversely affected and perhaps mostly perhaps disabled.

26.

There are several priority projects that are ongoing, which would be destroyed if execution on the property of the Applicant was to occur. These projects, amongst others, include the following:

- 26.1 The Integrated Provincial Safety Campaign for the Festive Season;
- 26.2 The ICT Summit, which is to be held in Durban;
- 26.3 The Provincial Executive Council Meetings;
- 26.4 The Political Cluster Meetings;
- 26.5 The Chinese Government handing over generators to the Province;
- 26.6 The launch of the International Day of No Violence Against Women and Children; and
- 26.7 The HIV Aids and Gender-Based Violence Program, which is already ongoing.

Full / 

27.

- 27.1 The Applicant has good prospect of success in the Review Application therefore, I submit that it would cause injustice and irreparable harm to the Applicant if the stay is not granted as the First Respondent, if allowed to execute, would be at liberty to distribute and/or liquidate the property as he pleases, thus making it extremely difficult for the Applicant to recover the attached property or the value thereof upon success on review.
- 27.2 Indeed, there is a real and substantial risk that the Applicant may not recover the property from the First Respondent, if successful in the review application. Therefore, the harm would be irreparable should the assets of the Applicant be sold in execution based on an award that may ultimately be set aside.

**[G] SECURITY FOR COSTS**

28.

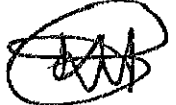
I am advised that the onus lies with an applicant who must show that it has assets of a sufficient value to meet its obligations should the Arbitration Award be upheld by the court on review. I submit that the Applicant has core and non-core assets; equitable share from the Provincial Treasury; and valuable office assets.

29.

The Applicant and the entire KZN Government are solvent and able to pay its debts. Accordingly, the applicant must be absolved from providing security.

30.

The Applicant has sufficient budget and assets to settle the debt if the review application was decided in favour of the First Respondent. Therefore, it is not

RP/ 



necessary for the Applicant to furnish security. The Applicant implores the Honourable court to use its discretionary power to absolve it accordingly.

31.

Accordingly, the interest of justice demand that the fulfilment of the award and execution on the Applicant's property be stayed pending the decision of this Court on Review.

**WHEREFORE**, the Applicant prays that an Order be granted in terms of the Notice of Motion prefixed hereto.

**DEPONENT**

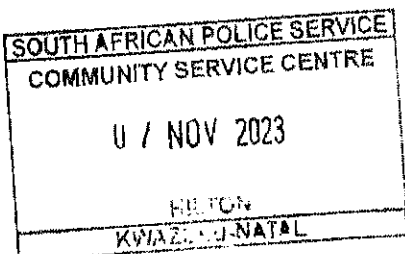
The Deponent has acknowledged that he knows and understands the contents of this Affidavit, which was signed and sworn to before me at HILTON, this 7<sup>th</sup> day of NOVEMBER, 2023, the provisions of the regulations contained in Government Notices R1258 of 21 July 1972 and R1648 of 16 August 1977, having been complied with.

**FULL NAME:** RICHMAN PHILELEWA MABHAYE

**BUSINESS ADDRESS:** HILTON SAPS - Dennis Shephene Drive  
HILTON

**CAPACITY:** Police official

**AREA:** Umgungundlovu South





GENERAL PUBLIC SERVICE  
SECTOR BARGAINING COUNCIL



**"KHK 1"**

Physical Address:  
260 Baaden Avenue,  
Lyttelton, Centurion  
Pretoria

Postal Address:  
PO Box 16883,  
Lyttelton, 1040

Tel: 012 644 8132  
Web: <http://www.gpsbc.org.za>

# IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in Durban

Commissioner: Vusumuzi Mthethwa

Case No.: GPBC3086/2018

Date of Award: 16 August 2023

In the Dispute between:

A Govender  
(Applicant)

And

Office of the Premier, KZN  
(Respondent)

Applicant's representative: Advocate M Pillemer SC

Respondent's representative: Advocate R Choudree SC

Page 1

*RP/*

---

## ARBITRATION AWARD

---

### DETAILS OF HEARING AND REPRESENTATION:

1. This is the award in the matter between Arumugan Govender, the Applicant, and the Office of the Premier KZN, the Respondent. The hearing was conducted under the auspices of the GPSSBC on 11/04/2023, 26/06/2023 and 27/06/2023. The Applicant was represented by Advocate M Pillemer SC. The Respondent was represented by Advocate R Choudree SC. The parties submitted bundles of documentary evidence which were admitted into evidence and used by both parties. The proceedings were digitally recorded.

### ISSUE TO BE DECIDED:

2. Whether the Applicant was dismissed by the Respondent; if so, Whether the dismissal was unfair; and if so, Decide on an appropriate relief.

