IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J1720/99**

In the matter between:

GS GOUWS Applicant

and

MPUMALANGA PROVINCIAL GOVERNMENT First Respondent

EASTVAAL DISTRICT COUNCIL Second Respondent

JUDGMENT

JAMMY AJ

The papers filed in this matter indicate, and I was so informed at the outset of the hearing, that the application against the cited First Respondent was not being pursued by the Applicant and that the application would proceed solely against the Second Respondent, to which I will therefore henceforth refer as **"the Respondent"**.

The Applicant seeks an order for the payment of compensation as a consequence of what he contends to have been the substantive and procedural unfairness of his alleged retrenchment by the Respondent. The Respondent denies that the termination of the

Applicant's employment was for operational reasons and either substantively or procedurally unfair. Acknowledging that, to all intents and purposes, the consultation requirements of Section 189 of the Labour Relations Act 1995 were not complied with by it, it submits that since the Applicant was not retrenched by it, there was no obligation on it to have done so.

It is not disputed that for a number of years prior to that formal appointment, the Applicant had already served as Chairperson of the Council, his various terms of office in that regard having been extended from time to time.

The formal appointment with effect from 1 January 1996 was for an unspecified period of time but the letter effecting it, dated 14 December 1995, expressly recorded that -

> **"Furthermore, the appointment would be subject to the legislative restructuring of District Councils".**

Section 7 of the Regional Services Councils Act 1985, however, the Applicant testified, prescribed the period of appointment as one of five years, but because of the uncertainty which he felt in that regard in the absence of any specific reference thereto in his letter of appointment, he procured a meeting with the MEC for Local Government, Mr J.B. Masilela in order to clarify the position.

The period of his appointment was reviewed by reference to the relevant section of the Act but he was unequivocally informed however that, in any event, it would extend until the date of the next municipal elections, which were scheduled to be held approximately four to five years thereafter.

By the end of 1996, the Applicant testified, he became aware of amendments to the Local Government Transition Act 1993 which made provision for the **election** of Chairpersons for the various District Councils. The effect of the amendment, he ascertained, would be to terminate his term of office at the end of June 1997, from which date District Council

Chairpersons would be elected, and no longer appointed.

In order to seek clarity regarding their positions in that context, the Applicant, together with the Chairpersons of the two other District Councils in Mpumalanga, met with the member of the Executive Council for Local Government, Housing and Land Administration, Mr C Padayachee on 28 February 1997. He informed Mr Padayachee, the Applicant testified, that he was **"quite prepared to terminate his service against an 'acceptable package"** and by May of that year they learned that the amount which would in fact be paid to them at the end of June was equivalent to three months remuneration.

He immediately telephoned Mr Padayachee, said the Applicant, and informed him that this was not acceptable. An undertaking by the MEC to investigate the matter and revert to him was not carried out.

. On 10 June 1997, he received formal written notice confirming what had already been traversed. The letter, signed by Mr Padayachee, read as follows

> **"RE-ELECTION OF CHAIRPERSONS OF DISTRICT COUNCILS**
>
> **The Local Government Transition Act , 1993 has been amended to now make provision for the election of Chairpersons for the various District Councils.**
>
> **This decision was taken in order to give effect to the democratic principle of election rather than appointment of Chairpersons.**
>
> **The amended legislation therefore now makes provision for the election of a Chairperson for the District Council from amongst the members of the District Council, which means that your term of office will lapse by not later than 1 July 1997.**

Your excellent service to our Province and the community in particular during your term of office has always been appreciated.

I wish you well on the road forward".

. At approximately the same time, he received a copy of a letter addressed to the Chief Executive Officer of the Respondent from the head of the Department of Local Government, Housing and Land Administration, dated 13 June 1997. The relevant portion of that letter read thus

"RE-ELECTION OF CHAIRPERSONS OF DISTRICT COUNCILS

1 Section 9B(3) (b) of the Local Government Transition Act, 1993 (Act No. 209 of 1993 "LGTA") *inter alia* determines –

"…….. Council: Provided further that the period of office of a person who has been appointed as Chairperson of a District Council shall lapse by not later than 1 July 1997, whereafter the Chairperson of all District Councils shall be elected". (Own emphasis).

2 **As effect have** (sic) **to be given to the principles of the LGTA mentioned above you are hereby directed to pay an amount equal to three months salary to your Chairperson and give effect to the relevant provision of the LGTA with effect from 1 July 1997."**

. His response, said the Applicant, was to inform Mr Padayachee and other relevant officials that the three month package was not acceptable to them and that he proposed to take legal action. Notwithstanding an exchange of further correspondence, no settlement eventuated. As far as he was concerned, he had had ten years experience in

Local Government whereas his two Chairperson colleagues had served respectively for thirteen months and two and a half years. All three of them however received the same severance package.

3. He left his employment, as directed, on 30 June 1997 and as far as he was aware, a Chairperson was thereafter elected in accordance with the legislation. Whilst his two colleagues continued to act in their positions on a month to month basis and were ultimately appointed permanently as Chief Executive Officers, he, the Applicant, was offered no other position. A reason for this, he suggested, might have been because he left Secunda, which was the site of his office.

