**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

Reportable

Case No: C970/2010

In the matter between:

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| **ALAIN GODEFROID NDIKUMDAVYI** | Applicant |
| and | |
| **VALKENBERG HOSPITAL** | First Respondent |
| **MINISTER OF HEALTH** | Second Respondent |
| **MEC FOR DEPARTMENT OF HEALTH FOR THE PROVINCE OF THE WESTERN CAPE** | Third Respondent |

**Heard**: 2 February 2012

**Delivered**: 23 April 2012

**Summary**: Foreign Health Professional- formal refugee- termination of employment on basis that permanent contract *void ab initio* in light of policy of national health department and provisions of the Public Service Act-interpretation of "dismissal" where *par delictum* rule applies

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**JUDGMENT**

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RABKIN-NAICKER J

Introduction

1. This matter was set down for trial on the 31 January 2012. On that day it was agreed by the legal representatives of applicant and the first and third respondents, that a stated case be drafted and that the matter be argued on 2 February 2012. The stated case made reference to an agreed bundle of documents certain of which are referred to in this judgement. It should be noted that the second respondent, the Minister for Health, did not oppose the application.

2. The applicant (Ndikumdavyi), is a Burundian citizen. In terms of the National Health Department's "policy on the recruitment and employment of foreign health professionals in the South African health sector" (the Policy), he qualifies as a Foreign Health Professional. At the date of the dispute and of the trial, he had been certified as a refugee in terms of section 24 (3) (a) of the Refugees Act 130 of 1998.

3. Ndikumdavyi obtained the degree of Baccalaureus Curationis in nursing from the University of the Western Cape on the 13 March 2009. He then received a letter from the sub directorate: foreign workforce management of the National Department of Health on 24 March 2009, advising him that he could take up employment in the Republic.

4. On the 31 August 2009, Ndikumdavyi received a National Department of Health endorsement certificate entitling him to seek employment and apply for registration, subject to certain conditions. These were that he may seek employment in the South African Health Sector; must submit a job offer to the Foreign Workforce Management Program of the National Department of Health (FWMP) for further endorsement; and must maintain the validity of a refugee permit. On 16 February 2010, he received an annual practising certificate from the South African nursing Council which was valid for the period 1 January 2010 to 31 December 2010.

5. Pursuant to a written job application for the post of professional nurse (general) at first respondent, he was offered employment by the acting senior medical superintendent and the job offer indicated the effective date to be 1 July 2010. On 29 June 2010, Ndikumdavyi signed the acceptance form for the post. He commenced employment in the post of professional nurse on 1 July 2010. The applicant did not allege that he submitted the job offer to the FWMP for further endorsement.

6. Having commenced employment, and on the 20 July 2010 he received a letter from the senior medical superintendent of first respondent informing him that:

> "Please note that in terms of the National Department of Health's policy on the recruitment and employment of foreign health professionals in the South African health sector that only a fixed term contract and not permanent employment can be offered. As the formal recognition of your refugee status in South Africa expires on the 24 December 2010 such temporary contract cannot extend past the said date. Approval for such temporary appointment must furthermore be obtained from the National Department of Health.
>
> In light of the aforementioned circumstances, we are withdrawing our job offer for permanent employment with immediate effect. You are furthermore informed that a job offer for temporary appointment shall only be issued if the necessary approval therefore has been obtained."

7. On 26 July 2010, the University of Cape Town law clinic sent a letter to first respondent advising it, *inter alia,* that their letter dated 21 July 2010 instructing Ndikundavyi not to come back to work pending further notice, amounted to a breach of his employment contract and effectively constituted a procedurally and substantively unfair dismissal. First respondent replied on 30th of July 2010 advising that the offer of employment was made contrary to the Policy, and was therefore not a valid offer. The letter from first respondent further stated that: "Administrative Law permits the employer to correct mistakes made in administering its duties. Approval for the appointment of Mr Ndikudavyi has to be obtained before an offer for temporary employment can be made.

Valkenberg Hospital has applied for such approval." There is no further correspondence of record before the launching of the referral on the 1 November 2010.

