



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

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: 1912/09

In the matter between:

THE PREMIER OF THE NORTHERN CAPE

APPELLANT

AND

MOTLALEPULA ELIAS SELEMELA

RESPONDENT

Date of hearing : 23 May 2011

Date of judgment : 17 June 2011

JUDGMENT

TLALETSI J

Introduction

[1] This appeal revolves around the question whether, on the facts of this case, the

respondent waived his permanent status as a public servant when he was appointed Head of a Department (HoD) of Transport, Roads and Public Works in the provincial government. The appeal emanates from the judgment of B M Pakati AJ in this division in an application brought by the respondent against the appellant. The order issued by the learned Acting Judge on 13 August 2010 was on the following terms:

“1.It is declared that the applicant’s (Mr Motlalepula 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.

3. That the respondent pays the costs of this application.”

- [2] Aggrieved by the aforesaid order, the appellant applied for leave to appeal which application was partially successful. The terms of the leave granted to the appellant would be discussed in due the course.

Factual Background

- [3] For a proper understanding of the issues a brief factual background is necessary. These facts are extrapolated from the affidavits and other documents filed as part of the record and are mainly common cause or not in dispute. The principles enunciated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**¹ will be observed to the extent that the allegations made in the affidavits are disputed.
- [4] The respondent was employed by the Northern Cape Provincial Government on 01 February 1996 in the position of Director: Human Resources Management in the Premier's Office². On 01 April 1997 the respondent was promoted to the position of Deputy Director-General Corporate Services in the same office.
- [5] During April 2004 the political head of the province changed and Ms Elizabeth Dipuo Peters ("Ms Peters") took over as the Premier of the Province. She commenced a process of deployment and transfer of various senior managers from their posts in the various departments. The process resulted in the HoD of the Department of Transport, Roads and Public Works("DTRPW") being removed and was to be placed in a department that was still to be established. The respondent was consequently moved to the DTRPW. His position in the Premier's office was occupied by the HoD of the Department of Education, one Mr Moraladi.
- [6] For the purposes of this appeal it is necessary to set out in detail the process that was

¹ 1984(3) S A 623(A) at 634E-635C.

² The Premier of the province was at the time Mr Emsley Manne Dipico.

followed in the appointment of the respondent as HoD for the DTRPW. This information is based on the respondent's averments in his affidavits as well as the annexures thereto. I may mention in passing at this stage that this information has not been contradicted by the appellant who adopted the view, *inter alia*, that it is irrelevant.

- [7] The respondent's position as the Deputy Director General ("DDG") in the office of the appellant was a permanent one. When Ms Peters offered him the position of HoD, he indicated to her that he was willing to accept the offer on condition that his deployment as HoD be construed as a secondment and that upon termination of the contractual period as HoD he would revert to his permanent position as the DDG in the office of the respondent or in any of the departments within the Northern Cape Provincial administration. According to the respondent, Ms Peters accepted his counter-offer and undertook to "*deploy*" him to a position of HoD on that condition.
- [8] On 6 May 2004 Ms Peters in her capacity as the executing authority wrote a letter to the respondent stating that:

"Dear Mr Selemela,

Secondment as HEAD of DEPARTMENT: Transport, Roads and Public Works

I, Elizabeth Dipuo Peters, Premier of the Northern Cape Provincial Government, in terms of the powers vested in me by the Public Service Act 1994 (as amended) hereby second you as Head of the Northern Cape Transport, Roads and Public Works Department with immediate effect for an initial period of six months.

This secondment vests in you all such powers and obligations as are incidental to the office of the Head of Department Transport, Roads and Public Works including those conferred or imposed by the PFMA and the Public service Act and such other legislation, policy or collective agreements as may be applicable to the said office.

Your current remuneration package and employment benefits remain unchanged.

I take this opportunity to wish you every success.

Yours faithfully,

E D PETERS: PREMIER”

The letter was copied to Mr F A Wyngaardt who was at the time the Member of the Executive Council (“MEC”) responsible for the DTPRW. According to the respondent his secondment was made in terms of his agreement with Ms Peters and the period of six months had as its purpose for him to familiarize himself with the *“environment at the department and to determine whether I would have a [good] working relationship with the then MEC, Mr Fred Wyngaardt”*.

- [9] The respondent averred further that prior to the expiry of the six month period he was again approached by Ms Peters who suggested that the initial period of six months be extended by way of a five year fixed term contract. The respondent mentioned that he agreed to the proposal on condition that the contract should reflect that he remained a permanent employee, albeit employed as DDG.

