REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/ of interest to Judges

Case No: JS 925/2010

In the matter between:

MAKHUBALO NDABA **Applicant**

and

DEPARTMENT OF COMMUNICATIONS **Respondent**

Heard: 20 February 2012

Delivered: 11 May 2012

Summary: **Whether employment contract purportedly in terms of section 15 of the Public Service Act of 1994 valid and enforceable; *Khanyile v Minister of Education and Culture, Kwazulu-Natal and Another* (2006) 27 ILJ 769 (N) and *Dwane-Alpman v Premier, Eastern Cape* (2008) 29 ILJ 541 (E) distinguished.**

JUDGMENT

[1] This matter was referred to court in terms of section 77 (3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). The applicant, Mr Makhubalo Ndaba (Ndaba), asks that the respondent be ordered to pay him an amount of R1 708 404.75 in respect of the 21 months remaining of a fixed term contract of employment. The trial took place on the 20 February 2012. It has only been necessary to refer briefly to the oral evidence on that day.

[2] There are two written contracts at issue, both signed by Ndaba and the then director-general of the respondent, Ms Mamodupi Mohlala (Mohlala). The first was signed on May 17 2010 (the first contract), and the second on the 29 June 2010, (the second contract). Ndaba bases his claim on the second contract.

[3] Certain facts were common cause in terms of the pre-trial minute. Ndaba was informed that his contract of employment with the respondent was to terminate on or about 5 August 2010. His annual salary at date of termination was R976 317.00 and such salary was paid until the end of August 2010. Since 17 May 2010, Ndaba worked as the Acting Deputy Director: Governance and Administration of the respondent, having resigned from his former position at the office of the Pension Fund Adjudicator on that very day. It was undisputed that Ndaba had once reported to Mohlala in her previous position as Pension Fund Adjudicator. Ndaba was remunerated at Senior Management Service (SMS) level during his employment with respondent.

[4] It was common cause during the trial of the matter that Ndaba took over the duties of the department's Chief Operating Officer, who was under suspension. It was furthermore undisputed at the trial that Ndaba was informed that his contract was terminated for operational reasons on the day that he advised that the Special Investigating Unit should investigate fraud and corruption in the department, and he opened a fraud case with the police on the instructions of Mohlala.

[5] The respondent contended, in its written submissions filed after the trial, that the

second contract of employment (which purported to extend the duration of appointment reflected in the first contract from six months to two years) was void and of no force and effect. This was because the contracts which purported to be “secondment” agreements were not valid in that they did not comply with the applicable legislation, being section 15 of the Public Service Act of 1994 as amended (the PSA). Respondent had initially pleaded that the second contract was fraudulent but after confirmation by Mohlala at trial that she had signed it, did not proceed with this allegation.

[6] Regard must first be had to the content of the contracts at issue and the provisions of the PSA. It is of assistance to note that the definition of “department” in the PSA is as follows: 'department' means a national department, a national government component, the Office of a Premier, a provincial department or a provincial government component.*’*

[7] The provisions of the PSA dealing with secondment read as follows:

> ‘15 Transfer and secondment of officials
>
> (1) A person holding a pensionable appointment in a department under any law other than this Act or in any institution or body established by or under any law and which obtains its funds directly in whole or in part from revenue, may be transferred to, and appointed in, a post in the A or B division.
>
> (2) A person in the service of a department under any law other than this Act, or in the service of another government, or of any council, institution or body established by or under any law, or of any other body or person, may be employed by another department or a department, as the case may be, for a particular service or for a stated period and on such terms and conditions, other than conditions laid down by or under any pensions law, as may be agreed upon by the employer of the person concerned and the

relevant executive authority and approved by the Treasury.

(3) (a) An employee may with his or her consent and on such conditions, in addition to those prescribed by or under any law, as may be determined by the relevant executive authority after consultation with the Treasury, be placed at the disposal of another government, or of any council, institution or body established by or under any law, or of any other body or person, for a particular service or for a stated period.

(b) Such an employee remains subject to the laws applicable to employees in the public service while so placed at such disposal.

(4) (a) A person (in this paragraph referred to as the official) in the service of a department under any law other than this Act, or in the service of another government, or of any council, institution or body established by or under any law, or of any other body or person, may be employed by another department or a department, as the case may be, for a stated period and on such terms and conditions, other than conditions laid down by or under any pensions law, as may be agreed upon by the employer of the official and the relevant executive authority and approved by the Treasury, and in such a case, on such conditions, in addition to those prescribed by or under any law, as may be determined by the said authority after consultation with the Treasury, an employee may with his or her consent and in terms of such an agreement be placed at the disposal of the employer of the official for the same period on an exchange basis.

(b) Such an employee remains subject to the laws applicable to employees in the public service while so placed at such disposal.'[1]

1 This section has not yet been substituted in terms of section 22 of the Public Service Amendment Act 30 of 2007 by proclamation.

