



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Adv. S.C. Letele
Case No.: GPBC 1480/2022
Date of Award: 7 August 2023

In the ARBITRATION between:

MPOLOKENG PARKIES

(Union / Applicant)

And

GAUTENG DEPARTMENT OF ECONOMIC DEVELOPMENT

(Respondent)

Union/Applicant's representative: PSA obo MPOLOKENG PARKIES _____

Union/Applicant's address: BONGANE SIPHO QANKASE _____

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Respondent's representative:ZAMA SHANGE_____

Respondent's address: GAUTENG DEPARTMENT OF ECONOMIC DEVELOPMENT

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration proceedings in this matter started on 12 December 2022. It continued on a number of occasions until concluded on 20 June 2023. The Applicant Ms Mpolokeng Parkies was represented by Mr. Bongani Sipho Qankase of PSA and the Respondent was represented by Mr Zama Shange.
2. The Applicant referred a matter of unfair dismissal in terms of Section 191(1) & 191(5) (a) of the Labour Relations Act.

ISSUE TO BE DECIDED:

3. The issue to be decided is whether or not there was an unfair dismissal of the Applicant by the Respondent when the Respondent terminated the alleged fixed term contract of the Applicant on 31 August 2022.

BACKGROUND TO THE MATTER:

4. The Applicant Ms Mpolokeng Parkies was appointed with effect from 26 July 2019 to 31 May 2024. In terms of the contract it stated that the nature of the contract is linked to the term of office of the MEC. These were not the only terms of the contract. The contract is a 6 page (see pp26-31 of "R"1 bundle) document with a number of terms and conditions regulating the relationship. It was signed by the Applicant on 26 July 2019. The Head of Department (HOD), Ms. Pumla Ncapayi signed the contract on behalf of the Respondent Department on 11 August 2019 when the Applicant had already commenced with her appointment. The Applicant was employed as a Technical Specialist in the Office of the MEC in accordance with the Public Service Act 103 of 1994.

5. The inclusive salary package of the Applicant was R1, 245 495.00 (one million two hundred and forty five, four hundred and ninety five thousand rands). She was also entitled to a personal non-pensionable allowance of R7 035.00 (seven thousand and thirty five rands) per month and to a once-off clothing allowance of R5 995.00 (five thousand nine hundred and ninety five rands)
6. Clause 8 of the Applicant's contract under the title of "**Transfer/Secondment**" indicated that "From time to time the Public Service requirements change and you may be offered the opportunity to be transferred or seconded within the South African Public Service to where your services are required. The Department will endeavour to align the organisational requirements with your developmental needs, before making such an offer to you."
Clause 9 of the contract of the Applicant dealing with promotion provided that "on promotion to a more senior level, you may be required to sign a new contract of employment".
7. According to the Respondent the Applicant was not terminated but her appointment came to an end due to the operation of Regulation 66 of the Public Service as a political appointee. The Applicant was an employee in the office of the MEC and appointed during the term of MEC Dr Kgosientso Ramokgopa in July 2019. When MEC Ramokgopa was transferred on 10 October 2019, she remained in the Department under the leadership of another MEC but was eventually moved and absorbed in the Department and given other responsibilities until she was terminated on 31 August 2022.
8. The Applicant on the other hand contended that she was employed for a five (5) year term and her appointment was linked to the appointment of the MEC. However after the departure of MEC Dr Kgosientso Ramokgopa, changes were made to her appointment which created a legitimate expectation of a permanent employment or that her appointment of five (5) years would hold because her term of conditions of employment were changed by the Respondent and she was given other responsibilities in the Department and moved from the office of the MEC. The Applicant contents therefore that her termination was an unfair dismissal under the LRA section 191 and not in terms of Regulation 66 of the Public Service.

9. Regulation 66 of the Public Service Act reads as follows:

Filling of posts in Office of executive authorities and Deputy Ministers.-

(1) 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 at the end of the first month after the month which the term of that executive 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.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence: Respondent

10. The first witness for the Respondent was Ms Glory Makhubele . She testified that she was now holding the position of Director responsible for Organisational Efficiency with the Department of Human Settlements since 31 July 2021. She went on to say that from March 2014 she held the position of Deputy Director in the Gauteng Department of Economic Development before she took assignments in other Departments of Governments. She testified that she knew the Applicant Ms Mpolokeng Parkies and that the Applicant was appointed under Regulation 66 of the Public Service Act in the Office of the MEC in July 2019 during the term of MEC Ramokgopa who stayed with the Department for a short while and got transferred to another assignment in October 2019.

11. The witness went on to testify that according to the Ministerial Handbook the contracts of employees appointed when the new MEC comes in are linked to the appointment of the MEC. This means that if the MEC is redeployed elsewhere or reshuffled, such employees' contracts are

supposed to be terminated within one month of the redeployment of the MEC. In terms of practice the MEC comes in with between six (6) and seven (7) people and four(4) of these are appointed as administration staff and they remain for institutional memory to assist with proper handing over to the new MEC.

