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**THE RIGHTS OF ILLEGAL WORKERS
NOT TO BE UNFAIRLY DISMISSED, WITH EMPHASIS ON
ILLEGAL IMMIGRANTS AND SEX WORKERS**

BY

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TABLE OF CONTENTS

<u>CHAPTER ONE</u>	5
Introduction	5
1.1 Rationale	5-6
1.2 Research Questions	6
1.3 Research Methodology	6
<u>CHAPTER TWO</u>	7
Who is an employee	7
2.1 The National Economic Development and Labour Council (NEDLAC) Code Of Good Practice	8-9
2.2 Workers who may be classified as employees in terms of the Labour Relations Act: Legislation and Precedent	10-14
<u>CHAPTER THREE</u>	15
Do illegal workers have a right not to be unfairly dismissed?	15
3.1 The rights of illegal immigrants as vulnerable employees	15-24
3.1.1 South Africa's international obligations	24-26
3.2 The rights of sex workers as vulnerable employees	26
3.2.1 Kylie v CCMA and Others	27
3.2.2 Judgement of the CCMA	27-28
3.2.3 Judgement of the labour court	28-33
3.2.4 Judgement of the labour appeal court	33-36
3.2.5 Concluding comments on the court findings	36-37
3.2.6 The difference between the Discovery Health v CCMA and the	

Kylie v CCMA judgements	37-40
3.2.7 The need to extend labour rights to sex workers	40-46
3.2.8 The test applied by the Labour Court upon review	46-49
 <u>CHAPTER FOUR</u>	 50
Comparative study with foreign law on the rights of illegal immigrants	50
4.1 Non-protection approach	51-53
4.2 Protection with consequences approach	53-56
4.3 Full protection approach	56-60
 <u>CHAPTER FIVE</u>	 61
The current legal position regarding the treatment of illegal immigrants and sex Workers by South African Labour Law	61
Court decisions and the law	61-66
 <u>CHAPTER 6</u>	
Conclusion	67-69

ABSTRACT

Illegal workers have been and continue to be the most vulnerable category of employees in the labour market, the reason for this is the invalidity of their employment contract due to illegality. For the longest time, the Labour Relations Act (hereinafter the LRA) has not been able to afford these workers protection because they did not fall within the ambit of the legal definition of 'employee' and the Act only recognises employees as holders of the rights provided for under the LRA. As a result of the Act not being able to protect these workers, they have become victims of exploitation and vicious abuse in the hands of their employers, making them vulnerable in their employment relationship. The law concerning illegal workers has since changed. Courts have found that these workers are in fact employees for the purposes of the LRA, and that, for an employment relationship to exist there need not be a valid employment contract in existence. An employment relationship may take various forms and the goal that the Labour Relations Act seeks to achieve is to protect those employees who find themselves vulnerable as a result of the illegality of their employment contract. It has also been argued that the law aims mostly at penalising the employer rather than the employee who is economically and socially weaker than the employer, therefore, courts have found that the Labour Relations Act should be interpreted in a manner that is consistent with the Constitution of the Republic of South Africa (hereinafter the Constitution) which requires a wider interpretation of who may be afforded the right to fair labour practices.

CHAPTER ONE

1.1 Introduction

Background

The law regarding the dismissal of sex workers and illegal immigrants as illegal employees in South Africa is quite a controversial issue. This is evident from the cases that have come before the South African labour courts. What causes this controversy is that, the employment contract that brings about the employment relationship is illegal and unenforceable, as such contracts are against public policy. However, although this may be true, the number of people who find themselves in an abusive employment relationship and at the mercy of the law is appalling and calls for concern and possibly some protection by South African courts.

The purpose of this research is to evaluate the law regarding the unfair dismissal of illegal employees with emphasis on sex workers and illegal immigrants as vulnerable workers. Firstly, I will examine the right to fair labour practice and who this right applies to in terms of section 23 of the South African Constitution.

I will then consider the legislation that prohibits such illegal work and how the courts have applied it to the cases. I will then evaluate the decisions of the courts that have dealt with these cases and whether the remedies were effective in the circumstances, bearing in mind the unavoidable socio and economic issues faced by sex workers and illegal immigrants in the labour market. The research will then draw attention to the vulnerability of these workers and the causes, focusing on the reasons why they continue to be vulnerable even when the law is available to “protect” them. It will then provide a comparative study between South African law and other states that have extended employment rights to illegal immigrants. This research will then conclude on how the law treats illegal immigrants in a manner which differs from how it treats sex workers.

In short, I will evaluate the law regarding the unfair dismissal of sex workers and illegal immigrants and whether the law currently provides adequate protection for these employees as vulnerable workers.

1.2 Rationale

The rationale of this study is based on the reality of the issues faced by vulnerable workers in society, and based on the belief that there is cause for concern and a need for a voice

with regards to these workers. It is to show that their vulnerability is the reason for their continued exploitation and abuse in the hands of their employers. It is worth researching because it goes behind what the court sees as just another criminal, and digs deeper into the employee's social and economic challenges and reasons as to why these workers find themselves at the mercy of the law while fully conscious of the illegality of their employment contract.

1.3 Research Questions

This research will focus on whether a valid contract is necessary for an employment relationship to exist whether workers employed illegally have the right not to be unfairly dismissed. If such workers have the right not to be unfairly dismissed, what remedies are they entitled to? It will also ask the question as to whether South Africa has an international obligation to protect the rights of illegal workers and will consider why these workers deserve protection. Lastly it will focus on foreign law and whether South Africa can learn from foreign jurisdictions.

1.4 Research Methodology

For this research, cases, legislation and literature surveys will be conducted. Information will be gathered primarily from case law available on the primary issues and to conduct persuasive arguments, information will be drawn from journals and normative studies to provide a more overall perspective.

CHAPTER TWO

WHO IS AN EMPLOYEE

In any labour dispute, the primary issue is whether the person seeking relief is by definition an employee.¹ The second issue is whether he/she can be afforded the necessary protection under applicable legislation, such as the Labour Relations Act 66 of 1995, the Basic Conditions of employment Act 75 of 1997 or the Employment Equity Act 55 of 1998.² Only “employees” have the right to seek recourse under the Labour Relations Act, as this is the only category of people who can be victims of unfair labour practice.³

An employee is defined in section 213 of the Labour Relations Act⁴ and section 1 of the Basic Conditions of Employment Act as:-⁵

*“(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; and⁶
(b) any other person who in any manner assists in carrying on or conducting the business of an employer.”⁷*

An almost identical definition of an employee is also provided for in section 1 of the Employment Equity Act.⁸

¹ Labour Relations Act 66 of 1995, *see also* L Muswaka “Sex Workers and the Right to Fair Labour Practices”. (2011) 23 SA Merc LJ 537.

² Ibid.

³ Ibid.

⁴ Section 213 of the Labour Relations Act 66 of 1995.

⁵ Section 1 of the Basic Conditions of Employment Act 75 of 1997.

⁶ Ibid note 4 and 5 above.

⁷ Ibid.

⁸ Section 1 of the Employment Equity Act 55 of 1998.

2.1 The National Economic Development and Labour Council (NEDLAC) Code of Good Practice

The National Economic Development and Labour Council (NEDLAC) has prepared and issued a Code of Good Practice that sets out guidelines to determine whether persons may be defined as employees.⁹

“To determine whether a person is an employee rather than an independent contractor, courts must determine the true relationship between the parties.¹⁰ Sometimes this relationship may be found from the contract that the parties have concluded.¹¹ However, the wording of the contract will be given effect to only if it is a true representation of the realities of the existing employment relationship.”¹²

“In instances where the contract is not a reflection of the true relationship between the parties, courts will nevertheless disregard the form of the contract and give effect to the true relationship between the parties, despite what they have chosen to call it.¹³ Courts look beyond the form of a contract because sometimes employers attempt to disguise the true nature of the relationship.”¹⁴

It is noteworthy that a disguised relationship is a reality in the South African labour Market.¹⁵ “A disguised relationship occurs when the employer treats an individual as anything else but an employee, which in turn hides the employee’s true legal status as an employee.”¹⁶ It is a reputable principle of our law that “the label given to a contract is of no effect where its objective is to hide the true nature of the relationship.”¹⁷ A contract that describes an employee as an independent contractor, but in terms of which the employee is in a subservient or dependent position, remains a contract of service.”¹⁸ Employers have claimed that an individual who was working as an employee had changed to being an independent contractor.¹⁹ This is, however, a strong symbol that the employee remains an employee

⁹ National Economic Development and Labour Council Code of Good Practice.

¹⁰ Ibid note 9 above at par 28.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid note 9 above at par 30.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

where he/she continues to perform the same or similar work as he did whilst he was an employee.²⁰

It is in harmony with the Labour Relations Act and other labour legislation to classify as employees, workers who have agreed to contracts purporting to categorise them as independent contractors.²¹

One of the major determining factors that classify a worker as an employee is that he/she must perform the services personally.²² The employee is obliged to carry out lawful instructions of the employer.

While NEDLAC has established these criteria to create certainty as to who is an employee, the common law is still an important and applicable source in our law.²³ In terms of the common law, an employee performs personal services, while an independent contractor's role is to produce a specified result.²⁴ An employee enters into the contract to work and the labour itself is the purpose of a contract of employment.²⁵ An independent contractor enters into the contract to provide a completed product and the result of the labour is the purpose of the contract.²⁶

It is also the employer who chooses when he/she wishes to make use of the employee's services.²⁷ Different from the cases of an independent contractor, the employer has the right to determine whether they require the employee to work, an independent contractor on the other hand has to perform as specified by the contract²⁸

The employer has the right of control and supervision over the employee but does not have right of control and supervision over the independent contractor.²⁹ This right includes the

²⁰ Ibid.

²¹ Ibid note 9 above at par 31.

²² Ibid note 9 above at par 32.

²³ Ibid note 9 above at par 33.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid note 9 above at par 38.

²⁸ Ibid.

²⁹ Ibid note 9 above at 39.

right to determine what work the employee will perform”³⁰ This last factor is the most indicative, when it comes to determining whether an employment relationship exists.³¹

2.2 Workers who may be classified as employees in terms of the Labour Relations Act: Legislation and Precedent

In the case of *Universal Kingdom of God v Myeni and Others*, the court had to decide what the meaning of “employee” was in terms of the Labour Relations Act and therefore who deserves protection under the Act.³² Section 200A of the Code of Good Practice provided for under the LRA creates a presumption that “a person is an employee, regardless of the form of the contract.” This notion will apply if the relationship has certain characteristics.³³ Section 200A therefore provides:

*“Until the contrary is proven, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present.”*³⁴

- a) *The manner in which the person works is subject to the control or direction of another person;*
- b) *The person’s hours of work are subject to the control or direction of another person’;*³⁵
- c) *In the case of a person who works for an organisation, the person forms part of that organisation;*³⁶
- d) *the person has worked for that other person*
- e) *for an average of at least 40 hours per month over the last three months;*³⁷
- f) *the person is economically dependent on the other person for whom he or she works or renders services;*³⁸
- g) *the person only works for or renders services to one person.”*³⁹

The facts of the *Universal Kingdom of God* case are as follows:

³⁰ Ibid.

³¹ Ibid.

³² *Universal Church of the Kingdom of God v Myeni and Others* (2015) 9 BLLR 918 (LAC).

³³ Section 200A of the Code of Good Practice.

³⁴ Ibid note 33 above.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

Mr Myeni was dismissed as a pastor by the board of the church after receiving sacrificial offerings from certain church members and converted them for his own private use.⁴⁰ He had denied this to the bishop but admitted to receiving money on 3 separate occasions from different church members as gifts.⁴¹ The bishop said he would conduct an investigation, however Mr Myeni was not informed of the outcome thereafter and was dismissed.⁴² He regarded this as a dismissal which was unfair.⁴³

Upon arbitration, the church argued that Mr Myeni was not an employee as a pastor's services to the church are voluntary and they did not intend to conclude an employment relationship with him.⁴⁴ Moreover, he had signed a declaratory document that confirms that his services are voluntary and that all pastors of the church sign this document and it was not an employment contract.⁴⁵ The Commissioner considered the circumstances under which Mr Myeni rendered his services to the church and the fact that he earned an income and based on those grounds found that an employment relationship existed between Mr Myeni and the church.⁴⁶

The church was not happy with the outcome and took the matter on review to the Labour Court.⁴⁷ The Labour Court held that the church failed to rebut the section 200A presumption and ruled that "Mr Myeni was in fact an employee of the church at the time his relationship with the church was terminated."⁴⁸

The court stated that the absence of an employment contract does not mean that no employment relationship could be established.⁴⁹ The presumption contained under section 200A does not require that there be a written contract in existence.⁵⁰

⁴⁰ *Universal Church of the Kingdom of God v Myeni and Others* (2015) 9 BLLR 918 (LAC) par 10.

⁴¹ *Supra* note 40 above at par 10.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Supra* note 40 above at par 17.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Supra* note 40 above at par 20.

⁴⁸ *Ibid.*

⁴⁹ *Supra* note 40 above at par 21.

⁵⁰ *Ibid.*

The church was still not satisfied with the court's finding, and took the matter to the Labour Appeal Court.

