Africa Personnel Services (Pty) Ltd v The Government of the Republic of Namibia & Others[1]

Explanatory notes

These notes are for the convenience of the media and any other institution or person interested to read this résumé. These notes are not an aid to interpret the judgment. The notes have no legal status and in the event that there is any difference between the notes and the judgment, the judgment shall be the only authentic source.

A. THE [GENESIS] OF SECTION 128

1. This case concerns the constitutionality of sec. 128 of the Labour Act, Act 11 of 2007 ("the Act"), which provides in s.s.(1): "No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party." S.s. (3) provides that any person contravening the section would be guilty of an offence.
2. The appellant, describing itself as a specialist in providing employees for its clients' needs, falls squarely within the ambit of the prohibition set out in s. 128(1) of the Act. It stated that 90% of its business activities concern the providing of services to third parties, sometimes loosely referred to as "Labour Hire." It therefore brought an application in the High Court for the striking down of s. 128 as unconstitutional.

3. This application was based on Art. 21(1)(j) of the Constitution, which is part of the fundamental freedoms set out in Chapter 3 of the Constitution and which provides that :

"21(1) All persons shall have the right to:
(a) ...
(j) practice any profession, or carry on any occupation, trade or business."

[1] This text has been placed verbatim from the source. For this reason it has not been subjected to the in-house journal style in terms of spelling preferences or formatting. Where editorial amendments have been made, these are indicated within square brackets.

4. Three Judges of the High Court dismissed the application and stated that agency work had "no legal basis at all in Namibian law and therefore (that it was) not lawful."

5. In its judgment the Supreme Court, first of all, dealt with the history of labour law and labour relations during the previous century. It dealt with the contract labour system which was part of the practices, and inspired by, the policies of racial discrimination. The contract labour system was also characterized as "labour hire." The Court referred to various legislative Acts, which had at their roots, statutory classification of people based on ethnic origin and race, such as influx control, the carrying of passes, curfew in urban areas and the forceful repatriation of some members of those groups. A lack of commercial infrastructure, poverty and large scale unemployment in the then northern reserves compelled Namibians from those areas to find employment elsewhere in the then South West Africa. However they could not do so, unless through the contract labour system, because of the harsh and stringent enforcement of the influx control legislation.

6. The only viable option open was to go through the various recruitment and placement agencies, which in 1943, amalgamated and established SWANLA.[2] The Court dealt with the inimical way in which persons recruited were treated. The system, which offended their dignity, was deeply resented by the majority of Namibians, who felt that it infringed their liberty and denied them equality and opportunities to develop their capacity and abilities as human beings and brought with it profound suffering. Bearing in mind this historical background, the Court appreciated that the mere possibility of reintroducing the contract system, albeit in a different form, would cause resistance. Against this historical background, the Court found that Parliament was justified in questioning and scrutinizing the regulation of "labour hire" as proposed in the then Labour Bill. During the debate in the committee stage "labour hire" was equated to the inimical SWANLA labour contract system which caused emotive reaction from most members. Other principled objections were also raised with the result that the Minister of Labour and Social Welfare withdrew the original clause and later tabled an amended s. 128 whereby "labour hire" was prohibited.

7. The Court pointed out that the phrase "labour hire" was not definitive and included a wide range of employment relationships. Classically it referred to the Roman law of

[2] South West African Native Labour Association.

letting and hiring of which today only two types remained. namely letting and hiring of services and letting and hiring of work, with many other possibilities in between. Driven by post-industrial economic forces and technological advances, the nature and structure of work had changed both nationally and globally, more particularly in regard to employment in services. But even in the industry, certain connotations of the words “labour hire” still remained. The Court referred to various examples thereof.

8. With all employment relationships based on the law of letting and hiring and their contents so different, “labour hire” does not convey the scope and meaning of the prohibition in s. 128 with legal clarity. The examples previously given by the Court illustrate that even today it may refer to any of four branches of the employment services industry. For historical reasons the words are in Namibia more closely related with the recruitment and placement industry than with the agency services industry.

