

## EMPLOYMENT WITHOUT RIGHTS?

**Discovery Health Limited v CCMA  
2008 7 BLLR 633 (LC); and  
"Kylie" v CCMA 2008 9 BLLR 870 (LC)**

### 1 Introduction

The cases of *Discovery* and *Kylie* provide interesting comparative material for a number of reasons. Firstly, both cases involved parties who were guilty of contravening aspects of South African statutory law. Secondly, in both cases the individuals concerned sought protection as employees in terms of the Labour Relations Act, 1995 (hereinafter "the LRA"). Thirdly, the individuals in both cases were members of groups which have previously been acknowledged as being vulnerable in South African society. Finally, and perhaps most interestingly, the Acting Judges of the Labour Court who presided over the two cases were both aware of the similarity of the cases and nevertheless managed to arrive at contrasting conclusions – despite both courts having held that a valid contract of employment was not a prerequisite for workers to acquire labour rights and that the individuals concerned were "employees" for purposes of the LRA. By conducting a legal analysis of both cases against the backdrop of the common law contractual principles traditionally applied to illegal activity and in the light of post-Constitutional reflections on public policy, the authors aim to contextualise the significance of the two decisions for South African employment law.

### 2 *Discovery Health Limited v CCMA (2008 7 BLLR 633 (LC))*

Lanzetta, an Argentinian national, lawfully resident in South Africa, informed the applicant, Discovery Health Limited, that he was legally entitled to work in South Africa and was accordingly appointed by the latter. Discovery Health subsequently learned that Lanzetta did not have a work permit and terminated the work relationship. When Lanzetta referred a dismissal dispute to the CCMA, Discovery Health contended that he was not an employee since the employment contract was unlawful, and that he consequently could not claim to have been dismissed.

The commissioner ruled that the concept of an employment relationship was sufficiently wide to extend the protections of the LRA to workers such as Lanzetta and held that, although an employer could not be required to continue the employment of an illegal foreigner or a foreigner whose specific work permit does not permit the employer to employ him, that does not

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mean that the protections afforded by the LRA cannot apply to such foreigners who were illegally employed.

The commissioner accordingly ruled that the CCMA had jurisdiction to determine whether Lanzetta had been unfairly dismissed and found further that Lanzetta had established the existence of a dismissal.

In its judgment the Labour Court dealt with two separate but related enquiries. The first enquiry was whether the contract between Discovery Health and Lanzetta was invalid because of the fact that Lanzetta was not in possession of a permit issued under the Immigration Act 13 of 2002 that entitled him to work for Discovery Health.

The second enquiry was whether a finding that the contract was invalid meant that Lanzetta was not an employee in terms of section 213 of the LRA.

Regarding the first question the court noted that the Immigration Act merely prohibits employment of foreigners who do not possess work permits and penalises contraventions.

The court considered previous authorities and pointed out that the interpretational tools of the constitutional era had overtaken the debate as to whether or not a contract is void even if only one party to the contract is exposed to a criminal penalty (641B-C). Section 39(2) of the Constitution requires that, when a court interprets legislation, it must “promote the spirit, purport and objects of the Bill of Rights” (641C-D).

The court emphasised that the right to fair labour practices was a fundamental right. There was no clear indication from section 38(1) or the other provisions of the Immigration Act that it intended to limit this constitutional right. Only the employer is penalised and there is no provision that explicitly proscribes contracts concluded by persons unauthorised to do so. Similarly, the Immigration Act does not provide that such contracts are unenforceable (641F-G).

The court furthermore opined that there was a sound policy reason for adopting such a construction of section 38(1) of the Immigration Act. Certain employees might be willing to risk possible prosecution under the Immigration Act, employ foreigners without work permits, then at the end of the contract term refuse to pay them on the basis that the contract was void. Such foreigners would then be without a remedy. The consequence would be that the constitutional guarantee of the right to fair labour practices to everybody would then be undermined.

This decision dispensed with the review. However, the court also addressed the second issue since the commissioner had determined that the employment relationship transcends the contract of employment and that the jurisdiction of the CCMA is derived from the existence of that relationship.

The issue the court addressed in this regard was therefore whether the definition of “employee” in section 213 of the LRA depends on a valid underlying contract.

Section 213 of the LRA defines an “employee” as

- “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer ...”

The court pointed out that much of the previous jurisprudence concerned with interpreting the definition viewed it through the lens of the law of contract and established, by and large, that a valid contract of employment had to be in existence in order to determine that an applicant was an employee in terms of the definition (643F-G). These judgments predated the constitution. It was the court’s view that the courts are presently bound to interpret the definition of “employee” so that it will best give effect to the constitutional guarantee of fair labour practices. This fundamental right is, for instance, extended to individuals such as defence force workers – people specifically excluded from obtaining the benefits of being employees in terms of the labour statutes.