The Labour Appeal Court came to a different conclusion to that of the Labour Court and held that, the words contained in section 200A to the effect that 'an employment relationship will exist regardless of the form of the contract', is an indication that there must in fact be a contract of employment between the parties.⁵¹ Therefore, this reinforces the notion that, in order for the section 200A presumption to apply, there must be a legally enforceable agreement or some contractual agreement between the parties.⁵²

The court went on to state that where there is a contractual agreement between the parties, such agreement must be legally binding and enforceable and the parties must have intended to enter into a contract of employment.⁵³ The court went on to state that where there is a contractual agreement between the parties, such agreement must be legally binding and enforceable and the parties must have intended to enter into a contract of employment.⁵⁴

Here the court emphasized that where there is no agreement between the parties to the effect that one of the parties will render services as an employee or where there is no other form of agreement of employment; then the presumption cannot apply. While the Labour Court correctly noted that "the form of the contract is not a prerequisite", it erred in holding that there was in fact an agreement between the parties which contained a mutual intention that the appellant was in fact in an employment relationship with the church, whereas there was no agreement to that effect. Since there was no agreement to that effect, the presumption cannot apply.

The court referred to the NEDLAC Code of Good Practice and its purpose in determining who is an employee for the purposes of the Labour Relations Act. In this regard I cite the objectives of the Code:

"The purpose of the NEDLAC code is to promote clarity and certainty as to who is an employee for the purposes of the Labour Relations Act and other labour legislation; to set out the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee; to ensure that a proper distinction is maintained between employment relationships which are regulated by labour legislation and independent contracting; to ensure that employees who are in an unequal bargaining position in relation to their employer are protected through labour law and are not deprived of these protections by contracting arrangements; to assist persons applying and interpreting labour law to understand and interpret the variety of employment relationships present

⁵¹ Supra note 40 above at par 36.

⁵² Supra note 40 above at par 40.

⁵³ Supra note 40 above at par 42.

⁵⁴ Supra note 40 above at par 55.

in the labour market including disguised employment, ambiguous employment relationships, a typical employment and triangular employment relationships.”⁵⁵

“The presumption in section 200A applies regardless of the form of the contract.⁵⁶ The person applying the presumption must evaluate the evidence and determine the true nature of the relationship and ultimately determine whether the applicant is an employee or an independent contractor. The applicant’s status will not merely be taken from the obligations of the applicant in terms of the contract or what the parties have chosen to label the contract.⁵⁷ However, the fact that the applicant has established one or more of the factors listed under the presumption does not mean that applicant is an employee, the employer bears the onus of proving that the applicant is not an employee.”⁵⁸

What we can learn from the NEDLAC code is that in order for the section 200A presumption to apply, there must be an agreement of employment between the parties, which agreement stipulates that the individual is an independent contractor, where one or more of the factors listed under section 200A are present, the court may rule that the applicant is in fact an employee.

However, the establishing of one of the listed factors in section 200A by an employee does not automatically render the applicant an employee, the employer is required to prove that the employee is in fact not an employee and the employment contract is one of independent contracting.

Another case on this issue is the case of *South African Broadcasting Corporation v McKenzie*. The respondent in this case instituted an action in the Industrial Court on the basis that his services had been terminated unfairly. The court found that “the termination of his contract constituted an unfair labour practice.”⁵⁹ The SABC appealed the decision on the basis that he was not an employee.⁶⁰

The Labour Appeal Court held that an employment relationship between the parties should be established regardless of what the parties own perceptions of the relationship may be and regardless of how it is carried out in practice. How the contract is termed will not necessarily assist the court in determining the true nature of the relationship between the parties.⁶¹ The court is not bounded by what the parties have decided the call the contract

⁵⁵ National Economic Development and Labour Council Code of Good Practice

at par 16.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid note 55 above at par 17.

⁵⁹ *South African Broadcasting Corporation v McKenzie* (1999) 20 ILJ (LAC) at par 10.

⁶⁰ Ibid.

⁶¹ Ibid.

but the court's duty is to establish whether in the true nature of the contract, the applicant is an employee for the purposes of the LRA.⁶²

What the court emphasised in this case is that, a court will not rely on the agreement between the parties and what label they have decided to give the contract. When deciding whether the contract is one of an employer-employee relationship, the court will look at the true nature of the relationship, while being guided by the factors listed under section 200A of the NEDLAC code.

One of the most important principles enunciated under Section 200A include the protection of vulnerable employees who are contractually described as independent contractors meanwhile they fall within the scope of the definition of an employee. I find that it is fair to extend this section to illegal contracts involving sex workers and illegal immigrants as employees on the basis that they qualify to be classified as "employees" in terms of the Labour Relations Act. Moreover, they are vulnerable workers that deserve the protection under the Act. Employers assume that they can escape the consequences of their unscrupulous actions because the employment contract is illegal. This encourages the exploitation and abuse of these workers. It should be the Constitution's priority to protect these employees as they are deserving of such protection.

⁶² Ibid.

CHAPTER THREE

DO ILLEGAL WORKERS HAVE THE RIGHT NOT TO BE UNFAIRLY DISMISSED?

3.1 The rights of Illegal Immigrants as vulnerable employees

Until recently, it has generally been accepted that there can be no employment relationship without a valid contract of employment. However, this position has since changed as courts have found themselves having to decide whether the right to fair labour practices under section 23 of the Constitution extends to workers that are in an illegal employment contract. The decisions of the courts have been significantly in favour of these workers, in particular cases involving illegal immigrants and sex workers.

Before discussing the cases that created precedent in relation to illegal immigrants, it is important to refer to the legislation that currently exists in relation to the labour rights of illegal immigrants.

Section 10 (A) of the Immigration Act provides that"

"An employee must have a valid visa, one which may be a work permit.⁶³ A person who is employed by another, without a valid work permit is guilty of an offence and liable on conviction to a fine or imprisonment and can be arrested or removed from the country."⁶⁴

Section 38(1) of the Act relates to employment and provides that:

"No person shall employ:

(a) *an illegal immigrant,*⁶⁵

(b) *a foreigner who's status does not authorize him/or to be employed by such a person, or*⁶⁶

(c) *a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.*"⁶⁷

Section 49(3) provides that:

⁶³ Section 10 of the Immigration Act 13 of 2002.

⁶⁴ Ibid note 63 above.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

“It is an offence to employ an illegal foreigner or a foreigner in violation of the Act and the employer may be liable on conviction to a fine or imprisonment not exceeding one year.”⁶⁸

One particular case which dealt with the issue of whether illegal immigrants may be regarded as employees in South Africa, and receive protection from the Labour Relations Act, is the case of *Discovery Health Ltd v CCMA and Others*.⁶⁹ In this case, the court had to determine “whether a foreign national who works for another person without a valid work permit is an ‘employee’ as defined by the LRA.”⁷⁰

In this case, the employer terminated the employment relationship with Mr Lanzetta, an Argentinian national who worked in their call centre, for not possessing the requisite work permit.⁷¹

Discovery Health argued at the CCMA that “Mr Lanzetta’s contract was illegal and was therefore unenforceable by law, as a result he could not be regarded as an employee who could be afforded the right not to be unfairly dismissed provided under the Labour Relations Act.”⁷² The commissioner found in favour of Mr Lanzetta and ruled that “he was an employee despite the fact that his contract of employment was invalid.”⁷³ The court based its decision upon section 23 of the Constitution and the existing international obligations.⁷⁴

The court referred to section 23(1) of the Constitution, and held that the right to fair labour practices should be interpreted in a manner that includes everyone, which is precisely what the Constitution envisaged.⁷⁵ The court went on to state that, in interpreting section 23(1) courts must have due regard to international law principles.⁷⁶

Unsatisfied with the decision, *Discovery Health* took the matter on review to the Labour Court. The Labour Court reasoned that by criminalising only the conduct of the employer who employed a foreign national without a valid permit, Parliament did not intend to render

⁶⁸ Section 49(3) of the Immigration Act 13 of 2002.

⁶⁹ *Discovery Health v CCMA and Others* (2000) 5 BLLR 578 (LC).

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Supra* note 69 above at par 38.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

the contract invalid.⁷⁷ In essence, the applicant was an employee when his contract of employment was terminated, and the CCMA had jurisdiction to entertain the dispute between him and Discovery Health.”⁷⁸

In other words the court’s reasoning was based on the existence of an employment relationship between the parties.⁷⁹ The court noted that “a statute should be interpreted in a manner which does not limit the right to fair labour practices as envisaged in section 23 of the Labour Relations Act.”⁸⁰

The Labour Court went on to state that a contract entered into in Contravention of the Immigration Act is valid and enforceable.⁸¹ The court emphasised that, nowhere in the Immigration Act does it state that such a contract is void; a statute should be interpreted, if its language reasonably permits, in a manner which protects the rights of illegal immigrants instead of limiting them.⁸² The legislature intended penalizing the employer without rendering the employment contract void.”⁸³

In essence, the Labour Court found that since the Immigration Act does not expressly exclude contracts entered into in contravention of the immigration Act as valid, the Constitution must be given preference, in that when interpreting a statute, one should interpret it, if the language does not limit such interpretation, in a manner which gives recognition to fundamental human rights and in this case, the rights of illegal immigrants to fair labour practices.

The court then found support in the application and interpretation of relevant International Labour Organisation Conventions in particular Convention 143 to the issue of whether an illegal worker could seek protection in terms of the LRA against an unfair dismissal.⁸⁴ The court held that Convention 143 places an obligation on member states to respect the fundamental human rights of all migrant workers. This includes those who are illegally employed.⁸⁵ The court reasoned that, bearing in mind the principles of international

⁷⁷ Supra note 69 above at par 32.

⁷⁸ Ibid.

⁷⁹ Ibid, *see also* section 200A of the Code of Good Practice.

⁸⁰ *Discovery Health v CCMA and Others* (2000) 5 BLLR 578 (LC) at par 32.

⁸¹ Supra note 80 above a par 41.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Supra note 80 above at par 47.

⁸⁵ Ibid.

conventions, the LRA should be interpreted in a manner that does not limit the rights of illegal immigrants.⁸⁶

The court reasoned that “section 23 of the Constitution applies to everyone.”⁸⁷ The court drew attention to section 233 of the Constitution which states that “When interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law.”⁸⁸

The court then made reference to the case of *NUMSA v Bader Bop (Pty) Ltd & Another*⁸⁹ which found that “the Conventions and recommendations of the ILO are an important source of International law when it comes to interpreting the right to fair labour practices.”⁹⁰ The court found that the ILO Conventions of 1949 and 1975 sets out the obligation of member states to respect the basic human rights of all migrant workers.”⁹¹

It is worth mentioning that there have been a few cases that have been decided on the same issues relating to the labour rights of illegal immigrants, which have found support from the decision in *Discovery Health*. One of such cases is the case of *Sithole v Metal & Engineering Industries Bargaining Council & others*, where an application for review and to set aside the commissioner’s decision and award was brought by a Namibian National who had worked for his employer as a gardener and subsequently a general worker for a period of 5 years without a valid work permit.⁹²

The employer dismissed him for not having a work permit, after the employee, who despite his requests to his employer to provide him with the documents that would assist him to apply for a work permit, the employer refused to do so.⁹³ The employee argued that he was dismissed because he had asked for protective clothing.⁹⁴ The court found support in the

⁸⁶ Ibid .

⁸⁷ Ibid.

⁸⁸ Supra note 80 above at par 42, see also Section 233 of the Constitution of the Republic of South Africa Act 108 of 1996.

⁸⁹ Supra note 80 above at par 43, see also *NUMSA v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC) at par 26

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² *Sithole v Metal & Engineering Industries Bargaining Council & others* (2018) 39 ILJ 472 (LC) at par 3.

⁹³ Supra note 92 above at par 5.

⁹⁴ Supra note 92 above at par 3.

case of *Discovery Health v CCMA & others* and held that the commissioner put too much focus on the fact that the applicant did not have a work permit and failed to consider the material facts placed before him.⁹⁵

The Commissioner paid no due regard to the fact that the applicant had worked for his employer for a period of 5 years, and that the issue of him not having a valid work permit was raised for the first time after he had requested his employer to assist him in obtaining the relevant work permit, who in turn refused to do so.⁹⁶ After the three days' leave he had been given, the employer refused to allow him to work and he was told never to come back."⁹⁷

The court concluded that the applicant was indeed dismissed and that the reason for his dismissal was his failure to obtain a work permit, despite him requesting his employer to assist him in doing so.⁹⁸ It was in the court's finding that the applicant's employer had been reaping the benefits of the applicant's services without concerning itself with the unlawfulness of the employment contract."⁹⁹

The court importantly noted that the contravention of s 38(1) of the Immigration Act was never intended to protect employers from the legal consequences of terminating contracts which were entered into in violation of the Immigration Act.¹⁰⁰

The court held that the dismissal was substantively and procedurally unfair and ordered four months compensation.¹⁰¹

One of the goals that the Labour Relations Act is trying to achieve is to eradicate the abuse of employees in the hands of their employers. The fear that illegal immigrants have of being penalised under the Immigration Act is what encourages employers to continue exploiting illegal workers. It is a reflection of the court's finding in the case cited above, that the LRA will no longer allow such behaviour from employers. It is clear from the facts of the case that the employer was scrupulous in his actions in that he expected to benefit from the employer's services, meanwhile he did not want to perform his contractual obligations as an employer. Only when the employee requested his assistance, of which he refused, does he play the illegality card and dismiss the employee, confident that the court would find in his

⁹⁵ Supra note 92 above at par 11.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Supra note 92 above at par 12.

⁹⁹ Ibid.

¹⁰⁰ Supra note 92 above at par 13.

¹⁰¹ Supra note 92 above at par 16-17.

favour and totally disregarding that he has never raised this issue for the duration of 5 years, in which the applicant was in his employ. This is exactly what the LRA seeks to prevent and to hold employers who treat their employees in this manner accountable.