12. The witness was taken to p.26 - p31 of "R"1 bundle and she confirmed that this was the appointment contract of the Applicant. She indicated that upon the redeployment of MEC Ramokgopa the Applicant's contract was supposed to have been terminated within a month. She went on to say that the termination date of 31 May 2024 on the Applicant's contract on p.26 of "R"1 bundle was a mistake. During cross-examination the witness testified that she picked up the mistake of the termination date on the Applicant's contract between December 2020 and January 2021. She informed her Principal who was the HOD and this was at the time that she was about to appoint the new staff team coming in with the new MEC Parks Tau. According to the witness what was not a mistake was the fact that the Applicant's contract was linked to the term of office of the MEC Ramokgopa even though the name of the MEC Ramokgopa was not spelt out in the contract. which indicated the nature of the appointment.
13. The witness continued to testify that in October 2019 when MEC Ramokgopa left all the staff that came in were terminated whilst others left with the MEC but there was an arrangement between the new in coming MEC Mosupye and MEC Ramokgopa to retain the Applicant in the office of the MEC of the Respondent. In November 2020 MEC Mosupye left and in December 2020 MEC Parks Tau came in with his new team of staff. The MEC Mosupye's staff had to be terminated by January 2021 whilst others left with MEC Mosupye. The Applicant remained and was not terminated according to the witness because MEC Tau was against the termination of the Applicant's contract. MEC Tau wanted the Applicant to be given an opportunity to apply for other positions within the Government Departments.
14. The witness testified further that she later wrote an email to the Applicant on 26 April 2021 (p.19 of "R"1 bundle) copied Lemmy Chappie and Dawn Robertson. In the email the witness notified the Applicant that emanating from the implementation of the Public Service Regulations 66 (i)

which requires the Department to terminate contracts of all employees appointed on contract linked to the former MEC's term of office with effect from 30 January 2021, a decision was taken to extend the Applicant's contract by six (6) months to allow her to apply and contest for other positions within the Government Departments. The witness further notified the Applicant in the email that it was no longer feasible to extend her contract since the post she was occupying was no longer available as per the November 2020 Ministerial Handbook. The only option left was to therefore appoint the Applicant on the vacant position of Director Resource Based (Primary) under the Branch Economic Planning in an Acting capacity for a period of six (6) months. The Applicant was requested to sign the letter of appointment by Thursday 29 April 2021. The letter of notification to the Applicant to Act as Director: Resource Based (Primary) was attached, signed by Ms. Dawn Robertson, the Acting HOD and back-dated to the 19 April 2021.

15. The witness was asked during cross-examination as to where the Applicant was working in the Department when she wrote an email to the Applicant on 26 April 2021 advising her of the new six-month contract. She indicated that she could not recall if at the time the Applicant was working in the office of the HOD or in the MEC's office. The witness was referred to document "A"2, an email written to the Applicant on 3 May 2020 by the HOD, Ms Phumla Ncapayi informing the Applicant of the new responsibilities and new reporting lines in the Department and not reporting lines in the office of the MEC. The witness answered to say the email was not from Human Resources so she would not have known about the email.
16. The witness was then referred to p.13 of "R"1 bundle p.13-p16. This was a memo written to the HOD Ms Phumla Ncapayi from Ms. Fikile Madi the Director: Human Capital Management. The memo was a request for approval of relocation of Ms Mpolokeng Parkies from the position of Head of Office in the MEC's Office. The witness was challenged that she ought to have known about this memo as it came from Human Resources Unit. The witness conceded that she knew about the memo but in terms of the memo the Applicant was still in the MEC's office and the recommendation was to move her out of the office of the MEC as her position was needed for someone else in the MEC's office. According to the witness the Applicant was supposed to have been terminated in November 2019 when MEC Ramokgopa left but the Department decided to be

generous and good to the Applicant and kept her because of the arrangements with the Principals as they came in and left the Department.

17. The witness was asked which contract the Department was extending when they offered the Applicant the six-month contract in April 2021 as Director:Resource Based (Primary). She responded to say that the Applicant 's appointment was still in terms of her contract with MEC Ramokgopa. To be absorbed in the Department there would have been the process of interview which was never done in the case of the Applicant. The witness confirmed that the Applicant's benefits were reduced when she moved from the office of the MEC to the office of the HOD but that her salary remained the same. The personal non-pensionable allowance of R7 035 (seven thousand and thirty five thousand rands) was removed as this is a benefit earned only whilst working in the MEC's office. The witness was challenged that the Applicant was not properly consulted when a decision was taken to put her on the six-month contract in contemplation of terminating her contract on 31 August 2021. At any rate she had been occupying a position in the HOD's office with new responsibilities as set out on p16"R"1bundle since 18 August 2020 when this move was approved by the HOD through the memo from Ms Fikile Madi of Human Capital Management.
18. The witness testified that according to her the email sent to the Applicant on 26 April 2021 was consultation and that since the Applicant should have left in November 2019 she ought to have known that her contract has to come to an end. The witness conceded that there was no termination clause in the appointment letter of the Applicant but this was because her term was linked to the term of the MEC under which she was appointed. She also conceded that it was an error to have written that the Applicant's contract would terminate on 31 May 2024. However, when she picked up the error she reported it to her Manager and that Human Resources Unit should have amended the mistake but it never did.
19. The second witness for the Respondent was Mr Lemmy Chappie. He testified that he is the Chief Director ICT, Resource Management, Security and Facilities Department. He confirmed that he knows the Applicant and that she joined the Respondent's Department during the term of MEC

Ramokgopa and was employed as part of the MEC staff team. He testified that during this time he was Acting as DDG Corporate Management where he acted for three (3) years. The witness confirmed that p.26 of "R"1 bundle was the Offer of Employment and contract of the Applicant Ms Mpolokeng Parkies as Technical Specialist in the Office of the MEC. He went on to mention that every employee that is employed in the Office of the MEC knows that their term of office is linked to the term of office of the MEC. For example, if the MEC comes in and spends two months in the Department, the employees' term of office terminates when the MEC leaves. The witness was taken to p.22 of "R"1 bundle which is Regulation 66 (1) of the Public Service Act and was asked to explain what he understands with this Regulation. The witness testified that the Regulation 66 (1) (a) (ii) indicates that if the employee that came with the MEC remains behind when the MEC leaves she/he cannot stay for a period that exceeds three years.

