

SOUTH AFRICA / JUDGMENT

Noe and Others v Premier of the Free State Provincial Division and Others (3607/09) [2010] ZAFSHC 56 (4 June 2010) [2010] ZAFSHC 56

COURT

Free State High Court, Bloemfontein

BEFORE

J.P. Daffue

CASE / FILE NUMBER

3607/09

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 3607/09

In the matter between:

NOE E.P. 1st Applicant

BASSON M.R. 2nd Applicant

KHOMO M.N. 3rd Applicant

SEDIO C.G. 4th Applicant

MOHAPI N.S. 5th Applicant

and

DEPARTMENT OF PREMIER FREE STATE 1st Respondent

PROVINCIAL DIVISION

THE PREMIER, FREE STATE, 2nd Respondent

THE DIRECTOR GENERAL IN THE OFFICE 3rd Respondent

OF THE PREMIER

THE MANAGER ORGANISATIONAL 4th Respondent

DEVELOPMENT

JUDGEMENT:

J.P. DAFFUE, AJ

HEARD ON: 27 MAY 2010

DELIVERED ON: 4 JUNE 2010

INTRODUCTION

- [1] Applicants seek an order in terms whereof the decision of first and/or second respondents as contained in a letter of 17 June 2009 in terms of which applicants' contracts of employment were allegedly retrospectively terminated be declared unlawful. Further relief is also claimed, the effect being that applicants should be allowed to resume their respective duties with full pay from the date of termination of their contracts of employment to date of resumption of their duties.
- [2] The application is opposed by respondents who filed a counter application. Respondents seek a declaratory order to the effect that the decision of the erstwhile Premier of the Free State Province (Me Marshoff) to appoint the applicants in permanent posts in the Public Service, was in conflict with the provisions of the Public Service Act, 1994 (PSA) and/or the Public Service Regulations of 2001 and therefore a nullity and of no force or effect. This application is opposed by the applicants.
- [3] Applicants are represented by their attorney, Mr. Khang, who also argued the matter on their behalf. Respondents are represented by the State Attorney. Mr. Tip SC assisted by Mr. Malema argued respondents' case.

FACTUAL

BACKGROUND

- [4] The material facts that led to the present litigation are largely common cause. All five applicants entered into fixed term contracts with the Government of the Free State Province represented by Me Marshoff. Although the date of commencement differed, all five contracts stipulated that the contracts would terminate "on the termination of the term of office of Premier F.B. Marshoff as Premier of the Free State Provincial Government or 30 June 2009, whichever period is the shortest". The terms and conditions of all five contracts were the same, except for the commencement dates and duration thereof.
- [5] The contracts of second, third, fourth and fifth applicants referred to appointments in terms of section 12A of the PSA, while the contract of first applicant appears to be an appointment as member of the SMS in terms of section 9 of the PSA. The employment contracts provided that the employees were to serve the employer in the office of the Premier at such place as may from time to time be directed by the employer or any other officer duly authorised

thereto and the employee might be required to perform other duties or to work at other places that might reasonably be required by the employer.

- [6] None of the applicants were appointed in terms of the selection procedures applicable to Public Service employees. In particular, the posts in which they were appointed, were never advertised and consequently no applications were received from a pool of candidates. No selection process and/or short listing and/or interviews by an interviewing and selection panel took place.
- [7] On 22 November 2006 first applicant was transferred to another post, that of Deputy Manager: Community Liaison Services, which transfer he accepted on 24 April 2007.
- [8] Since December 2008 a process was undertaken in terms whereof applicants were relocated and permanently absorbed in the organisational

structure and staff establishment of the Free State Provincial Government. Me Marshoff finally approved the relocation and permanent absorption of applicants. It appears as if this process was finalised in respect of first, third, fourth and fifth applicants on 15 December 2008 and in respect of second applicant, Me Basson, on 20 April 2009. The fourth respondent set the wheels in motion for the aforesaid approval by Me Marshoff, but senior officers, such as third respondent, approved the relocation and permanent absorption process as well.

