REPORTABLE

CASE NO. SA 51/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AFRICA PERSONNEL SERVICES (PTY) LTD: **Appellant**

versus

GOVERNMENT OF THE REPUBLIC OF NAMIBIA: **First Respondent**

SPEAKER OF THE NATIONAL ASSEMBLY: **Second Respondent**

CHAIRPERSON OF THE NATIONAL COUNCIL: **Third Respondent**

PRESIDENT OF THE REPUBLIC OF NAMIBIA: **Fourth Respondent**

CORAM: SHIVUTE, C.J., MARITZ, J.A., STRYDOM, A.J.A., CHOMBA, A.J.A. *et* MTAMBANENGWE, A.J.A.

Heard on: 2009/03/03

Delivered on: 2009/12/14

APPEAL JUDGMENT

THE COURT:

[1] In Namibia, the expression “labour hire” is loaded with substantive and emotive content extending well beyond its ordinary meaning. Considered in its historical context, it evokes powerful and painful memories of the abusive “contract labour system” which was part of the obnoxious practices inspired by policies of racial discrimination. So regarded, it constitutes one of the deeply disturbing and shameful chapters in the book of injustices, indignities and inhumanities suffered by indigenous Namibians at the hands of successive colonial and foreign rulers for more than a century before Independence. The manner of its implementation during that era mirrors and, in a sense, encapsulates a collection of some of the very worst elements the policy of apartheid brought to bear on them: Statutory *classification* of people on the basis of race[1]; proclaimed *segregation* by reference to race and ethnic origins in locations[2] and reserves[3] - the latter at times more euphemistically labelled as

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By, amongst others, s. 1 of s the *Native Administration Proclamation*, *1922*; s. 25 of the *Native Administration Proclamation, 1928*; s. 7 of the *Immorality Proclamation, 1934*; s.1 of the *Natives (Urban Areas) Proclamation*, 1951; s.1 of the *Prohibition of Mixed Marriages Ordinance, 1953* and s.1 read with sections 4(c) and 7(1) of the *Population Registration Act, 1970.*

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E.g. sections 1 and 3 of the *Native Locations (Entry of Europeans) Proclamation, 1919*; s. 25 of the *Native Administration Proclamation, 1928*; sections 1, 2, 9, 10, 12, 15, 22, 25 of the *Natives (Urban Areas) Proclamation, 1951* and its predecessor, *Proclamation 34 of 1924.*

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Compare, for example, s.16 of the *Native Administration Proclamation, 1922*; the *Native Reserve Regulations* published in Government Notice 68 of 22 May 1924; the *Native Reserves Fencing Proclamation, 1926*; s. 2 of the *Prohibited Areas Proclamation, 1928* and its predecessor, *Proclamation 15 of 1919*; the *Caprivi Zipfel Administration Proclamation, 1929*; the *Caprivi Zipfel Affairs Proclamation, 1930*; s. 1 of the *Ovamboland Affairs Proclamation, 1929*; s.1 of the *Okavango Native Territory Affairs Proclamation, 1937*; the *Black Reserves (South West Africa) Act, 1945*; Government Notice 193 of 1952; the Kaokoveld Native Reserve as defined in Government Notice 374 of 1947 and amended by Government Notices 156 of 1948, 201 of 1953 and 262 of 1954; s.5 of the *South-West Africa Native Affairs Administration Act, 1954*; the *Native Reserves Ordinance, 1956*; the *Namaland Consolidation and Administration Act, 1972*; Kaokoland, Damaraland, Ovambo, Kavango as defined in Schedules A, B, C, and D to Government Notice No. 2428 of 1972 respectively; Hereroland as defined in Schedule B to Government Notice No. 1196 of 1970 and Schedule E to Government Notice No. 2428 of 1972 as amended by Government Notice 322 of 1976; Eastern Caprivi, defined in the Schedule to Government Notice No.

"group areas", "homelands" or "self-governing areas"[4] in an attempt to smarten up the ugly face of apartheid; substantive *isolation* of indigenous groups in reserves and locations by enforced measures of "influx control,"[5] passes,[6] curfew (in urban areas)[7] and the forced removal, repatriation and resettlement of some members of those groups resident in urban areas[8]; relative *repression* of the personal, social[9], educational[10] and economical development[11] of those Namibians; *exploitation* of their disadvantaged position and of their personal and natural resources[12] and, in general, the application of a system of institutionalised

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2429 of 1972; the *Kavango Constitution Proclamation, 1973*; the *Owambo Constitution Proclamation, 1973* and the *Caprivi Constitution Proclamation, 1976*.

4 See: s 17A of the *Development of Self-government for Native Nations in South-West Africa Act, 1968*.

5 C.f. sections 5 and 11 the *Native Administration Proclamation, 1922*.

6 Compare sections 11 and 12 of the *Native Administration Proclamation, 1922*.

7 E.g. section 27 of the *Natives (Urban Areas) Proclamation, 1951*.

8 See: sections 25 and 26 of the *Natives (Urban Areas) Proclamation, 1951*.

9 Compare s. 20 of the *Native Administration Proclamation, 1928*.

10 See: s. 15*ter* of the *Black Education Act, 1953* and the *Bantu Special Education Act, 1964*.

11 Compare s. 2 of the *Prohibition of Credit to Natives Proclamation, 1927* and sections 10*bis* and 31 of the *Natives (Urban Areas) Proclamation, 1951*.

12 Compare the *South West Africa Company Limited Temporary Mining Reserve Proclamation, 1920* and the various extension Proclamations; *Kaoko Land und Minen Gesellschaft Temporary Mining- Reserve Proclamation, 1920* and various extension Proclamations and the *Registration of Deed of Grant (Kaokoveld Prospecting and Mining) Proclamation, 1944*.

racial discrimination that permeated virtually every aspect of their existence as human beings.

"Labour Hire" under the Contract Labour System

[2] Those who suffered the indignities and inhumanities of the abhorrent, discriminatory practices under the contract labour system during that era were left with such deep and indelible memories of its abuses that, more than half a century later, they could still vividly recall their experiences and, on affidavit, paint clear and disconcerting pictures with words of their suffering. A lack of commercial infrastructure, debilitative poverty and large scale unemployment prevailing in the northern reserves compelled native Namibians to try and find employment elsewhere in the then South West Africa – in areas south of what was known as the "Police Zone"[13]. But, outside the ambit of the contract labour system, the harsh and stringent enforcement of influx control legislation made it virtually impossible for them to do so. Barring a few exceptions falling within a narrowly defined scope,[14] their presence in urban or proclaimed areas elsewhere in Namibia for more than 72 hours without an official permit was criminalised[15] by the *Natives (Urban Areas) Proclamation*, 1951 – the legislative instrument used by the South African government to transpose the much reviled provisions of the

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13 The Police Zone comprised the Owambo, Kavango, Caprivi and Kaokoveld reserves in the North of the then South West Africa.

14 See: S. 10(1) of the *Natives (Urban Areas) Proclamation, 1951*.

15 See: S. 10(4) of the *Natives (Urban Areas) Proclamation, 1951*.

(Urban Areas) Consolidation Act, 1945 (through which it enforced influx control of black persons in the Union of South Africa) to Namibia. If found in an urban area without or after the expiry of a permit, they could be repatriated by warrant to their reserves and the costs of removal defrayed from money found on or due to them – that is, in addition to the criminal sanction[16] imposed on them in proceedings in which their stay beyond the 72-hour limit was presumed.[17] It was a crime to induce or assist them to enter urban areas[18] or, for that matter, to employ them, if they did not have a permit.[19]

[3] Constrained by the economic necessity to find work, the only feasible employment option available to them was via the contract labour system. An all-important cog in that system was the employers' recruitment and placement agencies which, in 1943, amalgamated into the South West Africa Native Labour Association[20] and, notoriously, became known as "SWANLA" until 1972 when it was abolished after the "Owambo strike" and replaced by an "employment bureaux-system".[21] Subject to some variations in the recruitment and placement

16 See: S. 12 of the *Natives (Urban Areas) Proclamation, 1951*.

17 See: S. 10(5) of the *Natives (Urban Areas) Proclamation, 1951*.

18 See: S. 11 of the *Natives (Urban Areas) Proclamation, 1951*.

19 See: S. 10*bis* of the *Natives (Urban Areas) Proclamation, 1951*.

20 See: Du Pisani, *SWA/Namibia: The Politics of Continuity and Change,* p. 210, (1986) Jonathan Ball Publishers, Johannesburg.

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practices both before and after the three decades under the SWANLA-system, the placement procedure under the latter system comprised essentially the following: Once they have offered themselves for recruitment to SWANLA, they were - (a) classified (depending on their health and physical fitness) in one of four categories (A, B, C or D) and given tags reflecting their classification which they had to wear around their wrists or necks; (b) registered with the authorities for purposes of securing an official permit to work in proclaimed areas;[22] (c) if permitted to work as a "togt" or casual labourer, provided with a metal badge[23] which had to be prominently displayed on their person at all reasonable times and on which their individual registration numbers were recorded and, in each instance, also the name of the proclaimed area to which they were limited;[24] (d) placed in the employ of employers who had placed labour requisitions with SWANLA[25] and (e) signed contracts of employment at a minimum wage[26] which, at stages, could be for a period of up to two years at a time without any leave.

See: The *Employment Bureaux Regulations*, 1972 (Proclamation R.83 of 1972) by the State President of the Republic of South Africa.

22 Which, in terms of the regulations promulgated under s. 32(1) of the Proclamation by the South African Administrator in Government Notice No. 65 of 1955, included virtually all the major towns and cities of Namibia to the south of the Police Zone.

23 This practice resulted in the contract labour system being referred to in local parlance as "omtete uokaholo", meaning "to queue up for the identity disk" (See: Du Pisani, *op. cit*., at p 210).

24 See: Regulation 11(6) of the regulations published in Government Notice No. 65 of 1955.

25 See: Du Pisani, op. cit., at p 213

26 C.f. the *Natives Minimum Wage Proclamation*, 1944 (Proclamation 1 of 1944).

[4] Once they were placed with employers, their employment was subject to an array of offensive and coercive regulatory provisions. For example, during most of the SWANLA era, regulatory provisions were in place which made it a crime punishable by imprisonment (with or without hard labour)[27] for them to refuse or neglect to obey any lawful command of their employers; to absent themselves during working hours from the workplace without leave or lawful cause; to carelessly or improperly perform their work or neglect to perform any work which they were under duty to perform; to enter the service of another employer during the currency of their employment or to fail or refuse without lawful cause to commence service at the stipulated time. Moreover, if the employer so desired, the judicial officer could in addition "make an order directing any native convicted under this regulation, after having satisfied the sentence imposed upon him, to return to work and complete the term of his contract to which shall be added any period lost by reason of desertion, trial proceedings or sentences served in respect of any convictions for offences under this regulation, and if any such native shall fail to comply with such order he shall be guilty of an offence".[28] Once their employment terminated, they had to return to their respective reserves. It was a crime not to.

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27 See: Regulation 33 of the regulations published in Government Notice No. 65 of 1955 read with s. 36 of the Proclamation.

28 See: Regulation 9(1) of the regulations published in Government Notice No. 65 of 1955.

[5] Although some of the most offensive elements of the contract labour system were addressed by structural and regulatory changes after the labour unrest in 1972,[29] it continued to be a key component in enforcing the policies of influx control, segregation and racial discrimination until 1977 when most of the statutory framework on which it had been based was abolished.[30] By then, the contract labour system - which the appellant labelled as "a crude and inhuman coercive compulsory placement regime for indentured labour as part of a racially based influx control system" - had been in operation for many decades. It was deeply resented by the majority of Namibians. It offended their dignity; infringed their liberty; denied them equality; deprived them of opportunities to develop their capacity and abilities as human beings and brought with it such profound suffering that, whilst many boycotted the system and others resisted with industrial action, some took up arms – as part of a much greater struggle for freedom, justice and liberation – to rid Namibia from this practice, the policies on which it had been based and those who had imposed it on our People. But, irrespective of how they chose to respond, it is beyond doubt that the contract labour system left a deep scar on the Namibian psyche. Very few Namibians were left untouched by it – not only those who had served and suffered under it, but also their families and the communities within which they lived. It also bears on the collective socio-political conscience of those who were too naïve, ignorant,

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29 For a summary of the changes see: Du Pisani, *op.cit.*, at p. 212.

30 See, amongst others, the *General Law Amendment Proclamation*, 1977 (Proclamation AG 5 of 1977) by the Administrator-General.

indifferent, prejudiced or meek to resist or change it but, instead, tacitly allowed, facilitated, participated in or benefitted from the system.

[6] Seen in this historical framework of racist practices and policies, it is easy to understand why the “contract labour system”, added so much emotive and substantive content to the concept of “labour hire” in a Namibian setting. Like the policies and practices of apartheid and racial discrimination which inspired the system and gave specific content to the phrase during those dark years of foreign rule – especially during the SWANLA era - the mere possibility of its reintroduction, albeit in a different guise, knee-jerks resistance. In that sense and context, the phrase “labour hire” contains “fighting words”.

The Prohibition of “Agency Work” by S. 128 of the Labour Act

[7] Against this historical background and, given the fact that those experiences are still part of the living memory of many, it is unsurprising that,

when clause 128[31] of the Labour Bill,[32] which sought to regulate "employment hire service," was tabled for debate at its committee stage in the National Assembly, it sparked fierce opposition and condemnation across the political spectrum. In the heated debate that followed, the concept was equated with "labour hire"; assertions were made of another SWANLA being accommodated 17 years after Independence; "labour brokers" were compared to SWANLA; labour hire was likened to the sale of human beings at a profit by the broker to user companies; the House was reminded of how many thousands of Namibians had been "brought in from the North with tickets around their necks saying they are going to be sold to another" and the view was expressed that the attempt to regulate

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It read as follows prior to its amendment:

"128. (1) In this-section, "employment hire service" means any person who, for reward, procures for or provides to a client, individuals who –

(a) render services to, or perform work for, the client; and

(b) are remunerated either by the employment hire service, or the client.

(2) For all purposes of this Act, an individual whose services have been procured for, or provided to, a client by an employment hire service is the employee of that employment hire service, and the employment hire service is that individual's employer.

(3) The employment hire service and the client are jointly and severally liable if the employment hire service or the client, in respect of any of the employees of the employment hire company, contravenes –

(a) Chapters 2 through to 6 of this Act;

(b) a collective agreement or contract of employment; or

(c) a binding arbitration award that regulates terms and conditions of employment.

(4) An employee aggrieved by a contravention referred to in subsection (3) may refer a dispute or seek enforcement of an arbitration award against either the employment hire service or the client or both in accordance with this Act.

(5) An employment hire service must not offer to persons whom it procures or provides to a client for employment, conditions of employment which are less favourable than those provided for in this Act.

(6) For the purposes of this section an individual procured or provided for employment must be regarded as an employee even if that individual works for periods which are interrupted by periods when work is not done or work is not made available to the employee.

(7) An employment hire service or a client company which 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."

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Which was amended and later promulgated as the Labour Act, 2007.

labour hire was not dissimilar to attempts made during the abolitionists' struggle against slavery to regulate the slave trade "to make it a bit humane".[33] Typifying labour hire as a form of slavery where human beings were being bought and sold resonates with similar characterisations of the contract labour system made almost 40 years earlier.[34]

[8] The National Assembly is constitutionally obliged "to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies".[35] Given the racial practices and policies which gave meaning and structure to the concept of "labour hire" during the pre-independence era, the National Assembly was clearly justified in questioning and scrutinising its recognition and regulation in the Labour Bill. In addition to these, other principled objections were also raised during the debate. They are similar to those advanced by counsel for the respondents in argument and will be dealt with later in this judgment.

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33 See: pages 22, 23, 25 and 30 of the debates at the committee stage of the Bill as published in the Hansard of 27 June 2007.

34 Compare the views expressed during the strikers' meeting on 10 January 1972 recorded by Du Pisani, *op. cit.,* p 211.

35 See: Article 63(2)(j) of the Constitution.

[9] The upshot of the parliamentary debate was that the Minister of Labour and Social Welfare withdrew - and later tabled an amended - clause 128 of the Labour Bill. The amended clause was later enacted without opposition as s. 128 of the Labour Act, 2007 (the "Act")[36]. Being the central issue in this appeal, we reproduce it in its entirety:

> "128. Prohibition of labour hire
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> (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) Sub-section (1) does not apply in the case of a person who offers services consisting of matching offers of applications for employment without that person becoming a party to the employment relationship 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$80,000.00 or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.
>
> (4) Insofar 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."

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36 Act No. 11 of 2007

[10] If the gist of the section is to be ascertained from its caption,[37] its provisions are designed to prohibit "labour hire". The phrase, which may include a wide range of employment relationships, is not definitive. Classically, "labour hire" may refer to the typical common law employment relationships based on the Roman Law of letting and hiring (*locatio et conductio*). In a labour context, only two of them remain relevant:[38] the letting and hiring of services (*locatio conductio operarum*) and the letting and hiring of work (*locatio conductio operis*)[39] with many shades of grey in between[40]. Moreover, in the zone between these typical – mostly bilateral – employment relationships (at the one extreme) and self-employment (at the other) "new atypical and hybrid working arrangements are

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With that, we do not intend to decide if - or to which extent - captions may be used in the interpretation of statutory provisions as discussed in *S v Liberty Shipping and Forwarding (Pty) Ltd and Others*, 1982 (4) SA 281 (D) at 285D-286D. Compare generally: Devenish, "*Interpretation from the Bowels of the Act"* 1989 SALJ 68 at 74-7;

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The third, the letting and hiring of slaves under the *locatio conductio rei* by their masters to others was abrogated with the abolition of slavery.

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See: *Smit v Workmen's Compensation Commissioner,* 1979 (1) SA 51 (A) and the distinctions between them apparent from the *dictum* of Joubert JA at 61A-F as well as the earlier evolution of different "tests" to distinguish between them: the "supervision and control" test postulated in *Colonial Mutual Life Assurance Society Ltd v MacDonald,* 1931 AD 412 by De Villiers CJ at 434 – 5; the "organisation test" (referred to by Naidu AJ in *Motor Industry Bargaining Council v Mac-rites Panel Beaters & Spray Painters (Pty) Ltd,* 2001 (2) SA 1161 (N) at 1164B and the "dominant impression test" adopted by Rabie JA in *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB,* 1976 (4) SA 446 (A) at 457A .