### BACKGROUND TO THE MATTER:

3. The career of the Applicant commenced at eThekweni Municipality where he worked as Executive Director: Emergency Services. Thereafter he worked in the KZN Department of Transport as Acting Chief Financial Officer (CFO) for three years. The CFO was advertised and he successfully applied for it. He was appointed on a permanent basis as CFO in the KZN Provincial Department of Transport in December 2000. The Applicant acted as the HOD in the Department of Transport from 2005 to 2007. In July 2007 he was appointed as Chief Operations Officer (COO) in the Office of the Premier (OTP). In April 2009 the Applicant was appointed as Acting Deputy Director General (Acting DDG) of the Province from April 2009 to July 2010. In July 2010 the Applicant reverted to his post as COO when the Deputy Director General (DDG) post was filled. The Applicant was appointed as the Acting CFO of the OTP, a position which became vacant during his tenure as the Acting DDG of the Province. The Applicant was appointed as HOD in the Royal House a five year term while remaining the COO in the OTP. In 2011 the Applicant was appointed as the HOD of Public Works. In March 2017 his employment in the capacity of HOD: Public Works came to an end. The Applicant submits that he was dismissed. The

RP/ 

Respondent, on the other hand, insists that the Applicant was not dismissed but the contract of employment as HOD Public Works expired. The Applicant seeks an award declaring that he was dismissed and that his dismissal was unfair. He also seeks reinstatement, back-pay and benefits with effect from 01 April 2017 to 30 September 2021. He seeks the award to also declare that he retired with effect from 01 October 2021 and is entitled to retirement benefits. The Applicant also seeks an order for costs. He testified that at the time of the termination of his employment he was earning remuneration in the amount of R 2 099 995 per annum.

**SUMMARY OF EVIDENCE AND ARGUMENT:**


**The Applicants' evidence:**

4. The Applicant, Arumugan Govender, testified in support of his case. His evidence is briefly that his career in the public service dates back to the old Durban City Council where he served as Executive Director in the Emergency Services unit.
5. In June 1998 he was headhunted by the KZN MEC for Transport, Mr Sbu Ndebele, to serve a three year fixed term contract as a consulting Chief Financial Officer (CFO). The post of CFO was advertised in 2000 and he applied. He was successful and he became the first CFO in the Province. In terms of section 9 of the Public Service Act (PSA) his appointment in the Department of Transport was permanent. As a permanent employee his retirement age was 65 years. In terms of section 16(7) of the PSA he could serve two more years and retire at the age of 67 if that was in the public interest.
6. In June 2007 Mr Sbu Ndebele became Premier of the Province. He was then transferred to the position of Senior General Manager: Institutional Development in the Office of the Premier (OTP), a permanent position. In June 2007 he resigned from the provincial administration to take up a lucrative offer elsewhere. The Premier advised him to withdraw the resignation and appointed him in the permanent post of Chief Operations Officer (COO) in the Office of the Premier (OTP). The post was at salary level 16 and had the status of a DDG.
7. In 2009 Mr Zweli Mkhize was appointed as the new Premier as Mr Ndebele was appointed Minister of Transport for the National Department of Transport. He acted in the post of DDG from 2009 to 2010. In July 2010 the post of DDG was filled and he reverted to his COO post.
8. He was subsequently appointed in a vacant HOD post in the Royal Household while he was COO in the OTP. He was paid a 10% HOD allowance. The King wanted him to be appointed as HOD in the



Royal Household. A legal opinion from DPISA stated that there is nothing wrong with holding more than one position.

9. Premier Mkhize did not delegate the appointment of HOD's. In October 2011 Premier Mkhize informed him that he had advertised the post of the HOD of Public Works but he did not find a suitable candidate. He then offered him the post of HOD of Public Works. He asked the Premier in terms of which section of the PSA he was transferring him. He advised the Premier that he was not going to accept the Public Works offer if he would be transferred in terms of section 12(3) of the PSA. He had served one year two months in the Royal Household. Therefore a section 12(3) transfer would mean he was transferred for the remainder of the five year contract. He neither requested nor consented to this transfer. He was 55 years old and he would be 60 years and two months at the end of that five year contract. He would then retire in terms of section 16(3)(b) of the PSA. He would lose R 6 000 000.00 if he so retired.
10. He made representations stating that he had to retain his permanency if he transferred to Public Works. He would then retire at 65 or 67 years. He wanted to retain salary level 16. A section 14 transfer is permanent in nature and he would be transferred to retirement date. His transfer would be for an indefinite period. He stated that the transfer must not nullify his permanent contract. HOD's were given the option to join the Government Employees Pension Fund (GEPF). Permanent employees, on the other hand, are obliged to be on GEPF. He wanted his retirement age to be recorded in his appointment letter. He wanted his conditions of service to continue without a break in service. After receiving his appointment letter on 01 August 2011 he asked for three months to think about it. He was to start in October 2011.
11. He wanted the Provincial Cabinet to approve his appointment and ensure that his transfer would be up to age 65. The Premier prepared a memorandum to cabinet. Paragraph 4.2 of the memorandum states that he would enter into a new contract which would be effective from 01 October 2011 to avoid a break in service and that any accrued or pro rata entitlements will be carried forward into the new contract. There is no end date to the new contract according to paragraph 5 of the memorandum. The cabinet resolution was not given to him. On 11 August 2011 the Premier issued a letter appointing him to the post of HOD in Public Works at the level of the DDG. The appointment letter declare his retirement age to be 65. Membership of the GEPF was compulsory, indicating permanency. The PERSAL printout on page1 of Bundle C shows that he was appointed on 01 December 2000 at salary level 15. The printout on page 2 of Bundle C shows that he changed to salary level 16 when he transferred to the OTP where he was still permanent. The printout on page 3 shows that he was still

HP/ 

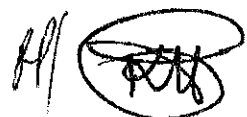
permanent on 01 October 2011. According to the printout on page 3 he retained his permanency when he was transferred to Public Works. The executing authority cannot transfer you from a permanent to a temporary post. The employer cannot unilaterally change the conditions of service of an employee. A colleague in the North-West was seconded and transferred. He referred a dispute and it was found that clause 6.2 of Chapter 8 of the SMS Handbook was subordinate to the PSA.