- [10] On 31 August 2004 the respondent concluded a written Memorandum of Agreement of employment with Ms Peters as the executing authority in terms whereof the respondent was appointed HoD. The Preamble to the said Memorandum of Agreement read:

“WHEREAS the Executing Authority wishes to deploy and transfer the Appointee to perform the functions as Head of the Department of Transport, Roads and Public Works;

AND WHEREAS the Appointee had been and is still appointed on a

permanent basis into the Public Service and is willing and able to perform the duties of Head of Department;

AND WHEREAS the parties are desirous to formalize the matters agreed to between them;

NOW THEREFORE the Parties agree as follows:

APPOINTMENT

The Executing Authority hereby appoints the Appointee, who agrees and accepts appointment as Head of Department in terms of section 12 of the Public Services Act, 1994 (hereinafter referred to as the Act) for a period of five (5) years commencing on the 1st day of September 2004 and terminating on the 31 day of August 2009.”

- [11] The Memorandum of Agreement further contained the following provisions on variation and waiver thereof:

6.5 “VARIATION

6.5.1 The agreement constitutes the whole of the agreement between the parties to this agreement relating to the subject matter of this agreement, and save as otherwise provided, no amendment, alteration, addition or variation of any right, term or condition of

this agreement will be of any force or effect unless reduced to writing and signed by the parties to this agreement.

6.5.2 *The parties agree that there are no other conditions, warranties or representations, whether oral or written and whether expressed or implied or otherwise, save those contained in this agreement, the Act, the Regulations and other relevant legislation (e.g Government Pension Fund Law).*

6.6 *WAIVER*

No waiver of any of the terms and conditions of this agreement will be binding for any purpose unless expressed in writing and signed by the party giving the same, and any such waiver will be effective only in the specific instance and for the purpose given. No failure or delay on the part of either party in exercising any right, power or privilege precludes any other or further exercise thereof or the exercise of any other right, power or privilege.”

[12] The term of office of Ms Peters as Premier of the province came to an end during April 2009.³ Mrs Hazel Jenkins who is the deponent to the answering affidavit succeeded Ms Peters as the Premier of the province.

[13] The respondent’s term as HoD expired on 31 August 2009 as stipulated in the

³ Ms Peters was appointed and is still the Minister of the National Department of Energy.

Memorandum of Agreement he concluded with Ms Peters. On 23 September 2009 the respondent wrote a letter to the appellant in which he confirmed that his employment contract as HoD expired on 31 August 2009 and that his status as Deputy Director-General in the administration was, among others, still outstanding and requested a meeting with her as a matter of urgency. The letter was served on the administrative secretary in the office of the appellant who acknowledged receipt by signing a copy thereof.

[14] It is common cause that neither the appellant nor any other officer in the employ of the provincial administration responded to the respondent's letter. On 6 October 2009 the respondent's attorneys wrote a letter to the appellant marked "*urgent*" and was transmitted per telefax. In the aforesaid letter the respondent, *inter alia*, requested the appellant to confirm his position as a public servant in writing within three days of receipt of the letter failing which he would approach the High Court for urgent relief. Being placed on terms as aforesaid did not solicit any response from the appellant's office.

[15] On 13 October 2009, the respondent's attorneys wrote a second letter to the appellant which was also marked "*urgent*" and transmitted per telefax. In this letter the attorneys referred to their previous correspondence and pointed out, among others, that they had not received a response. They further requested the respondent's salary advice of the salary he was due to receive on 15 October 2009. The purpose of the request was intended to enable the respondent to establish whether or not he was not being paid money in *lieu* of his accumulated leave and other benefits as part of a

termination arrangement. The letter indicated further that the respondent regarded himself as a permanent employee of the state and that he would not accept any termination of employment payments other than his salary for that month into his bank account. The attorneys requested the salary advice to be forwarded to them before the end of business on the same day, being 13 October 2009. The appellant's office responded to this letter by only sending a salary advice to the respondent's attorney's office without commenting on substantive issues raised in the letter. It was this stance adopted by the appellant on the substantive issues, which necessitated the institution of the proceedings under consideration.

