

## Exploring Sex Traders Status in Labour Relations

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### Abstract

*This article looks at the commercial sex phenomenon and how it has evolved in South Africa. The article evaluates the challenges that commercial sex workers face in South Africa and argues that the dignity of sex workers as citizens of South Africa are infringed and it would seem that little is being done to protect these sex workers due to the nature of their work. It is argued that sex workers are still entitled to the rights enshrined in the Constitution despite the illegality of sex work. It argues further that commercial sex work continues to exist in South Africa despite its illegality and it would be prudent to address the challenges that encourage sex work as the criminalization of this type of work does not seem to minimize its existence. The article examines the case of *Kylie v CMMA* which has been subject to much debate recently. It also makes a comparative case study of Canada and Sweden's law on sex work, its challenges, methods and laws adopted to curb the practice. Based on this, it determines the lessons which South Africa can learn from these two countries regarding criminalization of sex trades.*

**Keywords:** Sex trade, Victims, Status in Labour Relations, Illegality, Recognition

### 1. Introduction

Historically, commercial sex is not a new phenomenon in South Africa (Varga, 1997). Prior to 1866, apart from legislation put in place to control disorderly conduct in public, the authorities did little to interfere with the practice of commercial sex work and there appeared to be no public outcries against this practice (Gardner, 2009). Commercial sex work was seen as inevitable; a necessary evil to satisfy male desire (Overall, 1992). In 1866, pressure for the legislature to take action on commercial sex trade came from the British colonial master when they (Kantola and Squires, 2004) threatened to withdraw troops from Cape Town after more than 13 per cent of their troops were hospitalized for Sexually Transmitted Infections (STIs) (Killingray and Omissi, 1999). Until the late 1980s, "the exchange of sexual acts for reward was not criminalized although various acts associated with prostitution, including soliciting, living off the earnings of prostitution and brothel-keeping, were criminalized" (Pudifin and Bosch, 2012). Pudifin and Bosch (2013) asserted that "In 1988, Parliament amended the infamous Immorality Act 23 of 1957 which had criminalized sexual relationship between different race groups in apartheid South Africa and renamed the Sexual Offences Act 23 of 1957." This is the current law that criminalizes sexual offences in South Africa.

The purposes of the Constitutional democratic dispensation in South Africa were to address the past imbalances and human rights abuses experienced by different persons under the apartheid government (Mutua, 1997). This included the human rights abuses experienced by commercial sex workers in the course of performing their jobs (Bosch and Christie, 2007) Accordingly, Section 2 of the 1996 Constitution of the Republic of South Africa makes the Constitution to be the supreme law of the Country and establishes a society that is based on democratic values, social justice and fundamental human right (Chaskalson, 2000). The significance of the 1996 Constitution is that it extends its protection to all citizens living in South Africa. This means that every citizen is equally protected by law and provides for the Bill of Rights which is the cornerstone of democracy in South Africa (Goldstone, 1997). It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. The state is required to respect, protect, promote and fulfil the rights in the Bill of Rights by virtue of section 7 of the Constitution (Liebenberg, 2005).

Klare (1998) once remarked that the 1996 Constitution should be interpreted as a transformative Constitution. This means that the Constitution should be interpreted comprehensively enough to accommodate changes that take place in South Africa. The transformative nature of the Constitution was further explained by Langa (2008) when he stated that:

"Every nation should deeply consider ways in which the plight of those without a say in the democratic process and with little bargaining power in concluding the social contract may be elevated by sympathetic state intervention" (Klare, 1998).

Commercial sex work or trade in sex in South Africa is perceived as an illegal activity and the piece of legislation that prohibits this practice is the Sexual Offences Act of 1957 (Gardner, 2009). The issue of criminalization of sex work has been challenged before the courts on many occasions (S v Jordaan 2002 (6) SA 642) and it raises complex legal, social and moral issues (Meyerson, 2004). Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act provides that a person ('A') who unlawfully and intentionally engages the services of a person 18 years or older ('B'), for financial or other reward, favour or compensation to B or to a third person ('C') –for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or by committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older.

Apart from the criminalization of sex work, the definition of employee in terms of the Labour Relations Act (LRA) of 1995 has recently been subject to much debate and interpretation (Gauss, 2011). The interpretation of the definition of employee has been a matter of scrutiny in the matter of *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC) particularly with regard to employees' right to fair labour practices and the vulnerability of illegal workers (Nevondwe, 2012).

The definition of an employee interpreted in *Kylie v CCMA* has brought some far reaching implications for labour law (Le Roux, 2010). This case explored whether a sex worker can claim protection against unfair dismissal in terms of the LRA, a right enjoyed comprehensively by employees. It is evident that the definition of employee has been subjected to this debate and interpretation because the trade of sex is criminalized in South Africa. In comparison, this article will look into the recent developments in Canada and Sweden regarding whether to continue to sustain the criminalization or to decriminalize the practice or to regulate it.