Furthermore, the International Labour Organisation attempts to protect the rights of migrant workers by means of different conventions.

Recent judgments of the Labour Court (notably *Rumbles v Kwa Bat Marketing (Pty) Ltd* 2003 24 ILJ 1587 (LC); and *White v Pan Palladium SA (Pty) Ltd* 2006 27 ILJ 2721 (LC)) also indicated that the definition of “employee” in section 213 of the LRA was not dependent solely on the conclusion of a contract recognised at common law as valid and enforceable (646I-647B).

The court concluded as follows in this regard:

“[A] person who renders work on a basis other than that recognised as employment by the common law may be an ‘employee’ for the purposes of the definition. Because a contract of employment is not a sole ticket for admission into the golden circle reserved for ‘employees’, the fact that Lanzetta’s contract was contractually invalid only because Discovery Health had employed him in breach of section 38(1) of the Immigration Act did not automatically disqualify him from that status.”

The court held further that the commissioner’s decision that the applicant had been dismissed could not be faulted and dismissed the review application.

### **3 “Kylie” v CCMA 2008 9 BLLR 870 (LC)**

The applicant in this case was a sex worker who alleged that she had been dismissed unfairly by her employer, a massage parlour business belonging to the third respondent. After a commissioner had ruled that the CCMA lacked jurisdiction to resolve the dispute because of the invalidity of her contract of employment, the applicant referred the matter to the Labour Court.

Cheadle AJ held that there was a fundamental principle in law that precluded the sanctioning or encouragement of illegal activity by the courts and that this principle applied equally to claims based on statutory rights (par 3). Accordingly, despite the existence of a constitutional right to fair labour practices, the statutory right not to be unfairly dismissed was held to be unenforceable when it was a sex worker who sought to enforce such a statutory claim. In particular, the court found that, as a matter of interpretation, the scope of the labour rights in section 23 of the Constitution did not include sex workers and brothel keepers as bearers of those rights and that, alternatively, the Sexual Offences Act (23 of 1957) justifiably limited the scope of section 23 by excluding sex workers and brothel keepers as rights holders (par 3).

### 3.1 *The applicant's submissions*

The applicant conceded that her work was in contravention of two sections of the Sexual Offences Act (ss 3(a) and 20(1)(1A) respectively) by admitting that she resided in a brothel and committed unlawful carnal intercourse or indecent acts with other people for reward. The applicant argued that the commissioner committed a legal error in excluding workers who did not have a valid and, therefore, enforceable contract from the ambit of the LRA because the LRA defined employees to include anyone "who works for another person" and accordingly applied to all employment relationships irrespective of whether they were based on enforceable contracts or not (par 12). In other words, a proper interpretation of the Constitution and the LRA extended labour protection to sex workers despite the illegality of their work. The argument was broadened to include the submission that an arbitrator faced with an unfair dismissal of a sex worker may decline to reinstate the person for public policy reasons and instead order compensation (par 13).

The applicant based her constitutional argument on the interpretation afforded to the term "everyone" by the Constitutional Court in *Khoza v Minister of Development* (2004 6 SA 505 (CC) par 111). The right to fair labour practice contained in section 23(1) applies to everyone and this, according to *Khoza*, is a term of "general import and unrestricted meaning" (par 14). The applicant argued that as the LRA stood to be interpreted in accordance with section 23 of the Constitution, the right not to be unfairly dismissed should apply to all workers, including sex workers, and ought not be restricted to those employed under a valid and enforceable contract (par 15). Support for this line of argument was derived from the definition of "employee" contained in the LRA, a definition which has historically been given a wide meaning in a different context (*NAAWU now known as NUMSA v Borg-Warner SA* 1994 3 SA 15 (A)). The applicant also submitted that the court should look at the substance rather than the form of the relationship and cited a case where the Labour Court held that a worker who entered into an employment relationship with an employer despite not concluding a contract between them was considered an employee for purposes of the LRA (*White v Pan Palladium SA* 2005 6 SA 384 (LC)). Finally, the applicant highlighted the consequence of the decision she challenged:

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“If the definition of employee in the LRA admits only those employees under a valid and enforceable contract of employment, that would have the drastic consequence of excluding workers without such a contract from the basic protection of a raft of employment laws on health and safety, basic conditions of employment and unemployment insurance.”