[16] As a matter of fact the first time that the appellant reacted to the respondent's claims was through an answering affidavit deposed to by Premier Jenkins in opposition to the respondent's application. In the affidavit she confirmed that she only occupied the position of Premier from April 2009 and that at all times material to the application she was not attached to that office. She however mentioned that she had all the records containing the relevant facts dealt with by her in her affidavit, at her disposal.

[17] The appellant's defence to the respondent's claim is that the appointment of HoD's is regulated by section 12 of the Public Service Act Proclamation⁴ which states, *inter alia*, that a person appointed to the post of HoD shall be for a fixed term not exceeding five years. In terms of Chapter 4 of the Public Service Regulations⁵ the Minister of Public Service and Administration may include any or all of the determinations, directives and guideline provisions to Senior Management Services

4 103 of 1994

5 GNR.1 of 5 January 2001, Public Service Regulations, (Government Gazette No. 21951).

(“SMS”) in the Handbook for “SMSes”. The appellant contended also that employees who occupy the position of HoD, like the respondent, have most of their career incidents set out in the SMS Handbook and that in terms of para 6.2 of Chapter 8 of the SMS Handbook a serving employee who is appointed to the post of HoD will automatically lose his/her status as a permanent employee.

[18] The appellant contended that, in line with the principle of election, the respondent waived his right of being a permanent employee when he elected to accept the appointment as HoD. The appellant contended further that clause 6.5 of the Memorandum of Agreement, quoted above, confirmed unequivocally that it constitutes the whole agreement between the parties and that no amendment, alteration, addition or variation of any right, term or condition of the said agreement would be of any force or effect unless reduced to writing and signed by the parties to the agreement. The argument goes on to state that the respondent, by providing the “*background circumstances*” relating to his discussions and negotiations with Ms Peters, is seeking to contradict, alter, add or vary a written document with hearsay evidence without the supporting affidavit by Ms Peters. In her affidavit the appellant further contended that the background facts provided by the respondent are irrelevant and should be struck from the record.

[19] For completeness I need to mention that the appellant also raised two other contentions in her answering affidavit. The first was that on a proper interpretation of the dispute between the parties it was arguable that the respondent should have approached the Labour Court and not the High Court. This point was, however, not

persisted in during argument both in the Court below and in this Court. I need not say more about it. The second issue raised as a point *in limine* was that of non-joinder. In short the argument was that the respondent ought to have joined Mr Moraladi in these proceedings as he had an interest in the matter because he had been appointed to the position of DDG in the appellant's office which is the position that the respondent occupied before his appointment as the HoD. As I will indicate below this point was in my view correctly dismissed by the Court *a quo*.

Findings of the Court a quo

[20] The Court below after considering authorities on the interpretation of contracts and the relevant statutory provisions made the following remarks and findings in its judgment:

20.1 The terms of the operative part of the Memorandum of Agreement are clear and unambiguous as to what the parties agreed upon. However, the preamble serves the purpose of confirming that the respondent had been in permanent employment.

20.2 In terms of the Public Service Act, s16(1)(a) the respondent was entitled to remain in the Public Service until he reached the age of 65 years.

- 20.3 The memorandum does not stipulate that the respondent consciously waived his right to permanency in the Public Service; nor does it state that the respondent was aware or was made aware of clause 6.2 in Chapter 8 of the SMS Handbook and that he made a deliberate choice that he will exit the Public Service when his five years service as HoD expires.
- 20.4 The provisions of clause 6.2 of Chapter 8 of the Handbook are subordinate to the statutory enactment of the Public Service Act and to the extent of its inconsistency it is null and void. Alternatively, the court felt bound to read clause 6.2 *pro non scripto*.
- 20.5 Clause 6.2 of Chapter 8 of the Handbook is very drastic and takes away permanent employees' job security and adversely affects their long term pension benefits, particularly those who are appointed HoDs long before their retirement is due. That not every conceivable detail can be incorporated in a contract but if clause 6.2 is invoked by an Executive Authority like a Premier or the President it needs to be incorporated in the agreement.
- 20.6 There was no upward mobility for the respondent in his re-deployment as his movement was horizontal. It would make no sense that the respondent would have contracted himself from a permanent position of strength into a precarious temporary position if he did not legitimately expect to be retained in the Public Service until retirement or until he opted to leave when it suited

him.

20.7 That in light of the decision reached by the court it is unnecessary to deal with the issue of non-rectification raised during argument on behalf of the appellant. Nor was there a need to strike out certain statements in the founding affidavit on the basis, postulated by the appellant, that the respondent introduced extrinsic evidence relating to the surrounding circumstances leading to the written agreement. In the court *a quo*'s view the said evidence merely supplied vital background information.