9. Emerging from a century of discriminatory practices and seeking to address the socio-economic imbalances left thereby, the Legislature, through the Labour Act, sought “to give effect to its constitutional commitment to promote and maintain the welfare of the people and to further a policy of labour relations conducive to economic growth, stability and productivity.” The “constitutional commitment” is embodied in Art. 95 of the Constitution where the Principles of State Policy are set out. All these principles bear to a greater or lesser extent on the enactment of s. 128.

10. The prohibition in s.s. (1) and the exception in s.s. (2) of s. 128 draw in part on two of the types of “labour market services” set out in art. 1 of the *Private Employment Agencies Convention, 1997 (No 181)* of the International Labour Organisation (ILO). S.s (1) of s. 128 corresponds in part to the definition in art. 1(b) of the Convention, which latter article provides for “services consisting of employing workers with a view to making them available to a third party……. *who assigns their tasks and supervises the execution of these tasks.*” [Emphasis added] As already stated, Sec. 128(1) prohibits any person to “*for reward*, to employ any person with a view to making that person available to a third party *to perform work for the third party.”* The highlighted parts illustrate the differences between the Convention and the Act. In terms of the Act, to fall within the prohibition contained in s. 128(1), the third party need not be the person who assigns or supervises the tasks. All that is required to bring the prohibition into play, was to perform work for the third party.

B. THE NATURE OF APPELLANT'S BUSINESS.

11. For clarification the Court stated that it would provisionally refer to all employment structures prohibited by s. 128 as "agency work." To the "employer" in the relationship as the "agency service provider", to the "employee" as the "agency worker" and to the "third party" as the "agency client."

12. The appellant is an agency service provider. This activity forms the core of its business activities. To that extent the appellant concludes agreements to provide agency services to agency clients and it has employment contracts with its employees to do agency work for the clients. The appellant also had other business activities which do not fall within the prohibition but that form less that 10% of its revenue and workforce. The appellant had a workforce of about 6085 employees of which some 50% are skilled or semi-skilled. The balance of the workforce is unskilled. All the employees are engaged under either fixed or indefinite term contracts. The fixed term contracts are usually for the performance of specific tasks and terminate on completion thereof. Such workers are then re-engaged if their services are again in demand.

13. Indefinite contracts provide for remuneration on rates payable in the industry and commensurate with the skill of a particular worker. If there is no demand for their skills, their contracts are terminated within the ambit of the statutory requirements for retrenchment. Because there was an ongoing demand for labour this did not happen frequently.

14. The types of services provided are innumerable. Upon receiving a request for services the appellant would submit a quotation. This would include the terms and conditions of remuneration for the agency worker, the appellant's duty to register the worker with the Social Security Commission and the contributions to be made thereto as well as contributions to be made in terms of the Employee Compensation Act. It would also include arrangements for the transport of the agency worker as well as any other obligations which the appellant must comply with in terms of labour legislation. Once the quotation is accepted, the appellant then concludes a written agency service agreement in order to provide for the services. This agreement includes the reciprocal obligations of the agency client such as remuneration, hours of work etc. What is paid to the service provider is more than the remuneration received by the worker in terms of his or her agreement with the service provider.

C. THE JUDGMENT OF THE HIGH COURT

15. In dealing with the judgment of the High Court this Court stated that, excepting one instance, the High Court based its judgment on issues which were not raised by the respondents nor argued by their counsel and which were also not relied on by counsel in argument before this Court. The Court noted that the finding by the High Court that agency services were not known in the classical setting of letting and hiring of work and services in Roman times did not mean that such contracts were therefore unlawful. Such finding also negates the development which has since taken place driven by socio-economic changes as a result of globalization, industrial innovations, information technology developments and instant global telecommunication. Because of these developments contracts of letting and hiring have not remained static.

16. The Court then discussed the issue of letting and hiring in Roman times and pointed out that because most services were rendered either by slaves or other persons who, as a result of their status, were required to render services to others, contracts of letting and hiring were not of importance in the workplace. Centuries later, contracts of service were still not supplied over the entire spectrum of skilled, unskilled and professional work.