8. The Policy had been revised on 25 February 2010 and duly circulated to third respondent's heads of office. The Policy (which was approved by the National health Council on 5 February 2010) states in clause 15 that:

> "the employment of foreign health professionals recruited by the public health sector shall be limited to health facilities in designated underserved rural areas in South Africa, unless otherwise approved by the head of the provincial Department of Health and subject to endorsement by the National Department of Health. A head of a Provincial Department of Health may not delegate the responsibilities in this regard."

Issues in dispute

9. In their pre-trial minute, the parties raised certain issues of law that were in dispute (albeit under the heading 'facts in dispute'). These included the following:

> "Whether the applicant was an employee of the first respondent as contemplated in section 213 of the Labour Relations Act number 66 of 1995 (" the LRA" ) at the time of his dismissal by the first respondent.
>
> Whether the National Department of Health's policy on the recruitment and employment of foreign health professionals in the South African health sector is discriminatory, or alternatively, constitutes an unfair labour practice in terms of section 188 (1) of the LRA."

10. The primary relief sought by the applicant was recorded in the pre-trial minute as follows:

> "A declarator that the National Department of Health's "policy on the recruitment and employment of foreign health professionals in the

South African health sector" constitutes unfair discrimination against foreign nationals and refugees, in violation of section 187 (f) of the LRA.

Reinstatement backdated to 21 July 2010, being the date of dismissal.

Payment of the maximum monetary compensation as a solatium for the automatically unfair dismissal."

11. The issues which the court was required to decide in terms of the pre-trial minute were as follows:

"whether the dismissal constituted unfair discrimination against the applicant directly and/or indirectly on the grounds of his nationality and refugee status, in contravention of subsection 187 (f) of the LRA.

whether the dismissal constituted unfair discrimination against the applicant directly and/or indirectly on the grounds of his nationality and refugee status, in that it was based on an alleged policy laid down by the second respondent described as " the national departments health policy on the recruitment and employment of foreign health professionals in the South African health sector", which policy is discriminatory against foreign nationals and refugees, in contravention of subsection 187 (f) of the LRA."



Evaluation

12. The approach adopted by the applicant that a declarator could be sought on the basis that the policy in question was discriminatory and in contravention of subsection 187 (f) of the LRA appears to have been misconceived.

13. Section 187 of the LRA provides inter alia that a dismissal is automatically unfair if the reason for the dismissal is:

*"that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender,*

*sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility"* (section 187(1)(f))

14. The section is not a prohibitory provision.[1] Nor does it create positive rights such as those contained in section 185 of the LRA, i.e. the right of every employee not to be unfairly dismissed or to be subjected to an unfair labour practice. A declarator regarding the violation of this section is simply not apposite. I must have regard to the principle that pleadings contain the legal basis of the claim under which an applicant chooses to invoke the court's competence[2]. Given that the declarator was not sought with reference to the provisions of section 157(2) of the LRA thus placing reliance on an alleged violation of any fundamental right entrenched in chapter 2 of the Constitution, by the state as employer, this court's competence is restricted to deciding whether there was a dismissal and if so, whether it was automatically unfair.

15. First and Third Respondents submitted before court that due to the Policy binding on them, the "appointment" of Ndikundavyi was void ab initio and he could not therefore have been dismissed in terms of the LRA. His appointment was "an administrative error" and the contract was invalid. Reliance was also placed on section 10 of the Public Service Act which provides that:

"No person shall be appointed permanently, whether on probation or not, to any post on the establishment in a department unless he or she-

(a) is a South African citizen or permanent resident; and

(b) is a fit and proper person."

16. The jurisprudence of this court assists Ndikundavyi. In relation to persons who are "illegal immigrants", the Labour Court has found:

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[1] Contrasting with that contained in section 6 of the of the Employment Equity Act which provides that 'no person may unfairly discriminate....'

