



# ARBITRATION AWARD

Panellist/s: Mohau C Ntaopane  
Case No.: GPBC565/2022  
Date of Award: 23 July 2023

**In the ARBITRATION between:**

B NGOBESE & 6 OTHERS

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(Applicants)

and

DEPARTMENT OF DEFENCE AND MILITARY VETERANS

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(1<sup>st</sup> Respondent)

and

DEPARTMENT OF CORRECTIONAL SERVICES

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(2<sup>nd</sup> Respondent)

**Applicants' Representatives:** Joel Ntwampe and Ntethelelo Kumalo (self-representing)

**1<sup>st</sup> Respondent's Representative:** Luther Mdluli

**2<sup>nd</sup> Respondent's Representative:** Not in attendance

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

- [1] This is the arbitration award in the arbitration between B Ngobese & 6 Others, hereinafter referred to as “the Applicants”, and the Department of Defence and Military Veterans, hereinafter referred to as “the 1st Respondent”, and the Department of Correctional Services, hereinafter referred to as the “2nd Respondent”.
- [2] The arbitration was held under the auspices of the General Public Service Sector Bargaining Council (GPSSBC) in terms of section 191(5)(a)(iii) of the Labour Relations Act, 1995 as amended (“the Act”) and the award is issued in terms of section 138(7) of the Act.
- [3] The arbitration was a stop-start affair that commenced on 23 August 2022 via the “Zoom” virtual platform, after which the bulk of the evidence was heard at 370 Nossob Street, Erasmuskloof, Armscor Building, Pretoria, and concluded on 04 July 2023 at the GPSSBC Offices on 260 Basden Avenue. Initially the parties to the matter were B Ngobese & 7 Others v Department of Defence, however, in a ruling issued on 22 November 2022, the Department of Correctional Services was joined as a party with a substantial interest in the subject matter of the proceedings. One of the Applicants, Ms. Daisy Dowelani Ramashia, withdrew from the dispute.
- [4] The Applicants were represented by PSA Labour Relations Officer, Mr. Joel Ntwampe, however, on 02 February 2023 Mr. Ntethelelo F. Kumalo opted to represent himself henceforward. The 1<sup>st</sup> Respondent was represented by Mr. Luther Mdhuli, while the 2<sup>nd</sup> Respondent remained unrepresented throughout the arbitration, despite having been properly notified.
- [5] The process was conducted in English, and it was digitally recorded. Three (3) witnesses testified for the Applicants and two (2) witnesses testified for the Respondent. A further two (2) witnesses appeared under subpoenas issued by the Applicants. The Applicants submitted bundles of document into the record, which were referred to as Bundles A1 to A5. The 1<sup>st</sup> Respondent also submitted documents which we labelled Bundle R. The parties undertook to submit written heads of arguments by no later than 11 July 2023.

### ISSUE TO BE DECIDED:

- [6] I am required to determine whether the Applicants have established the existence of dismissals as required by section 192(1) of the Act. Should I find in the affirmative, I am also required in terms of section 192(2) to determine whether the Respondents have proven that such dismissals were fair, and if not, what the appropriate remedy should be in terms of section 193 of the Act.

## BACKGROUND TO THE MATTER:

- [7] The Applicants were working in the Office of the Minister of Defence and Military Veterans. Their employment details as they appear in the conciliation referral form are as follows:

Name	Position	Persal Number
J.N. Peter	Media Liaison Officer	96014998CB
N.F.Kumalo	Director: Administration	91008409CB
P.A.M Morobi	Chief Director	83004481CA
N.B Loji (Kweyiya)	Cabinet Liaison Officer	00059006CB
B. Ngobese	Head of Security: Ministry of Defence	82005448CB
Z.S. Ketelo	PA to Chief of Staff	00058974CA
B.P. Nsindane	Deputy Director Administration	01059401CB

- [8] The Applicants allege that the date of dismissal is 31 March 2022. The matter was referred to the GPSSBC on 28 April 2022 according to the parties, although the certificate of non-resolution issued at conciliation on 24 May 2022 records that the matter was referred to conciliation on 04 May 2022. The matter was referred to arbitration on 27 May 2022.

## PRELIMINARY POINTS:

- [9] Neither party raised any true jurisdictional issues, other than preliminary points related to the joining of the Department of Correctional Services and the Department of Public Service and Administration as interested parties. Only the Department of Correctional Services was joined in the matter. Other issues included subpoenas that were dealt with as the arbitration progressed.

## SURVEY OF EVIDENCE AND ARGUMENT:

### Evidence for the Applicants

- [10] Mr. **Ntethelelo Freddy Kumalo** was the **first witness** to be called in support of the Applicants' case. He was appointed permanently by the 2<sup>nd</sup> Respondent in 2011 as Deputy Director: Administration, salary level 11. In June 2012, when the then Minister of Correctional Services, Minister N.N Mapisa-Nqakula, was reassigned to the 1<sup>st</sup> Respondent, he was seconded to the 1<sup>st</sup> Respondent in terms of a secondment agreement entered into between the two heads of department, the National Commissioner of the DCS and the Secretary of Defence, as part of a group of support staff being transferred together with the Minister. He was then appointed permanent additional to the DOD Establishment by the 1<sup>st</sup> Respondent and seconded as Parliamentary Liaison Officer (at

the level of Director) to the office of then Minister N.N Mapisa-Nqakula in 2014 in terms of the letter of appointment appearing on page 85 of A. On 28 March 2022 he received a letter from Director: Career Management, Ms. Muregu (page 15 of A), and signed by the Chief HR, which mentioned engagements the 1<sup>st</sup> Respondent had with them and the 1<sup>st</sup> Respondent's attempts to return them to the DCS, which he considered odd. The letter also indicated at para 4 that the 1<sup>st</sup> Respondent regarded his permanent employment as irregular, as a result his services would be terminated on 31 March 2022. He considered the notion that his permanent appointment was irregular odd since he had been appointed permanently in 2014 by the 1<sup>st</sup> Respondent in terms of an appointment letter they issued, paid by the 1<sup>st</sup> Respondent, and his retirement date was reflected on the 1<sup>st</sup> Respondent's system as 2040 when he would have reached the age of 65. Mr. Kumalo explained that in order to declare the appointment irregular, the executive authority needs to approach the court in terms of the Public Service Commission guidelines (6.2, 6.2.1-6.2.3 on pages 165-169 of A).

[11] Mr. Kumalo testified further that he was appointed permanently by the 1<sup>st</sup> Respondent as per his appointment letter and that his secondment in the Office of the Ministry was in line with the Ministerial Handbook in terms of which the Minister can second officials from the relevant department to the Ministry. This means that when the Minister leaves, the 1<sup>st</sup> Respondent has a responsibility to place him as a permanent employee in line with his profile, competencies, qualifications, and experience, in a position within the Department. The 1<sup>st</sup> Respondent started the process of terminating the services of those who were appointed on contracts linked to the term of the Minister, which is evident on page 135 of A, an email from Ms. Muregu sent on 2 September 2021. Those were the only four (4) officials in the Ministry at the time, that were on contracts linked to the term of the Minister, and the 1<sup>st</sup> Respondent acceded to that. Mr. Kumalo explained further that one of the reasons his contract was not one of those on page 135 was because in a memo written by Brigadier-General Leketi (para 8(a) of page 76 of R), confirming his permanent employment and those of others in the Department. On Page 77 his stated pension date reflected as 31 December 2040. In October 2021 the 1<sup>st</sup> Respondent began what they thought to be the process of placing them as would happen to permanent employees seconded to the Ministry, when a letter was issued in which the 1<sup>st</sup> Respondent indicated that they would be utilized in structures within the Department, subject to certain conditions which appeared to be the 1<sup>st</sup> Respondent delegating the responsibility of their placement to them as employees (page 67 of A). The letter also pushed a narrative that they were appointed on fixed-term contracts linked to the term of the Minister, which they disputed in their response. Mr. Kumalo held the view that the 1<sup>st</sup> Respondent knew very well that they were not appointed as per the four (4) employees mentioned in Ms. Muregu's email, otherwise they would have simply been terminated likewise because there would have been no obligation to utilize them at the end of their contracts.

[12] Mr. Kumalo testified further that, as appears on para 2 of his 2014 appointment letter, he was appointed in terms of section 9 of the Public Service Act, which empowers the executive authority to make appointments in the department, and delegates that authority down. He submitted that the Ministry uses the Ministerial Handbook, however, the administration is done by the department. He added that his employment was governed by Ministerial Handbook at that time, the Public Service Act, and Public Service Regulation prior to

amendment, which amendments would not affect the nature of his employment. He explained that during the secondment period of 2012-2014, prior to his permanent appointment, his Level 11 salary was still being paid by the 2<sup>nd</sup> Respondent since they had seconded him to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent at that time was paying him the difference between the salary level 11 and salary level 13 since he had been seconded to a Level 13 salary position. Mr. Kumalo explained that these appointments are not new in the Department and held the view that the 1<sup>st</sup> Respondent, having been responsible for facilitating appointments in line with the relevant prescripts through its HR, would have issued the 2014 appointment letter in line with due processes to ensure compliance with such prescripts. The fact that their letters were signed by the HOD, Dr. SM Gulube as Secretary of Defence, who is equivalent to a Director-General, it would be reasonable to assume that the 1<sup>st</sup> Respondent had done its due diligence.

- [13] **Mr. Bekophilayo Bekozenzo Ngobese was the second witness** to be called in support of the Applicants' case. He first joined the public service at the Department of Home Affairs in August 2001 as permanently appointed Security Officer. In 2009 he was transferred to the 2<sup>nd</sup> Respondent as a Correctional Officer, Salary Level 8, through a departmental transfer. In 2012 he was transferred to the 1<sup>st</sup> Respondent, firstly as a secondment linked to the term of the Minister through a secondment letter (page 145 of A) after which he would return to the 2<sup>nd</sup> Respondent, then in 2014 he received a letter of appointment confirming his permanent employment additional to the DOD establishment and seconded as Head of Security – Deputy Director, Salary Level 12, for a period coinciding with the term of the Minister (page 71 of A). He pointed out, however, that para 2 of the appointment letter incorrectly recorded that he was appointed in terms of section 12A (3) of the Public Service Act, which is only applicable to Advisors appointed in terms of Special Contracts. He was one of the employees who received a letter terminating his services with effect from 31 March 2022 (page 17 of A), which the 1<sup>st</sup> Respondent was not entitled to do because he was permanently appointed. Others who received similar letters were Ms. S.Z. Ketelo (page 16), Ms. J.N. Peter (page 18), and Ms. N.B. Loji (page 19).
- [14] Mr. Ngobese referred to the Employment Status Report of the Ministry Employees, which outlined the date of appointment of each individual and their date of discharge (pages 92-95 of A). He explained that his permanent status was also evident in the fact that he has been contributing to the government pension fund with the 1<sup>st</sup> Respondent and has been receiving PMDS benefits. He felt seriously aggrieved that, after having been employed in the public service since 2001 and having been a loyal servant, the 1<sup>st</sup> Respondent would decide to terminate his services without a hearing. He even lodged a grievance, and it was never attended to. He wondered when the 1<sup>st</sup> Respondent first realized that his appointment had been irregular and believed that this was something for human resources to answer because he did not appoint himself. He also held that there are remedies available to the Executive Authority to correct irregular appointments as they appear in the Public Service Commission Guide to Correct Irregular Appointments (page 154-167 of A), none of which were followed in his case. In his view there would not have been a need to refer an unfair dismissal dispute had the 1<sup>st</sup> Respondent followed the correct procedure. Mr. Ngobese sought reinstatement and adequate compensation for what he considered an unfair dismissal.