It is evident that sex work continues to exist in South Africa despite its illegality (Kempadoo, 2003). Against the backdrop of this illegal trade, sex workers are vulnerable to all sorts of crimes, ranging from physical abuse from their clients and law enforcement officials who take advantage of this vulnerability (Sanders and Campbell, 2007). Sex workers often offer law enforcement officials sexual favours in order to escape arrest and prosecution (Raymond, 2004). This is an unlawful exercise of public power against the vulnerable sex workers. In *SWEAT v Minister of Safety & Security* 2009 (6) SA 513 WCC, it was observed that sex workers are often arrested in violation of the principle of legality and, secondly, that members of the South African Police Service and the City Police routinely use the powers of arrest conferred by the Criminal Procedure Act (CPA) 51 of 1977 to arrest sex workers for the ulterior purpose of harassing them rather than for the lawful purpose of having them prosecuted (Freedman and Grant, 2010).

In view of this damning indictment and abuses being perpetrated by the law enforcement agents, South Africa should start conversation on how to provide adequate protection for sex workers as citizens of South Africa who are entitled to adequate protection of the law (McCarthy et al. 2012). However legalizing this practice will face challenges because of the resistance of religious and cultural practices in South Africa (Coovadia et al. 2009).

Whilst sex work remains criminalized, the decision of the Labour Appeal Court (LAC) in *Kylie* case has put clarity to the definition and interpretation of the word 'employee' but has equally left a vacuum both in the field of labour law and criminal law (Gardner, 2009). The cardinal question is what remedy is there for a sex worker who is unfairly dismissed by the employer? In terms of section 193(2) of the LRA, in the case of an unfair dismissal the primary remedy is reinstatement or re-employment. It is pertinent to point out that an order of reinstatement is the primary remedy for an unfair dismissal (de Clark, 1969). However, reinstating a person in illegal employment would not only encourage illegal activity but may also constitute an order on the employer to commit a crime (Christiansen, 1975).

The decision in *Kylie* has classified a sex worker as an employee and can thus approach the relevant CCMA or Bargaining Council or the Labour Court where the arbitrator or a judge would then have to consider if the sex worker has been treated unfairly and what an appropriate remedy would be. This also brings about a valid question, as employees, would sex workers be eligible to pay tax and if so would that not be promoting illegal trade using legal means? (Bindman and Doezema, 1997).

## 2. Aims and Objectives of the Study

The study conducted a critical analysis of the current laws, policies, regulations and guidelines regulating sex work in South Africa and examined the impacts which the decriminalization of sex work will have in the field of labour law in South Africa. The study also explored the protection and remedies available to sex workers under the Constitution and as employees under the labour law just like other workers.

### 3. Insights from the Case of Kylie

In order to address the issues associated with sex work in South Africa, it will be prudent to take stock of facts of the case of Kylie. In *Kylie v CCMA*, (2008) 29 ILJ 1918 (LC), the Labour Appeal Court in *Kylie v CCMA & others* had to grapple with the question of whether the definition of an employee extends to persons engaged in unlawful activities. Kylie was employed in a massage parlor as a sex worker; her employer was Michelle Van Zyl (trading under the name Brigitte's). "In 2006, Kylie was informed by her employer that her employment was terminated, apparently without a prior hearing. In 2007, Kylie referred the dispute to the CCMA. In the CCMA, the legal question was whether the CCMA had jurisdiction to hear the matter in the light of the fact that Kylie had been employed as a sex worker which according to law is illegal, therefore her employment was unlawful. The Commissioner handed down a ruling in which she concluded that the CCMA did not have jurisdiction to arbitrate on an unfair dismissal in a case of that nature. It was against this ruling that Kylie approached the Labour Court for review (*Kylie v CCMA*, (2008) 29 ILJ 1918 (LC) at para 5 to 9).

The Labour Court has held that the definition of employee in section 213 of the LRA was wide enough to include a person whose contract of employment was unenforceable in terms of the common law. Furthermore, the essential question was whether 'as a matter of public policy, courts (and tribunals) by their actions ought to sanction or encourage illegal conduct in the context of statutory and constitutional rights'. However, "it was held that a sex worker was not entitled to protection against unfair dismissal as provided in terms of section 185(a) of the LRA because it would be contrary to a common law principle which had become entrenched in the 1996 Constitution that courts 'ought not to sanction or encourage illegal activity.'" (*S v Jordaan & Others* 2002 (6) SA 642 (CC) at para 69). Kylie then referred the matter to the LAC which surprisingly overruled the Labour Court's judgment and found in her favour, to the effect that sex workers can now claim protection from the LRA and section 23 of the Constitution, 1996.

#### 3.1 *Legal implications of the Judgment*

Section 23(1) of the 1996 Constitution provides that "everyone has the right to fair labour practices." The term 'everyone', which follows the wording of section 7(1) of the 1996 Constitution which provides that the Bill of Rights enshrines the right "of all people in the country", is supportive of an extremely broad approach to the scope of the right guaranteed in the 1996 Constitution (Jordaan, 2009).