Another case in point is the case of *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*. In this case, the employee was a foreign national who was employed as a hotel receptionist by her employer.¹⁰² Her work permit expired and she was suspended without pay and was told to obtain a work permit as she could no longer tender legal services.¹⁰³ The employee brought a claim for an unfair labour practice in the CCMA for the unfair suspension.¹⁰⁴ The employer argued that “the CCMA did not have jurisdiction to hear the matter.”¹⁰⁵

The arbitrator found that the CCMA did have jurisdiction, and that the suspension of employees due to their status as illegal employees can be brought in terms of the LRA, and that it may be argued that Southern Sun's failure to assist the employee in getting a work permit amounted to an unfair labour practice.”¹⁰⁶

The employer then applied for a review in the Labour Court.

The Labour Court held that having considered the decision in *Discovery Health*, it is now a feature in our law that there need not be a valid contract of employment in order for a worker to enjoy the status of an employee in terms of the LRA.¹⁰⁷ An illegal immigrant is entitled to the right to fair labour practices, regardless of the illegality of his/her contract of employment.¹⁰⁸

The court noted that the suspension of the contract of employment by the employer does not relieve the employer of its duty to pay the employee.”¹⁰⁹ Such unfair practice can be brought in terms of the LRA.¹¹⁰

Worth mentioning is that an employer can no longer dismiss an employee on the basis that they are not in possession of a valid work permit, an employee remains an employee for the

¹⁰² *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 2756 (LC).

¹⁰³ Supra note 102 above at par 4.

¹⁰⁴ Supra note 102 above at par 6.

¹⁰⁵ Supra note 102 above at par 7.

¹⁰⁶ Supra note 102 above at par 11.

¹⁰⁷ Supra note 102 above at par 16.

¹⁰⁸ Ibid.

¹⁰⁹ Supra note 102 above at par 18.

¹¹⁰ Supra note 102 above at par 19.

purposes of the LRA regardless of his/her status. Even in this instance, an employer cannot use this as a ground for dismissal; the dismissal has to be fair. In *Southern Sun*, the court emphasised that in cases where the employee is suspended for not being in possession of a valid work permit, the employer still has a duty to pay the employee.

Before the decision in *Discovery Health*, Craigh Bosch published an article called “Can Unauthorized Workers Be Regarded as employees for the Purposes of The Labour Relations Act?” it is from this article that the court based its finding.¹¹¹ Bosch concluded in his article that these workers should be regarded as ‘employees’ and bearers of the right not to be unfairly dismissed.¹¹²

He mentions that, “Although there are arguments to the contrary, stronger arguments to the effect that contracts concluded in contravention of the Immigration Act are null and void exist.”¹¹³ Bosch, in this regard however, argues that “there is no express limitation in the Constitution or persuasive reasons to limit the right to fair labour practices to workers legally employed.”¹¹⁴

Craigh Bosch also mentions that, “it is the employer’s conduct that should be punished and that this may have been what the legislature intended.”¹¹⁵

Dawn Norton however, holds a different view to that of Craigh Bosch and argues that if on the one hand the Act properly interpreted prohibits contracts that are entered into in violation of the Immigration Act but then on the other hand Bosch and the court in *Discovery Health* hold the view that such contracts are valid and enforceable in terms of the Labour Relations Act, then will legislation and the courts deal with this contradiction.¹¹⁶

My response in this regard, is that it is a well-founded principle in our law that when courts interpret any statute they “must promote the spirit, purport and objects of the Bill of Rights.”¹¹⁷ However, when it comes to the question as to how courts are to deal with situations as such, it should be born in mind that what we are seeking to determine is

¹¹¹ C Bosch “Can unauthorized workers be regarded as employees for the purpose of the Labour Relations Act?” (2006) 27 *Industrial Law Journal* 1342.

¹¹² Ibid note 111 above at pg 1342.

¹¹³ Ibid note 111 above at pg 1349.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ *Discovery Health v CCMA and Others* (2000) 5 BLLR 578 (LC) at par 41, see also C Bosch “Can unauthorized workers be regarded as employees for the purpose of the Labour Relations Act?” (2006) 27 *Industrial Law Journal* 1342.

¹¹⁷ Section 39 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.

whether the worker falls within the definition of an employee under the Labour Relations Act and more especially if they are treated as such. Equally, their rights under the Constitution should also be given effect to.

As we have seen from *Discovery Health*, a valid contract of employment is no longer a prerequisite for an employment relationship to exist, the effect of this decision is that courts will assume jurisdiction regardless of the invalidity of the contract.

I share the same view with Craig Bosch and the Learned Judge in *Discovery Health* in that the intention of the legislature was not to criminalize the employee's actions but those of the employer.¹¹⁸ This argument holds significant weight when considering the fact that it is the employer who holds more power in the employment relationship. The argument is stronger for penalising the employer than it is for penalising the employee.

This does not render the employee an innocent party, but it takes into account that the employer is in a better position to honour the law, bearing in mind that it is the employee who seeks employment. It is therefore the employer who uses the desperation of the employee to his advantage and lures him into the situation, then in turn abuses his rights. I am of the belief that this is precisely what makes illegal workers vulnerable. It is the abuse of the employees by the employers that calls for concern and which we must seek to eliminate.

It was argued that an estimation of 150 million migrants move to the destination state to seek better economic opportunities, however, during their stay, they experience exploitation and abuse at work, which makes them even more vulnerable.¹¹⁹ They find it difficult to seek recourse as this may lead to them being arrested and deported.¹²⁰ Previously, the courts refused to acknowledge the difficulties faced by illegal workers, however, *Discovery Health* was a turning point. For the very first time, illegal immigrants were afforded protection under the Labour Relations Act, which meant that they could not be dismissed on the basis that their employment contract was invalid.¹²¹

Craig Bosch argues that it is crucial that we extend labour law protection to illegal workers as the purpose of the labour rights being entrenched in the Constitution is to protect

¹¹⁸ C Bosch "Can unauthorized workers be regarded as employees for the purpose of the Labour Relations Act?" (2006) 27 *Industrial Law Journal* 1342.

¹¹⁹ Wabo, DC 'Emerging Jurisprudence on the Labour Law Protection for Undocumented Migrant Workers in South Africa: Lessons for Countries, available at www.ilera-directory.org/15thworldcongress/.../CSIW_28_COFFIEPDF, accessed on 17 March 2006.

¹²⁰ Ibid note 141 above at pg 2.

¹²¹ Ibid.

vulnerable workers.¹²² He argues that the violation of someone's right to fair labour practices is also a violation of his dignity and this begs for an interpretation of the Immigration Act that affords protection of the rights contained in the LRA to illegal immigrants.¹²³

The purpose of International law in South Africa is very important and the Constitution strongly enforces this notion.¹²⁴ The relationship between International law and South African law needs to be seen through the lens of the history of South Africa, one which aims to promote the fight against apartheid.¹²⁵

Illegal immigrants are a vulnerable group and deserve even more protection from the Labour Act. It cannot be argued against that international law, mainly the ILO, promotes their protection under the Constitution, this protection extends far beyond their protection from unfair labour practices, but it also looks at their vulnerable background and how they are seeking to improve their quality of life. They already come from vulnerable situations within society, this is without doubt a compelling reason for courts to be careful of the strict application of legislation, courts must bear in mind that some laws need a broader interpretation which accommodates the protection of fundamental human rights for all persons.

Further, referring to the Constitution and its purpose, it seems to place no restriction on the Labour Relations Act, therefore, illegal workers are entitled to fair labour practices in their work relationship.¹²⁶ Moreover, as it is a constitutional principle to protect vulnerable workers, and illegal workers falling within that group, these workers should be entitled to the right to fair labour practices.¹²⁷

Some of the hardships faced by illegal immigrants, apart from being victims of hate crimes such as xenophobia, are that they experience exploitation at work by their employers.¹²⁸ Most of these workers are paid far less than what they deserve, they work long hours than

¹²² C Bosch "Can unauthorized workers be regarded as employees for the purpose of the Labour Relations Act?" (2006) 27 *Industrial Law Journal* 1352.

¹²³ Ibid

¹²⁴ Wabo, DC 'Emerging Jurisprudence on the Labour Law Protection for Undocumented Migrant Workers in South Africa: Lessons for Countries, available at www.ilera-directory.org/15thworldcongress/.../CSIW_28_COFFIEPDF, accessed on 17 March 2006.

¹²⁵ Ibid note 124 above at pg 8.

¹²⁶ Ibid.

¹²⁷ Ibid note 124 above at pg 3.

¹²⁸ Ibid.

what the law authorises, they have are not provided access to compensation for occupational injuries and diseases, and this is exactly what strengthens their vulnerability.¹²⁹

I am not of the opinion that although the legislature's intentions was to make illegal work a criminal offence he had in mind the challenges that these workers would face, nor did he consider that such cases would inevitably make their way to the Labour Courts. The law has indeed taken a shift in relation to illegal immigrant workers; however, it does not entirely solve the problem, and hence is still a controversial issue in our law.

It is evident that more still needs to be done to address the problem because such cases will continue to make their way to the labour courts and it is an undisputable fact that immigrants will continue to work without a permit and employers will continue to employ them regardless. In fact, it is probable that most of them will not even approach the courts for protection because of the fear of detention or deportation. This stands as evidence that the law does not provide full protection to illegal immigrants and more needs to be done in this regard.

The true criminals are the employers and because of the existing shade in the law regarding illegal workers, their conduct is almost unstoppable. There are many factors that could contribute to a migrant not being able to obtain a work permit, at least not immediately or for a period he/she cannot be able to stay unemployed, as Bosch pointed out, these factors include the expiry of a work permit while the employee is in the process of applying for a new one. The continued employment of the employee will be an unlawful one until the work permit has been granted and it would be unreasonable to refuse reinstatement in these instances.

Therefore, it is only those employees who wilfully disregard the requirements of the Immigration Act that should not be afforded the rights of an employee in terms of the Labour Relations Act. Wilful disregard of this requirement would include not making means to apply for the permit or renewing it once it has expired. Such workers should face the consequences of the law.

3.1.1 South Africa's International obligations

International law plays a significant role in determining whether section 23 of the Constitution applies to everyone, including illegal immigrants. There are three conventions applicable to the employment conditions of migrant workers, and they are as follows:

¹²⁹ Ibid.

“Migration for Employment Convention 1949 (the 1949 convention)”¹³⁰; “Migrant Workers (Supplementary Provisions) Convention 1975 (the 1975 convention)”;¹³¹ and the “International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (the 1990 convention)”¹³².”

Under these conventions, migrant workers enjoy full protection from the law, including their rights in their respective employments, ensuring that they receive protection under the Labour Relations Act. The International Labour Organization (herein after the ILO) is an international organisation most concerned with migrant workers including illegal migrant workers.¹³³ It sets out the duty to protect the “interests of workers when employed in countries other than their own.”¹³⁴ It does not deal directly with illegal workers but indirectly recognizes the constituency of workers in that it promotes equal rights for all forms of employment.¹³⁵ It advocates for the equality between illegal workers, legal workers and the respect of basic human rights.¹³⁶

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN Convention) came into being and reinforced the principles expressed in the ILO, which objectives are “to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.”¹³⁷ This convention deals with the rights of both illegal and legal employees, in that their basic human rights are to be protected regardless of their status in relation to employment.¹³⁸

South Africa’s immigration Act 13 of 2002 promotes the “highest applicable standards of human rights and the prevention of xenophobia”, the conclusion that can however be drawn from the preamble is that not all migrant workers are welcome, only those needed to benefit the South African economy.¹³⁹

¹³⁰ Migration for employment convention 1949.

¹³¹ Migrant Workers Convention 1975.

¹³² International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990.

¹³³ D Norton “Workers in the Shadows: An International Comparison of Dismissal of Illegal Migrant Workers” (2010) 31 *Industrial Law Journal* 17.

¹³⁴ Ibid note 133 above at pg 17.

¹³⁵ Ibid

¹³⁶ Ibid.

¹³⁷ Ibid, see also The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

¹³⁸ Ibid.

¹³⁹ Ibid note 133 above at pg 18.

The position in South Africa right now in relation to illegal immigrants is not clear in that the rights afforded to them under the LRA are somewhat not enforceable and the reason for this is the possibility that an illegal immigrant will face detention or deportation should he/she report any unfair treatment. However, in relation to the protection currently provided in illegal immigrants in South Africa, it seems we are on the right path. It remains however an uncertainty whether courts may disregard the provisions of the Immigration Act in order to give a judgement in in harmony with constitutional principles, which I am of the opinion favour an effective protection of the rights of to illegal immigrants. International law promotes the protection of fundamental human rights for all persons, and such rights, which include equality as well as job security, remain at the heart of the South African Constitution.

3.2 The rights of sex workers as vulnerable employees

Many say that sex work has been the oldest profession around, however also the most stigmatized for centuries. This stigma is a result of differing moral perceptions of our society and the continued belief that sex work is against public policy. As a result of the historical conceptions around sex work, it has been difficult for sex workers to speak a voice that is heard with regards to their labour rights. For this reason sex workers remain victims of exploitation and other forms of abuse by their employers with the certainty that these employees will not be able to seek redress from the law while they are illegally employed.

The Sexual Offences Act provides that “both working as a sex worker and living on the premises of a brothel are prohibited by section 20(1) (a) of the Act.”¹⁴⁰ The Sexual Offences Act has been amended to overtly include penalties for people who use the services of a sex worker. This follows the minority judgement in *S v Jordan* which made a submission to the effect that “anyone who receives sexual gratification from another and furnishes a reward for it is guilty of an offence.”¹⁴¹

A fairly recent case that involved important issues pertaining to sex workers and their right to fair labour practices is the case of *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC).¹⁴²

¹⁴⁰ Section 20(1) (a) of the Sexual offences Act 23 of 1957.

¹⁴¹ *S v Jordan* 2002 (60) SA (CC) para [43], see also L Muswaka “Sex Workers and the Right to Fair Labour Practices”. (2011) 23 SA Merc LJ 533.

