



CONSTITUTIONAL COURT OF SOUTH AFRICA

Sylvia Bongi Mahlangu and Another v Minister of Labour and Others

CCT 306/19

**Date of hearing: 10 March 2020
Date of judgment: 19 November 2020**

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 19 November 2020 at 10h00 the Constitutional Court handed down a judgment in an application for confirmation of an order of the High Court of South Africa, Gauteng Division, Pretoria (High Court), which declared section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) unconstitutional to the extent that it excludes domestic workers employed in private households from the definition of “employee” and effectively denies them compensation in the event that they contract diseases or suffer disablement, injuries or death in the course of their employment.

The mother of the first applicant (deceased) was employed as a domestic worker in a private home for 22 years. On 31 March 2012 the deceased drowned in her employer’s pool in the course of executing her duties as a domestic worker. The first applicant, the daughter and sole dependent of the deceased, approached the Department of Labour to enquire about compensation for her mother’s death. The first applicant was informed that she could neither get compensation under COIDA, nor could she get unemployment insurance benefits for her loss which would ordinarily be covered by COIDA. The first applicant along with the South African Domestic Service and Allied Workers Union (SADSAWU) (applicants) brought an application in the High Court to have section 1(xix)(v) of COIDA declared unconstitutional to the extent that it excludes domestic workers employed in private households from the definition of “employee”.

The applicants argued that the exclusion of domestic workers from the ambit of COIDA infringes their right not to be unfairly discriminated against in terms of section 9(3) of the Constitution on the basis of race, sex and/or gender and social origin, as the exclusion

differentiates between domestic workers employed in private households and other employees covered by COIDA, without any rational connection to a legitimate government purpose. The purpose of COIDA is to afford social insurance to employees who are injured, contract diseases or die in the course of their employment. They further argued that the exclusion of domestic workers from COIDA deprives them of the benefits of social insurance, thus violating their right to social security under section 27(1)(c) of the Constitution. Finally, the applicants contended that the exclusion of domestic workers from COIDA infringes their right to dignity under section 10 of the Constitution.

The Minister of Labour, Director-General: Department of Labour (Minister) and the Acting Compensation Commissioner (respondents) conceded that section 1 (xix)(v) of COIDA is unconstitutional. However, they contended that it was unnecessary to challenge the constitutionality of COIDA through a court application as the relief sought by the applicants would be of academic value because the Minister was spearheading amendments to COIDA in order to include domestic workers.

On 23 May 2019 the High Court declared the exclusion of domestic workers from COIDA unconstitutional and invalid and ordered that section 1(xix)(v) be severed from COIDA. The High Court did not provide reasons for its declaration of constitutional invalidity. It postponed the issue of the retrospective effect of the order of constitutional invalidity to allow the parties to file further submissions on that aspect. On 17 October 2019 the High Court ordered that the declaration of invalidity apply retrospectively to provide relief to other domestic workers who were injured or died at work prior to the granting of the order.

The applicants sought confirmation of the High Court's order of constitutional invalidity from the Constitutional Court in terms of section 172(2)(d) of the Constitution. The applicants persisted in their contention that section 1(xix)(v) is irrational and infringes domestic workers' constitutional rights to equality, human dignity and access to social security.

The respondents conceded that the exclusion of domestic workers limits domestic workers' rights under sections 9, 10 and 27(1)(c) of the Constitution. Given the absence of any justifiable purpose for the limitation to satisfy the requirements of section 36 of the Constitution, the respondents did not oppose the application for the confirmation of the order of invalidity. The respondents initially resisted the retrospective order of constitutional invalidity due to the possible impact potential claims might have on the compensation fund, but this argument was later abandoned.

The Commission for Gender Equality (Gender Commission) was admitted as the first *amicus curiae*. The Gender Commission supported the confirmation of the order of constitutional invalidity. It contended that the exclusion of domestic workers from COIDA unjustifiably perpetuates the disadvantages suffered by this group of workers. It further submitted that this exclusion prevents domestic workers from equal access to social security protection. The Gender Commission also supported the immediate and retrospective effect of the declaration of invalidity on the basis that the respondents had not

laid a factual or legal foundation for limiting the retrospective effect of the order of constitutional invalidity.

The Women's Legal Centre Trust (WLC) was admitted as second *amicus curiae*. WLC submitted that it was imperative for the Constitutional Court to draw on the lived experiences of Black women and the manner in which the Constitution recognises their rights in sections 9, 10 and 27, as well as the discrimination that they face. WLC proposed an intersectional approach to the matter which would require the Court to adopt a nuanced, purposive and socio-contextual approach in interpreting COIDA and when making its decision on the constitutionality of COIDA and the retrospectivity of the order. WLC also submitted that the respondents had not put sufficient reasons before the Court to limit the retrospective effect of the order of constitutional invalidity.