This is also addressed in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para11 where it was held that the word 'everyone' is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system." (*Kylie v CCMA* 2010 (4) SA 383 (LAC), para15).

From its inception, the Constitutional Court has been consistent in this approach. In *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph137, it was said that the right to life and dignity 'vests in every person, including criminals convicted of vile crimes. The court further said that these criminals 'do not forfeit their rights under the 1996 Constitution and are entitled, as all in the country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment' (*Kylie v CCMA* 2010 (4) SA 383 (LAC) at para18).

In *Chirwa v Transnet and Others* 2008 (4) SA 367 (CC) at para 110 the court held that the objects of the LRA are not just textual aides to be employed where the language is ambiguous. This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the 1996 Constitution. The primary objects of the LRA must inform the interpretation process and the provisions of the LRA must be read in the light of its objects. Thus where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA- *Kylie v CCMA* 2010 (4) SA 383 (LAC) at para 15.

The Sexual Offences Act makes brothel keeping a criminal offence and this includes residing in a brothel for purposes relating to prostitution activities. In terms of section 20(1) (A) (a) of the Act, unlawful carnal intercourse for reward constitutes a criminal offence which attracts a criminal penalty of imprisonment of no more than three years and a fine of no more than R6000.

In addition to these provisions there is a common law principle that courts ought not to sanction or encourage illegal activity, (Packer, 1968). This principle is now incorporated within the 1996 Constitution entrenched as an element of the rule of law, and set out in section 1 of the Constitution, 1996.

The question arises thus as to whether section 23 affords protection to a sex worker. In *NEHAWU v UCT* (2003) 24 ILJ 95 (CC) at para 40 the Constitutional Court emphasized that the focus of section 23(1) of the 1996 Constitution

was as on the 'relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both' (Kylie v CCMA 2010 (4) SA 383 (LAC) at para 21). That approach followed upon the judgment in SANDU v Minister of Defense (1999) 20 ILJ 2265 (CC) at paras 28-30 where it was held that even if a person is not employed under a contract of employment that does not deny the 'employee' all constitutional protection. This conclusion is reached despite the fact that they 'may not be employees in the full contractual sense of the word' but because their employment 'in many respects mirrors those of people employed under a contract of employment' (Kylie v CCMA 2010 (4) SA 383 (LAC) at Para 21). This can also be supported by two decisions of the LAC in which the court 'approached the vexed question of employment relationship on the basis of the substance of the arrangements between the parties as opposed to the legal form adopted' (State Information Technology Agency (Pty) Limited v CCMA (2008) 29 ILJ 2234 (LAC) at para 10.).

The principle *ex turpi causa non oritur actio* 'prohibits the enforcement of immoral or illegal contracts' (Rautenbach, 2013.). Thus, if a contract is illegal, courts must regard the contract as void and hence unenforceable (Corbin, 1993). In turn, a contract is illegal if it is contrary to public policy and it is against public policy to engage in a contract which is contrary to law or morality (Schwartz, 1952). In South African law, adultery and commercial sex are regarded as immoral and of such turpitude so as to render an agreement concerning or linked to such morality as void and thus unenforceable (Simon-Kerr, 2012).

Even though the contractual relationship between Kylie and her employer was invalid, the question therefore arise as to whether a constitutional protection of fair labour practices as enshrined in section 23 of the 1996 Constitution apply to a person who would, but for an engagement in illegal employment, enjoy the benefits of this constitutional right.

That question was answered in the negative by the Labour Court, primarily because, were such rights to be granted, a court would undermine a fundamental constitutional value of the rule of law by sanctioning or encouraging legally prohibited activity. In the view of the learned judge in the court *quo*, that conclusion was supported by the Constitutional Court in its decision in *S v Jordan and others* (2002) 6 SA 642 (CC) at para 28 ff. In Kylie, the court said that reinstating a person in illegal employment would not only sanction illegal activity but may constitute an order on the employer to commit a crime.

Section 23 of the Constitution, 1996 does afford constitutional protection to Kylie. The illegal activity of a sex worker does not *per se* prevent her from enjoying a range of constitutional rights (Hanna, 2000). Even though the character of the vocation sex worker undertake devalues their human dignity and respect, they are still human beings that need to be accorded protection under the law ( Bonthuys, 2006). This does not mean that as sex workers they are stripped of the right to be treated with respect by law enforcement officers (Lopes, 2006). All arrested and accused persons including sex workers must be treated with dignity by the police (Goldstein, 1969). However, any invasion of dignity, going beyond that ordinarily implied by an arrest or charge that occurs in the course of arrest or incarceration cannot be attributed to section 20(1A)(a) but rather to the manner in which it is being enforced. The remedy is not to strike down the law but to require that it be applied in a constitutional manner (Waldron, 2011). The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the sex worker (Selala, 2011).