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"In many cases it is comparatively easy to determine whether a contract is a contract of service [locatio conductio operarum] and in others whether it is a contract of work [locatio conductio operis] but where these two extremes converge together it is more difficult to draw a borderline between them. It is in the marginal cases where the so-called dominant impression test merits consideration. . . . (T)he presence of a right of supervision and control . . . is not the sole determinative factor since regard must also be had to other important indicia in the light of the provisions of the particular contract as a whole." Per Joubert JA in *Smit v Workmen's Compensation Commissioner, supra,* at 62D - 63B. Compare also: *Midway Two Engineering & Construction Services v Transnet Bpk,* 1998 (3) SA 17 (SCA) and *SA Broadcasting Corporation v McKenzie,* (1999) 20 ILJ 585 (LAC) at 591E - H and many other cases where the Courts were called upon to decide whether the employment relationship was either the one or the other.

progressively emerging."[41] Driven mainly by post-industrial economic forces and technological advances - both globally and nationally - both the nature and structure of work are progressively changing, most significantly, towards employment in services.[42] But even in the employment services industry, the term "labour hire" "elicits many connotations but few firm definitions."[43] Less typical "labour hire" arrangements appeared a few decades ago: (a) the traditional "agency employment industry" in which "temping agencies" assisted in providing workers to client enterprises experiencing temporary fluctuations in demand or the temporary absence of employees; (b) the "recruitment and placement industry", typified by SWANLA-like agencies in Namibia prior to 1972 and the employment bureaux which replaced it. (c) In other countries, such as Australia, the dynamics of "the recruitment industry," which evolved in the 1970s and the 1980s, are again somewhat different:[44] As an alternative to permanent placements, recruitment agencies offered their clients short or long term

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41 Countouris, "*The Changing Law of the Employment Relationship: Comparative Analysis in the European Context*" (2007) Ashgate Publishing Ltd., England.

42 In their report on "*Labour Hire in Namibia: Current Practices and Effects*" (May 2006), the Labour Resource and Research Institute noted that labour hire in Namibia "forms part of a global trend towards more ' flexible' forms of employment …" (p.5) and that it "can be observed in the emergence of new forms of employment … and new employment relationships". Referring to the position in South Africa, Theron: "*The Shift to Services and Triangular Employment: Implications for Labour Market Reform*" (2008) 29 ILJ 1 observed a similar trend: "Statistically speaking, the clearest indication of this structural change has been in a shift to employment in services".

43 O'Neill, "*Labour Hire: Issues and Responses*", Research Paper No. 9 2003-04, p.3, published by Information and Research Services, Parliamentary Library, Commonwealth of Australia.

44 Described by Dr. Richard Hall in "*Labour Hire in Australia: Motivation, Dynamics and Prospects*", p.3, Working Paper 76 dated April 2002, University of Sydney.

placements to trial prospective employees as if on probation, allowing them to decide subsequently whether or not to engage the labour hire placements as direct employees. During temporary placement, the wages of the workers are paid by the recruitment company but, should a client enterprise decide to directly employ the worker as an employee, it is required to pay a once-off fee to the recruitment-labour hire enterprise. (d) In the 1990's the "temporary employment services industry",[45] based on identical labour hire practices which evolved and rapidly expanded in many countries all over the world more than a decade earlier, was established in Namibia. This industry, succinctly described,[46] "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." It has, of course many more contractual components defining its peculiar nature as an atypical employment structure - some of which will be discussed hereunder – but, whatever may be said for or against it, the reality is that it has proliferated worldwide on both national and supranational levels in recent years and is redefining the frontiers of the global employment services industry.

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Sometimes also referred to as the "labour brokering" industry (Jan Theron, *Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship,* (2005) 26 ILJ 618 at 620) or the "'Pure' labour hire industry" (Hall, *op. cit.,* p.3).

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By Charles Power, "*Labour Hire: The New Industrial Law Frontier*", (2002) 76 Law Institute Journal, p. 64 (Australia).

[11] With the entire range of employment relationships rooted in the law of letting and hiring and their content as diverse as the terms of the consensual contracts (*contracti consensu*) underlying them, the expression "labour hire", is not a definitive term of art with exclusive legal content which, by itself, conveys the scope and meaning of the prohibition in s. 128 of the Act with legal clarity. As illustrated, even in contemporary labour parlance it may refer to any of at least four branches of the employment services industry and, in a Namibian context, it is for historical reasons more closely associated with the recruitment and placement industry than with the temporary employment services industry[47]. Therefore, the phrase "Prohibition of labour hire" in the heading of s. 178 is of very limited assistance in gathering the meaning of the section in the context of the Act as a whole.

[12] The setting of the Act and the policies and considerations which inspired it are evident from the historical analysis given earlier in this judgment and from the preamble to the Act[48]. Emerging from a century of discriminatory employment practices and still seeking to redress the socio-economic imbalances left in the wake thereof, the Act is an important instrument through which the Legislature sought to "give effect to (its) constitutional commitment to promote and maintain

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47 This, as indicated earlier is sometimes referred to in Australia as "the 'pure' labour hire industry".

48 See: *Attorney-General v Dow,* 1994 (6) BCLR 1 (Botswana) where the court, citing "*Bennion on Statutory Interpretation*" on the effect of preambles, said at 9H: "The preamble is an optional feature in public general Acts, though compulsory in private Acts. It . . . states the reason for passing the Act. It may include a recital of the mischief to which the Act is directed. When present, it is thus a useful guide to the legislative intention"

the welfare of the people of Namibia" and to "further a policy of labour relations conducive to economic growth, stability and productivity."[49] The "constitutional commitment" referred to in the opening paragraph of the preamble to the Act is embodied in the "Principles of State Policy" which, amongst others, enjoins the State[50] to –

> "actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:
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> (a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the Government shall seek through appropriate legislation, to provide maternity and related benefits for women;
>
> (b) enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength;
>
> (c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices;
>
> (d) membership of the International Labour Organisation (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO; …

49 As stated in the preamble to the Act.

50 In Article 95.

(i) ensurance that workers are paid a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities; …"

All these principles bear to a greater or lesser extent on the enactment of s.128 and, although they are not legally enforceable, they may inform the Court on the interpretation of the Act – more so, because the Act expressly intends to give effect to them.[51]

[13] The prohibition in subsection (1) and the exception to it in subsection (2) of s.128 draw in part on two (of the three) types of "labour market services" defined in article 1 of the *Private Employment Agencies Convention*, 1997[52] of the International Labour Organisation ("ILO") (hereinafter "the Convention").

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51 See: Article 101 which reads: "The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them"; *Government of the Republic of Namibia v Mwilima and All Other Accused in the Caprivi Treason Trial,* 2002 NR 235 (SC) at 252A-E and the discussion by Bertus de Villiers of a similar provisions in the Indian Constitution in his article: "*Directive Principles of State Policy and Fundamental Rights: The Indian Experience,* (1992) SAJHR 29 at 33-4.

52 Convention No 181 of 1997, defines the term "private employment agency" as follows in article 1:

"For the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

(b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;

(c) other services relating to jobseeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment."

Subsection (1) prohibits any person to "*for reward*, employ any person with a view to making that person available to a third party *to perform work for the third party*". Its formulation corresponds in part with the type of labour market service defined in article 1(b) of the Convention, i.e. "services consisting of employing workers with a view to making them available to a third party…*which assigns their tasks and supervises the execution of these tasks*". The differences between the two formulations, indicated by the phrases in italics, are of significance in determining the sweep of the prohibition in subsection (1): to fall within its ambit, the third party need not be the one who assigns the tasks of the workers and supervises their execution, it will suffice if the workers perform work for that party. We shall return to the significance of the broader sweep of s. 128(1) when we deal with the issue of justification under Article 21(2) of the Constitution later in this judgment. For the purpose of differentiating between s. 128(1) and article 1(b) of the Convention, nothing much turns on the inclusion of the words "for reward" in the prohibition. Inasmuch as the Convention targets "private employment agencies," it may be assumed that they would provide labour market services "for reward" – which is also what s. 128(1) requires. The specific inclusion of those words in the section is probably intended to exclude employment services of a public nature which the Government may provide without reward.

The exception in section 128(2) provides that the prohibition in 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". Except for the introductory words, the description of this type of labour market service is identical to the definition used in article 1(a) of the Convention.

[14] In what follows, we shall provisionally[53] refer to all employment structures prohibited under s. 128(1) as "agency work" (rather than by the even wider concept of "labour hire"); to the "employer" in the prohibited employment relationship as the "agency service provider"[54]; the "employee" in that relationship as the "agency worker" and the "third party" referred to in the subsection as the "agency client". We also note that the prohibition does not differentiate between temporary or indefinite agency work and, therefore, we do not find it appropriate to qualify any of these concepts by the word "temporary" as may be customary in the employment services industry.

The Nature of Appellant's Business

[15] As suggested by its name, the appellant's core business is included in that of an agency service provider. To that end, the appellant concludes agreements to provide agency services to agency clients on the one hand and, on the other,

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53 Later in the judgment, we shall differentiate between "labour market services" as defined in article 1(b) of the Convention and other types of agency work prohibited by the section.

54 Theron, *Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship, op.cit.,* p. 620 suggests that, because the agencies procure labour to do the work of user enterprises (which he refers to as the "clients"), the activity they engage in could more appropriately be labelled "labour broking" and the agencies should be referred to as "labour brokers".

has employment agreements with its employees to do agency work for those clients. It also engages in other business activities such as the recruitment and training of workers and the provision of advisory services to clients. The latter activities are not directly affected by the prohibition but they are merely ancillary to the appellant's core business and accounts for less than 10% of its revenue and workforce. Being a Namibian company with its headquarters in Windhoek and branches in several towns in Namibia, the appellant employs approximately 6085 employees and is considered to be one of the country's largest employers. About 50% of its agency workers are either skilled or semi-skilled and the others are unskilled. They are all engaged under either fixed or indefinite term contracts. The fixed term contracts, usually entered into with skilled agency workers hired out to agency clients for the performance of specific tasks, terminate upon completion or cessation of those tasks. They are re-engaged by the appellant only if and when their skills and services are again in demand.

[16] The other agency workers are engaged on an indefinite basis. Their remuneration is calculated at rates in the industry commensurately to their skills and paid either fortnightly or monthly on the basis of hours worked per day. The notice period for termination provided for in their employment contracts are for the benefit of the agency workers only. If there is no demand for their services, the appellant only terminates their contracts within the ambit of the statutory requirements for retrenchment. This, according to the appellant, does not frequently arise because of the large pool of agency clients which creates an

ongoing demand for labour and allows for the redeployment of agency workers from one agency client to another.

[17] The terms of appellant's contracts with agency clients depend on the nature and duration of the agency services required. Requests to provide the agency clients with agency workers are based on the clients' needs: it may be for skilled, semi-skilled or unskilled workers; for a shorter (e.g. to temporarily fill in for permanent staff of the agency client when they are on leave, including maternity leave), longer (e.g. to provide additional capacity during specified peak or seasonal periods) or indefinite periods; for a specific job (such as the construction of a building), for outsourced services or simply for services contracted in; etc - the variations are innumerable. Upon receiving requests for services, the appellant will provide a quotation setting out the terms and conditions on which the agency workers' time and skills will be hired out. Those terms and conditions, amongst others, relate to the agency workers' remuneration, the appellant's duty to register them with - and to make contributions to - the Social Security Commission under the Social Security Act, 1994 and the Employee Compensation Act, 1942; to comply as employer with other statutory obligations towards the agency workers under labour legislation; to provide transport for the agency workers to the workplace and the like. Upon acceptance of the appellant's quotation, it concludes a written agency service agreement with the agency client for the supply of the required services. The agency clients' reciprocal obligations include the payment of hourly rates for the

agency workers' services on the basis of productive hours worked. The amount paid under an agency service agreement by the client for work done by an agency worker is higher than the remuneration payable by the appellant under the employment agreement to that worker. The difference between the two, less the appellant's *pro rata* management, administrative and other expenses incurred in respect of that worker, constitutes part of the appellant's revenue.

The Proceedings in and Judgment of the Court a quo

[18] With its core business falling squarely within the ambit of the prohibition, the appellant sought to have s. 128 constitutionality reviewed.[55] Hence, it brought an application in the High Court against the Government of Namibia, the Speaker of the National Assembly, the Chairperson of the National Counsel and the President of the Republic of Namibia - cited as the 1st to 4th respondents respectively - for an order "striking down section 128 of the Labour Act, 2007 as unconstitutional" and costs of suit. The basis of the appellant's challenge is singular: the impugned section infringes its fundamental freedom to "carry on any … trade or business" entrenched in Article 21(1)(j) of the Constitution. The first and fourth respondents opposed the application (the "respondents"). They did so on essentially three grounds which, we must add, are also the grounds on which they are opposing this appeal: (a) being a juristic person, the appellant does not have *locus standi* to invoke the fundamental right protected by Article 21(1)(j) of the Constitution because that right is only accorded to natural persons; (b) even

55 See: Article 25 of the Constitution.

if the appellant is a bearer of the fundamental right protected by Article 21(1)(j), s. 128 does not limit that fundamental right, because the right, purposively interpreted, protects equal opportunity and access in the field of economic activity - not forms of economic activity themselves and, in any event, (c) any limitation of the 21(1)(j) fundamental right by s.128 is a permissible limitation authorised by Article 21(2) of the Constitution.

[19] The Full Bench of the High Court dismissed the application with costs. It did so, we must immediately note, not on any of the grounds advanced on behalf of the respondents in opposition to the application. The principal finding which the Court made is that "labour hire has no legal basis at all in Namibian law, and, therefore, it is not lawful."[56] Premised on this finding, the Court *a quo* reasoned that "accordingly, such arrangement cannot create any legal right in favour of the applicant and, *a priori*, cannot create a fundamental right in terms of Article 21 of the Constitution";[57]that "in Namibia labour hire is not a business or trade that is entitled to the protection of Article 21" and that it was therefore not necessary to consider whether the prohibition was justified under Article 21(2), read with Article 22, of the Constitution.

[20] For its finding that agency work (referred to as "labour hire" in the judgment) "has no legal basis at all in Namibian law, and, therefore, is not lawful,"

56 See: Para [29] of the judgment.

57 See: Para [38] of the judgment.

the Court a quo reasoned that “the contract of employment under our common law is based on the Roman Law of *locatio conductio operarum*, i.e. the letting and hiring of personal service in return for a monetary return”; that "at common law …(t)here is, therefore, no room for a third party in the servant (employee) - master (employer) relationship…”; that, inasmuch as agency work contemplates the interposition of a third party in the employer-employee relationship, that "interposition creates an unacceptable situation that has no legal basis in our law”; that such an arrangement “is unknown, nay, offensive of, our law of contract of employment at common law …” and that “the hiring or renting of one’s employee to another person, for reward, in order for such employee to render personal service to that other person is not only not part of our law of contract of employment but it also smacks of the hiring of a slave by his slave-master to another person under *locatio conductio rei* in Roman Law”.

[21] We have no quarrel with the Court’s understanding of basic nature of consensual contracts for the letting and hiring (*locatio conductio*) of things (*rei*), of services (*operarum*) and of work (*operis*) in Roman and common law. However, given the evolution of employment relationships from classical to modern times and the rapid changes in recent decades as a result of globalisation, industrial innovations, information technology developments and instant global telecommunication, we must point out that contracts for the letting and hiring of services have not remained static but continuously evolved in scope

and application to address continuously emerging challenges presented by socio-economic changes at the workplace over more than 2000 years.

[22] In Roman times, status rather than contract was the pivotal element of employment relationships: that of slaves (*servi*) towards their masters (*domini*); slaves who were liberated (*libertini, liberti, Latini Iuniani, or dediticii* – denoting different classes of liberation) towards their former masters (*patroni*) for personal services (*operae officiales*) and trade or professional services (*operae fabriles*); defaulting debtors (*addicti*) subordinated to their creditors; ransomed prisoners of war (*redempti ab hoste*) towards the person who had paid the ransom; etc[58]. With most services rendered in that society either by slaves or persons who, by virtue of their status were required to render services to others, contracts for letting and hiring of services (*locatio conductio operarum*) were not of any great moment at the workplace. Those contracts were limited to the engagement of unskilled work at an agreed (usually, daily) wage. Skilled work was almost invariably rendered under agreements for the letting and hiring of work (*locatio conductio operis*) and professional persons were expected to render their services (*artes liberalis*) free of charge.[59] In his comment on letting and hiring of

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58 For a more detailed discussion hereof and the applicable references to Justinian's Institutes and the Institutes of Gaius compare: Van Warmelo, *'n Inleiding tot die Studie van die Romeinse Reg,* pp.46-51, (1971) A.A. Balkema Publishers.

59 Ibid., p. 304-305.

services in the *Institutes* (Book 3, Title 24) Thomas[60] summarised the position as follows:

> "In *locatio operarum*, the locator let out his services to his employer. It is commonly held that practice of the professional skills (*artes liberalis*), such as medicine, surveying and the like, could not be the object of *locatio conductio*, but the truth appears to be that it was not the nature of the work but the social status of the worker which determined the matter, *locatio operarum* being the contract of the lower classes who undertook service in a menial capacity."

Centuries later, contracts of service were still not applied over the entire spectrum of skilled, unskilled and professional work: In his *Commentary on the Pandects*,[61] Voet (at 19.2.6. on letting and hiring) deals with services which may be let out: [62]

> "In addition to the use of things services also, both those of free men and of slaves, are let out. This means services for wages, not other services, and not the liberal services of advocates and the like to whom not wages but fees are wont to be rendered,…."[63]

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60 "*The Institutes of Justinian: Text, Translation and Commentary*", p. 237 (1975) Juta & Co.

61 Part I published in 1698 (See: J.C. De Wet, "*Die Ou Skrywers in Perspektief*", p .154 (1988) Butterworths.

62 Gane's Translation, Vol. 3, p. 411 (1956) Butterworth & Co (Africa) Ltd.

63 "Praeter usum rerum elocantur & operae, tam liberorum hominum quam servorum mercenariae, non aliae, non liberales advocatorum similiumque, quibus salaria, non mercedes, praestari solent,…" – Johannis Voet, "*Commentarius ad Pandectas*", p 668 (1757) Fratres Cramer

We interpose here to note that it is not clear whether Voet meant that services of slaves are let out by the slaves themselves or by their masters. Given Voet's comment in an earlier section (19.2.4) that, subject to exception, an owner cannot generally hire his own property, it is unlikely that he meant that slaves may let their services to their masters. If he meant that the services of slaves may be let either by themselves or their masters to third parties, the question arises whether it was not also contemplated that the services of "free men" might be let out in that fashion? Without the benefit of argument on the interpretation of his comment in that section, we prefer not express any firm views thereon.