- [15] Ms. **Patience Alice Mamello Morobi was the 3rd witness** to be called in support of the Applicants' case. She started as a Personal Assistant (PA) on a contract basis in the office of the Minister at the Department of Home Affairs in 2005. In 2009 the Minister of Home Affairs appointed her permanently, still in the position of PA to the Minister. In the middle of 2009, she then moved with the Minister to the 2<sup>nd</sup> Respondent through a lateral transfer. She was then given the responsibilities of Director: Parliamentary Liaison Officer by the Minister, although she could not recall the specific year. Ultimately there was a need for a post of Chief Director to head the office of the Minister as Chief of Staff, and the Minister requested her to assist in an acting capacity. In June 2012 the Minister was redeployed to the 1<sup>st</sup> Respondent, and she was seconded to the 1<sup>st</sup> Respondent (page 27 of R), and became Parliamentary Liaison Officer at Level 13. She also referred to page 90 of A, which was her appointment letter as Chief of Staff in the Ministry of Defence and Military Veterans with effect 1 August 2013 on a contract linked to the term of the Minister. She explained that the contract in this regard was necessitated by the transition period of the movement of the Minister and at that time she was still permanent employee of the 2<sup>nd</sup> Respondent, operating under an arrangement between the two entities that also outlined how her salary would be paid. In 2014 the post of Chief of Staff became vacant, and the Minister appointed her accordingly, the appointment letter in this regard appearing on page 1 of A2.
- [16] Ms. Morobi testified further that she was dismissed by the 1<sup>st</sup> Respondent through a letter of termination appearing on page 164 of R. It was her view that her appointment was not irregular and submitted that there was never a time during her employment period was it brought to her attention that her appointment was irregular prior to receiving her letter of termination. Referring again to page 27 of R, she explained that having been seconded to the 1<sup>st</sup> Respondent, if the term of the Minister ended, she should have been returned back to the 2<sup>nd</sup> Respondent. She also referred to page 69 of R, which was a document circulated in the Office of Minister pertaining to the status of employment of all staff in that office and confirmed that stipulated the discharge date of every employee in the Office of the Minister. Her name appeared on page 77 in the Category 1 list, which stated that her term of employment ends when she goes on pension in 2032. She submitted that this was also in line with section 8(3)(a) of the Public Service Act. She also confirmed that the 1<sup>st</sup> Respondent did not follow any of the steps outlined in 6.2(a) and (b) of the Guidelines to Correct Irregular Appointments (page 164 of A). Ms. Morobi therefore regarded her dismissal as having been unfair.

### **Evidence for the 1<sup>st</sup> Respondent**

- [17] Ms. **Khathutshelo Muregu was the first witness** to testify in support of the Respondent's case. She is the Director Human Resource and Career Management for Civilians (Officials appointed in terms of Public Service Act). She holds an NQF Level 7 qualification in Human Resources Management and has been a director for four (4) years. She was previously a DD: HR for eight (8) years at the Department of Human Settlement and came to work for the 1<sup>st</sup> Respondent by applying for an advertised position, going through the recruitment process, competency assessment by an independent service provider, and ultimately being issued with an appointment letter. She explained that whether or not a person can be appointed in the public service without

undergoing an interview depends on the nature of the appointment. There are appointments that are additional to the structure, which are for a period of twelve (12) months, unless approved by the Minister. In this regard the structure manager would provide a CV and qualifications required, and submissions would be made for appointments additional to the structure for 12 months. There are also appointments where people are appointed in terms of Regulation 66 in the Office of the Executive Authority and Deputy Ministers, and those appointments are linked to the term of office of the incumbent Executive Authority. Referring to page 27 of R, letter issued to Ms. Morobi, she explained that the process of secondment happens when a department identifies the services of an official in any state department and institutes a process of obtaining approval to second that official for a period of 12 months, or more if approved by the Minister for Public Service and Administration. The seconded official must possess the competency for the functions they are going to perform in the recipient dept.

[18] Ms. Muregu testified further that for a post to exist in the public service, Regulation 26.1 provides that an Executive Authority shall determine the organizational structure in terms of the department's core mandated and support functions, thereby defining and creating posts accordingly. The post created should be within the current budget (NTEF), as well as within the norms and standards determined by the DPSA, one of which is the directive requiring consulting the proposed structure before it is approved by the Minister, as well as grading the post in order to determine its level. Grading of posts is done by trade analysts in the department in terms of a system prescribed by the DPSA, and one of the divisions is Chief Defence Policy: Strategy and Planning, which is the custodia of job evaluation. The evaluation process is also moderated by a panel and then approval is granted by the Delegated Authority for the post to be created. Currently posts that are consulted with the Minister of Public Service and Administration are those at Level 9 and above, and such consultation does not take place or there is no concurrence letter from the DPSA, the process is irregular. Referring to page 33 of R, where Minister Nqakula on 15 May 2014 directs that staff in her office be permanently placed in on appropriate vacant and funded posts on the staff establishment, Ms. Muregu confirmed that she was aware of the document, however, did not see approval of anyone being appointed in a vacant and funded post. She also added, however, that she was appointed after this date, as such if there was such an approval, she did not deal with it.

[19] Ms. Muregu testified further that for one to be appointed as director at Level 13 they would need to possess an NQF Level 7 qualification and five (5) years' experience at middle management (DD), while for a chief director you would have to possess an NQF Level 7 qualification with five (5) years' experience as a director. Referring to para 3.1 of page 38 of R, she explained that a person seconded from one department to another cannot be appointed permanent on arrival in the department seconded to, however, an employee can apply for a transfer. Referring to page 44 of R, a 22 July 2014 communication written by one of her subordinates, Mr. C.M. Nqeto, regarding Ministerial appointments at the 1<sup>st</sup> Respondent and in terms of which a submission is prepared in line with applicable policy considerations to give expression to the directives by the Minister for review of the current ministerial post structure and her requirements for staffing and appointments in the Ministry, Ms. Muregu

confirmed that she was au fait with section 7A of the Public Service Act. Regarding the proposed establishment design and staffing and appointments based on that proposed establishment in the Ministry referred to in the communication, she submitted that she has not seen any laws that would allow the structure to be “ballooned” without following those prescripts. Referring to page 83 of R, a letter by the Minister to Lt. General Yengeni, regarding the staffing of Ministry posts, transfer of certain employees, and abolishment of certain posts in the Ministry for the optimization of her office, Ms. Muregu explained that she played a part in the preparation of the submission to appoint officials who will form part of the sixth (6<sup>th</sup>) administration and issuing appointment letters upon their arrival.

[20] Ms. Muregu testified further that she prepared the 02 July 2019 submission to the Minister for the appointment of officials in the private and administrative offices (page 89 of R) in terms of the Guide for Members of the Executive (para 3 of page 90), which is the Ministerial Handbook after it was revised for 2019. In terms of the table listing personnel to be appointed in the private office, Ms. Morobi’s salary level was prescribed at L11 for a person appointed as Community Outreach Officer, and as explained in para 8 (page 92), she noted that Ms. Morobi was currently on salary level L14, which was not in line with the job evaluation of the post, as such it would have been irregular to keep her at that level and misleading to the Minister. The same consequence would arise in the case of the Registry Clerk if left at salary level L10 as opposed to the prescribed L7. She explained that Mr. Ngobese was appointed in terms of regulation 57 (2) to (6) (para 6 of page 91). In terms of para 7 the Minister was advised to appoint the employees for a period not exceeding twelve (12) months whilst approval is sought from the DPSA for additional staff based on the Special Needs of the Office of the Minister. Ms. Muregu explained that special needs are contemplated by regulation 57 as the need to increase in capacity of the establishment and during that period there was a need for the Minister’s security detail to be supplemented in terms of VIP protectors and a protocol officer based on the functions she was performing. These officials were therefore appointed additionally to the establishment as the minister had the authority to approve those appointments.

[21] Still on the July 2019 submission, Ms. Muregu testified further that it was signed by Lt. General N.E. Yengeni, the Chief of the Human Resources Division at the time, and Dr. S.M Gulube, the Secretary for Defence (DG) as the Head of Department. The Minister also approved the submission on 11 July 2019, and it was acted on. The officials mentioned in the submission were recommended for appointment on a twelve (12) month basis and contracts and appointment letters were issued to them in line with the approval of the Minister. In this regard she referred to page 95 of R, which is the appointment letter issued to Ms. Morobi as Chief of Staff in the Ministry of Defence, Salary Level 14, on a contract linked to the term of Office of the Minister as of 1 August 2013. Ms. Muregu explained further with reference to the appointment letter issued to Mr. Kumalo dated 21 July 2014 that for a person who came with the Minister to the department, the Minister can appoint them in terms of Regulation 66. While she had not joined the 1<sup>st</sup> Respondent at the time this particular appointment letter was issued, she submitted that in her whole career she has never seen the words “permanent appointment additional” in any legislation, so she did not know what that portion meant. She submitted further



para 2 provides that the appointment was in terms of section 9 of the Public Service Act and Chapter 1, Part VII, C.1 B.1 (a)(i) of the Public Service Regulations, which to her meant that the appointment was still linked to the term of the Minister. She held the same view with regard to the 2014 appointment letter issued to Ms. Morobi. She submitted further that for Ms. Morobi's appointment to be permanent as Chief Director she would have applied for a vacant funded advertised post, interviewed, underwent competency assessment, and if recommended to be the suitable candidate, approved for appointment in terms of a letter that says she is appointed in terms of section 11 of the Public Service Act, or if she requested a horizontal transfer to this department having been a Chief Director in another.

[22] Ms. Muregu testified further that Mr. Ngobese was nominated, as he didn't go through the recruitment process, to support the Minister in the sixth (6<sup>th</sup>) administration. He was appointed in terms of the appointment letter dated 1 July 2019 as Head of Security in the Office of the Minister for a period of twelve (12) months in line with regulation 57(2) (page 117 of R). The benefits listed in the appointment letter would not have applied to anyone not appointed in the Office of the Minister. The fact that Mr. Ngobese alleged that he was also permanent implied that he would have also undergone the process outlined above in respect of Ms. Morobi, although at his level a competency assessment would not have been required. Ms. Muregu explained that in order to know that a post is vacant and funded, they draw a persal report which will reflect the details of the post in terms of the post tile and usage number and send the request to the HR Strategy and Planning directorate to provide financial authority. A post cannot be advertised without this information and the fact that such information does not appear on page 117 is because Mr. Ngobese is not in the post. Ms. Muregu testified further that when it was announced that Minister Nqakula will become the speaker, she drafted letters of contract termination for Ms. Morobi and others in line with the 2019 appointment letters.

