IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, BRAAMFONTEIN

Reportable

Case no: JA 91/2015

In the matter between:

Dr JOACHIM VERMOOTEN **Appellant**

and

DEPARTMENT OF PUBLIC ENTERPRISES **First Respondent**

JN MATSHEKA NO **Second Respondent**

THE GENERAL PUBLIC SERVICE SECTOR BARGAINING

COUNCIL **Third Respondent**

Heard: **22 September 2016**

Delivered: **14 December 2016**

Summary: **Where parties in a relatively equal bargaining position choose to enter into a consultancy agreement and not a contract of employment and the consultancy agreement is not a sham, then in the absence of any overriding policy considerations, neither a tribunal nor a court may ignore its terms. Held the person in question was not an employee.**

Coram: Waglay JP, Ndlovu JA, and Landman JA

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Neutral citation: **Dr Joachim Vermooten v Department of Public Enterprises and others** (LAC**:** JA 91/2015)

JUDGMENT

LANDMAN JA

Introduction

[1] Dr Joachim Vermooten, the appellant, appeals against a judgment of the Labour Court (Fourie AJ) that reviewed and set aside an award by an arbitrator, the second respondent, acting under the auspices of the General Public Service Sector Bargaining Council, the third respondent (the Bargaining Council), that held that the appellant was an employee of the Department of Public Enterprises, the first respondent (hereafter the DPE). The appeal is with leave of the court *a quo*.

[2] The appellant filed its notice of appeal late but as there was no objection and a full explanation for the delay was provided, condonation was granted.

The issue in dispute

[3] This appeal relates to the issue whether the appellant is an employee of the DPE. Section 213 of the LRA defines an employee as:

> '(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; and
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer.'

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[4] The issue arose this way. The DPE advertised a post for Director Aviation. The appellant applied for the post and was interviewed. During the interview, he stated that he could not accept the remuneration that was offered. Later the DPE offered him a contract as Specialist Aviation Consultant for a period of 12 months with effect from 9 October 2006. Further contracts followed until March 2011 when the DPE decided against renewing the contract.

[5] The appellant was dissatisfied and referred a dispute to the Bargaining Council concerning a unilateral variation of a contract (but, as Mr Gerber who appeared for the appellant, stated the appellant contends that he, as an employee, has been unfairly dismissed). At the commencement of the arbitration, the DPE raised a point *in limine* that the appellant was not an employee of the DPE; rather he was an independent contractor and therefore the Bargaining Council did not have jurisdiction to arbitrate the dispute.

[6] The DPE made certain submissions to the effect that the appellant was not an employee but led no evidence in support of its preliminary point. The appellant testified about the circumstances leading to his appointment as a consultant, his work experience, his other income stream and generally, why he should be regarded as a public servant. The arbitrator found in favour of the appellant. The DPE successfully reviewed the finding of the arbitrator.

<u>A jurisdictional fact</u>

[7] The question whether an applicant is an employee is a jurisdictional fact that must be determined, in the event of a dispute, by a competent court. On what facts must this decision be made? In *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) and Others,*[1] it was observed that:

> '73. In *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others* the Labour Appeal Court held that where the applicant

[1] (2013) 34 ILJ 3184 (LC).

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disputed that there was an employer-employee relationship (and therefore that the CCMA had jurisdiction) the Labour Court was called upon 'to decide de novo' whether an employer-employee relationship existed.

74. On the other hand, in *Phera v Education Labour Relations Council and Others,* Tlaletsi AJA also faced with the question of whether an employer-employee relationship existed held that the question which the Labour Court had to consider when reviewing an arbitrator's award on the question of jurisdiction, was 'whether the material that was placed before the commissioner' established that the CCMA or bargaining council, as the case may be, had jurisdiction to entertain the dispute.

75. In general, the approach adopted by the Courts appears to have been to determine the jurisdictional fact on the record which served before the arbitrator without being bound by any of the findings made by the arbitrator in respect of that jurisdictional fact. This is the approach I will adopt for the purpose of this case, having proper regard to the applicable principles relating to the resolution of factual disputes, but I do not think that the issues which I have raised above have been authoritatively resolved.' [Footnote omitted] S

[8] There is no contradiction between these approaches. In both cases, the Labour Court determines the question of jurisdiction, as always, on the basis of the evidence before it. Sometimes a party may seek to place new evidence before the court. In many cases, the parties are content with the evidence relating to jurisdictional facts adduced before a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) or an arbitrator at a bargaining council. In this case, no new evidence was led.