### 3.2 *The judgment*

The Acting Judge, by contrast, approached the matter from a different perspective, asking not whether the definition of employee was wide enough to include those without a valid contract of employment but whether, as a matter of public policy, courts ought to sanction or encourage illegal conduct in the context of statutory and constitutional rights (par 23) by phrasing the key question in this manner, the court circumvented the Labour Court’s decision in *Discovery*.

The court accepted that the relationship between the applicant and the third respondent was an employment relationship but rejected the applicant’s arguments for the following reasons:

- 1 The prohibition of prostitution: The Sexual Offences Act considers brothel keeping (including persons who reside in a brothel and share in any moneys taken there) and “unlawful carnal intercourse ... for reward” as offences which attract a criminal penalty of imprisonment of no more than three years and a fine of no more than R6000 (ss 2, 3(a) and (c), 20(1(aA) and 22(a) of the Sexual Offences Act).
- 2 The constitutional principle of not sanctioning or encouraging illegal activity:

In *Schierhout v Minister of Justice* (1926 AD 99 109), the court held that “it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect”. It is this principle which is reflected in a number of common law rules such as *ex turpi causa*, which prohibits the enforcement of immoral or illegal contracts, and *in pari delicto*. Interestingly, the court made much of slotting this “fundamental principle” under the value contained in section 1(c) of the Constitution, namely supremacy of the constitution and the rule of law.

The court highlighted, under this heading, that the statutory prohibitions against brothel-keeping and commercial sex were recently introduced, thereby confirming the common law’s long standing view that commercial sex is immoral (par 33). Of course, the *ex turpi causa* rule only applies if the statute in question, properly interpreted, went beyond prohibiting and criminally penalising conduct such as prostitution and intended to nullify contracts arising from, or associated with, the prohibited activity (par 34 quoting *Swart v Swart* 1971 1 SA 819 (A)). The court surmised that contracts which directly or indirectly involve prostitution have not been enforced in the past and held that the common law will not enforce a contract to perform statutorily prohibited activity or recognise a claim based on such activity if it is the intention of the statute to do so (par 37). Even in cases where the harsh application of the *in pari*

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*delicto* rule had led to its relaxation by the courts, that relaxation, according to Cheadle AJ, had never compromised the underlying policy of discouraging illegality (par 35).

### 3.3 *The application of the principle to statutory claims and the Sexual Offences Act*

As mentioned above, the court pinned its reasoning on the “fundamental constitutional value” principle that illegal activities should not be sanctioned or encouraged (par 39). According to the court, the test for the application of the principle when applied to statutory claims is that the entitlement to a statutory right should be circumscribed if:

- (a) the legislative intention of the statutory prohibition is to go beyond its own penalties;
- (b) the person pursuing the right has knowingly sought to violate the prohibition; and
- (c) the grant of the right will sanction or encourage the prohibited conduct.

The court found that the Sexual Offences Act sought to address the mischief of social ills associated with commercial sex. Relying on *S v Jordan*, this was considered to be an “important and legitimate constitutional purpose” (par 43 relying on *S v Jordan* 2002 6 SA 642 (CC) 651-652). That the contraventions of the prohibitions contained in the Sexual Offences Act constituted offences and are clearly peremptory, was found to be an indication that the legislature intended the transaction itself to be void (par 44). Cheadle AJ found that a reading which considered the criminal penalty to be the only sanction for the illegal activity had to be subservient to the Act’s purpose to protect the public along the lines of the common law approach to prostitution (par 44). Importantly, the court accepted that the legislature was aware of the common law when it legislated regarding the prohibition against commercial sex and stated that if it had been the intention to limit the penalty for participation in a brothel to that provided in the Act, the common law approach to prostitution would have had to be expressly undone in the legislation. Ultimately, in this regard, the court concluded that recognition of the contract in question would result in affording legal sanction to a situation which the legislature sought to prevent.

### 3.4 *The impact of the constitutional values*

While the court recognised that dignity, equality and the rule of law values contained in section 1 of the Constitution were implicated by the applicant’s scenario, it held that the first two values mentioned were inextricably part of the analysis of the impact of the rule of law on the scope of the right to fair labour practices and were not values to be independently assessed (par 59). The court acknowledged that the application of the “rule of law” value did not automatically result in the withholding of constitutional rights to those engaged in illegal activity (par 60). It held that the legislature intended, via

the Sexual Offences Act, to prohibit courts from recognising any rights or claims arising from such activity (par 62).

