Discovery Health Limited v CCMA & others
[2008] 7 BLLR 633 (LC)

Division:	Labour Court, Johannesburg
Date:	28/03/2008
Case No:	**JR2877/06**
Before:	A van Niekerk, Acting Judge

Application in terms of section 145 of the LRA

Commission for Conciliation, Mediation and Arbitration – Arbitration award – Review – In testing rationality of award, reviewing court may have regard to reasons commissioner might have taken into account, but did not.

Contract of employment – Unlawful contracts – Employer terminating contract with foreigner after learning he was working without permit – Contract, though unlawful, not void ab initio and termination constituting dismissal.

Dismissal – Proof of – Employer terminating contract with foreigner on learning that he had no work permit – Termination constituting dismissal.

Employee – Who constitutes – Foreigners – Foreigner employed without work permit an employee, and entitled to all rights afforded employees under labour legislation and Constitution.

Foreigners – Rights as employees – Contract between South African employer and foreigner without work permit illegal, not void – Foreigner entitled to all rights afforded employees under labour legislation and Constitution.

Section of the LRA considered:

Section 213 (definition of "employee")

Editor's Summary

The third respondent, an Argentinean national lawfully resident in South Africa, informed the applicant when he applied for a job that he was legally entitled to work in South Africa. When the applicant subsequently learned that he did not have a work permit, it terminated the employment relationship. At subsequent CCMA proceedings, the parties agreed that the respondent commissioner would first decide whether the commissioner had jurisdiction to entertain the dispute. The applicant contended that the third respondent was not an employee because the employment contract was unlawful, and that he consequently could not claim to have been dismissed. The third respondent contended that the statutory definition of "employee" contemplates the existence of an employment relationship that transcends the contract. The commissioner ruled that the third respondent was an employee.

The Court noted that it is now established that the proper test on review of CCMA arbitration proceedings is whether the commissioner reached a decision which any reasonable commissioner could have reached. Even if a commissioner gives invalid reasons in the award, a reviewing court may take into account reasons on which the commissioner might have relied, but did not.

The Court held that the proper approach to the matter was to decide, first, whether the contract between the parties was valid. If it was, that was the end of the matter. However, if the contract was invalid, it was then necessary to decide whether that invalidity meant that the parties were not an employer and an employee, respectively, within the statutory meaning of those terms.

On the validity of the contract, the Court noted that the Immigration Act 13 of 2002 merely prohibits employment of foreigners who do not have work permits, and penalises contraventions. The question was whether the Legislature intended to rely only on the deterrent effect of the prohibition, or whether it intended to visit contracts concluded in violation of the prohibition with nullity. The Court noted that earlier judgments on this issue had been overtaken by the Constitution of the Republic of Soouth Africa, 1996. Now, the right to fair labour practices is entrenched. Were the Immigration Act 13 of 2002 to be interpreted in the manner contended for by the applicant, the unfair consequences that could follow were easy to imagine. Unscrupulous employers might be willing to risk possible prosecution under that Act, employ foreigners without work permits, then at the end of the contract period refuse to pay them on the basis that the contract was void. Such foreigners would then be without remedy. This would undermine the constitutional guarantee of everybody to fair labour practices. The Court accordingly held that the contract between the applicant and the third respondent was valid,

and that the CCMA accordingly had jurisdiction to determine whether the third respondent had to entertain the unfair dismissal dispute.

The Court noted further that, while this finding disposed of the issue, the commissioner's ruling was based on the proposition that the employment relationship transcends the contract. This approach gave rise to the second question posed by the case – i.e. whether the statutory definition of "employee" assumed the existence of a valid employment contract. The Court noted in this regard that many of the judgments in which the statutory definition is linked to the existence of an employment contract also antedated the current Constitution. Now, the courts are bound to interpret that definition so that it will best give effect to the constitutional guarantee of fair labour practices. The Court held that that fundamental right extends to individuals, like members of the defence force, who are excluded from the labour statutes. Furthermore, international bodies like the ILO had attempted to deal with the effects of globalisation of the economy by protecting the rights of migrant workers. In the light of the Constitution, international law and recent judgments in which the Labour Court has held that a valid contract of employment is not a necessary element of the statutory definition of "employee", the Court held that, even if the third respondent's contract was invalid, he was still to be regarded as an employee.

The Court held further that the commissioner's decision that the applicant had dismissed the third respondent could not be faulted.

The application was dismissed and the matter was remitted to the CCMA to decide whether the third respondent's dismissal was fair.

