**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**
**(HELD AT JOHANNESBURG)**

**Case No.: CA10/08**

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| **KYLIE** | **Appellant** |
| **and** | |
| **COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | **First Respondent** |
| **COMMISSIONER BELLA GOLDMAN** | **Second Respondent** |
| **MICHELLE VAN ZYL t/a BRIGITTE'S** | **Third Respondent** |

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**JUDGMENT:**

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**DAVIS JA:**

**Introduction**

[1] The appellant was a sex worker who was employed in a massage parlor to perform various sexual services for a reward.[1]

[2] On 27 April 2006, 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. On 14 August 2006 the dispute was referred to arbitration which was set down to be

[1] As the appellant wants her identity to be protected, she is cited as 'Kylie', a name by which she was known to the third respondent's clientele. From the record, it does not appear that an application was made either to the second respondent or the Court a quo for an order in terms of which her identity was to be concealed. Such an application should have been made prior to a litigant like appellant seeking the assistance of a court.

heard on 13 September 2006. 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. On 11 December 2006, 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.

[3] Cheadle AJ held that the definition of employee in section 213 of the Labour Relations Act 66 of 1995 ('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'.

[4] In order to fully analyse the submissions made on behalf of appellant[2] by Mr Trengove, who appeared together with Mr Kahanovitz, Ms Cowen and Ms Mji, it is necessary to analyse the precise reasoning employed by Cheadle AJ more comprehensively.

[2] There was no representation on behalf of any of the respondents.

**The judgment of the court a quo**

[5] As noted, Cheadle AJ defined the essential question as whether 'as a matter of public policy, courts (and tribunals) by their actions ought to sanction or encourage illegal conduct in the context of statutory and constitutional rights'.

[6] Cheadle AJ then referred to the Sexual Offences Act 23 of 1957 ('the Act') which makes brothel keeping a criminal offence and which defines the concept of a brothel to include persons who reside in a brothel and share in any monies taken there. Section 3(a) and (c). In terms of section 20(1) (A) (a) of the Act, unlawful carnal intercourse for reward constitutes a criminal offence which attracts a criminal penalty of imprisonment of no more than three years and a fine of no more than R6000.

[7] On this basis, Cheadle AJ invoked the principle *ex turpi causa non oritur actio* which 'prohibits the enforcement of immoral or illegal contracts'. Thus, if a contract is illegal, courts must regard the contract as void and hence unenforceable. In turn, a contract is illegal if it is contrary to public policy and it is against public policy to engage in a contract which is contrary to law or morality. Citing Christie *The Law of Contract in South Africa* (5ed) at 382, Cheadle AJ noted that courts regarded adultery and commercial sex as immoral and of such turpitude so as to render an

agreement concerning or linked to such morality as void and thus unenforceable.

[8] Turning to the implications of a statutory prohibition and to the application of the *ex turpi causa* rule, Cheadle AJ found that the rule applies, if a statute properly interpreted, intends to nullify a contract arising from or associated with a legally prohibited activity. While the corollary to the *ex turpi causa* rule, the in *pari delicto* rule, does, on occasion, relax the former rule, that relaxation does not compromise the underlying policy of discouraging illegality of contractual relationships. As the court stated in Jajbhay v Cassiem 1937 AD 539, the relaxation is only justified if there are claims of simple justice between individuals of which account must be taken and if public policy is 'not foreseeably affected by a grant or a refusal of the relief claimed'. at 545.

[9] Applying this *dictum* to the provisions of the Act, Cheadle AJ concluded that the language which was employed in the statute clearly supports the conclusion that a contravention of a prohibition of the Act results in the nullifying of a contract made in pursuit of or which is associated with the prohibition.