The court, importantly, distinguished between the impact of requiring the police to treat sex workers with dignity during arrest and detention, which it found did not sanction or encourage prostitution and the granting of compensation to sex workers for an unfair dismissal. The court expressed the view that the conflict between the objective of the right to a fair dismissal and the objectives of the Sexual Offences Act was best illustrated by the issue of reinstatement – an order which would sanction the illegal activity and result in the employer being asked to commit a crime (par 68). A further anomaly would be the situation where a sex worker who refused to obey an instruction sanctioned by the purported contract would have the right to refuse to obey that instruction because of its illegality (par 68). Accordingly, the enforcement of the right to fair labour practices would lead to the Labour Court and the CCMA sanctioning or encouraging organised prostitution in contravention of the Sexual Offences Act (par 69).

### *3 5 The difference between sex workers and those illegally employed as foreign workers*

The court noted that sex workers are a vulnerable group subjected to exploitation in a similar fashion to child workers and those illegally employed as foreign workers and acknowledged that this exploitation was a consequence of illegality (par 70). It sought to distinguish the sex workers' situation as follows:

“The difference is that the prohibition in respect of foreign workers and child workers is a prohibition aimed at who does the job rather than the job itself. This means that illegally employed foreign workers and child workers compete with workers in legal employment for jobs. The withdrawal of labour rights in these instances will create an incentive to employ illegal workers in place of legal ones ... (which) threatens the employment and pay security of those in legal employment and encourages the employment of illegal workers – the very thing that the Immigration Act and the prohibitions on the employment of children seek to prevent. The exploitation of sex workers does not have this consequential effect on the right for those in legal employment. Sex workers are exploited – just like many others who engage in organised crime. To protect them from exploitation will mean sanctioning and encouraging activities that the legislature has constitutionally decided should be prohibited. It is the application of the foundational principle to this prohibition that excises sex workers and brothel owners as holders of section 23 rights” (par 70 and 71).

### *3 6 Limitation of the scope of the constitutional right and the right not to be unfairly dismissed in the LRA*

In addition to this significant finding regarding the limitation of the scope of section 23, the court added that it in any event considered a limitation of the section 23 right by the Sexual Offences Act to be a reasonable and justifiable limitation for purposes of section 36 of the Constitution (par 88). In

particular, the court echoed portions of the Constitutional Court's judgment in *Jordan* by finding that the legislature had made a constitutionally permissible choice in declining the invitation to substitute the criminalising provisions of the Sexual Offences Act with less restrictive measures to regulate prostitution (par 87).

Once the court had made this finding, it was a relatively small leap to find that the definition of dismissal in section 186 did not include illegal employment relationships because of the lack of a valid contract of employment (par 91). The court, in a footnote, did state, however, that a claim of unfair discrimination under the EEA or a claim for workers' compensation in terms of COIDA required assessment under their respective provisions in order "to determine whether by upholding the claim the court or tribunal concerned will be sanctioning or encouraging the prohibited activity" (par 89, fn 75).

Finally, the court pegged its refusal to grant the relief sought by the Applicant on the fact that none of the statutory exceptions to the primary remedy of reinstatement appeared to be apposite in the situation where an employee insisted on reinstatement and that this would result in the anomaly of requiring the employer to break the law by reinstating a contract considered by the courts to be void, thereby sanctioning a transaction prohibited by law.

#### **4 Earlier case law**

The South African law governing commercial transactions is rooted in the notion of freedom of contract. This means that an individual is free to decide whether, with whom and on what terms to contract. Such autonomy entails that the decision-maker must accept responsibility for his considered actions and acknowledge that they are subject to the values of society when exercising his private autonomy. The rules of the law of contract reflect the attempts in the legal system to achieve a balance between relevant principles and policies so as to satisfy prevailing perceptions of justice and fairness.

A contract of employment links the employer and the employee in an employment relationship and it is this relationship that ensures the application of the labour law rules. The common law contract of employment remains relevant in so far as labour legislation applies to parties in a contract of employment. A contemporary contract of employment has been defined as a voluntary agreement between two parties, in terms of which one party places his or her personal services or labour potential at the disposal and under the control of the other party in exchange for some form of remuneration which may include money and/or payment in kind (Basson, Christianson, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* 4ed (2005) 21).

In order to conclude a valid employment contract, the law prescribes that the parties must reach consensus as to the nature of the contract, that the parties' performance of their obligations must be possible, and that the

conclusion and the objectives of the contract must be lawful. If a contract fails to fulfil any of these, including the requirement of lawfulness or legality, the contract is invalid, that is, it is void *ab initio*.

The agreement that a contract is void even if only one party to the contract is exposed to a criminal penalty has been accepted in several older judgments. In *Standard Bank v Van Rhyn* (1925 AD 266) the court held that when the legislature penalises an act it impliedly prohibits it, and that the effect is that the act is null and void. In *Lende v Goldberg* (1983 2 SA 284 (C)) the appellant was employed by the respondent as a domestic worker until her dismissal in February 1980. She instituted proceedings in which she claimed her salary for that month and or payment in lieu of notice. She relied on the law of unjustified enrichment.