20. Mr Chappie went on to testify that when MEC Ramokgopa left in October 2019, there was an arrangement with the incoming MEC Mosupye to retain the Applicant in the Office of the MEC. However, MEC Mosupye also did not stay for long. When she left the MEC took all her staff members except for Ms Mpolokeng Parkies the Applicant, who was left behind. When the new MEC Parks Tau came into the Office he indicated that the Applicant should be given an opportunity to apply for vacant positions in the Department and not be terminated. The Applicant was then transferred from the office of the MEC to a lower position within the Department.
21. He testified that there was an arrangement with MEC Tau that the Applicant be kept for six months but Mr Chappie did not produce a written arrangement with the MEC as the agreement appeared to have been verbal with the MEC. He went on to say that positions were advertised in the Department but the Applicant did not apply. He said he personally confirmed this as he was the one who shortlisted for various positions and that he actually looked out for the Applicant's application for various positions advertised in the Department. So because the Applicant did not apply for any positions the Respondent had to invoke Regulation 66 (1) (a) (ii) to terminate the Applicant's fixed term contract which according to him had to terminate within the three year period.

22. Regarding the term on the Applicant's contract indicating that her contract would expire on 31 May 2024, Mr Chappie's comment was that it was a mistake which he raised and discussed with the HOD and that this mistake should have been corrected by Human Resources Unit but it was however, not corrected. According to him regardless of this mistake it was clear that the Applicant's contract was linked to the term of office of MEC Ramokgopa and should have been terminated when MEC Ramokgopa left. Therefore, since that didn't happen the Respondent had to work within the three year period to terminate the contract of the Applicant as this was according to the Ministerial Handbook. Mr Chappie indicated that the Ministerial guidelines are very clear. They indicate that each MEC comes in with their own private staff but leaves with the staff when his/her term ends as these are also political appointees. When asked to comment on the Memo on p13 "R"1 bundle from Ms Fikile Madi to HOD Ms Phumla Ncapayi that transferred the Applicant from the MEC's office to the Department, Mr Chappie said regardless of this memo, the Applicant remained a political appointee. This transfer did not change the Applicant's status in the Respondent's Department. He confirmed that he signed the Memo and could not explain why Legal implications were not articulated as the portion remained blank and it was said to be non-applicable.

23. The background to this Memo on p13 "R"1 bundle read as follows: " Ms Mpolokeng Parkies was appointed as the Technical Specialist in the office of the MEC on 26 July 2019. The appointment letter is attached.....The organisational Efficiency Unit is in a process of creating a position additional to the staff establishment where Ms Parkies will be placed. In the meantime Human Capital Management received a request to temporary relocate her to another vacant position whilst the creation process is ensuring. In that regard a vacant level 11, Deputy Director Service Delivery Transformation position in the Organisation Efficiency Unit has been identified to temporary place Ms Parkies. This position is vacant because it is earmarked to be abolished since it is not in the proposed structure. **Once the creation process has been finalised, Ms Parkies will be placed in that newly created position accordingly**".

24. Mr Chappie was asked about the practice that has always existed in Government Departments that when the Minister or MEC leaves some of the qualified staff is absorbed and stay in certain

positions within the Department. He indicated that the practice was done away with in terms of the Ministerial Guide For Members of the Executive in November 2019 by the new President. So from that time on, the Minister or MEC takes his/her staff compliment that he/she brought in when they leave. He made reference to document "R"2 table 1 and table 2 and read specifically table 2 that makes reference to Regulation 66 of the Public Service which has been mentioned earlier. So he emphasised that since the coming into force of this Ministerial Guideline, its very clear that the staff must be terminated when the Members of the Executive leave the Department for whatever reason. So Ms Mpolokeng Parkies, the Applicant was not an exception. She ought to have left with MEC Ramokgopa in October 2019. Since she remained for a while the Department had to work within a period of three years and terminate her contract in terms of Regulation 66 (1) (a) (ii) and could not go beyond that period.

25. During cross-examination Mr Chappie conceded that the Applicant's contract was signed by HOD Ncapayi and that it provided for a five year term. He confirmed that he was aware of this but did nothing about correcting the clause on the Applicant's contract which he believed to be incorrect. He further conceded that the term of the Legislature is five (5) years as contained in the Constitution (see p.25 "A" section 108 of the Constitution). Mr Chappie confirmed that the Applicant was transferred to the HOD's office according to the term of the contract and that her salary was remunerated from the Department's budget but he insisted that she remained a political appointee whose contract should have been terminated at the time that MEC Ramokgopa left in November 2019. At some point during cross-examination he seemed to have forgotten that he worked with the Applicant when she left the MEC's office to join the Department. However, he later conceded that he did when he was shown the email that HOD Ncapayi wrote to the Applicant on 03 May 2020 directing that she would work with Mr Chappie. He indicated that he had forgotten because the Applicant was not the only one he worked with as there were other staff members and that later he left and worked elsewhere in the Department.

Evidence: Applicant

26. The Applicant testified that she was employed on 26 July 2019 in the office of the MEC Dr.

Kgosientso Ramokgopa as a Technical Specialist. Her term of office in terms of her original contract was 26 July 2019 to 31 May 2024. Her contract is on p26 – p31 of "R"1 bundle. She testified that her understanding was that her appointment would end on 31 May 2024 when the term of the MEC ends and since her contract was not specific to any particular MEC she believed she would stay until the end of the full Five (5) year term. The Applicant said she first heard for the first time when Ms Makhubele was testifying that her contract was an error as no one had ever tried to correct her contract during her tenure at the Respondent's Department. She testified that when MEC Ramokgopa left she was called into the office and told that she was going to remain and work under the new MEC Masupye.