20.8 The fact that the position of DDG in the office of the appellant has an incumbent or that other vacancies at that level may all have been filled does not constitute a bar to the respondent being awarded the substantial relief sought.

[21] The court *a quo* then made the order quoted at para [1] of this judgment. As pointed out above the appellant was aggrieved by the judgment of the court *a quo* and applied for leave to appeal. In granting leave to appeal to this Court, the court *a quo* held:

“6. The memorandum does not stipulate that the [respondent] consciously waived his right to permanency in the Public Service. Nor does it state that the [respondent] was aware or was made aware of clause 6.2 in Chapter 8 of the SMS Handbook and that he made a deliberate choice that he will exit the Public Service when his five years as HoD expires.

7. On this narrow issue only I will grant leave to the full bench of this division as this issue is very important and that certainty in the Public Service must be established”.

The appeal.

[22] On behalf of the appellant a Notice of Appeal was served and filed on 17 December 2010. The Notice lists seven grounds upon which the appellant is appealing against the judgment and order of the court below⁶. In view of the limited ground on which leave was granted I am of the view that it is appropriate that the grounds of appeal in the notice be reflected in *toto*. They are:

“1. The Court a quo misdirected itself by not finding that upon termination of the agreed contractual period the applicant will not revert to the position of Deputy Director General.

2. The Court a quo misdirected itself by not finding that upon termination of the said period the applicant’s employment will automatically terminate.

3. The Court a quo misdirected itself by declaring that the applicant is still permanently appointed as Deputy Director General in the Northern Cape Provincial Government.

⁶ Rule 49(3) of the Uniform Rules provides that the notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded.

4. *The Court a quo erred in finding that the applicant's appointment as Deputy Director General (permanent appointment) has survived the termination of the applicant's five (5) year term as head of the Department of Transport Roads and Public Works.*

5. *The Court a quo misdirected itself by ordering the respondent to re-instate the applicant as Deputy Director General in the Northern Cape Provincial Government with effect from 1 September 2009.*

6. *The Court a quo misdirected itself by finding that the parties have agreed that after termination of the applicant's appointment as HOD he will continue to maintain his prior status as a public servant.*

7. *The Court a quo erred in its ruling of law in relation to paragraph 6.2, chapter 8 of the SMS Handbook on the ground that the Honourable Court misdirected itself by not finding that Section 41(3) of the Act expressly empowers the Minister to issue directives on the same basis as it authorises regulations and that these directives remain binding until being nullified by a Court."*

It is worth mentioning that all the grounds of appeal referred to above were part of the sixteen grounds of appeal that the appellant placed before the court *a quo* in the application for leave to appeal.

It was within the powers of the court *a quo* to grant leave as it deemed necessary on limited grounds.⁷

⁷ Sec 20(5) (a) of the Supreme Court Act 59 of 1959 provides that : "Any leave required in terms of subsection (4) for an appeal against a judgment or order of a court given on appeal to it, may be granted subject to such conditions as the court concerned or the appellate division, according to whether leave is granted by that court or the appellate division, may determine, and such conditions may included a condition that the applicant shall pay the costs of the appeal". See also: **Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en**

[23] There is no doubt in my mind that these grounds go beyond the parameters that the court below had granted leave to the appellant to this Court. It was open to the appellant to have approached the Supreme Court of Appeal for leave to broaden the grounds if dissatisfied with the order of the court *a quo*. That has not happened.

[24] Ms Nkosi-Thomas SC who appeared on behalf of the appellant before us submitted that whilst accepting that the appellant is indeed limited to the ground(s) on which leave to appeal was granted, the rest of the grounds contained in the Notice of Appeal are ancillary to the ground on which leave to appeal was granted and as such the appellant is entitled to rely on these grounds. She relied on the **Harlech-Jones Treasure Architects CC** case where the following was said at para [61](6):

“...In short, where leave to appeal is granted on specified grounds, it means no more and no less than that those are the only grounds that can be invoked on appeal (including, however, in terms of what has been said above, all aspects that are ancillary thereto), but that no other grounds may be raised; leave to appeal on any further grounds must be taken to have been impliedly refused.”(Emphasis added)

Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere 1988 (4) SA 224 (A) at 246G-247B; **S v Safatsa and Others** 1988(1) SA 868 (A) at 877 A-G, **Douglas v Douglas** [1996]2 B ALL SA 1(A) at 8i; **Harlech-Jones Treasure Architects CC v University of Fort Hare** 2002(5) SA 32 (E) at 50-52.