Judgment

Van Niekerk AJ:

Introduction

[1] This application raises a complex and controversial question: is a foreign national who works for another person without a work permit issued under the Immigration Act 13 of 2002 ("Immigration Act") an "employee" as defined by the Labour Relations Act 66 of 1995 ("the Act/LRA")?

[2] The third respondent, Lanzetta, is an Argentinean national. It appears from the papers that he is and has always been lawfully resident in South Africa, although the applicant ("Discovery Health") contends that at the time it employed him, Lanzetta represented that he was legally permitted to work for that company, which he was not. When this became apparent to Discovery Health, the company terminated Lanzetta's employment. Lanzetta referred an unfair dismissal dispute to the CCMA. The parties agreed that the commissioner should determine, as a preliminary point, whether the CCMA had jurisdiction to arbitrate Lanzetta's claim.

[3] Discovery Health denied that the CCMA had jurisdiction primarily because, so it contended, only an "employee" as defined by section 213 of the LRA may claim the protection that the Act affords. The argument is this: the statutory definition contemplates that an "employee" is a party to a valid contract of employment. Since the contract of employment concluded with Lanzetta (a foreign national not in possession of a valid work permit) was tainted with illegality, Lanzetta's contract was not valid and he was therefore not an "employee" as defined in the LRA. Because Lanzetta was not an "employee", he could not claim the right not to be unfairly dismissed and the CCMA had no jurisdiction to arbitrate his dispute with Discovery Health.

[4] The commissioner ruled that Lanzetta was an employee, and that the CCMA had the jurisdiction to determine his unfair dismissal dispute. The merits of the dispute have not been determined – the arbitration hearing was postponed pending the outcome of these proceedings in which Discovery Health seeks to review and set aside the commissioner's jurisdiction ruling.

The factual background

[5] The facts before the commissioner were not in dispute – indeed, the parties requested the commissioner to make his ruling based on facts agreed between them. These are:

> "
> - The respondent deposed to an affidavit in its application to rescind a default award that had been granted in the applicant's favour.
> - No disciplinary hearing as contemplated by the LRA took place prior to the termination of the applicant's employment.
> - The applicant commenced employment with the respondent on 1 May 2005.

- The applicant's employment was based on a temporary residence permit (at 46 of A and at 9 of R).
- The applicant's services were terminated by means of a letter dated 4 January 2006 (at 6 of A).
- A certificate of employment dated 4 January 2005, was issued by the respondent to the applicant (at 7 of A).
- An employment relationship existed between the parties.
- The applicant is a foreigner. He is a citizen of Argentina.

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- No hearing took place in terms of the Act prior to the termination of the relationship between the parties. The parties had a meeting on 4 January 2006 ie on the day he was dismissed.
- From the outset the applicant's services should not have been engaged because no valid contract of employment came into existence nor could it be enforced at the time of engagement."

[6] These agreed facts do not disclose the full factual backdrop against which the parties' respective attorneys argued this matter. A potted history of this dispute is recorded below, on the basis that not all of the facts are necessarily agreed, but with the intention both of placing the issue of the CCMA's jurisdiction in context and to provide a degree of coherency to this judgment.

[7] Lanzetta entered South Africa on 21 January 2001 on a study visa issued by the Department of Home Affairs. The permit was valid until 15 January 2002, but the Department later extended the visa until 31 December 2002.

[8] On 1 January 2003, Lanzetta obtained a temporary residence permit, valid for a period of three months. He also applied for a work permit, which he obtained on 8 May 2003, permitting him to work until 31 March 2004. The work permit was later extended, to permit Lanzetta to work for Multi-Path Customer Solutions (Pty) Ltd only, until 31 December 2005. This work permit forms the subject of the present dispute.

[9] On 18 April 2005, Discovery Health (which appears not to be associated with Multi-Path) offered Lanzetta employment, with effect from 1 May 2005, as a call centre agent. Lanzetta accepted the offer. Lanzetta avers that during September 2005, he requested his manager to provide him with the necessary documentation to enable him to renew his work permit. He says that the Discovery Health' s management gave him the necessary documents on 2 December 2005 and that their tardiness resulted in his work permit expiring at the end of December 2005. Discovery Health contends that when it came to the company's attention that Lanzetta did not have a valid work permit, it terminated Lanzetta's employment.

[10] On 4 January 2006, Discovery Health called Lanzetta to a meeting. At the meeting, attended by three of the company's managers, they handed Lanzetta a letter, which read as follows:

> "Dear German
>
> *Re Work Visa*
>
> It has come to our attention that your work visa, allowing you to work in South Africa, has expired. Accordingly, we regret there is no longer a legal basis for your employment at Discovery. As such, your employment at Discovery must terminate with immediate effect."