27. The Applicant made reference to document "A"2 which is an email that was sent to her by Ms Pumla Ncapayi on 3 May 2020, informing her that from 4 May 2020 she would be reporting to the Department and assigned new responsibilities. The email further informed her that the HOD would conclude a placement process in the following week and therefore needed the Applicant's CV . In the meantime the Applicant was assigned with Bra Lemmy (Mr Lemmy Chappie, the second witness in this arbitration process) on the work being done at the command centre. Mr Chappie was supposed to brief the Applicant on the work to be done.

28. The Applicant testified that she complied and submitted her CV to the HOD and thereafter had a meeting with Mr Chappie who advised her on how they would work together at the command centre. According to her testimony, as soon as she became familiar with the command centre Mr Chappie stopped working there and the Applicant became responsible for the command centre together with another employee. HOD Pumla Ncapayi communicated with her telephonically and at times physically about the finalisation of her appointment but did not mention exactly the kind of appointment the Department was working on to place her and no formal appointment was made at that time.

29. It was put to the Applicant that Ms Makhubele testified that when MEC Masupye left in December 2020 MEC Parks Tau took over and she was then moved out of the MEC's office,. The Applicant Confirmed that she left the MEC's office per the email of HOD Pumla Ncapayi in May 2020. She

confirmed that her benefits were reduced as testified to by Ms Makhubele but she was not consulted before they were reduced. It was only upon her enquiry that she was informed that she enjoyed such benefits whilst in the MEC's office. However her basic salary remained the same. When HOD Pumla Ncapayi left, HOD Dawn Robertson came in and she continued to work in the office of the HOD and nothing happened.

30. Later on 26 April 2021 she received the email from Ms Makhubele on p.19 of "R"1 bundle informing her of the six month contract which she had to sign by 29 April 2021. The email spoke about the acting arrangement; the termination of the Contracts linked to the former MEC's term of office with effect from 30 January 2021; the extension of the Applicant's contract for six months to allow the Applicant a chance to apply and contest for other positions to be advertised within government departments; and that the post she was occupying was no longer available as per the November 2020 Ministerial Handbook. The email further mentioned that it was for these reasons that it was decided that the Applicant should act in the position of Director Resource Based (Primary) for a period of six(6) months.

31. The Applicant also received a letter signed by Ms Dawn Robertson, Acting HOD dated 19 April 2021 informing her about the six month contract that she was supposed to sign and which would terminate on 31 August 2021. The letter was talking about new reporting lines to the Chief Director: Sector and Industry Development. The Applicant was also informed amongst other things that if this post got filled whilst still acting, her acting role would be stopped when the new appointee commenced duty. The Applicant testified that she didn't sign the proposed six (6) month contract because she was confused about what was going on. She sent an email to Ms Makhubele to seek clarity about the proposed six (6) month contract but did not get clarity concerning it nor did she get clarity concerning her contract that was supposed to terminate on 31 May 2024. She testified that her understanding was that clause 8 of her appointment on p.29 "R"1 bundle was applicable.

32. Clause 8 reads as follows: **Transfer/Secondment.**

"From time to time, the Public Service requirements change and you may

be offered the opportunity to be transferred or seconded within the South African Public Service to where your services are required. The Department will endeavour to align the organisational requirements with your developmental needs, before making such an offer to you."

The Applicant was asked if she knew for sure why she was terminated and how it happened. She testified that in a meeting held on 4 August 2022 she was told that the Department was going to terminate her because her contract as a political appointee was supposed to have terminated in October 2019 when MEC Ramokgopa left. She testified that subsequently on 23 August 2022 she received a letter informing her of the termination of her contract on 31 August 2022. The letter was signed by the HOD Mr Blake Mosley-Lefatola dated 22 August 2022. (See p.25 "R"1 bundle). The letter informed the Applicant that her official last day at work was supposed to be 30 November 2019. The Applicant was further informed in this letter that the post on which she was subsequently placed temporarily was to be abolished on the proposed organisational structure. The letter further referred to the recent discussions which were held by the Respondent Department and the Applicant where the Applicant was informed that her last day of employment was going to be recorded as 31 August 2022.

33. The Applicant was referred to p. 8- p9 of "A" bundle and asked to explain what the notes entailed. She testified that these were the notes she prepared leading to her termination of employment by the Respondent. She captured all that happened from the time she was employed in the MEC's office under MEC Ramokgopa until her termination on 31 August 2022. She testified that she shared the notes with Pertunia and Mr Zama Shange but didn't get any response from Mr Shange. She mentioned that it was the first time during this meeting that she learned that HOD Blake had a problem with her appointment. This was because she worked with HOD Blake for one year and when she started working with him they had a meeting where she explained her duties to the HOD and he appeared to be happy with her work throughout the period they worked together. During that meeting of 1 August 2022 she also saw the Memo on p13-p15 written by HOD Pumla Ncapayi for the first time. The Memo is the one that was recommending her to be placed in a position within the Department. She indicated that what she was fully aware of was the email "A"2 of HOD Pumla Ncapayi that was informing her that she was being moved out of the

MEC's office to the HOD's office with new responsibilities. The email was written to her on 03 May 2020 by HOD Pumla Ncapayi.