The main judgment penned by Victor AJ (Mogoeng CJ, Khampepe J, Majiedt J, Madlanga J, Theron J and Tshiqi J concurring), confirmed the order of constitutional invalidity made by the High Court and ordered that the order have immediate and retrospective effect from 27 April 1994. It held that the exclusion of domestic workers from the definition of "employee" constitutes an infringement of the rights to: access to social security in terms of section 27(1)(c) read with section 27(2) of the Constitution; equal protection and benefit of the law under section 9(1) of the Constitution; human dignity in section 10 of the Constitution; and constitutes indirect discrimination on the bases of race, sex and gender, in terms of section 9(3) of the Constitution which proscribes unfair discrimination by the state on certain grounds.

The main judgment reasoned that social security assistance for the dependents of a person who suffers death, disability or disablement in terms of COIDA is a subset of the right of access to social security under section 27(1)(c) of the Constitution. It held that COIDA is an example of the kind of legislation that the Constitution envisages in section 27(2) as a reasonable legislative measure, within its available resources, to achieve the progressive realisation of the right. The main judgment thus found that the obligation under section 27(2) to take reasonable legislative and other measures, within available resources, includes the obligation to extend COIDA to domestic workers. Applying the reasonableness test to the facts at hand, the main judgment found that it was manifestly unreasonable to exclude this category of workers who suffer from intersecting vulnerabilities based on their race, sex, gender and class. The main judgment accordingly concluded that the failure to include domestic workers under COIDA in the face of admitted available resources is unreasonable and constitutes a direct infringement of section 27(1)(c), read with section 27(2) of the Constitution.

The main judgment further held that the differentiation between domestic workers and other categories of workers is arbitrary and inconsistent with the right to equal protection and benefit of the law under section 9(1) of the Constitution. Through an intersectional framework, it reasoned that the differentiation also amounts to indirect discrimination in terms of section 9(3) as the various grounds of discrimination against domestic workers intersect given that domestic work in South Africa is predominantly performed by Black

women. Thus, their race, sex and gender are intrinsically bound up in the discrimination against them.

Finally, the main judgment held that the exclusion of domestic workers from benefits under COIDA has an egregious and stigmatising effect on their dignity. The exclusion demonstrates the fact that not only are domestic workers undervalued, but their work is not considered real work; the kind performed by workers that do fall within the definition of the impugned section of COIDA. It found that the multiple intersecting forms of discrimination illustrate the indignity domestic workers endure. On the issue of retrospectivity, the majority judgment reasoned that given the intersectional discrimination, a just and equitable order is one that does not limit the retrospective effect of the declaration of invalidity. Consequently, it ordered that the declaration of invalidity would have retrospective effect from 27 April 1994 to provide relief to other domestic workers who were injured or died at work prior to the granting of the order.

The second judgment penned by Jafta J (Mathopo AJ concurring) agreed that the impugned provision is inconsistent with the Constitution and invalid but for reasons that differ materially from those contained in the first judgment. The second judgment differed from the main judgment on three issues. First, it held that the socio-economic right guaranteed by section 27(1) of the Constitution is not at all violated. Second, that in this matter it has not been shown that denying domestic workers the COIDA benefits enjoyed by other workers impairs their right to dignity guaranteed in section 10 of the Constitution. Third, the second judgment held that the majority judgment's failure to apply the *Harksen* test, made it difficult to determine whether the applicants had established that the impugned provision constitute unfair discrimination.

The second judgment preferred to take a simpler and straightforward pathway to the outcome reached in the main judgment. This is by showing how the impugned provision breaches section 9(1) of the Constitution. The second judgment held that the differentiation arising from excluding domestic workers in private households from compensation and benefits payable to employees and their dependants for injuries sustained at work has no rational link to any government purpose. The respondents had conceded to this. Accordingly, the second judgment held that the impugned provision fails the rationality standard and as a result it is inconsistent with section 9(1) of the Constitution. The second judgment concluded that for this reason alone the impugned provision should be declared invalid to the extent of its inconsistency.

In a third judgment, Mhlantla J agreed with the main judgment that the impugned provision is indeed unconstitutional. This is in so far as it is not consonant with the constitutional rights to equality and dignity, and unfairly discriminates against domestic workers. However, Mhlantla J found that on a plain reading of the impugned section – and due to other incongruences between the statutory right and the constitutional right – simply incorporating COIDA into the right to social security in section 27(1)(c) is an untenable proposition. In this regard, Mhlantla J agreed with the second judgment penned by Jafta J. The third judgment found that it is not enough to take cognisance of the discrimination that makes up the present lived experiences of domestic workers but that it is necessary to also

acknowledge the historical significance of the role that domestic workers play and the accompanying struggles they face. Many of these can be typified as caused by the intersection of various axes of discrimination such as race, sex, gender, and social class. This condition is further exacerbated by the private nature of the sphere in which they work. Consequently, domestic workers are unseen and unheard to the detriment of their constitutional rights despite the pivotal role they play in society.

These women are all too often the sole providers for their households and work strenuous hours away from their own families to serve their employers. Having recognised this, the third judgment underscored the importance of vindicating the rights of domestic workers in the greater transformative constitutional project. For this reason, their long-silenced voices must be heard and the means to vindicate their rights must be availed to them.