It is also important to bear in mind the fact that the unfair labour practice jurisdiction was introduced to counter the arbitrariness of lawfulness, in particular, termination by lawful notice ( Le Roux, 2009). Furthermore, as suggested earlier, it is conceivable that a labour practice may well impact on the position of either prospective or retired employees. For these reasons, and in the absence of an internal limitation clause, it is suggested that labour practices in s 23(1) ought to be approached dispassionately and be given a broad construction. An act of terminating employment, the structuring of working hours, or discipline at work remain labour practices, irrespective of whether they are done in the context of legal or illegal work ( Le Roux, 2009).

Selala 2011 eloquently asserts that "sex workers cannot be stripped off their right to be treated with dignity by their clients, it must follow that, in their other relationship namely with their employers, the same protection should hold. It should be recognized that they must be treated with dignity not only by their customers but by their employers according to section 23 of the Constitution, 1996 which, at its core, protects the dignity of those in an employment relationship."

Without an iota of doubt, the Labour Appeal Court's decision that Kylie meets the threshold requirement so that she is a beneficiary of the applicable constitutional rights is a good decision to that extent only. The next issue now is to consider whether she is entitled to any legal relief. In refusing to recognize the possibility of a remedy in terms of the LRA, the Labour Court based its decision on the view that the legislature intended that the Act not only penalized prohibited activity but precluded courts from recognizing any rights or claims arising from that activity. In terms of this approach, where courts recognize a claim based on 'a constitutional right' that court would be sanctioning or encouraging the prohibited activity'. Whereas, the court in Kylie observed that "foreign and child workers, who are prohibited from

assuming certain forms of employment, can be afforded protection because the prohibition is aimed at 'who does the job rather than the job itself', the prohibition with regard to sex work concerns the nature of the job."

Even though sex workers are vulnerable to exploitation, such protection 'will mean sanctioning and encouraging activities that the legislature has constitutionally decided should be prohibited' (Kylie v CCMA 2010 (4) SA 383 (LAC) at Para 29). In general, South African law takes the view that an illegal contract is void and that the illegality arises when a contract's conclusion, performance or object is expressly or impliedly prohibited by legislation or is contrary to good morals or public policy (MacQueen, 2010). In *Sasfin (Pty) Ltd v Beukes* 1989(1) SA 1(A) the court held that the principles underlying contracts contrary to public policy and *contra bonos mores* may overlap.

Generally, where performance had been made in terms of an illegal contract, a court will also not assist a party who has performed to recover his or her performance by the use of an enrichment based remedy (Strong, 1960). However, the courts have acknowledged that they have an equitable discretion to relax the operation of the so called *par delictum* rule in order to allow one party utilize an enrichment based remedy, an approach which is sourced back to *Jajbhay v Cassiem* 1939 AD 537. In this case, the Appellate Division held that the court should relax the rule if it was necessary 'to prevent injustice or to satisfy the requirements of public policy'. Our law is not wholly inflexible in its refusal to relax the *par delictum* rule. The criminalization of prostitution does not necessarily deny to a sex worker, the protection of the Constitution, 1996 and, in particular section 23(1) thereof, and by extension its legislative implementation in the form of the LRA.

The LRA came into effect as a result of section 23 of the Constitution, 1996 which affords everyone the right to fair labour practices. The purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratization of the work place. The LRA was designed to ensure that the dignity of all workers should be respected and that the workplace should be predicated upon principles of social justice, equality and fairness (*NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at 33-40).

If the purpose of the LRA was to achieve these noble goals, then courts have to be very vigilant to safeguard those employees who are particularly vulnerable to exploitation in that they are inherently economically and socially weaker than their employers. This consideration applied with even greater force in the case of sex workers who are especially vulnerable class exposed to exploitation and abuse by a range of people with whom they interact, including their employers and clients.

The United Nations General Assembly Declaration on the Elimination of Discrimination against Women expressly condemns the exploitation of women. In addition, paragraph 5 of the ILO's Employment Relationship Recommendation R198 of 15 June 2006 requires member states to take particular account in national policy of the need to ensure the effective protection of workers 'especially those affected by the uncertainty as to the existence of an employment relationship, including female workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.'

In South Africa, many sex workers are particularly vulnerable and are exposed to exploitation and vicious abuse (Higson-Smith and Richter 2004). The court said "it may be that this categorization is not applicable to all cases of sex workers but no matter how it is perceived, there is no doubt that Kylie falls within such a vulnerable category." Consequently, Kylie was an employee for the purposes of the LRA and all the rights and entitlements in it should benefit her.

In defending the rights and dignity of a sex worker, the court also emphatically said that "in the circumstances, where a sex worker forms part of a vulnerable class by the nature of the work that she performs, the position she holds and as a result becomes subject to potential exploitation, abuse and assaults on her dignity, there is, on the basis of the finding in this judgment, no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity and which protection by extension has now been operationalized in the LRA."

The court emphasized the need to consider the impact of a broad based constitutional protection and the preservation of the dignity of vulnerable persons in so exercising discretion to decide that such an employment relationship holds some implications for the parties to the relationship.