What the learned Judge referred to by ancillary aspects were the aspects that had a bearing on the validity of a number of factual findings made by the Court of first instance.⁸ What the appellant is seeking to do *in casu*, is to broaden the grounds of appeal which do not deal with ancillary aspects.

[25] The appointment of HoDs is regulated by the Public Service Act, 1994. Section 3B was inserted in the Public Service Act by Act 5 of 1999. The section was later deleted by Act 3 of 2007. At the time of the respondent's appointment as HoD sec 3B was still applicable. It provided that:

“3B Handling of appointment and other career incidents of heads of department

(1) Notwithstanding anything to the contrary contained in this Act, the appointment and other career incidents of the heads of department shall be dealt with by, in the case of

(a)...

(b) a head of a provincial administration, department or office, the relevant Premier.

(2) Any person appointed as head of department may before or at the expiry of his or her term of office, or extended term of office, be deployed with his or her consent by the relevant executing authority referred to in paragraph (a)

⁸ Supra at para [60]

or (b) of subsection (1) in the case of-

(a)...

(b) a head of provincial administration, department or office, to perform functions in a similar or any other capacity in the administration, department or office of the relevant province in a post or against a post of equal, higher or lower grading or additional to the establishment, as the executing authority deems fit.

(3)...

(a)...

(b)...

(4) The executing authority referred to in paragraph (a) or (b) of subsection (1) may delegate or assign any power or duty to appoint the head referred to in that paragraph, as well as any power or duty regarding the other career incidents of that head, in the case of

(a)...

(b)..."

[26] Section 12 of the Public Service Act has been subjected to various amendments since the advent of democracy. Its current wording is different from what it was at the time of the respondent's appointment as HoD. Section 12 at the time read:⁹

"12 Appointment of heads of department

⁹ s.12 amended by s. 5 of Act 86 of 1998, by s.32 (1) of Act 38 of 1994 and by s.2 of Act 13 of 1996 and substituted by s.9 of Act 47 of 1997 and by s.9 of 1997.

(1) *Any person who immediately prior to the commencement of the Public Service Laws Amendment Act, 1997-*

(a) *was appointed in the office of head of department or to any post mentioned in the second column of Schedule 2 or 3, or was promoted or transferred to that office or post; or [para. (a) substituted by s.5 (a) of Act 86 of 1998].*

(b) *was promoted or transferred from the office of head of department referred to in paragraph (a) to another office or head of department, shall occupy, subject to the provisions of chapter V and any collective agreement contemplated in section 18 (b) of the Public Service Laws Amendment Act, 1998-*

(i) *in the case of a person referred to in paragraph (a)-*

(aa) *that office for a period of five years as from the date of his or her appointment, promotion or transfer, or the shorter period approved by the relevant executing authority, and if the term of office was extended at the expiry thereof, for the extended period approved by that executing authority;*

(bb) *that post for a period of five years as from the date of commencement of the Public Service Laws Amendment Act, 1997; [Para. (i) substituted by s.5 (c) of Act 86 of 1998.]*

(ii) *in the case of a person referred to in paragraph (b), the latter office for the remainder of the term of office which applies to him or her in terms of paragraph (i) in respect of the former office, and if the term of office was extended at the expiry thereof, for the extended period approved by the*

relevant executing authority.

[Sub-s. (1) amended by s.5 (b) of Act 86 of 1998.]

(2) *As from the date of commencement of Public Service Laws Amendment Act, 1997-*

- (a) *a person shall be appointed in the office of head of department in the prescribed manner, on the prescribed conditions and in terms of the prescribed contract between the relevant executing authority and such a person for a period of five years from the date of his or her appointment, or such shorter period as that executing authority may approve;*
- (b) *the term of office as head of department of such a person may be extended at the expiry thereof in accordance with the terms and conditions of the contract or a further contract, as the case may be, concluded between that executing authority and such a person for a period or successive periods of not less than twelve months and not more than five years, as that executing authority may approve;*
- (c) *the terms of office as head of department of any person referred to in subsection (10, or any extended term thereof, may be extended at the expiry of the term of office or extended term, as the case may be, in the prescribed manner for a period of not less than twelve months and not more than five years, as the relevant executing authority may approve,*

provided the said person concludes the prescribed contract with that executing authority, whereupon any further extension of his or her term of office shall, subject to the provisions of paragraph (b), take place in accordance with the terms and conditions of that contract or a further contract, as the case may be.

