

LABOUR LAW

SIBERGRAMME 11/2010

ISSN 1606-9994

7 JULY 2010

BY: **JOHN GROGAN**

*BA (Hons)(RU) B Iuris LLB (SA) LLM PhD (RU)
Advocate of the High Court of South Africa*



Siber Ink

Published by Siber Ink CC, B2A Westlake Square, Westlake Drive, Westlake 7945.

© Siber Ink CC, J G Grogan

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

Subscriptions: subs@siberink.co.za or fax (+27) 086-514-5276

In this issue:

1. Solace for sex workers 2
2. Not the least unfair 5
3. Demoted by transfer 7
4. Whistling at work 8

1. SOLACE FOR SEX WORKERS

Sex workers may have been putting in overtime during the Soccer World Cup. But are they entitled to protection under labour legislation if they are ill-treated by their employers?

The answer depends, first, on whether those engaged in the world's oldest profession are classified as employees; second, on whether, even if they are, they are entitled to seek the protection of the courts.

A professional prostitute known as “Kylie” – not her real name – has helped provide the answer to this question, and perhaps for others who perform work that has been stigmatised by the lawmakers as illegal.

Kylie worked for a Cape Town massage parlour and performed services other than massages for clients. She worked a seven-day week, and her days sometimes stretched to 14 hours. But there was one service she was not prepared to afford the parlour's customers. That was oral sex.

The parlour's owner Mr Van Zyl apparently thought that that service fell within Kylie's job description. But Kylie was insistent that it did not. Her services were terminated without a hearing, whether for poor performance or misconduct is unclear.

Kylie referred a dispute to the CCMA, claiming that she had been unfairly dismissed. The commissioner herself raised the question whether the commission had jurisdiction, and decided that it did not (see “*Kylie*” / *Van Zyl t/a Brigittes* [2007] 4 BALR 338 (CCMA)).

The commissioner reasoned that, because offering sex for monetary reward is prohibited by the Sexual Offences Act 23 of 1957, professional prostitutes cannot fall within the statutory definition of “employee”.

Kylie proceeded to the Labour Court. There, the judge held that the commissioner was wrong in deciding that sex workers are not employees, at least where, like Kylie, they work for brothels for remuneration.

But the judge dismissed the review application on another basis. This was that, even though sex workers may be employees, the courts (and the CCMA) may not grant

them relief because the work they perform is illegal (see “*Kylie*” v *CCMA & others* [2008] 9 BLLR 870 (LC)).

That finding was based in turn on the well known principle *ex turpi causa non oritur actio*, which applies to all parties who seek relief on the courts on the basis of unlawful agreements. This means, in brief, that the courts will not give effect to unlawful agreements because to do so would be to encourage criminal activities.

The judge cited a few examples to support his conclusions. If prostitutes were to be reinstated, the order would force the parties to continue their unlawful activities. And, if sex workers could form unions, they could conclude collective agreements regulating conditions of service and possibly bind other sex workers to agreed conditions of service.

Kylie was not satisfied with the solace of merely being pronounced an employee. She appealed to the Labour Appeal Court, claiming that both the commissioner and the Labour Court had deprived her of her constitutional right to protection as an employee. Kylie could see no problem with being reinstated or with the formation of sex workers’ unions.

In ***Kylie v CCMA & others*** (Labour Appeal Court case no. CA10/08 dated 26 May 2010, unreported (Davis JA, Zondo JP and Jappie AJ concurring)), the Labour Appeal Court (“the LAC”) accepted that in South African law illegal contracts are deemed void. This means that no consequences are attached to them.

This is an inflexible rule. How, then, could a court possibly assist Kylie? The answer was provided by another Latin concept: the *par delictum* rule. That rule provides that, where two parties are in the wrong, a court may assist one to some extent. Whether the *par delictum* rule is applied depends in turn on an even more flexible concept – public policy – which, as the court pointed out, is now sourced in the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

The LAC agreed with the Labour Court on at least this: Kylie was an employee, even though the contract between her and Mr Van Zyl was illegal. Once it was recognised that an employment relationship exists in these circumstances, the focus shifted from the contract (on which the Labour Court had kept its eyes) to the Labour Relations Act 66 of 1995 (“the LRA”), which supersedes all contracts.

The LRA gives the CCMA and the Labour Court power either to reinstate unfairly dismissed employees or to award them compensation. The question was therefore whether, in spite of the illegality of Kylie' contract, she could claim these remedies under the Act.

The answer, as so often happens, lay in the Constitution. The Constitution guarantees to all "workers" the right to fair labour practices. Implicit in the right to fair labour practices is the right to dignity of all workers, and the wider concept of social justice. Even sex workers are entitled to their dignity and social justice.

If the LRA is designed to give expression to the right to fair labour practices, the Labour Court and statutory arbitrators must safeguard those employees who are particularly vulnerable to exploitation because they are economically and socially weaker than their employers. And who is more vulnerable than sex workers, often forced to ply their trade through financial desperation?