In stating why the constitution has come to address the inequalities and injustices of the past racial apartheid and colonial past, the court vehemently and eloquently said that "the Constitution's commitment to freedom, equality, dignity and its concern to protect the vulnerable, exploited and powerless should always be encouraged. The 1996 Constitution reflects the long history of brutal exploitation of the politically weak, economically vulnerable and socially exploited during three hundred years of racist and sexist rule."

### 3.2 The implications of the case on labour relations

This case also clarifies the role played by a contract of employment in the modern employment relations, which addresses a question of whether a contract concluded on illegal activities or a contract concluded by an illegal immigrant or a person with a doubtful status, can be enforceable under the labour protective legislation and the Constitution before courts (LeRoux, 2009).

The issue is whether there is a valid employment relationship as opposed to whether the contract is valid or not. This is what the court will establish first before delving to the issue of whether the contract is valid or not (Dau-Schmidt and Haley, 2006). In *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 24 ILJ (LC), the court stated that what is required in determining whether a worker is an employee is a conspectus of all relevant facts including any contractual terms and determination whether these holistically viewed established a relationship of employment as contemplated by the statutory definition.

This approach is in line with the findings of the LAC in *Kylie*. It also finds proponents from *Chipenete v Carmen Electrical CC & another* 1998) 19 ILJ (LAC). The notable difference between this case and *Kylie* is that this case dealt with the 'illegality' in terms of status of the claimant within the country whereas *Kylie* and other cases dealt with the illegality of the work itself. *Chipenete*, a Mozambican national, was an illegal immigrant, in that his presence in South Africa was not authorized in terms of the then Aliens Act. He had applied to the Industrial Court and had been granted a status quo order in terms of section 43 of the then LRA of 1956. On presenting himself for reinstatement, he was arrested at the behest of his employer for being an illegal alien, imprisoned and released on paying police fine of R100. Although the court noted the 'illegality' in status of claimant, it ruled that it was not relevant to the core issues and as such collateral issue over which court had no jurisdiction, hence parties were in employment relationship. Court held to be more concerned with conferring legal remedies for unfair discrimination and exploitation of foreigners in deterring employers rather than for employing aliens with no valid permits (Bosch and Christie, 2007).

The recent case which dealt with similar facts to *Chipenete* is that of *Discovery Health Ltd v CCMA* (2008) 29 ILJ 1480 (LC). In this case, the Labour Court dealt with a case where the employer had employed Mr German Lanzetta, an Argentinean national, who was in South Africa on a temporary residence permit. Mr Lanzetta's employment with Discovery Health Ltd was terminated summarily on the 14th January, 2006 when the employer realized that he did not have a valid work permit. Mr Lanzetta then referred an unfair dismissal claim to the CCMA which ruled that he was an employee in terms of the LRA. On review, the Labour Court upheld the findings of the CCMA, evincing that '...because a contract of employment is not the sole ticket for admission into the golden circle reserved for employees.' The judgment in *Discovery Health Ltd v CCMA* serves to demonstrate clearly that establishing the existence of an employment relationship transcends finding contract of employment and that the invalidity of a contract does not automatically invalidate the employment relationship (Bosch, 2006). This therefore is in concord with the findings of both the Labour Court and Labour Appeal Court that it was not in dispute that *Kylie* was an 'employee', necessarily because an employment relationship was established, inconsiderate of the nature of the work involved or the validity of whatever employment contract which might have existed between them.

In *South African Broadcasting Corporation v Mckenzie* (1999) 20 ILJ 585, the LAC held that the definition of an employee in fact refers to a person working for another in terms of contract of employment. This attempt by the Labour Appeal Court to transcend the realities of employment, that is the nature of employment relationship, with contract of employment, a valid one for that matter, proved controversial. This is considerate of the old judgment in *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) wherein it was held that words of statute must be given their ordinary, literal and grammatical meaning where words appear clear and unambiguous. It is submitted therefore that, in handing down the *Kylie* judgment, the LAC took this into consideration. Hence, it is asserted that similar approach should be adopted when dealing with a situation of workers purged into the informal sector as these workers experience varying patterns of insecurities and exploitations.

In *Wyeth SA (Pty) Ltd v Manqele & Others* (2005) 6 BLLR 523 (LAC), it was held that even a person who has concluded a contract but have not yet commenced work is nevertheless an employee for purposes of LRA. Du Toit (2006:74) argues that this is considerate of the fact that such people need the special attention of labour laws due to their vulnerability arising from, for instance, economic dependence on the employer and further that the purpose of the definition is to identify those categories of persons to whom such protection should be extended. This we opine will play a significant role in the effective extension of protection to the majority of workforce in the informal sector, considerate of the matrix of different forms of work and the absence of security associated with these, characterized by a dire lack of legal protection.