(3) Notwithstanding the provisions of subsection (10), any person referred to in that subsection may at any time after the commencement of the Public Service Laws Amendment Act, 1997, conclude a contract contemplated in subsection

(2) with the relevant executing authority.”¹⁰

[27] Also relevant to the appointment of HoDs is the SMS Handbook¹¹ referred to above, issued in terms of regulation 1D of Chapter 4 of the Public Service Regulations (PSR)

10 The current sec. 12 of the Public Service Act relied upon by the appellant reads: “Notwithstanding anything to the contrary contained in this Act, but subject to this section and sections 2 (2B) and 32 (2) (b) (i), the appointment and other career incidents of the heads of department and government component shall be dealt with, in the case of-

- (a) a head of a national department or national government component, by the President; and*
- (b) a head of the Office of a Premier, provincial department or provincial government component, by the relevant Premier.*

(2) (a) A person shall be appointed to the post of head of department in terms of section 9 for such term, not exceeding five years, as the relevant executive authority may approve.

(b) The head of department shall conclude the prescribed contract within the prescribed period.

(c) The relevant executive authority may at the expiry of the term of office of a head of department or at the expiry of an extended term of office extend the term for a period of not more than five years at a time.”

¹¹ The first edition of the Handbook coincided with the establishment of the SMS on 1 January 2001.

under the Public Service Act. The second edition of the SMS Handbook incorporates all the determinations, directives and guidelines issued by the Minister for the Public Service and Administration to the SMS as at 01 December 2003. The SMS Handbook cautions in clause 2 of Chapter 1 that:

“Legal Mandate

2.1 *This Handbook is issued in terms of regulation 1 D of chapter 4 of the PSR.*

2.2 *This Handbook must always be read in conjunction with the Act, the PSR, relevant collective agreements and circulars.*

2.3 *Readers should take cognisance of the fact that different chapters of the Handbook consist of both compulsory and advisory elements.”*

[28] In this Court counsel for the appellant based her argument on waiver. She submitted that there existed two rights or options for the respondent, the first being in terms of sec.16 of the Public Service Act that stipulates that a person who was in the position of the respondent as DDG had the right to retire from the public service when he attains the age of sixty five years: henceforth referred to as the *right to permanency*. The second right is the one provided in sec. 12(2)(a) of the Public Service Act that provides that a person appointed to the post of HoD in terms of sec. 9 of the Public

Service Act shall serve for a period not exceeding five years: the latter scenario constitute the right to fixed term employment. The respondent, so goes the argument, was faced with two inconsistent rights from which he had to make an election when he concluded the Memorandum of Agreement with Ms Peters, and that he made an election to be appointed on a fixed term contract thereby waving his right to permanency.

[29] My understanding of sec 12 in its previous and current wording is that a person who is appointed HoD is to serve in that position for a fixed period not exceeding five years. The relevant executing authority may approve a lesser period than the permissible maximum. Furthermore, the relevant executing authority may at the expiry of the term of office of an HoD extend it for a further term which should also not exceed five years. This means that an HoD may be appointed for a contractual period of ten years consisting of the initial fixed term of five years and a further extended fixed term of five years. However, appointment to the position of HoD should not be for an indefinite tenure.

[30] What section 12 does not say, is 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 HoD. The contention, therefore, that the respondent lost or waived his rights to permanency when he accepted appointment as HoD is not supported by sec 12 of the Public Service Act, whether in its original or amended form.

[31] The respondent's pleaded case is that he agreed with Ms Peters that he should not lose his permanent status as a public servant when seconded or appointed to the position of HoD. Ms Peters was the executing authority at the time and had the authority to appoint and deal with issues incidental to the appointment of HoDs. According to the respondent he made a counter-offer to Ms Peters to retain his permanency and such counter-offer was accepted.

[32] It follows therefore that the respondent was apprehensive that it may later be construed that he lost his permanent status and contracted against such potential loss. It is not clear though from the papers that clause 6.2 of Chapter 8 of the SMS Handbook was ever discussed by the respondent and Ms Peters. The papers are silent on the issue. There is also no reference to this clause in the Memorandum of Agreement. The court *a quo* was accordingly correct in finding that the Memorandum of Agreement does not stipulate that the respondent consciously waived his right to permanency in the Public Service. Furthermore, the court *a quo* was correct in finding that the Memorandum of Agreement does not state that the respondent was made aware of Clause 6.2 of Chapter 8 of the SMS Handbook. There is also nowhere in the Memorandum of Agreement where it is stated or contemplated that the respondent would cease to be a civil servant when his fixed term as HoD comes to an end¹².