12. He signed a written contract of employment on 19 September 2011. The contract features strong clauses against variation and waiver in paragraph 8.5 and 8.6. There is no end date in his contract. His remuneration and benefits remained the same, meaning he retained his salary level. Membership of GEPF was compulsory, indicating permanency of his employment. He would retire at the normal retirement age of 65. This contract was the answer to his representations.
13. His contract for the post of HOD in Public Works on page 17 of bundle B is not a fixed term contract but an indefinite contract. Paragraph 2 states that his remuneration benefits shall remain the same. The restriction relating to appointment of HOD's in section 3B of the PSA was deleted by the Public Service Amendment Act, 2007 (PSAA). His contract does not refer to section 16(3)(b) of the PSA which provides that he can retire upon expiry of the term of appointment and that such retirement is deemed to be a dismissal. Clause 23 of the SMS Handbook provides that termination of the HOD contract must be by agreement. The letter required him to negotiate a contract of employment with the Premier. The letter stated that his remuneration remained unchanged. Membership of GEPF was compulsory and there was no break in service. His leave vacation accrues at 22 days per annum for the first ten years, not five years. His normal retirement age was 65 and compulsory retirement age was 67. He did not have to apply when the post was advertised since he was permanent. The Respondent looks at his transfer to Public Works as if there was a section 12 transfer whereas it was a section 14 transfer.
14. Paragraphs 4.4 and 4.5 of his contract of employment were added for his protection. The said paragraphs provide that if the Premier or the MEC terminates his contract he shall be entitled to benefits until the age of 65. Paragraph 5 states that the employer shall inform him regarding extension of the contract. Paragraph 1.2.6 states that matters arising from the contract shall be dealt with in terms of the PSA. In terms of section 12 of the PSAA there is no limitation to the number of times the contract may be extended. It also does not state that you lose your permanent status when your HOD contract ends. You do not lose your permanency. Nowhere in his contract does it state that he loses his permanency. Witnesses in the previous arbitration referred to the 2016 Public Service Regulations,


RP/ 

which do not apply to him. He was transferred in terms of section 14(3)(b) of the PSA. There is no end date in the letter that appointed him HOD of Public Works.

15. He expected his contract to be renewed. In May 2016 there was a change of leadership in KZN. A new Premier was appointed. He had signed his contract of employment with the Premier and his performance agreement with the MEC, Mr Ravi Pillay. The MEC informed him in a meeting that his contract would be extended for five years. That extension would take him to two months past the age of 65. The MEC submitted a recommendation for extension of his contract to the OTP for its concurrence, not for concurrence of cabinet. The recommendation is on page 28 of bundle C. An advisory memorandum, on page 29, was prepared.
16. The OTP then prepared a cabinet memorandum. The Respondent refuses to give him a copy of the cabinet memorandum. Item 7.2 of the agenda for cabinet on page 33 of bundle C is the extension of his contract. However, the item was withdrawn without permission of the Premier. In terms of protocol the Premier chairs cabinet meetings. However, the MEC for Economic Development who is chair of the ANC Deployment Committee instructed the MEC for Public Works to withdraw the item from the agenda. That was wrong. He was not present in the cabinet meeting but Louise van Rensburg was. She said that is what happened.
17. MEC for Public Works then asked for his curriculum vitae so he could submit a political motivation to the Deployment Committee to approve the extension of his contract. The PSA does not provide for this. He was appointed in terms of the PSA. He is not a deployee of the ANC. The PSA does not provide for the ANC Deployment Committee to give instructions to the MEC to extend his contract. Appointment of HOD's does not require permission of the ANC.
18. In his discussions with the MEC and Human Resources he maintained that he would not accept a three month extension, unless there was confirmation from the Premier that his contract was going to be renewed for five years.
19. The Chief Director of Corporate Services, Mr Duma, served him with the letter on page 34 extending his contract for three months to 31 December 2016. This extension and a further three month extension was not submitted to cabinet.

Handwritten initials 'HJ' and a signature in a circle.

20. The email from Louise Janse van Vuuren, on page 35 of bundle, informed him that the Premier withdrew the cabinet memorandum without any explanation. He wrote a letter, on page 41, to the Premier enquiring about the status of his contract.
21. The Premier invited him to his house. He met the Premier at his house at around 18h00 on the day the Premier was discharged from hospital. The Premier informed him that he had been instructed to terminate his contract. The Premier advised him that he could apply once the post was advertised. He then gave him the notice of termination on page 36 and advised him not to refer a dispute since the ANC would not take kindly to that. The Premier said he would never get work in the Province again if he referred a dispute. Mr Duma gave him the letter on page 37 but he refused to sign it since it was different from the letter on page 36.
16. The post was advertised and the whole recruitment process was irregular. The post was advertised as an entry level post at salary level 15 while he was at salary level 16 at that stage. Everything was done in a hurry. The Premier did not even see the advertisement. The advertisement was not signed by the executing authority before advertising.
17. On 14 March 2017 he wrote to the Premier asking that the post be re-evaluated. There was no response. In terms of the last paragraph of his letter on page 43 he expressed that the whole time since his deployment from the OTP his expectation was that if his contract at Public Works was not renewed he would be redeployed until he reached the age of 65. His state of mind was that his contract would be renewed until he turned 65. There were no complaints about his performance.
18. He seeks reinstatement with accrued interest from 01 April 2017 to 30 September 2021, the date on which he turned 65. He was at salary level 16. PMDS performance assessments would take him to notch 6 at an annual salary of R 2 099 995.00 per annum.
19. The directive from DPSA on pages 45 to 52 of bundle C draws the attention of government departments to the court decision in *Nowalaza and Others v Office of the Chief Justice and Another* (J177/2017) [2017] ZALCJHB 234. In line with that decision the directive advises government departments that if they act in a manner that creates an expectation of permanent employment will find themselves faced with the prospect of permanently appointing such affected employees.
20. When your services terminate the Department completes a Z102 form. D1 and D2 in the bundle is the Z102 form that the Department filled upon termination of his services. The Department indicated the