[23] Ms. Muregu testified further that prior to the letters of termination being issued and as part of the exit process, they met with the employees on two (2) occasions for career interviews (page 121) because the 1<sup>st</sup> Respondent wanted to try and utilize them before they can be terminated. Letters were sent to services and divisions of the 1<sup>st</sup> Respondent (page 119 of R), informing them that of the officials who had served in the Office of the Minister and their respective experience and qualifications, and requesting that they identify where these officials could be utilize in the meantime while they were embarking on their recruitment process. The services and divisions were not prepared to utilize the officials but gave no reasons as to why. They then also engaged the 2<sup>nd</sup> Respondent with the view to returning them to the 2<sup>nd</sup> Respondent the four (4) officials who were saying they were permanent there; however, the 2<sup>nd</sup> Respondent was not prepared to take them back stating that the 1<sup>st</sup> Respondent had committed to absorb the officials permanently to the structure in 2014. Ms. Muregu submitted further that the career interviews were meant for the Applicants to indicate if they have identified where they can be utilized and to provide specific information outlined on page 121 by 31 January 2022. None of the Applicants submitted the information requested. Referring to page 196 of R, a letter from the Minister of the DPSA dated 18 June 2020, Ms. Muregu testified that they had requested the Minister of the DPSA to continue with the employment of some of the officials who were appointed on a 12 months basis, however, they were not

expecting that the DPSA would also remind them that they cannot transfer any of those employees back into the department or any other department without complying with Regulation 65.

[24] Brigadier General. **Monica Leketi was the second witness** to testify in support of the Respondent's case. She is currently the Director: Career Management for SANDF (uniformed) members, but prior to the appointment of Ms. Muregu she was also responsible for Public Service Act personnel since 2017. Referring to page 75-82 of R, she testified that she received instructions and requests to clarify the suffixes of personnel in the Office of the Minister. She explained that at the 1<sup>st</sup> Respondent, all personnel including uniformed members and those working in the Ministry appointed in terms of the Public Service Act, are allocated different suffixes. The Applicants from the 2<sup>nd</sup> Respondent were receiving all the benefits as public service members, so when they came to the 1<sup>st</sup> Respondent, those that had posts were allocated the suffix "CA", which is meant to attract the pension benefit. The suffix "CB", however, is allocated to a member who does not have a post, but who also has a pension benefit, whereas "CJ" is for those members who do not contribute towards a pension. Referring to page 76, she explained that SMS members are normally treated separately from those from levels 5 – 12, so Category 1 spoke to SMS members, while Category 2 spoke to levels 5 – 12. The two categories, however, spoke to the same thing, only for different classes of employees.

[25] Brigadier General Leketi testified further that she found the officials in the Office of the Minister and couldn't know because her office does not deal with recruitment, only with members who are revolving within the organization. What she knew, however, was that the officials were linked to the Ministerial Handbook. She explained that their persol system and data integrity system does not make provision for members linked to the Ministerial Handbook and that when the persol system is populated, a source document is used for capture by the acquisition section, and using the information before them and when they find that you need to contribute to pension, they allocate a suffix. Based on the suffix allocated, the system programmatically allocates a discharge date and if your suffix is "CA" or "CB", it will generate an end date applicable to your pension date based on your age as it would for any other person. For the suffix "CJ" they will require to know when your contract is coming to an end. She explained further that if the appointment is linked to the Ministerial Handbook and there are source documents that cannot be loaded on persol, when the Minister is reshuffled or their term ends, they will be informed. The persol system is not linked to those events when they happen, but only allocates the suffixes.

### **Subpoenaed Witnesses**

[26] Ms. **Nadia Prinsloo was the first subpoenaed witness** to testify. She is the ASD: Placements, responsible for transfers and secondments within the 2<sup>nd</sup> Respondent. She confirmed that she was familiar with the cases of Mr. Kumalo, Ms. Morobi, Mr. Ngobese and Ms. Loji, and explained that they were firstly seconded in 2012 to the 1<sup>st</sup> Respondent with the Minister of the 2<sup>nd</sup> Respondent at that time, Minister Nqakula. While she did not have the Applicants' persol reports in front of her, she explained that in terms of Bundle A3, it was stated that the Applicants should be employed back into the 2<sup>nd</sup> Respondent since they were interdepartmentally

transferred in 2014, and only permanent employees can be interdepartmentally transferred. On the letter from Vice Admiral Kubu dated 25 February 2022 requesting that the four (4) officials be returned to the 2<sup>nd</sup> Respondent (1 of A3), she referred to para 3 where it is stated that the 2<sup>nd</sup> Respondent had requested the 1<sup>st</sup> Respondent to permanently absorb the officials in a 27 May 2014 and that no further correspondence to this effect was approved for inter-departmental transfer as not suitable posts were available at the time. She disputed this by referring to pages 23 onwards of A3, which were appointment letters received from the 1<sup>st</sup> Respondent after requesting the 1<sup>st</sup> Respondent to either return the officials in 2014 or absorb them (page 18 of A3), and in terms of that document the officials were interdepartmentally transferred. Accordingly, the 2<sup>nd</sup> Respondent replied to Vice Admiral Kubu's letter that the time had lapsed and that the officials were interdepartmentally transferred (pages 3-5 of A3). Ms. Prinsloo submitted that if permanent employees were seconded to the office of the Minister, they must be sent back to their posts within the department when the term of the Minister lapses.

[27] Ms. Prinsloo testified further, with regard to the secondment agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent involving Mr. Kumalo (page 10 of A3), that, in terms of clause 2.6, during the term of the secondment the amount paid to him by the 2<sup>nd</sup> Respondent was claimed from the 1<sup>st</sup> Respondent. In terms of clause 2.4, the 2<sup>nd</sup> Respondent continued to remunerate him according to his current level 11 and benefits applicable to his post, while the difference between that and the remuneration during his secondment was paid by the 1<sup>st</sup> Respondent. After the interdepartmental transfer of 2014, the 1<sup>st</sup> Respondent no longer claimed from the 2<sup>nd</sup> Respondent. She explained further that he was seconded for the term of the Minister and when that term ended, the secondment agreement also ended. When the Applicants were interdepartmentally transferred in 2014, they were terminated on the persol system of the 2<sup>nd</sup> Respondent. Ms. Prinsloo explained that Mr. Kumalo's position was definitely filled since he had vacated the post. If the post had been filled under normal secondment, however, what would have happened is that the 2<sup>nd</sup> Respondent would have had to find a position equal to his post and place him because an employee retains their terms of employment and level and a permanent employee cannot be changed to a contract employee. Ms. Prinsloo conceded that page 1 was directed at Ms. Ramulifho (CDC:HR) and that page 3-5 was her response, as such she would be the one to talk to those documents. She explained, however, that in 2022 they had meetings with Ms. Ramulifho as the newly appointed CDC and she agreed that this was the way to respond. Ms. Prinsloo confirmed that she did not have the information as to whether the four (4) Applicants had applied for posts prior to their secondment, all that she knew was that they came with Minister Ngakula. She confirmed their salary levels and positions at the time.

[28] Vice Admiral. **A.E Kubu was the second subpoenaed witness** to testify. He is the 1<sup>st</sup> Respondent's Chief of Human Resources. He testified that status of appointment of the Applicants was still in question, however, according to the records that he has, they were appointment permanent fixed to the term of office of the Minister of Defence and Military Veterans, as it is stated in their contracts. In principle this meant that when the Minister leaves, their appointments come to an end in terms of normal HR processes. He held that this meant that they were appointed on fixed-term contracts. He explained that he was aware of the fact that most

of the Applicants were seconded from the 2<sup>nd</sup> Respondent, where they were permanently appointed and held that he did not think the 1<sup>st</sup> Respondent was disputing that fact. He agreed and also disagreed with the testimony of Ms. Prinsloo that by law only permanently appointed employees may be seconded or transferred since that is dependent on the agreement between the two (2) departments. He agreed that when the secondment term ends the employees must be returned to their original employer. He explained that a letter was written to the 2<sup>nd</sup> Respondent stipulating that if they were seconded in line with the handbook of the executives they must return (page 159 of R). The reason the 1<sup>st</sup> Respondent terminated their contracts was because a secondment was not meant to be permanent since the Applicants were still permanently employed by the 2<sup>nd</sup> Respondent. Vice Admiral Kubu held that the four (4) Applicants were not employees of the 1<sup>st</sup> Respondent.

[29] Vice Admiral Kubu testified further the 2014 appointment letters still stated the same thing, that the condition of contract was linked to the term of the Minister, and he agreed that the 1<sup>st</sup> Respondent did not have a right to terminate their contracts, hence the process to return them to the 2<sup>nd</sup> Respondent was initiated. However, the 2<sup>nd</sup> Respondent contradicted what they were saying and also cited the period the Applicants were with the 1<sup>st</sup> Respondent as reasons they could not be taken back. He confirmed that the two departments had signed a secondment agreement. With regard to those Applicants that did not come from the 2<sup>nd</sup> Respondent like Ms. Peters and Ms. Sindane, Vice Admiral Kubu explained that when you are appointed in line with the appointment by the executive in terms of the Ministerial Handbook, you are appointed to the term of Office of the Minister, which is not permanent but fixed. The only people who would stay in the department when the Minister leaves would be those seconded to the Office of the Minister but were permanent in the department having been appointed in positions for which they had applied. He conceded that secondment letter regarding Ms. Sindane dated 08 April 2015 (page 87 of A), a document which he has never seen before, could be read to mean that she was an employee of the 1<sup>st</sup> Respondent, however, he used to letter dated 19 March 2015 (page 89 of A), and admitted that he was only involved with this process when the Minister was leaving and may not have all the answers to some of issues causing this confusion. He also admitted that if there was one employee that might have been permanent with the 1<sup>st</sup> Respondent coupled with those from the 2<sup>nd</sup> Respondent, that might have been an oversight.

[30] Vice Admiral Kubu testified further that the termination letters of the Applicants (pages indicated that their permanent appointments were deemed irregular because they did not apply for posts. He held the view that the process for correcting irregular appointments (para 6.2 of page 164 of A) was not applicable to fixed-term contracts. He conceded that the termination letters did not mention fixed-term contract but referred to permanent appointments. With regard to his memorandum on page 119 of R, he explained that this was a difficult decision for anybody to make since the Applicants had been with the 1<sup>st</sup> Respondent for a long period, while he was also mindful of the confusion in terms of the type of appointment, which was also created by the suffix situation. The fact of the matter was that each Minister that is appointed comes with his/her own people in terms of the guidelines, so there was no way that the Applicants could remain in the office with the current

Minister. So, he was trying to do was to see if the Applicants could possibly be utilized within the 1<sup>st</sup> Respondent, hence he used the words “possible utilization”. Meaning that they were going to look at the possibility of finding out if there are posts that they can be accommodated in, taking into account the profile and requirements of the post, in the department, not just the Office of the Minister, subject to the recruitment processes. Vice Admiral Kubu also held the view that section 8 of the Public Service Act says what is says in respect of permanent additional to the establishment, however, the way the 2014 appointment letters were drafted may have meant different things to different people.

