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Kylie v Commission for Conciliation Mediation and Arbitration and Others (CA10/08) [2010] ZALAC 8 (26 May 2010)

JUDGEMENT: JA DAVIS

Introduction

The appellant was a sex worker who was employed in a massage parlor to perform various sexual services for a reward. Appellant was informed that her employment was terminated, apparently without a prior hearing, for a series of reasons which are not essentially relevant to the present dispute. The dispute was referred to arbitration which was set down for hearing. Before evidence could be heard, second respondent enquired as to whether first respondent had jurisdiction to hear the matter in the light of the fact that the appellant had been employed as a sex worker and accordingly her employment was unlawful.

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CCMA Ruling

Second respondent handed down a ruling in which she concluded that first respondent did not have jurisdiction to arbitrate on an unfair dismissal in a case of this nature. It was against this ruling that the appellant approached the court *a quo* on review.

Decision court a quo

Cheadle AJ held that the definition of employee in section 213 of the LRA was wide enough to include a person whose contract of employment was unenforceable in terms of the common law. However, he held that a sex worker was not entitled to protection against unfair dismissal as provided in terms of section 185 (a) of the LRA because it would be contrary to a common law principle which had become entrenched in the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution') that courts 'ought not to sanction or encourage illegal activity'.

Appellant's Case

Mr Trengove attacked the reasoning as adopted by Cheadle AJ in the court a quo. In his view, instead of starting with a discussion of public policy as divined from the law of contract, the proper approach was to commence with the Constitution and in particular, whether, in principle, a person such as appellant, enjoyed constitutional rights in general



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and specifically those rights set out in section 23. Only if the question of the application of the Constitution to this dispute was answered in favour of the appellant, was the court then required to proceed to examine issues relating to the appropriate remedy. In Mr Trengove's view, it is at this stage that concerns of public policy become applicable.

The question of the application of the Constitution thus becomes the starting point for appellant's argument. Thereafter, Mr Trengove contended that the LRA must be read so as to implement section 23 of the Constitution, a point reiterated recently by Ngcobo J (as he then was) in *Chirwa v Transnet* [2007] ZACC 23; 2008 (4) SA 367 (CC) at para 110:

“The objects of the LRA are not just textual aides to be employed where the language is ambiguous. This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. Thus where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA.”



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For this reason therefore, since the present dispute is predicated on the application of the LRA, it is necessary to commence with the source of the LRA, that is to engage in an examination of the application of section 23(1) of the Constitution to the present dispute.

Once it is accepted that the constitutional right to fair labour practices vests in 'everyone' and, further that it includes not only parties to a contract of employment but those persons in an employment relationship, Mr Trengove's submission, to the effect that persons, who engage in services pursuant to an employment relationship such as appellant, are covered by section 23, becomes particularly compelling.

Evaluation

The court held that it is important to emphasise the precise findings of this judgment and what this judgment does not so hold. This judgment cannot and does not sanction sex work. That is a matter for the legislature. However, the fact that prostitution is rendered illegal does not, for the reasons advanced in this judgment, destroy all the constitutional protection which may be enjoyed by someone as appellant, were they not to be a sex worker.



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In other words, only those rights which are necessary for the implementation of the provisions of the Act are to be removed from the enjoyment of appellant. Her dignity is not to be exploited or abused. This remains intact and the concomitant constitutional protection must be available to her as it would to any person whose dignity is attacked unfairly. By extension from section 23(1), the LRA ensures that an employer respects these rights within the context of an employment relationship. Expressed differently, public policy based on the foundational values of the Constitution does not deem it necessary that these rights be taken away from appellant for the purposes of the Act to be properly implemented.

Accordingly, held the court, while the remedial issues must be tailored to meet the specific context of this case, the objects and provisions of the Act, the illegality of the work performed, there is for the reasons articulated above, nothing which indicates that no form of protection in terms of section 193 of the LRA should be available to someone such as appellant who was unfairly treated within the context of the provisions of LRA.

Remedy

When it comes to the question of remedy, each case will have to be decided in terms of the facts thereof. Manifestly, not all persons who are in an employment relationship which is prohibited by law will enjoy a remedy in terms of the LRA. In so deciding, a



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tribunal or court is engaged with the weighing of principles; on the one hand the *ex turpi causa* rule which prohibits enforcement of illegal contracts and on the other public policy sourced in the values of the Constitution, which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community. The *ex turpi causa* rule is, as is evident from its implementation by the courts, a principle of law for it guides rather than dictates a single result. The public policy considerations mentioned in this judgment have developed from those set out almost 75 years ago in *Jaibday v Cassim* but which now find definitive guidance in the Constitution (*Barkhuizen v Napier* 2007 (7) BCLR 671 (CC)) must be weighed against the principle of *ex turpi causa* to determine the outcome.

For this reason, cases involving employment relationships which are in breach of legislation, such as the present dispute, should proceed through the constitutional threshold but not all will enjoy the defining weight of public policy, as set out, so as to justify the granting of a remedy. The weighing process however concerns questions which must be decided after the enquiry at the jurisdictional stage. This dispute concerns access through threshold which a party, such appellant, must proceed in order that it may be properly determined whether any relief should be granted. That is all that was required for a determination in the case before this Court.



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At the hearing, the court raised the question of the consequences for organizational rights of classifying workers, who are engaged in illegal work, as employees for the purposes of the LRA. In particular, the question focused upon the implication that a positive finding for appellant, namely that she is an employee for the purposes of the LRA, might have regarding trade union formation; that is a finding that, as employees, sex workers would be entitled to form and join a trade union. However, even if these workers could form or join a trade union, they could not assert any right to participate in any unlawful activities through such a trade union nor could they use the vehicle of the union to further the commission of a crime. In short, it is only by way of lawful activities of a trade union that employees are entitled to exercise this organizational right. This conclusion follows upon the approach adopted in this judgment as to the clear limitations which flow from the finding that appellant is an employee for the purposes of the LRA. In addition, the Registrar of Labour Relations is vested with a discretion in terms of the LRA to refuse to register a trade union. Thus, if a trade union is formed to further the commission of crime, the Registrar would be entitled to refuse to register it.

Even though appellant is an employee for the purposes of section 185 of the LRA, this does not mean that collective agreements purportedly concluded between brothels and sex worker unions which amount to the commission of crime or the furtherance of the commission of a crime are enforceable under the LRA nor does it imply that sex



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worker unions would be entitled to exercise organisational rights, including the right to strike to that end.

On the contrary, although sex workers would, as employees, be entitled to form and join trade unions, they would not be entitled to participate in any activities, including collective bargaining, that amounted to the furthering of the commission of crime.

The appeal was upheld.