[8] In terms of the Regulations promulgated under the PSA, secondment is dealt with as follows:

> 'B.4.1 An executing authority may, with the consent of the employee concerned, second the employee to another department in the public service for a particular service or for a period of time.
>
> B.4.2 The recipient department shall bear the inclusive costs of secondment, unless both departments agree otherwise.
>
> B.4.3 If an employee is seconded in terms of section 15(3) or (4) of the Act, the recipient government, council, institution or body or person shall bear the inclusive costs of the secondment, unless the relevant department, after consultation with the Treasury, and the recipient entity agree otherwise.
>
> B.4.4 If an employee is seconded in terms of section 15(3) or (4) of the Act, the relevant executing authority may, subject to the written consent of the employee, bind her or him to continued employment in the relevant department or another department in the public service immediately after the secondment, for a period not exceeding the period of the secondment.'

<u>The contracts</u>

[9] The first contract is headed: 'Consent of employee to be seconded and agreement to return to the South African Public Service on expiry of the secondment.' In terms of clause 1 of the first contract, the employee (Ndaba):

> 'herewith consents to her/his secondment to the Department of Communications herein referred to as the Recipient Organisation on the conditions and terms in terms of the undertakings below.'

It is notable that the Respondent is referred to as both "the Department" and as "the recipient organisation" in this contract.

[10] In their written submissions, the legal representatives of the parties had differing interpretations of section 15 of the PSA, and of which of its sub-sections applied in this matter. On a close reading of the applicable provisions and the terms of the first contract, I am of the view that pro forma contract used for the purposes of first contract was drafted to cater for the secondment of an employee out of the public service in terms of section 15(3) of the PSA, to a recipient organisation.[2] In other words, it is in fact a contract that the respondent's Director General (as delegee of an executing authority) may enter into, in order to second (i.e. temporarily transfer) an employee of respondent to a body such as the Pension Fund Adjudicator. The first contract provides in Clause 10 for the following:

> '10 obligation to continue services after expiry of the secondment
>
> 10.1 the employee undertakes to continue, after expiry of the secondment, his/her employment in the Department for a period equal to/not exceeding the period of the secondment.
>
> 10.2 should the employee fail to comply with this requirement, she/he undertakes to repay the Department or the department in which she/he is employed at the time, an amount equal to the additional conditions of service (i.e. those conditions of service that relate directly to the secondment) that she/he rendered after expiry of her/his secondment.
>
> 10.3 the employee understands and accepts that clause 10.2 supra will apply only if she/he resigns or if she/he is dismissed from service due to misconduct or incapacity, but excluding incapacity due to ill-health or injury on duty.'

2 Section 15(3) (a) provides 'An employee may with his or her consent and on such conditions, in addition to those prescribed by or under any law, as may be determined by the relevant executive authority after consultation with the Treasury, be placed at the disposal of another government, or of any council, institution or body established by or under any law, or of any other body or person, for a particular service or for a stated period.
(b) Such an employee remains subject to the laws applicable to employees in the public service while so placed at such disposal.'

[11] The second contract, an amended version of the first, on which Ndaba's claim is based, was signed on the 29 of June 2010, and extends the "secondment" to the 16 May 2012. It refers to Ndaba as an "employee of the office of the pension fund adjudicator" and is dated a month and a half after he resigned from that Office. A material amendment to the first contract is found in clause 9 which is headed*:* 'obligation to continue services after expiry of the secondment' and includes the following sub-clause:

> '9.1 the employee undertakes to continue, after expiry of secondment, her/his employment in the Department or the public service for a period equal to/not exceeding the period of secondment and if the employee has resigned from his original position, it will be at the discretion of any government department to receive the employee into full-time employment. However, the employee is obliged to serve the entire contract period unless circumstances as mentioned in paragraph 8 above are applicable.[3] Conversely, the employer undertakes to allow the employee to perform his or her duties until the expiry of the contract, if the employee has resigned from the original employer, and if the employer decides to terminate the contract prematurely other than on the grounds mentioned in paragraph 8 above, the employer will negotiate an exit of the employee and meet all the contractual obligations for the remains of the contract period.'

[12] The second contract thus purports to allow for Ndaba to be received into any government department after the expiry of his contract, and to protect him from premature cancellation of the two year contract by the respondent. Ndaba was not a member of the Public Service before he joined the respondent. The remuneration and terms and conditions of employment of an employee of the Office of the Pension Fund Adjudicator are determined by the Adjudicator with the concurrence of the Financial Services Board, in terms of the Pensions Funds Act 24 of 1956. The Office is funded by the Financial Services Board.[4] The Office

3 This clause deals with the "premature termination of secondment" due to misconduct or personal circumstances of the employee.