[10] For Cheadle AJ the question therefore arose, on the basis of this finding, as to whether, notwithstanding the invalidity of the contractual relationship

, section 23 of Constitution affected the conclusion of the court a quo , being a finding which was clearly adverse to the appellant. The question can be phrased thus: Does a constitutional protection of fair labour practices as enshrined in section 23 of the Constitution apply to a person who would, but for an engagement in illegal employment, enjoy the benefits of this constitutional right. That question was answered in the negative by the court *a quo,* primarily because, were such rights to be granted, a court would undermine a fundamental constitutional value of the rule of law by sanctioning or encouraging legally prohibited activity. In the view of the learned judge in the court *a quo,* that conclusion was supported by the Constitutional Court in its decision in S v Jordan and others 2002 (6) SA 642 (CC) at para 28 ff.

[11] The court *a quo* further bolstered its approach by examining the nature of dismissal legislation. In terms of section 193 (2) of the LRA, in the case of an unfair dismissal the primary remedy is reinstatement or reemployment. In the view of Cheadle AJ:

> "*Nothing illustrates the conflict of the objective of the right to a fair dismissal and the objecting of the Sexual Offences Act more than the issue of reinstatement. An order of reinstatement is the primary remedy for an unfair dismissal. Reinstating a person in illegal employment would not only sanction illegal activity but may constitute an order on the employer to commit a crime*."

[12] Cheadle AJ then engaged in an alternative analysis, on the assumption that section 23 of the Constitution does afford constitutional protection to the appellant. He concluded that, in such a case, the Act constituted a justifiable limitation upon the section 23 sourced constitutional rights of appellant, essentially because the limitation 'gives effect to the fundamental rule of law principle: courts should not by their actions sanction or encourage illegal activity'.

[13] So much for the essential reasoning employed by Cheadle AJ in the court *a quo*. I turn now to deal with the primary submissions of appellant.

**Appellant's Case**

[14] 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 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.

[15] 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 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*."

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.

**The scope of the section 23 right**

[16] Section 23(1) provides that 'everyone has the right to fair labour practices'. The term 'everyone', which follows the wording of section 7(1) of the Constitution which provides that the Bill of Rights enshrines the right 'of all people in the country', is supportive of an extremely broad approach to the scope of the right guaranteed in the Constitution.

[17] This point was confirmed by Ngcobo J (as he then was) in Khosa v Minister of Social Development 2004 (6) SA 505 (CC) para 111:

> "*The word 'everyone' is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system."*

[18] From its inception, the Constitutional Court has been consistent in this approach. In S v Makwanyane 1995 (3) SA 391 (CC) at para 137 Chaskalson P (as he then was) said that the right to life and dignity 'vests in every person, including criminals convicted of vile crimes'. The learned president went on to say that these criminals 'do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment'.

[19] This affirmation of protection of a very broad constituency of persons is not undermined by the finding in S v Jordan *supra*. In their minority judgment, O'Regan and Sachs JJ (a point not contradicted in the majority judgment) observe at para 74:

> "*The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body. This is not to say that as prostitutes they are stripped of the right to be treated with respect by law enforcement officers. All arrested and accused persons must be treated with dignity by the police. But any invasion of dignity, going beyond that ordinarily implied by an arrest or charge that occurs in the course of arrest of incarceration cannot be attributed to section 20(1A)(a) but rather to the manner in which it is being enforced. The remedy is not to strike down the law but to require that it be applied in a constitutional manner. Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the prostitute*."

[20] This *dictum* affords support for Mr Trengove's argument that the illegal activity of a sex worker does not *per se* prevent the latter from enjoying a range of constitutional rights. By contrast, the test is rather what constitutional protections are necessarily removed from a sex worker,

given the express criminal prohibition of their employment activities in terms of the Act.