There is no ambiguity about the operative terms of the Memorandum of Agreement.¹³

12 The appellant bears the onus to prove on a balance of probabilities that the respondent had indeed abandoned his rights with full knowledge of it or that he gave up his right for good. See: *Moyce v Estate Taylor* 1948 (3) S A 822(A); *Feinstein v Niggli* 1981 (2) S A 684 (A); *ABSA Bank Ltd v The Master NNO* [1998]3 ALL S A 198(N); 1998 (4) S A 15(N) at 251-27A.

13 Joubert JA in *Coopers & Lybrand v Bryant* 1995 (3) S A 761 (A) at 767E-768E held: "According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. *Principal Immigration Officer v Hawabu and Another* [1936 AD 26](#) at 31, *Scottish Union & National Insurance Co Ltd v F Native Recruiting Corporation Ltd* 1934 AD 458 {dictum at 465-6 appl} at 465-6, *Kalil v Standard Bank of South Africa Ltd* [1967 \(4\) SA 550 \(A\)](#) at 556D...

Its purpose was to regulate the respondent's terms and conditions of his appointment as HoD as required by sec.12 as it then read when he was appointed. The current version does not detract from the same conclusion.

[33] It was open to the appellant to controvert the respondent's version concerning what transpired between him and Ms Peters with credible evidence to the contrary. It would reasonably be expected that for a person in the position of the appellant if there was nothing in the records at her disposal to assist in establishing the true facts, to call on Ms Peters to comment under oath on the respondent's allegations. As Ms Peters is a Cabinet Minister it should not have proven difficult to gain access to her to shed some light on this matter in the interests of good public administration and co-operative governance. This Court, perhaps the court below as well, remain in the dark as to why Ms Peters' version of the events that led to the appointment of the respondent as HoD

The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself. See *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* [1979 \(1\) SA 195 \(A\)](#)...

The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ *supra* ;
- (2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. *Delmas Milling Co Ltd v Du Plessis* [1955 \(3\) SA 447 \(A\)](#) at 454G-H; *Van Rensburg en Andere v Taute en Andere* [1975 \(1\) SA 279 \(A\)](#) at 305C-E; *Swart's case supra* C at 200E-201A & 202C; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 180I-J;
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. *Delmas Milling case* at 455A-C, *Van Rensburg's case* at 303 A-C, *Swart's case* at 201B, *Total South Africa (Pty) Ltd v Bekker* NO 1992 (1) SA 617 (A) at 624G, *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A) at 10C-D."

was not made available. It does not help the appellant to contend that the respondent is the one who should have sought support from Ms Peters for this averment. The respondent's explanation relating to what he discussed and agreed upon with Ms Peters is not hearsay. He is a party and participated directly in the discussions.

- [34] The respondent's averments of what he agreed upon with Ms Peters is also supported by the probabilities. In the first place the letter dated 6 May 2004 from the Office of the Premier to the respondent states that "*Secondment as Head of Department: Transport, Roads and Public Works*" as its heading. Secondly, the first paragraph of the letter states that the respondent is seconded "*with immediate effect for an initial period of six months.*" Thirdly, the procedure followed by Ms Peters to appoint the respondent was not in accordance with the usual process of advertising, short listing and interviewing of candidates as prescribed in the SMS Handbook. The process followed is as described by the respondent that it was a matter of discussions. Fourthly, it would not make sense to state in the preamble to the Memorandum of Agreement that the respondent "*had been and is still appointed on a permanent basis into the Public Service and is still willing and able to perform the duties of Head of Department*" if it was of no consequence. The wording thereof as well as the fact that it is not a standard clause in the employment contract of HoDs leads one to the only reasonable conclusion under the circumstances namely that there was some discussion about the respondent's permanency in the public service. The contention therefore that the respondent elected to waive his right to be a permanent employee is in my view without merit.