RP/ 

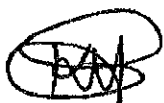


reason for termination as retirement on the form. The form is completed by the MEC and other officials per delegation from the Premier. He raised a dispute with GEPF regarding calculation of his pension. He received a detailed calculation from GEPF. He made representations to the Premier in respect of his conditions of service when he was transferred to the HOD post in Public Works. His representations were considered favourably and a letter was issued. A similar report was tabled by GEPF. It was ultimately decided that his retirement age was 65. He received correspondence from GEPF requiring him to pay contributions up to age 65. When the Premier extended his contract the implication is that it was extended to the compulsory retirement age of 67.

21. The Premier terminated his services based on operational requirements since his post was abolished.

**The Respondent's evidence:**

22. The former Premier of KZN, Mr Thembinkosi Willis Mchunu, testified for the Respondent. His evidence is briefly that he was Premier of KZN from around May 2016 to 2019. As a member of the Executive Council he had known the Applicant since the days of the former Premier, Sbu Ndebele. He interacted with the Applicant and other senior government officials. The Applicant was HOD of Public Works when he became Premier. He was not involved in the advertisement of posts since that is an administrative process. The Applicant was employed in the OTP before he arrived and he was a DDG at some point.
23. When he arrived he had to deal with staff establishment, not with just one position. One of the matters he had to deal with was the contract of the Applicant which was nearing expiry. He was advised that the Applicant was in an HOD position on a five year contract. The Applicant was on a five year contract, unless if he was acting. When he came in he needed time to deal with the contract of the Applicant. His immediate action was to extend his contract for three months.
24. He had interaction with the MEC for Public Works, Mr Ravi Pillay. He did receive communication from Mr Pillay regarding the extension of the Applicant's contract. The communication would have been contained in a memorandum. The memorandum was to be submitted to cabinet. Procedurally, the OTP has the duty to consult. Consultations take place widely, including consultation with Cabinet. If the Premier takes a decision he consults with colleagues in Cabinet since he wants to take an executive decision. The Premier is responsible for compiling agenda's for cabinet meetings. Matters that are not ready when the meeting is held are withdrawn from the agenda. The matter relating to the contract of the Applicant was brought to cabinet prematurely since he was not ready as to what he would do. He accordingly withdrew the item. Cabinet meetings are closed meetings, including the documents that serve in those meetings. He finds it

RP/ 

difficult that the Applicant was there when the meeting started. The only person who had the prerogative to withdraw the Item was himself as Premier. He does not remember how he withdrew the item.

25. They always had the Deployment Committee to ensure that the policies of the ANC are implemented. The MEC would not have taken the Applicant's CV to the Deployment Committee. Instead, he would have taken Applicant's CV to the Deployment Committee himself in order to consult and to get views. There were strong views of exploring further. There was a view of finding a person with an engineering qualification and experience in order to concretise the Infrastructure Master Plan. That view meant he had the option to re-advertise the post to see if they could get a person with an engineering qualification. However, they did not preclude anyone from applying.
26. He gave the Applicant one three month extension. The second one was a notification of termination. He is not aware of the Applicant's resentment regarding the three month extension. He does not know Mr Duma.
27. He does not recall inviting the Applicant to his house on the 13<sup>th</sup> of December. He never set his eyes on any letters that the Applicant claims he wrote to him. If he had told the Applicant about the Deployment Committee he would have used the same language which was used in the Deployment Committee discussion. He would not have said the Deployment Committee instructed him to terminate his contract. The Deployment Committee wanted the possibility of getting someone with an engineering degree to be explored. The Applicant was free to apply. He does not remember if he signed the letter on page 36 of bundle C in the presence of the Applicant. He would not have issued the unsigned letter which Mr Duma gave to the Applicant. He does not even know Mr Duma. He would not have advised the Applicant not to declare a dispute. He is not aware of the letter written to the OTP by the Applicant requesting re-evaluation of the HOD post. He always insisted that they evaluate the whole organogram, rather than one post. Evaluating one post could cause a skew in the functions. The Premier does not get involved in the advertising of posts. It would have been reported to him that the advertisement had gone out but he does not remember.
28. Internal memoranda do not reflect the final position before they are approved by Cabinet. He does not know of anything that guarantees an HOD to work until 65. He knows of many permanent employees who accept the HOD post. It is a choice an employee has to make. Many of them have refused to take up the HOD post, saying it is too risky. Others say they would consider it when they are older. You forfeit your permanent post when you accept the HOD post. He is not aware of anything that would make the Applicant remain permanent while occupying the HOD post. He does not know who would have prevented the

RP/ 


Applicant from applying for the HOD post after his term expired. He does not know why the Applicant reacted for the first time in March 2017 to the termination of his contract.