[21] The question arises thus as to whether section 23 affords protection to a sex worker. In Nehawu v UCT (2003) 24 ILJ 95 (CC) at para 40 the Constitutional Court emphasised that the focus of section 23(1) of the Constitution was on the 'relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both'. That approach followed upon the judgment in SANDU v Minister of Defense (1999) 20 ILJ 2265 (CC) at paras 28 – 30. Even if a person is not employed under a contract of employment, that does not deny the 'employee' all constitutional protection. This conclusion is reached despite the fact they 'may not be employees in the full contractual sense of the word' but because their employment 'in many respects mirrors those of people employed under a contract of employment'.

[22] 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.

[23] That conclusion is also supported by two decisions of the Labour Appeal Court in which this Court 'approached the vexed question of employment relationship on the basis of the substance of the arrangements between the parties as opposed to the legal form so adopted'. State Information Technology Agency (Pty) Limited v CCMA (2008) 29 ILJ 2234 (LAC) at para 10.

[24] In Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC), Zondo JP, after a meticulous examination of comparative and local authorities, said at para 94:

> "*I am unable to agree with the approach adopted by the Industrial Court in* Callanan*, by this court in* Briggs *and by Lord Denning MR and Lord Justice Lawton in* Massey's *case and Lord Justice Lawton in* Ferguson's *case which, it seems to me, is to the effect that, once it is found that the alleged employee voluntarily made an arrangement in terms of which he or she would not be 'an employee' of the alleged employer but would not be 'an employee' of the alleged employer but would be an 'employee' of his or her own company or close corporation which would provide services to the alleged employer, he cannot later be found to have been an employee of the company with which his or her own had an agreement to provide services. As I have indicated above already, the main weakness of that approach is that it disregards the*

*realities of the relationship between the parties and is open to abuse because it makes it possible for two persons to take themselves out of the reach of such important legislation as the Act and the Basic Conditions of Employment Act 75 1997.*"

[25] Taken together these arguments support a generous approach to the range of beneficiaries of rights provided for in terms of section 23(1). In turn, this conclusion is supported by the minority judgment of O'Regan and Sachs JJ when they note that sex workers are not stripped of the right to be treated with dignity by their customer. By logical extension, this should also mean that their employers incur a similar obligation.

[26] In summary, as sex workers cannot be stripped of the right to be treated with dignity by their clients, it must follow that, in their other relationship namely with their employers, the same protection should hold. Once it is recognised that they must be treated with dignity not only by their customers but by their employers, section 23 of the Constitution ,which, at its core, protects the dignity of those in an employment relationship, should also be of application.

[27] Professor Rochelle Le Roux expresses the point as follows:

*"[it is] also important to bear in mind the fact that the unfair labour practice jurisdiction was introduced to counter the arbitrariness of*

*lawfulness, in particular, termination by lawful notice. Furthermore, as suggested earlier, it is conceivable that a labour practice may well impact on the position of either prospective or retired employees. For these reasons, and in absence of an internal limitation clause, it is suggested that labour practices in s 23(1) ought to be approached dispassionately and be given a broad construction. An act of terminating employment, the structuring of working hours, or discipline at work remain labour practices, irrespective of whether they are done in the context of legal or illegal work*."

See R. Le Roux "The meaning of 'worker' and the road towards diversification: Reflecting on Discovery, SITA and 'Kylie'" 2009 (30) ILJ 49 at 58.

[28] In my view, appellant meets the threshold requirement so that she is a beneficiary of the applicable constitutional rights. The enquiry now turns to whether she is entitled to any legal relief.

**The question of relief**

[29] In refusing to recognise the possibility of a remedy in terms of the LRA, Cheadle AJ based his decision on the view that the legislature intended that the Act not only penalised prohibited activity but precluded courts from recognising any rights or claims arising from that activity. In terms of

his approach, were a court to recognise a claim based on 'a constitutional right', that court would be sanctioning or encouraging the prohibited activity'. Whereas foreign and child workers, who are prohibited from assuming certain forms of employment, can be afforded protection because the prohibition is aimed at 'who does the job rather than the job itself', the prohibition with regard to sex work concerns the nature of the job. Even though they are vulnerable to exploitation, such protection 'will mean sanctioning and encouraging activities that the legislature has constitutionally decided should be prohibited'.