- [9] During the process described in the previous paragraph, none of the applicants were subjected to a selection process and the posts in which they were appointed, were not advertised. Applicants allege in their application papers that first applicant was permanently appointed on 1 February 2009, while the second to fourth applicants became permanently appointed on 26 April 2009 and fifth applicant on 3 April 2009. However, in the heads of argument of their attorney and during his oral argument he submitted that the permanent appointments were subject to a suspensive condition and that they became permanently employed effectively from 6 May 2009 only, the day Me Marshoff left her office as Premier of the Free State Province.
- [10] Four letters were placed before the court as proof of the so-called permanent absorption of the applicants with exclusion of Me Basson, the second applicant. These letters, dated 28 January 2009, were signed by Me Marshoff. It appears from the contents thereof that the applicants were permanently absorbed in the Public Service, "effective from the 1st day of the month following the end of your current employment contract or in accordance with clause 1.1 of the said contract".

A similar letter in respect of Me Basson was not attached to the papers and neither of the legal representatives of the parties could provide me with a copy thereof. I accept that she received a similar letter although dated either 20 April 2009 or thereafter based on the facts set out above.

- [11] The applicants continued to work with the knowledge of the new Premier of the Free State Province, Mr. E.S. Magashule (the Premier) and all other senior staff from 6 May 2009 and onwards. However, on 20 May 2009 the Premier issued letters to the applicants requesting

submissions from them as to why he should not reverse the decision of Me Marshoff to appoint them permanently. Notwithstanding written submissions by the applicants dated 25 May 2009, the Premier issued letters to them dated 17 June 2009 alleging that the decision of Me Marshoff to appoint them, was null and void and of no legal consequence and therefore he reversed that decision. Until then the applicants still carried out their functions as employees and also received their salaries for May 2009.

- [12] On 7 July 2009 Mr. Khang wrote a letter on behalf of the applicants to the Premier in which he requested copies of certain documentation and reasons for the reversal of his clients' appointments. This letter was replied to on 30 July 2009 only and after the present application had been instituted. The reasons for the Premier's decision were recorded as follows in his letter:

"2.1 The Public Service Act, 1994 read with Chapter 1, part VII of the Public Service Regulations prescribes peremptory processes for appointment, which include advertisement and selection processes.

2.2 The peremptory appointment processes were not followed when your clients were allegedly appointed.

2.3 Section 12A of the Public Service Act is not applicable.

2.4 The absorption into posts were therefore null and void and without any legal effect."

Simultaneously the Premier wrote a letter to the Minister of Public Service and Administration advising him in accordance with section 5(7) of the PSA of the corrective action taken.

POINTS IN LIMINE

- [13] Two points in limine were taken on behalf of the applicants.

13.1 The first point in limine taken on behalf of the applicants was in relation to the lack of authority of Amelia Swanepoel to depose to an affidavit on behalf of the respondents. She is the Director responsible for legal services in the Department of the Premier.

This point was abandoned by Mr. Khang during his oral argument and wisely so. Letters of authority have been filed as part of the respondents' replying affidavit to the counter application. More importantly, this point is without any substance based on legal grounds. The deponent, Swanepoel, was called upon by the State Attorney, acting for the respondents, to place evidence before the court. Authority has to be challenged on the level of whether the attorney in fact held empowerment. Rule 7(1) must be complied with by a party seeking to dispute the authority of an attorney to act on behalf of a party.

See *UNLAWFUL OCCUPIERS, SCHOOL SITE v CITY OF JOHANNESBURG* 2005 (4) SA 199 (SCA) at paragraphs [14] – [16] and *ANC UMVOTI COUNCIL v UMVOTI MUNICIPALITY* 2010 (3) SA 31 (KZP) at paragraphs [26] – [29], p. 42 and 43.

13.2 A further point in limine was raised, i.e. the misjoinder of Me Marshoff as a party to the counter application. In fact, it cannot be misjoinder, but non-joinder. Although Mr. Khang intimated that he was tempted to abandon this point as well, he presented argument to me and I shall briefly deal herewith.

Me Marshoff does not have a direct and substantial interest in the outcome of this application, including the counter application. No order issued by this court can profoundly and substantially affect her interests. As advanced by Mr. Tip, the question for me to consider is essentially one of statutory interpretation and the fact that Me Marshoff is not before the court as a party, will not in the slightest degree affect the carrying out of the court's order and there is no prospect of any prejudicial consequence for her.