29. He cannot comment on the Applicant's submission that Dr Zweli Mkhize promised him permanent employment despite taking up the HOD post at Public Works. That matter concerns Dr Mkhize. What he knows is that only an acting HOD retains his permanent post.
30. He would not be in a position to authorise compensation of the Applicant to the time of retirement. There would no basis for that. As soon as you take up the HOD post you occupy a five year contract, unless you get deployed to another permanent post. While the Applicant's case is that he was transferred to Public Works in terms section 14 of the PSA, the OTP's case is that the Applicant was transferred in terms of section 12.
31. It is not an oddity that the Applicant was COO at the OTP and also acting as HOD at the Royal Household. He acknowledges that paragraph 5.1 of the contract of employment on 20 of bundle C has mechanism of either ending or extending the contract. He agrees that an employee with such a contract will have an expectation of extension. The practice was that when a contract matter came to his office when he was already out of time, the first thing he did was to extend the contract. If he had not met with the employee in time he would extend the contract.
32. His understanding is that the Deployment Committee was established to ensure that people are deployed according to law and that the deployed people will deliver according to the programmes of the ANC. The ANC Manifesto is delivered on the 8<sup>th</sup> of January every year. The Manifesto deals with the ANC and its role in government. The Deployment Committee ensures that what government does is in furtherance of the Manifesto. Premiers, MEC's and others are deployed cadres but he does not understand deployment as meaning deployment in the administration. Mr Sihle Zikalala was chairperson of the Deployment Committee at that time. The Deployment Committee was made up of seven or eight people drawn from leadership of the ANC, SACP, COSATU and COSATU. They meet on *ad hoc* basis whenever there is a need to meet. In the case of senior leadership in the administration of national, provincial and local government the executive authority has to consult the Deployment Committee regarding vacancies in the establishment. That is how ANC leadership gets to know about vacancies in senior government positions.
33. The Premier explains the nature of the position and reports on the progress regarding government programmes. Members of the Deployment Committee then express their views which constitute their advice to the Premier. The Deployment Committee does discuss a person to fill the position since the

RR/ 

Premier discusses the attributes needed for the position. The Deployment Committee does not suggest individuals for appointment. The Premier comes up with an individual from the processes of government, not from the ANC. The meeting with the Deployment Committee takes place after the selection process has ended and the selection panel has given the Premier a list of suitable candidates. It happens that the Deployment Committee express views leading to candidates being considered differently. However it is never about individuals. The Deployment Committee would not say so and so is not fit for appointment, except where the Deployment Committee brings up ethical issues in respect of a candidate. The Deployment Committee process is not in the PSA. The recommended candidates are not afforded the opportunity to make representations to the Deployment Committee. The functioning of the Deployment Committee does not provide for that.

34. The MEC may attend meetings of the Deployment Committee but it not compulsory. However it is compulsory for the Premier to attend Deployment Committee meetings. Deployment Committee meetings are not published anywhere. They are an informal consultative process.
35. The memorandum from the MEC to the Premier recommending renewal of the Applicant's contract for a further five years is an internal consultation memorandum. It does not have the status of informing the Applicant of the renewal his contract. The decision to renew rests with the Premier. The MEC missed the point if he prematurely told the Applicant that his contract would be renewed. The MEC should have awaited the processes and a formal letter to the Applicant.
36. The process of preparing a Cabinet memorandum starts in the OTP. The MEC would be privy to the memorandum. The memorandum serves at Cabinet on a confidential basis until it is published. The Premier withdraws the memorandum if there is some inadequacy. Once withdrawn, the memorandum is no longer an official document of cabinet therefore the Premier would not disclose it. He does not recall withdrawal of the memorandum in question and he would not dispute that it recommended renewal of the Applicant's contract. He does not know how the Applicant would have seen the memorandum in the Cabinet file since that would be breach of secrecy.
37. He does not recall if Mr Ravi Pillay was present. In the meeting he would have presented the situation that there was now a vacancy and heard views on how to he situation going forward. He would then have gone and made his own decision.
38. He would have dissuaded Public Works from conducting a job evaluation exercise in respect of the HOD post before advertising it as requested on page 30 of bundle E1. Job evaluation is conducted when job

RP/ 

content changes. It is not appropriate to evaluate one job in the structure since jobs are interlinked. Even if the advertisement did not mention the engineering qualification the panel would have looked for someone with an engineering qualification.

**Closing arguments:**

39. In argument, the Applicant briefly submits that he was a permanent employee and treating him as if he was a temporary employee with a fixed term contract and terminating his employment on notice constituted a dismissal as described in section 186(1)(a) of the Labour Relations Act (LRA).
40. The Applicant submits that the High Court of the Northern Cape in *Premier of the Northern Cape v Motiapelula Elias Selemela* 2011 JDR 0734 (NCK) has found that the employment of a permanent employee who gets appointed as HOD for a five year term does not terminate when that term ends. He remains employed and can be deployed by the executive authority to serve in his previous or another post.

The High Court sets out the order as follows:

"It is declared that the applicant's permanent employment as the Deputy Director General in the Northern Cape's Provincial Government still subsists and survived the termination of the applicant's five year term he served as the Head of the Department of Transport, Roads and Public Works in the Northern Cape, without any break of service."