4. Cross-examined by the Respondent's Counsel, the Applicant conceded that his letter of appointment of 14 December 1995 was for an unspecified period and that the appointment was **"subject to legislative restructuring of District Councils"**. It was precisely to obtain clarification of that condition that he sought the meeting with Mr Masilela at which he was informed that it would enure at least until the next municipal election. When it was put to him that that election was eventually held more than five years later, and asked whether, in those circumstances, he believed that his appointment would have continued to that time, the Applicant responded that this was not the case as the Regional Services Councils Act limited it to a five year period and a new appointment would have been required. Had the elections been held within a five year period however, the arrangement with Mr Padayachee, and not the legislation, would have prevailed and his employment would have terminated at that stage.

5. The undertaking by Mr Masilela had not been recorded, he acknowledged but he was the MEC for Local Government and they enjoyed a **"very good trust relationship"** he said.

6. Questioned further about his earlier knowledge of the pending legislation and what would be its certain effect on his position, the Applicant responded that he considered the concept to be unfair and that it was not acceptable to them. It was correct that the three month package was an *ex gratia* payment for which there was no legislative provision but, as far as he was concerned, it was unfair and inadequate. He and his colleagues

believed, he said, that Mr Masilela had the authority to commit himself to a term of office for each of them of approximately four years – the anticipated period until the next election.

7. The extract from the Local Government Transition Act 1993, quoted in the letter of 13 June 1997 referred to, had been gazetted, said the Applicant, in December 1996, **"and so we knew that our term of office would be drastically shortened"**. He hoped, however, that **"there would be an acceptable adjustment"**.

8. When it was finally put to him, at the conclusion of cross-examination, that his appointment was specifically subject to legislative restrictions and that he understood and was aware that that appointment could terminate very much sooner in the circumstances, the Applicant responded affirmatively, but reiterated that this was **"not acceptable"**.

ANALYSIS AND CONCLUSION

9. No evidence was adduced in this matter on behalf of the Respondent. It was submitted by Advocate Ismael, representing it, that the Applicant had presented no *prima facie* case for the Respondent to meet. He had failed, it was submitted, to discharge the primary onus of establishing that he had been retrenched.

10. The Applicant had conceded, it was submitted, that his appointment was subject to legislative restructuring and that, in that context, it could be prematurely terminated at any appropriate time. The Applicant could not, in those circumstances, have had any expectation of continued employment until the municipal elections were held and once that employment was terminated by legislative enactment, no question of entitlement to re-employment or even selective re-employment, could have arisen. Indeed, it was submitted, this was not part of the Applicant's case.

. The Applicant's position, in these circumstances, was akin, Advocate Ismael submitted, to that of the Applicant in

Malandoh v SABC (1997) 5 BLLR 555 (LC)

in which it was held that an employee on a fixed-term contract cannot claim reasonable expectation of permanent appointment where the contract expressly provides to the contrary and where the persons **"who made promises"** were not authorised to bind the employer.

. Advocate M Van As, for the Applicant, argued that his case was not based on any suggestion or contention of legitimate expectation. It was common cause that at the end of 1995, his contract, in the context of Section 7 of the Regional Services Councils Act 1985, had been renewed for a period of five years notwithstanding that this period was not specially recorded in the letter of appointment. He had been assured in these circumstances, by the relevant Member of the Executive Council, that it would enure at least until the next municipal election, expected in approximately four years. The termination of the contract within that period constituted a dismissal and in the circumstances, once, as was the case, the Applicant did not qualify for continued employment in the position which he held, there was an obligation on the Respondent to consider alternative positions. In every sense, having regard to the circumstances in which it occurred, the termination of the Applicant's employment was for operational reasons.

. There is, in my view, no substance to that submission. The termination of the Applicant's employment was by express direction to, and not in the discretion of, the Respondent. The administrative restructuring which gave rise to it was determined by legislative enactment, the possible adverse effect of which on the Applicant's tenure of office was not only expressly recorded when he was appointed but was acknowledged by the Applicant to have been, at all material times, within the contemplation of the parties. The fact that, when eventually it came into existence, its terms and provisions were

considered by the Applicant to be unfair in the context of his past service, is irrelevant to the conduct of his employer.

4. The Applicant was not retrenched in the ordinary and accepted meaning of that concept. His employer was left with no alternative other than to give effect to the requirements of the Transition Act and the directive to it to terminate the Applicant's appointment and to pay to him an amount equal to three months salary. That payment cannot, in my view, be equated to severance pay as contemplated by Section 189 of the Labour Relations Act 1995 and in the circumstances in which it occurred, I have no hesitation in concluding that there was no obligation on the Respondent to have reference to the other requirements of that section or to comply with them. Simply stated, they had no application or relevance to the reason for and basis of the termination of the Applicant's employment.

5. For the same reasons, the Applicant's alternative submission that his dismissal was unfair for any other reason falling within the ambit of Chapter VIII of the Labour Relations Act, cannot be sustained. I agree with Advocate Ismael that in all the circumstances of the matter, no case has been made out by the Applicant necessitating any formal evidence in rebuttal on the part of the Respondent. The Applicant's position was governed, regulated and terminated by legislation.

6. For all of these reasons, he is not entitled to any aspect of the relief which he seeks.

7. There is no reason that has been suggested to me or that I can find, to deviate from the accepted principle that costs in litigation of this nature will normally follow the result and the order that I accordingly make is the following.

The application is dismissed with costs

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B M JAMMY

Acting Judge of the Labour Court

28 May 2001

Representation:

For the Applicant: Adv M Van As instructed Wentzel Viljoen and Swart Attorneys

ndent: Adv M I E Ismael instructed by the State Attorney (Pretoria)