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EMPLOYMENT ALERT

SOUTH AFRICA: NO REFUGE FROM EMPLOYMENT RIGHTS

A Burundian Refugee was recently awarded 12 months compensation for a procedurally unfair dismissal. The Cape Town Labour Court granted this relief despite the fact that there was essentially no legal employment contract that could have been entered into between the respective parties. Moreover, the "permanent employment contract" that was entered into was *void ab initio* (in that in law there was effectively no "contract" to terminate), contra public policy and unlawful.

Although quite controversial in legal jurisprudence terms, the judgment is in line with the precedent set by previous decisions from South African Labour Courts.

What follows is a brief explanation of how the Labour Court in *Alain Godefroid Ndikumdavyi v Valkenberg Hospital and others Case No: C970/2010*, came to the decision it did, and more importantly, what the judgment means for employees, employers and legal practitioners.

Alain Godefroid Ndikundavyi (the employee) received an annual practising certificate after he obtained a nursing degree from the University of Cape Town. Later, after a written job application, he was erroneously offered a permanent position by Valkenberg Hospital despite the fact that it was 1 July 2010 and he was legally only entitled to practice for a further six months. After 19 days and an admitted "administrative error", his employment offer was withdrawn and he was effectively suspended pending his acquisition of the necessary temporary approval.

The question must then be asked, how does the Court grant 12 months compensation in the face of principles such as *void ab initio*, contra public policy and good morals, unlawful and s10 of the Public Service Act? It did so because the objects of the Labour Relations Act, No 66 of 1995 (LRA) and the protection afforded by the Constitution, take precedence over these other legal principles.

The Court said that South African jurisprudence favours vulnerable groups. It quoted from various judgments such as *Discovery Health Limited v CCMA and others (2008) 7 BLLR 633 (LC)*, which said that the definition of employee is not rooted in a contract of employment and even in the event of a violation of statute (Immigration Act, No 13 of 2002) an employee's status would not be affected. The Court also came to its decision based on South Africa's international obligations and the formal status of refugees.

The Court also referred to *Kylie v CCMA (2010) 7 BLLR 705 (LAC)*, a case in which the criminalisation of prostitution and an employment relationship that was void for illegality was not enough to prevent the courts from awarding compensation for unfair labour practices. When referring to *Kylie*, the Court said "our law is not wholly inflexible in its refusal to relax the rule which deems contracts void when their conclusion, performance or object is expressly or impliedly prohibited by legislation or is contrary to good morals of public policy."

There seem to be no limits when it comes to the protection afforded by the Constitution through the LRA. When referring to its role in this regard the Court said that it would be "vigilant" in ensuring that this protection is afforded to vulnerable groups.

Whether the employment contract is *void ab initio*, impossible (such as the present example), contra good morals and public policy, with an illegal immigrant with no valid work permit *(Southern Sun Hotel Interests (Pty) Ltd v CCMA (C255/09; C362/09) [2011] ZALCCT 14 (21 June 2011))* or in the most extreme case involves a sex worker, the vulnerable group "employees" above are afforded equal protection under the Constitution. Employers need to be cautious and not cut corners to avoid a substantial compensation award.

continued

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What does the judgment teach us? The theoretical legal argument that there existed no contract in law to terminate (*void ab initio*) was rejected by the Court on a reading of s186 (1) (a), which gives expression to the objects of the LRA. It also applied the rationale of *Ngcobo J in Chirwa v Transnet 2008 (4) SA 367 (CC)*, who states that the objects of the LRA are not merely textual aids and any interpretation (such as whether an employment relationship exists) must be one which advances these primary objects. The objects of the LRA and s23 of Constitution are insurmountable in the face of any other conflicting legal principles.

How does the Court justify awarding relief in such unlawful situations? The Court quoted from Kylie and stated that compensation is treated as solatium for the loss of an employee's right to fair procedure (*Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89 (LAC)*) and is therefore independent of the loss of illegal employment or where the services are classified as illegal. It only seems logical that if an illegal sex worker was protected under the LRA, a lawful refugee who was a nurse in South Africa helping the public would also receive similar protection.

The Court could and would have done much more if it had been given the opportunity. It reminds the parties (and legal practitioners) that it is bound by the principle that pleadings contain the basis upon which the Court is to exercise its competency. Accordingly, it could not rule on the substantive fairness of the dismissal or make a finding on Section 10 of the Public Services Act.

The employer could have mitigated its loss extensively. It should have been privy to judgments such as those described above. If it had merely afforded the employee an opportunity to be heard it would probably have avoided a 12 months compensation award. Having a keen understanding of the basic underlying legal principles was the key to this matter.

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