The letter was signed by Corné Quinn, the service manager.

[11] Lanzetta referred a dispute to the CCMA, alleging that Discovery Health had unfairly dismissed him. As I have noted above, after hearing argument, the commissioner ruled that the CCMA had jurisdiction to determine the dispute.

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The commissioner's ruling

[12] The commissioner's ruling records Discovery Health' s argument at the arbitration hearing that the definition of "employee" in section 213 of the LRA contemplated an underlying contract of employment and that since the contract in this instance was void *ab initio* because it was in conflict with the Immigration Act, it could not be said that Lanzetta was an employee.

[13] The commissioner similarly records the primary argument proffered on Lanzetta's behalf ie that the definition of "employee" in the LRA contemplates an "employment relationship" that transcends contract, and that while a contract of employment entered into with a foreign national who does not possess a valid work permit is invalid, the employment relationship is not. Lanzetta's argument owes much to an article

Labour Relations Act?"1 In short, the commissioner agreed with Bosch's view that the concept of an employment relationship was an appropriate vehicle to extend the protections of the LRA to what Bosch terms "unauthorised workers". The commissioner concluded:

> "While it seems to me to be obvious that an employer cannot be required to continue the employment of an illegal foreigner or a foreigner whose specific work permit does not permit the employer to employ him that does not mean that the protections afforded to employees by the Act cannot apply to such foreigners prior to decisions being made in this regard."

[14] On this basis, the commissioner ruled that the CCMA had jurisdiction to determine whether the applicant had unfairly dismissed Lanzetta, and found further that Lanzetta had established the existence of a dismissal. As an aside, the commissioner's ruling is one made against the tide – commissioners seem traditionally to have adopted the view that what they have termed illegal aliens are not employees in terms of the LRA since their employment contracts are null and void *ab initio*.2

The test on review

[15] I turn now to deal with the legal issues arising in these proceedings. In *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC), the Labour Appeal Court made a number of observations about the judgment of the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). Those pertinent to this case include the observations that a commissioner conducting an arbitration under the LRA engages in administrative action in circumstances where the Promotion of Administrative Justice Act 3 of 2000 does not apply, that the test of rational justifiability established by *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 (LAC) no longer applies as a basis for a review brought under section 145

of the LRA, and that the grounds for review under that section are suffused by the criterion of reasonableness and the constitutional requirement that arbitration awards be lawful, reasonable and procedurally fair. The question that this Court must ask is whether the decision or finding reached by the commissioner is one that a reasonable commissioner could not reach.

[16] The Labour Appeal Court went on to note that in assessing the reasonableness or otherwise of a decision made by a CCMA commissioner, this Court may conclude that it would have arrived at a different conclusion to that reached by the commissioner. This is not a basis on which this Court would be entitled to interfere with the decision but at the same time, it does not require that the commissioner's decision be grossly unreasonable before it is entitled to review and set aside that decision.

[17] The *Fidelity Cash Management* judgment is also authority for the view that while there may have been a debate in the *Carephone* era as to whether a commissioner's decision for which bad reasons are given could nonetheless be justifiable if there were other reasons on the record not articulated by the commissioner but that could sustain the decision made, *Sidumo* makes it clear that the reasonableness or otherwise of a commissioner's decision does not depend solely on the reasons proffered by the commissioner. Reasons on which the commissioner did not rely to support the finding under review can legitimately be taken into account in proceedings such as these.

[18] In interpreting the definition of "employee" and thereby the jurisdiction of the CCMA to entertain Lanzetta's claim of unfair dismissal, the commissioner was required to have regard to the Constitution of the Republic of South Africa, 1996 and to the provisions of the LRA itself. This he did, but on the assumption that the contract between Discovery Health and Lanzetta was invalid. In these proceedings, I intend to interrogate that assumption and, in so doing, question the commissioner's reasons for the ruling that he made. As I have already noted, since the *Sidumo* judgment establishes an outcomes-based approach to application for review, it does not necessarily follow that reasons other than those relied on by the commissioner, but which support his conclusion, cannot be taken into account in these proceedings.

The merits of this application

[19] In these proceedings, the parties' representatives broadly restated the arguments that had been placed before the commissioner. To determine whether the commissioner erred in concluding that the CCMA had jurisdiction to entertain Lanzetta's claim, I propose to deal with two separate but related enquiries. The first is whether the contract of employment concluded between Discovery Health and Lanzetta was invalid because of the fact that Lanzetta did not have a permit issued under the Immigration Act that entitled him to work for the applicant. If the contract was invalid, the question that then arises is whether that conclusion is of any consequence. What this enquiry raises is the question

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whether the definition of "employee" in section 213 of the LRA is necessarily underpinned by a common law contract of employment. If it is not, then it follows that the illegality of a contract in terms of which a person is engaged to perform work does not necessarily nor decisively determine whether that person is an "employee". On the other hand, if the statutory definition of "employee" is necessarily predicated on a valid common law contract of employment, then the argument that a person engaged to perform work in terms of an underlying contract that is invalid can never be an "employee", must succeed.