See *GORDON v DEPARTMENT OF HEALTH, KWAZULU-NATAL*

[2008] ZASCA 99; 2008 (6) SA 522 (SCA) paragraphs [9] – [11], p. 529 – 530.

The second point in limine is therefore dismissed.

APPLICABLE LEGISLATION

[14] Section 197 of the Constitution of the Republic of South Africa, 108 of 1996, reads as follows:

“(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of

national legislation, and which must loyally execute the lawful policies of the government of the day.

- (2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.
- (3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.
- (4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the

public service in their administrations within a framework of uniform norms and standards applying to the public service.”

[15] “Employee” is defined in section 1 of the PSA as

“a person contemplated in section 8, but excludes a person appointed in terms of section 12A.” (emphasis added)

[16] Section 9 of the PSA reads as follows:

“Appointments in public service

An executive authority may appoint any person in his or her department in accordance with this Act and in such manner and on such conditions as may be prescribed.”

[17] Section 11 of the PSA reads as follows:

“Appointments and filling of posts

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.

In the making of any appointment in terms of section 9 of the public service –

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

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.”

(emphasis added)

It is noted at this stage that Mr. Khang referred me in his oral argument to section 11(3) of the PSA. However, section 11(3) was deleted by section 16(b) of Act 30 of 2007. I was also requested not to consider sections of the PSA in isolation, but the Act as a whole.

[18] Section 12A reads as follows:

“Appointment of persons on grounds of policy considerations

Subject to this section, such executive authorities as the Cabinet may determine may appoint one or more persons under a contract, whether in a full-time or part-time capacity –

to advise the executive authority on the exercise or performance of the executive authority’s powers and duties;

to advise the executive authority on the development of policy that will promote the relevant department’s objectives; or

to perform such other tasks as may be appropriate in respect of the exercise or performance of the executive authority’s powers and duties.

The maximum number of persons that may be appointed by an executive authority under this section and the upper limits of the remuneration and other conditions of service of such persons shall be determined by the Cabinet in the national sphere of government.

The special contract contemplated in subsection (1) shall include any term and condition agreed upon between the relevant executive authority and the person concerned, including –

the contractual period, which period shall not exceed the term of office of the executive authority;

the particular duties for which the person concerned is appointed; and
the remuneration and other conditions of service of the person concerned.”

[19] Section 14 of the PSA deals with the transfer within the Public Service and the relevant part thereof is quoted:

“(1) Subject to the provisions of this Act, every employee may, when the public interest so requires, be transferred from the post or position occupied by him or her to any other post or position.....”

(emphasis added)

[20] Insofar as Mr. Khang referred me to section 5(5)(a) of the PSA to bolster his argument that a deviation of the provisions of the Act and the regulations can be allowed in certain circumstances, it must be pointed out that that section was deleted by section 7(c) of Act 30 of 2007 and is accordingly not applicable to the dispute in casu.

[21] Section 5(7) of the PSA which came into operation on 1 April 2008 is the section relied upon by the Premier for the reversal of the decisions by Me Marshoff. This subsection reads as follows:

“(7) (a) A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission.

(b) The relevant executive authority shall in the prescribed manner keep record of and report to the Minister any correction by a functionary

of a department within the portfolio of that executive authority.”

A “functionary” is defined in section 1 of the PSA as

“any person upon whom a power is conferred or a duty is imposed by this Act”.

[22] The Public Service Regulations of 2001 (the Regulations) must also be considered. It is apparent that Me Marshoff believed that part III.B2 of the Regulations authorised her to approve the proposals made for the permanent appointment of applicants as Public Service employees. When part III is considered,

both with reference to the heading thereof and the contents, there can be no doubt that it deals with strategic planning pertaining to inter alia the determination of an organisational structure, defining of posts, grading of proposed new jobs according to the job evaluation system and engaging human resource planning with a view to meeting the resulting human resource needs. Paragraph F of part III reads as follows:

“F Creation and filling of posts

Before creating a post for any newly defined job, or filling any vacancy, an executing authority shall –

- (a) confirm that she or he requires the post to meet the department's objectives;
- (b) in the case of a newly defined job, evaluate the job in terms of the job evaluation system;
- (c) in the case of a vacant post on grade 9 or higher, evaluate the job unless the specific job has been evaluated previously; and
- (d) ensure that sufficient budgeted funds, including funds for the remaining period of the medium-term expenditure framework, are available for filling the post."