41. The Applicant refers to the appeal judgment in the matter which is reported as *Premier of the Northern Cape v Motiapelula Elias Selemela* 2011 JDR 0734 (NCK). The appeal judgment discusses and sets out the order of the court a quo in the judgment. According to the doctrine of stare decisis the ratio of the judgment is binding on the GPSSBC which means that an employee's permanency is not lost unless it is expressly waived by him or her and according to the judgment that waiver should appear clearly in the five year contract that is signed.
42. The Applicant also submits that the judgment is important in relation to another aspect of the defence raised in the Statement of Defence, where the Respondent refers to and relies upon what is set out in clause 6.2 of Chapter 8 of the SMS Handbook. The Applicant submits that the Respondent ought not to have relied upon this clause since the court in the *Selemela* case found that it was not a valid provision. The Appeal Court found that section 12 of the PSA does not say that an HOD who has been appointed for a fixed term contract ceases to be a permanent public servant if he or she was one before being appointed

RR/ 

HOD. In that case (like the present) the applicant had the agreement of the executive authority that he would retain his permanency and that was upheld by the Appeal Court.

43. The Applicant alternatively submits that even if it is found that he was employed on terms of a fixed term contract, that the contract had been renewed for five years until 30 September 2021. Therefore to terminate it on three months' notice on 31 March 2017 constituted a dismissal as described in section 186(1)(a) of the LRA. The Applicant thus submits that the MEC and the Premier co-signed the Memorandum referred on pages 29 to 31 of bundle C in which renewal of Applicant's contract was to be renewed. The memorandum states the following: "Contents noted. Contract of Mr A Govender, current HOD: Public Works is to be renewed." And a letter advising Mr Govender thereof is to be drafted for my signature"
44. The Applicant makes a further alternative submission that even if it is found that he was employed in terms of a fixed term contract that was not renewed, he had a reasonable expectation that it would be renewed on the same or similar terms; or that he would be retained on an indefinite basis. By failing to renew the contract or failing to retain him indefinitely the Respondent dismissed him in terms of the definition set out in section 186(1)(b)(i) and (ii) of the LRA.
45. In argument, the Respondent briefly submits that there was never an intention that the Applicant will return to a position on the staff establishment of the OTP or any other Provincial Government Department since he was appointed in terms of a fixed term contract. A transfer cannot be interpreted as a secondment. A transfer upon which a fixed term contract is based means that employment terminates upon the termination date as specified in the contract. This together with a notice of termination of contract indicates that the employment relationship would not continue.
46. The Respondent further submits that there could have been no reasonable expectation that his contract was going to be automatically renewed. The Applicant had been given notice in writing in accordance with the terms of the contract, which provided that notice of the termination of the contract be given. The Applicant did not have a legitimate expectation that his employment together with all attendant emoluments would continue and that he would not be dismissed despite having received formal notice of termination of his employment. The Applicant has incorrectly interpreted a clause in the Public Service Act 1994 that led him to aver that he had a legitimate expectation to continue the employment.
47. In regard to the conditions in which a legitimate expectation can be held to prevail, the Respondent made reference South African Veterinary Council and Registrar, South African Veterinary Council v Greg

Handwritten signature and initials, possibly 'RUB' or similar, enclosed in a circle.

Szymanski Supreme Court of Appeal Case No. 79/2001 Judgment dated 14 March 2003. In that judgment Cameron JA stated, at para 19, that the requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher J in *National Director of Public Prosecutions v Phillips and others*. He said:

"The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:

- (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification; He explains': The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.
- (ii) The expectation must be reasonable;
- (iii) The representation must have been induced by the decision-maker;
- (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

48. The Respondent also made reference to the following judgments in support of its submissions: *Sibongile Zungu v Premier, Province of KwaZulu-Natal* and *MEC, Department of Health, KwaZulu-Natal – Labour Appeal Court of South Africa - Judgment dated 16 May 2017*; and *Keletso Motlaase and The Commission For Conciliation, Arbitration And Mediation and Two Others – Labour Court of South Africa, Johannesburg – Case No. JR 1802/2017*
49. Applying the above pronouncements the Respondent submits that applying the above *dicta* there is no room to find in the circumstances of the present matter that the Applicant conceivably held a reasonable belief or legitimate expectation that his contract was to be renewed or even extended.
50. The Respondent maintains that a written contract may not be varied unless the terms thereof are reduced to writing. In this case any alleged extension of contract as claimed by the Applicant does not entitle him to continued employment.
51. The Respondent also submits that the discharge of the Applicant from service was based on operational reasons as the post was required by the Respondent to be advertised and, moreover, the Applicant did not have to be consulted with regard to the termination of the contract upon the expiry of the contractual period.

RP/ 

**ANALYSIS OF EVIDENCE AND ARGUMENTS:**

52. I am required to decide whether the Applicant was dismissed. Section 186(1)(a) and section 186(1)(b)(i) and (ii) of the LRA define dismissal as follows:

"Dismissal" means that—

- (a) an employer has terminated employment with or without notice;
  
- (b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer—
  - (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
  - (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;

53. The first determination to make is whether the Applicant was dismissed. I must therefore decide whether the Applicant was a permanent employee, the termination of whose employment on notice constituted a dismissal as envisaged in section 186(1)(a) of the LRA. The Applicant was transferred from the permanent post of COO in the OTP to the post of HOD in Public Works. The post of HOD was a fixed term post of five years.

54. Mr Mchunu, testifying for the Respondent, submits that a permanent employee loses the permanency of his employment when he takes up the HOD post. He further explains that an employee has to make a difficult choice between remaining in his permanent post and taking up the HOD post. The Applicant, on the other hand, maintains that he remained a permanent employee when he was appointed HOD of Public Works. Therefore the question to be answered is whether the Applicant lost permanency of his employment when he took up the HOD post at Public Works.