The essence of her dismissal was due to the fact that the plaintiff was not in possession of the permit required by section 10*bis* of the Black (Urban Areas) Consolidated Act (a statute that prohibited employers from engaging Black people in the absence of permission granted by a labour bureau).

The court decided that a Black employee cannot claim to be lawfully employed despite the fact that the section is not explicitly directed at the Black employee.

The court was of the view that, by implication, the section did not afford a Black employee lawful employment contrary to the terms of the subsection, and it followed that such an employee could not claim specific performance of the contract itself or any relief involving enforcement of the terms of, or the contractual incidents of the contract. The court therefore rendered the contract void for illegality.

Kaganas criticised this judgment (see "Exploiting Illegality: Influx Control and Contracts of Service" 1983 4 ILJ 254). She argued that despite the peremptory tone of section 10*bis*, it could be argued that the legislature was content with criminal sanctions and that it did not intend the offending transaction to be void. Influx control laws violated personal liberty and should be narrowly construed.

A view different to that of the court was also expressed by Jordaan ("Influx Control and Contracts of Employment" 1984 5 ILJ 61). He submitted that a contract of employment entered into in contravention of section 10*bis*(1) of the Urban Areas Act is not void and that the section merely imposes a penalty on an employer who contravenes it.

Peremptory wording of a section and the provision of a penalty for its contravention are only *indicia* of legislative intent, and neither is conclusive. Jordaan also suggests that the distinction between the prohibition of the performance of a contract rather than prohibition of the contract itself is significant. He is of the view that to hold otherwise would result in the penal provisions of section 10*bis*(2) being rendered ineffective. It would be untenable to deprive an employee who was already disadvantaged by the fact that his employment fell outside the scope of the previous Labour Relations Act 28 of 1956 of their common-law contractual rights (Jordaan

1984 5 ILJ 65). (Employees like Lende were excluded from the ambit of this Act).

In the case of *Georgieva-Deyanova v Craighall Spar* (2004 9 BALR 1143) the applicant had been working for the respondent for more than a year, she was not a South African citizen and was not in possession of a valid work permit nor a residence permit during the course of her employment.

The employer requested the employee to provide documents in respect of the work permit required by the Immigration Act or a South African identity document. The employee failed to do so and was subsequently dismissed.

The applicant referred the matter to the CCMA under its unfair dismissal jurisdiction. The issue to be decided was whether there was a valid and binding employment contract between the applicant and the employer. After referring to the provisions of the Immigration Act (ss 38(1) and 49(3) of 2002), the CCMA decided that it did not have jurisdiction because the contract of employment was void *ab initio*. The same conclusion was attained in the case of *Vundla v Millies Fashions* (2003 24 ILJ 462) which had a similar set of facts.

In the case of *Maila v Pieterse* (2003 12 BALR 1405) the applicant was a citizen of the United States of America. She was offered the position of adviser to the employer but this offer was subject to her obtaining a work permit. After two months the employment relationship ended and the matter was referred to the CCMA. The arguments raised by the applicant were:

- The wide definition as it appears in section 213 of the LRA includes illegal immigrants.

The commission responded to this argument by stating that the literal interpretation would cover even illegal aliens. However, the commissioner was of the view that the word “employee” did not cover those employees whose acts are unlawful regardless of the absence of an express provision condoning unlawful conduct.

- The right to fair labour practices as contained in section 23(1) of the Constitution applied to everyone and not only to South African citizens.

The court’s response was that the right to fair labour practices was not unlimited, and that it was, in this specific case, limited by the Aliens Control Act of 1991. Furthermore, the court held that by limiting this right the CCMA and Labour Courts were preventing the opening of floodgates for all illegal immigrants to challenge the fairness of their dismissal.

In most of the cases the conclusion was accordingly that once it is determined that a contract is void due to illegality the applicant is not an employee and the LRA does not apply.

A contrary conclusion (and one in line with the outcome of the second leg of the enquiry of the court in *Discovery Health Limited v CCMA supra*) was reached by the commissioner in the arbitration of *Mackenzie v Papparazzi Pizzeria Restaurant obo Pretorius* (1998 9 BALR 1165 (CCMA)), who held that section 213(b) was sufficiently wide to include prohibited employment. In

the proceedings before the commissioner, the waitron who was below the age of 18 years of age worked in a restaurant which sold alcohol in accordance with a valid liquor licence. Such employment is prohibited by the Liquor Act.

