Civil & Legal Sciences

Rautenbach, Civil Legal Sci 2013, 2:2
http://dx.doi.org/10.4172/2169-0170.1000e113

Editorial Open Access

'Jolly Old Law': The Sex Worker Who Sued Her Pimp for Unfair Dismissal

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Who says the law is boring? Most definitely not the judge of appeal, Dennis Davis JA, who reviewed the facts of a labour dispute between a sex worker and her employer in *Kylie v CCMA* 2012 (SA) 383 (LAC). The case initially came before the Commission for Conciliation Mediation and Arbitration (the 'CCMA') for arbitration and then on review before the Labour Court (LC) before it ended up on appeal in the Labour Appeal Court (LAC) before Davis JA.

The facts can be summarised as follows. The appellant, cited only as Kylie, is a sex worker employed at the business of the third respondent, known as Brigitte's Massage Parlour. It is no secret that this is more than just a massage parlour and that money changes hands in exchange for sexual favours. For reasons unknown to us, Kylie was informed on 27 April 2006, without a prior hearing, that her employment was terminated. A dispute was declared which was referred to the CCMA for arbitration on 13 September 2006, before Commissioner Bella Goldman. The commissioner was, however, of the opinion that she had no jurisdiction to arbitrate on an unfair dismissal case of this nature and she ruled to this effect. The phrase of 'this nature' referred of course to the fact that Kylie's contract of employment was illegal in terms of the Sexual Offences Act 23 of 1957, which makes the keeping of a brothel a criminal offence and everyone benefiting from its keeping a criminal offender. In addition, the Act criminalises unlawful carnal intercourse for reward, a fact which also did not favour Kylie's chances of obtaining retribution for her 'unfair dismissal'.

Kylie was not dissuaded after this ruling and instead approached the LC for a review of the CCMA-ruling. The presiding judge in the LC, Cheadle AJ, resolved the case by a combined application of the Labour Relations Act 66 of 1995 (the LRA) and common law principles. First of all, he held that the definition of an 'employee' in section 2 the LRA is wide enough to include a person whose contract of employment was unenforceable in terms of the common law. Kylie thus jumped over the first hurdle. The second hurdle, which was also based on a common law principle, proved to be an insurmountable one, however. The common law prevents the sanctioning or encouragement of illegal activities and although Kylie might be regarded as an employee she might not benefit from her illegal activities by receiving relief for her unfair dismissal. In addition, the court asked if the constitutional protection against unfair labour practices as enshrined in section 23(1) of the Constitution of the Republic of South Africa, 1996 (the 'Constitution') was also available to someone such as Kylie, who was involved in illegal employment. Section 23(1) of the Constitution stipulates that everyone has the right to fair labour practices.' If section 23(1) was to the avail of Kylie, it would entail that her unfair dismissal be remedied. The primary remedy, in terms of section 193(2) of the LRA, is reinstatement or reemployment. Both remedies would, however, result in the sanctioning of the illegal activity or, even worse; require the employer to commit a crime by reinstating Kylie's *status quo*. The question had therefore to be answered in the negative, because affording protection to Kylie would undermine a fundamental constitutional value of the rule of law by sanctioning or encouraging illegal activities. The LC went even further by maintaining that, even if section 23(1) of the Constitution did afford protection to Kylie, the LRA constituted a justifiable limitation on the constitutional rights of Kylie because courts could not by their actions sanction or encourage illegal activity.

One can only admire Kylie for not taking even this ruling lying down. She appealed to the LAC, which brings us to the reported case of *Kylie v CCMA* 2012 (SA) 383 (LAC) before Davis JA. After a good dose of legal juggling, Davis JA surprised everybody by holding not only that the finding of the LC was wrong but also that the CCMA did have jurisdiction to hear the matter. Contrary to the common law approach followed by the court *a quo*, he followed a constitutional approach with section 23(1) as point of departure. He drew attention to the fact that section 23(1) of the Constitution refers in a broad sense to 'everyone,' a term which, if one followed a generous approach to the range of beneficiaries of rights provided for in this section, included sex workers as well. This conclusion, according to Davis JA, is supported by the fact that sex workers have the right to be treated with dignity by their clients and their employers regardless of the illegality of their profession. His exact words in this regard were as follows (at paragraph 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.