Part III.B2 relied upon by Me Marshoff, reads as follows:

"Subject to regulation B.2A, an executing authority shall, based on the strategic plan of the department

–

- (a) determine, after consultation with the Minister, the department's organisational structure in terms of its core and support functions;
- (b) define the posts necessary to perform the relevant functions while remaining within the current budget and medium-term expenditure framework of the department, and the posts so defined shall constitute the department's approved establishment;
- (c) grade proposed new jobs according to the job evaluation system referred to in Part IV; and
- (d) engage in human resource planning in accordance with regulation III D with a view to meeting the resulting human resource needs."

Nowhere in this Regulation is an executive authority authorised to approve the permanent appointment of persons on the staff establishment.

[23] The respondents rely on part VII of Chapter 1 of the Regulations which deals with the procedures for appointment, promotion and termination of service. Regulation VII.A sets out general principles which include the need to ensure employment equity and the use of affirmative action. Regulation

VII.B contains several general conditions. Regulation VII.C1A addresses the recruitment process and deals with the timeframes for the filling of funded posts and in particular makes it clear that such posts must be advertised. Regulation VII.C2 deals in detail with the process of advertising and stipulates that the advertisement of a vacant post must reach the entire pool of potential candidates. Regulation VII.D sets out the manner in which the selection of an appointee is to be made and details the composition of the selection committee and relevant criteria are enumerated which the selection committee must consider.

MR. KHANG'S SUBMISSIONS ON BEHALF OF APPLICANTS

- [24] Although it was conceded by Mr. Khang that none of the posts, to which applicants were allegedly transferred, were advertised and also that no selection processes were followed prior to the filling of these posts by applicants, he invited me to study the PSA as a whole and cautioned me not to read and adjudicate sections thereof in isolation.
- [25] Mr. Khang submitted that insofar as first applicant's employment contract refers to section 9 of the PSA and not section 12A as in the other instances, I should distinguish between him and the other applicants. This is said notwithstanding the fact that all five applicants were initially *ad idem* that their employment contracts were materially the same.
- [26] Mr. Khang submitted that Me Marshoff was fully within her rights to deviate from the provisions of the Act and the Regulations in order to appoint applicants permanently as she did. He relied on section 5(5)(a) of the PSA for authority in this regard and when invited to provide me with case law in support of his argument, he could not do so. As indicated above, section 5(5)(a) was deleted by section 7(c) of Act 30 of 2007.
- [27] Mr. Khang submitted that the matter should be approached on the basis of the common law and contacts of employment entered into in terms of the common law. The case law to which he referred me also deal with employment contacts between individual employers and employees in which cases no statutory requirements as in the case of Public Service appointees applied. He consequently submitted that valid and forceable employment contracts were entered into which became operative the day after Me Marshoff left the office, i.e. 6 May 2009.
- [28] He also relied on the Appeal Court judgement of *WILKEN v KOHLER* 1913 AD 135 for his submission that performances under a contract which is purported to be void for non-compliance with formalities, cannot be set aside or reversed.
- [29] According to Mr. Khang, applicants performed their services as employees for the remainder of May 2009 as well as for June 2009 until they received the letters of 17 June 2009 and due to the silence and inaction of the employer and the Premier in particular, this led to a reasonable inference and belief that the applicants' submissions were accepted and they performed from their side in terms of their employment contracts.
- [30] Mr. Khang submitted that a proper case has been made out that the Premier waived his right to reverse or cancel the contracts, alternatively he should be estopped from doing so. The case law relied upon by Mr. Khang deal with waiver and estoppel in general.
- [31] Finally, Mr. Khang submitted that a party wishing to cancel or rescind a contract, must do so within a reasonable time failing which the other party may fairly infer that the power or right of cancellation or rescission has been waived. According to him the Premier failed to act timeously and consequently he could not have reversed the decision of Me Marshoff on 17 June 2009 as he did.