4 Section 30S Of the Pension Funds Act 24 of 1956.

is a public entity and is accountable under the Public Service Management Act.

[13] Clause 9.1 of the second contract contains rights and obligations absent from secondment arrangements prescribed by the PSA. These rights and obligations are more in line with appointments to the SMS of the Public Service, in the normal course.

Evaluation

[14] The crisp issue for the Court to decide is whether Ndaba can enforce the second contract to obtain the relief claimed from the respondent in terms of clause 9.1 of the contract.

[15] Section 8A of the PSA sets out how the services of persons may be obtained in the Public Service:

> '8A Mechanisms for obtaining services of persons Services of persons may be obtained in terms of this Act by means of-
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> (a) appointments in terms of section 9, including appointments of heads of department in terms of section 12;
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> (b) appointments in terms of section 12A on grounds of policy considerations; or
>
> (c) deployments in the form of-
>
> (i) transfers in terms of section 14, including transfers of heads of department in terms of section 12 (3);
>
> (ii) secondments in terms of section 15; and
>
> (iii) assignments in terms of section 32.

[S. 8A inserted by s. 13 of Act 30 of 2007.]"

[16] It is relevant to look at certain of the applicable Public Service Regulations prescribed for members of the SMS. In regard to appointments the following prescripts apply:

'A Principles

The recruitment, selection and appointment of persons to the SMS, shall take place in accordance with section 11 of the Act. Posts shall as far as possible be filled through open competition. Selection shall increasingly be competency-based so as to enhance the quality of appointment decisions.

B Employment capacities

B.1 Persons newly appointed to the SMS shall be employed in a permanent or temporary capacity in posts on the fixed establishment.

B.2 Where persons are appointed to the SMS in a temporary capacity, it shall be for a fixed term or for a specific project.

C Advertising of posts and employment equity

The Minister may issue directives on how SMS posts are to be advertised and the application forms to be utilised; and targets to be achieved in promoting a SMS that is broadly representative of the South African people, including representation according to race, gender and disability.

D Competency-based selection

The Minister may issue directives on the desired managerial and leadership competencies of members of the SMS and the selection processes for the filling of SMS posts.

E Nurturing of talent to sustain SMS

The Minister may introduce programmes to identify and nurture talented individuals for possible appointment to SMS posts.

F Employment contracts

F.1 A person newly appointed to the SMS, other than a head of department, shall conclude a contract of employment, which shall be based on the provisions of the contract set out in Part 2 or 3 of Annexure 2, as the case may be.'

[17] The regulations governing the SMS also deal with exit management as set out below:

> 'Exit Management
>
> A Principles
>
> Executing authorities shall give consideration to the termination of service of members of the SMS in a manner that is fair to the individuals concerned and takes into account the public interests. The Minister may assist executing authorities to act accordingly.
>
> B Procedures and benefits
>
> The Minister may issue directives and provide guidelines to executing authorities on the procedures to be followed and benefits to be paid when terminating the services of members of the SMS.'

[18] Section 11 of the PSA which also governs appointments to the SMS provides:

> '11 Appointments and filling of posts
>
> (1) In the making of appointments and the filling of posts in the public

service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.

(2) In the making of any appointment in terms of section 9 in the public service-

(a) all persons who applied and qualify for the appointment concerned shall be considered; and

(b) the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act 55 of 1998), the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.'

[19] *In Khanyile v Minister of Education and Culture, Kwazulu-Natal and Another*,[5] the court decided that an appointment into the Public Service was null and void, as it had not been in compliance with the PSA or its regulations, and was thus ultra vires the statute. *Khanyile*'s case was that he had been appointed in the ordinary course to full time employment in the Public Service. The court found that the appointment into the SMS had been flawed in at least three major aspects – first, the post was not advertised; secondly, the proper selection procedures were not followed and thirdly, no contract of service, nor a performance agreement were concluded.

[20] In *Dwane-Alpman v Premier, Eastern Cape*,[6] the court considered an urgent application for reinstatement by the applicant into the position to which she had been appointed in terms of section 12A of the PSA. The parties had signed a "Special Advisors Contract" in terms of which the applicant was obliged to enter

5 (2006) 27 ILJ 769 (N).
6 (2008) 29 ILJ 541 (E).

into a performance agreement with the Premier. Her failure to do so was considered a material breach of her obligations and a repudiation of the contract. It was submitted before that court that before the performance agreement had been signed, the contract was inchoate and had no enforceability. The court found on the facts, that it was an implied term of the agreement that until the performance agreement was finalised, the applicant would perform such duties as were assigned to her by the Premier, either personally or on her behalf via other officials in her office, and would in respect of such performance receive the remuneration stipulated for in the agreement, provided that such duties fell within the ambit of one or more of the subparagraphs of the contract. On that basis, a valid and binding agreement was in existence as at the date when the premier addressed the letter of termination to the applicant.