34. The Applicant worked for two years in the Department in the HOD's office until she left the Department before the expected permanent appointment promised by HOD Pumla Ncapayi came to fruition. She testified that she later worked with HOD Blake until her contract was terminated on 31 August 2022 per the letter of HOD Blake Mosley- Lefatola. During cross-examination the Applicant was asked why she did not apply for other positions which were advertised. She indicated that she did not apply because in her mind she understood that she would be in the Department until the end of her contract in May 2024 if not placed on a permanent appointment in the Department as originally impliedly promised by HOD Ncapayi . Furthermore she indicated that one normally applies for positions which match one's qualifications and skills and cannot just apply for the sake of applying.

Argument: Respondent

35. The Respondent's argument is that the Applicant's fixed term contract came to an end and that there was no dismissal of the Applicant. It is the Respondent's further contention that the fixed term contract of the Applicant came to an end of the three year term period provided for in Regulation 66 (a) (ii) following the failure of the Applicant to apply for any permanent advertised posts. The argument goes on to say that the Applicant was appointed during the term of MEC Ramokgopa whose term terminated in October 2019 which in accordance with Regulation 66 her contract should have terminated at the end of November 2019. The contracts of all staff members whose appointments were linked to the term of office of MEC Ramokgopa were not terminated but were handed over to the new incoming MEC Masupye by agreement with the two MEC's. When MEC Masupye left in November 2020 she took all other staff members with her to the Department of Social Development except the Applicant Ms Parkies. Then a decision was taken to temporarily place the Applicant in a vacant position in order to afford her an opportunity to apply for permanent positions that were to be advertised. The Applicant decided not to apply for any permanent positions within the Department.

36. The Respondent further argues that the Applicant was advised to accept the appointment to act as a Director Resource Based (Primary) under the Branch Economic Planning for a period of six months due to the reason that the post in the MEC's office was no longer available for her. However, the Applicant did not make use of that opportunity irrespective of follow ups, she decided to be just quite and ignore the emails. So based on the fact that the Applicant was appointed on a contract in regard to Regulation 66, the Department took advantage of an alternative provision in Regulation 66 1 (a)(ii) that an appointment in the MEC's office may also be made for a period not exceeding three years.
37. It was based on this provision that the Department was able to allow the Applicant to remain in the Department temporarily still on contract, with hope that she would apply and contest for positions and be permanently employed. The Applicant did not apply for any advertised posts until the three year period lapsed at the end of July 2022, which left the Department with no any other option but to terminate the Applicant's contract by operation of the law. The Respondent therefore submits that there was a termination of a fixed term contract of the Applicant. A fixed term contract does not constitute dismissal under section 191 of the LRA. Furthermore, placement of the Applicant temporarily in a position that was earmarked to be abolished did not constitute any expectation for a long term employment because the Applicant was aware that she was appointed in terms of Regulation 66 of the Public Service Regulations and that she was not holding any position in the Department.
38. The Respondent's argument goes further that prior to 2019 Ministerial Handbook, which came into effect on 20 November 2019 ("R" 2) , employees whose contracts were linked to the term of the MEC, used to be absorbed into the Departments of Government when the term of the incumbent executive authority terminates, however, such practice was stopped when the 2019 Ministerial Handbook came into operation. Therefore, the only way to absorb the Applicant into the Department was through the recruitment processes, where the Applicant would apply for the advertised post, be interviewed and appointed, if she would be successful.

39. So since there was evidence that many posts were advertised and the Applicant decided not to apply the Department had no option but to terminate her in line with Regulation 66. The Applicant relied on assumptions that the Department would create a position for her and appoint her permanently or that her contract would end on 26 July 2024 whereas she knew that her contract was linked to the term of office of MEC Ramokgopa and it was supposed to be terminated on 30 November 2019. According to the Respondent the Applicant did not even bother to seek clarity when she received an email on "R"1 bundle p 19 informing her of management's decision to extend her contract for six (6) months to establish if indeed she was no longer employed under Regulation 66.

Argument: Applicant

40. The Applicant argues that her contract that she signed with HOD Pumla Ncapayi was supposed to end on 31 May 2024. Further the HOD created an impression that she was going to be absorbed in the Department when she released her from the office of the MEC to work in the Department with new roles and responsibilities. She testified that on 9 December 2020 when MEC Masupye left the Department as the MEC she was not affected by the changes because she was no longer in the office of the MEC. She had long been released from the office of the MEC on 03 May 2020 by HOD Ncapayi and she gave HOD her CV per her request indicating that she wanted to conclude a placement process within the Department which she understood to be more of a permanent arrangement in the Department.

41. Regarding the '*Nature of Appointment*' the Applicant argued that according to her contract it was clear that she was on a five year term till 31 May 2024 as it was linked to members of the executive's term of office. Her contract did not stipulate that it was linked to MEC Ramokgopa and that if he left it would terminate. Furthermore during her tenure at the Respondent's Department no attempts were ever made to amend her contract of employment nor was it ever raised that her contract was an error. She only learned about these errors and mistakes which should have been corrected for the first time during the arbitration hearing.