¹⁴² *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others* (2010) 4 SA 383 (LAC) at par 2.

3.2.1 Kylie v Commissioner for Conciliation Mediation and Arbitration and Others

Factual background

The appellant, Kylie, was employed in a massage parlour as a sex worker.¹⁴³ Her employer wanted her to perform certain sexual acts that she was not comfortable with performing.¹⁴⁴ Consequently she was dismissed without a proper hearing.¹⁴⁵ She referred a dispute of an unfair dismissal to the CCMA and claimed for compensation for her unfair dismissal as opposed to a claim for reinstatement.¹⁴⁶

3.2.2 Judgement of the CCMA

The first issue that the commissioner had to decide upon was “whether the CCMA had Jurisdiction to hear the matter as the applicant was employed as a sex worker which rendered her employment contract illegal.”¹⁴⁷

The CCMA found that “it was not their duty to change the common law relating to illegal, unenforceable employment relationships.”¹⁴⁸ According to the CCMA, “Kylie had been employed to perform illegal work, which differed from instances where an illegal person was employed to undertake legal, enforceable work.”¹⁴⁹ In this instance, “the work itself had been illegal, 'Kylie', the person, was not illegal.”¹⁵⁰

The commissioner emphasised that “the CCMA was an administrative body that had to apply the law as it stands, and not redress perceived social unfairness.”¹⁵¹ It was the CCMA’s finding that to assume jurisdiction, the contract had to be lawful and enforceable.¹⁵² In the

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ 'Kylie' and Van Zyl t/a Brigittes (2007) 28 ILJ 470 (CCMA) at par 478-479, *see also* D Smit, V Du Plessis “Kylie and the Jurisdiction of the Commission for Conciliation, Mediation and Arbitration.” (2011) 23(3) SA Merc LJ 483.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Supra note 148 above at par 479, *see also* *ibid* note 148 above at pg 483.

¹⁵² Supra note 148 above at par 479-480, *see also* *ibid*.

applicant's case, both legality and enforceability were lacking.¹⁵³ The CCMA noted further that, if it were to assume jurisdiction, it would lead to absurdity, in that every instruction given to a sex worker by her employer would be an instruction that the sex worker has the right to disobey.¹⁵⁴

The CCMA's decision was based on its inability to assume jurisdiction because it was the work performed by the applicant that was illegal and not that the applicant was herself an illegal person; therefore this rendered the contract illegal and unenforceable. It was on these grounds that the CCMA denied the applicant protection under the Labour Relations Act. It was also the CCMA's concern perhaps, that due to the nature of sex work, one cannot necessarily distinguish between acceptable and unacceptable acts between the sex worker and her client, and since it is prohibited by the Sexual Offences Act, then all acts are potentially ones that a sex worker may be entitled to disobey. This would definitely encourage sex work and flood courts with cases of this nature.

The CCMA correctly referred to sex work as "being outlawed in South Africa, and in this regard stated that it was not for the CCMA to adjudicate on whether the criminalisation of sex work is correct or not, that remained the task of the legislature or the Constitutional court."¹⁵⁵

It was against this ruling that the appellant approached the court *a quo* for the review of the Commissioner's decision

3.2.3 Judgement of the Labour Court

The Labour Court noted that "sex work is and was prohibited by section 20(1) (a) of the Sexual Offences Act and that courts were still discouraged to promote illegal activity."¹⁵⁶

The Labour Court confirmed that the maxim *ex turpi causa non oritur action* which essentially prohibits the enforcement of immoral or illegal contracts and renders the employment contract null and void, forms part of the common law entrenched in the

¹⁵³ Ibid.

¹⁵⁴ Supra note 148 above at par 481, see also ibid note 148 above at pg 483

¹⁵⁵ Ibid note 148 above at par 482, see also ibid note 148 above at pg 477.

¹⁵⁶ *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others* 2008 (9) BLLR 870 (LC) par 3.1-3.2, see also D Smit, V Du Plessis "Kylie and the Jurisdiction of the Commission for Conciliation, Mediation and Arbitration." (2011) 23 (3) *SA Merc LJ* 478.

Constitution.¹⁵⁷ The LC thus found that if it were to assume jurisdiction it would be violating the common law principle and promoting illegal activity.¹⁵⁸

In essence the Labour Court confirmed that the CCMA could not assume jurisdiction because that would mean that courts would be sanctioning illegal activity which is prohibited by statute. The Labour Court stressed on the point that an illegal contract is void and therefore unenforceable by law.

The Labour Court thus confirmed that the work done by the applicant is illegal and used that as a ground to not order assumption of jurisdiction by the CCMA.¹⁵⁹

The Labour Court further noted that, section 23 of the Constitution, properly interpreted could not be extended to sex workers, as they could not legally be bearers of the right to fair labour practices, if this right was to be afforded to sex workers, it would require a “reading in or amendments to the provisions of the Labour Relations Act.”¹⁶⁰

The thinking behind the LC’s finding is that as a matter of fact, if section 23 of the Constitution was to be properly interpreted, it would be interpreted in a manner that does not extend the right to fair labour practices to sex workers. The Labour Court’s basis for this finding was that in terms of existing legislation, sex workers are not legal holders of the rights contained in the Labour Relations Act, and with the Labour Relations Act having to be in harmony with the Constitution, affording sex workers the right to fair labour practices would require courts to read in such provisions in the LRA, or order that it be amended.

In my opinion, the Labour Court erred in stating that it would be a proper interpretation of the Constitution to interpret it in a manner that does not extend labour rights to sex workers. If the Constitution and any other Legislation promulgated under it was to achieve its goal, the rights contained under the Constitution would apply to everyone, thus the ‘everyone’ under section 23 should be interpreted to include even sex workers as bearers of fundamental human rights.

The Constitution is superior to any Legislation and where such legislation is not in harmony with the Constitution, courts are required by section 39 of the Constitution to interpret and develop all legislation, common law and customary law in accordance with the spirit, purport and objects of the Bill of Rights. If it is the LC’s view that sex workers cannot be bearers of the right to fair labour practices because the LRA does not explicitly grant them such rights, then in my opinion the LRA is defective in this regard. Courts are not obliged to

¹⁵⁷ Supra note 156 above at par 1.3-3.2, *see also* *ibid* note 156 above at pg 479.

¹⁵⁸ *Ibid*.

¹⁵⁹ *Ibid*.

¹⁶⁰ Supra note 156 above at par 3.5, *see also* *ibid* note 156 above at pg 480.

first develop the law before granting labour rights under the LRA, courts are required to interpret legislation in the spirit of the Constitution.

The Labour Court added that, “the rights contained in section 23 of the Constitution were rightfully limited by the Sexual Offences Act, in which such limitation results in the exclusion of sex workers as holders of the right to fair labour practices.”¹⁶¹

The Labour Court pointed out that the vital issue is that “as a matter of public policy, courts by their actions ought not to sanction or encourage illegal activity in the context of statutory and constitutional rights”.¹⁶²

The court then had to determine what the appropriate remedy would be a remedy and noted that, what the legislature intended was not just merely to prohibit and penalise sex work but also to prevent courts from entertaining any rights or claims arising from sex work.¹⁶³ If courts were to recognise such claims “they would be sanctioning or encouraging illegal activity.”¹⁶⁴ The court went on to add that, “illegal immigrants and child workers, as illegal workers are an exception when it comes to such a claim because the prohibition is aimed at who does the job rather than the job itself.”¹⁶⁵ The court emphasised that even if sex workers are a vulnerable class, affording them protection in terms of the LRA would amount to sanctioning or discouraging illegal activity.¹⁶⁶

While the Labour Court correctly noted that since the applicant was performing work that was illegal, it was difficult to provide any form of protection in this case than instances of child labour or illegal immigration, where the prohibition applies to who does the job rather than the job itself. I cannot agree entirely with the Labour Court’s finding. The vulnerability of sex workers is the specifically the reason why they deserve protection, and to only focus on the illegality of the work they perform would mean that courts are turning a blind eye to the challenges that these workers face and basically leaving them neglected, destitute and with no remedy for the violation of their human rights. The violation of someone’s right to fair labour practices, which includes abuse and exploitation, is in essence violation of their right to their dignity.

While on this issue, the Labour Court further noted that since sex work is regarded as immoral by the courts, any contract relating to it is invalid and unenforceable.¹⁶⁷ The court

¹⁶¹ Supra note 156 above at par 3.6, *see also* *ibid*.

¹⁶² Supra note 156 above at par 23, *see also* *ibid* note 179 above at pg 478.

¹⁶³ Supra note 156 above at par 29.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid*.

¹⁶⁶ *Ibid*.

¹⁶⁷ Supra note 156 above at par 33-34, *see also* note 156 above at pg 479.

came to the decision that “any extension of the rights contained in the LRA could only be justified if there were claims of simple justice between individuals and if public policy was not negatively affected by the granting or refusal of such a claim.”¹⁶⁸ The court held that the applicant’s matter did not fall within these limitations.¹⁶⁹

Another issue that the Labour Court had to consider was the issue of the applicant’s vulnerability. The Labour Court noted that the appellant was in fact in an employment relationship and that in modern society, employment relationships may take different forms, and not everyone in these different forms of employment can be classified as an employee for the purposes of section 23 of the Constitution.¹⁷⁰ Kylie and her employer were in an employment relationship and if this was not the case, the CCMA would refuse to have heard the matter in that the first step of founding jurisdiction would not have been established.¹⁷¹

I find that the Labour Court contradicted itself in its judgement in that it first agreed that the CCMA could not assume jurisdiction as the contract was null and void and therefore unlawful and unenforceable, then later in its judgement the LC noted that the applicant was in fact an employee for the purposes of the Labour Relations Act, as the first step of jurisdiction was established, if this was not the case, then the CCMA would have refused to hear the matter.¹⁷² I find it hard to relate with this finding, the LC cannot find that an applicant falls under the definition of ‘employee’ and then deny the applicant the rights contained under the LRA for an unfair dismissal; to me this appears to be absurd. Moreover, jurisdiction does not come in stages, it’s either from the onset the court has jurisdiction or it does not. Therefore, I find that the LC’s reasoning in this regard is questionable.

In determining whether sex workers were a vulnerable group, the Labour Court did find that “sex workers were vulnerable and victims of exploitation, such as many others that are involved in illegal activities or organised crime.”¹⁷³

With regards to the dignity argument, the Labour Court held that “prostitutes are entitled to their dignity.”¹⁷⁴ Legislation does not have a direct effect of limiting the constitutional rights of those who engage in illegal work.¹⁷⁵ The court referred to the decision in *Jordan’s* case and noted that, although sex work is criminalised by statute, this takes nothing away from

¹⁶⁸ Supra note 156 above at par 35, *see also* note 156 above at pg 479.

¹⁶⁹ Ibid.

¹⁷⁰ Supra note 156 above at par 55-54, *see also* note 156 above at pg 483.

¹⁷¹ Supra note 156 above at par 56, *see also* *ibid*.

¹⁷² Ibid

¹⁷³ Supra note 156 above at par 70-71.

¹⁷⁴ Supra note 156 above at par 60, *see also* note 156 above at pg 484.

¹⁷⁵ Ibid.

sex worker's right to dignity and that they are entitled to be treated with such by police and their clients.¹⁷⁶ The court however held that the right of sex workers to privacy does not extend to acts of crime committed in private.¹⁷⁷

I do agree with the Labour Court that privacy rights of sex workers do not extend to the commission of crimes committed in private, sex workers and their clients should face the harsh wrath of the law for their illegal activities. However, I struggle to come to terms with the fact that one's right to dignity can be recognised but not their right to fair labour practices, subsequently I do not believe that the Sexual Offences Act justifiably limits sex workers' right to fair labour practices. The argument does not focus on the legal activity but rather their vulnerability and the challenges they face in their employment, which is why such a limitation cannot succeed.

The Labour Court was steady in its finding that "section 20(1) (a) of the Sexual Offences Act was a justifiable limitation of illegal work, essentially because it gave effect to the fundamental rule-of-law principle that courts ought not by their actions and sanctions encourage illegal activity."¹⁷⁸

Lastly but not least important, the court considered the issue of the inability of the CCMA to make an order of an appropriate remedy and noted that the fact that reinstatement which is the primary remedy contained under section 193 of the Labour Relations Act could not be granted by the CCMA this was a strong indication that the CCMA could not assume jurisdiction¹⁷⁹

In this regard, the LC added that although the remedy that the applicant sought was that of compensation, the commissioner's decision to refuse the relief sought by the applicant was reasonable in the circumstances because the granting of the relief by the CCMA would amount to sanctioning or encouraging illegal activity.¹⁸⁰

I am of the opinion that the court erred in stating that since reinstatement was not possible, then the CCMA could not assume jurisdiction on those grounds. Section 193 of the LRA has a wide spectrum of remedies, and in case reinstatement would not be just, there are other remedies that can be ordered by the court, such as compensation. Although reinstatement is a primary remedy, this takes nothing away from the fact that the applicant is vulnerable and deserves protection in terms of the Labour Relations Act.

¹⁷⁶ Ibid.

¹⁷⁷ Supra note 156 above at par 61, *see also* *ibid*.

¹⁷⁸ Supra note 156 above at par 61-63, *see also* *ibid* note 156 above at pg 480.

¹⁷⁹ Supra note 156 above at par 92, *see also* *ibid* note 156 above at pg 484.

¹⁸⁰ Supra note 156 above at par 93, *see also* *ibid* note 156 above at pg 485.