- [35] In light of my conclusion on the aspect of waiver, as well as the limited ground on which leave to appeal was granted, it is not permissible to traverse the other findings made by the court below. Suffice it to state that this appeal is being decided on the facts and circumstances unique to this case. The validity of Clause 6.2 of Chapter 8 of the SMS Handbook is not an issue to be decided in this appeal. One should however note that the same document (the SMS Handbook) contains in different chapters thereof a contrast of both compulsory and advisory elements.
- [36] I wish to state *obiter*, as opposed to *ratio decidendi*, that the court *a quo*'s observation that clause 6.2 of Chapter 8 of the SMS Handbook is very drastic and takes away permanent employees' job security and adversely affect their long term benefits, particularly of those who are appointed HoDs long before their retirement age is due, has merit. I would add that the clause is also arbitrary. It boggles the mind, that for example, a 32 year old employee who is in the permanent establishment of Government and who is appointed HoD for one or two years could find himself/herself unemployed at the end of that short period on the basis of this clause. This is even more obnoxious if the provisions thereof are not incorporated in an HoD Memorandum of Agreement. More particularly, in this matter Mr Selemela was born on 22 November 1947 and is due to retire next year when he turns 65 years.
- [37] In conclusion therefore there is no need to interfere with the judgment or order of the court below. The appeal accordingly falls to be dismissed and there is no reason why costs should not follow the result.

[38] In the result I make the following Order:

“The appeal is dismissed with costs.”

L P Tlaletsi J

I agree

F Diale Kgomo JP

I agree

J Henriques AJ

Appearances:

On behalf of the Appellant : Adv L Nkosi-Thomas SC

Adv Khokho

Instructed by : The State Attorney, Kimberley

On behalf of the Respondent : Adv Moss Mphaga

Adv A M Petho

Instructed by : Du Toit Attorneys, Kimberley

This submission is in my view not in accordance with the respondent's pleaded case. I may state that in so far as para 18 of the judgment as well as para 6 of the judgment on the application for leave to appeal may be interpreted to suggest that the respondent was not aware of clause 6.2 of chapter 8 the SMS handbook, that would not be the correct position. The respondents' case made out in the founding affidavit is that he agreed with Ms Peters that should he be seconded to the position of HoD he should not be made to lose his permanent status as a public servant. Ms Peters who was the executing authority accepted and agreed to the respondent's counter offer. It therefore means that on the respondent's version he was aware that he could waive his permanent status if he accepted the offer of the position of the HoD

and for him not to waive his status agreed with the competent executing authority for the waiver not to apply.

[28] The attitude adopted by the appellant towards the averments made by the respondent is that what the respondent mentioned which is not contained in the written memorandum of agreement is not only hearsay but irrelevant and must be struck out. The court a quo has already dismissed the application to strike out on the basis that the information is relevant.

[29] Be that as it may, the respondent's averments though not controverted is plausible for the reasons that follows. The letter dated 6 May 2004 from the Office of the Premier refers to "Secondment" of the respondent as HoD Transport, Roads and Public Works. Secondly, the procedure followed in the respondent's appointment as HoD did not follow the selection process, the normal procedure of advertising, short listing and interviewing of candidates as prescribed in the SMS Handbook. Thirdly, the reference to the respondent's permanent status in the preamble to the memorandum of agreement is unusual and its conclusion differs from the court.

Generally, a party who has been granted leave on la particular ground to approach a full bench of the High Court does not have the liberty to ignore the order granting leave and present the appeal on other grounds. He or she may do so only with the leave of the Supreme Court of Appeal. This means therefore that if the appellant was aggrieved by the order of the court below granting her leave to appeal, the course that should have been followed was to petition the President of the Supreme Court of Appeal for leave to appeal on grounds different or in addition to those granted by the court below. The legal position was aptly put by Kroon J in the *Harlech-Jones Treasure Architects CC v University of Fort Hare*¹⁴ as follows:

¹⁴ Supra at para: [56]

"In our judgment, it is clear that the power of the Supreme court of Appeal, when hearing an appeal, to permit argument on grounds of appeal, on which leave to appeal was refused, is derived, not from the fact that it is the forum hearing the appeal, but from the fact that it is the forum that, in terms of the Act, is empowered to adjudicate upon a petition for leave to appeal refused by the Court of a Provincial or Local Division. A Full Court of a Provincial Division is not so empowered and the fact that it is the forum hearing the appeal does not give it the power to entertain grounds of appeal in respect of which leave to appeal was refused."

TLALETSI JA

I agree.

ZONDO JP

I agree

SANGWENI AJA