The commissioner rejected the respondent's argument that the applicant was not an employee because the contract was illegal and held that she assisted in carrying on or conducting the business of an employer, the respondent. This view was, however, not the prevalent view of CCMA commissioners until *Discovery Health Limited* and commissioners were generally advised that an illegal employment contract of an applicant meant that the latter was not an employee.

This view prevailed until the ruling that led to the *Discovery* review and is now clearly altered.

The reasons the court advanced for finding firstly that the contract of employment was not valid, and secondly that, even if it was not valid, that the (b) part of the definition of employee was sufficiently wide to include applicants who rendered work on a basis other than that recognised as employment in terms of a common law contract. In this regard the court endorsed the view of the commissioner in the *St Elmo's Pizzeria* (*supra*) arbitration.

The court, correctly it is submitted, found it unnecessary to resort to the concept of a wider employment relationship in constituting the definition of employee in labour legislation. It is this basis on which Bosch's article "Can Unauthorised Workers be Regarded as Employees for the Purposes of the Labour Relations Act?" (2006 27 ILJ 1342) and Bosch and Christie's article "Are Sex Workers 'Employees'?" (2007 28 ILJ 804) construct the argument that unauthorised workers are employees for the purposes of the LRA and Basic Conditions of Employment Act.

## 5 Prostitution in South Africa

### 5.1 General

"We can trace it [prostitution] from the earliest twilight in which history dawns to the clear daylight of today, without a pause or a moment of obscurity" (Sanger *The History of Prostitution* 2ed (1913) 1).

Prostitution is often referred to as "the oldest profession" in the world. It has existed in every society for which there are written records (Jenness *Making It Work* (1993) 2). The decision to prostitute should, according to Schurink and Levinthal, be understood in terms of economical criteria, socio-psychological factors and the demand for commoditised sex (154-155). The harmful facets of prostitution include the threat to marriage and family, concerns relating to "public nuisance" and health considerations, most notably the perceived relation between prostitution and HIV/AIDS. The key question of how the South African legal system should respond to prostitution has recently received a great deal of attention (Bosch and Christie "Are Sex Workers 'Employees'?" 2007 28 ILJ 804; and Bosch "Can

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Unauthorised Workers be Regarded as Employees for the Purposes of the Labour Relations Act” 2006 27 ILJ 1342).

The legislature has the responsibility to combat social ills and, where appropriate, to use criminal sanctions (Ngcobo J in *S v Jordan* 2002 6 SA 642 CC par 25). In doing so, it has to act consistently with the Constitution. Once the legislature has chosen to impose criminal sanctions, courts are not permitted to enter into the debate as to whether the choice made is the correct one (*S v Jordan supra* par 25.) The means employed by the State to address the problem of prostitution (and the associated violence, drug abuse and child trafficking) are to criminalize commercial sex and brothel-keeping (par 26 *Jordan*). The amendment of the Sexual Offences Act in 1988 to include section 20(1)(aA) criminalised the performance of sexual acts for reward and made it a criminal offence to work as a prostitute in South Africa. This approach runs contrary to supporters of “prostitution-as-work”.

## 5.2 *Prostitution-as-work*

“It is the laws against prostitution that constitute the violation of human rights, rather than the prostitution itself” (Lim as quoted in the South African Law Commission Project 107 “Sexual Offences” Issue Paper 19 Chapter 4 “Sexual Offences: Adult Prostitution” 15).

Proponents of this view hold that women have a right to choose to engage in prostitution as a legitimate occupation, as in any other form of work, and that they should therefore have the same rights as other workers (Bingham “Nevada Sex Trade: A Gamble for the Workers” 1998 *Yale Journal of Law and Feminism* 77 as quoted in Issue Paper 19, Chapter 4. A premise underpinning this view is that not all prostitution is forced or coerced. Some so-called “liberal feminists” choose to depict prostitutes as choosing legitimate service work that should be respected and protected like work in other legitimate service occupations and that this is work that people should have the right to choose). Importantly, they attribute much of the police harassment and general violence experienced by prostitutes to society’s refusal to recognise that prostitutes have rights, and cite both gender and ethnic discrimination in police enforcement of laws against prostitution (Bingham (79) as quoted in Issue Paper 19, Chapter 4, as noting, in relation to the United States of America, that female prostitutes are arrested in much greater numbers than the men who solicit them and that most of the women who are arrested are women from minority groups). Supporters of the prostitution-as-work perspective therefore demand the decriminalisation of prostitution, and argue that if the laws criminalising prostitution were removed, prostitution would be more likely to be seen as a legitimate form of work. This would in turn reduce the risk of police harassment and brutality, and would place prostitutes within the ambit of protective labour mechanisms (Bingham (81) as quoted in Issue Paper 19, Chapter 4).