The issue of illegality also arose in *SITA (Pty) Ltd v CCMA & Others* (2008) 29 ILJ 2234 (LAC). This judgment strengthened a tack that determining who an employee is in the contemporary world of work, should be through establishing the existence of employment relationship rather than a valid contract of employment. Therefore, an employee who worked for the front company of the South African Defence Force (SANDF) as retrenched and given severance package in terms of which he could not be employed again by the defence force. He continued serving the defence force through a close corporation. The defence force cancelled the project as a result of lack of funding and the employee was effectively dismissed. He instituted a claim of unfair dismissal. The court had to determine the identity of the true employer; whether it was the defence force or the close corporation. With reference to *Denel v Gerber (Pty) Ltd*, the court did not concern itself with the existence of a contract of employment but held that an employment relationship was established between an employee and the defence force and ordered payment for compensation.

#### 4. Lessons from Other Countries

##### 4.1 Canada

The case of *Bedford v Canada* 2010 ONSC 4264 demonstrates the tension that exists around the moral, social and historical perspectives on the issue of prostitution and the effect of certain criminal law provisions on the constitutional rights of those affected. Prostitution is not illegal in Canada (Duchesne, 1997). However, Parliament has seen fit to criminalize most aspects of prostitution (Barnett and Nicol, 2008.). The applicants did not challenge all of the prostitution-related provisions in the Criminal Code. The provisions relating to living on the avails of a person under the age of 18 and obtaining sexual services from a person under the age of 18 was not challenged by the applicant, but only challenged ss. 210, 212(1)(j), and 213(1)(c) of the Criminal code. These provisions relate to adult prostitution.

The impugned read as follows:

"Section 210(1) of the Criminal code provides that everyone who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Everyone who;

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house, is guilty of an offence punishable on summary conviction

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

Section 212 (1)(j) Everyone who lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Section 213 (1)(c) Every person who in a public place or in any place open to public view stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction."

It was contended that the provisions at issue:

(a) Limit the places and ways in which prostitution can be practiced. It can also lower the risk of violence, (*Bedford v. Canada*, 2010 ONSC 4264 at Para 125) (b) Sustain stigmatization of prostitutes and prostitution (*Bedford v. Canada*, 2010) and (c) Create a conflicting victim/criminal status in the eyes of the police, which leads many prostitutes to believe that the police are not willing to protect them (*Bedford v. Canada*, 2010).

Thus the applicants further argued that safer ways to conduct prostitution are criminalized, whereas riskier ways are not. For example, the applicants' experts tended to agree that working in-call is the safest way to conduct prostitution; however, it is illegal due to the bawdy-house provisions. Working outcall can be done without violating the law, but carries its own set of risks (*Bedford v. Canada*, 2010).

At the core of these contentions lies section 7 of the Charter which provides that: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

And also Section 2(b) which states that:

"Everyone has the following fundamental freedoms: Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

The Court concluded that the applicants have proven on a balance of probabilities that the impugned provisions infringes the Charter rights of the applicants and that there was no demonstration that the infringement of those rights is justified.

#### 4.2 Sweden

After decades of decriminalization, Sweden introduced a unique legal response to prostitution in 1999. The Act on Violence Against Women 1999, 1 January 1999, criminalized buying sex and pimping, while the selling of sex by prostitutes remains legal (Scoular, 2011). Promoting or encouraging casual sexual relationships for commercial services can be punished by up to eight years imprisonment where significant exploitation is present (Scoular, 2011). State-run exit programs are accompanied by poverty-reduction measures aimed at women in order to prevent their entry into the sex trade (Bedford v. Canada, 2010). The number of women in street prostitution in Sweden has decreased from 650 in 1999 to less than 500 in 2002 (Ekberg, 2004). Government reports suggest that there are almost no foreign women left in street prostitution, and there is some suggestion that human traffickers may now find Sweden to be an unattractive destination for trafficked women (Ekberg, 2004).

The legal change has been accompanied by activities targeting male demand for prostitution including a nationwide poster campaign raising awareness about prostitution and trafficking in women (Bedford v. Canada, 2010, at para 208). Additional educational programs have been established for police personnel to increase their understanding of the conditions that make women vulnerable to becoming victims of prostitution and trafficking (Lederer, 2010). According to the government fact sheet, after this program began in 2003, complaints that the law was difficult to enforce ceased and there was a 300 per cent increase in arrests (Bedford v. Canada, 2010, at para 208). Convictions however remain rare. The law applies equally to Swedish peacekeeping forces stationed abroad; in 2002, three Swedish soldiers stationed in Kosovo who were found with prostitutes were arrested and discharged from the military (Bedford v. Canada, 2010, at para 208).

### 5. Conclusion and Recommendations

The issue of criminalizing or decriminalizing of sex work is indeed a huge challenge as it has the propensity of affecting other legislations and therefore requires better interpretation or amendment in order to cater for the transformative society. The criminalization of sex work does not in itself reduce the rate at which it is being practiced. Perhaps the factors that encourage sex work should be addressed in a similar approach to what was implemented in Sweden in order to reduce this practice, The suggested approach may include poverty eradication and implementations of educational programmes.

In Sweden, it appears that there were too many arrests of sex workers than their actual conviction. This is also the case in South Africa. Those who are supposed to arrest sex workers usually compromise their positions by patronizing them instead thus becoming part of the problem instead of solution. It is therefore recommended that harsher sanctions should be imposed on law enforcement officials who arrest sex workers for other ulterior motives.