MR. TIP'S SUBMISSIONS ON BEHALF OF RESPONDENTS

- [32] According to him the key question in casu involves an issue of legality in the context of the Public Service, namely whether it was lawful for Me Marshoff to have appointed the applicants to permanent posts without having followed the prescribed procedures. He submitted that the Premier was within his rights to reverse the appointments which had been made unlawfully.
- [33] He differentiated between section 12A appointments and appointments in terms of section 9 of the PSA. According to him the conclusion of a section 12A contract is done on an entirely different basis. This section is exceptional in its nature and unlike a permanent appointment, is directly coupled with the political term of a particular executive authority. The number of persons that may be appointed on this basis is defined by Cabinet at National level.
- [34] He submitted that the reference to section 9 of the PSA in the employment contract of first applicant is plainly an error as it should read section 12A. He interpreted section 14 of the PSA to be concerned with the transfer of employees who already occupy posts or positions on the permanent establishment of the Public Service and consequently the section is not applicable to section 12A appointees who are not defined as employees. Mr. Tip submitted that Me Marshoff failed to appreciate that section 8 of the PSA as well as the definition of “employee” was changed by the PSA Amendment Act, 30 of 2007, which came into operation on 1 April 2008. Consequently he submitted that the effect of the changes is unambiguous and one of the consequences thereof is that persons under section 12A contracts could no longer be dealt with in terms of section 14(1).
- [35] He concluded his main argument in submitting that the appointments by Me Marshoff amounted to a nullity and was at no time valid or of force and effect. For this submission he relied on the judgments in *UNIVERSITY OF THE WESTERN CAPE & OTHERS v MEMBER OF EXECUTIVE COMMITTEE FOR HEALTH & SOCIAL SERVICES & OTHERS* (1998) 19 ILJ 1083 (C) and *KHANYILE v MINISTER OF EDUCATION AND CULTURE, KWAZULU-NATAL AND ANOTHER* [2004] 4 ALL SA 442 (N).
- [36] Mr. Tip submitted that applicants cannot rely on waiver or the doctrine of doctrine of estoppel and for these submissions he relied on *KHANYILE loc cit*, *EASTERN METROPOLITAN SUBSTRUCTURE v PETER KLEIN INVESTMENTS (PTY) LTD* 2001 (4) SA 661 (W) at 682 (E) and *EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHERS v CONTRACTPROPS 25 (PTY) LTD* 2001 (4) SA 142 (SCA) at par. [11]. Based on his reasoning, the principle of legality will be undermined by giving public authorities powers which they do not in law possess.

- [37] In addition to his main argument, Mr. Tip submitted that posts can be filled only if they are vacant and funded. In this regard he placed reliance on par. 14 of Resolution 1 of 2007 which was adopted in the PSCBC on 5 July 2007. It has been shown that at least in respect of the posts of second and third applicants these posts were not funded at all whilst in the case of the first applicant his post was funded only up to a level 11 appointment whereas he was appointed at level
13. Consequently he submitted that the appointments of these applicants in the relevant posts were irregular and of no force or effect.
- [38] He contended that the decision of Me Marshoff to appoint applicants were based on an error of fact or law and it was submitted on behalf of respondents that it could have been reversed and/or corrected if it was in the public interest to do so which was the case indeed. For this proposition he relied on section 5(7) of the PSA.
- [39] He not only submitted that the application should be dismissed with costs, but that it is both desirable and appropriate for a declaratory order to be made in terms of the counter application.
- [40] He also emphasised that there can be no unlawful repudiation of a contract as alleged on behalf of applicants if the contract itself is irregular and null and void. The Premier did not repudiate any contracts, but reversed the decision of Me Marshoff as he was entitled and obliged to do.
- [41] Mr. Tip was requested to address me on the provisions contained in clause 1.2 of the Ministerial Handbook, an extract of which is attached to the applicants' papers. He contended that Me Marshoff was entitled to headhunt applicants for the purpose of entering into fixed term contracts with them, otherwise they could be appointed as full time public servants on condition that all applicable regulations were followed. Me Marshoff elected to arrange for the appointment of applicants in respect of fixed term contracts and consequently the second option was not available to her at a later stage. Even so, there should have been compliance with the strict regulations if they were to be appointed as full time public servants. I instructed the respondents' counsel to provide me in corporation with applicants' attorney with a full copy of the relevant handbook and I thank them for their assistance in this regard.