42. The Applicant's submission is that she didn't sign the six month contract which Ms Makhubele the first witness for the Respondent proposed to her and wrote to her on email which was followed by the back-dated letter from the HOD Dawn Robertson requesting her to sign the same because she found the communication confusing. The six (6) month contract that she was asked to sign was going to terminate on 31 August 2021 and it was not clarified to her why she had to sign it. She testified that she didn't sign it because she knew that her contract at least gave her security of employment till 31 May 2024. The Applicant indicates that by not signing that contract that purported to terminate on 31 August 2021, and continuing to work on her current work assigned to her by HOD Ncapayi in the HOD's office, nothing happened. The 31 August 2021 came and passed till she was terminated a year later in August 2022 and amongst the reasons given being that she was supposed to have been terminated when MEC Ramokgopa left in November 2019.
43. The Applicant has argued that the provisions of the Ministerial Handbook which the Respondent has relied on in terminating the Applicant's contract doesn't provide guidance in terms of when there is a Cabinet or Legislative reshuffling what happens to the appointment of the employees in the office of the Member of the Legislative Assembly. The only provision found in the contract of the Applicant is that her term of employment must be linked to the term of office of the Member. The Constitution of the Republic of SA provides that the term of the Legislature which the MEC is a member is five (5) years in terms of section 108 the Constitution.
44. Furthermore, the Applicant has argued that changes to the Ministerial Handbook that the Respondent purported to rely on did not have an impact on her because at the time that they were made effective the Applicant was employed on a contract in the office of the MEC effective 26 July 2019 till 31 May 2024. The Ministerial Handbook doesn't make provision for retrospective application but merely gives the date of effect and therefore cannot be relied upon by the Respondent as a legal source for its action to terminate the employment of the Applicant before its expiry date.
45. The Applicant has further argued that the Respondent cannot rely on Regulation 66 because if it ever applied to her, it ceased to apply to her when she was moved from the MEC's office in May

2020. She was then transferred to the HOD's office and released from duties in the MEC and such duties were given to another and she was transferred to the Department to carry out new roles and responsibilities and was paid from the Departmental budget and forfeited some benefits which came with the office of the MEC. Furthermore, it is common cause that when MEC Ramokgopa left on 10 October 2019 the Applicant remained as there was an agreement that the Applicant and other employees should remain and be kept by the incoming MEC Masupye.

46. The Applicant made a further submission in her argument that failure by the Respondent to call the HOD's that were involved in the transferring of the Applicant in the Department especially HOD Pumla Ncapayi who assigned her new duties should bear an adverse inference that there was fear that her evidence would expose facts unfavourable to the Respondent and damage its case. The argument goes further to say that if it was possible for the Respondent to call Ms Makhubele who is now with Department of Human Settlements as a witness, there was no real reason why the Respondent did not call HOD Ncapayi and the other former HOD's involved in writing memo's to the Applicant to come and explain the nature of employment that the Applicant was now on.
47. The Applicant has further contended that the Respondent purported to terminate her contract on the basis that the post that she was holding in the HOD's office was to be abolished on the proposed organisational structure. She was then informed that her last day with the Respondent would be recorded as 31 August 2022. The Applicant has argued that it is clear that the Respondent has terminated her contract on a number of grounds and this in itself makes her dismissal unfair. Her letter of termination was dated 22 August 2022 and she received it on 23 August 2022, seven (7) days before the date of termination and it informed her that her last day at work was 31 August 2022.
48. The Applicant's prayer is that the Commissioner should find that her dismissal was unfair and is asking for reinstatement as she believes that she had now been absorbed by the Department as a permanent employee . She had a reasonable expectation of permanent employment following her transfer by HOD Pumla Ncapayi in May 2020 when she was requested to submit her CV to enable the HOD to conclude a placement process. New roles and responsibilities were

allocated to her and she worked in the office of the HOD (though with different HOD's) till she was terminated on 31 August 2022.

ANALYSIS OF EVIDENCE AND ARGUMENT:

49. I have listened to the evidence and the arguments presented by both the Applicant and the Respondent in this matter. It is common cause that the Applicant came with MEC Dr. Kgositso Ramokgopa and was appointed as Technical Specialist in the Office of the MEC in July 2019. It is also common cause that MEC Ramokgopa left on 10 October 2019 soon after the Applicant was appointed on 26 July 2019. There was evidence adduced by the Respondent that there was an agreement between MEC Ramokgopa and the incoming MEC Masupye that the staff that came in with MEC Ramokgopa be retained by MEC Masupye and these included the Applicant. We were not told by the Respondent about the finer details of this arrangement between the MEC's. The Applicant remained with MEC Masupye but was later transferred from the MEC's office during the term of MEC Masupye and was assigned new roles and responsibilities in the office of HOD Pumla Ncapayi.

50. It appears from the evidence that there was a plan at some point that the Applicant was going to be absorbed in the Department as a permanent employee as it has always been the practice which the Respondent conceded to. This is evidenced by the email of HOD Pumla Ncapayi to the Applicant on 03 May 2020. The HOD requested the Applicant's CV with an indication that she would use the following week to conclude a placement process for the Applicant. In the meantime the Applicant was assigned to work at the command centre with Mr Lemmy Chappie where she went to work immediately. Later there was a Memo that emanated from Ms Fikile Madi Director: Human Capital Management addressed to the HOD Pumla Ncapayi requesting the formal relocation of Ms Mpolokeng Parkies, the Applicant from the office of the MEC to occupy a vacant position in the Organisation Efficiency Unit. The Memo further stated that the Organisation Efficiency Unit was in the process of creating a position additional to the staff establishment where Ms Parkies was going to be placed (see pp14-15 of "R"1 bundle).

51. The Memo continued to say that in the meantime Human Capital Management had received a request to temporarily relocate her to another vacant position whilst the creation process was ensuring. In this regard a vacant level 11 Deputy Director Service Delivery and Transformation position in the Organization Efficiency Unit was identified as temporary arrangement for the Applicant to occupy. It was clearly stated that this position was vacant because it was earmarked to be abolished since it was not in the new proposed structure. So once the creation process had been finalized, Ms Parkies was to be placed in that newly created position. The Memo was approved by the HOD Ms. Pumla Ncapayi on 18 August 2020. Mr Lemmy Chappie the second witness for the Respondent was one of those who approved the Memo and there were no legal implications noted in as far as this process was concerned. Roles and Responsibilities of the new position were outlined for the Applicant and she started doing the work (see p16 of "R"1 bundle). By the time the Memo was approved the Applicant had already been moved from the MEC's office by the HOD in May 2020 according to the evidence that was adduced during the arbitration supported by the email marked "A"2 where the Applicant was given new reporting lines by HOD Pumla Ncapayi.