Was there a valid contract of employment between Discovery Health and Lanzetta?

[20] The commissioner's ruling does not reflect any definitive finding on the validity of the contract concluded between Discovery Health and Lanzetta. He refers to a number of decisions that might be construed as suggesting that the contract is invalid, but preferred ultimately to decide the matter on the basis of an "employment relationship" not solely dependent on a contract. If, however, the contract between the Discovery Health and Lanzetta was never invalid, that is a perfect reply to Discovery Health' s contention that the CCMA had no jurisdiction because of the underlying validity of the contract. There is merit, therefore, in interrogating the validity of the contract. This requires an examination of the applicable legislation, and a determination of whether the Legislature intended that a contract of employment concluded in circumstances where any party to the contract was in breach of the legislation, is necessarily invalid.

[21] Section 38(1) of the Immigration Act reads:

> "Employment – (1) No person shall employ–
>
> (a) an illegal foreigner;
>
> (b) a foreigner whose status does not authorise him or her to be employed by such person; or
>
> (c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status."

[22] Section 49(3) of that Act states:

> "(3) Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year, provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding three years without the option of a fine."

[23] In his argument, Mr Bleazard (who appeared for Discovery Health) referred also to section 49(1)(a) of the Immigration Act, which makes it an offence for a foreign national to enter, remain in or depart from the Republic of South Africa in contravention of the Act. In this instance, however, it is common cause that at the time of his dismissal, Lanzetta was lawfully resident in South Africa. Section 49(1)(a) therefore does not apply.

[24] What is immediately apparent about sections 38(1) and 49(3) is that neither directly declares that a contract of employment concluded without

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the necessary permit is void, nor does a person commit an offence by accepting work from or performing work for another without a valid work permit. What the Act prohibits is the more limited act of employing a person who is a foreign national, in violation of the Act. The question that arises then is whether in these circumstances it can be said that the Legislature intended to rely only on the deterrent effect of the penalty visited on employers who breach section 38, or whether it was intended more broadly that any contract of employment concluded in circumstances where one party to the contract commits an offence is void.

[25] The argument that a contract is void even if only one party to the contract is exposed to a criminal penalty has a long and controversial pedigree. In *Standard Bank v Van Rhyn* 1925 AD 266, the court stated:

> "When the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law."

[26] In *Lende v Goldberg* (1983) 4 ILJ 271 (C), a case that concerned section 10*bis* of the Black (Urban Areas) Consolidation Act 1945 (a statute that prohibited employers from engaging Black people in the absence of permission granted by a labour bureau), the court said the following:

> "I do not think that the fact that the section is not per se directed at the Black employee vitiates this conclusion. Probably for good reasons the Legislature considered it not prudent to expose the employee to a

> criminal penalty and consequently it was neither necessary nor appropriate to make subsection (1) in terms applicable also to the employee. It seems to me, however, to be necessarily implied by the section that a Black employee cannot claim to be lawfully employed contrary to the terms of the subsection and that such an employee could not therefore claim specific performance of the contract itself or any relief involving enforcement of the terms of, or the contractual incidents of, the contract."3

[27] The *Lende* decision, *supra*, was criticised by Felicity Kaganas who, in her article "Influx control and Contracts of Service" (1983) 4 ILJ 254, argued that despite the peremptory tone of section 10*bis*, it could be contended that the Legislature was content with criminal sanctions and that it was not intended that the offending transaction should be void. Influx control laws violated personal liberty and should be narrowly construed. Kaganas cites *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 where the court stated:

> "It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole."4

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[27] Writing in (1984) 5 ILJ 61, Barney Jordaan noted that the peremptory wording of a section and the provision of a penalty for its contravention are only indicia of legislative intent, and that neither is conclusive of it. Jordaan also suggests that the distinction between the prohibition of the performance of a contract rather than prohibition of the contract itself is significant, and that penalising an employer acting in breach of the Act without visiting the penalty of invalidity on the contract was not an interpretation necessarily at odds with the purpose underlying the Act.