**Evaluation**

[30] It is now possible to evaluate this part of the court *a quo's* judgment. To recapitulate: the foundational propositions upon which the judgment of the court *a quo* can be summarized thus:

1. There is a common law principle that courts ought not to sanction or encourage illegal activity;
2. This principle is now incorporated within the Constitution, entrenched as an element of the rule of law, and set out in section 1 of the Constitution;
3. As a constitutional imperative, the statutory rights are trumped which 'renders a sex worker's claim to statutory right to fair dismissal and LRA unenforceable.'

[31] Mr Trengove submitted that these propositions were all palpably wrong. The common law principle was more limited in its scope and more qualified in its application than had been held to be the case by the court *a quo*. Furthermore, the common law principle was not entrenched in the Constitution and accordingly, as a principle of common law, did not automatically trump those protections afforded by the Constitution, including section 23(1) thereof and any legislative implementation thereof, including section 185(a) of the LRA.

[32] In general, South African law takes the view that an illegal contract is void and that the illegality arises when a contract's conclusion, performance or object is expressly or impliedly prohibited by legislation or is contrary to good morals or public policy. Macqueen and Cockrell '*Illegal Contracts'* in Zimmermann et al *Mixed Legal Systems in Comparative Perspective* 143 at 144. In this connection, a comment made more than seventy years ago by Aquilius (1941) 58 SALJ 344 is of particular significance: 'in a sense … all illegalities may be said to be moral and all immorality and illegality contrary to public policy'.

[33] This approach was later reflected by Smalberger JA in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1(A) at 8F as follows:

> "*That the principles underlying contracts contrary to public policy and contra bones mores may overlap also appears from the*

*judgment of this court in Ismail v Ismail … These classifications may not be of importance in principle, for where a court refuses to enforce a contract it ultimately so decides on the basis of public policy*."

[34] Whatever the justification for refusing to enforce the terms or obligations which flow from an illegal contract, in South African law this position has ossified into an absolute rule so that courts will not assist a person who has entered into an illegal contract to so enforce this contract. While the court possesses a certain amount of discretion to determine whether a contract is illegal, once it has so determined it follows 'as a necessary and inflexible consequence that no action could be based thereon' Macqueen and Cockrell at 163. Generally, where performance had been made in terms of an illegal contract, a court will also not assist a party who has performed to recover his or her performance by the use of an enrichment based remedy. However, the courts have acknowledged that they have an equitable discretion to relax the operation of the so called *par delictum* rule in order to allow one party to utilise an enrichment based remedy, an approach which is sourced back to Jajbhay v Cassiem 1939 AD 537. In this case, the Appellate Division held that the court should relax the rule if it was necessary 'to prevent injustice or to satisfy the requirements of public policy' at 558. See more recently, Henry v Brandfield 1996 (1) SA 244 (D) at 252 – 253.

[35] In examining this approach Macqueen and Cockrell write at 165:

> "*In determining whether to exercise this discretion, the South African courts purport to secure 'the doing of simple justice between man and man'. Such an approach allows for a nuanced and context – sensitive consideration of all relevant factors*."

[36] The point that emerges from these *dicta* is that our law is not wholly inflexible in its refusal to relax the *par delictum* rule. As Professor Visser *Unjustified Enrichment* at 447 writes:

> "*No hard and fast criteria had been laid down to judge when the rule should be relaxed and each case will have to be determined according to its peculiar circumstances*."