52. Changes to the new role of the Applicant in the HOD's office also meant forfeiting the benefits she enjoyed whilst in the MEC's office which was the R7 035.00 (seven thousand and thirty five rands) per month as non-pensionable allowance as she was now paid under the Respondent Departmental budget. In November 2020 HOD Pumla Ncapayi resigned before the conclusion on the appointment of the position that was being created for the Applicant and Dawn Robertson was appointed Acting HOD. On 9 December 2020 a Cabinet reshuffle happened and MEC Parks Tau came in. MEC Masupye left with all the staff she had except the Applicant as she was no longer in the MEC's office. It seems after these changes in Cabinet reshuffle and the resigning of HOD Pumla Ncapayi the original plan to absorb the Applicant as a permanent employee changed without verbalising it any further and the Applicant fell from grace. There was nothing said any further about the position that was being created for the Applicant and everything went silent in this regard.

53. Instead evidence was adduced by the Respondent's second witness Mr Lemmy Chappie that MEC

Parks Tau when coming in did not want the Applicant to be terminated but to be given six months within which she could apply for permanent jobs within the Government Departments but that the Applicant did not apply to any of the advertised jobs. The Applicant was working in the HOD's office awaiting the creation of the position she was going to occupy on a permanent basis but tables turned with the coming in of the new MEC Parks Tau. The Respondent also argued in closing that the Applicant was advised to accept the appointment to act as a Director Resource Based (Primary) under the Branch Economic Planning for a period of six (6) months due to the reason that the post in the MEC's office was no longer available. This argument doesn't make sense to me because by the time MEC Parks Tau came in the Applicant had long been relocated from the MEC's office in May 2020 and was working in the HOD's office. She was waiting to be placed in a permanent position that was being created for her. Someone else had occupied the position in the MEC's office during MEC Masupye. There was no position in the MEC's office to talk about at this stage because MEC Parks Tau would have come in with his own staff complement as it is the practice as supported by evidence led in the arbitration.

54. The Applicant testified that she did not sign the six (6) month contract of Director position because she was confused and when she asked for clarity from Ms Makhubele she didn't get clarity. The email by Ms Makhubele according to my analysis was really confusing. It spoke about a number of issues which amongst others was a route towards termination of the Applicant's contract under Regulation 66 of the Public Service Act. The email mentioned that there was a decision by Executive Management for the extension of the Applicant's contract by six (6) months to allow her to apply and contest for other positions which were to be advertised within the Government Departments. It did not specify which contract was being extended. The email also mentioned that the extension of the Applicant's contract was not feasible since the post she was occupying was no longer available as per November 2020 Ministerial Handbook. The only option left was to appoint the Applicant to Act in a vacant position for a period of six (6) months as the main reason for the appointment before termination in six months. Ms Makhubele made no mention of the earlier sentiments of creating a position for the Applicant which were expressed by HOD Pumla Ncapayi. Applicant had always known that she was placed in a position which was to be abolished

temporarily whilst a new position was being created for her. The Memo of Ms. Fikile Madi to HOD Pumla Ncapayi supports this position. Now the Respondent was turning around and changing its original promises unilaterally after moving the Applicant from the MEC's office in May 2020 with an expectation of being absorbed permanently in the Department in the new Structure being created according to the Memo of Ms. Fikile Madi to HOD Ncapayi.

55. The letter of Ms Dawn Robertson, Acting HOD talking about the six month Acting position for the Applicant went further to say that if the post of Director: Resource Based (Primary) got filled whilst the Applicant was still acting, she would be removed and a new appointee would commence duty. This Acting position is one which was definitely threatening security of employment of the Applicant and any reasonable man would not sign up for such a position which was leading to termination of employment when she believed to be better secured under her current contract that would terminate on 31 May 2024 if the permanent employment route had now been abandoned by the Respondent because of the in coming MEC. By not signing this contract I don't support the Respondent's view that she did not make use of an opportunity given to her. This was not an opportunity given, but a way of trying to terminate the Applicant earlier than May 2024 as it now became apparent that the promise of a permanent position had been abandoned without verbally communicating it to the Applicant.

56. When the Applicant didn't sign the six (6) month contract nothing happened to her for another year until the Respondent finally decided to terminate the Applicant for a number of reasons in August 2022. It was unfair of the Respondent to mention that it was terminating the employment contract of the Applicant which should have terminated in November 2019. There was no such contract because the Applicant was retained in the MEC's office when MEC Ramokgopa left in October 2019. Evidence was led that there existed an agreement that the Applicant together with others should remain. So this point was no longer viable to be revisited when the decision to terminate the Applicant was reached. Mr Chappie and Ms Makhubela testified that regardless of the movement of the Applicant from the MEC's office and the changing of her terms of employment when she moved to the HOD's office, she remained a political appointee and was governed by

Regulation 66 of the Public Service Act. However, both witnesses, who were both key in the process of appointment of the Applicant in terms of providing guidance and advice never verbalized this position nor appropriately advised the Principals during the term of MEC Masupye when the Applicant was moved from the MEC's office to the HOD's office. This position should have been clearly articulated under the Legal Implications in the MEMO of Ms Fikile Madi but it wasn't. I am persuaded to believe that the Applicant was clearly promised to be absorbed in the Respondent's Department and would have been absorbed had the Cabinet Reshuffle not happened and she fell from grace. Unilateral change of conditions of employment is unfair. The changes which happened when the Applicant was moved to the HOD's office were consented to by the Applicant as there was a promise of a permanent placement. The Applicant had even accepted losing certain benefits by being moved to the HOD's office because of the new position that was being created for her as this would be a long term employment relationship. The original terms which were altered by the Respondent could not be relied upon again by the Respondent when the Respondent wanted to terminate the Applicant. This was unfair.