Sex workers need to be protected both from their clients and their employers, although reinstatement is not possible, some form of protection should be afforded to them in order to recognise them as employees and effective bearers of fundamental human rights, including the right to fair labour practices. Sex workers are already casted out by society and this exactly what strengthens their vulnerability.

The applicant was not satisfied with the decision of the Labour Court and took the matter to the Labour Appeal Court.

3.2.4 Judgement of the Labour Appeal Court

The main issue that had to be addressed in the Labour Appeal Court related to the discretion of the courts to decide on a remedy to be granted in instances where a sex worker could prove that she had been unfairly dismissed.

The Labour Appeal Court correctly found that section 23 of the Constitution did apply to sex workers, even though their work is criminalized by the Sexual Offences Act.¹⁸¹ The right contained under section 23 of the Constitution, namely that ‘everyone has the right to fair labour practices’ had to be read to include all people in the country.¹⁸² The term ‘everyone’ carries a wide and unrestricted meaning and therefore should be interpreted in a manner that does not limit the rights to fair labour practices only to those who are legally employed.

¹⁸³

In essence, the LAC stressed that the right contained under section 23 should apply to everyone, including sex workers. In other words, the word ‘everyone’ should be interpreted in a manner which does not limit the right to fair labour practices only to those employees employed under a legal contract of employment.

The court also made reference to *S v Jordan* in that “prostitutes do not lose their legal protection even if the character of their work degraded the very aspect that the Constitution seeks to protect.”¹⁸⁴ Such a consideration is significant in that it recognises sex workers as holders of fundamental human rights, and does not withhold those rights merely because of their job title. Everyone is at liberty to be in an employment of their choice and the realisation of sex workers as autonomous beings is the recognition of their right to dignity which is closely related to their right to fair labour practices.

¹⁸¹ *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others* (2010) 4 SA 383 (LAC) at par 16-17, see also D Smit, V Du Plessis “Kylie and the Jurisdiction of the Commission for Conciliation, Mediation and Arbitration”, (2011) 23(3) *SA Merc L J* 481.

¹⁸² Supra note 181 above at par 19, see also *ibid*.

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid*, see also *S v Jordan* 2002 (60) SA (CC) at par 74.

The LAC importantly stated that “since the right to dignity cannot be taken away from sex workers by their clients, it must follow that the same protection should be applicable in their relationship with their employers.”¹⁸⁵ The court held that as a result of this, “section 23 of the Constitution should also apply to sex workers as the right to dignity is closely linked to the right to fair labour practices.”¹⁸⁶ Subsequently, the court found that sex workers as a group were vulnerable and deserved protection.¹⁸⁷

The Labour Appeal held that if the LRA was to achieve its goals, then courts have to ensure that they protect the rights of vulnerable workers, such as sex workers, who as we know are particularly vulnerable to abuse and exploitation in that they are economically and socially weaker than their employers. In addition, courts are to have due regard to the provisions of the ILO which explicitly state that the rights of vulnerable workers must be protected.¹⁸⁸ The court held further that “although abuse and exploitation may not necessarily occur in all cases of sex work, in this case there was clear evidence that the appellant was a victim of an unfair labour practice and it appears that the appellant was in fact an employee for the purposes of the LRA.”¹⁸⁹

The LAC correctly noted that, where the nature of the job that the sex worker performs is the direct cause of her vulnerability, there is no compelling reason to deny such a person protection in terms of the Labour Relations Act, where such protection can be used as a weapon to prevent such worker from becoming a potential victim to abuse and exploitation and to preserve her dignity.¹⁹⁰

In essence the court held that since sex workers have the right to dignity when dealing with their clients, such right should extend to their relationships with their employers. I also find this reasoning to be true. Ultimately, if such protection extends to the employment relationship, then the conclusion should be that they are also entitled to the right to fair labour practices and therefore deserve protection in terms of the Labour Relations Act.

I am also in full agreement with the Labour Appeal Court in that the whole purpose of the Labour Relations Act is to protect vulnerable workers who are potential victims of abuse and exploitation such as the appellant. While it may be true that courts may not find that there is abuse in all cases of sex work, the appellant certainly falls under the class of vulnerable persons and is therefore deserving of the protection of her constitutional right to dignity as well as her rights contained under the LRA. I certainly cannot stress enough that one’s right to dignity is closely linked to one’s right to fair labour practices.

¹⁸⁵ Supra note 181 above at par 26, *see also* *ibid* note 181 above at pg 482.

¹⁸⁶ *Ibid*.

¹⁸⁷ Supra note 181 above at par 29, 41, 43, 52; *see also* *ibid* note 181 above at pg 484.

¹⁸⁸ Supra note 181 above at par 41

¹⁸⁹ Supra note 181 above at par 43.

¹⁹⁰ Supra note 181 above at par 44.

The court then went on to discuss the important issue of a possible remedy and held that “not all remedies available in terms of the Labour Relations Act should necessarily be available in every case and further found that section 193 of the Act allows for flexibility in terms of choice of remedy.”¹⁹¹ The court noted that reinstatement would not be suitable in this case as this would “manifestly be in violation of the provisions of the Act,” however, the court held that compensation would be an appropriate remedy as protection of the applicant’s rights.¹⁹²

The court came to the conclusion that affording protection to sex workers in terms of the LRA does not mean that the full range of remedies available in terms of section 193 of the Act should be available in every such case. In other words, the court emphasised that it was not within the court’s finding that where there has been an unfair dismissal of a sex worker, a court may or should order reinstatement, as this would amount to sanctioning or encouraging sex work. However, section 193 is considerably flexible and gives a court room to order any other remedy in terms of the LRA that it may deem fit. In essence, a court may refuse reinstatement where it is not reasonably practicable for an employer to reinstate or reemploy an employee and it would be against public policy to reinstate a sex worker where she has been unfairly dismissed, as this would encourage illegal activity.¹⁹³ However, this consideration should not be used to limit the right to fair labour practices only to those legally employed.¹⁹⁴ Some form of protection under the LRA should be afforded to sex workers in order to reduce their vulnerability, exploitation and violation of their dignity.”¹⁹⁵

The decision of the Labour Appeal Court is centred on the fact that sex workers are a vulnerable class in society and therefore deserve some form of protection from the Labour Relations Act. The Labour Appeal Court agreed with the Labour Court that reinstatement would be inappropriate in a case of an unfair dismissal of a sex worker as this would amount to sanctioning and encouraging illegal activity. However, the LAC pointed out that section 193 of the LRA was flexible enough to provide an alternative appropriate remedy, one that would reduce the vulnerability, exploitation and violation of the appellant’s dignity. In this regard I am in agreement with the LAC’s findings.

Out of fear of misinterpretation of the court’s decision, the court stated that it “did not sanction sex work” but found that, “although sex work is illegal, not all constitutional protection is forfeited by the performance of illegal sex work by someone such as Kylie.”¹⁹⁶

¹⁹¹ Supra note 181 above at par 52, *see also* *ibid* note 181 above at pg 485.

¹⁹² *Ibid*.

¹⁹³ *Ibid*.

¹⁹⁴ *ibid*

¹⁹⁵ Supra note 181 above at par 52.

¹⁹⁶ Supra note 181 above at par 54, *see also* *ibid* note 181 above at pg 485.

It was further stipulated that the judgement did not hold or order that an unfairly dismissed sex worker should be reinstated.¹⁹⁷

The LAC found that it could not sanction sex work, that aspect was the job of the legislature.¹⁹⁸ It also shared the same views as the LC in that sex work was prohibited by statute and therefore remained illegal.¹⁹⁹ However, the LAC held that the absence of enforceability did not lead to an absence of jurisdiction, and subsequently, also the absence of protection granted in terms of the LRA, therefore, although the LAC did find that the applicant's job was illegal, it did not consider that as a need to bar her from the protection in terms of the Labour Relations Act.²⁰⁰

3.2.5 Concluding comments on the court findings

There have been arguments that the Labour Appeal Court misguided itself by seeking guidance directly from the Constitution and ignoring the Labour Relations Act, in that the court assumed jurisdiction based on the right contained under section 23 of the Constitution, namely that everyone has the right to fair labour practices.²⁰¹ In determining jurisdiction the legality feature is of outmost importance, and using the Constitution to assume jurisdiction was unreasonable, especially where the court is not able to render an effective judgement as in this case, the court was unable to order reinstatement.²⁰² Section 193 of the Labour Relations Act provides for "reinstatement as the primary remedy where there was a substantively unfair dismissal."²⁰³

The Labour Court pointed out that in similar cases an effective award or judgement will not be possible to obtain.²⁰⁴ When it comes to sex workers and other illegal employment relationships, courts cannot provide an effective remedy and therefore courts cannot

¹⁹⁷ Supra note 181 above at par 52, *see also* *ibid* note 181 above at pg 486.

¹⁹⁸ Supra note 181 above at par 54, *see also* *ibid* note 181 above at pg 478.

¹⁹⁹ *Ibid*.

²⁰⁰ Supra note 181 above at par 55, *see also* *ibid* note 181 above at pg 478.

²⁰¹ KJ Selala "The Enforceability of illegal employment contracts according to the Labour Court: Comments on *Kylie v CCMA 2010 4 SA 383 (LAC)*". (2011) 14(2) *Potchefstroom Elec Law Journal* 215.

²⁰² *Ibid* note 201 above at pg 215.

²⁰³ *Ibid*.

²⁰⁴ *Ibid* note 201 above at pg 216.

assume jurisdiction.²⁰⁵ An employee may not disregard the LRA and rely directly on the Constitution, as section 23 cannot be exclusively invoked to assume jurisdiction.²⁰⁶

As I have already mentioned above, the law has placed a duty on courts to develop the law where it is not consistent with the Constitution. The Labour Relations Act does not override the Constitution, and where any provisions of this Act are not in harmony with the values enshrined in the Constitution, such provisions should not be given effect to by a competent court. It has already been established that sex workers are amongst the most vulnerable class of employees in the labour market, needless to say, they deserve more protection than other employees that are legally employed. In my opinion, when the Labour Appeal Court turned directly to the Constitution, it was seeking to remedy a defect in the law and its aim was to ensure that a vulnerable employee does not leave without recourse.

On the point that the court's decision is not an effective remedy, I hold the view that a partial remedy is better than no remedy at all, moreover, where a court cannot give an effective remedy, it does not suggest that there was no violation of a fundamental right, the court will give an order that it deems fit at that given time. An effective remedy would therefore be a remedy of reinstatement, however, in this case the court was unable to order reinstatement, the court therefore had to order compensation as a recognition of the appellant's right to fair labour practices. In essence, an employee's right to fair labour practices is in harmony with the employee's right to dignity. I am of the belief that the court had the duty to clarify this stance and I see no other way of doing so other than granting the appellant some form of protection for the violation of her constitutional rights.

3.2.6 The difference between the *Discovery Health v CCMA* (2000) 5 BLLR 578 (LC) and the *Kylie and Van Zyl t/a Brigittes* (2007) 28 ILJ 470 (CCMA) judgments

The decisions in the *Discovery* case and that in the *Kylie* case indicate contradictory approaches by commissioners when having to determine who is an employee for the purposes of the Labour Relations Act.²⁰⁷ In *Discovery Health v CCMA*, the Commissioner ruled that "the determining factor is the existence of an employment relationship between the parties, and not the existence of a valid contract of employment."²⁰⁸ In *Kylie v CCMA*, the Commissioner held that "the determining factor was the existence of a valid contract of employment."²⁰⁹ The effect of these differing approaches is that in one instance the CCMA

²⁰⁵ Ibid.

²⁰⁶ Ibid note 201 above at pg 218.

²⁰⁷ L Muswaka "Sex Workers and the Right to Fair Labour Practices". (2011) 23 SA Merc LJ 535.

²⁰⁸ *Universal Church of the Kingdom of God v Myeni and Others* (2015) 9 BLLR 918 (LAC) at par 21

²⁰⁹ Supra note 208 above at par 21

will be found to have jurisdiction to entertain the matter, whilst in another, the CCMA would be found not to have jurisdiction.”²¹⁰

Linda Muswaka submits that:

“The above cases do not plead a question about the procedure to be followed, but rather the test that a Commissioner must use to determine whether one is an employee, and, consequently, whether the CCMA has jurisdiction.²¹¹ It is argued that the test neither lies solely in the existence of a valid contract of employment nor solely in the existence of an existing employment relationship between the parties.²¹² An appropriate test would be one that involves a two-stage enquiry. In the first stage, the enquiry relates to the employment relationship between the parties and to the contract of employment.²¹³ The second stage becomes relevant only if the employment relationship is found to be illegal.²¹⁴ In this second stage, a wide interpretation of the term ‘employee’ must be preferred.”²¹⁵

With regards to *Kylie v CCMA*, one may argue that any interpretation of the term ‘employee’ that invalidates a contract concluded in violation of section 20(1) (a) of the Sexual Offences Act would unjustifiably limit the right to fair labour practices.²¹⁶ The problem with this invalidation is that it allows a brothel keeper, who is prepared to face the full consequences of the law, to employ a sex worker and simply to refuse to pay the remuneration due, on the basis that the contract was invalid. In these circumstances, the sex worker would be without a remedy in contract.²¹⁷

An interpretation that finds contracts of employment in violation of immigration legislation to be valid will not only ensure that fundamental rights and international standards are upheld, but also discourage the violation of immigration legislation.²¹⁸ The determining factor in recognising a right seems to be whether a court’s ruling will encourage or discourage illegal activity. As pointed out by Cheadle AJ in the Labour Court:

“Since there is a fundamental principle in our law that courts ought not to sanction or encourage illegal activity, an assumption to the effect that that if an individual qualifies as an employee in terms of

²¹⁰ Ibid.