55. From the outset the Applicant was unwilling to accept appointment as HOD: Public Works if it meant that he would lose his status as a permanent employee. He therefore made representations since he wanted to put on record that he wanted his employment to continue without any break in service.

Handwritten signature and initials, possibly 'MCH' and 'PCH', with a circular stamp or mark.



56. Section 29 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) requires the employer to supply an employee with particulars of his employment in writing upon commencement of employment.

Section 29(1)(m) of the BCEA provides:

29. *Written particulars of employment.—(1) An employer must supply an employee, when the employee commences employment, with the following particulars in writing—*

(m) *the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate.”*


Section 29(2) of the BCEA reads:

*{2) When any matter listed in subsection (1) changes—*

(a) *the written particulars must be revised to reflect the change; and*

(b) *the employee must be supplied with a copy of the document reflecting the change.”*

57. The letter of appointment on page 7 of bundle C does not specify that the employment of the Applicant is for a fixed period of five years. In addition, the Applicant was not supplied with a revised letter of appointment reflecting a fixed term appointment.
58. The letter of appointment describes the appointment of the Applicant as an “appointment on transfer” to the post of HOD: Public Works. On page 8 the letter of appointment provides that his membership of the GEPF is compulsory. Membership of the GEPF is not compulsory for fixed-term employees. The letter further states that his normal retirement age is 65. The PERSAL records issued by the Respondent and the retirement documentation filled by the Respondent indicate that the Applicant was permanently employed.
59. Nothing in the appointment letter and the contract of employment suggests that the Applicant waived the permanency of his employment when he took up the HOD post at Public Works. The court in *Premier of the Northern Cape v Selemela* (1912/09) [2011] ZANHC 13 (17 June 2011) dealt with the case of a similarly situated government employee. The court, at para 1, sets out the following appealed order:

PP/ 

*"1. It is declared that the applicant's (Mr Mottalepula Elias Selemela's) permanent appointment as the Deputy Director General in the Northern Cape Provincial Government still subsists, and survived the termination of the applicant's five year term he served as the Head of the Department of Transport, Roads and Public works, in the Northern Cape, without any break of service.*

*2. It is ordered that the respondent (the Premier) reinstates the applicant as a Deputy Director General in the Northern Cape Provincial Government, with effect from 01 September 2009, with all benefits attached to the post. Alternatively, to pay applicant his benefits as if he had retired at age 65."*

60. The appeal court upheld the above order. In line with *Selemela* above I accordingly find that the Applicant was permanently employed during his tenure as HOD of Public Works since he did not consciously waive his right to permanency in the Public Service when he took up that position. Therefore termination of his employment on notice on 31 March 2017 was a dismissal.
61. Having made the finding in paragraph 60 above, I make no determination regarding the alternative reliefs sought by the Applicant.
62. A dismissal for operational requirements (retrenchment) is a dismissal based on economic, technological, structural or similar needs of the employer. The decision to dismiss the Applicant was not based on economic reasons. No new technology had been introduced that necessitated termination of the Applicant's contract of employment either. In addition, there were no changes in the structure of Public Works. Furthermore, there were no similar needs or needs akin to economic, technological or structural needs based on which the Applicant was dismissed. The submission that the Respondent wanted an HOD with an engineering qualification is not borne out by the advertisement for the vacancy in bundle E2. The suggestion that the selection panel would look for a candidate with an engineering qualification while that requirement is not specified in the advertisement is not believable. In addition, the dismissal of the Applicant did not meet the procedural requirements for a retrenchment in section 189 of the LRA. Section 189 requires consultation on several topics. In addition, section 41 of the BCEA requires payment of severance pay to the retrenched employee. None of these requirements were met. I accordingly reject the submission that the Applicant was retrenched.

PP/ 

63. The second determination to make is whether the dismissal of the Applicant was fair. There are no submissions to show that the dismissal was substantively and procedurally fair. I accordingly find that the dismissal of the Applicant was substantively and procedurally unfair.
64. I find that reinstatement is the primary remedy even in cases where the Applicant has reached retirement age. The purpose of reinstatement is placing an employee back to the position he would have been in, had dismissal never occurred. Re-employment and compensation cannot achieve that purpose. In *Ivanova v Department of Health- KwaZulu-Natal and Others* (D695/14) [2015] ZALCD 70 (29 December 2015) the court ordered reinstatement of an employee who had reached retirement age. The case summary refers to reinstatement in this situation as "restoration of the status quo ante." Therefore the fact that the Applicant has reached retirement age by the time the award is issued is no bar to ordering reinstatement.

In *Ivanova* above, at para 59.2, the court ordered the following:

"The First and Fourth Respondents are directed to reinstate the Applicant to her employment with effect from the date of her dismissal with no loss of income and benefits that she would ordinarily be entitled to but for the dismissal, subject to the retirement of the Applicant on her normal retirement date, that is at the end of March 2015."

In *Samuel v Old Mutual Bank and Others* (D39811) [2018] ZALCD 16 (21 September 2018), at para 28, the court held that the decision not to reinstate but to award compensation based on that the Applicant has reached retirement age constitutes a defect in the award.

The court, at para 27, also found the following:

"The term 'not reasonably practicable' in section 193(2)(c) does not equate with "practical", as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility."

The court, at para 30.4, went on to make the following order:

"As the applicant has reached retirement age the reinstatement is for the period 23 May 2007 to 31 August 2012, the date upon which she would have retired had she not been dismissed."