[23] Had contracts of service remained marooned in Roman or common law of pre-modern times, the narrow scope of their application would have been entirely inappropriate to address the demands of employment relationships in the modern era. But, as Countouris illustrates in his analytical work "*The Changing Law of the Employment Relationship: Comparative Analysis in the European Context*",[64] the fulcrum of employment relationships during the 18th and 19th century gradually shifted from "the pre-modern idea of status to the modern contract of employment" which "sprang from the interplay of two social phenomena emerging in Europe between the 18th and 19th centuries, namely the industrial revolution and the rise of liberal ideas", such as the French Revolution's notions of freedom and equality.[65] This may be illustrated by a borrowed example: No

64 (2007) Ashgate Publishing Ltd, England.

65 Ibid., at p. 16 – 17.

longer was a carriage “the product of the labour of a great number of independent artificers, such as wheelwrights, harness-makers, tailors, locksmiths, upholsterers, turners, fringe-makers, glaziers, painters, polishers, gilders, etc” who were independently contracted to perform specific work within their respective skills, but that of contracted skilled employees who “are assembled in one building where they work into one another’s hands.”[66] He shows that during the second half of the 20th century –

> "the contractualisation of the employment relationship was consolidated and its binary nature was crystallised in labour and social legislation, case law, collective bargaining and legal analysis. All these regulatory and normative pressures fostered, through a process of legal and social engineering, the emergence of an inherently unitary notion of contract of employment that embraced a multifarious range of working relationships and numerous categories of workers. This notion of the contract of employment tended towards the socially and politically desirable standardisation and decasualisation of the employment relationship."[67]

Hence, the establishment of what is nowadays regarded as the “standard employment relationship”: a binary full-time employment relationship where the employee is engaged to work for an indeterminate period at the workplace of the employer.[68]

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66 To borrow elements from the quoted example of K. Marx, “*Capital - A Critical Analysis of Capitalist Production”*, Vol.1, pp.318-319 (1974) Lawrence and Wishart, London.

67 Countouris, *op.cit.*, p.15.

68 Compare also: Theron, “*Employment Is Not What It Used To Be”* (2003) 24 ILJ 1247 at p. 1249.

[24] This cursory analysis demonstrates that contracts of service adapted in scope and application from classical to modern times to address the challenges presented by changing employment relationships in a perpetually evolving socio-economic environment. As was said in *Holden v Hardy*:[69]

> "In view of the fact that … amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees as they arise."

The rapid rise of new structures in the employment services industry during more recent decades forged new, non-standard employment relationships with increasing frequency. We have referred to a number of these atypical relationships earlier in this judgment, but there are many more[70] within the spectrum. They demand new legal categorisations which may not always neatly fall within the ambit of binary classical employment models. The multilaterality of the employment relationship, the diversity and complexity in market forces driving and opposing it and the need to strike the right balance between flexibility and security are but some of the challenges presented in the context of agency services as contemplated in the Convention.

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69 169 US 366 at 387

70 Compare, for instance, the outsourcing of labour, amongst others, as contemplated under the ILO's *Home Work Convention*, 1996 (No 177).

[25] Some may argue that, inasmuch as "(a)ll things can be let out which are the subject of commercial transactions whether corporeal or incorporeal"[71], it is at least notionally possible to accommodate agency services within the common law framework of the subletting or –hiring of services: Once the agency service provider has hired the services of a person (the agency worker) under a bilateral employment agreement, it may, with the consent of that person, again hire those services out to a third party (the agency client) - in much the same way as other hired incorporeal rights[72] may, in turn, be subleased. Others argue that, given the nature of the relationship between the agency service provider and the agency worker, the notion of an employment relationship between them seems "far-fetched and contrived"[73]. They contend that the activities of agency service providers are akin to those of brokers: they procure labour to do work for a client.[74] Therefore, the law of agency should be brought to bear in part on the employment relationship. It is thus regarded as the net result of employment and commercial contracts which leads to a "unique and *sui generis* tripartite

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Compare Gane's translation of *Voet* 19.2.3: "Elocari possunt res omnes, quae sunt in commercio, sive corporales, sive incorporales". The rule is subject to certain exceptions (*Slims (Pty) Ltd v Morris NO*, 1988 (1) SA 715 (A) at 727F-G) not relevant to this discussion.

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Examples of other incorporeal rights hired out may be found in *Graham v Local and Overseas Investments [Pty) Ltd.*, 1942 AD 95 at p 108 and *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs,* 1991 (4) SA 718 (A) at 724D-F.

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C.f. Theron, *Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship, op. cit.,* p. 621.

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Ibid., p.620.

relationship"[75]. Then there is also the view that the agency worker is a contractor engaged on the basis of a contract for work (*operis* - in some jurisdictions also referred to as a "contract for service" as opposed to a "contract of service") and that he or she is neither an employee of the agency service provider nor of the agency client.[76]

[26] Unless otherwise provided by regulating legislation, the legal characterisation of and response to agency services must ultimately depend on the terms and conditions of *bona fide* agreements underlying them in each instance[77] – be they for service, of service, of agency, *sui generis* or any combination thereof. The mere fact that they may not fit the typical mould of a bilateral contract of service described in Roman or Common Law does not mean that they are "not lawful" – as the Court *a quo* seemingly held. We would think, with respect, that the Court's approach should rather have been the converse: "…surely public policy demands in general full freedom of contract; the right of

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75 Compare the view expressed by the Labour Court in South Africa as summarised in *Lad Brokers (Pty) Ltd v Mandla*, 2002 (6) SA 43 (LAC) at 47F.

76 See: *Building Workers Industrial Union of Australia and Others v Odco Pty Ltd* (1991) 29 FCR 104; 99 ALR 735 and the discussion of thereof by O'Neill, *op.cit.,* p.10.

77 Although "(t)he legal relationship between the parties is to be determined primarily from a construction of the contract between them" (Per Van Dijkhorst AJA in *Lad Brokers (Pty) Ltd v Mandla*, *supra*, at 46H), the Court will define the legal relationship with reference to the underlying reality thereof rather than the contractual label attached to it if, by subterfuge, a contract seeks to disguise the true nature of the employment relationship". Compare also: Paul Benjamin, "*An Accident of History: Who Is (And Who Should Be) An Employee Under South African Labour Law*" (2004) 25 ILJ 787 at 790 and the authorities referred to by him in connection with disguised employment.

men freely to bind themselves in respect of all legitimate subject matters."[78] In *Printing and Numerical Registration Co v Sampson,*[79] Sir George Jessel MR expressed it even more strongly:

> "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."

[27] But, freedom of contract is not only a matter of public policy; it is a fundamental principle of our law. Voet 2.14.16[80] noted in his comments: "All honourable and possible matters may be made the subject of an agreement, but not those contrary to public law nor those which might redound to the public injury." What is considered as contrary to law, morality and public policy has been carefully developed by judicial pronouncements and authorities over centuries but, although "the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of

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78 Per Innes CJ in *Law Union and Rock Insurance Co. Ltd v Carmichael's Executor*, 1917 AD 593 at 598. He added: "The general interest of the community may and does in certain cases require the abridgment of the right. But language enforcing such abridgment should be narrowly regarded and strictly construed." See also: *Sasfin (Pty) Ltd v Beukes*, 1989(1) SA 1 (A) at 9 E-F; *Nathan NO v Ocean Accident and Guarantee Corporation Ltd*, 1959 (1) SA 65 (N) at 72B; *Gawith v Gawith*, 1966 (3) SA 596 (C) at 599A and *National Industrial Credit Corp (Rhodesia) Ltd v Gumede and Another*, 1964 (2) SA 42 (SR) at 45C-D.

79 (1875) LR 19 Eq 462 at 465 quoted with approval in *Wells v South African Alumenite Company,* 1927 AD 69 at 73.

80 Gane's translation, o*p. cit.,* p 428 "Deduci possunt in pactionem negotia quaevis honesta et possibilia, non juri publico contraria, quaeve ad publicam spectarent laesionem."

the power."[81] The respondents have not challenged the legality of the agreements facilitating agency work on grounds of public policy. Their reliance on considerations of "decency and morality" is limited to their second alternative defence, i.e. that, in so far as s. 128 "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."[82] Constitutional justification to diminish the freedom is an issue which will be discussed later in this judgment.

[28] The notions of "law, morality and public policy" by which the legality of contracts is assessed accommodate the regulation of contractual freedom by legislation lawfully enacted. Parliament may, for example, prescribe formalities in the interest of contractual certainty or set minimum standards to prevent the exploitation of persons who do not have an equal bargaining power – as, for example, it has done in the Act[83] in the interest of sound labour relations, fair

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81 See: Williston on Contracts, 3rd ed., para 1630 quoted with approval by Smalberger JA in *Sasfin (Pty) Ltd v Beaks, supra,* at 9 D-E and endorsed by the Court (at 9B-C): "No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness." See also: *Brisley v Drotsky*, 2002 (4) SA 1 (SCA) at 35E-F.

82 C.f. s. 128(4) of the Act.

83 As Van Den Heever AJ put it in *National Automobile and Allied Workers Union (now NUMSA v Borg-Warner SA (Pty) Ltd,* 1994(15) ILJ 509 A at 515H: "The unmistakable intent of labour legislation generally, is to intrude, or permit the intrusion of third parties, on this relationship in innumerable ways."

employment practices and the welfare of Namibians generally. But, barring these considerations bearing on the legality of contracts, freedom of contract is indispensable in weaving the web of rights, duties and obligations which connect members of society at all levels and in all conceivable activities to one another and gives it structure. On an individual level, it is central to the competency of natural persons to regulate their own affairs, to pursue happiness and to realise their full potential as human beings. “Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.”[84] For juristic persons, it is the very essence of their existence and the means through which they engage in transactions towards the realisation of their constituent objectives.

[29] The respondents did not contend, either on affidavit or through their counsel in argument before the Court *a quo*, that under common law agency work had “no legal basis at all in Namibian law and therefore (that it was) not lawful” or, for that matter, that the contracts which accommodate such arrangements were unlawful. Had they done so, the appellants would have had the opportunity to canvass and address the constitutionality of the common law restrictions relied on – a matter which the Court *a quo* did not even consider in its judgment. They have also not submitted that agency work is “offensive of our law of contract” under common law for any of the reasons mentioned in the Court’s

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84 Per Ngcobo, J in *Barkhuizen v Napier*, 2007 (5) SA 323 (CC) at 341C-D.

judgment[85]. In *Kauesa v Minister of Home Affairs*[86] this Court had occasion to deal with a similar situation. Referring to several aspects raised by the Court *a quo* in its judgment which had not been advanced by either counsel on behalf of the litigants, this Court stated:

> " … a frequent departure from counsel's, more correctly the litigants' case, may be wrongly interpreted by those who seek justice in our courts of law. It is the litigants who must be heard and not the judicial officer.
>
> It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel."

This is all the more so when the basis upon which the Court predicated all its other findings - the common law - has neither been pleaded nor invited in argument. It falls to be noted that, on appeal, the respondents did not even seek to support the fundamental basis upon which the Court *a quo* decided the matter.

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85 The respondents' contention that "in Namibia labour hire is not a business or trade that is entitled to the protection of Article 21 of the Namibian Constitution", which the Court agreed with in paragraph [39] of the judgment, was based on a completely different premise, i.e. that the "business" of agency work was rendered unlawful because it had been prohibited by s.128 of the Act, more so, because it conflicted with the notion that labour is not a commodity subscribed to by reference under Article 95(d) of the Constitution.

86 1995 NR 175 (SC) at 183D-G

Except for one, which we shall turn to presently, none of the real issues on the merits as defined in the affidavits exchanged between the litigants was decided.

Standing

[30] The first ground upon which the respondents challenge the appellant's right to seek constitutional review of s.128 of the Act relates to standing: Not on the basis that the appellant does not have a direct and substantial interest in the relief being sought as generally required in common law for *locus standi*[87] - given the prohibitive effect of the section on the conduct of appellant's core business, its standing in common law is clear - but on the basis that the fundamental right protected by Article 21(1)(j) of the Constitution, which is the exclusive basis for the relief being sought, only vests in natural – not juristic - persons. Although not expressly so articulated, the contention suggests that the appellant's fundamental rights or freedoms guaranteed by the Constitution have not been infringed or threatened by the enactment and, therefore, that it cannot claim to be an "aggrieved" person entitled under Article 25(2) of the Constitution to seek the Court's protection. Being the basis of the appellant's attack on the constitutionality of s. 128 – and of the respondents' opposition thereto - it is expedient to quote Article 21 of the Constitution for purposes of this judgment:

> "(1) All persons shall have the right to:

87 C.f. *Clear Channel Independent Advertising (Pty) Ltd and Another v TransNamib Holdings Ltd and Others*, 2006 (1) NR 121 (HC) at 138G-I;

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;

(c) freedom to practise any religion and to manifest such practice;

(d) assemble peaceably and without arms;

(e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;

(f) withhold their labour without being exposed to criminal penalties;

(g) move freely throughout Namibia:

(h) reside and settle in any part of Namibia;

(i) leave and return to Namibia;

(j) practise any profession, or carry on any occupation, trade or business.

(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are 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."

Although the Sub-Article refers to both fundamental "rights" and "freedoms", we shall refer to them only as "fundamental freedoms" to distinguish them from other fundamental rights entrenched elsewhere in Chapter 3 of the Constitution.

[31] Mr Chaskalson, who appears for the respondents, contends that the fundamental freedom protected by Article 21(1)(j) is linked to human dignity, a value that vests only in natural persons. Although the word "person" is capable of embracing both natural persons and juristic persons, he argues that to include

juristic persons as right bearers would be to transform a right, the essence of which was bound up with human dignity, into a right which was a purely proprietary one. Such an interpretation, he submits, would be incongruous in the context of Article 21(1)(j) which enumerates a series of individual freedoms, all of which are linked to human dignity. He points out that some of the fundamental freedoms in sub-article (1) are incapable of being exercised by juristic persons and, where the dignity interest protected by a particular fundamental freedom demands protection through a corporate institution, the specific freedom is framed in terms which make clear that it may be exercised through corporate entities. Article 21(1)(j) is not framed in such terms and should not be interpreted to provide for its exercise by juristic persons.

[32] Mr. Smuts, who appears on behalf of the appellant, contends that the approach advanced on behalf of the respondents is too narrow and negates the beneficial interpretation being placed by the Courts in Namibia on fundamental rights and freedoms protected in Chapter 3. Accordingly, the rights and freedoms listed therein apply without limitation to all persons and not merely to natural persons who are Namibian citizens. Moreover, the freedom to carry on a business, trade or occupation or even a profession, is frequently exercised in Namibia through corporate entities. On this issue, the appellant's submissions found favour with the Court *a quo*. The Court reasoned that some of the freedoms contemplated in sub-article (1) can naturally only be enjoyed by natural persons, others only by legal persons and the remainder by both natural and

legal persons. The Court cited a number of examples under each category, the correctness of which we do not find necessary to comment on save to the extent that it is necessary for the adjudication of the issues in this appeal[88]. Had it been the intention of the makers of the Constitution to restrict the enjoyment of all the freedoms in sub-article (1) to natural persons only, "they would have made such of their intention known by clear words", the Court *a quo* held.

[33] The most fundamental force which inspired our aspirations for freedom, justice and peace and compelled us to secure those rights in a Constitution for ourselves and our children is the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family." The dignity inherent to all people is articulated as the first value in the first paragraph of the Preamble to the Constitution and, together with the recognition of their equal and inalienable rights, set the tenor of the entire Constitution. Human dignity is a value which permeates all the fundamental rights and freedoms enshrined in the Constitution.[89] It underlies all the freedoms in Article 21(1), including the one to

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Compare the cautionary remarks of this Court in *Kauesa v Minister of Home Affairs*, *supra*, p 184A-C where, after he quoted Bhagwati J in *M M Pathak v Union,* (1978) 3 SCR 334 to the effect that it is settled practice of the Supreme Court of India "to decide no more than what is absolutely necessary for the decision of a case", Dumbutshena AJA continued: "We respectfully endorse those words, particularly when applied to constitutional issues, and commend such a salutary practice to the Courts of this country. Constitutional law in particular should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time".

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Similar weight has been given to the value of dignity in the South African Constitution. In *S v Makwanyane and Another*, 1995 (3) SA 391 (CC) O'Regan J said: "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched." (at 507A-B)

economic activity protected under paragraph (j) thereof - as the respondents contend, amongst others, with reference to the remarks of Ncobo J[90] on a related provision[91] in the South African Constitution:

> "What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence.'"

[34] As important - even fundamental - as human dignity may be in underpinning the freedom to "practice any profession, or carry on any occupation, trade or business", it is not the sole value which inspired and shaped the formulation of Article 21(1)(j). The freedoms protected by the provision must also be construed with the background and history thereof in mind.[92] The

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90 In *Affordable Medicines Trust and Others v Minister of Health and Others*, 2006 (3) SA 247 (CC) at 274H-275B. See also: *Minister of Home Affairs and Others v Watchenuka and Another*, 2004 (4) SA 326 (SCA) at paras 26 – 27

91 Section 22 of the South African Constitution provides: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

92 *S v Makwanyane*, *supra* at 403G-H Chaskalson P held that: " …the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of chap 3 …"

construction of Article 21(1)(j) in its historical context was considered by the High Court in *Hendricks and Others v Attorney General, Namibia, and Others*:[93]

> "The inclusion of that right in our Constitution must be seen against a shameful history of job reservation for the privileged few and the exclusion of a large number of disadvantaged persons from access to certain professions, occupations, trades and businesses in South West Africa under South African rule. They are closely associated to the scourge of discriminatory apartheid laws and racist practices so expressly condemned in the preamble and other parts of our Constitution (cf arts 23, 40(1) and 63(i)). Those who founded this country's constitutional future were determined to eradicate those practices by providing, amongst others, for equal accessibility to and a free choice to pursue a career in any profession, occupation, trade or business."

Against this background, it is evident that the "recognition … of the equal and inalienable rights" of all people is another value which, in addition to the inherent dignity of all people, underpins Article 21(1)(j).