17. Had contracts of service remained rooted in Roman law or the common law of pre-modern times, it would not have been able to address the demands of employment relationships in the modern era.

18. The rapid rise of new structures in employment services industry during the last decades necessitated that new, non-standard employment relationships, were forged to cope with the development. The Court referred to the various theories concerning agency work which were developed in order to find a legal niche into which to fit agency work.

19. The Court concluded that unless provided for by regulating legislation, the legal character of agency services must ultimately depend on the terms and conditions underlying each agreement. The fact that such agreements may not fit a typical mould of a bilateral contract in Roman law or common law does not mean that they

are “not lawful” as was held by the Court *a quo*. Freedom of contract is demanded by public policy.

20. The demand for freedom of contract is also a fundamental principle of our law and is not only based on public policy. This was in any event not the basis of the respondents’ challenge. They relied on considerations of “decency and morality” which are limited to their second alternative defence based on the wording of Art. 21(2) of the Constitution which was used to justify the interference with the fundamental freedom set out in Art 21(1)(j).

21. The notion of “law, morality and public policy” by which contracts are assessed allows the regulation of contractual freedom by laws which are lawfully enacted. Such law may prescribe formalities for greater certainty or set minimum standards to prevent exploitation of people, as was done in the Labour Act. Barring these examples, freedom of contract is indispensable in the relationship of rights, duties and obligations which connect people.

22. It was not contended by respondents, either in their affidavits, or in argument by their counsel, that under common law agency work had no “legal basis at all in Namibian law and therefore (that it was) not lawful.” All the other findings by the Court *a quo*, except one, were based on the position in the common law which was neither pleaded or argued by respondents, and was also not relied upon on appeal.

D. THE ISSUE OF STANDING

23. The Court considered the submissions made by counsel. Counsel for the respondents first submitted that the appellant, being a private company and therefore being a juristic and not a natural person, did not enjoy any protection under Art. 21(1)(j) as that Article only protects the rights of natural persons. Counsel for the appellants contended that that approach was too narrow, bearing in mind the beneficial interpretation by our Courts concerning the rights set out in Chapter 3 of the Constitution. Moreover the freedom to carry on a business, trade or occupation was frequently exercised in Namibia through corporations. Counsel for the respondents submitted that Art. 21(1)(j) did not apply to juristic persons because a person’s profession or trade was tied up with his dignity and that could only include natural persons. The Court stated that although dignity underlies all the freedoms set out in Art. 21, and is even fundamental to those rights, it is not the only value which

inspires those rights but that those rights must also be seen against a history where job reservation for a minority was practised and the exclusion of a large number of disadvantaged people from access to practise certain professions and perform certain work was based on laws closely associated with discriminatory practices. The Court found that there were no grounds to limit the wide meaning of the introductory words of the Article, namely “All persons……” , in this instance, to natural persons only and that it was intended, in Art. 21(1)(j) to also include juristic persons. This interpretation is in accordance with the constitutional principle that the fundamental rights and freedoms, set out in Chapter 3 of the Constitution, should be interpreted in such a way as to give to subjects the full measure of the rights set out therein. Appellant was therefore an “aggrieved person” entitled to approach the Court to seek enforcement of its fundamental freedom as contemplated in Art. 25(2) of the Constitution.

E. THE SCOPE OF PROTECTION UNDER THE FREEDOM

24. The second ground raised by the respondents was that because s. 128 of the Act rendered the business of agency work unlawful it followed that agency work was not protected under Art. 21(1)(j). This argument was based on two decisions of the High Court. The Court analysed these decisions and concluded that they did not support the contentions of the respondents. The Court pointed out that to test the constitutionality of a law under Art. 21 involved two phases. Firstly, to determine whether the statutory prohibition is a limitation of a fundamental freedom. If that is found then the Court must establish whether the prohibition is permissible in terms of the provisions of Art 21(2). If the prohibition which limits the freedom is permissible the prohibition is constitutional. If the prohibition does not pass the test set for it by Art. 21(2) it is unconstitutional. The argument by the respondents only considers the first phase and suggests that once an economic activity is rendered unlawful that is the end of the matter and whether the prohibition is permissible, or not, in terms of the s.s. (2) does not arise. If this is correct it would mean that the Legislature, where it by statute places restrictions on the freedoms set out in Art. 21, could do so without being subject to constitutional review.