57. I am not persuaded that the Applicant's terms remained as those in the MEC's office from the evidence given. This argument was advanced by the Respondent because it needed reasons to terminate the Applicant as plans had now changed concerning her absorption into the Department as a permanent employee. Trying to get her to sign contracts that would make herself easily terminated was a way used by the Respondent to look at other options of terminating the Applicant. That is why even the reason of the abolished position that the Applicant was occupying is also advanced in the termination letter. On the other hand Ms Makhubele's email clearly articulated the reasons why the Applicant had to be terminated. There was a decision taken by executive management that employees appointed on contract linked to the former MEC's term of Office be terminated with effect from 30 January 2021. As the Applicant had joined the Respondent Department through MEC Ramokgopa the Respondent felt it had to terminate her albeit her changed terms and conditions of employment.

58. When Mr Chappie was asked about the practice that has always existed in Government Departments to absorb some staff when MEC's leave for one reason or another, he mentioned

that this practice had been done away with the introduction of the 2019 Guide for Members of the Executive Ministerial Handbook. This Ministerial Handbook came into effect on 20 November 2019 a few months after the Applicant had been appointed in her position. I am not persuaded that this Ministerial Handbook was applicable to the Applicant as it doesn't state that it is to be applied retrospectively. There was a plan to move the Applicant from the MEC's office with the intention to absorb her permanently in the Department. The plan appears to have changed and was not implemented because of the coming in of MEC Parks Tau. I am persuaded to believe that an expectation of creating a long term employment relationship with the Applicant was created during the term of MEC Masupye and HOD Pumla Ncapayi. The Applicant waited for the new appointment and it did not come into fruition. It was therefore not proper and unfair for the Respondent after turning against its promises of absorbing the Applicant in the Department, to terminate the Applicant's contract of employment that gave her security of employment till 31 May 2024.

59. The Respondent witnesses testified that they saw the Applicant's contract of five (5) years as an error on her contract but never corrected it. If it was not a binding term of this contract I believe it should have been easily corrected. The Respondent simply terminated the Applicant's fixed term contract of five (5) years before time and it was unfair to do so and this constituted unfair dismissal. The contract did not come to an end by operation of the law and the Applicant's contract was not three year fixed contract either. The Applicant was no longer bound by the term of the office of the MEC as she was moved and some of the conditions which go with the office were removed unilaterally by the Respondent whilst others remained in her contract like the termination date. The term of the contract remained as five (5) years and it could have only been changed by offering the Applicant a permanent employment in the Department which was promised but never came to fruition. I find that the Applicant was unfairly dismissed when her fixed term contract of five (5) years was terminated before its expiry date. The Applicant was not on a permanent employment with the Respondent as this was never concluded. HOD Ncapayi left and the reshuffle ushered in a new MEC and the Respondent reneged on its promise of a permanent appointment. I cannot therefore order reinstatement of the Applicant as she was not

yet holding a permanent position with the Respondent when MEC Parks Tau came in and conditions changed at the Respondent's Department.

60. On the other hand whilst I have established that there was unfair dismissal of the Applicant, I am also not in a position to order for the payment of the remaining term of the Applicant's contract which was terminated by the Respondent unfairly as my jurisdiction is clearly articulated by section 194(1) of the LRA and is limited to the unfair dismissal by the Respondent which is where I can exercise my discretion to award compensation for the unfair dismissal and such an award of compensation cannot go beyond 12 months.

Section 194(1) of the LRA is very clear in this regard and states:

*"The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but **may not be more than the equivalent of 12 months' remuneration** calculated at the employee's rate of remuneration on the date of dismissal."*

61. The Applicant was not given any hearing before the termination of her employment contract. She was given the letter notifying her of the termination with all other reasons as to why she should have left when MEC Ramokgopa left as if the whole matter was solely in her hands and this letter of termination of employment was given to the Applicant seven days before termination date of 31 August 2022. I find that it was procedurally unfair of the Respondent not to give the Applicant an opportunity to be heard before the pre-mature termination of her contract and also to give her less than one month's notice of termination of employment. I also find that the dismissal of the Applicant was substantively unfair as it was not based on any fair reason by the Respondent.

AWARD:

62. I now make the following determination and award:

62.1 That the dismissal of the Applicant by the Respondent was both procedurally and substantively unfair.

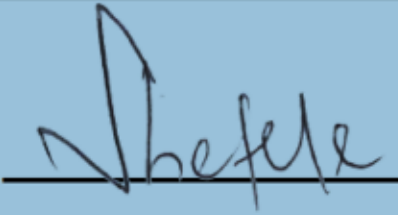
62.2 I order compensation of one month's salary for the procedural unfairness of the

Applicant and six months compensation for the substantive unfairness of the Applicant to the total amount of seven months compensation for the unfair dismissal of the Applicant

62.3 The Applicant's inclusive salary package was R1 245 495 (one million two hundred And forty five four hundred and ninety five thousand rands) per annum.

62.4 I order that an amount of R726 539.00 (seven hundred and twenty six, five hundred and thirty nine thousand rands, less tax deductions) to be paid by the Respondent to the Applicant for the unfair dismissal.

62.5 I order the Respondent to pay the Applicant the said amount within ten days of the issue of this award.



Name: Adv S.C. Letele

Arbitrator