[35] It must also be recognised that the freedom is essential to the social, economic and political welfare and prosperity of our society. By according its

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93 2002 NR 353 (HC) at 357H-B. See also p 358C-G where the High Court quoted Jones J in *J R 1013 Investments CC and Others v Minister of Safety and Security and Others,* 1997 (7) BCLR 925 (E) at 930B-E on the historical background of s. 22 of the South African Constitution: "We have a history of repression in the choice of a trade, occupation or profession. This resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions on where and how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens in the country did not have a free choice of trade, occupation and profession."

members freedom to engage in different professions or occupations and to carry on a wide range of different trades and businesses, the Constitution allows them to render services, to provide food and goods and to earn incomes which are necessary to sustain and uplift their families, their communities and, ultimately, the Nation - even, if and where needed or required, also communities in other countries. This they do, not only as individuals or in partnership or association with others, but also – and perhaps most importantly - by organising themselves and contributing their collective resources to structured corporations and enterprises which, by their seize and resources, are often better positioned to make larger and more meaningful contributions to the development and welfare of society.

[36] Given these considerations, we must question whether the construction proposed by the respondents is one "most beneficial to the widest possible amplitude"?[94] We think not, but that is not the only consideration. In *Minister of Defence v Mwandinghi,*[95] this Court formulated a general approach which should inform Courts in gathering the scope and import of fundamental rights and freedoms protected in Chapter 3 of the Constitution:

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94 Compare: *Government of the Republic of Namibia v Cultura*, 2000 1993 NR 328 (SC) at 340C-E; See also: *Ex parte Attorney-General; In re The Constitutional Relationship between the Attorney-General and the Prosecutor-General*, 1998 NR 282 (SC) at 290 H-I and *Chairperson of the Immigration Selection Board v Frank and Another*, 2001 NR 107 (SC) at 171A-B where this Court endorsed that approach.

95 1993 NR 63 (SC) at 71F-H.

> "The whole tenor of chap 3 and the influence upon it of international human rights instruments, from which many of its provisions were derived, call for a generous, broad and purposive interpretation that avoids `the austerity of tabulated legalism'."[96]

[37] The respondents concede, correctly so in our view, that the phrase "all persons" in the introductory part of the Article 21(1) may refer to both natural and legal persons. Whether it refers to the one, the other or both in any particular instance must be ascertained by reading the introductory sentence together with the respective rights or freedoms contemplated in paragraphs (a) to (j) thereof. Article 21(1)(j), when read in that manner, provides:

> "All persons shall have the right to…practise any profession, or carry on any occupation, trade or business."

The nature of the economic activities mentioned being such that they may be exercised by natural and juristic persons alike, there is nothing in the formulation of the freedom which, on the face thereof, suggests that "all persons" must be read down to refer to "natural persons" only. Clearly, a broad and generous approach to its interpretation does not commend such a restrictive meaning. But, would a purposive approach result in a different construction? We are mindful that, although a purposive interpretation may often yield the same result as a "generous", "broad" or "liberal" approach, the construction of a particular right or

96 This approach has been restated, albeit differently worded, in *Government of the Republic of Namibia v Cultura, supra,* at 329H-I: "A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must be broadly, liberally and purposively interpreted so as to avoid the `austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."

freedom in its widest amplitude may sometimes "overshoot" the purpose of the right or freedom.[97] The respondents submit that it would be the case in this instance. The dignity interest that underlies the freedom, they contend, is one that invests only in natural persons and the meaning of the word "persons" in Article 21(1)(j) must accordingly be restricted.

[38] One of the most lucid expositions on purposive interpretation - approved on a number of occasions in this jurisdiction[98] - is that of Dickson J in *R v Big M Drug Mart Ltd*[99] with reference to the Canadian Charter of Rights:

> "'The meaning of a right of freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a

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97 See: Hogg, *Constitutional Law of Canada*, (Loose-leaf Ed.) p. 33.20, (Carswell Publishers, Scarborough, Ontario). See also: *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC) at para [17].

98 See: *S v Vries,* 1998 NR 244 (HC) at 273A; *S v Scholtz,* 1998 NR 207 (SC) at 218I; *S v Ganeb,* 2001 NR 294 (HC) at 303F and *Chairperson of the Immigration Selection Board v Frank,* 2001 NR 107 (SC) at 134G.

99 (1985) 18 DLR (4th) 321 at 395-6

guarantee and the securing for individuals the full benefit of the Charter's protection."

[39] In seeking to interpret the fundamental freedom under consideration purposively, we have referred in brief and cursory terms at the outset to the historical setting of the Constitution; mentioned some of the indignities and injustices suffered during the apartheid-era; highlighted some of them with reference to labour practices and economic policies and, later in this judgment, referred to particular injustices, all of which suggest that the redress contemplated in Article 21(1)(j) is intended to apply in its widest amplitude.

[40] We have also carefully considered the dignity interest on which the respondents rely for the narrower construction proposed by them and noted that it is not the only interest which inspired the right to freely engage in economical activities: it is also underpinned by the recognition of the equal and inalienable rights of all people. So are most, if not all, the fundamental rights and freedoms in Chapter 3 of the Constitution.[100] Yet, although those values either by their nature or by reference to their formulation in the first paragraph of the Preamble attach to human beings, a number of the fundamental rights and freedoms which they underlie equally apply to juristic persons as well[101]. Those that do not are

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For the sake of completeness, we must also note that our Constitution and the fundamental rights and freedoms therein are also underpinned by other values apparent from the Preamble and constitutional principles such as freedom, justice, peace, democracy, rule of law and constitutional supremacy, to mention a few. They too, must inform constitutional interpretation where appropriate.

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Compare: *Pinkster Gemeente van Namibia (previously South West Africa) v Navolgers van Christus Kerk,* SA 2002 NR 14 (HC) at 22B-C (Article 12 – Fair Trial); *Cultura 2000 and Another v Government of the Republic of Namibia and Others,* 1992 NR 110 (HC) at 124D-E (Article 16 – Property)

either qualified by words to that effect (“men”, “women”, “children”, etc.) or excluded on the basis that, given their peculiar nature, they invest in natural persons only. In the absence of such a qualification or exclusion, the phrase “all persons” must be construed to incorporate juristic persons.[102] A purposive approach commends such a construction. The aim of a generous and purposive interpretation “must be to move away from formalism and make human rights provisions a practical reality for the people”.[103] Behind the “corporate veil” of juristic persons are their members; behind the legal fiction of a separate legal entity are, ultimately, real people. They are the final beneficiaries of the corporate structures which they have created.

[41] The respondents suggest an approach to the interpretation of the freedoms protected by Article 21(1) which, in essence, is the converse: they propose that, unless the specific freedom is framed in terms which make it clear that it may be exercised through corporate entities, the expression "all persons" must be construed to include only natural persons. We find this contention at odds with this Court's stated approach that the Articles in Chapter 3 of the

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102 Although not on all fours, compare e.g. *Mahlaule and Others v Minister of Social Development and Others,* 2004 (6) SA 505 (CC) at 529A-D where, in the absence of any indication that the socio-economic rights in s. 27 of the South African Constitution are to be limited to “citizens”, the Court held that, on a purposive approach, the word "everyone" cannot be so restrictively construed.

103 *Smyth v Ushewokunze*, 1998(2) BCLR 170 (ZS) at 177I-J

Constitution "must be interpreted in a purposive and liberal way so as to accord to subjects the full measure of the rights" therein.[104]

[42] The purpose of the freedom in Article 21(1)(j) must also be assessed, not only by referring to its history and background but also by looking forward at its objectives. The Constitution, after all, is not a memorial of a bygone era but an ever-present compass, its constituent parts carefully composed of our People's collective experiences, values, desires, commitments, principles, hopes and aspirations, by which we seek to navigate a course for the future of our Nation in a changing and challenging world.

[43] We have earlier emphasised the importance of the freedom to engage in a wide range of commercial activities in securing the social, economic and political welfare and prosperity of the country and noted the significant role corporations and enterprises play in bringing about those desirable conditions. The freedom of an individual to choose and practice his or her profession or to carry on any occupation, trade or business of his or her choice is beyond debate. So too, their freedom to do it in partnership or in association with one another. What conceivable reason, one may rhetorically ask, would there have been for the Founders to deny individuals the freedom to do so indirectly (through corporations or corporative enterprises) if their right to do so directly is

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104 Per Strydom ACJ in *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*, 2004 NR 194 (SC) at 209F-G.

guaranteed? We, with respect, endorse the view taken by Justice McLachlin (as she then was) in *R v Zundel*[105] where she said:

> "Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection."

[44] We do not find any justification to exclude juristic persons from the protection of Article 21(1)(j) and hold that the phrase "all persons" in Article 21(1), when read in the context of the freedom protected in paragraph (j) thereof, is inclusive of natural and juristic persons; that the appellant, as a juristic person, is also a bearer of that freedom and, therefore, that it is an "aggrieved person" entitled to approach the Court to seek enforcement or protection of its fundamental freedoms as contemplated by Article 25(2) of the Constitution. The respondents' objection to the appellant's standing is dismissed.

Are the Appellant's activities protected by the freedom?

[45] The second ground raised by the respondents in opposition to the application is that s. 128 of the Act does not limit the appellant's fundamental freedom protected by Article 21(1)(j). The gist of the argument advanced by Mr. Chaskalson in support of this submission is this: The Article protects a fundamental freedom to economic activities that are lawful. It does not entrench a

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105 (1992) 10 CRR (2d) 193 (SCC) at 209

fundamental freedom to unfettered economic activities. The "business" of agency work has been rendered unlawful by s. 128 of the Act.[106] Hence, like other economic activities criminalised by statutory provisions, such as "dealing in drugs", "keeping a brothel" or "dealing in unpolished diamonds," agency work too is no longer included on the menu of lawful business options available to the appellant. It follows, he contends, that Article 21(1)(j) no longer protects it and, therefore, is of no assistance to the appellant. In support, he seeks to rely on the *dicta* in two High Court judgments: *Hendricks and others v Attorney General, Namibia, and Others*[107] and *Matador Enterprises (Pty) Ltd t/a National Cold Storage v Chairman of the Namibian Agronomic Board.*[108] Compared to those cases, he submits, this is an *a fortiori* case because agency work also derogates from the principle that "labour is not a commodity" entrenched in the Philadelphia Declaration to which Namibia is committed under Article 95(d) of the Constitution and because, unlike the activities considered in those cases, agency work did not exist in Namibia at the time when the Constitution was adopted.

[46] Mr. Smuts accepts on behalf of the appellant that Article 21(1)(j) presupposes the carrying on of a lawful business, trade or occupation as held in

106 The Court *a quo* decided it on a different basis as discussed earlier: i.e. that agency work was "not lawful" because contracts of employment under common law do not countenance an arrangement whereby the employer (the agency service provider) supplies his or her employees to work at a workplace controlled by a third party (the agency client) and because, the Court added, such an arrangement violates a fundamental principle on which the ILO is based, namely, that "labour is not a commodity".

107 *Supra,* at 357H-359A

108 Unreported judgment of the High Court in Case No A326/1999, 3 April 2003, pp 21 – 22.

the *Hendricks'*-case - a concession, which counsel for the respondents claims, is the death knell to the appellant's case. Given the respondents' reliance on *dicta* in the two judgments, it is perhaps apposite to consider them – and the support which the respondents are seeking to draw from them - more closely.

[47] In *Hendricks'* case, the applicants, amongst others, challenged the constitutionality of s. 2(1) of the Combating of Immoral Practices Act, No. 21 of 1980. The section criminalised the keeping of a brothel. One of the grounds on which the challenge was based, was that the applicants' fundamental freedom to economic activity as contemplated by Article 21(1)(j) was diminished by the prohibition. In discussing the challenge brought on that premise, the Court held that it was "implied by that Article that the protected right relates to a profession, trade, occupation or business that is lawful."[109] The Court then discussed the history and background of the Article and held that "(t)hose who founded this country's constitutional future … never contemplated or intended to create a constitutional right to be or become a professional pedophile, assassin, kidnapper or drug lord"[110] and concluded:

> "It is against Namibian law to keep a brothel. Unless the law is unconstitutional for another reason, it cannot be unconstitutional on account of Art 21(1)(j) simply

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109 At 357I.

110 At 358B-C.

because the business of 'keeping a brothel' is not included in the menu of lawful business options available to the applicants."[111]

[48] Before we analyse the respondents' reliance on this judgment – especially on the last sentence of the quoted passage – we must briefly refer to the structure and construction of Article 21. Sub-Article (1) sets the norm: it sets the constitutional benchmark of the protected fundamental freedoms enumerated therein. In gathering their scope and meaning before regard is had to limitations permitted under Sub-Article (2), they must be construed broadly, liberally and purposively – in a manner most beneficial to the widest *possible* amplitude. But, they are not absolute.[112] Had they been, everyone would be subject to the tyranny of the others' boundless freedoms. With no measure to determine where the legal sphere of the one's "unlimited" rights and freedoms ends and that of the other begins, the rule of law would have little or no application and anarchy, conflict and chaos are certain to follow. The Constitution, therefore, expressly allows for their limitation. Sub-Article (2) exhaustively defines permissible limitations to the freedoms. It circumscribes exceptions to the norm.[113] The

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111 At 358J-359A.

112 In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others,* 2003 (3) SA 389 (W) Epstein AJ stated at 425G: "I reiterate that the rights contained in the Bill of Rights are not absolute." Referring to the constitutional dispensation in that country, he continued: "Rights have to be exercised with due regard and respect for the rights of others. Organised society can operate only on the basis of rights being exercised harmoniously with the rights of others. Of course, the rights exercised by an individual may come into conflict with the rights exercised by another and, where rights come into conflict, a balancing process is required."

113 C.f. Sieghart, "*The International Law of Human Rights*" p 19 (1985 Clarendon Press, Oxford) with reference to the report of the European Commission for Human Rights in *Handyside v United Kingdom*, (5393/72) Report: 30/9/1975.

introductory words of the Sub-Article make it clear: "The fundamental freedoms referred to in Sub-Article (1) shall be exercised subject to the law of Namibia …". The boundaries within which the protected freedoms under the Constitution may be exercised must, as a first step, be ascertained with reference to the "law of Namibia" as it applies. If the constitutionality of such a law is challenged on the basis that it impermissibly derogates from or diminishes a protected freedom, the Court will also assess, during the first phase of the enquiry into the constitutionality of the impugned provision, whether it indeed limits the exercise of a fundamental freedom and, if so, determine the extent of the limitation. If it does not limit it, *cadit quaestio*. If it does, then the Court must proceed to the second stage of the constitutional enquiry.

[49] Being the "Supreme Law of Namibia",[114] the Constitution delineates the general scope of permissible limitations to the exercise of the fundamental freedoms permitted in other laws of Namibia - whether such be by legislation enacted after Independence or the customary laws, common law or other laws in force in Namibia at the date of Independence which, subject to the Constitution, may still be of application. The phrase "… in so far as such law imposes …", which follows immediately upon the introductory words in Article 21(2) but precedes the constitutional definition of permissible limitations following upon it, clearly conveys that the exercise of fundamental freedoms is only subject to laws

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114 See: Article 1(6) of the Constitution. Also: *S v Scholtz,* 1998 NR 207 (SC) at 218F.

which impose restrictions falling squarely within the limitations authorised by Sub-Article (2). To the extent that the "law of Namibia" may purport to impose restrictions falling outside the scope of what is permissible under the Sub-Article, they are unconstitutional and, thus, unenforceable. The second stage of an enquiry, therefore, seeks to determine whether the limitation which the impugned provision purports to impose on the exercise of the freedom is constitutionally permissible or not.

[50] It is apparent from this brief analysis that, in establishing the actual boundaries within which the fundamental freedoms may be enjoyed, Sub-Articles (1) and (2) of Article 21 must be read together: the norm as qualified by the exception; the fundamental freedom as circumscribed by the law only in so far as the latter imposes restrictions which are constitutionally permissible. Therefore, when read in context, Article 21(1)(j) in effect only protects lawful economic activities. If certain economic activities are proscribed by legislation lawfully enacted, i.e. enacted in accordance with the Constitution, those activities may no longer be exercised as contemplated by Sub-Article (2) or, as the Court stated in *Hendricks'* case, they are no longer on "the menu of lawful business options available." Similarly, if certain economic activities are unlawful under common law, i.e. so much of the common law as does not conflict with the Constitution or

any other statutory law,[115] those activities are illegal and, they too, are not available on the "menu".

[51] We interpose here to note that, when we refer to legislation enacted “in accordance with the Constitution” and so much of the common law “as does not conflict with the Constitution”, we also include, particularly in the context of this case, reference to constitutionally permissible limitations allowed by Article 21(2). As pointed out earlier, statutory, customary or common law restrictions that fall outside the ambit of permissible limitations under Sub-Article (2) are unconstitutional. Impermissible restrictions contained in legislation cannot be considered as “legislation lawfully enacted” and, if they are part of customary or common law, the impermissible restrictions ceased to be valid law under Article 66(1) of the Constitution upon the date of Independence. If the limitation of a fundamental freedom by “the law of Namibia” is unconstitutional, the scope of the fundamental freedom is not circumscribed by it. To hold otherwise would be to put the proverbial cart before the horse.

[52] This is a consideration which, seemingly, escaped the Court *a quo.* It held that agency work "is unknown, nay, offensive of, our law of contract of employment at common law" and, therefore, that it was not a lawful “economic activity protected by Article 21”. We have already dealt with - and disposed of –

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115 See: Article 66(1) of the Constitution which provides: “Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.”

this finding. But even if the Court *a quo* was correct that agency work - or the basis on which it was being carried on – was not a lawful economic activity at common law, it does not follow without more that it is not a lawful economic "activity protected by Article 21" – as the Court *a quo* held. The latter conclusion could only have followed, had the Court *a quo* also enquired whether the restriction of those activities at common law fell clearly and unambiguously within the ambit of permissible limitations authorised by Article 21(2) and concluded that they did. If they did not, the common law restrictions would have been unconstitutional and the activity (to carry on the business of an agency service provider) – at least as far as the common law was concerned – would still be protected by Article 21(1)(j). However, no such enquiry was made, probably because the respondents did not rely on common law for their contention that the business of an agency service provider was not a protected economic activity: they relied exclusively on the provisions of s. 128 of the Act for that contention.