[2] See GCABA v MINISTER FOR SAFETY AND SECURITY AND OTHERS 2010 (1) SA 238 (CC) at para 75

"Taking into account the provisions of s 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definition of 'employee' by this court, I do not consider that the definition of 'employee' in s 213 of the LRA is necessarily rooted in a contract of employment. It follows that a person who renders work on a basis other than that recognized as employment by the common-law may be an 'employee' for the purposes of the definition. Because a contract of employment is not the sole ticket for admission into the golden circle reserved for 'employees', the fact that Lanzetta's contract was contractually invalid only because Discovery Health had employed him in breach of s 38(1) of the Immigration Act did not automatically disqualify him from that status."[3]

17. On the approach taken in the Discovery Health matter, and taking into account the status of formal refugees in terms of the Refugees Act[4] and the international law obligations referred to in that statute as well as the fact that refugees as a class in this country and the world over are a particularly vulnerable group, I am satisfied that Ndikundavyi must qualify for the status of "employee" in terms of the LRA. That being said, there is a need to go further and address the issue of whether there has been a "dismissal" in terms of the LRA. Section 186(1)(a) of the LRA provides that:

"186 Meaning of dismissal and unfair labour practice

(1) 'Dismissal' means that-

(a) an employer has terminated a contract of employment with or without notice;

18. In the *Discovery* matter the court dealt with the inclusion of the words 'contract of employment' in the definition of dismissal in the following way:

"The commissioner's finding that Discovery Health dismissed Lanzetta cannot be faulted. The definition of dismissal, defined in s 186 of the LRA inter alia to

[3] Discovery Health Limited v CCMA and others (2008) 7 BLLR 633 (LC) at para 49
[4] No. 130 of 1998

include 'the termination by an employer of a contract of employment, with or without notice' may present a jurisdictional difficulty to persons who are engaged in disguised employment relationships and who claim unfair dismissal (because of the specific reference to a 'contract of employment') but his is not one of those cases. It is common cause that Lanzetta was engaged in terms of a contract of employment and Discovery Health terminated that contract."[5]

19. In *Discovery* it was not necessary to decide whether the contract in question was *void* as Lanzetta had signed it when he was still lawfully able to work[6]. Where, as in this case, it is alleged that the contract was void *ab initio*, we are still confronted with the problem of the definition of "dismissal" in the LRA. Given the definition, it remains arguable that there was no contract in law to terminate. As the law stands, the interpretation of the word 'employee' in line with constitutional imperatives needs to be accompanied by a reading of section 186(1) (a) which gives expression to the objects of the LRA, if employees such as Ndikundavyi can be recipients of the same remedies as those employees whose contracts of employment are not subject to the par delictum rule. Ngcobo J (as he then was) had this to say about these imperatives:

"[110] The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in s 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.[7]

20. It is arguable then, that the words "employment contract" in section 186(1)(a) may be read, not in the strict sense, but to mean the wider term "employment relationship". This will give effect to the primary objectives of the LRA and

[5] At paragraph 55
[6] At paragraphs 8 and 9
[7] Chirwa v Transnet 2008(4)SA367 (CC) at paragraph 110

provide equal protection for formal refugees and other vulnerable groups of employees. The need to take such an interpretative approach may soon be redundant if the proposed amendment to section 213 of the LRA in the first Amendment Bill to the LRA currently before Parliament is enacted. It is drafted thus:

> " **'contract of employment'** means—
>
> *(a)* a common law contract of employment; or
>
> *(b)* any other agreement or arrangement under which a person agrees to work for an employer but excluding a contract for work as an independent contractor;"

21. The approach taken by the Labour Appeal Court in dealing with the *par delictum* rule in "Kylie" v CCMA and Others[8] was to found a remedy for the Appellant on the basis that an employment relationship existed between a sex worker and her employer, even if the contract of employment was void for illegality. The court found that 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 or public policy. The issue of remedy was dealt with by Davis JA as follows:

> "..... 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 s 23(1) of the Constitution and enshrined in the LRA.

That enquiry is not necessarily incongruent with the finding in Jordan's, that the Act which criminalizes prostitution is constitutional. As noted, the criminalization of prostitution does not necessarily deny to a sex worker the protection of the

[8] (2010) 31 ILJ 1600 (LAC)

Constitution and, in particular s 23(1) thereof, and by extension its legislative implementation in the form of the LRA.

The express purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratisation of the workplace' (s 1 of the LRA). In itself, this set of principles can be traced to s 23 of the Constitution. In particular, s 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) 24 ILJ 95 (CC); 2003 (2) BCLR 154 (CC) at paras 33-40.

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....."[9]

22. In *Kylie* the remedy suggested, but not decided, was as follows:

"These considerations 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 s 193 of the LRA provides for considerable flexibility to first respondent or a court. For example, although an arbitrator or court should require the employer to reinstate or re-employ 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 re-employ the employee. Manifestly, it would be against public policy to reinstate an 'employee' such as appellant in her employ even if she 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.