- [31] Vice Admiral Kubu testified further with regard to the 11 July 2019 submission (page 89 of R) that the submission made mention of Mr. Kumalo’s name, as such a formal offer like the one issued to other members should have been given to him. He also held the view that the fact that it mentioned him and the fact that he was still in the Office of the Minister in the sixth (6<sup>th</sup>) administration meant that he still had a contract. He conceded that there might have been administrative errors if he didn’t receive it and that this would actually mean that Mr. Kumalo did not have a contract with the 1<sup>st</sup> Respondent if there was no acceptance on his side. Vice Admiral Kubu testified further that he would not have drafted the 2014 appointment letters the way they were drafted. He also held the view that the word permanent therein implied that it was unknown how long the term of the Minister was going to be. He testified that the current Minister of the 1<sup>st</sup> Respondent was Minister Thandie Modise and that he could only advise her in terms of qualifications in terms of the public service regulations, etc, but cannot tell her who to appoint. He explained that the formal process that he had been questioned on was not within his domain. He explained further that when he was appointed in 2019 Minister Mapisa-Nqakula’s staff was already in place and he was not part of the process of the appointment. He explained further that he has not seen any appointment letters to the effect that the Applicants coming from the 2<sup>nd</sup> Respondent were appointed permanently by the 2<sup>nd</sup> Respondent, as such he could not speak to the process followed by the 2<sup>nd</sup> Respondent.

## Argument

### Submissions for the Applicants

- [32] On the procedural fairness of the dismissal, Mr. Ntwampe argued that the Respondent terminated the permanent employment contracts of the Applicants without following due process as required by law. While Vice Admiral Kubu had testified that there was no need to follow process on account that the Applicants were employed in terms of fixed-term contracts, this view is challenged in light of the letter from the Respondent to the DCS stipulating that Ms. Morobi, Mr. Kumalo, Mr. Ngobese, and Ms. Kweyiya were appointed permanently in the DCS prior to their secondment to the Respondent (page 159 of R). Further reference is made to page 160 on the same letter, in which it was stated that since the DCS had confirmed their permanent appointments in the office of the executive authority in the DCS, it was therefore proper that they be returned to the DCS on the same conditions they occupied prior to the secondment. Further reference was made to appointment letters issued by the Respondent to the effect that they will be permanently appointed additional to the establishment

and then seconded to the Minister (pages 20 – 41 of A3), which supported the testimony by Ms. Prinsloo, with reference to the DCS's response letter to the Respondent (page 4 of A3), that the Applicants could not be absorbed back to the DCS in light of those appointment letters. It was further argued that Vice Admiral Kubu was unable to refer the tribunal to any fixed-term contracts of the Applicants and that his view that their ordinary appointment letters were in fact fixed term contracts was a misinterpretation.

[33] Mr. Ntwampe pointed out that under cross-examination Vice Admiral Kubu conceded that the termination of Ms. Nsindane and Ms. Peters, whose secondment letters stipulated that they had been appointed in permanent positions in the Respondent and seconded to the office of the Minister (pages 87 and 79 of A respectively), was an oversight by his office and that they had not checked the status of their employment correctly. He further argued that Vice Admiral Kubu could not substantiate the irregularity deemed in the permanent appointments mentioned in the Applicants termination letters as they appear on pages 164 – 171 of R, while the letters themselves did not mention that they were terminating fixed-term contracts. Mr. Ntwampe argued that the evidence therefore demonstrated that the Applicants had established a dismissal and that such dismissal was without a fair reason, nor were the Applicants afforded an opportunity to defend any allegations against them if it was the Respondent's view that they were blameworthy or had a case to answer.

[34] On the substantive fairness of the dismissal, Mr. Ntwampe argued that Ms. Muregu conceded that the appointments of the Applicants as per the submission of 22 July 2014 (pages 44 to 53 of A) were approved and permanent in nature as they coincided with the term of the Minister, although she also considered the appointments to have been irregular. Ms. Muregu also conceded that the Applicants' termination letters were not signed by the Minister as required by law. Ms. Muregu also conceded that the Respondent sometimes makes mistakes with regard to the provision of the Public Service Act for which the Applicants were appointed, when referred to the appointment letter of Ms. Kweyiya, which erroneously stipulated that Ms. Kweyiya was section 12A(3) (a) (b) (c) of the Public Service Act (page 105 of R). Mr. Ntwampe pointed out that Section 12A is applicable to special advisor, whereas Ms. Kweyiya was appointed as Cabinet Liaison. Mr. Ntwampe pointed out that in terms of Regulation 66(1)(b) of the Public Service Regulations, as referenced in the letter from DPSA (pages 196-197 of R), *an executive authority may only fill vacancies in the office of the executive authority or Deputy Minister by means of: (b) a transfer in terms of section 14 of the Act, provided that the employment status of the transferred employees as permanent or temporary, as the case may be, shall remain unaffected by the transfer.* Mr. Ntwampe held that the Respondent did not challenge Ms. Prinsloo's testimony that only permanent employees can be transferred and that after the term of the Minister has lapsed the Respondent was supposed to transfer them back into the Department of Defence and Military Veterans as opposed to terminating their contracts.

[35] Mr. Ntwampe argued further that Brigadier General Leketi confirmed the status of employment in terms of the report she generated (pages 75 – 82 of A5). In terms thereof, she explained that Categories 1 and 2 employees with the suffix CB are those who are appointed permanently but not in any post, otherwise their

suffix would have been CA. Their term of office would end on their pension date. She further explained that with regard to Category 3, those employees with the suffix CB, but appointed on contracts linked to the term of office of the Minister, their exit date was 30 June 2019. Mr. Ntwampe argued that the fact that none of the Applicants exited on 30 June 2019 was an indication that they were permanently appointed. Mr. Ntwampe held further that assertion that appointments additional to the establishment are irregular is incorrect and misleading because section 8(1)(a)(b) of the Public Service Act makes provision for such appointments. Mr. Ntwampe referred to paragraph 1.3 of the PSC Guide (page 157 of A), which provides that *irregular appointments or promotions are potentially unlawful. It was found in the **Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (2013) ZACC 49; 2014 (3) BCLR 333 (CC)** that appointments made irregularly are not automatically null and void. It was further held that in this case that not only court can grant a “just and equitable” order of section 172(1)(b) Constitution, when considering the consequences of declaring a decision unlawful. Until a court pronounces on the validity of the act (the appointment), the act exists in fact and has a legal effect in terms of which legal consequences will continue to exist.* The process prescribed in paragraph 6.2 (page 164 of A) for remedying irregular appointments was not followed as confirmed by the witnesses of the Respondent, which proves that there were no irregular appointments and that the Applicants were dismissed.

#### Submissions by Mr. Kumalo

- [36] Mr. Kumalo argued that he was permanently appointment as Deputy Director: Administration, Salary Level 11, at DCS with effect from 3 October 2011 as per page 77 of R, and that this was conceded to by Vice Admiral Kubu in that the DCS had confirmed his permanent appointment prior to his secondment to the Respondent (page 159 of R). Vice Admiral Kubu also agreed that the submission for his transfer and appointment at the Respondent in 2014 (pages 44-54 of R) was approved by the duly delegated authority and was valid, which submission was meant to give expression to the then Minister’s directive that he should be transferred from DCS and appointed in a permanent post additional to the establishment of the Respondent (pages 36-39 of R). The Respondent then offered him a position as Director at Salary Level 13 through an appointment letter dated 21 July 2014 (page 98 of R), signed by the Secretary for Defence (DG) as the delegated authority, which stipulated his permanent appointment, the relevant remuneration and date of appointment with effect from 1 June 2014. Such an appointment could only be affected after the separation process at the DCS was completed (page 99 of R) and has been the only basis for the continued employment relationship with the Respondent.
- [37] In illustrating procedural unfairness, Mr. Kumalo argued further that the HR Division, represented by Major General Mkhize made a commitment that it honestly intended to initiate the standard practice of reassigning permanent personnel to relevant vacant and funded posts within the Department after the end of a secondment to the Ministry (page 173 of R); while overtly making statements to undermine his permanent appointment in the Respondent (page 119 of R). The Chief Human Resources issued a confusing memo to various divisions within

the Respondent wherein his employment was misrepresented as having lapsed on 06 September 2021, and yet requested DOD Divisions to identify vacant and funded posts to absorb him for an undefined period, which Vice Admiral Kubu confirmed was intended to be permanent in nature. In what Mr. Kumalo considered an abrogation of its responsibility as per page 123 of R, the Respondent decided, via a similar letter addressed to him, to unfairly delegate its HR responsibility of reassigning personnel to appropriate vacant and funded posts within the Department after the end of a secondment to the Ministry as per the norm (par 8 on page 173 of A), when the incoming Minister indicates that she/he would not be requiring the services as support staff that was seconded or transferred during the term of an outgoing Minister. Mr. Kumalo pointed out that he was expected to seek these vacant and funded posts, together with written agreements of intended utilization, during a period where most managers were on vacation, without the assistance from the HR division and with their access having been deactivated. He further highlighted that Ms. Muregu's testimony that as Applicants they did not respond to the letters dated 23 December 2021 (pages 121-130 and 135-136 of R) related to their possible utilization in structures within the Department was unsupported by the relevant responses and acknowledgement of receipt thereof by Ms. Muregu (pages 119-132 of A).

[38] In illustrating substantive unfairness, Mr. Kumalo argued further that Ms. Muregu suggested that he accepted a less favourable appointment on contract linked to the term of the former Minister under the sixth (6<sup>th</sup>) administration, whereas no copies of the claimed appointment or acceptance therefore by himself was furnished at arbitration. Mr. Kumalo argued that the purported new 2019 appointment was an ultra vires invention meant to support the HR division's narrative that he had naively accepted the new appointment on a contract linked to the term of the former Minister. In this regard he referred to the former Minister's directive, wherein under the paragraph, Staffing of Ministry Posts, she stated that there were no new appointments on this list and the post descriptions remain as currently reflected on HR records (page 83 of R). He pointed out that during this change over period, the employment service of four (4) support personnel, who had been appointed on a contract linked to the former Minister's term under the fifth (5<sup>th</sup>) administration, were terminated (page 136 of A). Mr. Kumalo argued further that the Respondent failed to prove that there was a meeting of the minds by the relevant parties to the 2019 employment contract claimed by the Respondent in line with **Universal Church of the Kingdom of God v Myeni & Others**, the absence of which invalidates the Respondent's assertion that it had substantively fair reasons to terminate his services because he was appointed on a contract of employment which had "simply come to an end" having been linked to the term of the former Minister.