Many sex workers in this country are particularly vulnerable and are exposed to exploitation and abuse. For example, Kylie had worked 14 hours a day for seven days a week, and was subject to other work practices outlawed by the Basic Conditions of Employment Act 75 of 1997. There was accordingly no reason she should not be entitled to some constitutional protection designed to protect her dignity.

But the LAC stopped there. While sex workers are entitled to protection, it did not follow that they were entitled to the full range of remedies afforded by the LRA. The Labour Court and arbitrators enjoy wide discretion when it comes to remedies. But, said the LAC, it would be "manifestly against public policy" to reinstate a sex worker.

That left compensation. The LAC declined to commit itself on whether compensation should be granted to an unfairly dismissed sex worker. But it could see no reason that, if the dismissal was procedurally unfair, they should be denied compensation.

If the dismissal was substantively unfair, the position might be different, because in that case the sex worker would be compensated for remuneration she would otherwise have earned illegally.

The LAC added a further rider to the proposition that sex workers are entitled to be treated fairly as employees. While it could see no reason that they should not be able to

form trade unions, those unions could not serve as vehicles for the commission of crimes. So, collective agreements might not be enforced if they promoted illegal activities.

The LAC declared that the CCMA commissioner was wrong in dismissing the matter for want of jurisdiction. It remains to be seen whether Kylie can persuade a commissioner that she is entitled to compensation for losing her job.

2. NOT THE LEAST UNFAIR

After Ms Swart had acted in a post that carried the rank of inspector for about five years, the post was upgraded to the rank of captain. The re-graded post was advertised internally, and Ms Swart applied.

The selection committee decided that three of the 15 candidates, including Ms Swart, were appointable, but recommended that the post be re-advertised externally. Ms Swart claimed that she was the victim of an unfair labour practice.

A bargaining council arbitrator agreed. He found that the selection committee should not have recommended that the post be re-advertised, and ordered the SAPS to promote Ms Swart to the rank of captain.

In **SA Police Services v SSSBC & others** (Labour Court case no. P54/09 dated 13/04/2010, unreported (A C Basson J) (*SILCS* 2010:21)), the SAPS argued that the arbitrator had acted irrationally for two reasons: by finding that the selection committee was not empowered to recommend that the post be re-advertised, and by ordering the SAPS to promote Ms Swart even though she had not even been selected for the post.

These points gave the court an opportunity to consider the principles applicable to disputes concerning promotion. These are:

- decisions on promotion should be made in a manner that does not constitute an unfair labour practice;
- the definition of “unfair labour practice” covers only disputes concerning promotion, and does not extend to disputes over whether employees *deserved to be* promoted;

- the decision whether or not to promote falls within an employer's discretion, which should not be interfered unless the decision exhibits gross unreasonableness or bad faith;
- arbitrators should not usurp the discretion of employers to decide who is the best candidate;
- the mere fact that an employee has been acting in a post does not give the employee a right to be permanently appointed to it;
- in deciding on whether decisions not to promote constitute unfair labour practices, arbitrators must strike a balance between the employer's prerogative and employees' right to be treated fairly.

The court found that the arbitrator had strayed beyond the limits set by these principles. His first mistake was the finding that selection committees may not recommend that posts be re-advertised. Based on that finding alone, the arbitrator had of his own accord promoted Ms Swart even though she had not been rated the best candidate, and without any evidence having been led to prove that she was.

These were not the commissioner's only errors. He had also failed to grasp that:

- a decision to re-advertise a post cannot be unfair *per se* unless the employee, who bears the onus, proves that it was *mala fide* or arbitrary, which Ms Swart had not done;
- the panel had not made any recommendation to the national commissioner, who is the final decision-maker, so no decision to promote had yet been taken.

The court also found nonsensical the commissioner's finding that Ms Swart had been shown "disrespect". In any case, disrespectful conduct does not equate to an unfair labour practice.

The commissioner had also made an adverse finding against the SAPS because it had led no evidence, even though the parties had agreed, and the commissioner had accepted, that the matter would be decided only on oral submissions.

Finally, and in spite of all the above, the arbitrator's decision to order that Ms Swart be promoted was reviewable in itself because that decision had been taken without evidence having been led on the merits of the other candidates.

The award was set aside, and Ms Swart remains an inspector.

3. DEMOTED BY TRANSFER

The boot was on the other foot in **SA Police Services v Salukazana & others** (Labour Court case no. P284/09 dated 16/02/2010, unreported (Moshona AJ)).

Mr Salukazana was temporarily transferred from his post as provincial head of supply chain management to the post of Section Head: Inspections.

He filed a grievance, claiming that the transfer amounted to a demotion. Before the grievance was resolved, Salukazana received a letter informing him that he had been permanently "laterally" transferred to the latter post.

This time, he referred a dispute to the Safety and Security Sectoral Bargaining Council, claiming that his transfer constituted a demotion. A council arbitrator ruled the demotion unfair.

On review, the SAPS argued that the council lacked jurisdiction to entertain the dispute because it concerned a transfer. SAPS added for good measure that the arbitrator had also misunderstood its transfer policy, erred in finding that the transfer was not "lateral", as Salukazana had remained on the same post level, and failed to have regard to the evidence before him.