²¹¹ L Muswaka “Sex Workers and the Right to Fair Labour Practices”. (2011) 23 *SA Merc LJ* 538

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ S Vettori “The Extension of Labour Legislation Protection to illegal Immigrants”. (2009) 21 *SA Merc LJ* 829.

legislation, then that employee is automatically entitled to the protection provided in terms of that legislation and in particular the Labour Relations Act cannot be made.”²¹⁹

It seems that the court’s reasoning was based on whether the recognition of labour rights in the applicant’s situation would encourage or discourage illegal activity. The Labour Court’s conclusion was that affording the applicant rights under the LRA would amount to sanctioning illegal activity and ultimately encourage it. However, what the LC failed to consider is that affording sex workers protection would eradicate the abuse and exploitation of sex workers, which is the primary reason why they are a vulnerable group of employees. I believe that by doing this the LRA would have achieved one of its goals.

According to the Labour Court, It would seem that, if a person falls within the definition of an “employee”, but the work that the employee does is illegal, as is the case of a sex worker, then providing relief for that employee may encourage the illegal activity.²²⁰ In such circumstances, ‘a court or tribunal need not recognise the right’.²²¹ However, if the illegality is a result of the identity of the worker, as opposed to the work done, for example, an illegal immigrant or a child, then providing relief will not encourage the illegal conduct.²²² In fact, it will discourage the conduct, because if employers are aware that these vulnerable employees are protected, they will be less likely to employ them with the purpose of exploiting them.²²³

The Labour Court in *Kylie* 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.”²²⁴ The court therefore reasoned a significant difference between penalisation of illegal work in respect of foreign workers and child workers is that the penalisation is aimed at who does the job rather than the job itself.²²⁵ This means that illegal immigrants and child workers compete with workers that are legally employed.²²⁶

To not provide labour rights to illegal immigrants would threaten job security and encourage the employment of illegal workers in place of legal ones, in other words, affording labour

²¹⁹ Ibid note 218 above.

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ *Kylie v CCMA* 2008 9 BLLR 870 (LC) at par 70, see also A Govindjee; A Van Der Walt “Employment without Rights”? (2008) 3 *Obiter* 548

²²⁵ Supra note 224 above at par 70, see also ibid note 224 above at pg 548

²²⁶ Ibid.

right to illegal immigrants will discourage employers from hiring these workers.²²⁷ On the other hand, sex work does not have the same effect on legal employment, in that the prohibition is aimed at the job itself. To protect them from exploitation will mean sanctioning and encouraging activities that the sexual offences Act is trying to prevent and it is for this reason that sex workers cannot be afforded the right under section 23 of the LRA.

228

Once the court had made this finding, it was a relatively small leap to find that the definition of dismissal in section 186 of the LRA did not include illegal employment relationships because of the invalidity of the employment contract.²²⁹

The Labour Court confirmed the decision in *Discovery Health* in that for an employment relationship to exist, a valid employment contract is not a prerequisite in that the definition in section 213 of the LRA was not dependant on the on or rooted on the contract of employment and subsequent to that, such employee is entitled to the rights contained under the LRA.²³⁰ Therefore, we can conclude that according to the Labour Court in *Kylie's* case, such protection is afforded in instances where it is the identity of the employee that results in the employment contract to be illegal, in any other case, it would amount to sanctioning and encouraging illegal activity. In essence, in the case of a sex worker, although the employee may be described as an employee, the fact that the work that he/she does is illegal, he/she may not be afforded protection under the LRA, this is the difficulty that the court faced in this case.

3.2.7 The need to extend labour rights to sex workers

There is something different 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.²³¹ This attitude may come from the fact that the crime of sex work is generally not enforced by the police and that sex workers are a common feature of most societies.²³² In addition, the special role that gender plays in the relationships between sex workers, their employers and clients requires further consideration and investigation.²³³ This may be particularly so when, as in the *Kylie* case, a

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Supra note 224 at par 91, see also ibid note 224 above at pg 549.

²³⁰ Supra note 224 above at par 56.

²³¹ A Govindjee, A Van der Walt "Employment without Rights?" (2008) 3 *Obiter* 556.

²³² Ibid note 231 above.

²³³ Ibid.

sex worker is dismissed for refusing to perform a particular sexual act.²³⁴ 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.²³⁵ In fact, they are often themselves the victims of an unfortunate relationship with a dictatorial employer.

Clients of sex workers are effectively the recipients 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.²³⁶ Supporters of this line of reasoning would also submit that granting protection to sex workers who are trapped in the reality surrounding this type of work, by itself, to result in the encouragement of the activities prohibited by the legislation.²³⁷ 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.²³⁸ This protection however, in one aspect of the law relating to the livelihood of sex workers, would still not change the status of their conduct as being criminal in South African law.²³⁹

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 does not have a valid work permit).²⁴⁰ This difference is self-evident from the facts of the two cases and is undeniable.²⁴¹ 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.²⁴² 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.²⁴³

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid note 231 above at pg 557.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

What I have observed is that the differing decisions in *Discovery Health* and in *Kylie* stem from the view that illegal immigrants deserve protection because it is not the work that they are doing that is illegal but it's the fact that they don't have a valid work permit and that in turn renders their employment contract invalid. In the case of sex workers it is the work itself that is illegal; therefore, affording sex workers protection under labour legislation, it would mean that courts are permitted to sanction illegal conduct which is against public policy.

My argument against this view is that the Labour Relations Act looks beyond the principle of legality and takes into consideration the changes of society and basic human right for all. It zones into the individual's circumstances, particularly the vulnerable state of the sex worker. Sex workers should be recognised as employees because of the employment relationship they have with their employers and the hours put into it. Although they may be engaging in illegal work, they are persons with inherent dignity, and to not realise someone's right to fair labour practices is to undermine her dignity.

There are arguments that the applicant's situation implicated her values that are enshrined in the Constitution and she cannot therefore rely on her right to dignity.²⁴⁴ However, the Labour Court held the following:

"While the court recognised that dignity, equality and the rule of law values contained in the Constitution were implicated by the applicant's scenario, it held that the first two values mentioned were 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.²⁴⁵ 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.²⁴⁶ It held that the legislature intended, through the Sexual Offences Act, to prohibit courts from recognising any rights or claims arising from such activity."²⁴⁷

In essence, what the Labour Court found was that the applicant cannot use her right to dignity to receive protection under the Labour Relations Act. According to the Labour Court, the rights contained in the Constitution namely the right to dignity and the right to equality are to be independently assessed, in other words, they oversee the impact the Sexual Offences Act on the right to fair labour practices. In essence the court found that the Sexual Offences Act does not automatically withhold the constitutional rights of illegal workers including the right to fair labour practice, the values of dignity and equality enshrined in the constitution are there to safeguard these rights. What the Sexual Offences Act seeks to do is to prevent any rights or claims arising from such activity. Therefore, since the Sexual

²⁴⁴ *Kylie v CCMA* 2008 9 BLLR 870 (LC) at par 59-62, see also A Govindjee, A Van der Walt "Employment without Rights?" (2008) 3 *Obiter* at pg 557.

²⁴⁵ Ibid note 244 above at pg 557.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

Offences Act prohibits sex work, then the applicant cannot receive protection under the Labour Relations Act.

I am not in agreement with the Labour Court in this regard. The rights contained in the Constitution and those in the Labour Relations Act should be seen as compatible and working together. Every law that is enacted should be in harmony with the Constitution. Moreover, section 39 of the Constitution requires courts to interpret all laws in the spirit and purport of the bill of rights.²⁴⁸ The argument lies with the vulnerability of sex workers, which the Constitution and international law seek to reduce. To deny recognition of the rights of sex workers would strengthen their vulnerability.

The Labour Court however, was correct in pointing out that police officials are required to treat sex workers with dignity when carrying out an arrest and during detention and that this requirement does not amount to sanctioning or encouraging sex work and the action of granting compensation to sex workers for an unfair dismissal, which would amount to affording sex workers the right to fair labour practice.²⁴⁹ The court was of the opinion that what would be the most significant factor in indicating that the right to fair labour practices and the Sexual Offences Act are in conflict when dealing with sex workers is the fact that a court is unable to order reinstatement, which if it did, the court would ultimately be sanctioning and encouraging illegal work.²⁵⁰

Another challenge with providing sex workers with employment rights is that a sex worker would be entitled to disobey an instruction because it is illegal.²⁵¹ In essence, extending the right to fair labour practices to sex workers would lead to the Labour Court and the CCMA sanctioning or encouraging organised sex work, which is in contravention of the Sexual Offences Act.²⁵²

It is crucial at this point to emphasise that the values enshrined in the Constitution, in particular the right to equality and the right to dignity have been remained one of the most important values in our democracy. Without these rights, the right to fair labour practices would be non-existent. To deprive any individual the right to fair labour practices would be to deprive them of their right to dignity and their right to equality. The Constitution is a very inclusive piece of legislation because it ensures that everyone has access to basic human rights that improves any individual's quality of life.

With the right to dignity comes the right to bodily integrity, the right to freedom and ones right to choose his/her desired profession. Discrimination begins by judging someone else's choices, dignity is inherent and every person is born with that right. One does not lose

²⁴⁸ Section 39 of the Constitution of the Republic of South Africa.

²⁴⁹ Supra note 244 above at par 68-69, *see also* *ibid* at pg 558.

²⁵⁰ *Ibid* note 244 above at pg 558

²⁵¹ *Ibid*.

²⁵² *Ibid*.

his/her right to dignity based on the fact that he/she sells his/her body. Public morals are created by a society within which each individual finds himself in but it is not those morals that give you dignity. Public policy is merely a law to be obeyed and legislation is there to prohibit any actions that go against public policy, hence courts ought not to sanction illegal conduct. However, the individual's dignity is not lost merely by engaging in illegal activity.

With that being said, I find no grounds for depriving sex workers the right to fair labour practices, as the emphasis is not on the legality of the contract or the fact that it's the work that they do that is prohibited by statute, but it's their vulnerability. Therefore, the Labour Court's argument does not hold much weight as it keeps pondering on the issue that sex work is a contravention of the Sexual Offences Act. This thinking is precisely what will hinder courts from looking behind the illegality of the work and focus on the challenges faced by sex workers and that because of these challenges they need some form of protection from the law. The fact that reinstatement is not possible in cases of sex work should not prevent courts from granting any other remedy it may deem fit in the circumstances, and it sure does not have to be used a weapon to deprive sex workers the rights contained under the Labour Relations Act.

Lastly, while I do agree with the Labour Court in that, affording sex workers with the right to fair labour practices would lead to absurdity, in that a sex worker would be entitled to disobey every instruction because of its illegality, which ultimately since the Sexual Offences Act prohibits sex work, every act is potentially one that a sex worker may be entitled to disobey. I once again bring attention to the fact that affording sex workers the right to fair labour practices does not mean that a court may or should arrive at an order of reinstatement, but a court may grant any other remedy that a court may deem fit in order to afford some form of protection to sex workers as vulnerable employees.

Dieudonne Coffee Wabo argues that "the Supremacy of the Constitution is worth emphasising as the Bill of Rights applies to all laws, and binds the legislature, the executive, the judiciary and all organs of the state."²⁵³ He refers to the *Discovery Health* judgement, where he noted that "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 Right."²⁵⁴

In this regard, it is important to note that courts were given the power to hold the state accountable, if the state fails to protect vulnerable workers and choose to ignore their fundamental rights then the question is who will protect them? The courts are there to be used as weapons to fight against the ills in the law.

Although the *Kylie's* case has created a lot of confusion and numerous views around the issue of the rights of sex workers in South Africa, this case however, provides us with

²⁵³ Wabo, DC "Emerging Jurisprudence on the Labour Law Protection for Undocumented Migrant Workers in South Africa: Lessons for Countries", available at www.ileradirectory.org/15thworldcongress/.../CSIW_28_COFFIEPDF, accessed on 17 March 2006.

²⁵⁴ Ibid note 253 above at pg 5.

certainty with the current legal position relating to sex work.²⁵⁵ The conclusion therefore, is that these workers have the right to fair labour practices.²⁵⁶ The protection of sex workers stems from the fact that they are vulnerable in their employment relationship, making them potential victims of abuse.²⁵⁷

As a result of the controversy built by the *Kylie* case, there is however uncertainty as to which class of employees are 'vulnerable' enough to be afforded protection, more specifically those illegal employments where there is a valid employment relationship in existence.²⁵⁸ The *Kylie* case does not provide certainty as to which employees can be classified as vulnerable enough to deserve protection.²⁵⁹

While one may argue that this position will give rise to a situation where anyone who is paid by another to perform illegal work can be protected by the Labour Relations Act, however, there have been submissions made that contradict such speculation. One should note that the principles in the above two cases cannot be applied to all situations in which an employee engages in prohibited activity.²⁶⁰ Certainly, in a situation where one 'employs' a murderer to kill someone and one is not satisfied with the result of the murderer's actions and thus terminates his services, the murderer will not succeed in an unfair dismissal dispute against the 'employer.'²⁶¹ While murder and engaging in sex work are both illegal, sex work merely devalues respect for the body, whereas murder works directly against the right to life.²⁶² Thus, while the Constitution provides a wide interpretation of section 23, in practice it is not absolutely everyone who is entitled to this right.²⁶³

The whole purpose of the protection of illegal workers is based on their vulnerability, but the kind that begs for concern because of the genuine purpose behind it. People who engage in criminal activities that harm society are the true criminals and not people who pursue an honest living and who do not harm society. It is also the fact that sex workers are

²⁵⁵ Viviers, D; Smit, D 'A Labour Law's perspective on the protection of persons in a vulnerable employment relationship: the journal of business.org, accessed in May 2014 at pg 59.

²⁵⁶ Ibid note 255 above.