[39] Mr. Kumalo argued further that the claim by the Respondent that he had been on secondment from the DCS since 2012 could not be sustained in light of Clauses 2.1, 2.4, and 2.9 of the secondment agreement between the Respondent and the DCS (Bundle A3). He pointed out with reference to clause 2.4 that he has been remunerated by the Respondent at Salary Level 13 in line with his appointment letter dated 21 July 2014 (page 98 of R) uninterrupted up until the termination of his employment contract on 31 March 2022. Mr. Kumalo further highlighted that, contrary to the approach proposed in **Khumalo and another v Member of the**



**Executive Council for Education**, Vice Admiral Kubu affirmed that the Respondent had not conducted any investigation into the validity of his 2014 appointment, nor did it approach the Office of the Public Service Commission as per DPSA Circular No HRP 8 of 2018 (paragraph 4 of page 173 of A). Mr. Kumalo argued that the Respondent was aware that a review of the administrative act may be the only legal way to declare his appointment irregular and that until a court pronounces on its validity, it existed in fact and has legal effect. He argued further that the Respondent preferred to deny its own pronouncements, reference for instance to Brigadier-General Leketi's attempt to deny her clear written confirmation in paragraph 89 (a) and (b) of the memo on page 93 of A to the effect that he was appointed permanently and that his term of service ends on his pension date. Further reference was to Vice Admiral Kubu's attempt to recant that he suggested that the Respondent had determined that "the entire process followed by the DCS and the DOD to confirm his permanent appointment did not follow the prescribed process and therefore deemed irregular" (page 165 of R). The Respondent therefore sought to circumvent the relevant legal process to declare an alleged irregular appointment invalid and instead opted to prove the supposed anomaly at the incorrect forum.

#### Submissions for the Respondent

- [40] The Respondent argued that when Minister Mapisa Ngcakula assumed her role as the Minister of Defence and Military Veterans on 12 June 2012, all the Applicants were appointed in terms of Section 9 of the Public Service Act, Regulations 66 of the Public Service Regulations of 2016, and as amended in terms of Government Gazette 42223, and Chapter 8 of the Ministerial Handbook. The Minister's term of office came terminated on 05 August 2021. Vice Admiral Kubu as the Chief HR reported to his post on 01 November 2019, therefore at the time of the initial employment of the Applicants in the former Minister's office, he was not privy to the conditions of their employment contracts and any other modifications that occurred thereafter. When it was time for the contracts to be terminated, it came to Vice Admiral Kubu's attention that some of the Applicants claimed to be appointed permanently in the Department of Defence. Vice Admiral Kubu needed to apply his mind, so in September 2021 he consulted with the employees in the office of the Minister and further invited some of the affected employees for career interviews in order to match their qualifications and skills to any available posts for possible utilization within the department. The Respondent points out that it should be noted that there was no need for this process to be followed in light of the facts and applicable law managing the Applicants' contracts of employment. Vice Admiral Kubu further wrote to all services and divisions in the Department on 20 October 2021 (page 119-120 of R) requesting they present vacant funded posts to be matched with the affected employees' qualifications and profiles for possible utilization, and only received a response from the Chief Defence Intelligence Division.
- [41] The Respondent submitted further that CHR wrote to all the affected employees, including the Applicants, on 23 December 2021 (page 121-138 of R), advising them to identify suitable vacant posts where they could be appointed subject to the relevant legal framework. On 26 January 2022 the Applicants responded (page 139-150 of R) denying that they had been appointed on contracts linked to the term of the former Minister as they

were permanently appointed in the Department of Defence. On 25 February 2022 CHR wrote to the Acting National Commissioner of the DCS specifying an intention to return the four (4) Applicants that were appointed by the DCS, and on 3 March 2022 advised the Applicants who were seconded from DCS were advised of that intention (page 151-158 of R), while those who were not were issued with notices of termination. On 18 March 2022 the DCS responded that the Applicants' services were on their system in 2014 (page 161-163 of R), and on 28 March 2022 the Applicants were issued with letters terminating their services with effect from 31 March 2022 (page 164-171 of R). The Respondent argued that Vice Admiral Kubu and Ms. Muregu elaborated on the words "permanent employment deemed irregular". The Respondent argued further that the Applicants' contracts were supposed to have been terminated in September 2021 and that the fact that they were only terminated in March 2022 was not an indication that it had been accepted that they were permanent employees since the delay was occasioned by the process undertaken to affect their possible utilization in the department under the circumstances.

[42] The Respondent argued further that the issue of the alleged 'permanent employment', which stemmed from the so-called Ministerial directive and the subsequent letters issued in 2014, was the root cause of the dispute. The Respondent pointed out that in terms of section 9 of the PSA, appointments in the Minister's office are the Minister's prerogative and that CHR only facilitates the administrative function in that regard. Whereas normal appointments within the structures of the Department are the responsibility of CHR and must comply with Regulation 65 and 67 of the PSR 2016, all the Applicants confirmed that they did not respond to any advertisements of posts, nor did they attend any interviews. Their contracts of employment, having been accordingly linked to the term of the Minister, naturally came to an end when the Minister was reshuffled to a new portfolio, therefore there was no dismissal. The Respondent argued that if the Applicants were permanently employed in 2014 through letters appearing on pages 98-109 of R, such letters would reflect that they had been placed in vacant funded posts, with post numbers, post descriptions, and the units where the posts are located and the service or division to which the posts belong. The Respondent argued that no evidence has been led by the Applicants to indicate that they formed part of the DOD structure, which showed that they did not form part of the DOD structure. The Respondent pointed out that the Applicants never challenged the manner in which the letters were drafted upon their receipt.

[43] The Respondent argued further that the nature of appointments in that it states "*permanent additional to the DOD establishment and seconded in the post of.... for the term of office of the Minister....*" left so many questions as all those words could not fit in one sentence since these are three processes that are regulated by different provisions of the legal framework in the Public Service. The Respondent pointed out that Vice Admiral Kubu and Ms. Muregu confirmed that there was no such appointment in the whole public service and argued that such inscription was to indicate that the Applicants were permanent the Minister construing that the term of office of the Minister was not known at that moment. As such in simple reading the letters issued in 2014 were irregular as they are not in line with the Public Service Act and the Public Service Regulations, however, such inscription had all the *bona fide* in the circumstances. The Respondent argued further that none of the

conditions contemplated in Regulation 57 of the Public Service Regulations existed in the Applicants' situation which could have prompted the Minister to appoint them additional to the DOD structure in terms of that regulation, which stands to conclude that their appointments were regulated correctly by the Ministerial Handbook as is the case at the moment. The Respondent argued further there was no need to approach the OPSC or the MPSA to investigate any irregular appointments because the Applicants' employment in the Office of the Minister was not irregular, nor were they dismissed because it was discovered that their appointments were irregular as it remains the Respondent's case that their contracts were terminated on the basis that the term of the Minister came to an end.

[44] The Respondent pointed out that in 2019 the former Minister upon entering the sixth (6<sup>th</sup>) administration instructed CHR to draft a submission for the re-appointment of officials in her office, and the submission was compiled by Ms. Muregu (page 89-93 of R), approved by the Minister and appointment letters were issued indicating that the employees were appointed on contracts linked to the former Minister's of office (pages 110-118 of R). The Respondent argued that the submission nullified the previous directive of 2014 and that the Mr. Kumalo's argument that he did not receive nor sign acceptance of the letter of appointment following the 2019 submission did not exonerate him from the authority of the submission in which his name was listed (page 89-93 of R). The Respondent pointed out further that Mr. Kumalo did not provide proof of acceptance of the 2014 appointment letter, while the fact that he was still in the Minister's office in 2021 suggested that he accepted the appointment letter of 2019 since there was neither any proof that he declined the appointment. The Respondent argued further that the argument that Ms. Loji did not accept the conditions on the letter on pages 112-113 of R because she accepted a secondment was a non-starter since she signed to accept the contents of the letter, which could not be changed by her writing secondment by hand as she did not demonstrate the authority to make such changes. The Respondent therefore acknowledged on the appointments that occurred in 2012 and 2013 for Ms. Loji and the appointments that took place in 2019.

[45] The Respondent argued further that in deciding whether the Applicants were appointed permanently or not consideration must be given to the laid down procedure in the PSA, PSR, Collective Agreement and the positions some of the Applicants were occupying in comparison to the qualifications they possess. The Respondent pointed out that Ms. Morobi was the Chief of Staff, a position equivalent to Chief Director (salary Level 14) when she could even remember when she did her matric, which suggested that she did not have a matric certificate. The Respondent pointed out that its witnesses testified that a minimum qualification of NQF Level 7 was required in this regard and argued that paying an employee the salary of Chief Director without a qualification would lead to public outcry. The Respondent argued further that Ms. Morobi's testimony should be treated with caution as she displayed dishonesty. Mr. Kumalo was also said to have been dishonest in his testimony as to how he came to be employed in the DCS because his testimony was contradicted by that of Ms. Prinsloo and he did not dispute it. The Respondent pointed out that Mr. Ngobese conceded that he was appointed on a contract linked to the term of the Minister and that it would lapse when that term ends, his only gripe having been that he was a loyal servant who was terminated without being afforded a hearing. The

Respondent argued that Vice Admiral Kubu afforded the Applicants the *audi alteram partem* opportunity prior to termination of their contracts. The Respondent argued that it was common cause that the four (4) Applicants moved with the Minister from the DOH to DCS to DOD in the same environment where appointments were effected in terms of the Ministerial Handbook. It was not clear as to which stage they became permanent as Ms. Prinsloo only speculated that if they were transferred, they must have been permanent.

- [46] The Respondent argued further that Brigadier General Leketi, the writer of the letter on pages 69-82 of R, demonstrated that the suffix "CA" is attached to employees who contribute and benefit to the pension fund in terms of the Pension Fund Act. She further explained that the DOD persal system did not have an option to capture employees who are on contracts linked to the term of office of the Minister as there normally is no end date in that regard and attaching the suffix "CA" automatically generates an end date of age 65. The Respondent argued that in the absence of evidence to the contrary, Brigadier General Leketi's testimony must be accepted as probable. The Respondent further objected to the admissibility of page 97-109 of A introduced by the Applicants as a persal printout because the authenticity thereof was not established by the Applicants. The Respondent argued further that three (3) of the Applicants with serial numbers 4,6 and 7, had applied for the posts in the Defence Intelligence Division following CHR's enquiries vacant funded posts, and attended interviews. These Applicants are still in the service of the DOD effective 01 June 2022 to 30 November 2024. The Respondent pointed out that Mr. Ngobese confirmed this evidence. The Respondent relied on case law<sup>1</sup> to demonstrate how the Courts have dealt with similar matters where selection procedures applicable in the Public Service were not followed. The Respondent argued that consequently it did not subject the Applicants to any form of unfair dismissal.