[53] The respondents' contention that, because the "business" of agency services has now been rendered unlawful by s. 128 of the Act, it is no longer and economic activity protected by Article 21(1)(j) is based on a similar misconception: it does not follow, simply because an economic activity is rendered unlawful on the face of a statute, that it falls, without more, outside the protection of the fundamental freedoms entrenched in Article 21. Such a conclusion would be justified only if the statutory prohibition or restriction of that activity is also permissible under Article 21(2). As we have pointed out earlier, the

fundamental freedoms referred to in Article 21(1) must "be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article …". If, at the first phase of the enquiry, the Court finds that the impugned statutory prohibition or restriction constitutes a limitation of a fundamental freedom, it is not the end of the enquiry – as the respondents suggest. The words “in so far” compels the Court to proceed to the second step of the enquiry, i.e. to ascertain whether or not the prohibition or restriction falls clearly and unambiguously within the ambit of permissible limitations authorised by Article 21(2). If it falls outside the permissible scope thereof, the prohibition or restriction is to that extent unconstitutional and the freedom to carry on the economic activity purportedly prohibited or restricted by the statutory provision, remains unaffected. If the prohibition or restriction is permissible under Article 21(2), the activity is unlawful and may no longer be exercised as part of the bouquet of protected freedoms under Article 21(1).

[54] The respondents’ proposition seeks to circumvent the second phase of the enquiry, i.e. into the constitutionality of the limitation. It suggests that, once an economic activity is rendered unlawful by a statutory provision, it is no longer a lawful activity protected under Article 21(1)(j) and, consequently, that the permissibility of the restriction under Article 21(2) does not arise as an issue at all. If this contention is correct, the Legislature, in effect, could avoid the constitutional review of statutory restrictions on protected freedoms altogether.

This would fly in the face of constitutional checks and balances, the rule of law and the structure of constitutional review contemplated by Articles 25, 79 and 80. It would allow for the legislative erosion of the fundamental freedoms contrary to the constitutional limitation set by Article 21(2). This is clearly not what *Hendricks*' case suggests.

[55] The *dictum* in *Hendricks'* case on which the respondents are seeking to rely does not support their contention. As we noted earlier, the High Court was called on in that case to decide the constitutionality of a statutory provision proscribing the keeping of brothels. In dealing with that provision in the context of Article 21(1)(j), the Court held: "Unless the law is unconstitutional for another reason, it cannot be unconstitutional on account of art 21(1)(j) simply because the business of 'keeping a brothel' is not included in the menu of lawful business options available to the applicants." In what followed, it examined the "other reason" for unconstitutionality relied on by the applicants (i.e. that the proscription amounted to an impermissible limitation under Article 21(2)). After a lengthy analysis, it concluded that the proscription was permissible and, therefore, that the provision was constitutional. We agree, with respect, that a law cannot be unconstitutional "simply" because it excludes a particular economic activity from the menu of freedoms protected under Article 21(1)(j). Had it been different, Parliament would not have been able to prohibit or restrict certain "undesirable" activities even if it would be necessary or justified to do so. The Court's *dictum* therefore makes it clear that the exclusion of an economic activity from the

"menu" may be unconstitutional for other reasons: such as that it is not justified when measured by the criteria allowed under Article 21(2) or that it is an activity proscribed by the Constitution itself.[116] Once a Court finds that the proscription is not unconstitutional for any "other" reason – as it did in *Hendricks'* case – it cannot be unconstitutional just because the proscribed activity is no longer on the menu of available options. That is how we understand the *dictum* in *Hendricks'* case and, it is evident from the judgment, that it is also how the High Court approached the constitutional issues before it in that case.

[56] The other *dictum* in Hendricks' judgment on which the respondents rely is to the effect that the freedom protected by Article 21(1)(j) "relates to a profession, trade, occupation or business that is lawful". The "business" of agency work having been rendered unlawful by s. 128 of the Act, they contend, it no longer falls within the ambit of that freedom. In support, they seek to draw a parallel in principle between the statutory provision which proscribes the keeping of brothels and s.128 of the Act. We have pointed out earlier that, on a proper construction of Article 21(2), an activity cannot be labelled as "unlawful" in a constitutional context (and thus be excluded from ambit of a protected freedom) simply because it is prohibited by law and emphasised that it may only be so regarded for purposes of Article 21(1)(j) if the restriction imposed by law on the exercise of that fundamental freedom is also constitutionally permissible. Only if the restriction of the fundamental freedom can be brought squarely within the

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116 Such as slavery or forced labour by Article 9 of the Constitution.

narrow scope of permissible limitations defined in Article 21(2), will it pass constitutional muster and be allowed to constrain the exercise of that freedom. The restrictions authorised by Article 21(2) "must be used only to establish the proper boundaries of the protected right…".[117] The parallel which the respondents are seeking to draw is therefore misconceived: the keeping of brothels is not a lawful activity protected by Article 21(1)(j) just ("simply") because it is proscribed by statute, but is so regarded for the time being[118] because the constitutionality of the proscription was tested against the criteria set by Article 21(2) and found to be constitutional in *Hendricks'* case. In the case of s. 128, it is the very issue which remains to be decided and to which we shall turn shortly.

[57] The other examples referred to by the respondents ("dealing in drugs" or "dealing in unpolished diamonds") have not been the subject of a constitutional challenge and we do not consider it prudent to express any views thereon.

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117 Sieghart, *op. cit.,* p 19.

118 We use the qualification "for the time being" advisedly because the concepts of "decency or morality" referred to in Article 21(2) are "living" concepts which continuously draw on the changing values of society and, when applied to the same issue in future, may conceivably result in a different assessment. Compare, by parity of reasoning, the treatment of a "value judgment" which the Court brought to bear on the notion of "cruel and inhuman punishment in *Ex Parte: Attorney-General Namibia; In re Corporal Punishment by Organs of State*, 1991 NR 178 (SC) where Mahomed AJA said at 188D-F: "It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy."

[58] The *Matador*-case provides even less support for the respondents' contentions. The applicant in that matter challenged the constitutionality of conditions imposed by the Namibian Agronomic Board on the importation of wheaten products on the basis that it diminished its freedom to carry on a business protected under Article 21(1)(j). Neither the constitutionality of the Agronomic Industry Act, 1992, nor the constitutionality of the Minister's prohibition to import certain wheaten products "except by the holder of a permit issued at the discretion of the Board and in accordance with such conditions as may be stated by the Board," was challenged. The Court cited some of the remarks made in *Hendricks'* case with approval and, based thereon, held:

> "It is against the law in Namibia to import wheaten products unless permitted to do so by the Board. Unless the law proscribing that activity is unconstitutional or unlawful for another reason, it cannot be unconstitutional on account of Article 21(1)(j) for the Board to attach conditions to such import. On the contrary, it is by that very law required to do so in appropriate circumstances."

What was at issue, was the constitutionality of the impugned administrative act of prescribing conditions subject to which the Board had issued permits for the import of wheaten products. Even if the unconstitutionality of the administrative act would be assumed, it does not follow that the enabling provision under which the functionary purported to act is also unconstitutional. It follows, as we understand the Court's *dictum*, that if the enabling law was also unconstitutional, it would have had to be for another reason. The Court did not expound on those reasons, presumably because the constitutionality of the Act and the Minister's conditional prohibition on imports were not the subject matter of the challenge

but, if an indication may be obtained from *Hendricks'* case (which was in part echoed in the judgment), they may well have related to the limitation in Article 21(2) – which we have already dealt with earlier in this judgment.

[59] The respondents' references to Article 95(d) of the Constitution, Namibia's membership of the ILO, the Philadelphia Declaration and the principle that "labour is not a commodity" under this point have been made in support of their submission that this case is an *a fortiori* case when compared to those of *Hendricks* and *Matador*. It is not necessary to deal with those references in deciding this issue (although we shall return to them when we deal with the issue of justification) because, in the view we take, those judgments do not support the respondents' contention that, just because s. 128 of the Act proscribes agency work, it is excluded, without more, from the scope of the appellant's fundamental freedom protected by Article 21(1)(j). This ground of opposition advanced by the respondents begs the question whether the prohibition is constitutionally permissible.

[60] For these reasons, we find that the appellant's business as an agency service provider falls within the ambit of economic activities protected by the fundamental freedom to carry on any trade or business under Article 21(1)(j) of the Constitution.

Does the s. 128-prohibition trench on the protected freedom?

[61] The appellant's challenge to the constitutionality of s.128 of the Act is brought on the basis that the proscription of agency work infringes on its freedom to carry on a trade or business entrenched in Article 21(1)(j). In support, the executive chairperson of appellant's board of directors gave an extensive exposition of the appellant's operations. We have captured the substance thereof earlier in this judgment. It is evident from his affidavit - and not in dispute, we should add - that the primary nature of the appellant's business is that of an agency service provider. It is also not in dispute that the appellant has been in that business for more than 10 years and that it accounts for more than 90% of its revenue.

[62] Given the benchmark set by Article 21(1)(j); the generous construction to be accorded to it – as we have held earlier - and the undisputed nature of the appellant's principal economic activity as an agency service provider, we are satisfied that the appellant's business falls within the general ambit of the freedom protected by Article 21(1)(j). The evidence also shows that, if s. 128 is implemented,[119] the appellant would have to cease its business as an agency service provider altogether. Thus, the appellant established both on evidence and in argument – and therefore discharged the burden it had to show - that s. 128, in effect, seeks to impinge the fundamental freedom to carry on a trade or business

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119 Implementation of the prohibition has been suspended by the High Court pending the outcome of this appeal.

by excluding the business activities defined therein from the general scope of the freedom.[120]

[63] This, it seems, was also Parliament's intention. It elected not to regulate agency work, as the Bill tabled in the National Assembly initially proposed, but rather to prohibit it. Its intent to limit the fundamental freedom to economic activities to that extent, is manifested in the constitutional authority for the limitation which it expressly relies on in s. 128(4) of the Act:

> "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."

This subsection was not included in the text *ex abundanti cautela* because "Parliament acted in the mistaken belief and under the misapprehension that labour hire is an economic activity protected by Article 21" - as the Court *a quo* erroneously held on the basis of common law - but in the proper discharge of Parliament's constitutional obligation under Article 22(b), which reads:

> "Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

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120 In *Ferreira v Levin NO; Vryenhoek v Powell NO,* 1996 (1) SA 984 (CC) at 1012B-D Ackermann J acknowledged that the "task of interpreting the chap 3 fundamental rights rests, of course, with the Courts" but noted that "it is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question". See also: Hogg, *supra,* p 35.7 where he says with reference to the Canadian Charter of Rights: "At the first stage of Charter review, the court must decide whether a Charter right has been infringed. This issue is subject to the normal rules as to burden of proof, which means that the burden of proving all elements of the breach of a Charter right rests on the person asserting the breach."

(a) …

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest."

[64] The appellant, therefore, showed that the purpose and the effect of s. 128 is to restrict the economic activities protected by Article 21(1)(j). What remains, therefore, is to examine whether the restriction is constitutionally permissible under Article 21(2).

Is the s.128-restriction constitutionally justified?

[65] The scope of constitutionally permissible restrictions to fundamental freedoms was restated by this Court in *Kauesa's* case:[121]

> "The limitations are set out in art 21(2). Freedoms shall be exercised in accordance with the law of Namibia only if that law imposes reasonable restrictions on the exercise of the rights and freedoms entrenched in art 21(1)(a). The restrictions must be necessary in a democratic society. Not only must they be necessary in a democratic society, they must also 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 commit an offence."

Under the limitation clause, the otherwise generous application and free exercise of fundamental freedoms may be circumscribed. As such, it constitutes an exception to the norm and must, therefore, be construed strictly, lest it be abused

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121 *Supra*, at 185H-I

to confine the exercise of freedoms to a narrower scope than that intended by the Founders.[122] The Constitution does not countenance the restriction of fundamental freedoms on grounds other than those mentioned in Article 21(2). Moreover, the party relying on the law which purports to restrict the fundamental freedom – not the one who challenges its constitutionality - bears the burden to show that the restriction is constitutionally justified.[123] In sum: Anyone who seeks to justify the limitation of a fundamental freedom by law bears the burden to show that the justification falls clearly and unambiguously within the terms of permissible constitutional limitations, interpreted objectively and as narrowly as the Constitution's exact words will allow.[124]

[66] The three criteria prescribed in Article 21(2) for a restrictive measure to pass constitutional muster as a permissible limitation are cumulative and in addition to those required by Article 22. They are interrelated and often applied collectively in assessing the constitutionality of a restriction but, ultimately, the Court must be satisfied that each of the criteria has been satisfied. It must also

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122 Compare: *Kauesa's* case, *supra*, at 190F-G and 191A-B; *Fantasy Enterprises CC Hustler The Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others,* 1998 NR 96 (HC) at 101J-102A:

123 See: *Kauesa's case*, *supra*, at 189I-J; *S v Makwanyane and Another, supra,* at 435I-436A;

124 To paraphrase the words of Sieghart, *op. cit.,* p.19: "…where a text confers a legal right, anyone who wishes to take advantage of some other provision of that text to restrict or limit the right conferred has the burden of establishing that his case falls clearly and unambiguously within the terms of that other provision, interpreted objectively and as narrowly as its exact words will allow."

be noted that the manner in which the permissible restrictions in Article 21(2) are worded and combined is unique to our Constitution and, in some respects, more stringent than comparative provisions in the constitutions of other countries. Comparable limitation clauses in the Constitution of India, the Charter of Rights in Canada and the European Convention for the Protection of Human Rights and Fundamental Freedoms have been quoted or discussed in Kauesa's case[125] and those of South Africa (both in their Interim Constitution and Final Constitution) have been cited and analysed in a large number of cases within that jurisdiction.[126] We do not find it necessary for purposes of this judgment to recite them and, in each instance, compare and distinguish their provisions from the formulation of Article 21(2). We nevertheless note the differences to remind ourselves that, useful and authoritative as the judicial interpretation and application of limitation clauses in other jurisdictions may be, they may inform us on similar criteria but must be distinguished on others.

[67] The three criteria, whether applied jointly or severally in determining the constitutionality of a limiting measure, are interrelated by the overarching requirements of "proportionality" and "rationality". They are implicit in the words "reasonable", "necessary" and "required". Every restrictive measure must be

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125 *Supra*, at 118A-F; 185A-B and 188H-J.

126 For the text of s. 33 of *the Constitution of the Republic of South Africa Act, 200 of 1993*, see *S v Makwanyane and Another*, *supra*, at 434H-435B and that of s. 36 of the *Constitution of the Republic of South Africa Act, 108 of 1996*, see *Gumede v President of Republic of South Africa and Others*, 2009 (3) SA 152 (CC) at 168H footnote 40.

rationally related and proportionate to the constitutionally permissible objective it seeks to attain. The requirement of proportionality in the context of the first two criteria has been explained by Chaskalson P in *Makwanyane's* case:[127]

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. … The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis."

As to what the requirement of proportionality entails, he reasoned that it involves a balancing of different interests which –

> "will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

This approach, made with reference to s.33 of the Interim Constitution of South Africa, was subsequently incorporated, by and large, in the formulation of s. 36(1) of that country's Final Constitution. In Canada, the approach to justification of a

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127 *Supra*, at 436C-E.

restrictive measure under article 1 of the Canadian Charter[128] is somewhat differently structured. Dickson CJC articulated it as follows in *R v Oakes*:[129]

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v Big M Drug Mart Ltd* (*supra*). . . . The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.
>
> Secondly, once a sufficiently significant objective is recognised, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Ltd* (*supra*). Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.
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> There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd* (*supra*). Thirdly, there must be a proportionality between the effects of the

128 It provides as follows: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

129 [1986] 1 SCR 103 at 138-139

measures which are responsible for limiting the Charter right of freedom, and the objective which has been identified as of "sufficient importance"

[68] Unlike Article 21(2), neither s. 33 of the Interim Constitution of South Africa nor s.1 of the Canadian Charter expressly required/requires compliance with a third criterion, i.e. that the restrictions must also 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". Whereas, in those jurisdictions, the purpose of the limitation and its importance in a democratic society is considered as an incidence of the proportionality-requirement, the approach in Namibia is different: Article 21(2) elevates it to a substantive criterion; exhaustively defines the permissible objectives which legal restrictions must be designed to achieve and sets a measure – in addition to the others prescribed in the Sub-Article - by which their constitutionality falls to be assessed, i.e. the need for the restrictive measure must be so pressing, substantial and essential that it is "required" in the interest of one or more of the defined objectives.

[69] The principal objects of the Act are set out in its preamble, parts of which we have quoted in part earlier in this judgment. Its purpose is to promote and maintain the welfare of the people of Namibia and to further a policy of labour relations conducive to economic growth, stability and productivity by –

> “promoting an orderly system of free collective bargaining;
> improving wages and conditions of employment;

advancing individuals who have been disadvantaged by past discriminatory laws and practices;

regulating the conditions of employment of all employees in Namibia without discrimination on grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status, in particular ensuring equality of opportunity and terms of employment, maternity leave and job security for women;

promoting sound labour relations and fair employment practices by encouraging freedom of association, in particular, the formation of trade unions to protect workers' rights and interests and the formation of employers' organisations;

setting minimum basic conditions of service for all employees;

ensuring the health, safety and welfare of employees at work;

prohibiting, preventing and eliminating the abuse of child labour;

prohibiting, preventing and eliminating forced labour; and

giving effect, if possible, to the conventions and recommendations of the International Labour Organisation"

The pursuit of these objects falls within the parameters of the policies which the State is constitutionally enjoined to adopt under Article 95. We have extracted the relevant policies from Article 95 and cited them earlier in this judgment. Those policies recognise the importance of labour, sound labour relations (including the role of independent trade unions in it), fair employment practices, reasonable remuneration and adherence to international labour standards to "the welfare of the people". The human and societal values underlying these policies are generally self-evident. One of them, which may perhaps not be so apparent at first blush, follows from Namibia's membership of the ILO and the fundamental principles upon which that organisation is based as reasserted by the adoption of the Philadelphia Declaration.[130]

130 On 19 May 1949 by the General Conference of the ILO concerning the aims and purposes of the ILO and the principles which should inspire the policies of its members.