“The lack of international and local protection renders sex workers vulnerable to exploitation in the workplace, and to harassment or violence at the hands of

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employers, law enforcement officials, clients and the public. The need for worker protection, including occupational safety provisions, is of particular relevance in the current context of HIV/AIDS" (South African Law Commission: Issue Paper 19 Chapter 4 <http://www.saflii.org/za/other/zalc/ip/19/19-CHAPTER-4.html#fn168#fn168> (accessed 2009-02-09).

### 5.3 *A gradual shift prior to Jordan?*

According to the South African Law Commission Issue Paper dealing with Adult Prostitution, there has not, however, been consistent policy support for the approach of criminalising prostitution (Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution: Chapter 2 – accessed <http://www.saflii.org/za/other/zalc/ip/19/19-chapter-2.html>). In 1996, for example, the Gauteng Ministry of Safety and Security produced a draft policy document which recommended the decriminalisation of prostitution. This process resulted in the setting up of a Task Team to report to the provincial Cabinet. The Gauteng Cabinet eventually endorsed and approved the Task Team's recommendations, unequivocally recommending the decriminalisation of (adult) prostitution, as set out in its final report (Task Team, Gauteng Province *Decriminalisation of Sexwork* (Final Report) 1997 7-8). The Gauteng proposals for decriminalisation received support from the African National Congress at its national conference in Mafikeng in 1997 but the initiative lost momentum in 1998 (Rakgoadi "Sex Work: Decriminalisation" Unpublished paper presented at SADC Conference on Prevention and Eradication of Violence Against Women (Durban, March 1998). Even in its first country report to CEDAW, submitted in 1997, the South African government reported on the status of the law regarding prostitution and noted that current laws may violate some constitutional rights, such as the right to equal protection and benefit of the law; the right to have one's dignity respected and protected; rights to freedom and security of the person; the right to privacy; the right to freedom of association; and the right to choose one's trade, occupation or profession. In 1998, the Commission on Gender Equality apparently produced a brief position paper supporting the decriminalisation of sex work and conducted research on options for legal reform (Issue Paper Chapter 2: "Background to the Current Debate on Adult Prostitution" <http://www.saflii.org/za/other/zalc/ip/19/19-CHAPTER-2.html#fnB34> (accessed 2009-02-09). It is also noteworthy that the adult pornographic media industry can be described as legalised: the Films and Publications Act (65 of 1996) provides for the lawful possession, distribution and exhibition of adult pornographic material, provided that these actions take place within the framework constructed by the Act (see s 2).

It is problematic that, due to the fact that prostitution is illegal, protective measures contained in labour legislation such as the Basic Conditions of Employment Act or the Occupational Health and Safety Act do not apply to prostitutes. This means that even where prostitutes are forced to work in agencies under circumstances approximating slavery, they would not have recourse to the remedies available to other workers (Issue Paper 19). The "employment" contract between the operator and the prostitute relates to illegal activities, and therefore does not fall within the ambit of "lawful"

employment. (The analogy provided by Issue Paper 19 is of a person working as a “runner” for a drug dealer: due to the fact that drug dealing is a criminal activity, the runner would not be in a position to claim recourse in terms of labour legislation if the drug dealer forced him to work for inordinately long hours.)

There are also cases, admittedly post-Constitution but prior to the *Jordan* case, which have resulted in interdicts being obtained against the management of an escort agency, preventing them from infringing on the human rights of prostitutes working at the agency (Issue Paper 19, Chapter 4).

In all the circumstances, it is undeniable that although the sector of the adult commercial sex industry generally referred to as “prostitution” is formally criminalised, the system in practice is a hybrid mixture of criminalisation and legalisation (<http://www.saflii.org/za/other/zalc/ip/19/19-CHAPTER-5.html#fn263#263>). There are also instances where criminal prohibitions, though formally in place, are not enforced by police or the prosecuting authorities. This approach is in accordance with the view of proponents of the prostitution-as-work perspective.

There appears to be clear recognition that women who voluntarily enter and remain in prostitution are rendered vulnerable to a range of violations of their basic rights. At present, there is no international instrument that explicitly condemns as such the abuse of human rights of prostitutes who were not “forced”. The Issue Paper on Adult Prostitution accordingly considers it significant that CEDAW, in addition to its implied recognition of the fact that not all prostitution is inherently exploitative, observes that the vulnerability of prostitutes to violence is exacerbated by the marginalisation that results from the fact that their status is unlawful (<http://www.saflii.org/za/other/zalc/ip/19/19-CHAPTER-7.html#fn616#fn616>). The right to equal protection of the law is specifically enumerated in this regard. The Special Rapporteur on Violence Against Women has also made the link between the increased marginalisation of prostitutes (due to the illegal status of prostitution) and the denial or violation of prostitutes’ rights.