<u>The facts</u>

[9] The DPE advertised a post for Director: Aviation. This was to be a post on the establishment of the DPE. A five-year contract was envisaged. The appellant applied on form Z83 and was interviewed. During the interview, he stated that he could not accept the salary attached to the post as it was too low. The representatives of the DPE, at the interview, responded that a solution could be

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found. This solution would circumvent the restrictions of the PERSAL system (Personnel and Salary System). But it was the appellant who suggested to the representatives of the DPE that the remuneration issue could be solved by approaching it as a specialist function because the DPE had in its service a number of specialists who operated outside the formal structure.

[10] The DPE later offered him a contract as Specialist Aviation Consultant for a period of 12 months with effect from 9 October 2006. He was informed that this was the only way the DPE could pay the desired salary as the PERSAL system would not permit the DPE to pay a higher salary than that attached to the post of Director: Aviation. The appellant would be obliged to submit an invoice monthly in order to receive payment. The appellant accepted the contract.

[11] When the first contract expired, the appellant was offered and accepted a second contract on the same basis. The agreement was amended and extended until 31 March 2011. During March 2011, the DPE informed the appellant that it would not be renewing the contract.

[12] The appellant testified that normally when a consultant is engaged there is a tender process and terms of reference are provided and a bid committee adjudicates the tender. This was not done in his case.

[13] The appellant described his duties. He said that he took the lead for the DPE in a number of transactions; including routine matters and those relating to the annual business plan of the SAA. He was engaged in the monthly monitoring of the SAA and the monitoring of the quarterly reports. He was also involved in financial transactions. He reported to the Deputy Director-General of the Department of Public Enterprises. His reports were supervised and edited by the Deputy Director-General.

[14] He was provided with a cellphone and a 3G card. He was given a computer. Staff were allocated to him as well as files. He was required to apply for leave. He did not receive a pension. Nor did he receive medical aid. PAYE at 25% was

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deducted from his remuneration He said that he was required to sign a work performance agreement, but was unable to produce a copy of such an agreement. He earned about R60 000 from accounting work that he did for family companies involving his siblings. He was sometimes designated as an acting Deputy Director-General for the purpose of making submissions to Parliament.

Submissions on behalf of appellant

[15] Mr Gerber took a multipronged approach to the issue whether the appellant was an employee of the DPE. He contended that this Court should pay regard to substance rather than form. Undoubtedly, this is the correct approach.

[16] Mr Gerber impressed upon us that although section 200A of the Labour Relations Act 66 of 1995 (LRA), which provides a rebuttable presumption as to who is an employee was not applicable in the case of the appellant on account of his earnings, it was permissible to use the presumption as a guide for determining whether a person is, in reality, an employee or an independent contractor. See *Denel (Pty) Limited v Gerber (Denel)*.[2] In the same vein, we were referred to the Code of Good Practice: "Who is an Employee?" published in terms of section 200A(4) read with section 203 of the LRA.[3]

[17] It is unnecessary to set out the details of the presumption or that of the Code because I accept that, absent the consultancy contract, the appellant would be performing the duties of an employee.

[18] Mr Gerber referred to the various tests, which had been adopted by the courts of law in order to determine whether a person is an employee, including the dominant impression test, the organisational test and the economic dependency test as outlined in the *Denel* decision (supra). The *Denel* judgment was in turn, adopted by this Court in *State Information Technology Agency (SITA) (Pty) Ltd v CCMA and Others*[4].[5] The weakness in the economic dependency test, which

[2] 2005 (26) ILJ 1256 (LAC).
[3] See GN 1774 in Government Gazette 29445 of 1 December 2006.
[4] [2008] BLLR 611 (LAC).

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describes itself as a reality test, is that it does not pay attention to all the facts including the contractual relationship between the parties.[6] But this test needs not be applied where the person in question is, in reality, an independent contractor, then he or she is not an employee as defined by the LRA.

[19] In *Chirwa v Transnet Ltd and Others,*[7] Ngcobo J (as he then was) quoted the Explanatory Memorandum[8] to the LRA that:

> 'The political dimension of the state as employer, more particularly the fact that its revenue is sourced from taxation and that it is accountable to the Legislature, gives rise to unique and distinctive characteristics of state employment. For example, the state can invoke legislation to achieve its purposes as employer and its levels of staffing, remuneration and other matters are often the product of political and not commercial considerations. This uniqueness does not, however, justify a separate legal framework.'

[20] Unlike the private sector, a State department such as the DPE may not remunerate employees as it sees fit. The doctrine of legality and legislation dictate that only the remuneration that is prescribed, from time to time, may be paid. The PERSAL used by the civil service is based on and reflects the authorised remuneration payable to a civil servant on a specific rank. Remuneration bands are linked to the ranks within a State department. A civil servant may only be remunerated through the PERSAL system. PERSAL also functions as a means of ensuring that State departments abide by the law as regard remuneration of their officials.