[70] The principle that "labour is not a commodity" is often referred to and heavily relied on by the respondents in these proceedings. Whilst we acknowledge that the meaning thereof is not always uniformly understood – the colour attributed to it often depends on the socio-political perspective of the "beholder" – and that both real and philosophical distinctions may be drawn between "labour" and "labour power," the undeniable basic premise thereof is that labour is not a tradable innate object but an activity of human beings. Unlike a commodity, it cannot be bought or sold on the market without regard to the inseparable connection it has to the individual who produces it: it is integral to the person of a human being and intimately related to the skills, experience, qualifications, personality and life of that person. It is the means through which human beings provide for themselves, their dependants and their communities; a way through which they interact with others and assert themselves as contributing members of society; an activity through which to foster spiritual wellbeing, to enhance their abilities and to fulfil their potential. All these elements must be brought into the equation of labour relationships if social justice and fairness are to be achieved at the workplace; if social security, stability and peace are to be maintained. Employees may be subordinate to their employers in employment relationships but that does not mean that they are lesser beings or that they do not have equal rights and freedoms as such.

[71] Unfortunately, bargaining imbalances between employers and employees resulted in bilateral employment relationships which did not accommodate adequate measures of social responsibility for the wellbeing of employees; where labour was bought (and sold) as if a commodity detached from the human aspect thereof. These unfair employment relationships were sometimes supported by discriminatory laws and structures. A typical example thereof is the contract labour system referred to at the outset of this judgment: the discriminatory laws and strict structure of influx control within which it operated in substance, resulted in the dehumanisation of contract workers and their treatment as mere units of labour: as commodities. Hence, it became necessary – here and elsewhere in the world where those inequalities subsisted – to impose minimum standards and conditions of employment by intrusive laws[131] that recognise the social aspects of labour and protect the interests of the individuals who render it, especially those most vulnerable to exploitation.

[72] The principle that "labour is not a commodity", the labour policies which the State is constitutionally enjoined to implement, the objects of the Act and the provisions seeking to give effect thereto have strong undertones of morality and decency. We therefore find that the multiple objects of the Act as stated in its preamble are consonant with the constitutionally permissible objectives of "decency or morality" under Article 21(2). Those are also the objectives which are

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131 Compare *National Automobile and Allied Workers Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd,* 1994 (3) SA 15 (A) where

identified in s. 128(4) of the Act and relied on by Parliament as authority for the prohibition.

[73] In seeking to establish a rational relationship between the prohibition in s. 128 and those objectives, the respondents strongly contend that the principal features of agency work are inimical to the objects of the Act and subversive to the scheme of social security benefits which the State is constitutionally enjoined to provide. They highlighted a number of features which we shall refer to in more detail later in this judgment but may be conveniently summarised at this juncture as the casualisation of employment and resultant commodification of labour. "Casualisation,"[132] because agency work arrangements "essentially dilutes the content of the standard employment relationship"[133] and enable agency service providers and agency clients to circumvent the requirements of the Act and its regulation of employment relationships in numerous ways. Moreover, because permanent workers are increasingly replaced by agency workers, the number of workers who enjoy protection of their social benefits under the Act is decreasing. "Commodification" because, once permanent workers become agency workers, they are no longer under the umbrella of the entire range of protective measures accorded to them by the Act; they are vulnerable to exploitation; they are more likely to be treated as units of labour and may be disposed of by agency service

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132 Paul Benjamin, *op cit.,* at 790 explains the concept as follows: "Casualization is best understood as the process of shaping employment relations to deprive workers, particularly vulnerable workers, of their basic statutory rights as employees."

133 *Per* Theron "*Employment Is Not What It Used To Be*", (2003) 24 ILJ 1247 at 1250

providers without any social responsibility. By prohibiting agency work, Parliament sought to preclude these consequences and their deleterious effect on the attainment of the Act's objects.

[74] Although the appellant denies that it is guilty of such practices, it acknowledges the danger and likelihood of exploitation if agency work remains unregulated. It supports the principle that there could and should be regulative measures to ensure that agency service providers comply with acceptable employment standards and to eradicate exploitative and unconscionable labour practices. If properly regulated, the appellant submits, there would be nothing indecent or immoral about agency work. The appellant and the respondents thus agree that unless exploitative and unconscionable agency services are addressed by appropriate legal measures, those practices are likely to continue. They differ on how it is to be addressed: The appellant propose regulation. The respondents support the prohibition thereof altogether – a restriction which the appellant contends is disproportionate, unreasonable and unconstitutional. It submits that the same objectives may be achieved by less restrictive regulatory measures. But for these differences, the appellant does not really take issue with the respondents' contention that there is a rational connection between the prohibition and the permissible constitutional objectives of decency and morality.

[75] What the appellant has taken issue with – and strongly so – is the respondents' assertion that the historical experiences of Namibians under the

pernicious contract labour system constitutes a rational basis for the prohibition of “labour hire” in the interest of decency and morality. This assertion, repeatedly made on behalf of the respondents, is perhaps best captured in the following extract from the answering affidavit of the Permanent Secretary: Ministry of Labour and Social Welfare:

> "I submit that parliament in outlawing labour hire discharged a historical obligation which arose out of the fight for freedom and independence against colonialism, apartheid and the inhuman and degrading contract labour system personified by SWANLA. In outlawing labour hire, parliament expressed the desire of the majority of the Namibian people to reject systems that undermine human dignity favour of corporate profits. I submit that in light of our historical experience, outlawing labour hire is justifiable on the basis that it is immoral and offends against general standards of decency.”

The appellant vehemently denies that the business of agency service providers is remotely similar to that of recruitment and placement agencies under the contract labour system. It emphasised in affidavits filed on its behalf that the statutory framework within which the contract labour system functioned was essentially a means of influx control, backed up by an array of offensive and coercive components which facilitated and resulted in the degrading and inhuman treatment of workers at the workplace and elsewhere. The discriminatory and coercive legal framework for contract labour was abolished many years ago and the current legal framework within which agency work is being performed bears no resemblance to it. Moreover, under the contract labour system, labour recruitment and placement agencies (such as SWANLA) did not engage the

workers as their employees; did not remunerate them and did not become a party to the resultant employment contract between the employer and the employee. Ironically, the appellant contends, the relationship between agency, employer and employee under the contract labour system is more akin to that "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" – an activity which is expressly excepted and protected by s. 128(2) of the Act. Thus, the appellant submits that, inasmuch as the respondents are seeking to rely on historical reasons as justification for the prohibition, their reasoning is fallacious and unsupported by facts and the law.

[76] The phrase “labour hire”, used in common parlance to refer both to the hated contract labour system and to the more recent concept of agency work, evidently contributed to the one being confused with the other. The emotive content added by history to that phrase – which we have expounded on at the outset of this judgment – clouded the rationality of the parliamentary debate and the *nexus* which the respondents are seeking to draw between the morally offensive contract labour system and agency work in justification of the latter’s prohibition. They are, however, not the same – not by the activities they comprise or, for that matter, the relationships they give rise to.

[77] The first, and probably one of the more significant distinguishing factors, is the dramatically different economic contexts under which those concepts evolved and legislative matrixes within which they manifested in practice. The contract labour system was structured on - and a constituent component of - an array of discriminatory laws implemented as part of a system of institutionalised apartheid. We have listed many of those laws earlier in this judgment and demonstrated how they classified Namibians on the basis of race and segregated, isolated, repressed and, ultimately, exploited indigenous Namibians. Those draconian laws, and the policies accompanying them, exacerbated poverty in the then Northern reserves and, together with the stringent enforcement of influx control, created coercive conditions which effectively narrowed down the available legal options for obtaining employment to one: recruitment and placement by agencies, such as SWANLA, under the despised contract labour system. Employment under that system was subject to an array of offensive regulatory provisions which, amongst others, criminalised non-performance of a number of contractual obligations by workers. Once employed under the system, they were essentially stuck with the employer who had contracted them; there was virtually no mobility allowed in the employment market; they were required to wear tags around their wrists or necks to identify themselves by number and classification as contract workers; they were generally paid the very minimum as a wage; they had no social security network, no entitlement to leave during the contract period and, once their contracts had expired, they had to return to the reserves where they registered initially for

purposes of the placement or had to face the possibility of imprisonment and forced repatriation at their own cost. None of those laws apply in a post-independence Namibia. Racial discrimination, the practice and ideology of apartheid and its propagation have been banished;[134] all people are equal before the law and may not be discriminated against on grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status;[135] may move freely throughout Namibia[136] and withhold their labour without being exposed to criminal penalties.[137] An employee's performance under a contract of employment is no longer enforced by the threat of criminal sanction.

[78] When stripped of the discriminatory and coercive laws, practices and policies which gave the contract labour system its pernicious character, the exposed nature of employment services provided by recruitment and placement agencies (such as SWANLA) is more akin to the type of placement services preserved by s.128(2) of the Act. The most defining features of employment placement services are that the employment agency matches offers of and applications for employment and that it does not become a party to the

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134 See: Article 23(1) of the Constitution and the provisions of the Racial Discrimination Prohibition Act, No. 26 of 1991.

135 See; Article 10.

136 Article 21(1)(g).

137 Article 21(1)(f).

employment relationships that may arise therefrom. These features correspond in substance with the type of employment services provided by agencies such as SWANLA: they matched recruited employees with employers who had placed labour requisitions with them and they did not become parties to the employment relationships between the employees and their employers resulting from the match.

[79] These defining features distinguish contract labour from the type of employment services being rendered by agency service providers such as the appellant: unlike SWANLA, agency service providers employ their employees (as s. 178(1) contemplates); they assume the contractual and statutory obligations of an employer towards those employees; they remunerate the employees and, when they hire out the services of their employees to third parties in terms of commercial arrangements, they are part of the triadic employment relationships which arise therefrom. Mr Chaskalson concedes these differences but contends that agency work shares a number of offensive features with the SWANLA system: Workers are treated merely as units of labour to be procured by an employer through a third party; it allows for employers to get rid of workers who they regard as "troublemakers", inefficient or unfit; it prevents workers from choosing the employer for whom they work and it purports to release the employer of responsibility for benefits of workers. Some of the parallels he is seeking to draw are rather tenuous, more so if regulative measures would be put in place to prevent abuses as contended for by the appellant. We must note to

his credit that he qualified the submission by referring to the position in "Namibia today", i.e. a position where, as a result of the suspended prohibition of agency work, no measures have been enacted to regulate it as a business. We do not understand that it is one of the *naturalia* of agency work that employees may not withhold their labour or that they may not refuse to work for certain agency clients.[138] Inasmuch as s.128(1) contemplates that agency service providers are also the employers of the agency workers, they, in principle, are bound by the Act to accord agency workers their social benefits under the Act and, whilst some of those obligations may be circumvented in practice, substantive compliance may be assured by proper regulation and enforcement.

[80] The much maligned contract labour system of yesteryears and the more modern concept of agency work may both bear the same label - “labour hire” - but, in reality, in law and judged by the nature of the employment relationships they result in, they have very little in common under our current constitutional dispensation. Hence, the support which the respondents are seeking to find in the abusive contract labour system to justify the prohibition of agency work is misplaced. With respect to contrary views expressed during the debate in Parliament, these distinctions have not been adequately appreciated and we are constrained to conclude that there is no rational relationship between the immoral SWANLA-like contract labour system and the prohibition of agency work on

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138 Compare: Cheadle, “*Regulated Flexibility: Revisiting the LHA and the BCEA*”, (2006) 27 ILJ 663 at 628.

grounds of decency and morality. In fact, to seek to rely on the immorality of those historical labour practices as a reason to ban agency work under s. 128(1) and yet, by the stroke of the same pen in the very next subsection, preserve and protect employment placement services – which is also a type of "labour hire" practice sharing many more similarities with the recruitment and placement services by SWANLA – sounds like selective reasoning.

[81] Albeit not for historical reasons, we are nevertheless satisfied for the other more substantial reasons we have referred to earlier that the respondents established a rational causal relationship between the proscriptive provision in s. 128(1) of the Act and the constitutional objectives relied on in subsection (4) thereof. What then remains to be decided is whether the prohibition of agency work constitutes a reasonable restriction which is "necessary": necessary to achieve the permissible objectives of "decency and morality" and necessary "in a democratic society". The notions of what is "reasonable", "necessary" and "required" set an objective standard by which the constitutionality of restrictive legal provisions must be assessed and, at the same time, allow for a margin of appreciation by the lawgiver. They articulate the constitutional demand that any restriction of a fundamental freedom should be reasonable and not extend beyond the limit of measures which are necessary in a democratic society and required in the interest of the legitimate constitutional objectives being pursued.

[82] These requirements for permissible restrictions are central to the appellant's constitutional challenge. As part of its wider challenge, the appellant submits that the prohibition constitutes a limitation which is "hopelessly overbroad and carries within the wide sweep of the ban legitimate and constitutionally protected activities". Similar allegations have been made in its replying affidavit. Expounding on those grounds in argument, Mr. Smuts submits that the section does not only prohibit the type of agency services which the appellant engages in, but a much wider range of activities. He referred as examples to the provision of cleaning services to shopping mall operators, the provision of security guards and even the rendering of professional auditing or legal services to clients. Mr. Chaskalson accepts on behalf of the respondents that the issue of overbreadth has been properly raised on the papers but contends that the appellant knows full well that the target of s.128 is "labour hire". If there is any lack of precision in the meaning of s.128, it does not affect the appellant and, if Parliament would be required to redraft the section with greater precision, the redrafted version will still prohibit “labour hire” in the form that it is practised by the appellant. He submitted that the Court should narrow the scope of the prohibition by reading it down and/or by transposing elements of the definition of “employee” in s.1 to s. 128(1) and limit its meaning accordingly.

[83] We appreciate that the appellant and respondents are eager that this Court should express itself on the constitutionality of the prohibition in so far as it relates to the type of agency services being provided by the appellant. As Mr

Chaskalson correctly observed: it would be a hollow victory for the appellant if the section would be struck down on the basis of overbreadth unrelated to the appellant's core business and Parliament were to redraft the section to target the type of agency services provided by it – thus necessitating yet another constitutional challenge. The main battle lines between the parties were drawn on that basis; that is where they concentrated their effort and hope to find an outcome. Nevertheless, the issue of overbreadth was also raised in relation to other types of agency services - and properly so, we should add. A "litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person".[139] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others,*[140] Ackermann J had occasion to deal with the question "whether the invalidity (being of 'no force and effect') of a statute (as a species of 'law') is determined by an objective or a subjective enquiry". He answered it as follows (at para [26]):

> "…(T)he enquiry is an objective one. A statute is either valid or 'of no force and effect to the extent of the inconsistency'. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of

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139 Per Ackermann J on the objective theory of unconstitutionality adopted by the Constitutional Court in South Africa in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,* 2000 (2) SA 1 (CC) at 22E-G.

140 1996 (1) SA 984 (CC) at 1006D-G.

> one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."

The objective approach in the judicial review of a law's constitutionality expressed in "its most general form … holds that a court's finding of invalidity with respect to a given law is not contingent upon the parties before the court."[141] Had it been otherwise, Yacoob J cautioned,[142] it would carry "with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant. This might mean that a provision of an Act of Parliament may be held valid for one set of circumstances and invalid for another."

[84] The objective approach to constitutionality issues in judicial review proceedings commends itself. More so, because neither the High Court Act nor the Rules of that Court require that the public must be informed of legal challenges to the constitutionality of laws and of the basis on which they are being challenged. A requirement of that nature will allow those with an interest adequate for standing to intervene as litigants subject to such directions as to the

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141 See: Woolman *et al.,* "*Constitutional Law of South Africa*", (Vol. 2) p 34-42, para. 34.6 footnote 5.

142 In *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others,* 1998 (4) SA 1157 (CC) at 1181D-F.

Court may seem meet or to make submissions as *amici curiae,* either by consent of all the litigants or if leave is granted upon application subject to such conditions as the Judge President or the Court may deem appropriate. Without publication, the prospect of any other parties seeking to join in under Rule 12 of the High Court Rules is remote, and, unless the Court were to raise issues *mero motu*, it is by and large informed by and limited to the issues and evidential material placed before it by the litigants. In the circumstances, it was proper of the appellant to raise the issue of constitutionality on a wider basis than its interests required.

[85] The sweep of the prohibition in s. 128(1) is clearly wider than the type of employment service the appellant is engaged in. It prohibits all persons to "for reward employ any person with a view to making that person available to a third party to perform work for the third party." We have noted earlier that, unlike article 1(b) of the Convention, s. 128(1) does not require that the third party also "assigns the tasks and supervises the execution of these tasks". As long as the labour constitutes "work for the third party", it matters not that it is assigned or supervised by the employer and not by the third party: it will still fall within the ambit of the prohibition. Moreover, it does not matter if the work is assigned, supervised or completed at the workplace of the employer; that of the third party; at the home of the person employed or at any other place. The implications of this wide formulation are drastic and, we should add, not narrowed by the words "making that person available". The word "available" is an adjective of wide

import (meaning in this context "capable of being used";[143] or "obtainable or accessible and ready for use or service"[144]) which does not necessarily imply the assignment of work or supervision and control by the third party over the person employed.

[86] The broad scope of the prohibition may be illustrated by a few examples. Lawyers engaged as professional assistants by legal firms in private practice are employed with the principal purpose to, for reward, make them available to clients (third parties) to perform work of a legal nature for those clients. Payment for the work done by the client is made to the firm and is normally not directly related or even proportionate to the salary payable by the firm (employer) to the professional assistant. The same holds true for auditors, architects, doctors and other professional persons engaged in a similar fashion and made available to render professional services to clients, patients and the like. All these employment relationships are proscribed by the section.

[87] Evenly significant are the implications which follow from the use of the word "work" in the prohibition. The prohibition is not in any way limited to the rendering of personal services to the third party by the person employed but, on the face thereof, also includes the performance of work (including outsourced work) under contracts of work. Contractors, contracted by third parties to perform

143 The Concise Oxford Dictionary, 6th ed., p. 64

144 The Free Dictionary by Farlex (www.thefreedictionary.com accessed on 11/12/2009)

specified work, who make available their employees to the third parties to perform work under contract for those parties also fall within the ambit of the prohibition. So too, if a person employs an individual who is an independent contractor (not an employee) to make that individual available to a third party to perform work for the third party as a subcontractor. The section, in effect, also bans the subcontracting of work. Even persons who employ “home workers” as defined in article 1 of the Home Work Convention, No. 177 of 1996, to make them available to user enterprises for the manufacture of goods (such as articles of clothing) at their homes would fall foul of the prohibition.

[88] So construed, the prohibition contemplates the imposition of restrictions on the freedom to engage in commercial activities protected by Article 21(1)(j) which are grossly unreasonably and overly broad in their sweep. The restriction, in so far as it extends beyond the type of agency services provided by the appellant (with which we shall deal presently), does not serve any legitimate object; is clearly not required in the interest of "decency or morality" or necessary in a democratic society and, we should emphasise, the respondents have not made any attempt to justify it.