PP/ 

65. Given that reinstatement is the primary remedy in unfair dismissal cases and given that the Applicant seeks reinstatement, I therefore find that the appropriate remedy is reinstatement. The reinstatement is to operate retrospectively to the date of dismissal. Therefore the Applicant is entitled to back-pay in the amount of R 9 449 977.48 (Nine Million Four Hundred and Forty Nine Thousand Nine Hundred and Seventy Seven Rand Forty Eight Cents), calculated at his rate of pay of R 2 099 995 per annum as follows:

4 years between 31/03/2017 and 31/03/2021: R 2 099 995 per annum x 4 years=R 8 399 980.00;  
6 months between 31/03/2021 and 30/09/2021: R 174 999.58 per month x 6 months=R 1 049 997.48  
Total=R 9 449 977.48.

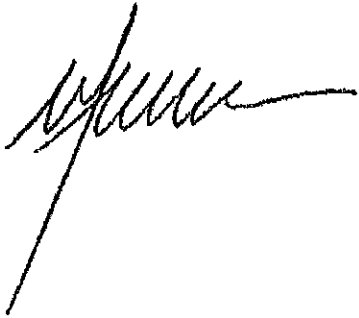
66. In labour matters costs do not necessarily follow the result. The established principle is that cost orders ought not to be made unless such an order would be in accordance with the requirements of the law and fairness. In light of this principle I make no order as to costs.

#### AWARD


67. The Applicant, ARUMUGAN GOVENDER, is found to have been dismissed by the Respondent, OFFICE OF THE PREMIER, KZN.
68. The dismissal of the Applicant is found to have been substantively and procedurally unfair.
69. The Respondent is ordered to reinstate the Applicant by no later than 15 September 2023 with no loss of income and benefits, and on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal. The re-instatement operates retrospectively to the date of dismissal and is effective from 01 April 2017 up to 30 September 2021, the date on which he would have retired had he not been dismissed.
70. The Respondent is ordered to pay the Applicant back-pay which is due to him as a result of the reinstatement ordered in paragraph 69 above in the amount of R 9 449 977.48 (Nine Million Four Hundred and Forty Nine Thousand Nine Hundred and Seventy Seven Rand Forty Eight Cents), minus such deductions as the employer is in terms of the law entitled or obliged to make, by no later than 30 September 2023.
71. No cost order is made.

Handwritten signature and initials, possibly 'RP' and 'MM', enclosed in a circle.

GPSSBC Commissioner: Vusumuzi Mthethwa



Signature: \_\_\_\_\_





the doj & cd

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

**OFFICE OF THE STATE ATTORNEY: KWAZULU-NATAL**  
Private Bag X54301, DURBAN, 4000 | 6<sup>th</sup> Floor Metlife Building, 391 Anton Lembede (formerly Smith) Street, DURBAN, 4000 | DOGEX 153, DURBAN | Tel (031) 3652500 | Fax (031) 3062448 | Direct Line (031) 3652503 | Cell: 078 804 0531

Ref: 43/18313/22/G/P14  
Enq: M. Dlamini  
E-mail: [MandiDlamini@justice.gov.za](mailto:MandiDlamini@justice.gov.za) CC: [LungiDlamini@justice.gov.za](mailto:LungiDlamini@justice.gov.za)

3 November 2023

**JAY REDDY ATTORNEY**  
[reddyattorney@telkomsa.net](mailto:reddyattorney@telkomsa.net)

Dear Sirs.

**ARUMUGAM GOVENDER VS THE OFFICE OF THE KWAZULU-NATAL PREMIER**

The above matter refers.

Our client instructs us that they have been made aware of execution proceedings which have been instituted by your client in an attempt to enforce the Arbitration Award. In this regard, our client further instructs us that they were not served with the Application to certify the Arbitration Award nor any other process in relation to the enforcement of the Arbitration Award. In the circumstances, we would like to ascertain if indeed the Arbitration Award has been certified and if your client has given any instructions to the Sheriff to date.

We look forward to your urgent response.

Yours sincerely,

Ms. M. Dlamini  
Senior Assistant State Attorney

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN

CASE NO: D601/2023

In the matter between:

THE KWAZULU-NATAL OFFICE OF THE PREMIER

Applicant

and

ARUMUGAM GOVENDER

First Respondent

THE SHERIFF OF THE LOWER COURT  
PIETERMARITZBURG

Second Respondent

---

**CONFIRMATORY AFFIDAVIT**  
**(In an Application to Stay Execution)**

---


I, the undersigned,

**BUSISIWE GLADYS ZONDO**

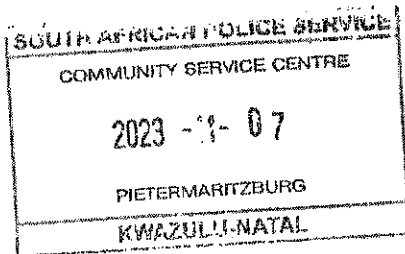
do hereby make oath and state:

1.

BK

  
DEPONENT

The Deponent has acknowledged that he/she knows and understands the contents of this Affidavit which was signed and sworn to at \_\_\_\_\_ before me this \_\_\_\_\_ day of 2023 and that the provisions of the regulations contained in Government Notices R1258 of 21 July 1972 and R1648 of 16 August 1977 having been complied with.



  
S. L. MOLELE  
COMMISSIONER OF OATHS