The Court noted that the SAPS relied on the judgment in *Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & others* (Labour Appeal Court case no. PA2/09 dated 29/01/2010, unreported) (see *Labour Law Sibergramme* 6 of 2010). The LAC held in that case that the council lacked jurisdiction to entertain disputes where the true issue concerned a transfer.

In *Salukazana*, the court held that the earlier case was distinguishable. In this case, the SAPS had clearly understood during the arbitration that the dispute concerned an

alleged demotion; SAPS had opportunistically sought to rely on review on the use of the word “transfer” in the award.

The court noted that, in any case, transfers and demotions may have the same results if the transfer entails a diminution of the employee’s status. Salukazana’s transfer was effectively a demotion. The court held that the council had jurisdiction to arbitrate the dispute.

The judge added that he could see nothing wrong with the arbitrator’s reasoning, and that his finding was consistent with the evidence. There were, in short, no grounds on which the award could be faulted.

The review application was dismissed with costs.

4. WHISTLING AT WORK

Soon after Mr Randles had joined Chemical Specialities as Group Legal Counsel, the company’s financial director began expressing worries about the manner in which the company was being run. The financial director then resigned.

His resignation did not put a stop to the concerns. Two months later, anonymous e-mails circulated expressing further criticisms—in particular about a loan to a director, one W, for the purchase of a helicopter.

Randles was drawn into the matter because he was at odds with W over his (Randles’s) share entitlement. Randles then resigned from the board. In his letter of explanation he reminded the board that the erstwhile financial director’s allegations had not been addressed, and for good measure added further allegations of mismanagement.

The gloves then came off. Randles sued W for his share entitlement, and addressed a further letter to the board alleging irregularities in the company’s loan account, and claiming that salaries and commissions had been inflated and that the Companies Act 61 of 1973 had been breached. He also sent a copy of this letter to the Johannesburg Stock Exchange.

The board undertook to investigate these complaints. But W counter-attacked. He ordered an investigation into Randles's salary structure and certain lease agreements concluded by him on the company's behalf.

After an investigation by auditors, Randles was charged with four counts of misconduct (including abuse of the company's computers) and suspended.

He requested a postponement of the disciplinary hearing, which was refused. Randles then launched an application in the Labour Court for an order halting the disciplinary proceedings. He claimed that they amounted to an "occupational detriment" as contemplated by the Protected Disclosures Act 26 of 2000 ("the PDA").

The company argued that Randles could not rely on the PDA because he had failed to satisfy the requirements of that Act and that, even if he had, he had waived his right to rely on the PDA because he had elected to participate in the disciplinary proceedings.

In **Randles v Chemical Specialities Ltd** (Labour Court case no. D42/2010 dated 05/02/2010, unreported (Cele J)), the court rejected the argument that Randles had waived his right to bring an action under the PDA.

The judge observed that that Act makes it clear that it is aimed at promoting a "culture" in which employees disclose criminal and improper conduct to appropriate authorities. That being the case, every case of alleged "whistle blowing" is a matter of public interest. The provisions of the PDA can accordingly not be impliedly waived.

As to whether Randles had satisfied the provisions of the PDA, the court held that, to succeed, an applicant must prove only that he had made a disclosure in good faith to an employee of his employer.

That Randles's disclosures repeated in part the allegations of the former financial director was immaterial. He appeared on the papers to have believed in the truth of his allegations, and they had been made through the proper channels, without any possibility of personal gain.

Finally, the timing of the disciplinary proceedings indicated that they were a direct response to his disclosure. The court accordingly ruled that Randles had made out a *prima facie* case for an interdict.

Chemical Specialities was ordered to halt the disciplinary proceedings until Randles's claim under the PDA was determined by the Labour Court.

Cases

"Kylie" / Van Zyl t/a Brigittes [2007] 4 BALR 338 (CCMA)	2
"Kylie" v CCMA & others [2008] 9 BLLR 870 (LC)	3
Kylie v CCMA & others (Labour Appeal Court case no. CA10/08 dated 26 May 2010, unreported (Davis JA, Zondo JP and Jappie AJ concurring))	3
<i>Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & others</i> (Labour Appeal Court case no. PA2/09 dated 29/01/2010, unreported)	7
Randles v Chemical Specialities Ltd (Labour Court case no. D42/2010 dated 05/02/2010, unreported (Cele J))	9
SA Police Services v Salukazana & others (Labour Court case no. P284/09 dated 16/02/2010, unreported (Moshoana AJ))	7
SA Police Services v SSSBC & others (Labour Court case no. P54/09 dated 13/04/2010, unreported (A C Basson J) (<i>SILCS</i> 2010:21))	5

Note: Cases considered only in Brief are distinguished in **red type**. *Italic* cases are merely referred to in the course of considering other cases. Those in **bold black** are more fully considered. *SILCS* is *Siber Ink's Labour Law Case Summaries*. All cases dealt with in *Sibergrammes* that have been summarised in *SILCS* carry the *SILCS* citation.