²⁵⁷ Ibid.

²⁵⁸ Ibid note 255 above at pg 60.

²⁵⁹ Ibid.

²⁶⁰ L Muswaka "Sex Workers and the Right to Fair Labour Practices: *Kylie v the Commissioner for Conciliation, Mediation and Arbitration*". *SA Merc LJ* 539.

²⁶¹ Ibid note 260 above at pg 539.

²⁶² Ibid.

²⁶³ Ibid.

regarded as employees and therefore deserve protection on an equal footing as legal employees.

3.2.8 The test applied by the Labour Court in *Kylie v CCMA* upon review

As seen from *Discovery Health* and *Kylie* in their differing judgements, it is evident that different commissioners may arrive at different decisions. It is important to note in this regard that a decision that a commissioner may arrive to can only be reviewed and not appealed, hence this gives wide powers to commissioners to make decisions that they find reasonable on the given facts of each case. A number of cases have been decided as to what test a commissioner is to apply when deciding whether the commissioner's decision was reasonable on the facts, for instance, whether the finding by the commissioner that the dismissal was an appropriate remedy was or was not reasonable. The courts have held that a decision may be reviewed if it is one that a reasonable decision-maker could not reach.

Section 145(1) of the Labour Relations Act provides that:

"Any party to a dispute who alleges a defect in any arbitration proceedings by a Commissioner may apply to the Labour Court for an order setting aside the award."

²⁶⁴

The case of *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* is the leading case on this issue. The court held that "in deciding a dismissal dispute, a commissioner/arbitrator is not required to defer to the decision of the employer."²⁶⁵ The commissioner is, however, not given the power to consider afresh what he or she would do but to decide whether what the employer did was fair.²⁶⁶ Stated differently, the Court concluded, the question to be determined is whether the decision reached by the commissioner was one that a reasonable decision maker could not reach."²⁶⁷ The court held that the duties of a commissioner are to determine the material facts of the matter and then apply his mind to them by referring to the provisions of the LRA and applying them to the facts, this will assist him in answering the question as to whether the dismissal was fair.²⁶⁸ Where the commissioner fails to apply his/her mind to the material facts of the matter in determining whether the sanction of dismissal was fair, then the decision is one that a reasonable commissioner could not reach."²⁶⁹

²⁶⁴ Section 145(1) of the Labour Relations Act 66 of 1995.

²⁶⁵ *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at par 267-268.

²⁶⁶ Supra note 265 above at par 276-268.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

The court further noted that, where a commissioner has failed to apply his mind to the facts of the matter, the commissioner commits a gross irregularity and such decision stands to be set aside, not because it is wrong because, but because the arbitrator committed a gross irregularity in the proceedings.²⁷⁰

The crux of the court's finding in the *Sidumo* case is that when deciding whether a dismissal was fair, a commissioner is not required to place himself in the shoes of the employer and decide on what he would have done if faced with a similar state of affairs, however, what is required of the decision maker is to closely determine the material facts of the matter and apply his mind to those facts using the provisions of the LRA. By doing so, the decision maker is able to decide on the issues reasonably and fairly and in a manner which will render his decision as one that a reasonable commissioner would have reached. By failing to apply his mind to the material facts of the matter, the decision maker commits a gross irregularity in the proceedings.

One other case is the case of *Dunwell Property Services v Sibande and Others*, where the court held the following:

"The test that should be applied upon review is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach?"²⁷¹ It has to be demonstrated on a balance of probabilities that the dismissal is fair from both dimensions, procedurally and substantively."²⁷²

In the case of *Modiba v Sirkhot*, the court explained the test contained under section 145 in the following terms:

"The better approach is that section 145 is now suffused by the constitutional standard of reasonableness.²⁷³ That standard is the one explained in *Bato Star (Pty Ltd) v Minister of Environmental Affairs & Others*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."²⁷⁴

²⁷⁰ Ibid.

²⁷¹ *Dunwell property Services v Sibande and Others* 2011 (2) BLLR 131 (LAC) at par 18.

²⁷² Supra note 271 above at par 18.

²⁷³ *Modiba v Sirkhot* 2010 (67) (LC) at par 11, see also *Bato Star (Pty Ltd) v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) at par 42.

²⁷⁴ *Bato Star (Pty Ltd) v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) at par 42.

In this case the court emphasised that section 145 of the LRA is now viewed from the spectrum of administrative action as contained in the Constitution. It is a constitutional requirement that all administrative action must be lawful, reasonable and procedurally fair, thus the same standard is now applied upon review to determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.

In the case of *Goitsimang David Mosima v South African Police Services and Others*, the court held that, courts should bear in mind the difference between appeal and review when applying this test.²⁷⁵ The test for an appeal entails the determining of the correctness of the decision maker, on the other hand in a review the test is that of determining the reasonableness of the decision or whether the arbitration award is defective in any manner relating to the factors set out in section 145 of the LRA.²⁷⁶ The court reasoned as follows:

“Thus the difference between an appeal and a review lies in the distinction between the concept of reasonableness and correctness.²⁷⁷ In applying the test for appeal, the court scrutinises the decision of the decision maker on the basis of determining its correctness which entails evaluating the exactness, precision and or accuracy in either its conclusion on the facts or the law.”²⁷⁸

An important distinction between an appeal and a review was made by the court in *Goitsimang*. Where section 145 of the LRA is invoked, the standard of reasonableness is applicable. In essence, the court determines whether the commissioner’s decision was reasonable or whether the award falls short of the requirements sets out in section 145, in that the decision was one that a reasonable decision maker could not reach. Put differently, a review does not focus on the correctness of the decision but rather how reasonable it is against the facts and whether it suffers from any of the defects set out in section 145. An appeal on the other hand focuses on the correctness of the decision and how accurately it was made against the facts or the applicable legislation.

Relying on the perspective provided by Govindjee and Van Der Walt²⁷⁹ in their article, I find that their reasoning is sound. The commissioner distinguished the work done by the person and the person’s identity. The contract entered into by an illegal immigrant is illegal because the worker does not have a valid work permit and not the fact that he engages in illegal work, therefore, in this instance, it is his/her identity that is in question and not the work that he/she does which forms the basis for providing an effective remedy to an unfairly dismissed employee. On the other hand, a sex worker engages in illegal work, which renders her contract illegal, and in turn making it difficult to provide an effective remedy for an unfair dismissal. It is for this reason that the CCMA and the Labour Court found that they did

²⁷⁵ *Goitsimang David Mosima v South African Police Services and Others* [2011] 103 (LC) at par 17.

²⁷⁶ Supra note 275 above at par 17.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ A Govindjee, A Van der Walt “Employment without Rights?” (2008) 3 *Obiter*

not have jurisdiction to entertain the applicant's matter due to the reason that courts ought not to sanction illegal conduct.

While I am of the view that based on the analysis given above, the commissioner's decision was based on the strict application of the Labour Relations Act, in that the court could not find jurisdictional powers that the LRA does not confer upon it, I am of the opinion that the commissioner's decision was one that a reasonable commissioner would not have reached. I strongly support the findings of the Labour Appeal Court, in that the Commissioner in *Kylie* failed to apply the principles enshrined in the Constitution, mainly the right to dignity of the applicant, which as I have mentioned above goes hand in hand with the right to fair labour practice.

Although the Labour Court correctly noted that sex workers can be regarded as employees for the purpose of the Labour Relations Act, and that they are vulnerable workers, it failed these workers considerably in that it did not provide them with any protection at all. The Labour Appeal Court on the other hand, while bearing in mind that reinstatement would amount to sanctioning of illegal work, found that in this case some form of protection needs to be afforded to the applicant as a result of the violation of her rights. In my opinion, the Labour Appeal Court's finding was just in the circumstances as it pondered on the vulnerability of workers such as the applicant.

CHAPTER FOUR

COMPARATIVE STUDY WITH FOREIGN LAW ON THE RIGHTS OF ILLEGAL IMMIGRANTS

Most recently, there has been recognition both in the European Union (E.U) and also in the United States that tackling the full factors of irregular immigration may be an alternative route to tackling irregular immigration, while simultaneously reducing exploitation.²⁸⁰ This recognition has led to policy initiatives in both jurisdictions to increase sanctions on employers of illegal immigrants or provide equal and enforceable right to back pay to irregular immigrants under certain conditions.²⁸¹ This latter approach potentially raises the cost of employing an illegal immigrant, reducing the employing incentive for hiring an illegal immigrant and this reducing the availability of work in the destination state.²⁸² Thus labour law and immigration law work together to achieve the dual purpose of protecting all workers and preventing illegal immigration.²⁸³

Elaine Dewhurst has identified three different approaches to the protection of the right of illegal immigrants to back pay.²⁸⁴ (1) The “non-protection approach” that provides no protection of certain labour rights for illegal immigrants.²⁸⁵ (2) The provider with consequences approach that provides for protection of the right to back pay but does not protect the irregular right from the consequences that might ensue once they attempt to enforce the right.²⁸⁶ (3) The full protection approach that provides for the full protection not only of the right back pay also to protection during to enforcement of this right.²⁸⁷

4.1 The non-protection approach

The main reason for this approach is the importance of (1) “maintaining the dignity of the courts by refusing to allow them to enforce illegal contracts” (2) “ensuring that illegal immigrants do not profit from their own illegal action” (3) determines illegal immigrants and (4) pushing illegal immigration.”²⁸⁸

²⁸⁰ E Dewhurst “Models of Protection of the Rights of Irregular Immigrants to Back Pay: The Impact of the Interconnection between Immigration Law and Labour Law”. (2013) 35 (2) *Comparative Labour Law & Policy Journal* 220.

²⁸¹ Ibid note 280 above at pg 220.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ibid note 280 above at pg 221.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid note 280 above at pg 222.

The biggest concern however, is the continued reliance on withdrawing protection from illegal immigrants instead of reducing the availability of illegal employment, despite international obligations which encourage the provision of employment rights to illegal immigrants.²⁸⁹

This approach was adopted and continues to operate in the United Kingdom and Ireland and has been a reason for both these states to opt-out of the E.U Sanctions Directives which have proposed a more protective approach.²⁹⁰

Both the United Kingdom and Ireland use the non-protection approach to deny employees the right to claim back-pay.²⁹¹ Only those who are employed under a valid contract of employment are afforded employment rights, a legal contract is therefore invalid and unenforceable, and both the employer and employee are in contravention.²⁹²

The non-protection approach supports the core function of immigration law in that it is against the protection of employment right, including the right to back pay, which will in turn discourage illegal immigrants from seeking work illegally.²⁹³

States such as the United Kingdom and Ireland have argued that “affording labour rights to illegal immigrants would be unjustly enriching the illegal immigrant for their illegal conduct.”²⁹⁴ The benefit of this notion is that, it will ensure that illegal immigrants are not rewarded for their illegal activities, which in turn will discourage them from seeking illegal employment.²⁹⁵

In this context, it is argued that “there is a conflict between the objectives of immigration law on one hand and labour law on the other.”²⁹⁶ If labour laws were to protect illegal immigrants, this would encourage illegal work, drawing more illegal immigrants into the state, thereby, defeating the purpose of the immigration law.²⁹⁷ This rationale causes immigration law and labour law to be in conflict with one another, instead of viewing them

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid note 280 above at pg 224.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid note 280 above at 225.

²⁹⁵ Ibid.

²⁹⁶ Ibid

²⁹⁷ Ibid.

as compatible with each other.²⁹⁸ As this tension cannot be reconciled, the law prioritises immigration law first.²⁹⁹

States implementing the non-protection approach are of the view that there is a disconnection between labour law and immigration law, which however is not the case.³⁰⁰ This disconnection, viewed from the destination state, is a result of the purpose of immigration law, which is to discourage illegal immigration on one hand and labour law which encourages illegal immigration on the other hand.³⁰¹ However, from the illegal immigrant's point of view, it is difficult to concede that, the illegal immigrant would seek illegal employment because the state provides labour protection, it is the availability of employment which is attractive.³⁰²

However, looking at the non-protection approach from the employer's point of view, one may realise that, immigration law and labour law may be seen as working together to combat illegal immigration.³⁰³ Since immigration law on the one hand, penalises the employer for hiring an illegal immigrant, which in turn discourages illegal employment, and labour law on the other hand provides protection of the illegal immigrants' labour rights which also discourages employers from hiring illegal immigrants, then both these regimes can be seen to work together to discourage illegal immigration, thereby eliminating the availability of illegal work.³⁰⁴

The impact of this approach is two-fold: First from a human rights perspective, the law does not protect irregular immigrants from abuse and exploitation at their employment, including the fact that such workers may have to work for reduced or delayed payment or even for no payment at all.³⁰⁵ It also does not comply with international law standards which encourage the protection of illegal immigrants.³⁰⁶

Second: The non-protection approach reduces the effective weapons that states have in the fight against irregular immigrants. The European Council and Parliament, in proposing the

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid note 280 above at pg 226.

³⁰⁶ Ibid note 280 above at pg 224.