25. The Court considered the evidence and was satisfied that the principal economic activity for which the appellant sought protection was that of an agency service provider and that this business fell within the general protection granted by Art 21(1)(j) of the Constitution. It was also satisfied that if sec. 128 was implemented, the

appellant would have to cease this business. Applying the first phase of the investigation, set out herein before, the Court was satisfied that s. 128 would limit the appellant's fundamental freedom to carry on a trade or business. This, so it seems, was also Parliament's intention by justifying its prohibition on the authority of Art. 21(2).

F. THE ISSUE OF JUSTIFICATION

26. The Court then discussed the second phase of the enquiry and pointed out that Art. 21(2) limited the restrictions of fundamental freedoms to the grounds mentioned in the Article, which were threefold namely, that the fundamental freedoms should be exercised subject to the law of Namibia in so far as such law imposed reasonable restrictions on such exercise, which were necessary in a democratic society and were required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. The Court also pointed out that the party relying on a restricted law carried the burden to show that the restriction fell within the scope of Art. 21(2). The three criteria necessary for the constitutionality of a limitation on a fundamental freedom were further bound together by the requirements of "proportionality" and "rationality".

27. The Court referred to case law in other jurisdictions and compared our Art. 21(2) to that of various other Constitutions and concluded that Namibia was unique in expressly requiring a third category for limitations to freedoms to be constitutional namely that they be "required in the interests of [the] sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." A restrictive measure, to be constitutional, must therefore also be "required" in the interest of one or more of the above defined objects.

28. The Court discussed the objectives of the Act as set out in its preamble and found that they fell within the scope of State policies as set out in Art. 95 of the Constitution and that the objectives also fell within the scope of what is constitutionally permissible in terms of "decency and morality" as set out in Art. 21(2). These were also the objectives which Parliament identified and relied on for authority for the prohibition. (See s. 128(4).) In supporting their justification for the prohibition of agency work the respondents argued that agency work ran counter to the objectives of the Act. By

prohibiting agency work Parliament sought to preclude deleterious aspects thereof such as “com[m]odification” and “casualisation.”

29. Having found that the prohibition on agency work is rationally connected to the permissible objective of “decency or morality” it remained for the Court to decide whether, in terms of Art 21 (2), the prohibition is a reasonable restriction which is necessary to achieve the permissible objectives of “decency and morality” and which is necessary “in a democratic society.” The requirements of reasonableness and necessity in Art 21(2) meant that the restrictive measure should not go further than what is reasonably necessary for it to achieve that objective.

30. Both the appellant and the respondents recognized that agency work was open for abuse. They however differed in their approach to the problem. The respondents addressed the problem by total prohibition of agency work whereas the appellant maintained that the deleterious aspects of agency work could be curbed by regulatory measures which would force service providers, who might be guilty of abusive practices, to comply with acceptable employment standards. The appellant contends that to totally prohibit agency work is disproportionate, unreasonable and unconstitutional as these objectives can be achieved by regulatory measures without prohibiting agency work altogether.

31. It seems that in part the stance of the respondents is based on the historical background which finds its setting in the inimical contract labour system as further personified by SWANLA. The appellant denied that agency work was similar to that system and it was pointed out that the contract labour system functioned essentially as a means of influx control, which was further backed up by various legislative enactments, which, in combination, resulted in the degrading and inhuman treatment of workers under that system. These discriminatory measures were abolished long ago and the present legal framework in which agency work is carried out bears no resemblance to the contract labour system. It was pointed out that, unlike agency services, under the contract labour system workers did not work for SWANLA, were not paid by SWANLA, and SWANLA did not become a party to the resultant work contract between the worker and his employer.