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

[9] At paragraphs 38-41

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."[10]

23. It is evident from the judgment in Kylie that the LAC was prepared (obiter) to consider the termination of an "illegal" contract of employment as a "dismissal" for the purpose of the LRA. On the basis of the Court's approach in Kylie, I have no hesitation in reading the definition of dismissal in the LRA in line with the objectives of the LRA (derived from the protection of section 23 of our Constitution) and its' interpretation clause. In my view, this amounts to a to a reading of the definition of "dismissal", and in particular the term "contract of employment", in a way that allows a term derived from our common law to be given an extended meaning in certain circumstances, a meaning consistent with section 23 of our Constitution and the objectives of the LRA.

24. It is necessary to distinguish the current matter from *Kylie*, in that the court in *Kylie* was concerned with the rendering of illegal services in what the law regards as a criminal activity. In this matter, we are dealing with the rendering of legal services, but where a permanent appointment is prohibited by statute. It is in this context that the court must exercise its' discretion in terms of section 193 of the LRA.

25. Section 193 of the LRA provides as follows:

"193 Remedies for unfair dismissal and unfair labour practice

(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

[10] At paragraphs 52 and 53

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee."

26. In my view the so-called 'administrative error' conceded by first respondent led to an unfair termination of the employment relationship with Ndikundavyi. It is manifestly an obligation on an employer of this type to be aware of the provisions of the PSA and of a policy which it is bound to apply. The letter written by first respondent on the 30 July 2010 acknowledges as much. I am precluded by the content of section 10 of the PSA in making a finding of substantive unfairness.[11] However, I find that the first respondent has failed to establish that the dismissal was procedurally fair. I note that first respondent made no attempt whatsoever to afford Ndikundavyi a right to be heard before summarily dismissing him. In exercising my discretion under section 193(1) of the LRA, I take into account that first respondent quite properly acknowledged that it made mistakes "in administering its duties" and find that the obligation to ensure the endorsement of the applicant's appointment, by dint of its own version, rested on it.

27. In this case, a Burundian refugee, trained and qualified in South Africa, was unable to perform his calling assisting our citizens as a nurse in a state psychiatric facility. The case has not provided the court with an opportunity to examine the constitutionality of the Policy which prevented his continued employment. Nor did it, as stated above, allow for a finding that the dismissal was substantively unfair. What it has done however, is to confirm that formal refugees must be the recipients of the rights afforded by the LRA. In exercising the discretion to find an appropriate solatium in a matter such as this, a court may be mindful of the sentiments expressed in the minority judgment of the *Constitutional Court in Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC)* when it considered the provisions of the Refugee Act and stated inter alia:

[11] There was no direct or collateral challenge to the constitutionality of that section by the applicants

"Refugee status may be conferred upon a person in terms of the Refugees Act. Section 3 of that Act provides that a person will qualify for refugee status if that person -

'(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere'

A reading of these provisions gives some understanding of the predicament in which refugees generally find themselves. Refugees have had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there. Often refugees will have left their homes in haste and find themselves precariously in our country without family or friends, and without any resources to sustain themselves....

"The circumstances that qualify an applicant for refugee status in s 3 of the Act are drawn from the provisions of the 1951 UN Convention and the OAU Convention. It is important to note that political events on our continent have resulted in many people becoming refugees. South Africa has played its own tragic role in this history. Many South Africans fled South Africa during the apartheid era to avoid persecution at home. They were welcomed warmly and given support and sustenance by countries all over our continent and elsewhere. Africa's special refugee problem was recognized in the late 1960s by the Organization of African Unity which led to the adoption of the OAU Convention regulating refugees."[12]

28. In all the circumstances of the matter, I make the following order:

1. The dismissal of the applicant was procedurally unfair;

[12] At paragraphs 100,101 and 105

2. The first respondent is ordered to pay the applicant an amount equal to twelve months of his remuneration at the time of his dismissal;

3. Costs are to be paid by the first and third Respondents jointly and severally.

Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

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| On behalf of the applicant: | Adv R Nyman |
| Instructed by: | UCT Legal Aid Clinic |
| On behalf of 1st and 3rd respondents: | Adv de Wet |
| Instructed by: | The State Attorney |