[21] The court in *Dwane-Alpen* distinguished the decision in *Khanyile v Minister of Education and Culture, KwaZulu-Natal and Another*[7] stating that:

> '[I]n that case the applicant was appointed in terms of the Act, and the applicable regulations thereunder (as opposed to s 12A) provided inter alia that an executing authority-
>
> "(a) may appoint employees on a permanent basis, either full time or part-time;
>
> ....
>
> (g) shall ensure that each employee upon employment, is provided with a written contract of employment, including the terms and conditions of her or his service."
>
> It was held that on the grounds, inter alia, that no contract of service had been concluded, the purported appointment of the applicant to a post in the public service was flawed in a major respect and was therefore of no force and effect.

7 (2006) 27 ILJ 769 (N) at para 24.

The ratio of the decision finds no application in the present case.'

[22] In my judgment, this matter is distinguishable from both those decisions. This case concerns a purported secondment in terms of section 15 of the PSA[8] as is evident from the face of the second contract. More significantly, and in distinction to both those cases, the said contract appears to be in the nature of a simulated or disguised agreement. The Appellate Division (as it then was) was concerned with the distinction between motive and purpose, on the one hand, and intention on the other, in trying to determine the genuineness of a contract, and of the underlying intention to transfer a right, where the transfer was not an end in itself. Nienaber JA had this to say in *Hippo Quarries (Tvl) (Pty) Ltd v Eardley*:[9]

> 'Motive and purpose differ from intention. If the purpose of the parties is unlawful, immoral or against public policy, the transaction will be ineffectual even if the intention to cede is genuine. That is a principle of law. Conversely, if their intention to cede is not genuine because the real purpose of the parties is something other than cession, their ostensible transaction will likewise be ineffectual. That is because the law disregards simulation. But where, as here, the purpose is legitimate and the intention is genuine, such intention, all other things being equal, will be implemented.' [10]

[23] The test to be applied to decide whether a contract is simulated i.e. not genuine, has recently been considered by the Supreme Court of Appeal[11] in a tax matter. The court held that the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. The court stated that invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved, they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance

8 I note that there is a distinction between a 'deployment' such as secondment in terms of section 8A of the PSA and an 'appointment'
9 1992 (1) SA 867 (A).
10 Id at 877D-F.
11 *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA) at para 55.

and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation. A court should not look only to the outward trappings of a contract: it must consider, when simulation is in issue, what the parties really sought to achieve.[12]

[24] What Ndaba intended to achieve was was clearly expressed in his evidence before court. This evidence is also contained in a letter he wrote to the Acting Director General of the department, parts of which he read out in court, and which includes the following statement: 'Again, having been in permanent employment for about 15 years, only a madman would not negotiate a better and longer contract period. I left a permanent job, when I resigned, the employer had informed me that I will be able to negotiate a longer contract period.' I must also note that the content of this letter reflects that Ndaba is highly trained in law, as was the other signatory to the contract, Mohlala.

[25] The pleadings on Ndaba's behalf are drafted to claim monies owing in respect of a two year binding fixed term contract. The pleadings do not raise the principle of estoppel. On Ndaba's own version, the intention of the agreement was not to enter into a contract of secondment. Indeed, the common cause fact that he resigned from his previous employment on the day he entered into the first contract, as well as the undisputed fact that his previous employer did not second him to the respondent leaves the question beyond doubt.

[26] The matter appears to fall squarely into the category mentioned in the *Hippo Quarries* matter in which the court stated in respect of the parties that 'if their intention to cede is not genuine because the real purpose of the parties is something other than cession, their ostensible transaction will likewise be

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12 Id at paras 55 and 80

ineffectual. That is because the law disregards simulation.'[13] In this matter, the real purpose of the parties, on Ndaba's own version, was to enter into a fixed term contract and he would have been "a madman" to have left his former permanent employment on a temporary secondment contract basis. Most importantly, the second agreement purported to give Ndaba rights which normally would only accrue to a person who had been duly appointed to the SMS on a fixed term contract in accordance with the relevant prescripts, relating to qualifications, competence and due appointment process in both the PSA and its regulations as set out above.

[27] I therefore find that the second contract is not enforceable because it was simulated. The fact that two people with advanced legal skills entered into the contract only serves to fortify this conclusion. I do not consider this an appropriate case for costs to follow the result – the agreement had two signatories.

[28] In the premises I order as follows:

28.1 The application is dismissed

28.2 There is no order as to costs

Rabkin-Naicker J

Judge of the Labour Court

13 Hippo Quarries supra.

Appearances:

Applicant: Mr Moshoana, Mohlaba & Moshoana Inc

Respondent: Advocate PC Pio instructed by the State Attorney