Even though Kylie was found to have met the 'threshold requirement' (as the court called it) and was thus a beneficiary of constitutional rights regardless of the nature of her profession, the question of relief in the event of infringing those rights proved to be a harder nut to crack. The fact remained that the common law prevents the sanctioning of illegal activities through the *ex turpi causa non oritur actio* known as the *ex turpi causa* rule (which prohibits the enforcement of immoral or illegal contracts) in combination with the *in pari delico potior conditio defendentis* rule, which is more commonly known as the *par delictum* rule (if both parties are equally guilty, the guilt of the defendant is to be preferred – in this case that of the employer). The *par delictum* rule generally prevents someone from reclaiming a performance made in terms of an illegal contract. David AJ pointed out, however, that these rules have been relaxed to prevent injustice or to satisfy the requirements of public policy, ultimately sourced in the Constitution. According to the LAC the ultimate question was what discretion the courts have in the determination of a remedy in the case where a sex worker has been unfairly dismissed. In the words of Davis AJ (at paragraph 38)—

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Received July 29, 2013; **Accepted** July 30, 2013; **Published** August 03, 2013

Citation: Rautenbach C (2013) 'Jolly Old Law': The Sex Worker Who Sued Her Pimp for Unfair Dismissal. J Civil Legal Sci 2: e113. doi:10.4172/2169-0170.1000e113

... 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.

The court was adamant that the criminalisation of prostitution does not necessary deny a sex worker the protection of the Constitution, or more specifically section 23(1). Neither does it mean that the LRA, which was designed for the protection of vulnerable employees and thus also sex workers, is not at the disposal of these employees only because of the illegal nature of their employment. This being said, Davis AJ still had to determine the appropriate remedy. He was faced with the problem of reinstatement, which would have the effect of the court's endorsing or ordering the commission of the crime of prostitution, and stated (at paragraph 52):

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.

In an analogy to the Canadian case *Sauvé v Canada (Chief Electoral Officer)* [1993] 2 SCR 438, which had been cited in the Constitutional Court in *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC), Davis AJ held that even criminals have rights which may not be infringed. Although Kylie had committed a crime her dignity remained intact and the 'concomitant constitutional protection must be available to her as it would to any person whose dignity is attacked unfairly' (at paragraph 54). In terms of section 23(1) of the Constitution she also had the right to fair labour practices and the LRA ensures that an employer respects these rights within the context of an employment relationship. Put in another way, according to Davis D (at paragraph 54) —

... public policy based on the foundational values of the Constitution does not deem it necessary that these rights be taken away from appellant [Kylie] for the purposes of the Act to be properly implemented.

The only thing that remained was to find a proper remedy taking into account the context of the case, the objects and provisions of the LRA, and the illegality of the work performed. After quoting the well-known work of Ronald Dworkin (*Taking Rights Seriously* (1977), Davis AJ weighed the *ex turpi causa* rule (which prohibits the enforcement of illegal contracts) against the public policy sourced in the Constitution, which is based on freedom, equality and dignity for all members of society (including prostitutes), and came to the conclusion that the jurisdiction ruling of the CCMA was incorrect, in that it had jurisdiction to hear the dispute between Kelly and her 'pimp'. Davis AJ was thus able to pass the bucket to the CCMA to once again rule on the appropriate remedy – a task nobody would envy the relevant commissioner which would eventually preside in the matter.

Although the case has not yet reached a logical conclusion, a few observations may be prudent. Davis AJ took great pains to emphasise that he did not sanction prostitution; that was something for the legislature to do and not the courts. Nevertheless, the fact that prostitution continues to be an illegal profession in South Africa does not preclude sex workers from constitutional protection. Secondly, his order was not a *carte blance* relating to all existing or future illegal employment contracts. For example, would an unhappy housewife be able to sue a contract killer for specific performance if he failed to comply with the terms of their contract to kill her husband, or could a drug dealer sue a non-paying client for goods he or she received? Davis AJ's response was that each case would have to be considered in terms of its facts. It would primarily be the function of the courts to decide, after weighing up all of the relevant principles (the *ex turpi causa* rule, public policy, fundamental rights and legislation), if a remedy was available to the injured employee (the 'wronged') or not. Thus, public policy could dictate that a sex worker (conducting one of the oldest professions in the world) be compensated for unfair dismissal by her employer but not the contract-killer or the drug-dealer, although I should imagine that a dealer in cannabis would receive a more sympatric ear in the South African courts than one dealing in hard drugs.

This case illustrates that law and societies are on the move. Things we have taken for granted are no longer so. For that we have to thank the Kylies of the world, who are brave enough to take on their pimps in a legal world that has not shown her kind much favour over many centuries. So, who says that jolly Old Law is boring? Certainly not me!

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