32. For the reasons set out the Court found that agency work could not be equated to the contract labour system. One important distinguishing feature is that the contract labour system was rooted in discriminatory laws and implemented as part of a

system of institutionalized apartheid. Employment under that system was subject to an array of offensive regulatory provisions which, amongst others, criminalized the non-performance of a number of contractual obligations. In contrast thereto the legal framework against which agency work is carried out has changed. Racial discrimination and the propagation and practice of apartheid have been banished. People are equal before the law and all forms of discrimination are prohibited by the Constitution. People are able to move freely and can withhold labour without being exposed to criminal penalties. In addition service providers employ their employees and assume the statutory obligations as employers, and when they hire out the services of their employees they remain part of the employment relationship.

33. Counsel for the respondents conceded the differences between the contract labour system and agency work but submitted that agency work, as presently practised in Namibia, still contained many of the deleterious features of the old contract labour system. This, of course, refers to a situation where there is not any regulatory measures in place to curb these features.

34. Under our current constitutional dispensation there is very little in common between the contract labour system of years ago and agency work. The Court found that the justification which the respondents sought for the prohibition of agency work in the abusive labour contract system was misplaced and the Court found that there was no rational relationship between the immoral SWANLA-like contract labour system and the prohibition of agency work based on decency and morality. The Court further pointed out that there was a much greater similarity between employment placement services, preserved and protected in sec 128(2), and the contract labour system, as between that system and agency work. This, it was stated, appeared to be selective reasoning.

35. For the other reasons mentioned by the respondents, the Court was nevertheless satisfied that a rational causal relationship was established between sec. 128(1) and the objectives of decency and morality relied on by the respondents. What remained to be decided was whether the prohibition of agency work was reasonable, was necessary to achieve the permissible objectives of decency and morality and was necessary in a democratic society. These standards of assessment are objective and articulate that a restriction of a fundamental freedom must be reasonable, must be necessary in a democratic society and must be required in the interest of a legitimate constitutional objective, i.e., in this instance, to achieve decency and morality.

36. The appellant submitted that the prohibition was “hopelessly overbroad” and it was pointed out by its counsel that much more, than the type of agency work in which appellant engaged, was hit by the prohibition and would also become unlawful. Examples given were cleaning services to shopping mall operators, the provision of security guards and even the rendering of professional auditing and legal services to clients.

37. Although the issue of “overbreadth” was raised in the application, to limit the Court’s findings to the type of agency services provided by appellant alone might result in further challenges to the constitutionality, were Parliament to redraft the section, which would in any event, still prohibit appellant’s core activity. Therefore it was proper for the appellant to raise the issue of constitutionality on a wider basis.

38. The sweep of the prohibition is clearly wider than the type of employment services appellant is engaged in. As long as the labour constitutes “work for the third party” even if assigned or supervised by the employer (the service provider) and not the service client, it will still be prohibited by sec. 128(1). That is so even if the work is assigned, supervised or completed elsewhere than at the workplace of the employer, e.g. at home.

39. Examples of the type of work which is prohibited include lawyers, where a professional assistant is made available to do legal work for a client. Payment in such an instance is to the firm, i.e. the law firm which employs the professional assistant, and the fees charged are not related to what salary is paid to the assistant. This also includes similar instances where auditors, architects and doctors provide services through employees to clients or patients.

40. The use of the word “work” in the prohibition has wide implications and is not limited to personal services but would also include the performance of work under contracts of work. This would include sub-contract work.

41. Seen in this context the prohibition imposes restrictions on commercial activities protected by Art. 21(1)(j) which are grossly unreasonable and overly broad in their sweep. Such restriction, in so far as it extends beyond the type of agency services provided by appellant, does not serve any legitimate object, is not required in the

interests of decency and morality or necessary in a democratic society. Respondents, in any event, made no attempt to justify such wide prohibition.

42. Unable to defend its broad sweep, respondents contended that the prohibition be read down and/or, regard being had to the definition of “employee”, it be narrowly construed so as to avoid its wide application. The Court, dealing with these submissions, referred to the presumption of constitutionality which prescribes that, as far as possible, legislation should be interpreted to conform with the Constitution rather than to be struck down as unconstitutional, but concluded that the prohibition was so overly broad that it could not be read down as it would require a different and more exact reformulation to achieve that purpose.

