

African Personnel Services v Government of Namibia and Others, decided on 1 December 2008. Case No. A4/2008

Nico Horn* and Kaijata Kanguuehi**

Coram: Parker, J, Ndaueandapo, J, and Swanepoel, AJ

African Personnel Services (APS) brought an application to the High Court challenging the constitutionality of section 128 of the Labour Act, 2007.¹ Section 128 outlawed labour hire practices in Namibia. APS was of the view that the section infringed on its right to carry on a trade, which is enshrined in Article 21 of the Namibian Constitution. Article 21 provides as follows:

- (1) All persons shall have the right to:
- (j) ... carry on any ... trade or business.

Section 128 of the Labour Act provides the following:

Prohibition of labour hire

128. (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.

(2) Subsection (1) does not apply in the case of a person who offers services consisting of matching offers of and applications for employment without that person becoming a party to the employment relationships that may arise therefrom.

(3) Any person who contravenes or fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding N\$80,000 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.

(4) In so far as this section interferes with the fundamental freedoms in Article 21(1)(j) of the Namibian Constitution, it is enacted upon the authority of Sub-article 2 of that Article in that it is required in the interest of decency and morality.

The Court laid the foundation for its judgment by pointing out that Article 21 was not an absolute right:

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As I understand Article 21(1)(j), not every “trade or business” is entitled to the protection of Article 21, e.g. a business that is for a criminal enterprise. Thus, a person who is in the business of, for instance, stock theft, the keeping of a brothel, trafficking in women or children, and slavery cannot be heard to claim a right under Article 21(1)(j) of the Constitution on the basis that the business or trade yielded a profit or income. That much Mr Smuts is in agreement with. The reason – and this is very important for our present purposes, as I shall demonstrate in due course – is not only because such activity is criminal; it is also because it has no basis in law. In my view, if the business or trade has no basis in law, it is not lawful; and as Maritz, J (as he then was) correctly stated, in *Hendricks and Others v Attorney-General, Namibia and Others* 2002 NR 353 at 357H, “It is, in my view, implied by that article (i.e. Article 21(1)(j)) that the protected right relates to a profession, trade, occupation or business that is lawful.”

Quoting Maritz, J (as he then was) in the *Hendricks* case, the Court pointed out that only a lawful profession, trade, occupation or business were protected under Article 21(1)(j) of the Constitution. Moreover, *lawful*, the Court explained, was to be understood in its wider sense, namely –

... the activity involved in the business or trade is lawful when it is not a crime or when it has legal basis in Namibian law.

The Court then proposed the following definition for *labour hire*:²

Labour hire is a form of indirect employment relationship in which the employer (the agency) supplies its employees to work at a workplace controlled by a third party (the client) in return for a fee from the client.

After an extensive discussion of what constituted a *labour contract* in Namibian law, the Court concluded that a third party – in this case, the labour hire company – could not be party to such a contract. *Employment contract*, in Namibia, was defined under the Roman law of *locatio conductio operarum*, i.e. “the letting and hiring of personal service in return for a monetary return”.

The only other form of hiring or letting labour under Roman law was slavery, where the slave was the possession of its owner. A slave could be the object of a *locatio conductio rei*, and as such be hired out and be *locatio conductio operas (faciendi)* – the independent contractor.

Consequently, the common law knows only one labour contract: that of the rendering of personal service by the *locator operarum* (servant) to *conductor operarum* (master). This, the Court stated, was not changed by statutory law. Labour hire creates an unacceptable interposition of a third party (the labour hire agency’s client) in the employer–employee relationship, which has no basis in law.

² Power (2002:64).

The Court also pointed out that labour hire not only had no basis in law, it also violated the fundamental principle of the International Labour Organisation (ILO), of which Namibia is a member, namely that labour is not a commodity.

Justice Parker made two strong statements on the practice to express his resentment:

In my opinion it is letting or hiring of persons as if they were chattels; ... it also smacks of the hiring of a slave by his slave-master to another person ...

Consequently, the Court did not find it necessary to balance the right to labour protected in Article 21 with the disadvantages of labour hire to the workforce. Once labour hire was found to be against the law and alien to the Namibian common law, the debate was over.

The full bench held that –

the Article 21 right was a derogable one and could be limited, provided the limitation was reasonable, necessary in a democratic society, and in the interests of Namibia

the contract of employment had only two parties: the employer and the employee

there was no room for interposing a third party (the client) in a contract of employment

the common law did not know labour hire practices

labour hire was akin to slavery and, therefore, illegal, and

since labour hire was illegal, APS could not claim such a right and, therefore, did not have a right protectable under Namibian law.

References

Power, C. 2002. "Labour hire: The new industrial law frontier". *Law Institute Journal*, 76, 6 (July):64.