## 6 Analysis

A critical analysis of the two cases in question reveals subtle, yet significant, differences in approach which contributed to the divergent findings of the courts. It is arguable that an enquiry along the lines of the questions posed by Cheadle AJ in *Kylie* to the facts of *Discovery Health* may have resulted in a different outcome in the latter case. In particular, the great weight attached in *Kylie* to the principle that illegal activity should not be sanctioned was not replicated by the *Discovery Health* approach – an approach which ultimately protected workers who were parties to an illegal contract notwithstanding the previous case authority to the contrary reflected above.

In addition, Van Niekerk AJ in *Discovery Health* argued from the premise that while the employment of an illegal foreigner resulted in an offence being committed, there was no indication in the statute that the constitutional right

to fair labour practices was to be limited by its provisions. By contrast, despite the Sexual Offences Act also not containing any such express indication, Cheadle AJ held in *Kylie* that the underlying purpose of that Act to protect the public from the social ills associated with commercial sex should trump a reading which considered the criminal penalty to be the only sanction for the illegal activity. According to the court in *Kylie*, and contrary to the *Discovery Health* approach, if the contrary was intended the legislature should have expressly indicated that a contravention of the Sexual Offences Act resulted in only a crime being committed without any additional sanction. In fact, both the Immigration Act and the Sexual Offences Act criminalised the conduct which the individuals in *Discovery Health* and *Kylie* were guilty of in peremptory terms.

Furthermore, applying a portion of the *Kylie* approach to the facts in *Discovery Health* would open the door to the argument that the legislature, by retaining the Immigration Act on the statute books in its current form and criminalising certain behaviour, clearly sought to prevent the employment of illegal foreigners – an event now sanctioned to a significant extent by the court's judgment.

In addition, whereas the *Discovery Health* judgment was at pains to ensure that "unscrupulous employers" would not benefit further from a finding which refused protection to their employees, the *Kylie* decision placed far greater emphasis on the argument that a different finding in that case would encourage sex work – irrespective of the side-effect that employers of sex workers would now escape liability in terms of the LRA.

There is something distinct about the position of sex workers which results in the suspicion that their position may be somewhat distinct from that of "ordinary" criminals – notwithstanding the clear provisions of the Sexual Offences Act. This attitude may stem from the fact that the crime of prostitution is generally not enforced by the police and that prostitutes are a common (and tolerated) feature of most societies, as indicated above. In addition, the special role that gender plays in the relationships between sex workers, their employers and clients requires further consideration and investigation. This may be particularly so when, as in the *Kylie* case, a sex worker is dismissed for refusing to perform a particular sexual act. It is arguable that the case in favour of granting a level of protection to sex workers is distinguishable from cases involving other criminals – sex workers' conduct is not criminalised because they cause harm to another person. In fact, they are often themselves the victims of an unfortunate relationship with a domineering employer, as born out by the tone of the Report on Sexual Offences issued by the South African Law Commission. Clients of sex workers are effectively the beneficiaries of the services that sex workers in most cases are forced to provide because of the unfortunate position they find themselves in – economically dependent and psychologically affected, perhaps, but certainly living in a society in which, despite the high unemployment rate, the offer of sex for money is an alternative which continues to pay. Supporters of this line of reasoning would also submit that granting protection to sex workers who are trapped in the

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reality of constantly being engaged in this type of work is unlikely, by itself, to result in the encouragement of the activities prohibited by the legislation. What such a finding would do is to provide a solitary layer of protection for a group which is, arguably, desperately in need of some assistance. This protection in one aspect of the law relating to the livelihood of sex workers would not alter the status of their conduct as being criminal in South African law. Crucially, the court in *Kylie* came to the opposite conclusion.

Despite these sentiments and the contrast in approaches highlighted above, the real basis for distinguishing the *Kylie* case from *Discovery Health* remains the distinction between illegal work (such as sex work) and work which is legal (such as working in a food store) but performed illegally (such as in cases where the worker is a foreigner who is not in the possession of a work permit). This key difference is self-evident from the facts of the two cases and is undeniable. It was this distinction which effectively resulted in the constitutional protection afforded to “everyone” in section 23 of the Constitution only being used to the benefit of the individual concerned in the *Discovery Health* case. And this finding, ultimately, would appear to hinge upon the public policy of the time – public policy post-*Jordan* which currently still stacks against sex workers.

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