43. The respondent’s reliance on the definition of “employee” in s. 1, as a means to cut back the overbreadth of the prohibition, is based on the words “independent contractors” which, in terms of the definition, exclude such contractors from being employees. It is correct that where an independent contractor is employed such person would not be regarded as an employee, in terms of the definition in the Act, but that would not take away the fact that work performed is for services. As presently worded sec. 128(1) applies equally to work performed by an individual, whether as employee, or as an independent contractor.

44. For the reasons given, the Court concluded that the prohibition of the economic activity defined in sec. 128(1) is so overbroad that it is not reasonable and should be struck down as unconstitutional.

45. Having dealt with the issue of overbreadth, which in one sweep prohibited a wide range of agency work, the Court returned to the specific challenge of the appellant to the blanket prohibition of the type of agency work provided by it.

46. In this regard it was also submitted by respondents that the constitutionality of sec. 128 should be determined on the basis that it regulates an economic activity which is best left to Parliament, as the chosen representative of the people, to deal with. All that is required in such an instance was to see that there was a rational connection between the prohibition and what was necessary to obtain the objective which Parliament had in mind. Reasonableness, as required by Art. 21(2),did not play any part in determining the constitutionality of the prohibition. The Court rejected this argument and stated that in determining the constitutionality of the provision, the

Court should not limit its enquiry to rationality only of the legislative option chosen by Parliament and not also examine the proportionality thereof in the context of the criteria set by Art. 21(2). That does not mean that the margin of legislative appreciation allowed as part of the proportionality test would always be the same. In particular circumstances, the margin of Legislative option may be sufficiently wide to bridge the gap between the scope of the enacted restriction and that which, in the assessment of the Court, is necessary in a democratic society, is required and, which in the Court's assessment, would have been proportionate to achieve the objective. The Court pointed out that Art. 21(2) differed from the South African constitutional provisions applicable in that jurisdiction. Where Art. 21(2) demands that a restriction of a fundamental freedom must be reasonable, necessary in a democratic society and required in the interest of legitimate objectives, set out in the article, there is no justification for applying to some freedoms all three criteria when testing the constitutionality of a restriction thereto and to apply in regard to other freedoms only one or some of those criteria.

47. Moreover, the Court found that the prohibition of a particular trade or business does not amount to the regulation of that trade or business in how it should be carried on but precludes that trade or business from being carried on at all. In the present instance, the prohibition seeks to remove and not to regulate the business of an agency service provider from what would otherwise be permissible under the freedom. Thus the Court should, instead of taking a deferential approach, examine the constitutionality of the prohibition more closely.

48. Respondents further submitted that agency work was against the ILO principle that labour "is not a commodity." The Court again reiterated that, unlike a commodity, labour may not be bought and sold on the market without regard to its connection to the rights and human character of the individual who produces that work. Reference was made to the necessity for labour legislation to redress bargaining imbalances, to protect employees etc.

49. Appellant denied that agency work is [inimical] to that principle and referred to the ILO Convention and to the fact that the ILO itself recognized agency work in art. 1(b) as a "labour market service" but proposed regulation thereof. It was also pointed out that Namibia was a signatory to the Convention although it had not ratified it.

50. The Court referred to the provisions of the Convention on *Private Employee Agencies of 1997* and article 2.3 thereof which stated that "(O)ne purpose of (the) Convention is to allow the operation of private employment agencies as well as the protection of workers using their services, within the framework of its provisions."

51. The Court again referred to its previous discussion of labour as a commodity, and stated that the numerous regulative requirements proposed in the 1997-Convention were intended to ensure that agency work was not treated as a commodity. A reading of the Convention showed that it created a framework in which private employment agencies might operate and it ensured protection of workers using the services. If those measures were properly regulated by a member State and supervised and enforced, it would not allow workers to be treated as a commodity. If that were not so intended, the ILO would have been in conflict with one of its most basic principles. A principle on which the ILO was founded.