[21] There were several legitimate ways for the DPE to utilise the special knowledge and experience of the appellant. The two that the DPE considered were to

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[5] See the remarks by N Countouris in 'Uses and Misuses of "Mutuality of Obligation" and the Autonomy of Labour Law' UCL Labour Rights Institute On-Line Working Papers – LRI WP1/2014.

[6] See A van Niekerk 'Personal Service Companies and the definition of "Employee"' 2005 (26) ILJ 1904-1908.

[7] 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 101.

[8] Para 54 of the Memorandum reproduced at 2005 (26) ILJ 1094.

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employ the appellant as an employee on a contract basis or as a consultant on a different contractual basis.

[22] The appellant declined the first option because the level of remuneration was too low. Given his qualifications and level of expertise, it is understandable that he valued his services at a higher rate. The DPE wished to acquire his labour and expertise but it was not legally possible to remunerate him as their Director: Aviation on a salary scale other than the one prescribed for Directors in the civil service. The DPE accepted the appellant's suggestion for his appointment as a consultant at a higher rate than was applicable to the post envisaged. The appellant was clearly in a good bargaining position and able to influence his rate of remuneration.

[23] Mr Gerber submitted that the consultancy contract was a valid one. He is correct. Although the motive for entering into a consultancy agreement was to avoid the limitations of the remuneration prescribed for the post, that was not an illegal purpose. See the remarks in *Automotive Tooling Systems (Pty) Ltd v Sarel Johannes Wilkens and Others*:[9]

> 'The court below held the service agreements unenforceable in their entirety because, they had been concluded in *fraudem legis*, to circumvent the provisions of the Labour Relations Act 66 of 1995 (in particular those relating to collective bargaining.) The grounds for that conclusion were that they purported to create relationships of independent contractors between the appellant and each of the first and second respondents whereas the substance of the relationship was one of employment. This does not appear to me to be a sound conclusion. The mere fact that a contract is unsuccessfully designed to escape the provisions of the law does not in itself render it unenforceable. It is unenforceable only if the true nature of the relationship is one that the law forbids…' [Footnotes omitted]

[24] Mr Gerber submitted that there was no need to link the appellant to a post within the structure of the DPE. He contended that the appellant could simply be

[9] Unreported judgment of the Supreme Court of Appeal dated 28 September 2006, under case no 581/05) 2007 (2) SA 271 (SCA) at para 6.

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declared an employee of the DPE. There may be room for this approach in different circumstances eg should a third party seek to hold the DPE liable for acts performed by the appellant in the scope and course of carrying out or formulating policy on behalf of the DPE. But it is not legally permissible for the DPE to have an employee in the Department without a rank and a prescribed level of remuneration.

[25] Finally, there can be no doubt that the appellant and the Department consciously and deliberately elected to structure their relationship as one other than an employment relationship. It is permissible to do this. *See Universal Church of the Kingdom of God v Myeni and Others*.[10]

[26] The consultancy agreement was not a sham. Therefore, in the absence of any overriding policy considerations, neither a tribunal nor a court may ignore its terms. Where the parties are in a relatively equal bargaining position and consciously elect one contract or relationship over another, the legal effect should be given to their choice. To allow one of these parties to change or contend that the legal relationship between them is something else holds important implications for the integrity of the legal framework of departments of State. The appellant seeks to be defined as an employee and so, it seems to me, to achieve what could not be achieved when negotiations began ie to be the Director: Aviation at a remuneration level exceeding double the prescribed remuneration and with the inclusion of all the benefits which were previously excluded by reason of the consultancy agreement. In other words, he wishes to become part of an organisation which could not and still cannot, accommodate him at his desired remuneration level.

[27] In the result, the appeal must fail. There is no reason why costs should not follow the result.

[10] [2015] 9 BLLR 918 (LAC); (2015) 36 ILJ 2832 (LAC) (28 July 2015).

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Order

[28] I make the following order:

The appeal is dismissed with costs.

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AA Landman

Judge of the Labour Appeal Court

I concur,

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B Waglay

Judge President of the Labour Appeal Court

I concur,

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SK Ndlovu

Judge of the Labour Appeal Court

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APPEARANCES:

FOR THE APPELLANT: Adv H Gerber

Instructed by O J Botha Attorneys, Pretoria

FOR THE FIRST RESPONDENT: Adv F J Nalane

Instructed by Molefe Dlepu Attorneys, Pretoria

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