[28] Happily, the constitutional era has overtaken this debate on the appropriate interpretational tools to be applied in ascertaining the legislature's intent in cases such as the present. Section 39(2) of the Constitution requires that when a court interprets legislation, it must "promote the spirit, purport and objects of the Bill of Rights". In *NUMSA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC) [also reported at [2003] 2 BLLR 103 (CC) – Ed], the Constitutional Court emphasised that if a statute is capable of interpretation in a manner that does not limit fundamental rights, then that interpretation should be preferred. The court qualified this rule by stating:

> "This is not to say that where the Legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of parliament. If that were to be done, however, we would need to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by section 36 of the Constitution."

[29] The right to fair labour practices is a fundamental right. There is no clear indication from the terms of section 38(1) of the Immigration Act (or any of the Act's other provisions) that the statute intends to limit that right, or accomplish more than to penalise persons who employ others on unauthorised terms. As I have noted, the Act does not penalise the conduct of any person who accepts or performs work that is not authorised. The Act does not explicitly proscribe contracts concluded with those who are engaged to render work in circumstances where their engagement is unauthorised, nor does it provide that contracts are not enforceable in those circumstances.

[30] There is a sound policy reason for adopting a construction of section 38(1) that does not limit the right to fair labour practices. If section 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under section 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and if Discovery Health' s contention is correct, she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of the Basic

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> Conditions of Employment Act 75 of 1997 ("BCEA"), for example, by requiring the employee to work hours in excess of the statutory maximum and by denying her the required time off and rights to annual leave, sick leave and family responsibility leave. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the Legislature intended that contract be invalid where the employer party acted in breach of section 38(1) of the Act. This is particularly so when persons without the required authorisation accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorised engagement) to initiate any right of recourse against those who engage them.

[31] Far from defeating the purposes of the Immigration Act, to sanction a claim of contractual invalidity in these circumstances would defeat the primary purpose of section 23(1) of the Constitution which is to give effect, through the medium of labour legislation, to the right to fair labour practices.

[32] In my judgment therefore, by criminalising only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the Legislature did not intend to render invalid the underlying contract. For this reason, the contract concluded between Discovery Health and Lanzetta on 1 May 2005 was valid, and remained so until its termination by Discovery Health on 5 January 2006. Lanzetta was therefore an "employee" as defined in the LRA, and the CCMA had jurisdiction to determine the unfair dismissal dispute referred to it.

[33] There will no doubt be those who contend that my conclusion necessarily entails both that the CCMA condones illegality when it assumes jurisdiction in a dispute referred to that body by a foreign national not in possession of a valid work permit, and that to assume jurisdiction would give legal sanction to a position that the Legislature has specifically sought to prevent. The answer to this proposition, as Bosch and Christie suggest5, is that assuming jurisdiction may well expose any illegality that exists and thereby deter it. If employers were aware that foreign nationals who do not have work permits had rights of recourse to the LRA and the BCEA (and thereby to CCMA and to this Court) they would be less likely to breach section 38(1) of the Immigration Act by entering into contracts in these circumstances.

[34] My conclusion that the contract between Discovery Health and Lanzetta is not void disposes of this application and requires the court to remit the matter to the CCMA for an arbitration hearing on the merits of Lanzetta's claim. However, I noted above that the commissioner's ruling was based on the concept of an employment relationship that transcends contract, and that the CCMA's jurisdiction was derived from the existence of that relationship. Despite my finding on the issue of the validity of the

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contract and assuming for present purposes that the contract between the applicant and Lanzetta was invalid, the question remains whether the basis of the commissioner's finding (that there was an employment relationship between Lanzetta and Discovery Health) is correct. This raises the second question that I posed at the outset – does the definition of "employee" in section 213 of the LRA extend only to persons who render work in terms of common law contracts of employment? If not, does the concept of an "employment relationship" properly define the boundaries of the statutory definition? Assuming for present purposes that the contract between Lanzetta and Discovery Health was invalid, the commissioner's response to these questions is considered below.

Does the definition of "employee" in section 213 of the LRA depend on a valid underlying contract of employment?

[35] Section 213 defines an "employee" as:

> "(a) Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
>
> (b) Any other person who in any manner assists in carrying on or conducting the business of an employer."

The definition of "employee" in the BCEA is cast in identical terms.