Professor Zimmermann *The Law of Obligations* at 847 provides historical support for this approach:

> "*The Roman jurist did not seem to have hesitated to evaluate and compare the degree of turpitude of both parties involved in the transaction and decide in favour of the party who is less to blame."*

[37] Not only does the *par delictum* rule reflect a manifestation of public policy to guide the courts in the interpretation, application and development of the law, but contrary to the approach adopted by the court *a quo,* the determination as to whether the *par delictum* rule is inflexibly enforced in all circumstances depends upon public policy, ultimately sourced in the

Constitution. This conclusion is to be contrasted with the approach that the Constitution has encapsulated within it so inflexible an approach to the *par delictum* rule that a court is disempowered from exercising a discretion in favour of a party so as to prevent manifest injustice. See also Brummer v Gorfil Brother Investments (Pty) Limited en andere 1999 (3) SA 389 (SCA) at 403 B – G.

[38] I return to the key question: what discretion do the courts have in the determination of a remedy, in this case for an alleged unfair dismissal of a sex worker. Mr Trengove correctly noted that, while South African law eschewed the recognition of an illegal contract and the obligations and rights that flowed therefrom, in this case appellant's contention was that, even if there was no valid contract, there was an employment relationship and in terms of that relationship, the appellant fell within the scope of the LRA. Accordingly, the question arose as to whether a court could, in the light of the existing approach to illegal contracts, provide some remedy to a party, such as appellant, if she could prove her allegation that she had been unfairly treated within the framework of the unfair labour practice jurisprudence guaranteed in terms of section 23(1) of the Constitution and enshrined in the LRA.

[39] That enquiry is not necessarily incongruent with the finding in Jordan's *supra,* that the Act which criminalises prostitution is constitutional. As

noted, the criminalisation of prostitution does not necessarily deny to a sex worker the protection of the Constitution and, in particular section 23(1) thereof, and by extension its legislative implementation in the form of the LRA.

[40] The express purpose of the LRA 'is to advance economic development, social justice, labour, peace and the democratisation of the work place' Section 1 of the LRA. In itself, this set of principles can be traced to section 23 of the Constitution. In particular, section 23(1), which provides that everyone has the right to fair labour practices, was designed to ensure that the dignity of all workers should be respected and that the workplace should be predicated upon principles of social justice, fairness and respect for all. See Nehawu v UCT 2003 (2) BCLR 154 (CC) at paras 33 – 40.

[41] If the purpose of the LRA was to achieve these noble goals, then courts have to be at their most vigilant to safeguard those employees who are particularly vulnerable to exploitation in that they are inherently economically and socially weaker than their employers. Mr Trengove urged that this consideration applied with even greater force in the case of sex workers who are an especially vulnerable class exposed to exploitation and abuse by a range of people with whom they interact, including their employers. In this connection, he referred to the United

Nations General Assembly Declaration on the Elimination of Discrimination against Women which expressly condemns the exploitation of prostitution of women. In addition paragraph 5 of the ILO's Employment Relationship Recommendation R198 of 15 June 2006 requires member states to take particular account in national policy of the need to ensure the effective protection of workers '*especially those affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.*'

[42] There is a considerable debate within the feminist literature as to whether prostitution invariably entails an inherent element of coercion, exploitation and domination. Pro-sex feminists, for example, contend that sex work can be a positive experience for women who employ their autonomy to make an informed decision to engage in prostitution. See for contrasting perspectives, Catherine Mackinnon 1993 *Michigan Journal of Gender and Law;* Laurie Schrage *Moral dilemmas of Feminist: Prostitution, Adultery and Abortion* (1994); and Maggie O'Neil *Prostitution Feminism* (2001).

[43] This debate notwithstanding, when viewed within the South African context, many sex workers are particularly vulnerable and are exposed to exploitation and vicious abuse. It may be that this categorisation is not

applicable to all cases of sex workers but there is, at the very least, a *prima facie* case that the appellant falls within such a vulnerable category. This case is made out in the papers, which have been placed before the court. On these papers, it appears that appellant worked 14 hours a day, 7 days a week and was subjected to a strict regime of rules and fines, practices which in the ordinary course were curtailed by the Basic Conditions of Employment Act 75 of 1997.