The findings of the LAC in *Kylie* were not correct in maintaining that its judgment cannot and do not sanctions sex work. We opine that by affording a sex worker protection, it simply means that one can go to the extent of giving a relief. However, the fact that prostitution is rendered illegal does not, for the reasons destroy all the constitutional protection which may be enjoyed by someone as Kylie, a sex worker. After all, Kylie is a human being who is also entitled to constitutional protection in the Bill of Rights.

The sex worker's dignity should not to be exploited or abused. This remains intact and the concomitant constitutional protection must be available to her as it would to any person whose dignity is attacked unfairly. By extension from section 23(1), the LRA ensures that an employer respects these rights within the context of an employment relationship. However each case will have to be decided in terms of the facts thereof.

Not all persons who are in an employment relationship which is prohibited by law will enjoy a remedy in terms of



the LRA. In so deciding, a tribunal or court is engaged with the weighing of principles; on the one hand the *ex turpi causa* rule which prohibits enforcement of illegal contracts and on the other public policy sourced in the values of the Constitution, 1996, which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community.

The remaining questions which one can ask oneself is does the LRA afford legal remedy to contracts tainted with illegality? If so, to what extent? By ordering reinstatement or reemployment, are we not licensing someone to further continue committing such a crime? By awarding compensation are we not paying someone for committing a crime? The interpretation of the LAC to classify Kylie as an employee does create a good jurisprudence in the South African Labour Law.

## References

- Adam H, Moodley K 1993. *The opening of the Apartheid mind: options for the new South Africa*, University of California Press, Berkeley, California, USA.
- Barnett L, Nicol J 2008. Prostitution in Canada: International obligations, federal law, and provincial and municipal jurisdiction. From [http://publications.gc.ca/site/archievee-archived.html?url=http://publications.gc.ca/collections/collection\\_2012/bdp-lop/bp/2011-119-eng.pdf](http://publications.gc.ca/site/archievee-archived.html?url=http://publications.gc.ca/collections/collection_2012/bdp-lop/bp/2011-119-eng.pdf). (Retrieved June 5, 2013).
- Bindman J, Doezema J 1997. Redefining prostitution as sex work on the international agenda. From <http://ftp2.allianceantitrafic.org>. (Retrieved April 7, 2013).
- Bonthuys E 2006. Women's Sexuality in the South African Constitutional Court, *Feminist Legal Studies*, 14(3):391-406.
- Bosch C 2006. Can Unauthorized Workers be Regarded as Employees for the Purposes of the Labour Relations Act; *Industrial Law Journal*, 27:1342-1351.
- Bosch C, Christie S 2007. Are Sex Workers Employees; Bosch, *Industrial Law Journal*, 28:804-814.
- Bosch C, Christie S 2007. Are Sex Workers Employees, *Industrial Law Journal*, 28:804-813.
- Chaskalson A 2000. Third Bram Fischer Lecture - Human Dignity as a Foundational Value of Our Constitutional Order, *South African Journal on Human Rights*, 16:193:204.
- Christiansen J P 1975. Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics, *Vand Law Review*, 28:805-812..
- Coovadia H, Jewkes R, Barron P, David Sanders D, McIntyre D 2009. The health and health system of South Africa: historical roots of current public health challenges, Corbin AL, Perillo JM, Kniffin MN, Holmes EM 1993. Corbin on contracts. [http://www.mindservent.com/American\\_History/reference/corbin/corbin\\_6a\\_89.html](http://www.mindservent.com/American_History/reference/corbin/corbin_6a_89.html).. (Retrieved October 22, 2013).
- Dau-Schmidt KG Haley TA 2007. Governance of the Workplace: The Contemporary Regime of Individual Contract, *Comparative Labor Law and Policy Journal*, 28:313:322.
- de Clark GN 1969. Unfair dismissal and reinstatement, *The Modern Law Review*, 32(5): 532-546.
- Duchesne D 1997. Street prostitution in Canada. From <http://publications.gc.ca/site/archievee->. (Retrieved July 17, 2013).
- Ekberg G 2004. The Swedish Law that Prohibits the Purchase of Sexual Services Best Practices for Prevention of Prostitution and Trafficking in Human Beings, *Violence Against Women*, 10(10):1187-1218.
- Freedman W, Grant B. 2010. Protection of Sex-Workers from Unlawful Arrest, *South African Journal of Criminal Justice*, 23:401-413.
- Gardner J 2009. *Criminalising the act of sex: Attitudes to adult commercial sex work in South Africa*. From [www.hsrcpress.co.za](http://www.hsrcpress.co.za). (Retrieved February 21, 2013).
- Gardner J 2009. Criminalising the act of sex: Attitudes to adult commercial sex work in South Africa. From <http://academia.edu>. (Retrieved June 16, 2013).
- Gauss TC 2011. The Extension of Employment Rights to Employees who Work Unlawfully. From <http://www.nmmu.ac.za/>. (Retrieved January 29, 2013).
- Goldstein J 1969. Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, *The Yale Law Journal*, 69(4):543-594.
- Goldstone RJ 1997. South African Bill of Rights, *Texas International Law Journal*, 32:451-463.
- Hanna C 2000. Sex is Not a Sport: Consent and Violence in Criminal Law, B.C. L. Rev. 42:239-251
- Higson-Smith C, Richter LM 2004. *Commercial sexual exploitation and trafficking of children*, HSRC Press, Cape Town, South Africa.
- Jordaan DW 2009. Autonomy as an element of human dignity in South African case law, From <http://miami.edu>, <http://jpsl.org/>. (Retrieved June 10, 2013).
- Kantola J, Squires J 2004. Discourses Surrounding Prostitution Policies in the UK, *European Journal of Women's Studies*, 11(1): 1 77-101.
- Kempadoo K 2003. Globalizing sex workers' rights. From <http://pi.library.yorku.ca>. (Retrieved November 2, 2013).
- Killingray D, Omissi DE 1999. *Guardians of Empire: The Armed Forces of the Colonial Powers, c. 1700-1964*, Manchester University Press, Manchester, UK.
- Klare K 1998. "Legal Culture and Transformative Constitutionalism" (1998) 1.
- Langa P 2008. *Transformative Constitutionalism and Socio-Economic Rights*, Rhodes House, Oxford (2008).