[89] Unable to defend its broad sweep, the respondents contend that the prohibition must read down to conform to the constitutional restraints on permissible legislative restrictions and/or, regard being had to the definition of “employee”, be construed narrowly. The principle that, where possible, legislation

should be construed in conformity with the Constitution is well established. It does "no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany …".[145] Referring to this principle, Langa DP held[146]:

> "Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.
> [24] Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."

The prohibition is formulated in terms so overly broad that, in our view, it cannot be read down so as to limit its application only to the type of agency services which the appellant provides. To narrow the scope of the section's application to

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145 Per Ackermann J in *De Lange v Smuts NO and Others*, 1998 (3) SA 785 (CC) at821C-D.

146 In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*, 2001 (1) SA 545 (CC) at 559B-F

that type of activity only will require a different and more exact reformulation necessitating the insertion of words and phrases which do not fall within the constitutional domain of this Court to suggest. In *Kauesa's* case[147], this Court declined a similar invitation. Dumbutshena AJA, who wrote for the Court, responded to the invitation as follows:

> "Respondents are inviting the Court to legislate, that is, to perform the constitutional function of the Legislature. Reading down may provide an easy solution to respondents' acknowledged difficulties. It may be in suitable cases (of) a lesser intrusion into the work of the Legislature. It must be remembered, however, that legislating is the constitutional domain of Parliament. The Court's constitutional duty is to strike down legislation inconsistent with provisions of the Constitution and leave the Legislature to amend or repeal where the Court has struck down the offending legislation. The lesser the judicial branch … intrudes into the domain of Parliament the better for the functioning of democracy. Regulation 58(32) is invalid in many ways. It would be futile for the Court to try and guess the intention of the lawgiver. It is best left to the lawgiver."[148]

We agree. This is also the approach we propose to follow.

[90] The respondent's invitation that the Court should somehow cut back the overbreadth of the prohibition by reference to the definition of an "employee" in s. 1 may be disposed of briefly. They seek some support from the exclusion of

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147 Supra, at 197G – 198A.

148 Compare also the remarks of Sopinka J and Wilson J in *Osborne v Canada (Treasury Board),* (1991) 82 DLR (4th) 321 at 347 and 345 which the Court quoted with approval.

individuals who are “independent contractors” from the definition and submit that the agency of an independent contractor should not be regarded as one by an employer for purposes of the prohibition. This proposition requires a leap of logic which the formulation does not support. Clearly, one may “employ” an individual who is an independent contractor. However, given the definition of “employee”, the individual will not be regarded as an “employee” for purposes of the Act but it does not derogate from the nature of the employment relationship as one for services. In its current formulation, s. 128 is not restricted to either the employment of an individual as an employee or as an independent contractor. It applies equally to both. The respondents’ suggestion that the Court should interpret it as if it contemplates the employment of employees only is, therefore, not supported by the text and would require of the Court to unduly strain its language. Moreover, even if the section were to be interpreted as if it relates only to the employment of individuals as employees, it will still not address overbreadth in respect of professionals, contractors and home workers in the examples given earlier.

[91] For these reasons, the prohibition of the economic activity defined by s. 128(1) in its current form is so substantially overbroad that it does not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on any trade or business protected in Article 21(1)(j) of the Constitution and, on that basis alone, the section must be struck down as unconstitutional.

[92] What remains, is to deal with the final ground on which the appellant relies in challenging the constitutionality of the prohibition. i.e. that the blanket prohibition of the type of agency services which the appellant provides is also not a reasonable restriction which, by its measure, is proportionate to the ill or harm which the respondents seek to curtail and, thus, constitutes an infringement of the appellant's right to trade or carry on a business protected under Article 21(1)(j). That the type of employment services provided by the appellant falls within the wider sweep of the prohibition is not in issue. In what follows, we shall continue to employ the descriptive phrases "agency work", "agency service provider", "agency worker" and "agency client" but, where we have previously used them to refer to the wider scope of activities prohibited by s.128, we shall now limit them to the type of employment services provided by the appellant.

[93] The respondents propose that the constitutionality of s.128 should be determined in the context of regulatory legislation designed to implement economic policy. So regarded, they contend, the Court should appreciate that the prohibition is based on legislative facts which, unlike adjudicative facts, the Courts are not adequately equipped to evaluate. Only the Legislature may make political judgments about those facts and decide how to respond to them. If, on the basis of those judgments, it chooses to regulate or restrict private economic activity in a particular manner, the Courts may not question the merits or wisdom thereof. Parliament is a body of democratically elected representatives and the Courts should appreciate that it is better positioned to make political

assessments of the most appropriate economic policies to follow and allow it a generous measure of discretion in implementing those policies by means of regulation. They submit that the standard of judicial review to be applied in the assessment of regulatory legislation in the area of private economic activity is that of rationality and not strict proportionality. The rational basis-test has been explained in *Namibia Insurance Association v Government of Namibia* [149] as follows:

> "…(T)he rational basis test permits the Court to ensure that when the Legislature uses its powers to regulate or restrict private economic activity it does not do so arbitrarily, or for no good reason but does not allow the Court to evaluate expert testimony and reach a conclusion that legislation expressing economic or social policy is ineffective or unnecessary or that there are better ways to achieve the purpose.
>
> Economic regulation inevitably involves policy choices by the government and the Legislature. Once it is determined that those choices were rationally made, there is no further basis for judicial intervention. The courts cannot sit in judgment on economic issues. They are ill-equipped to do this and in a democratic society it is not their role to do so:
>
> > 'It is not for the court to disturb political judgments, much less to substitute the opinions of experts. In a democratic society, it would be a serious distortion of the political process if appointed officials (the judges) could veto the policies of elected officials.'"

149 2001 NR 1 (HC) at 12H-13B.

[94] In dealing with the rational basis-test in the context of s. 26 of the interim Constitution of South Africa[150], Chaskalson P quoted the following exposition by Prof Hogg:[151]

> "While a court must reach a definite conclusion on the adjudicative facts which are relevant to the disposition of litigation, the court need not be so definite in respect of legislative facts in constitutional cases. The most that the court can ask in respect of legislative facts is whether there is a rational basis for the legislative judgment that the facts exist.
>
> The rational-basis test involves restraint on the part of the court in finding legislative facts. Restraint is often compelled by the nature of the issue: for example, an issue of economics which is disputed by professional economists can hardly be definitively resolved by a court staffed by lawyers. The most that can realistically be expected of a court is a finding that there is, or is not, a rational basis for a particular position on the disputed issue.
>
> The more important reason for restraint, however, is related to the respective roles of court and Legislature. A Legislature acts not merely on the basis of findings of fact, but upon its judgment as to the public perceptions of a situation and its judgments as to the appropriate policy to meet the situation. These judgments are political, and they often do not coincide with the views of social scientists or other experts. It is not for the court to disturb political judgments, much less to substitute the opinions of experts. In a democracy it would be a serious distortion of the political process if appointed officials (the Judges) could veto the policies of elected officials."

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150 It read as follows:

> "26. Economic activity
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> (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
>
> (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality."

151 In *S v Lawrence; S v Negal; S v Solberg*, 1997 (4) SA 1176 (CC) at 1196A-E.

Chaskalson P then continued:[152]

> "The rational basis test fits the language of the section which, unlike s 33, sets as the criterion that the measures must be justifiable in an open and democratic society based on freedom and equality, but does not require in addition to this that the measure be reasonable. The proportionality analysis which is required to give effect to the criterion of 'reasonableness' in s 33 forms no part of a s 26 analysis."

[95] Like s 33 of the interim Constitution of South Africa, Article 21(2) incorporates the requirement of reasonableness which triggers the proportionality test for determining the constitutionality of a legislative restriction on the exercise of a fundamental freedom. Moreover, unlike s.26 of the South African interim Constitution (which provided the context within which the rationality test was applied in the *Lawrence*-case), Article 21(2) does not merely require a restrictive measure to be "justifiable in an open and democratic society based on freedom and equality" to pass constitutional muster, but demands that it must be "reasonable", "necessary in a democratic society" and be "required in the interest of" the legitimate objectives enumerated in the Sub-Article. We do not find any justification that only the one or the other of these criteria should be applied in relation to a particular fundamental freedom but that, in relation to the other freedoms, all three should be applied to assess the constitutionality of a restrictive measure. Article 21(2) does not allow for differentiation between the fundamental freedoms on that basis.

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152 At 1197A-C.

[96] The issues in the *Namibia Insurance Association*-case, which incidentally, referred to and relied heavily on the *dicta* in the *Lawrence*-case in applying the narrower rationality test, must also be distinguished from those which must be adjudicated upon in this matter. Teek JP, who wrote for the Court, emphasised (at 18B-D) that there was “no question of the applicant's members being precluded from carrying on their trade or business in breach of art 21(1)(j) of the Namibian Constitution” and pointed out that the Act in question was “founded on their continuing to engage in insurance” and, in effect, primarily sought only “to regulate the reinsurance element of their business”. He pointed out that the “right in art 21(1)(j) is not a right to practise a trade or business free from regulation” and on that premise applied the rational basis-test. The issues in this appeal are the exact converse: the appellant accepts that the business of labour hire may be regulated - that, in fact, is what it proposes the Legislature should do. Its complaint is that, instead of regulating the business of agency service providers, Parliament it seeking to prohibit it from carrying on that trade or business as protected in Article 21(1)(j).

[97] Accepting, as we do, that the freedom protected by Article 21(1)(j) does not imply that persons may carry on their trades or businesses free from regulation, we do not find it necessary for purposes of this appeal to determine by which measure regulative legislation in the area of private economic activity falls to be assessed. The prohibition of a particular trade or business does not

regulate how it may be carried on but precludes it from being carried on at all. Thus, the prohibition in this instance seeks to remove - not regulate - the business of an agency service provider from the protection of Article 21(1)(j). When the Legislature purports to do that, the Court should, instead of adopting a deferential approach - as the respondents suggest it is enjoined to do - examine the constitutionality of the prohibition more closely. In *Narenda Kumar and Others v The Union of India and Others,*[153] the Supreme Court of India was faced with a similar challenge brought under a similarly worded Article of the Indian Constitution against a law which precluded dealers from trading in imported copper. In interpreting the phrase "reasonable restrictions" on the exercise of the protected right the Court held as follows:

> "There can be no doubt therefore that they (the makers of the Constitution) intended the word 'restriction' to include cases of 'prohibition' also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted. *It is undoubtedly correct, however, that when, as in the present case, the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court.*" (The insertion and emphasis are ours)

We, therefore, reject the respondents' contention that, in determining the constitutionality of the prohibition of a protected economic activity, the Court should limit its enquiry to the rationality of the legislative option chosen by Parliament and not also examine the proportionality thereof in the context of the

153 [1959] INSC 147 (3 December 1959)

criteria set by Article 21(2) for permissible restrictions. In doing so, we do not intend to convey that the margin of legislative appreciation allowed as an incidence of the proportionality test[154] must always be the same, irrespective of how important the fundamental freedom trenched upon by the restriction is in a democratic society; how significantly the restriction trenches upon the freedom (i.e. whether it merely affects activities at the periphery or cuts into activities lying at the core of the protected freedom) or how important for Namibia the legitimate aims being pursued are within the range of permissible objectives contemplated by Article 21(2). The "margin" of Legislative appreciation in the proportionality-equation may, for example, be sufficiently wide to bridge the difference between the scope of the enacted restriction and that which, in the assessment of the Court, is necessary in a democratic society or required to accomplish the objective or the difference between the actual effect of the restrictive measure and that, which in the Court's assessment, would have been proportionate to achieve the objective. We shall turn to the "minimum impairment" and "proportionate effect"-requirements of Art 21(2) presently but must first deal with the respondents' contention that agency work is in two respects inimical to the Constitution. If it is, then there is constitutional justification for the prohibition and, as is the case with slavery and forced labour prohibited by Article 9, it need not be justified by reference to permissible restrictions under Article 21(2).

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154 C.f. *Fantasy Enterprises CC Hustler The Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others, supra*, at 102B

[98] The respondents submit that agency work violates a fundamental principle of the ILO that "labour is not a commodity". Namibia is enjoined by Article 95(d) to seek membership of that organisation and therefore, so the argument goes, agency work is inconsistent with the Constitution. This is one of the primary problems of agency work, the respondents submit, which cannot be addressed by regulation because it goes to the very core thereof. The appellant's answer is that agency work is not inimical to the ILO-principle and therefore, also not inconsistent with Article 95(d) of the Constitution. In support of this contention, it refers to the Convention and, in particular, to the fact that the ILO recognises agency work as a "labour market service" in article 1(b) of the Convention and recommends the regulation thereof by its member States in numerous ways.

[99] The preamble to the Convention notes awareness "of the importance of flexibility in the functioning of labour markets"; recognises the "role which private employment agencies may play in a well-functioning labour market; recalls "the need to protect workers against abuses" and recognises "the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue as necessary components of a well-functioning industrial relations system. Importantly, paragraph 3 of article 2 states 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*." Article 3 provides for the determination of the legal status of private employment agencies and the conditions governing their operation in

accordance with a system of licensing or certification. Article 4 requires measures to be taken to ensure that workers recruited by private employment agencies are not denied the right to freedom of association and the right to bargain collectively. Article 5 requires that measures the taken to promote equality of opportunity and treatment in access to employment and to particular occupations. Article 11 requires of members to "take the necessary measures to ensure adequate protection for the workers employed by private employment agencies … in relation to:

> (a) freedom of association;
> (b) collective bargaining;
> (c) minimum wages;
> (d) working time and other working conditions;
> (e) statutory social security benefits;
> (f) access to training;
> (g) occupational safety and health;
> (h) compensation in case of occupational accidents or diseases;
> (i) compensation in case of insolvency and protection of workers claims;
> (j) maternity protection and benefits, and parental protection and benefits.”

Article 12, in addition, requires of members to determine and allocate the respective responsibilities of private employment agencies and of user enterprises (such as agency clients) in relation to all the matters mentioned in paragraphs (b) – (j). The Convention contains numerous other provisions relating to the review of conditions; the promotion of cooperation between public employment service and private employment agencies; the communication of information; the supervision by labour inspection; the manner in which the

convention is to be applied, ratification and the like. Namibia is a signatory to the Convention but has not ratified it to date.

[100] We have discussed the principle that “labour is not a commodity” earlier in this judgment and pointed out that, unlike a commodity, it may not be bought or sold on the market without regard to the inseparable connection it has to the rights and human character of the individual who produces it. We emphasised the importance of labour legislation in bringing about social justice at the workplace; to redress bargaining imbalances between employers and employees and to protect employees, especially those who are most vulnerable, against exploitation. The numerous regulative requirements proposed in the Convention are intended to ensure that the labour of agency workers is not treated as a commodity and that their human and social rights as workers are respected and protected in the same respects as the protection accorded in labour legislation to employees in standard employment relationships. It is self-evident from a reading of the text as captured in the summary above that the purpose of the Convention is to create a framework within which private employment agencies may operate and, at the same time, to ensure that workers using their services are protected. If the proposed regulative framework for the protection of the workers and their rights is put in place by member States and it is supervised and enforced, it would not allow for the labour of agency workers rendered within its protective social structure to be treated like a commodity. This is so, not only because their engagement by agency service providers and placement with agency clients are

subject to their consent, but also because the social protection provided for in those regulative measures, which is inseparably attached to their person and labour, is by legal implication part of the terms and conditions of the triadic employment relationships which arise as a consequence. Had that not been so, then the adoption of the Convention by the ILO would be in conflict with one of the most basic principles upon which it was founded. The terms of the Convention do not give us reason to suggest such a conflict. It follows that we do not accept the respondents' contention that agency work cannot be regulated because it is *per se* inimical to the first principle of the Philadelphia Declaration and therefore, albeit indirectly, also at odds with Article 95(d) of the Constitution.

[101] If anything, Article 95(d) rather suggests the converse of the Respondents' contention. Read together with Article 101, it should guide the State to adopt a policy aimed at "*adherence to and action in accordance with* the international Conventions and Recommendations of the ILO", where possible. Convention No. 181 was accompanied by the adoption of a Recommendation[155]: the *Private Employment Agencies Recommendation*, 1997 (No. 188). The ILO Recommendation supplements the provisions of the Convention and must be applied in conjunction with them. It contains a number of recommendations to members regarding the protection of agency workers; fair and ethical employment practices by private employment agencies; cooperation between public employment services and private employment agencies and other

155 On 19 June 1997 at the 85th session of the ILO Conference.

recommendations of general import. Amongst the recommendations in respect of private employment agencies are the following: That they should have written contracts of employment with agency workers (5); refrain from making agency workers available to agency clients to replace workers who are on strike(6); not knowingly recruit, place or employing agency workers for jobs involving unacceptable hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind (8(a)); that they should not prevent agency clients from employing agency workers, restrict the occupational mobility of agency workers or impose penalties on an agency worker accepting employment in another enterprise (15(a)-(c)), to mention a few. Article 95(d) thus enjoins the State, where possible, to adopt policies which adhere to and to take action in accordance with the Convention and Recommendation on Private Employment Agencies. Both the Convention and the Recommendation supplementing it, urge the regulation of agency work - not the prohibition thereof.

[102] The second ground on which the respondents rely is that agency work is inimical to Article 95(c) of the Constitution because it is prejudicial to union organisation. They point out that union organisation is done along industrial lines and its effectiveness depends on the level of access unions have to the workplace where the workforce regularly congregate. Agency workers do not work at the workplace of agency service providers and the right to access and organise the workers there is meaningless. Agency workers are scattered across the workplaces of agency clients and are subject to transfer – virtually at will - in

and out of the industrial sectors within which their unions organise. The unions' difficulties in this case are exacerbated because the standard commercial agreement between appellant and its clients provides that the agency client may not allow unions access to their workplaces to communicate with agency workers.

[103] The nature of agency work clearly presents new and difficult challenges to labour unions. This is probably why they are globally the most vocal critics and staunchest opponents of agency work. As Theron noted:[156] the classical model for trade union organisation is based on, "what has been characterised as the Fordist mode of production, (where) large numbers of workers working for the same employer are massed in the same workplace. The Fordist workplace thus lent itself to trade union organisation, and the rules of engagement between organised labour and employers were developed there".

[104] But, just like standard employment relationships are gradually melting away[157] and more atypical work relationships are being forged, both the nature of work and the workplace are changing. Technological innovations have created employment opportunities which did not exist before and they are consistently changing the way work is being done. Advances in information and

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156 *"The Shift to Services and Triangular Employment: Implications for Labour Market Reform"*, *supra*, p 5.