[44] In the circumstances, where a sex worker forms part of a vulnerable class by the nature of the work that she performs and the position that she holds and she is subject to potential exploitation, abuse and assaults on her dignity, there is, on the basis of the finding in this judgment, no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity and which protection by extension has now been operationalised in the LRA.

[45] These considerations are supported by authority dealing with the legal implications of an act which is *void ab initio* as a result of a contravention of legislation. De Ville *Constitutional and Statutory Interpretation* (2000) at 261 writes about whether a sanction imposed is ‘sufficient punishment’ for non compliance with a statutory provision that ‘it needs to be asked whether the purpose of the legislation will be achieved by invalidating the action concerned or whether the imposition of the (penal) sanction will

suffice in attaining this purpose'. See for example Pottie v Kotze 1954 (3) SA 719 (A). In Kuhne and Nagel (Pty) Ltd v Elias and another 1979 (1) SA 131 (T) at 133 the following passage from Boshoff AJP is instructive:

> "*The use of the word "shall" and the word "moet" in the Afrikaans version is a strong indication, in the absence of considerations pointing to another conclusion, that the Legislature is issuing a statutory command and intends disobedience to be visited with nullity. See Sutter v Scheepers 1932 AD 165 at 173. In the last-mentioned case, Wessels JA suggested certain useful guides, which were not intended to be exhaustive, to test whether provisions are peremptory or directory:*
>
> > *"If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate, but this is not conclusive.*
> >
> > *If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.*
> >
> > *If, on a consideration of the scope and objects of the provision, it is found that its terms would, if strictly carried out, lead to injustice, and even fraud, and if there is no explicit statement that the act is to be void if the terms are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.*""

[46] What these *dicta* reveal is that courts have not always employed the inflexible approach adopted by Cheadle AJ to illegal transactions but have , on occasion , considered whether to refuse to recognise any implication of an illegal act after an inquiry into the purpose of the criminalizing statute and the effect of the prohibition. In this case, the court is asked to consider the impact of a broad based constitutional protection and the preservation of the dignity of vulnerable persons in so exercising a discretion to decide that such an employment relationship holds some implications for the parties to the relationship.

**The case of Hoffman Plastics Inc v NLRA; 53545 137 (2002)**

[47] The need to interrogate the purpose of legislation that is contravened by a contract or an employment relationship and the ideological implications of a decision are well illustrated by the judgments in this case. This case invoked the payment of backpay to a dismissed worker who had not complied with US immigration laws and was thus classified as an ‘undocumented worker’. Chief Justice Rehnquist, who wrote the majority opinion, drew an analogy between employees who worked without immigration authorization and employees who were ineligible for reinstatement or backpay because, they have ‘committed serious criminal acts’, such as trespass or violence against the employers property.

[48] The majority then went on to say that backpay award could undermine a 'federal statute or policy outside of the competence' of the National Labour Relations Board, in this case immigration laws. The majority characterized the dismissed employee's conduct in completing the relevant immigration laws as 'criminal' and hence awarding backpay would condone and encourage future violations of the relevant immigration laws.

[49] Justice Breyer, who dissented with three other justices, held that an award of backpay is consistent with labour law and immigration policy as it would help to deter unlawful activity that both labour and immigration laws seek to prevent. Further, the dismissal of the employee was motivated by the employer's anti-union conduct and not by the employee's own conduct.

[50] With due respect to the majority of the Supreme Court, much of their jurisprudence can be described as being significantly incongruent with our Constitution's commitment to freedom , equality and dignity and its concern to protect the vulnerable, exploited and powerless. The Constitution reflects the long history of brutal exploitation of the politically weak, economically vulnerable and socially exploited during three hundred years of racist and sexist rule. The text represents a majestic assertion of the possibility of the construction of a community of concern, compassion and restitution for all such segments of the South African community.