AN EVALUATION OF THE ARGUMENTS ON BEHALF OF THE PARTIES

- [42] Mr. Khang's reliance on section 5(5)(a) and 11(3) of the PSA is without foundation and I have already indicated supra that these subsections were repealed prior to the action taken by Me Marshoff in casu.
- [43] As invited by Mr. Khang, the PSA as a whole is considered by me and not only particular sections thereof. It must also be pointed out that the definition of "employee" prior to the amendment thereof through the Public Service Amendment Act, 30 of 2007, read as follows:

“Employee means a person contemplated in section 8(1)(c)”

and in turn section 8(1)(c) previously provided that

“The public service shall consist of persons who –

.....

(c)

- (i) hold posts on the fixed establishment other than posts referred to in paragraph (a);
- (ii) are employed temporarily or under a special contract in a department, whether in a full time or part time capacity, additional to the fixed establishment or in vacant posts on the fixed establishment.”

Section 8 was entirely substituted through the 2007 Amendment Act.

[44] The legislature clearly had in mind to distinguish between the appointment of persons on grounds of policy considerations which may be seen as political appointments, provided for in section 12A of the PSA and other Public Service appointments. Unlike in the event of section 12A appointments, the latter appointments must comply with the provisions of section 197 of the Constitution, together with section 11 of the PSA and the Regulations. The advertising of a particular post in the Public Service is a necessary requirement before an appointment can be made and the Regulations are clear. The purpose is to reach the entire pool of potential candidates for the particular post and especially persons that were historically disadvantaged in order to comply with affirmative action and the Employment Equity Act, 55 of 1998. Unlike persons that might be appointed in terms of section 12A of the PSA, no employee of the Public Service may be favoured or prejudiced only because he/she supports a particular political party or cause. See section 197(3) of the Constitution.

[45] Insofar as Mr. Khang relied on the provisions of paragraph 1.2 of the Ministerial Handbook and the options available to an executive authority, the Ministerial Handbook should be properly considered:

45.1 The handbook was approved by Cabinet on 5 February 2003 and thus prior to the important 2007 amendments of the PSA relating to inter alia the definition of “employee”, the substitution of section 8 and the changes to section 5.

45.2 It is apparent from the preface thereof that it is a guideline inter alia with regard to administrative and support services. It is neither legislation, nor subordinate legislation and consequently it remains merely what it is, i.e. a handbook containing guidelines. In the event of any uncertainty or conflict, the provisions of the PSA and its Regulations must be adhered to.

[46] I do not agree with Mr. Khang's viewpoint that the matter in casu should be adjudicated on the basis of a normal common law employment contract. Strict statutory provisions must be complied with in the appointment of Public Service employees. Where a public official has performed an act which is ultra vires or invalid according to a statutory provision, the ultra vires principle should apply and the contract should be null and void and of no force and effect.

[47] I am in respectful agreement with the judgment of Hlophe J (as he then was) in UNIVERSITY OF THE WESTERN CAPE & OTHERS loc cit to the effect that non-compliance with the provisions of the PSA and the Public Service Staff Code (which applied then) is fatal and it is not possible for employees and officers to contract out of them. (The Staff Code was replaced by the 1999 Public Service Regulations, which were later substituted by the present Regulations.) As also found by Hlophe J, no one could have a

legitimate expectation to do something contrary to the law or to prevent a functionary from discharging his/her statutory duty. The requirement that the prescripts of the PSA be strictly complied with was directly dealt with in KHANYILE where it was found that non-compliance with the PSA and its Regulations relating to a purported appointment of a person, rendered such appointment of no force and effect. The following dictum by Levinsohn J in this regard is with respect fully supported

"Having purported to appoint him as such the relevant authorities were obliged to follow the procedures set forth in the law. To do otherwise would result in a most chaotic and inequitable dispensation in the Public Service."