52. The 1997-Convention was accompanied by the adoption of a Recommendation, No 188 of 1997 which supplemented the provisions of the Convention. It contained a number of recommendations to member States for protection of agency workers. The Court set out the relevant recommendations and concluded that both instruments urge the regulation of agency work, not the prohibition thereof.

53. The second ground relied upon by respondents was that agency work was inimical to Art 95(c) of the Constitution because it was prejudicial to union organisation. It was submitted that agency workers were not working at the workplace of the agency service provider and were scattered all over a number of workplaces. Furthermore the standard contracts between appellant and the agency client might not allow unions access to their workplaces to communicate to agency workers.

54. The nature of agency work clearly presented unions with new and difficult challenges. Both the nature of work and the workplace are changing creating employment opportunities which did not exist before. Advances in communication technology, the social and economic effects of globalisation by huge multi-national and international enterprises and the ever improving communication and transportation infrastructures, to mention only a few examples, are reshaping markets, competition and business on a national and international levels. Employment patterns are also changing with the emphasis on flexibility. The shift away from standard employment relationships is an undeniable reality. These changes and developments in the workplace and in the

employment market cannot be arrested just to preserve the most favoured model for union organisation. Unions will need to move on from their traditional organizing model and reach out to recruit workers in an era characterised by changed employment patterns.

55. The substance of the respondents' complaint was that agency work made it more difficult for unions to access and organise agency workers. These difficulties are present throughout the employment spectrum and is not only related to agency work. Other examples are where employees are thinly scattered over vast and often remote areas such as farm and domestic workers. The difficulty with which labour unions have to access and organise these workers does not diminish the freedom of these workers from joining trade unions protected by Art. 21(1)(e) of the Constitution. These examples show that it can therefore not be said that the organisational difficulties caused by employment in those difficult sectors is "inimical" to the State's duty under Art. 95(c) to actively encourage formation of independent trade unions, and one can hardly argue the banning of domestic or farm labour for that reason. On the same grounds it cannot be said that agency work, because of the difficulties involved for trade unions to get access and to organise such workers, should be banned and consequently respondent's submission in this regard cannot be sustained.

56. The respondents also relied on what is known as "casualisation" of work which is allegedly facilitated by agency work. It was submitted that agency work arrangement allowed the agency client to deny responsibility for the agency workers placed with it. Respondents pointed out the various deleterious effects of agency work where the agency client, *inter alia,* can remove an agency worker without complying with the provisions of the Act regarding fair dismissals. Similarly the agency service provider can avoid his obligation to agency workers through reliance on the contractual application of "no work, no pay" principle.

57. The Court pointed out that "casualisation" cannot only be looked at in the context of agency work. On the one hand there is the necessity for businesses to curb costs in order to stay competitive. By outsourcing work only if and when demand requires it, the employer reduces or limits his legal and industrial relation risks and limits his costs. It further creates flexibility and so becomes more cost effective and competitive. From an employee's perspective, without adequate regulation the casualisation of their employment increases vulnerability to exploitation and reduces

their bargaining power, training opportunities and employment security. These issues caused an ever ongoing debate of where to strike the balance.

58. The issue before the Court is however not to resolve this conflict but, given the requirement of proportionality in Art. 21(2), to determine whether the respondents have shown that the prohibition of agency work, and not the regulation thereof, is necessary in a democratic society and required in the interest of the legitimate objectives pursued by the Act.

59. The Court referred to a judgment of the European Court of Human Rights where the word "necessary" in the phrase "necessary in a democratic society" was discussed. It was stated that the phrase "means that to be compatible with the Convention, the interference must, *inter alia,* correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued.'" The Court, with reference to case law, further pointed out that the requirement of reasonableness in terms of Art 21(2), requires that a limitation should not only be reasonable but also necessary, and would call for a high degree of justification. These remarks applied equally to the first two criteria under our Constitution and even more so given the fact that our Constitution required a third criterion. In order to pass constitutional muster it is not enough for a restriction to be rationally connected to the permissible objectives in Art. 21(2), it must also be "required" in the interest of those objectives.