[36] It is immediately apparent that the terms of the definition do not refer directly make reference to a contract of employment. Despite this, the courts have interpreted the definition narrowly, so as to apply it only to persons engaged in terms of a common law contract of employment (see *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A)). Much of the jurisprudence concerned with interpreting the definition, viewed as it has been through the lens of the law of contract, has accordingly sought to establish a touchstone by which an employment contract can be defined.6

[37] Paul Benjamin makes the point that none of these cases (and others to which he refers) has been located in a constitutional context, or within a purposive approach to the interpretation of the definition.7 A purposive interpretation, Benjamin suggests, requires that a statutory provision be interpreted to give effect to the Constitution and the underlying purpose of the statute. If more than one interpretation can be given to a particular provision, the interpretation that best gives effect to the Constitution must be applied provided, of course, that this does not unduly strain the language of the statute.8

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[38]

section 23(1) provides that "everyone has the right to fair labour practices". Since the right that Lanzetta seeks to enforce is one that relates to labour practices as they concern work security, the question is how the definition of "employee" in the LRA needs to be interpreted in the light of the obviously more expansive term "everyone". Secondly, the Constitution accords international law a particular status and requires the application of international law when interpreting South African legislation. I deal with these issues below.

The interpretation of section 23(1) of the Constitution

[39] Despite the wording of section 23(1) of the Constitution ("everyone has the right to fair labour practices"), it does not necessarily follow, as Halton Cheadle has argued, that the word "everyone" should be literally interpreted. Cheadle suggests that the scope of the right is appropriately determined by the inherent qualification in section 23 – the right is one that extends to fair labour practices. These are practices that arise from "the relationship between workers, employers and their respective organisations".9

[40] The Constitutional Court has defined the more narrow term 'worker' to extend beyond a contract of employment. In *South African National Defence Union v Minister of Defence & another* 1999 (4) SA 469 (CC) [also reported at 1999 (6) BCLR 615 (CC) – Ed], the constitutionality of a provision of the Defence Act 44 of 1957 that prohibited members of the permanent military force from forming and joining trade unions was at issue. It was argued by the South African National Defence Force that members of the military enlist in the armed forces, and that in the absence of a contract of employment as ordinarily understood between them and the South African National Defence Force, they were not "workers" for the purpose of section 23 of the Constitution.

[41] In its judgment, the Constitutional Court made specific reference to Article 2 of ILO Convention on Freedom of Association and Protection of the Right to Organise 87 of 1948 and, in particular, its provision that workers and employers, without distinction, have the right to establish and join organisations of their own choosing without previous authorisation. On this basis, and having regard to the parallel provisions of ILO Convention on the Right to Organise and Collective Bargaining 98 of 1949, the court concluded that the convention included armed forces within its scope, and that the ILO had therefore specifically considered members of the armed forces to be workers for the purposes of the Convention. The court concluded:

> "In many respects, therefore, the relationship between members of the permanent force and the defence force is akin to an employment relationship. It would seem to follow that when section 23(2) speaks of 'worker', it should be interpreted to include members of the armed forces, even though the

> relationship they have with the defence force is unusual and not identical to an ordinary employment relationship."

To summarise: The protection against unfair labour practices established by section 23(1) of the Constitution is not dependent on a contract of employment. Protection extends potentially to other contracts, relationships and arrangements in terms of a person performs work or provides personal services to another. The line between performing work "akin to employment" and the provision of services as part of a business is a matter regulated by the definition of "employee" in section 213 of the LRA.

Relevant international standards

[42] The importance of international standards as both a substantive and an interpretational tool is underscored by sections 232 and 233 of the Constitution. Section 232 provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". Section 233 regulates the application of international law. The section provides:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[42] There is well established precedent for the application of this provision in a labour context. In *South African National Defence Union v Minister of Defence & another*, *supra*, the Constitutional Court said:

> "Section 39 of the Constitution provides that, when a court is interpreting Chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation ('the ILO'), one of the oldest existing international organisations, are important resources for consider the meaning and scope of 'worker' as used in section 23 of the Constitution."

[43] In *NUMSA & others v Bader Bop (Pty) Ltd & another*, *supra*, the Constitutional Court had to consider the right of a minority trade union to strike in support of a demand that the employer recognise the union's

> "As has already been acknowledged by the court, in interpreting section 23 of the Constitution an important source of international law will be the conventions and recommendations of the ILO."

[44] The court went on to refer specifically to the supervisory structures established by the ILO and emphasised the importance of the jurisprudence developed by the ILO's committee of experts and the committee on freedom of association.

[45] Globalisation has had a profound effect on international labour migration, and has increased significantly the number of people who migrate as a means of escaping poverty, unemployment and other social, economic and political pressures in their home countries.10 The ILO has recorded

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that illegal immigration has become a particular matter of concern, with some 30 million irregular migrants worldwide (ILO 143). International instruments that seek to address the circumstances particularly of irregular migrants attempt to resolve a tension between the right of states to protect their labour markets and the protection of the fundamental rights of those, who by choice or necessity, seek work in countries other than their own. The ILO has noted that the resulting tension between internal and external forces tends to accentuate further the prejudices, xenophobia and racism of which migrants are often the victims.