See KHANYILE loc cit p. 449, par. g.

[48] The full bench of the Cape Provincial Division dealt with a not too dissimilar factual matrix in MGOQI v CITY OF CAPE TOWN AND ANOTHER; CITY OF CAPE TOWN v MGOQI AND ANOTHER 2006 (4) SA 355 (CPD). In that matter the Mayor of the City of Cape Town exceeded her authority in purporting to amend the terms of her delegated power and thereupon extended the employment contract of the city manager. The full bench found that this decision was fatally flawed and hence unlawful and invalid. (at p. 389H)

[49] Mr. Khang's reliance on either waiver or the doctrine of estoppel is without substance. If I were to allow either of his submissions, I would give validity to an act which is statutorily invalid. As Marais JA found in EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHERS v CONTRACTPROPS 25 (PTY) LTD loc cit at par. [11] on p. 148F:

"It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine

of estoppel."

In my view the same principle should apply pertaining to waiver.

[50] Notwithstanding Mr. Khang's invitation, I do not deem it apposite to distinguish between first applicant on the one hand and the other applicants on the other. If the terms and conditions of the five employment contracts are considered, they are substantially the same. First applicant mentioned in his own words in par. 6.2 of the founding affidavit the following:

"The terms and conditions of all the aforementioned contracts were the same, except for the commencement dates and durations."

The reference to section 9 in the case of first applicant's contract must be regarded as a mistake as it should have been section 12A as in the other contracts. In the light of the strict provisions contained in the Regulations pertaining to appointment there can be little doubt that persons to be appointed on the permanent staff establishment of the Public Service need to be subjected to certain procedures and inter alia strict selection processes.

[51] Me Marshoff's purported permanent appointment of applicants in terms of section 14(1) of the PSA was unauthorised and she not only exceeded her powers, but acted contrary to the strict provisions of the PSA and the Regulations. It must also be pointed out that the reference to section 14(1) is incorrect as this section deals with transfers of employees and not their appointment. Part III.B.2 of the Regulations relied upon by Me Marshoff for approval of the appointments of applicants on the permanent staff establishment deal with strategic planning, as set out above, and did not give any authority to her to appoint the applicants permanently and/or to transfer them in terms of section 14 without complying with the procedures set out in Part VII of the Regulations.

[52] Insofar as Mr. Khang placed reliance on the fact that there was a past practice in terms whereof previous Premiers of the Free State absorbed fixed term contract employees in the permanent staff establishment and transferred them, I must mention that no concrete evidence was placed on record in this regard. In any event, if this was allowed in the past, it cannot be countenanced now, taking into consideration the amendments to the PSA in accordance with the 2007 Amendment Act, which became effective on 1 April 2008.

[53] Mr. Khang requested leave to hand in an unreported judgment by Farber AJ when he addressed me in reply. He assured me that the case was on all fours with the case in *casu*. This submission is incorrect. It was found by the Labour Court that the applicant was not appointed for any of the purposes referred to in section 12A. It was also found that the applicant was not appointed to serve the then MEC. The court proceeded as follows:

"Additionally, the agreement lacks the qualities of a 'special contract', as contemplated in Section 12A(1), as read with Section 12A(3). Thus, its term was fixed for a period of five years and was not limited to the term of office of the then M.E.C. He may have held office for a lesser or even a longer period."

I therefore find that the THABANE-judgment by Farber AJ is inapplicable for purposes of adjudication of this application.