## ANALYSIS OF EVIDENCE AND ARGUMENT:

- [47] Section 192 of the Act reads as follows:
- 'Onus in dismissal disputes.** - (1) In any proceedings concerning any *dismissal*, the employee must establish the existence of the dismissal.
- (2) If the existence of the *dismissal* is established, the employer must prove that the *dismissal* is fair.'
- [48] In my analysis I also applied the principles set out by the courts on dealing with evidence and how much value to attach to evidence in determining probabilities. In **ABSA Brokers (Pty) Ltd v Moshwana NO and others**<sup>2</sup> the Court stated that a failure to cross-examine may, in general, imply an acceptance of the witness' testimony. In **Klaas and another v Eskom Holdings Ltd and others**<sup>3</sup>, the Court stated that appropriate / or considerable

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<sup>1</sup> Neo P.E. and four (4) others v Department of Premier Free State Provincial Division and others (2010) 3607/09; Khanyile v Minister of Education and Culture, KwaZulu-Natal and Another [2004] 4 ALL SA 442; Universities of the Western Cape & Others v Members of Executive Committee for Health & Social Services & Others (1998) 19ILJ 1083

<sup>2</sup> [2005] 10 BLLR 939 (LAC)

<sup>3</sup> (JR 251/2011) [2016] ZALCJHB 152 (handed down on 19 April 2016)

weight should always be placed on uncontested evidence. While in **NUM and another v CCMA and others**<sup>4</sup> the Court emphasized the importance of putting a version to the witnesses of the other side, since evidence cannot be accepted as uncontested in those circumstances. In **Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others**<sup>5</sup> the Court held that where a Commissioner is faced with two conflicting versions before him the Commissioner must make a finding on the credibility of witnesses and on the probabilities of the two versions, to determine where the truth lies. The Court further held that the credibility of a witness is in an inextricable manner bound to the consideration of the probabilities of the case, the Arbitrator should therefore resort to credibility where the probabilities fail to point which version embraces the truth more.

***Where the Applicants permanent employees prior to 2014?***

[49] Beginning the analysis by assessing the evidence led around the four (4) Applicants who originated from the 2<sup>nd</sup> Respondent seemingly makes more sense since the arbitration centered mainly around them, as a result the sequence of events was more clearly conveyed compared to the other Applicants, and I intend to tackle every question leading us to whether or not the Applicants were dismissed by the 1<sup>st</sup> Respondent in this manner. While Vice Admiral Kubu was not privy to any appointment letters of the Mr. Ngobese, Mr. Kumalo, Ms. Morobi, and Ms. Loji as evidence of their permanent appointments at the 2<sup>nd</sup> Respondent, he did hold the view that these permanent appointments were not disputed by the 1<sup>st</sup> Respondent. Granted he was not a witness called by the 1<sup>st</sup> Respondent, rather one who was subpoenaed, his testimony may have been the more impartial of any witness being led by either side having been free from the mandatory pre-testimony consultation witnesses who are called usually undergo. His testimony was in line with his letter to 2<sup>nd</sup> Respondent, the intention of which was to return the four (4) Applicants, in which he states that the 2<sup>nd</sup> Respondent confirmed that they were appointed permanently prior to their secondment. In cross-examination Mr. Kumalo testified that he was appointed in 2005 at Department of Home Affairs, resigned when was appointed by the 2<sup>nd</sup> Respondent in 2011 into a post that he had applied for and was found to have been the successful candidate. I submit that the 1<sup>st</sup> Respondent accepted this evidence, if only because it demonstrated that Mr. Kumalo was aware of how appointments are made in the public service, a key feature in the 1<sup>st</sup> Respondent's case. It is noteworthy that Mr. Kumalo did not dispute Ms. Prinsloo's testimony that they came to the 2<sup>nd</sup> Respondent from the Department of Home Affairs with the Minister.

[50] Mr. Ngobese in evidence in chief testified that he was permanently employed at Department of Home Affairs on 1 August 2001, and then he was transferred to the 2<sup>nd</sup> Respondent. In cross-examination he indicated that he had applied for his position and was appointed accordingly, however, he did not apply for his departmental transfer as he was only informed of it. He continued in cross-examination to confirm that while the position he had applied for at Department of Home Affairs was that of Security Officer, and in evidence in chief he had said that he was transferred to be a Correctional Officer at the 2<sup>nd</sup> Respondent, in cross-examination he explained

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<sup>4</sup> [2018] 3 BLLR 267 (LAC)

<sup>5</sup> [2003] (1) SA 11 (SCA) (handed down on 6 September 2002)

that on arrival he reported to the office of the Chief of Staff in the Office of the Minister, and that he was part of the VIP protection security detail of the Minister. Again, I reiterate that Ms. Prinsloo's testimony was not disputed that the Applicants came with the Minister from Department of Home Affairs, and Mr. Ngobese's evidence whether he was appointed in the 2<sup>nd</sup> Respondent, or the Office of the Minister is unclear. Ms. Morobi confirmed in her evidence that her move from the Department of Home Affairs to the 2<sup>nd</sup> Respondent was a lateral transfer on a permanent basis, still in the Office of the Minister. Her testimony corresponds with that of Ms. Prinsloo that the Applicants moved with the Minister from the Department of Home Affairs to the 2<sup>nd</sup> Respondent. Evidence regarding Ms. Loji's time at the 2<sup>nd</sup> Respondent and how her appointment came about was not heard and we know that she was one of the four (4) Applicants from the 2<sup>nd</sup> Respondent as she part of the group when the 1<sup>st</sup> Respondent sought to return them.

[51] Ms. Prinsloo did speculate that the Applicants must have been permanent employees of the 2<sup>nd</sup> Respondent, seeing as how they were transferred, conceding that she could not confirm for sure that they were permanent employees. Mr. Ntwampe correctly pointed out that the 1<sup>st</sup> Respondent did not dispute Ms. Prinsloo's evidence in this regard. It should be noted, however, that the 1<sup>st</sup> Respondent disputes that the Applicants were in fact permanently appointed in 2014, which would be the consequence of an interdepartmental transfer, as such failing to dispute that only permanent employees can be transferred is inconsequential. It seems, as argued by the 1<sup>st</sup> Respondent to some extent, that the four (4) Applicants moved with the Minister from the Department of Home Affairs to the 2<sup>nd</sup> Respondent on appointments effected in terms of the Ministerial Handbook. Regarding the private office staff complement, clause 1 of **Chapter 8 of the Ministerial Handbook** applicable at this time provides as follows:

'Executing Authorities may utilise the above-mentioned guideline for the Private Offices of Members provided that staff be appointed either:

- 1.1.1. on a contract linked to the political term of office of the Executing Authority or Deputy Minister concerned, as well as the contracts envisaged in section 12A (3)(a) of the Public Service Act and conditions laid down by Cabinet;
- or
- 1.1.2. as full-time public servants, provided that they utilise the job evaluation system and ensure that there are sufficient funds available on the approved budget of the relevant Department for the creation of post(s).
- 1.3. The Executing Authority may second personnel from components within the Department. The advantage of secondment is that staff members could return to their original components on the approved establishment without any burden to the Department.
- 1.4. The core staff will be determined by the relevant Executing Authority, who may decide on the creation and grading of posts as identified in their structure, based on proven needs and provided that sufficient funds are available in terms of the medium-term expenditure framework (MTEF) of the relevant Department. Regulations B.2 and F.1 of Part III, Chapter 1 of the Public Service Regulations, 2001 are applicable.

- 1.5. The organisational structure of a private office in support of a Member shall be determined after consultation with the Minister for Public Service and Administration in terms of Public Service Regulations, 2001 B.2 (a) and B.2A.'

[52] While the performance of the witnesses of the Applicants created the uncertainty as to their permanence at the 2<sup>nd</sup> Respondent, which was compounded by the fact that none of them provided appointment letters in this regard, a task which admittedly may have proven difficult considering how long ago this was, clarity was provided by documentary evidence in which the 2<sup>nd</sup> Respondent appears to claim them as permanent employees. In the 27 May 2014 letter by the 2<sup>nd</sup> Respondent National Commissioner at the time to the Secretary-General (DG) of the 1<sup>st</sup> Respondent at the time (page 28 of A3), the 2<sup>nd</sup> Respondent highlights the end of the secondment term of the support staff, a list that includes the four (4) Applicants, and emphasizes the importance that the current positions occupied by the seconded officials are available for the staff complement of the incoming Minister at that time. Ms. Prinsloo confirmed while being questioned by Mr. Kumalo that when the secondment term ended and the 1<sup>st</sup> Respondent confirmed that they had been absorbed, his post at the 2<sup>nd</sup> Respondent became vacant, was advertised and filled. In terms of the Ministerial Handbook at the time, there are no permanent appointments in the Ministry, only in a department, from which staff to occupy the office of the Minister may be sourced from a pool of permanent staff. The fact that the 2<sup>nd</sup> Respondent needed posts to become vacant implies that these Applicants were occupying posts on the 2<sup>nd</sup> Respondent establishment, which exist for the purposes of feeding the Ministry office staff complement.

[53] Ms. BP Nsindane's employment status appears to have been permanent with the 1<sup>st</sup> Respondent prior to 2014 when regard is had to the communication dated 08 April 2015 (page 87 of R), in terms of which she is seconded to the KZN regional office with effect from 1 February 2013, with emphasis being made that she remains an employee of the Department of Defence, employed permanently, while on secondment. The origin of Ms. Peter and Ms. Ketelo prior to 2014, however, was not adequately demonstrated through the evidence led by the Applicants. I submit that the reason it was important for the Applicants to prove that they have been permanent employees in the public service, despite the fact that they held the view that, as will be discussed below, they were also permanently employed by the 1<sup>st</sup> Respondent in 2014, is because of the sequence of events surrounding the movement of the Minister to whom they have been attached, which culminated in an event that saw the Minister, for the first time in a period that spans at least ten (10) years, leave a department seemingly without being able to bring them along, thereby calling into question their employment status where she left them. Some of the arguments advanced by the Applicants were that the 1<sup>st</sup> Respondent did not have a right to dismiss them, simply because they were permanent public service employees, not only because they allege to have been permanently employed by the 1<sup>st</sup> Respondent. The sway impressed by the Minister in each of these department clearly had the 2<sup>nd</sup> Respondent appoint the four (4) employees so as to accommodate the staffing needs of the Office of the Minister, and I submit that wherever the Minister went, as she insisted on bringing all these Applicants along, efforts were made to navigate a mine field of policy parameters in order to accommodate the Minister.

***Where the Applicants permanently appointed by the 1<sup>st</sup> Respondent in 2014?***

[54] The secondment of the four (4) Applicants from the 2<sup>nd</sup> Respondent in 2012 I submit was common cause. I have already referred to the end of secondment term letter, and it was not in dispute that between 2012 and 2014, these Applicants were no longer with the 2<sup>nd</sup> Respondent, but with the 1<sup>st</sup> Respondent. Some of the Applicants were issued with letters of appointments in July 2014, and except where they specifically contain information applicable to the relevant Applicant, read similarly as follows:

‘1. It is my pleasure to inform you that the Minister of Defence and Military Veterans granted approval for your permanent appointment additional to the DOD establishment and seconded to the Ministry for a period coinciding with the term of office of the Minister...