60. There was no evidence, either by experts or on the affidavits, that the phrase "necessary in a democratic society" was interpreted in other democratic societies to allow for the total prohibition of agency work. Where agency work was previously prohibited it was because it was considered to be an infringement "on the public monopoly in job placement." A judgment by the Oberslandesgericht of M[ü]nchen opened the way for private employment services in Europe which again led to recognition thereof by the ILO in the 1997-Convention. The 1997-Convention was not ratified by Namibia and is therefore not legally binding on it. However, to determine what is "required in a democratic society" it would be permissible to consider that the Convention was adopted by member States and ratified by those States of which many are constitutional democracies. The fact that the Convention was never denounced by any country is a significant consideration in order to determine what is required in a democratic society. The Court pointed out that the reference to the Convention is for the sake of comparison and to show that there is an alternative to

total prohibition of agency work. The reference is not to suggest to Parliament what regulatory measures it should adopt.

61. In relying on the issue of casualisation for justification of the prohibition of agency work, the respondents submitted that agency work, *inter alia,* caused the replacement of permanent workers with agency workers. The Court was aware that in an under[-]regulated situation these practices may impact adversely on matters such as the bargaining strength of workers, their skills' development and training. However in "high regulation" countries in Europe many of these concerns were addressed by regulation. In addition thereto laws were enacted specifying the length of agency work, restricting the purposes for which agency workers may be engaged, guaranteeing parity with other comparable workers in terms of pay and conditions of employment and ensuring the right of agency workers to join unions.

62. The Court further stated that in regulating agency work it would be permissible to distinguish between categories of workers. By excluding certain categories of workers, the Legislature may take into consideration that agency workers belonging to registered professions, who earn a substantial income and who are doing agency work by choice, are less vulnerable to exploitation. The converse may be true for unskilled workers who are much more vulnerable and therefore in need of much more protection.

63. Likewise, the exclusion of certain branches of economic activity may recognize that certain specialized activities are by nature temporary and cannot be accommodated by agency clients on a permanent in house basis. The Court mentioned various examples like [modelling] agencies, advertising agencies[,] etc. The Court further stated that economic activities such as providing agency services during pandemics, disasters, national emergencies etc. may also be excluded. This also goes for certain fixed term tasks such as building operations. Regulatory measures may also prohibit agency work in sectors where it would lead to the replacement of permanent workers by agency workers etc., unless required temporarily to replace employees on maternity leave, sick leave or other leave.

64. The Court concluded that if agency work is properly regulated within the ambit of the Constitution and the 1997-Convention it would be temporary in nature, pose no real threat to standard employment relationships or unionization and will greatly contribute to flexibility in the labour market. By enlisting as an agency worker with more than

one agency service provider, workers can assure employment in the interim until they can secure permanent employment. There are also those who choose the more flexible arrangements offered by agency work. All these options will not be available if agency work is prohibited.

65. Given the scope of regulation contemplated in the 1997-Convention to prevent potential abuses, the wide range of regulatory measures in other democratic societies and the fact that agency work in Namibia can also be effectively regulated without compromising the objects of the Act or the legitimate objectives of "decency and morality" in Art. 21(2) of the Constitution, the absolute prohibition of agency work by sec. 128(1) goes much wider than what would be a permissible restriction in terms of the Article. To state it differently, the prohibition goes much wider than would be required for the achievement of the same objectives and is disproportionately severe in relation to what is necessary in a democratic society to achieve those objectives. That is so even if a generous margin of appreciation is allowed for Parliament, as the Court was urged to do, because the unreasonable extent of the prohibition's sweep will still fall well outside what is permissible.

66. The Court, for the reasons set out in the judgment made the following order:

"1. The Appeal succeeds with costs, such costs to include the costs of one instructing and two instructed counsel.
2. The order of the court *a quo* is set aside and the following order is substituted:
   '1. Section 128 of the Labour Act, 2007 is struck down as unconstitutional.
   2. The 1st and 4th respondents are ordered to pay the applicant's costs, such costs to include the costs of two instructed counsel'."