[46] There are a number of ILO and other instruments that seek to balance what may appear to be competing interests, and which apply in the present circumstances. First, the International Convention on the Rights of all Migrant Workers and Members of their Families, adopted in 1990, extends migrant workers who enter or reside in the host country illegally (and members of their families) rights previously limited to persons involved in regular migration for employment. The Convention aims ultimately to discourage and even eliminate irregular migration, but at the same time, it aims to protect the fundamental rights of migrants, taking into account their vulnerable position.11 Although the Convention has not been ratified by a significant number of countries (South Africa has not ratified it) it remains a significant statement of international norms in relation to the rights of migrant workers. The court is therefore required to consider its terms when interpreting domestic legislation.

[47] ILO Convention on Migrant Workers (Supplementary Provisions) 143 of 1975 builds on ILO Convention on Migration for Employment (Revised) 97 of 1949, and sets out the general obligation of member States to respect the basic human rights of all migrant workers (see Article 1). At the same time, the Convention addresses problems associated with clandestine immigration, and calls, amongst other things, for the adoption and application of sanctions against persons who assist in the illegal movements of migrants, or illegally employ them. In short, the protection of the fundamental rights of migrants, even those who are employed illegally, is a primary purpose of the International Convention and Convention 143, and the LRA should be interpreted in a manner that recognises that purpose.

[48] Turning from international norms to domestic jurisprudence, and, in particular, to recent decisions by this Court, a number of judgments suggest that the existence of a contract of employment is not the sole basis on which a person performing work might be considered to be an "employee" for the purposes of the LRA. In *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 24 ILJ 1587 (LC) [also reported at [2003] 8 BLLR 811 (LC) – Ed],12 the Labour Court adopted the approach that a contractual relationship is not definitive as to whether a person was an "employee" as defined, and that the court must examine the true nature of the relationship between the parties. Similarly, in *White v Pan Palladium*

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SA (Pty) Ltd (2006) 27 ILJ 2721 (LC), the court held that the definition of "employee" in section 213 of the LRA was not dependent solely on the conclusion of a contract recognised at common law as valid and enforceable. The court stated that:

> "Someone who works for another, assists that other in his business and receives remuneration may, under the statutory definition, qualify as an employee even if the parties *inter se* have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship."13

[49] Taking into account the provisions of section 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 section 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 recognised 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

employed him in breach of section 38(1) of the Immigration Act did not automatically disqualify him from that status.

[50] That, I think, is the short answer to the question that the commissioner had to answer. It was not necessary for the commissioner, as he did in his attempt to overcome the argument that Lanzetta's employment contract was invalid, to construct a conception of an "employment relationship" and to consider whether Lanzetta was a party to such a relationship. If, as I have suggested, the statutory definition of "employee" is not a sidecar to the motorcycle of the common law contract of employment,14 the commissioner had simply to ask, when applying the statutory definition of "employee", whether Lanzetta worked for Discovery Health and whether he received or was entitled to receive remuneration. The answer to both these questions is clearly yes. Therefore, for the purposes of determining the CCMA's jurisdiction to accept Lanzetta's referral of a dispute, Lanzetta was an employee and Discovery Health employed him.

[51] In coming to this conclusion, I do not discount the potential value of the concept of an employment relationship in construing the definition of "employee" in labour legislation. It is the basis on which Bosch's article "Can Unauthorised Workers be Regarded as Employees for the Purposes of the Labour Relations Act?"15 and Bosch and Christie's article "Are Sex Workers 'Employees'?"16 construct the argument that "unauthorised workers" are "employees" for the purposes of the LRA and BCEA. The concept of an "employment relationship" may be useful in some

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instances, as it has been in the past (see *National Automobile and Allied Workers Union (now known as National Union of Metal Workers of South Africa) v Borg Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (AD) where dismissed employees who were the subject of selective re-hiring were considered "employees" for the purpose of an unfair labour practice claim). The concept of an employment relationship is also useful in distinguishing The definition of "employee" in section 213 of the LRA, purposively interpreted and read when required with the presumptions of employment established by section 200A of the LRA and section 83A of the BCEA, and the 2006 NEDLAC Code of Practice: Who is an Employee ought to provide an answer in most instances, particularly when what is at issue is a form of what has been termed "disguised employment" ie a case where the line to be drawn is between employment and genuine self-employment.17 This is not one of those cases. All that is at issue here is whether any invalidity in a contract of employment (put another way, the performance of unauthorised work) disqualifies a person performing work in terms of that contract from claiming to be a statutory "employee".