- [54] Section 5(7) of the PSA states that a functionary shall correct any action of omission purportedly made in terms of this Act by that functionary if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission. “Functionary” is defined in section 1 of the PSA to mean “any person upon whom a power is conferred or a duty is imposed by this Act”. At the first glance it might be argued that the only person that may correct an action or omission is the very functionary who was responsible for the action or omission. In my view, such an approach would be over technical.
- [55] “Functionary” is also defined as an official and an “official” is defined as “a person holding public office or having public duties”. See South African Concise Dictionary, p. 466 and p. 806. I am of the view that the legislature also intended to include a functionary who replaced the functionary whose action or omission was based on an error of fact, or law or fraud. Therefore the Premier who replaced Me Marshoff was entitled and obliged to take corrective measures, which he did. Not all actions or omissions can be set aside as a proper safeguard was built in by the legislature, i.e. the corrective measures must be in the public interest.
- [56] The golden rule of statutory construction is to ascertain the intention of the legislature by taking the language used and where the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect. However, due regard must be given to the context in which the words are used, the apparent purpose of the provision in which they are found and of course to their setting in and the object of the statute as a whole. See *ABP 4x4 MOTOR DEALERS (PTY) LTD v IGI INSURANCE CO LTD* 1999 (3) SA 924 (SCA) at par. [29], p. 937. The ordinary meaning should therefore in principle be adopted, unless the context shows or furnishes very strong grounds for a different reading of the intention of the legislature, such as that giving the section its ordinary meaning would lead to the interpretation of the section in question being unreasonable, inconsistent or unjust, or the result being absurd or the section being unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights. See J.R. De Ville, *Constitutional and Statutory Interpretation*, 2000 Edition, p. 95 and *NGCOBO AND OTHERS v SALIMBA CC; NGCOBO v VAN RENSBURG* 1999 (2) SA 1057 (SCA).
- [57] In my view it would be unreasonable and absurd to argue that a substituting functionary may not correct action which was based on an error of fact or law or fraud by his or her predecessor. See also section 5(8) of the PSA which became law on 1 April 2008 as well. In terms hereof the Public Service Commission is duty bound to investigate compliance with the PSA and may issue directions in this regard. It is a further indication of the purpose of the legislature to sufficiently provide for corrective measures in promulgating the 2007 Amendment Act.

[58] Insofar as applicants belatedly attempted to rely on the doctrine of legitimate expectation, this aspect was not seriously argued by Mr. Khang, but nevertheless, there can be no doubt that the law does not protect any expectations, but only those which are legitimate. The applicants could not harbour any legitimate expectation that their employer and the Premier in particular would condone their purported but illegal appointments on the permanent staff establishment of the Free State Province. See *supra* and *SOUTH AFRICAN VETERINARY COUNCIL AND ANOTHER v SZYMANSKI* 2003 (4) SA 42 (SCA) at paragraph [19].

CONCLUSION

[59] For the reasons set out *supra* there is no merit in the applicants' application and the application should be dismissed with costs. Strictly speaking, it may be argued that it is unnecessary to grant the relief claimed in the counter application. However, the granting of such relief may prevent any uncertainty and there is no reason in principle why the respondents should not be granted such relief in view of my findings therein. Mr. Tip asked for the costs to include the costs of two counsel, not only in the heads of argument, but also in his oral address to the court. Mr. Khang did not address me on this issue at all. The matter is important to both parties and it involves the consideration and interpretation of several sections of the PSA and in particular section 5(7) thereof which is a new section and in respect whereof no case law, either reported or unreported, could be found by counsel for the parties or myself. Consequently, the respondents are entitled to the costs of two counsels.

ORDER

[60] Accordingly, the following order will issue:

Applicants' application is dismissed with costs.

In respect of the counter application:

It is declared that the decision of Me Marshoff, the erstwhile Premier of the Free State Province purporting to appoint the applicants to permanent posts in the Public Service, pursuant to a process of relocation and absorption was in conflict with the provisions of the Public Service Act, 1994 and/or the Public Service Regulations, 2001.

It is declared that the said decision of the erstwhile Premier is a nullity and of no force and effect.

The applicants are ordered to pay the costs of the counter application, jointly and severally, the one to pay the others to be absolved.

3. The costs of the respondents pertaining to the main and counter application shall include the costs of two counsel.

J.P. DAFFUE, AJ

On behalf of the applicants: Adv. M. Khang

Instructed by:

Mphafi Khang Inc.

BLOEMFONTEIN

On behalf of the respondents: Adv. K.S. Tip SC

With him:

Adv. C. Malema

State Attorney

/sp

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