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EMPLOYMENT

The rights of illegal workers and workers engaged in illegal activities in South Africa

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In light of xenophobic violence which continues to be a problem in various regions in South Africa, the case of *Discovery Health Limited and Commission for Conciliation, Mediation and Arbitration, and German Lanzetta* has important implications for employers and for persons who do not have a right to work in the Republic of South Africa, but do or have in fact performed services in the RSA for an employer.

The Immigration Act 13 of 2002, ("**the Immigration Act**") provides that no person shall employ –

- an illegal foreigner;
- a foreigner whose status does not authorise him or her to be employed by such person; or
- a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.

The legal effect of the above is that no employer in the RSA may employ any person to work for such employer, unless that person is either a South African citizen (in which case he/she has the right to work) or that person has a work permit allowing him/her to work in the country.

In the normal course, an employer will ensure that any employee who is not a South African citizen has a valid work permit entitling him to work in the RSA before offering the employee employment. However, some employers either do not satisfy themselves that the employee is legally entitled to work in the RSA, or deliberately flout this restriction. It is often in the latter case that persons working in contravention of section 38 of the Immigration Act are taken advantage of by unscrupulous employers who fail to provide these employees with the minimum entitlements to which employees are entitled in terms of employment legislation.

For the purposes of employment legislation, an employee is defined in the Labour Relations Act as "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 any other person who in any manner assists in carrying on or conducting the business of an employer."

Prior to the *Lanzetta* judgment, the definition of employee as set out above was interpreted to mean only a person who was employed under a legal contract of employment, which excluded illegal foreigners. What the *Lanzetta* judgement says is that even if a person is working in the RSA in contravention of the Immigration Act, and is an illegal foreigner, he or she will nevertheless be considered to be an employee in terms of the definition of an employee, and will be able to seek the protection of employment legislation. An illegal foreigner can also now approach the CCMA or the Labour Courts for relief and for enforcement of his or her rights as an employee.

The moral, ethical and societal consequences of this judgment may be far-reaching. Some of the benefits may include reduced levels of xenophobia, arising from a perceived lesser threat to South African citizens of illegal immigrants taking jobs away from South Africans, since illegal immigrants may now invoke a right to the basic minimum conditions of employment to which all employees are entitled, thus making them less attractive to employers as a exploitable labour force.

Similarly, the court in *Kylie v Commission for Conciliation Mediation and Arbitration and Others* considered the question of whether section 23 of the Constitution containing the right to fair labour practices, affords protection to a sex worker. The court referred to the case of *Nehawu v UCT* where the Constitutional Court emphasised that the focus of section 23(1) of the Constitution was on the 'relationship between the worker and the employer on terms that are fair to both'. The court held that even if a person is not employed under a contract of employment, it does not deny the 'employee' all constitutional protection because their employment in many respects mirrors those of people employed under a contract of employment. Therefore, the constitutional right to fair labour practices vests in 'everyone' and includes not only parties to a contract of employment. Therefore, in light of the express purpose of the LRA to advance economic development, social

justice, labour, peace and the democratisation of the work place, courts have to be more vigilant to safeguard those employees who are vulnerable to exploitation in that they are inherently economically and socially weaker than their employers, such as sex workers and workers without a work permit.

When determining the appropriate remedy, each case will have to be decided based on its facts. A weighing of principles should take place. The rule which prohibits enforcement of illegal contracts should be weighed up against public policy sourced in the values of the Constitution, which promotes a society based on freedom, equality and dignity.

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