2. Your appointment is in terms of Section 12A (3) (a), (b) and (c) of the Public Service Act, 1994 and Chapter 1, Part VII, C.1.B.1 (a) (i) of the Public Service Regulations, 2011.

3. Your appointment details are as follows:

Rank: ...

Salary Level: ...

Nature of appointment: Permanent additional to the DOD establishment and seconded in the post of .... for a period coinciding with the term of office of the Minister N.N. Mapisa-Nqakula as Minister of Defence and Military Veterans...

[55] The letters were issued following the Ministerial directives beginning on page 44 of R, in which the request from the 2<sup>nd</sup> Respondent to accommodate the seconded personnel in the 1<sup>st</sup> Respondent and review organizational structure of the Office of the Ministry. It is apparent from the submission that the matter needed to be treated as urgent in order not to affect service delivery, and the policy considerations applied in an effort to give expression to the directive of the Minister were listed. Section 7A(1) of the **Public Service Act, 1994** provides that ‘An executive authority may only request the establishment of a government component in terms of section 7(5)(c) or (d) if the prescribed feasibility study is conducted and its findings recommend the establishment of such component. Section 8(1), regarding the **Composition of public service**, provides that ‘the public service shall consist of persons who are employed-

(a) in posts on the establishment of departments; and

(b) additional to the establishment of departments.’

Subsection (2) provides that ‘subject to the prescribed conditions, any person referred to in subsection (1) may be employed permanently or temporarily and in a full-time or part-time capacity.’ Section 9, which deals with **Appointments in public service**, provides that ‘an executive authority may appoint any person in his or her department in accordance with this Act and in such a manner and on such conditions as may be prescribed’.

[56] Part VII, C.1B.1 of the **Public Service Regulations, 2001**, prescribes as follows:



'An executing authority may only fill vacancies in the office of an executing authority or a Deputy Minister by means of-

- (a) an appointment in terms of section 9 for-
  - (i) the term of office of the incumbent executing authority or Deputy Minister which will terminate at the end of the first month after the month in which the term of that executing authority or Deputy Minister terminates for any reason; or
  - (ii) a period not exceeding three years;
- (b) a transfer in terms of section 14 of the Act, provided that the employment status of the transferred employees as permanent or temporary, as the case may be, shall remain unaffected by the transfer.'

C1.B.3 provides that 'Regulation 1/VII/C.1.B.1 shall not be construed as preventing the secondment in terms of section 15 of the Act or regulation B4.1, or an assignment in terms of section 32 of the Act, of a person to perform the functions of a post in the office of an executing authority or a Deputy Minister'.

[57] It should be noted that regulation cited above is similar to **Regulation 66 of the Public Service Regulations, 2016**, which provides that 'an executive authority may only fill vacancies in the Office of an executive authority or a Deputy Minister by means of:

- (a) an appointment in terms of section 9 of the Act for-
  - (i) the term of office of the incumbent executive authority or Deputy Minister which will terminate (efflux), at the end of the first month after the month in which the term of that executive authority or Deputy Minister terminates for any reason; or
  - (ii) a period not exceeding 3 years; and
- (b) a transfer in terms of section 14 of the Act, provided that the employment status of the transferred employees as permanent or temporary, as the case may be, shall remain unaffected by the transfer'.

Submitted for recommendation and approval in terms of submission were therefore the following (clause 18 of the submission):

'Posts at Salary Level 14. Ms P.A.M. Morobi is appointed permanently additional to the DOD establishment and seconded in the post of Chief of Staff in the MOD for a period coinciding with the term of office of the Minister...

Posts at Salary Level 13. Ms. J. Peter is appointed permanently additional to the DOD establishment and seconded in the post of Ministerial Liaison Officer (L13) linked to the term of office of the Minister of Defence and Military Veterans. No appointment letter will be issued since the post will remain...

Mr. N.F. Kumalo is appointed permanently additional to the DOD establishment and seconded in the post of Parliamentary Liaison Officer, MOD (L13) linked to the term of office of the Minister of Defence and Military Veterans...

Posts at Salary Level 12. Ms. B. Kweyiya is appointed permanently additional to the DOD establishment and seconded to the Ministry for a period coinciding with the term of Office of the Minister, as Cabinet Liaison Officer (Level 12)...

Mr. B. Ngobese is appointed permanently additional to the DOD establishment and seconded to the Ministry for a period coinciding with the term of Office of the Minister, as Head of Security (Level 12)..

Ms. B. Nsindane is a Deputy Director (Level 12) is appointed additional to the DOD establishment...

Posts at Salary Level 10. Ms. Ketelo is appointed permanently as Assistant Director Administration Level 10 additional to the DOD establishment and seconded to the Ministry for a period coinciding with the term of office of the Minister...'

[58] The permanent appointments additional to the establishment of the 1<sup>st</sup> Respondent in terms of the approved submission appear to have been in line with the **Public Service Act, 1994**, in that it makes provision for such appointments. It is not my view as argued by Mr. Ntwampe that they were then transferred since the term of the office of the Minister is mentioned, but were seconded to the Office of the Minister in terms of their appointment letters appears to have been in line with the **Public Service Regulations, 2001**, PART.VII C1.B.3, with their permanent appointment additional to the 1<sup>st</sup> Respondent having been confirmed. Perhaps Mr. Ntwampe is arguing that these Applicants were transferred from the 2<sup>nd</sup> Respondent, corroborating Ms. Prinsloo's testimony that an interdepartmental transfer took place. The positions they came to occupy were created in the structure of the Ministry, however, they were not on the establishment of the 1<sup>st</sup> Respondent, hence they were appointed additional to the structure. This is evident of the maneuvering the 1<sup>st</sup> Respondent did at the time to accommodate the Minister's directive, which was motivated by the fact that the 2<sup>nd</sup> Respondent had indicated that the secondment term had lapsed, as such these employees should either be returned to the 2<sup>nd</sup> Respondent, or the 1<sup>st</sup> Respondent must absorb them in order for their posts at the 2<sup>nd</sup> Respondent to become vacant. The appointment letters are clear that the Applicants it is only the secondment that is coinciding with the term of office of the Minister, as such they cannot be interpreted as implying a fixed-term contract. The fact that Vice Admiral Kubu was not there when the submission and the appointment letters were issued does not change the fact that this is what happened at the time. Neither does the fact that Ms. Muregu has never in her entire career seen appointment letters drafted in that fashion.

[59] In the case of Ms. BP Nsindane, the submission provided that she is appointed additional to the establishment of the DOD and that she is a Deputy Director, in this case the permanent aspect of the appointment is not included. I have already referred to the communication dated 08 May 2015 that confirms that she is permanent employee of the 1<sup>st</sup> Respondent and will remain as such in spite of her secondment. Her secondment letter is dated 19 March 2015 (page 89 of R) and it too shows that only her secondment is linked to the term of office of the Minister. I submit that the explanation by Brigadier General Leketi around the suffixes, whether in her memo or in the arbitration, is neither here nor there in light of my analysis above. Whether or not these Applicants were allocated suffixes that generated a pension date because they were permanent employees or because the persol system generated the pension date automatically since it does not make provision for employees appointed on contracts linked to the term of the Minister, the explanation by Brigadier General Leketi only served to clarify what different suffixes mean when the Applicants needed that clarity. It is therefore not my view that her explanation in the memo reinforces the fact that the Applicants were appointed permanently any

more than their appointment letters do, nor does it serve to invalidate said appointment letters. It is also my impression that the 1<sup>st</sup> Respondent conflates their view that the appointments were irregular with whether they were valid, and I submit that the two are separate.

***Where the Applicants' 2014 permanent appointments by the 1<sup>st</sup> Respondent irregular?***

[60] The Respondent argued that normal appointments within the structures of a department are subject to Regulations 65 and 67. **Regulation 65 of the Public Service Regulations, 2016** reads prescribes as follows:

- '65. (1) An executive authority shall ensure that vacant posts in the department are advertised, as efficiently and effectively as possible, to reach the entire pool of potential applicants, including designated groups.
- (2) An advertisement for a post shall as a minimum specify the job title, salary scale, core functions, place of work, inherent requirements of the job, including any other requirements prescribed in these Regulations.
- (3) A vacant post in the SMS shall be advertised nationwide.
- (4) An executive authority shall advertise any other vacant post, as a minimum, within the department, but may also advertise such post—
- (a) in the public service;
- (b) locally; or
- (c) nationwide.
- (5) When advertising outside the department, the department shall also advertise in the public service vacancy circular issued by the Department of Public Service and Administration.
- (6) An advertisement for a post shall not unfairly discriminate against or prohibit any suitably qualified person or employee from applying.
- (7) A funded vacant post shall be advertised within six months after becoming vacant and be filled within twelve months after becoming vacant.
- (8) An advertisement contemplated in subregulation (4) may be utilised to create a pool of potential employees for a period of not more than 6 months from the date of advertisement to fill any other vacancy in the relevant department if—
- (a) the job title, core functions, inherent requirements of the job and the salary level of the other vacancy is the same as the post advertised; and
- (b) the selection process contemplated in regulation 67 has been complied with.
- (9) With due regard to the criteria in regulation 67(5)(b) to (f), an executive authority may fill a vacant post without complying with subregulations (3) and (4) if—
- (a) the department can fill the post from the ranks of employees who have been declared in excess and are on a salary level linked to the grade of that post;
- (b) the department can appoint into the post an employee who was appointed under an affirmative action measure as contemplated in section 15 of the Employment Equity Act;

- (c) the post is to be filled through a transfer of an employee in terms of section 12(3) or 14 of the Act; or
- (d) the post falls within an occupation or category of employees as directed by the Minister.'

[61] It should be noted, however, that sub regulation (2) provides that 'Subject to the appointment criteria in regulation 67(5)(b) to (d), an executive authority may fill a post in the Office of the executive authority or a Deputy Minister in that executive authority's portfolio, in terms of subregulation (1) without complying with regulations 65(1); (3) and (4). Subregulation 67 reads as follows:

'(5) The selection committee shall make a recommendation on the suitability of a candidate after considering only—

- (a) information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;
- (b) the inherent requirements of the post;
- (c) the department's employment equity plan as contemplated in regulation 27; and
- (d) in respect of candidates applying for posts from salary level 9 and above—
  - (i) the level of understanding of the relevant departmental mandates;
  - (ii) the ability to identify problems and find innovative solutions; and
  - (iii) the ability to work in a team.

[62] The 1st Respondent pointed out that all the Applicants confirmed that they did not apply for any vacant and funded posts and with regard to their suitability, pointed out that witnesses had testified of the minimum requirement of an NQF Level 7 qualification for appointment into senior posts. Regulation 57 of the Public Service Regulations, 2016, as referenced by the 1<sup>st</sup> Respondent, reads as follows:

'(1) An executive authority—

- (a) shall not appoint any person—
  - (i) under the age of 15 years of age; or
  - (ii) under the minimum school-leaving age in terms of any law.
- (b) shall determine the health requirements for incumbency of a post in any case where it is part of the inherent requirements of the post;
- (c) shall subject an employee or a candidate for employment to personnel suitability checks as directed by the Minister;
- (d) shall ensure that each person upon appointment, is provided with written particulars of employment, including the terms and conditions of his or her service; and
- (e) shall not, with due regard to section 10(a) of the Act, appoint a temporary employee permanently or vice versa without complying with regulations 65 and 67.