- Le Roux R 2009. The meaning of 'worker' and the road towards diversification: Reflecting on Discovery, SITA and 'Kylie', *Industrial Law Journal*, 30(49): 58-64.
- Le Roux R 2010. The Evolution of the Contract of Employment in South Africa, *Industrial Law Journal*, 39 (2): 139-165.
- Lederer LJ 2010. Addressing Demand: Why and How Policymakers Should Utilize Law and Law Enforcement to Target Customers of Commercial Sexual Exploitation, *Regent University Law Review*. 23:297-2309.
- Liebenberg S 2005. Value of Human Dignity in Interpreting Socio-Economic Rights, *South African Journal on Human Rights*, 21:1-11.
- Mutua M 1997. Hope and Despair for a new South Africa: The Limits of Rights Discourse, *Harvard Human Rights Journal*, 10:63-74.
- Lopes L 2006. *Sex workers in the Labour Movement*, Willian Publishing, Uk.
- MacQueen, HL 2010. Illegality and Immorality in Contracts: Towards European Principles. From <http://ssrn.com/abstract=1542528> or <http://dx.doi.org/10.2139/ssrn.1542528>. (Retrieved September 9, 2013).
- McCarthy B, Benoit C, Jansson M, Kolar K 2012. Regulating Sex Work: Heterogeneity in Legal Strategies, *Annual Review of Law and Social Science*, 8: 255-271
- Meyerson D 2004. Does the Constitutional Court of South Africa Take Rights Seriously - The Case of the S v Jordan, *Acta Juridica* 138.
- Nevondwe L 2012. *The interpretations of a definition of an employee in the mordern world of work: A Kylie experience* International Labour Law and Social Protection Conference, 27-30 August 2012, Johannesburg, South Africa.
- Overall C 1992. What's Wrong with Prostitution? Evaluating Sex Work, *Signs*, 17(4):705-724.
- Packer HL 1968. *The limits of the criminal sanction*, Stanford University Press, California, USA.
- Pudifin S, Bosch S 2012. Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa, *Potchefstroom Electronic Law Journal*, 15(4):6-11.
- Rautenbach C 2013. Jolly Old Law': The Sex Worker Who Sued Her Pimp for Unfair Dismissal, *Journal of Civil Legal Science*, 2(2): 3-14.
- Raymond JG 2004. Prostitution on Demand Legalizing the Buyers as Sexual Consumers., *Violence Against Women*, 10(10): 1156-1186.
- Sanders, T. and Campbell, R. (2007), Designing out vulnerability, building in respect: violence, safety and sex work policy. *The British Journal of Sociology*, 58: 1-19.
- Schwartz JJ 1952. Business Expenses Contrary to Public Policy: An Evaluation of the Lilly Case, *Taxation Law Review*, 8:1952-1964.
- Scoular J 2011. Regulation of Sex Work in Sweden ESRC. From <http://ssrn.com/abstract=1868192> or <http://dx.doi.org/10.2139/ssrn.1868192>. (Retrieved August 10, 2013).
- Simon-Kerr JA 2012. Moral Turpitude. From <http://epubs.utah.edu/index.php/ulr/article/viewArticle/817>. (Retrieved May 19, 2013).
- Strong GA 1960. Enforceability of Illegal Contracts, *Hastings Law Journal*, 12:347-359. *The Lancet*, 374(9692):817 – 834.
- Varga CA 1997. The Condom Conundrum: Barriers to Condom Use among Commercial Sex Workers in Durban, South Africa, *African Journal of Reproductive Health*, 1(1):74-88.
- Waldron J 2011. Dignity, Rights, and Responsibilities, *Arizona State Law Journal*, 43:1107-1209.