157 Clive Thompson: "*The Changing Nature of Employment*" (2003) 24 ILJ 1793 at p 1798.

communication technologies have transformed the barriers of time and distance in functional terms: exchanging information, thoughts and ideas with someone, somewhere on the other side of the globe is often as quick, inexpensive and as easy as doing it with someone at the same workplace. The social and economic effects of globalisation driven by huge international and multinational enterprises, stock exchanges, "the sheer volume and mobility of financial capital, the transferability of intellectual capital, the relative immobility of labour, labour's location in different political orders with different cost structures and the enabling capacities of especially, information technology",[158] and ever improving communication and transportation infrastructures on an international scale, to mention a few, are reshaping markets, competition and business on a national and international level. The organisation of workplaces is changing by a process of restructuring with more focus on enhancing the functionality and profitability of core business activities and to reduce the costs and risks of supporting or peripheral activities by a process of managed externalisation: either by contracting them out altogether (such as outsourcing or subcontracting) or by contracting in part-time, casual or agency workers. Employment patterns are also changing with the emphasis on flexibility: to search for "a workforce of perfectly variable size, one that fluctuates in sync with the peaks and troughs of the customer demand for goods and services. And that fluctuation may be annual, seasonal, monthly, weekly, or even hourly".[159]

158 *Ibid.,* p 1793

159 *Ibid*, p 1797

[105] The global emergence of a "new economy", the dissipation of Fordian workplace and the shift away from standard employment relationships are undeniable realities. This much is recognised and generally accepted in many of the authorities referred to and relied on by the appellant. These shifts and developments at the workplace and in the employment market cannot be arrested to preserve the most favoured model for union organisation. Recognising the changing nature of employment, Thompson noted:[160] "Unions will need to move on from their traditional organizing model and reach out to recruit workers in all these modes, and on the understanding that their members are likely to be in a state of continual work status transition throughout their working lives. The union card must be protean enough to follow members and provide them with appropriate services whatever their (transient) station — both within and outside of the labour market."

[106] The substance of the respondents' complaint, as we understand it, is that the structure and mobility of agency work make it more difficult for unions to access and organise agency workers. These difficulties manifest themselves to a greater or lesser extend throughout the employment spectrum in Namibia, especially where employees are thinly scattered over vast, and often remote, areas – such as farm- and domestic workers. Challenging as it may be for labour unions to access and organise them, it does not diminish the freedom of workers

160 *Ibid*., at 1814

in those “difficult” sectors to form and join trade unions entrenched in Article 21(1)(e) of the Constitution and it cannot be said that the organisational difficulties caused by employment in those sectors are “inimical” to the State’s “duty” under Article 95 (c) to actively encourage the *formation* of independent trade unions – and, needless to note, it is hardly a reason to ban domestic or farm labour altogether. By parity of reasoning, the difficult challenges presented to labour unions by the more dynamic and fluid structure of agency work are not inimical to policies regarding the formation of trade unions contemplated in Article 95(c) of the Constitution. The respondents’ submission to the contrary and their contention that agency work should be banned on that basis, cannot be sustained.

[107] This finding does not mean that the difficulties presented by agency work to the unionisation of agency workers may not be added to the cumulative weight of other considerations advanced by the respondents in justification of the ban. The role of independent trade unions in protecting the rights and interests of workers and in promoting sound labour relations and fair employment practices by collective bargaining, industrial action and action to influence political policies bearing on labour related issues is so trite that it need not be restated. That role is clearly recognised: on an international level in numerous conventions and recommendations of the ILO[161]; on a national level by the Constitution and

161 E.g. the Freedom of Association and Protection of the Right to Organise Convention, No. 87 of 1948; the Right to Organise and Collective Bargaining Convention, No. 98 of 1949; the Workers' Representatives Convention, No. 135 of 1971; The Collective Bargaining Convention, No. 134 of 1981; the Collective Agreements Recommendation, No. 91 of 1951 and the Collective Bargaining Recommendation, No 163 of 1981, to mention a few.

Chapters 6 and 7 of the Act and on an institutional level by the numerous other statutory provisions institutionalising union participation and consultation on labour related matters. The role of unions in the context of agency work is also repeatedly emphasised in the Convention. The preamble to the Convention expressly recognises "the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue as necessary components of a well-functioning industrial relations system". Article 4 of the Convention requires of Member States to take measures "to ensure that the workers recruited by private employment agencies … are not denied the right to freedom of association and the right to bargain collectively. Article 11 imposes on Member States the duty to "take the necessary measures to ensure adequate protection for the workers employed by private employment agencies … in relation to: (a) freedom of association; (b) collective bargaining" and, in addition, to determine and allocate the respective responsibilities in respect of collective bargaining between agency service providers and agency clients.[162] These provisions allow for ample scope to regulate agency work, to facilitate union membership and organisation and to determine collective bargaining responsibilities. If, as some suggest, collective bargaining will only be effective if it involves the person that determines the parameters of agency workers' employment,[163] regulation may allocate responsibility for collective bargaining

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162 See: Article 12 (a).

163 Jan Theron, *Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship, supra,* p. 641

either to the agency client or to the agency service provider and agency client jointly. Moreover, collective bargaining may potentially ensure that agency workers receive the same remuneration as that which an agency client pays to permanent employees for doing the same work.

[108] The difficulties in unionising workers are also, in part, attributed by the respondents to the casualisation of work facilitated by agency work. The standard employment relationship, by and large, underpins the regulation of labour relations generally and the social protection accorded to workers under the Act. Those regulatory measures, according to Theron,[164] are based on four key assumptions: that the workplace is the place where workers actually work, and that their employer controls the workplace; that employment is a binary relationship between employer and employee and that there is a clear distinction between employment and self-employment; that different industries in the economy could be systematically demarcated according to the nature of the business or undertaking conducted at the workplace, taken as a whole and that employment is ongoing, or permanent, or long-term. If workers, therefore, shift away from the standard employment model to any of a variety of atypical employment relationships (amongst others, agency work), the consequences – either by design or effect - are that they will be deprived of some of the social benefits included in the Act for the protection of workers.

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164 "*The Shift to Services and Triangular Employment: Implications for Labour Market Reform*", *supra,* pp 5-7

[109] Agency work arrangements, the respondents submit, are designed to allow the agency client to disavow legal responsibility for the workers who work for it. By mediating its employment relationship with agency workers through the agency service provider, the agency client has no responsibility to pay the agency workers; it may remove them without having to conform to the requirements of law concerning procedurally and substantively fair dismissals; it has no responsibility to resolve grievances or disputes with employees at the workplace; it can avoid having to recognise a trade union representing the majority of its employees; it may break strikes by the engagement of agency workers and it only have to pay for the hours worked by workers who it would ordinarily engage on a permanent basis. Similarly, the agency service provider avoids its obligations to the agency workers by the contractual application of the "no work, no pay"-principle to the relationship and, by reserving to itself the right to place the agency workers on or off duty, it not only controls its obligation to pay wages to them but may also effectively terminate their employment without recourse to the legally required procedures for retrenchment or dismissal.

[110] It would be an oversimplification to look at the problem of casualisation only in the context of agency work. Casualisation is a product of a process of managed externalisation to drive down the production costs of goods and services in a competitive national and global economic environment characterised by free markets and increased trade liberalisation. From an

employer's perspective, by outsourcing work and/or contracting services in only if and when demand requires, it reduces its exposure to market, legal and industrial relations risks;[165] limits its labour costs; creates flexibility in operations and becomes more cost effective and competitive. From the employees' perspective, without adequate regulation, the casualisation of their employment increases vulnerability to exploitation and reduces their bargaining power, training opportunities and employment security. Between the employer's need for flexibility to stay competitive and survive economically challenging times and the employee's need for employment security as a human being and to provide for his or her dependants, the debate on where the socio-economic balance is to be found, rages on.

[111] It is a debate which must inform the Court, not to decide which regulative measures will strike that balance, but whether the legitimate objectives which the Legislature sought to achieve by the prohibition of agency work could not have been attained by less restrictive means, such as by the regulation thereof. Stated differently: given the requirement of proportionality implied by the criterion of reasonableness in Article 21(2), have the respondents shown that the prohibition of agency work - rather than the regulation thereof - is necessary in a democratic society and required in the interest of the legitimate objectives being pursued by the enactment?

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165 Thompson, *op.cit.,* p. 1796

[112] The meaning of the adjective "necessary" in the phrase "necessary in a democratic society" was the subject of analysis by the European Court of Human Rights in *Silver v United Kingdom.*[166] The Court held[167] that the word “is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’”. The phrase itself, the Court held, “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’”. When read together with the requirement of “reasonableness” –

> “(t)he element of necessity thus tightens up the scrutiny in respect of what would be reasonable and justifiable. It is a question of degree rather than of kind. Investigation of alternatives becomes more important and the tolerance given to the Legislature in its choice of means to achieve 'reasonable' objectives is reduced. The burden of persuasion is a higher one, and the balance is tipped more sharply in favour of upholding the infringed rights.”[168]
>
> “The requirement that the limitation should be not only reasonable but necessary would call for a high degree of justification. It would also reduce the margin of appreciation or discretion which might otherwise be allowed to Parliament.”[169]

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166 (1983) 5 EHRR 347 at para 97.

167 With reference to the case of *Handyside v United Kingdom, supra*, at par 48.

168 Per Sachs J in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison*, 1995 (4) SA 631 (CC) at 661G-H, par [56] in the context of s. 33 of the Interim Constitution of South Africa.

169 *Ibid*., at 664C-D

These remarks are equally of application to the first two criteria of justification under our Constitution – even more so, given the third: it is not enough to pass constitutional muster for a restriction to be rationally connected to the permissible objectives in Article 21(2), it must also be "required" in the interest of those objectives.

[113] The phrase "necessary in a democratic society" also invites a comparison of the need to restrict the freedom in question with the position prevailing in other constitutional democracies.[170] Neither the experts who filed affidavits in the application nor counsel representing the litigants were able to refer us to any other democratic society where agency work is prohibited *in toto*. We established that agency work was prohibited until the late 1970's in some states of European Union but for a different reason: it was considered as an infringment on "the public monopoly on job placement".[171] In *Höfner & Elser v. Macrotron GmbH*,[172] the Oberlandesgericht in München, Germany held that the statutory public monopoly on recruitment services which denied private employment agencies the freedom to operate in that market, was in breach of the European law on monopolies. This judgment opened the door for private employment services;

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170 *Ibid.,* at 662C; Woolman *et al., supra,* p. 34-68.

171 Kerstin Ahlberg, "*Regulating Temporary Agency Work: On the Interplay between EU-Level, National Level and Different Industrial Relations Traditions*" published in "*EU Industrial Relations v. National Industrial Relations: Comparative and Interdisciplinary Perspectives*", edited by Mia Rönnmar (2008) Kluwer Law International BV, The Netherlands.

172 [1991] ECR I-1979

contributed to the growth of that industry in Europe and, ultimately, the recognition thereof by the ILO in Convention No. 181. The ILO noted in the preamble to the Convention the "very different environment in which private employment agencies operate, when compared to the conditions prevailing when the (Fee-Charging Employment Agencies Convention (Revised), 1949) was adopted". We have noted earlier the significance of the Convention in the policy-context contemplated by Article 95(d) and the fact that, although Namibia is a signatory to the Convention, it has not ratified it. The Convention is therefore not binding on Namibia and, it follows that it is also not legally enforceable by the Court. Nevertheless, in determining whether the prohibition of agency work is "required in a democratic society," the adoption of the Convention by Members States of the ILO, the ratification thereof by many other notable constitutional democracies[173] and the fact that it has not been denounced by any country, are all considerations of significance in determining what is required in a democratic society. Inasmuch as the Convention seeks to promote a uniform international approach to the regulation of agency work by Member States, we shall refer to it as part of our comparative analysis of measures regarded by other democratic societies as less drastic than total prohibition. We must, however, note expressly that we shall refer to regulative options merely as alternatives to prohibition in a comparative context and, in doing so, do not suggest that Parliament should adopt measures along those lines or that there may not be other – perhaps, even less invasive or more proportionate – restrictive options available.

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173 Including Belgium, Finland, Hungary, Italy, Japan, the Netherlands, Poland, Portugal and Spain.

[114] One of the principal reasons on which the respondents rely for justification of the prohibition is that agency work facilitates the casualisation of work: permanent employees are replaced with agency workers and sometimes existing workers are retrenched so that they can be rehired at cheaper rates as agency workers through agency service providers. The result is that, in many instances, agency workers are "permanently" placed with agency clients at “dampened” rates of remuneration. These practices not only result in more precarious employment relationships, but, in an under-regulated environment, it may also impact adversely on their bargaining strength, their skills development and training. In “high regulation” European states many of these concerns, according to Hall,[174] are addressed by laws on those matters, including:

> “specifying the permissible length of (agency work) contracts; restricting the purposes for which (agency workers) may be engaged; guaranteeing (agency workers) parity with other comparable workers in terms of pay and conditions of employment; and, ensuring (agency workers) rights to union membership and representation.
>
> Where there are legislative restrictions on the use of (agency workers) these typically identify permissible purposes as including: temporary replacement of absent employees or in the interim prior to a new permanent engagement, the performance of a special, fixed term task or role or for the performance of inherently temporary or seasonal work. Eight countries (Australia, Belgium, France, Italy, Luxembourg, the Netherlands, Portugal and Spain) have laws guaranteeing that (agency workers) enjoy the same pay and conditions … as similar permanent employees working in the same host organisation.

174 Op. cit., p.13.

> …(M)any states have adopted a relatively strong regulatory approach, seeking to restrict (temporary agency work) to genuine cases of employer need for temporary workers as a supplement to, rather than a replacement for, the existing permanent workforce. ”

[115] The differentiation between categories of workers or branches of economic activity for purposes of exclusion or prohibition by regulative measures, is expressly allowed in the Convention.[175] By a process of inclusion and exclusion of certain categories of workers or branches of economic activities, the Legislature can demarcate the scope within which agency services may be rendered and agency work may be performed, subject, of course, to the other regulative measures contemplated in the Convention intended to ensure social protection, fair employment practices, collective bargaining, equal treatment, and occupational health and safety – to mention a few. By excluding certain categories of workers, the Legislature may take into consideration that agency workers belonging to registered professions may earn a substantial income, are less vulnerable to exploitation and as a matter of lifestyle choice, may prefer to be agency workers and thus enhance their life-work balance by more flexible working time arrangements or simply to maintain occasional contact with their professions after retirement. Exactly the converse may be true for unskilled

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175 Article 4, paragraph 4 of the Convention provides:

“After consulting the most representative organisations of employers and workers concerned, a Member may:

(a) prohibit, under specific circumstances, private employment agencies from operating in respect of certain categories of workers or branches of economic activity in the provision of one or more of the (labour market services) referred to in Article 1, paragraph 1;

(b) exclude, under specific circumstances, workers in certain branches of economic activity, or parts thereof, from the scope of the Convention or from certain of its provisions, provided that adequate protection is otherwise ensured for the workers concerned.”

agency workers: They are significantly more vulnerable, constrained by economic necessity to work and more in need of social protection. Hence, they may be included in the scope of regulation. Cheadle, in his article on regulated flexibility[176] explores the proposition that "the concept of regulated flexibility may be put to good use in extending protection to those who most need it and limiting intervention … where there is no appreciable gain in protection."

[116] Likewise, the exclusion of certain branches of economic activity may recognise that certain specialised activities are by their nature temporary and cannot be accommodated by agency clients on a permanent, in-house basis. These may, for example, include modelling agencies or casting agencies which make fashion models or actors/characters available to fashion houses, advertising agencies, or production agencies under whose direction they are engaged for fashion shows, promotional photography or cinematographic productions, as the case may be. It may also exclude agency work in the context of economic activities triggered by pandemics, disasters, national emergencies or the temporary extension of certain public services to address a particular public need or event. Consideration may be given to the exclusion of special fixed term tasks (such as building projects) or economic activities which are inherently temporary (such as nurses to care for terminally ill persons at home) or seasonal (in the agricultural or fishing sectors of the economy). None of this is possible under the current prohibition. Agency work may be prohibited in sectors where it

176 *Supra,* p. 664.

will lead to the replacement of permanent employees, unless required to temporarily replace permanent employees on maternity, sick, compassionate or annual leave or until a suitable candidate has been found to fill a vacancy occasioned by resignation.

[117] If properly regulated within the ambit of the Constitution and Convention No. 181, agency work would typically be temporary of nature; pose no real threat to standard employment relationships or unionisation and greatly contribute to flexibility in the labour market. It will enhance opportunities for the transition from education to work by workers entering the market for the first time and facilitate the shift from agency work to full-time employment. By enlisting as an agency worker with more than one agency service provider, those who by reason of their unemployment are for economic reasons constrained to find temporary work until they secure permanent employment elsewhere, improve their chances of earning an income in the interim. On the other hand, those, who by choice prefer the more flexible working arrangements offered by agency work also accept that the "no work, no pay" principle will apply and that they may be put on or off duty by the agency service provider - in much the same way as they may decide that they are available for a particular placement with an agency client or not. All these options are not available under the prohibition.

[118] Given the scope of regulation contemplated in the 1997-Convention to facilitate agency work and to prevent potential abuses; the wide-ranging

regulative measures introduced in other democratic societies to demarcate the areas of economic activity and the categories of employees in relation to which agency work may properly be engaged in and the potential to effectively regulate agency work in Namibia without compromising the objects of the Act or the legitimate objectives of "decency and morality" in Article 21(2) of the Constitution, the blanket prohibition of agency work by s. 128 of the Act substantially overshoots permissible restrictions which, in terms of that Sub-Article, may be placed on the exercise of the freedom to carry on any trade or business protected under Article 21(1)(j) of the Constitution. The prohibition is tailored much wider than that which reasonable restrictions would require for the achievement of the same objectives and is disproportionately severe compared to what is necessary in a democratic society for those purposes. Even if a generous margin of appreciation would be allowed in favour of Parliament, as the respondents urge us to do, the unreasonable extent of the prohibition's sweep would still fall well outside it.

In the result, the following order is made:

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."

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SHIVUTE, C.J.

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MARITZ, J.A.

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STRYDOM, A.J.A.

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CHOMBA, A.J.A.

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MTAMBANENGWE, A.J.A.

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