(2) An executive authority may, unless otherwise authorised by the Act, within the available budget and at a salary level linked to a grade determined through job evaluation or as determined in an OSD, employ persons additional to the establishment, where—

(a) the incumbent of a post is expected to be absent for such a period that his or her duties cannot be performed by other employees;

(b) a temporary increase in work occurs or it is necessary for any other reason to temporarily increase the staff of the department;

(c) an employee's post has been abolished and he or she cannot be transferred into another post; or

(d) an employee is part of a development programme as contemplated in regulation 58.

(3) Before making a decision on an appointment of a person additional to the establishment, an executive authority shall—

(a) satisfy himself or herself that the person qualifies in all respects for the position and that his or her claims in his or her application for the position have been verified; and

(b) record that verification in writing.

(4) The employment of a person additional to the establishment in terms of subregulation (2)(a) or (b) shall not exceed 12 consecutive calendar months unless otherwise directed by the Minister.

(5) An appointment shall take effect after approval by the relevant executive authority.

(6) An appointment shall take effect on the date of an employee's assumption of duty. If an employee assumes duty on the first working day of the month and this day is not the first day of the month, the first day of the month is deemed to be his or her date of assumption of duty.'

[63] The 1<sup>st</sup> Respondent argued that none of the conditions contemplated in Regulation 57 existed in the Applicants' situation and the fact that their Appointments were in line with the Ministerial Handbook meant that their appointments were in fact not irregular. The 1<sup>st</sup> Respondent argued further that was therefore no need to approach the OPSC or the MPSA to investigate any irregular appointments. The 1<sup>st</sup> Respondent, however, cited case law on how irregular appointments were dealt with by the courts. Mr. Ntwampe also cited case law, as did Mr. Kumalo, demonstrating that only the Courts can remedy irregular appointments in terms of the **Public Service Commission Guidelines of 2018**. It was common cause that the Applicants' termination letter indicated that their permanent appointments, and indeed the process undertaken by the two departments, had been irregular. As correctly pointed out by Mr. Kumalo, it is not for me as a GPSSBC panelist to assume the role the courts play in dealing with this issue. It should be noted that the so-called irregularity of the Applicants' employment was an issue that appears to have been discovered when the 1<sup>st</sup> Respondent attempted to terminate the contracts of the Applicants at the departure of the Minister as a result of the reshuffling of 2021. At that point, evidence shows that a new submission and terms of employment had been issued in respect of the Applicants, and whether or not those were accepted and binding should be the deciding factor as to whether the termination of their contracts in March 2022 did not amount to a dismissal in that their contracts had simply ended, or whether the termination of contracts was premature, and as such a dismissal, on the

basis that there may have been an obligation on the 1<sup>st</sup> Respondent to firstly have the Applicants' employment declared irregular by a Court.

### ***Where the Applicants dismissed?***

[64] Ms. Muregu prepared the submission to the Minister dated 02 July 2019 on the appointment of officials in the private and administrative offices, based on an instruction from the Office of the Minister dated 21 June 2019 on the finalization of appointments of officials who will form part of the sixth (6<sup>th</sup>) administration. The submission listed the appointments of the Applicants at para 3 as follows:

#### 'Private Office

J.N Peter, Media Liaison Officer, Level 13 (required Level 13)

P.A.M Morobi, Community Outreach Officer, Level 14 (required Level 11)

#### Administrative Support Staff

N.F Kumalo, Admin Secretary, Level 13 (required Level 13)

N.B Kweyiya, Cabinet and Parliamentary Officer, Level 12 (required Level 11)

S.Z Ketelo, Registry Clerk, Level 10 (required Level 7)

#### Appointed in terms of Regulation 57(2) to (6)

B.B Ngobese, Head of Security, Level 12 (required Level 12).'

[65] In line with the submission, appointment letters were issued. Ms. Kweyiya's appointment letter dated 23 July 2019 informs her that she has been appointed linked to the Minister's office and that her appointment is in line with Section 9 of the **Public Service Act, 1994**, as well as the **Guide for Members of the Executives**. She signed acceptance of the letter on 25 July 2019, inscribing in her own handwriting that she is accepting secondment. Ms. Ketelo's letter dated 19 July 2019 also informs her that she has been appointed for a period linked to the Minister's term of office. Her acceptance letter was not produced in the arbitration; however, it was not disputed that Ms. Ketelo did not receive the letter of appointment or that she did not accept it. Mr. Ngobese's letter of appointment dated 19 July 2019 provides that he is appointed additional to the establishment of the Minister in terms of regulation 57(2) for a period of twelve (12) months, and his acceptance letter was also not produced at arbitration. Like in the case of Ms. Ketelo, it was not disputed that Mr. Ngobese received the appointment letter, nor that he did not accept it. It was also not disputed that Ms. Morobi received an appointment letter, nor that her salary was reduced to Level 11, nor was the same contention raised in respect of Ms. Peter. On a balance of probabilities, it is my submission that these Applicants received their appointment letters giving effect to the submission and accepted them. Only Mr. Kumalo, whose appointment letter or letter of acceptance were not provided, disputed having received nor accepting one. The concession by witnesses of the 1<sup>st</sup> Respondent and Vice Admiral Kubu that administrative mistakes were made renders it probable that Mr. Kumalo's version should be accepted, notwithstanding the 1<sup>st</sup> Respondent's view in this regard.

- [66] In **Cook4life CC v CCMA and others**<sup>6</sup> it was held that the CCMA or Bargaining Councils will have the jurisdiction to determine whether a dismissal occurred, and in order to determine the dismissal, may have to interpret an agreement. The 1<sup>st</sup> Respondent argued that the *caveat subscriptor* principle is applicable in the case of Ms. Kweyiya (Loji), in that the fact that she inscribed that she accepted secondment to the acceptance letter to the appointment did not absolve her of the binding nature of the offer, nor did it change the terms thereof. The principle implies that a party is bound by what they have agreed or signed, and all the terms contained whether they read it or not. The question remains as to whether a party is still bound by the initial terms presented whereas they made their own inputs before signing. I submit that it is laudable that Ms. Kweyiya appreciated that signing acceptance of the appointment letter amounted to accepting different terms of employment to those she was employed under. In this case Ms. Kweyiya indicated that what she was willing to accept was a secondment when she signed the letter of acceptance, which in her view were the conditions under which she was employed in the office of the Minister. In my view, it may have been incumbent on the 1<sup>st</sup> Respondent to withdraw the offer on the basis that there was no meeting of the minds. The fact that Ms. Kweyiya was allowed to continue with her employment following the signing of the acceptance letter is an indication of acceptance of her amendment to the offer by the 1<sup>st</sup> Respondent.
- [67] It is therefore my view that those Applicants that accepted the July 2019 appointments accepted the new conditions of employment, and that the 1<sup>st</sup> Respondent did not, therefore, unilaterally change their terms and conditions of employment. It may have been prudent on those Applicants to refuse to accept those conditions and declare a dispute of unilateral changes to terms and conditions of employment at the time the offers were made. I am also not of the view that the efforts by the Vice Admiral Kubu and the 1<sup>st</sup> Respondent in facilitating a possible utilization of the Applicants was a bona fide gesture made in consideration of the plight the Applicants found themselves having travelled this long road with the Minister and the uncertainty around their employment. Vice Admiral Kubu also came after the fact and did the best he could to try to understand the facts of a situation that he did not take part in creating. As to whether the Applicants were dismissed, it should be noted that Ms. Nsindane's name did not appear in the 2019 submission, nor was she issued with a letter of appointment similar to those of the other Applicants. Vice Admiral Kubu did concede that the termination letter issued to her was an oversight. In this regard, Ms. Nsindane is found to have been dismissed on 31 March 2022 and her dismissal is found to have been unfair. Mr. Kumalo and Ms. Kweyiya are also found to have been dismissed and I would suggest that the 1<sup>st</sup> Respondent follow the Public Service Commission Guide to Correct Irregular Appointments if the intention is to declare their permanent appointments irregular. While the same issue that Ms. Peter was also appointed by the 1<sup>st</sup> Respondent and did not come from the 2<sup>nd</sup> Respondent was also raised with Vice Admiral Kubu, when his response was that Ms. Peter was appointed linked to the Office of the Minister, this was not disputed further. No other evidence regarding Ms. Peter was presented beyond what I have already referred to. The Applicants sought retrospective reinstatement.

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<sup>6</sup> (2013) 34 ILJ 2018 (LC)

## **AWARD:**

- [68] Mr. N.F Kumalo was found to have been dismissed by the Department of Defence and Military Veterans and his dismissal was found to have been unfair. The Department of Defence and Military Veterans is hereby ordered to reinstate Mr. Kumalo on the same terms and conditions that governed the employment relationship prior to 31 March 2022. The Department of Defence and Military Veterans is ordered to pay Mr. Kumalo an amount of R1 430 916-00 (One million four hundred and thirty thousand nine hundred and sixteen rands), which is the equivalent of sixteen (16) months' salary, subject to statutory deductions, calculated at a monthly salary of R89 432.25 (based on R1 073 187-00 annual Level 13 Salary), as back-pay.
- [69] Ms. N.B Kweyiya (Loji) was found to have been dismissed by the Department of Defence and Military Veterans and his dismissal was found to have been unfair. The Department of Defence and Military Veterans is hereby ordered to reinstate Mr. Kweyiya on the same terms and conditions that governed the employment relationship prior to 31 March 2022<sup>31</sup> March 2022. The Department of Defence and Military Veterans is ordered to pay Ms. Kweyiya an amount of R1 229 780-00 (One million two hundred and twenty-nine thousand seven hundred and eighty rands), which is the equivalent of sixteen (16) months salary, subject to statutory deductions, calculated at a monthly salary of R76 861, 25 (based on R992 335-00 annual Level 12 Salary), as back-pay.
- [70] Ms. B.P. Nsindane was found to have been dismissed by the Department of Defence and Military Veterans and his dismissal was found to have been unfair. The Department of Defence and Military Veterans is hereby ordered to reinstate Ms. Nsindane in an appropriate post at the Level of Director: Level 13 with effect from 31 March 2022. The Department of Defence and Military Veterans is ordered to pay Ms. Nsindane an amount of R1 229 780-00 (One million two hundred and twenty-nine thousand seven hundred and eighty rands), which is the equivalent of sixteen (16) months' salary, subject to statutory deductions, calculated at a monthly salary of R76 861, 25 (based on R992 335-00 annual Level 12 Salary), as back-pay.
- [71] The Department of Defence and Military Veterans is ordered to comply with the preceding paragraphs not later than 31 August 2023.
- [72] The remaining Applicants in this matter have not establishment a dismissal and are therefore not entitled to a remedy.
- [73] I make no order as to costs.





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**Name: Mohau Clement Ntaopane**

**GPSSBC Panelist**