[51] By contrast, the more enlightened minority opinion in Hoffman Plastics illustrates two key points for the purposes of this dispute: the need to interrogate the nature of the competing legal regimes, in this case labour law and the regime set out in the Act. Secondly, the basis of the conduct which triggers the relief sought, in this case allegations of employer misconduct, are not strictly connected to the prohibitions contained in the Act.

**Summation**

[52] These consideration do not mean that the full range of remedies available in terms of the LRA should necessarily be available in every such case. Expressed differently, this judgment does not hold that, when a sex worker has been unfairly dismissed, first respondent or a court should or can order her reinstatement, which would manifestly be in violation of the provisions of the Act. But section 193 of the LRA provides for considerable flexibility to first respondent or a court. For example, although a arbitrator or court should require the employer to reinstate or reemploy an employee on a finding that a dismissal is unfair, the court or arbitrator has a discretion to refuse reinstatement where it is not reasonably practicable for the employer to reinstate or reemploy the employee. Manifestly, it would be against public policy to reinstate an 'employee' such as appellant in her employ even if she has could show, on the evidence, that her dismissal was unfair. But, that conclusion

should not constitute an absolute prohibition to, at least, some protection provided under the LRA, a protection which can reduce her vulnerability, exploitation and the erosion of her dignity.

[53] For similar reasons it may well be that compensation for a substantively unfair dismissal would be inappropriate in the present kind of case. If compensation for substantive unfairness is to be regarded as a monetary equivalent for the loss of employment, it may be, although given the precise relief sought I express no final view, that such compensation would be inappropriate in a case where the nature of the services rendered by the dismissed employee are illegal. By contrast, monetary compensation for a procedurally unfair dismissal has been treated as a *solatium* for the loss by an employee of her right to a fair procedure. Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89 (LAC) at para 41. This kind of compensation is therefore independent of the loss of illegal employment in this case and would therefore appear to be applicable in the appropriate case where the services rendered by the employee are classified as illegal.

**Conclusion**

[54] 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. It may be that

the Law Reform Commission's investigation into adult prostitution will have a significant effect upon a legislative solution to the variety of difficulties raised by sex work and this case. 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. The approach adopted by Corbett JA (as he then was) in Goldberg and others v Minister of Prisons 1979 (1) SA 14 (A) which is sourced in our common law is equally applicable:

> "*[f]undamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldinn sense ) of an ordinary citizen except those taken away from him by law expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed*." at 39

This point was reinforced by the Constitutional Court in Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC) at para 58 where Chaskalson CJ cited the following passage from the judgment of Gonthier J in Sauvé v Canada (Chief Electoral Officer) [1993] 2 SCR 438:

> "*When the façade and rhetoric is stripped away, little is left of the government's claim about punishment other than that criminals are people who have broken society's norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right*

*to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognised goal of sentencing*."

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.

[55] Accordingly, 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.

[56] 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 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.

[57] As Ronald Dworkin wrote in *Taking Rights Seriously* (1977), principles do not produce 'all or nothing' answers; their impact depends on the weight to be accorded to each competing principles. 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.

[58] 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.

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

[60] 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.

**Order**

[61] For these reasons therefore, the following order is made:

1. The appeal is upheld.
2. The order of the Labour Court is set aside and replaced with an order in the following terms

2.1 The jurisdiction ruling of the second respondent of 11 December 2006 is reviewed and set aside.

2.2 The CCMA has jurisdiction to determine the dispute between the parties in the present case.

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**DAVIS JA**

I agree

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**ZONDO JP**

I agree

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**JAPPIE JA**

**APPEARANCES:**

**For the appellant: Wim Trengrove SC, Colin Kahanowitz SC, Susannah Cowen, Nomzamo Mji**

**Instructed by: Women's Legal Centre**

**For the Respondent: Not opposing the Appeal.**

**Date of Hearing: 11 March 2010**
**Date of Judgement: 28 May 2010**