[52] It was not necessary in this instance for the commissioner to resort to a construction that transcends the employment contract as a whole in order only to address the consequences of the alleged invalidity of Lanzetta's contract. As I have indicated, the invalidity argument is best dealt with more simply on the basis that because the statutory definition of "employee" extends beyond an employment contract, then contractual requirements (at least as they relate to validity) are not relevant to the application and interpretation of the definition.

[52] The commissioner's finding that Discovery Health dismissed Lanzetta cannot be faulted. The definition of dismissal, defined in section 186 of the LRA, *inter alia*, to include "the termination by an employer of a contract of employment, with or without notice" may present a jurisdictional difficulty to persons who are in 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.

[53] Finally, these proceedings (and the conclusion that follows) relate only to the commissioner's findings that the CCMA had jurisdiction to arbitrate the dispute between the parties, and that Lanzetta had been dismissed within the meaning of that term as defined by section 186 of the LRA. It remains for the CCMA to consider whether the dismissal was fair. Much of what Discovery Health has contended in relation to any misrepresentations that Lanzetta may have made regarding his status may be relevant to this enquiry. Further, there may be a valid and significant distinction between work that is illegal, and work that is alleged to be

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illegally performed. This case is an example of the latter. An example of the former is *Kylie v Van Zyl t/a Brigettes* (2007) 28 ILJ 470 (CCMA) [also reported at [2007] 4 BALR 338 (CCMA) – Ed]. In that case, a CCMA commissioner held that the CCMA did not have jurisdiction because the work performed by the applicant constituted a contravention of the Sexual Offences Act 23 of 1957. That ruling is the subject of a

pending application for review, and I make no comment on it.

[54] To conclude:

(a) The contract of employment concluded by Discovery Health and Lanzetta was not invalid, despite the fact that Lanzetta did not have a valid work permit to work for Discovery Health. For this reason, Lanzetta was an "employee" as defined in section 213 of the LRA and entitled to refer the dispute concerning his unfair dismissal to the CCMA.

(b) Even if the contract concluded between Discovery Health and Lanzetta was invalid only because Discovery Health was not permitted to employ him under section 38(1) of the Immigration Act, Lanzetta was nonetheless an "employee" as defined by section 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment.

[55] The commissioner did not base his ruling on the conclusion on the reasoning reflected in (a) and did so only partially on the reasoning reflected in (b). However, his ruling reflects the correct outcome and cannot be said to represent a conclusion that no reasonable decision-maker could reach. The commissioner's ruling therefore stands.

I accordingly make the following order:

1 The application to review and set aside the second respondent's ruling is dismissed.

2 The matter is remitted to the CCMA for the dismissal dispute between the applicant and the third respondent to be arbitrated.

3 The applicant is to pay the costs of these proceedings.

For the applicant:
Brian Bleazard

For the respondents:
Martin Henning

The following cases were referred to in the above judgment:

Carephone (Pty) Ltd v Marcus NO & others [1998] 11 BLLR 1093 (LAC)	637
Dadoo v Krugersdorp Municipal Council 1920 AD 530	640
Dube v Classique Panelbeaters [1997] 7 BLLR 868 (IC)	637
Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR 197 (LAC)	637

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Kylie v Van Zyl t/a Brigettes [2007] 4 BALR 338 ((2007) 28 ILJ 470) (CCMA)	649
Lende v Goldberg (1983) 4 ILJ 271 (C)	640
Medical Association of SA & others v Minister of Health & another [1997] 5 BLLR 562 ((1997) 18 ILJ 528) (LC)	643
Moses v Safika Holdings (Pty) Ltd (2001) 22 ILJ 1261 (CCMA)	637
Mthethwa v Vorna Valley Spar (1996) 7 (11) SALLR 83 (CCMA)	637
National Automobile and Allied Workers Union (now known as National Union of Metal Workers of South Africa) v Borg Warner SA (Pty) Ltd (1994) 15 ILJ 509 (AD)	648
Niselow v Liberty Life Association of Africa Ltd [1998] JOL 2432 (1998 (4) SA 163) (SCA)	643
NUMSA & others v Bader Bop (Pty) Ltd & another [2003] 2 BLLR 103 ((2003) 24 ILJ 305) (CC)	641
Pottie v Kotze [1954] 4 All SA 77 (1954 (3) SA 719) (A)	640
Rumbles v Kwa Bat Marketing (Pty) Ltd [2003] 8 BLLR 811 ((2003) 24 ILJ 1587) (LC)	646

Footnotes