E.U. Sanctions Directive, examined the possibility of maintaining only a system of sanctions and not dealing with prevention tactics such as the provision of a right to back pay for irregular immigrants.³⁰⁷ However, it concluded that the status quo in the majority of E.U. Member States have “not been shown to be effective” and the “level of existing sanctions may be so low as not to offset the economic advantage of illegal employment.”³⁰⁸

4.2 The protection with consequences approach

In essence, the protection with consequences approach seeks to provide employment rights but not as effectively as the full protection approach.³⁰⁹ This approach provides for a protection of the right to claim back pay and other employment rights, but does not guarantee protection without consequences of potential detection, detention and deportation.³¹⁰ Therefore, although the protection with consequences model has brought some positivity in dealing with the labour rights of illegal immigrants, it however, does not eliminate the fear that these workers may have when it comes to reporting cases of abuse at work.³¹¹

Most countries of the European Union (including Germany, France, Greece, and Poland) operate systems that resemble a protection with consequences approach and this is also the approach, which is closest to that advocated by the E.U. Sanctions Directive.³¹²

In the French legal system, the immigration law provides that it is the responsibility of the employer to ensure that the worker has the necessary permission to work in France, and it is illegal for an employer to hire a worker who has not been granted this permission.³¹³ From a labour law perspective, provision is also made for the protection of the right to back pay, despite the illegality of the employment contract.³¹⁴

There is a right to take a claim to the French Industrial Tribunal.³¹⁵ However, this is not a reliable process as the illegal immigrant is exposed to the consequences of being reported

³⁰⁷ Ibid note 280 above at pg 227.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid note 280 above at 227.

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ Ibid.

to the authorities and this reduces the confidence that illegal immigrants have on the system.³¹⁶

Germany operates on a very similar system, both the employer and illegal immigrant are penalised for their illegal conduct, but at the same time, Germany's labour laws afford protection to illegal immigrants in that they can claim back pay despite the illegality of the contract of employment.³¹⁷ This claim may also be brought in the Labour Court.³¹⁸

The Labour Court, however, has an obligation to report cases of illegal immigration to relevant authorities as long as it does not harm the vital personal interest of the parties involved.³¹⁹ However, this can be criticised for having a chilling effect in that workers may find it hard to report instances of abuse, due to fear of the consequences involved, thereby reducing the number of cases that make it to the Labour Courts.³²⁰

On the one hand, it is appropriate to hold accountable those employers who hire illegal workers so as to reduce the availability of illegal work, and on the other hand, it is important to be strict on the application of existing legislation, exposing those who break the law to the consequences thereof.³²¹ In analysing this model, it there appears to be a close connection between labour law and immigration law.³²² However, the Proposal for the E.U Directive viewed the two areas of law as separate entities and specifically stated that the "Directive is concerned with immigration policy, not with labour or social policy."³²³

There is evidence that states view the operation of the two aspects of the law as interconnected but are keen to ensure that the labour law protections do not outweigh the immigration law sanctions.³²⁴ Currently, there is a view at a European level that there is a need to develop a "closer connection between immigration policy and other policies of the E.U. scope" and this may, therefore, indicate an acceptance that these entities are in fact compatible.³²⁵ This model certainly makes any employer think twice about hiring an illegal immigrant because of the possibilities of the illegal worker seeking remedy under existing

³¹⁶ Ibid.

³¹⁷ Ibid note 280 above pg 228.

³¹⁸ Ibid.

³¹⁹ Ibid note 280 above at pg 229.

³²⁰ Ibid note 280 above at pg 230.

³²¹ Ibid note 280 above at pg 231.

³²² Ibid note 280 above at pg 232.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ Ibid.

labour laws where the employer is concerned.³²⁶ This model also decreases the availability of employment for illegal immigrants in the European Union.³²⁷

While employment rights are available to such workers, they are not practically enforceable and as such do not provide sufficient discouragement to employers to hire illegal immigrants.³²⁸ Challenges such as a lack of legal assistance, the illegal immigrant failing to avail him/herself to clarify the claim or provide security for legal costs due to the fear of detention or deportation, and the hardships associated with proving that an employment relationship did exist, all make it difficult for an effective enforcement of labour laws and ultimately an adequate protection of the rights of illegal immigrants.³²⁹

One particular example was a case in France, where despite the possibility of an illegal immigrants being able to make a claim, a report found that the informal status of illegal immigrants “implies the absence of any social coverage, a precarious status, and the impossibility to make any demands or to turn against one's employer if one were not to be paid.”³³⁰ The fear of retaliation by an employer in the form of demotion, loss of employment or the initiation of deportation proceedings contributes to reducing the impact of such a model.”³³¹

Cases of potential retaliations by employers were provided, such as using deportation as a threat to maintain the silence of an illegal immigrant and using reporting of the immigrant to the relevant authorities as a threat.³³² Therefore, while the approach has much to be commended, it is weak in practice and may not be able to fulfil the preventative role that states expect.³³³

4.3 The full protection approach

The full protection approach operates in opposition to the non-protection approach.³³⁴ This approach provides full labour rights to illegal immigrants regardless of the illegality of the

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid note 280 above at 233.

³³² Ibid note 280 above at 234.

³³³ Ibid.

³³⁴ Ibid.

employment contract.³³⁵ However, most significantly, this approach ensures that there is adequate protection for illegal workers, in that they are able to exercise their rights without fear of potential retaliation by the employer, deportation or detention.³³⁶

The notion behind this approach is founded firstly on the belief that everyone is entitled to basic human rights and protecting those rights includes the protection of labour rights. Secondly, that by providing illegal workers with those rights will in turn discourage employers from hiring illegal workers, thereby reducing the availability of illegal work which attracts illegal immigrants to the destination state.³³⁷

There is evidence of support for the full protection approach at both international and national levels.³³⁸ The United Nations have indicated a movement towards the full protection approach.³³⁹ Before the International Convention on the Protection of the Rights of Migrant workers and Members of Their Families (ICRMW) was introduced, there is evidence that a preference for a full protection approach had long existed, although it was never explicitly stated.³⁴⁰ This is seen from the many provisions of the United Nations human rights treaties on employment rights for legal and illegal immigrants.³⁴¹

However, the application of these provisions to illegal immigrants has been unclear.³⁴² The Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights have encouraged states to “put an end to inequality of treatment between legal and illegal immigrant workers and to ensure provision of economic, social, and cultural rights (including the right to back pay) to both legal and illegal immigrants.”³⁴³ However, the challenges pertaining to the protection of these workers from the consequences of reporting any form of violation of their rights as no express statement to this effect was made.³⁴⁴

However, the ICRMW, in particular Article 25, is in support of the full protection approach and affording labour rights to illegal immigrants. This realisation goes beyond recognising

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid note 280 above at pg 235.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Ibid

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

illegal immigrants as employees but also ensures that they are protected from the consequences of reporting any inequality treatment that they experience in the hands of their employers. This in turn provides job security and any other forms of protection from the challenges they may face.³⁴⁵ The ICRMW Committee highlighted the problems including but not limited to “low salaries, and late payment or non-payment of salaries” among illegal workers and encouraged states to “ensure migrant domestic workers should be able to access courts and other justice mechanisms without fear of being deported.”³⁴⁶ Despite these promising signs, however, there is still no express provision in the ICRMW for the effective enforcement of labour rights.³⁴⁷

The United States’ full Fair Labour Standards Act provides for a full protection for illegal immigrants and thus extends to all workers regardless of their legal status.³⁴⁸ This Act protects the right to equal pay and as such a claim for back pay. Illegal immigrants can recover back pay, whereby the worker claims wages he/she actually earned but was not paid.³⁴⁹ This view is also supported by the U.S. Department of Labour that has stated that “it would fully and vigorously enforce the Fair Labour Standards Act.”³⁵⁰

In order for a full protection approach be effectively applied, the illegal worker must first be recognised as an employee for the purposes of labour legislation.³⁵¹ Secondly, there must be an effective mechanism that ensures that the worker can be protected from deportation or detention.³⁵²

This has been the major challenge in the United States in protecting the illegal worker from the consequences bringing forward a labour claim.³⁵³ This challenge can be attributed to the employer who may decide to retaliate after a claim has been made and report an illegal worker to the authorities.³⁵⁴ In an effort to protect illegal workers from these challenges, the United States courts have ensured that the status of an illegal immigrant is not revealed during his/her trial as this would cause them to lose confidence in the system.³⁵⁵

³⁴⁵ Ibid note 280 above at pg 236.

³⁴⁶ Ibid.

³⁴⁷ Ibid

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid note 280 above at pg 238.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

Even if the courts protect illegal immigrants from revealing their status, there is still the possibility that the employer may report the illegal immigrant to relevant authorities.³⁵⁶ This form of retaliation is very common in the United States, and employers use it to prevent claims and as revenge towards workers who have brought claims labour claims against them.³⁵⁷

In an attempt to alleviate this problem, the United States courts have held that damages are available for retaliation by an employer on an illegal immigrant.³⁵⁸ This is a direct reflection of the purpose of the Fair Labour Standards Act, which provides that “it is unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act.”³⁵⁹ This consideration reinforces the notion that everyone is entitled to fundamental human rights and employers should be prohibited from benefiting from the labour of migrant workers without affording them fundamental human rights and thus states are obligated to ensure that these rights are adequately protected.³⁶⁰

The ICRMW’s purpose is to ensure that the hiring of illegal immigrants comes at a very high cost to employers, in that, despite the illegality of the employment contract, illegal immigrants may be able to seek redress using applicable labour legislation which is effective and does not subject them to any unfortunate consequences thereof.³⁶¹ This will then in turn ensure that the availability of illegal work is significantly reduced, as employers will not be able to escape from their illegal actions.³⁶² In this regard, the ICRMW and its goals indicate a commitment to full protection approach and thus views both labour law and immigration law as compatible regimes.³⁶³

Before the ICRMW, the provision of full protection to illegal immigrants has been unclear, although there has been great support for a full protection to illegal immigrants at both international and national level. There has been a number of Conventions that provide Labour Rights to legal immigrants and illegal immigrants on an equal footing with South African workers and provide them with labour rights. However, the ICRMW has now, although not explicitly, expressed the view that a full protection approach is one that is necessary to protect illegal immigrants as vulnerable workers. South Africa however, has not

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Ibid note 280 above at pg 240.

³⁶² Ibid

³⁶³ Ibid.

ratified the ICRMW which advocates for the provision of full protection rights to illegal immigrants, which is why these workers are still afraid to report instances of unfair treatment.

At a national level, international obligations are not being met by member states and the ICRMW's goal is to provide adequate protection to illegal immigrants. This is evident from the fact that although the labour rights of illegal immigrants are protected under labour law, there is still the threat that where an illegal immigrant brings an unfair labour practice claim, there will be consequences of him/her being subjected to deportation or detention which in turn defeats the whole purpose of seeking the protection and causes a chilling effect in that an irregular immigrant will rarely seek to recourse where he/she has been abused by his/her employer knowing that he/she might be detained or deported.

As seen also from the existence of the ICRMW and the comments made under it, namely that an illegal immigrant should be able to seek recourse without the fear of being deported, these are promising signs that there is a support of the full protection approach, however, concerns against this approach that were expressed during its drafting are the reasons that there is no express right not to be deported or detained.

One might argue that it would be against public policy to reinstate an irregular immigrant after he had taken up illegal employment. My argument in response to this contention is based on the belief that at times drastic measures need to be taken to solve a problem. If South Africa as a country was to eliminate the illegal employment of workers, it needs to put aside its swords for a moment and come up with a solution that will be better for all and not one sided. In my view, the best solution would be for South Africa to provide these workers full protection by ensuring that they are not deported or detained for bringing forward a claim for unfair labour practice. I believe that a new approach is required. If these workers are aware that their rights are fully protected a significant number of them will come to the fore, which in turn will discourage employers from hiring illegal immigrants.

CHAPTER FIVE

THE CURRENT LEGAL POSITION REGARDING THE TREATMENT OF SEX WORKERS AND ILLEGAL IMMIGRANTS BY SOUTH AFRICAN LABOUR LAW

It has already been established that sex workers and illegal immigrants fall within the category of vulnerable workers in South Africa and deserve protection under the Labour Relations Act, this is through the recognition of illegal workers as employees for the purposes of this Act. The court in *Discovery Health* has noted that an employment relationship exists regardless of the validity of the employment contract.

Courts have recognised persons employed under illegal contracts as employees that deserve protection under the Labour Relations Act and other applicable legislation such as the Basic Conditions of Employment Act and the Employment Equity Act. This recognition plays a significant role in our law, mainly because an employment relationship can take many

forms, including those falling outside the employment relationships that one would ordinarily familiarise himself/herself with. However, the defining factor is whether or not an employment relationship exists, one that does not dependant on the manner and form of the contract as established by the court in *Universal Kingdom of God v CCMA*. Moreover, employers are very unscrupulous in that they employ persons illegally, exploit and abuse them, then only when the employee seeks recourse does the employer play the illegality card.

There is a wide category of employees in the labour market who are in abusive employment relationships. The conditions they work under are what causes their vulnerability and labour law seeks to protect these workers. Some contracts may possess the legal element but yet the employee finds him/herself vulnerable in the hands of his/her employer because of the prominent fact that the employer is the dominant party in the existing employment relationship. Labour law takes cognisance of the fact that an employment relationship may take different forms and its objective is to protect vulnerable workers that fall under the definition of employee.

5.1 Court decisions and the law

The term 'employee' goes far beyond the status of the employee (whether or not he/she is legally employed). Courts will grant protection to employees in any form of employment relationship, where the employer has treated an employee unfairly. These decisions are therefore in harmony with the court decisions affording employee rights to illegal workers on the basis that they fall under the definition of 'employee' and that they are vulnerable in their employment. The purpose of the Labour Relations Act is to provide this protection.

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."³⁶⁴ The court importantly noted that the law has been very progressive when it comes to employee rights in terms of the Labour Relations Act, that not to accommodate a person in the circumstances of the appellant would completely not be in harmony with what the goals the Labour Relations Act is seeking to achieve.³⁶⁵ Therefore, if we are to give effect to exactly what the Labour Relations Act today seeks to achieve, s 123 of the LRA would be read to include contracts of employment concluded but of which the commencement date has been deferred to a future date.³⁶⁶

This case takes cognisance of the fact that persons who enter into employment contracts which stipulate that they will commence work at a later date are vulnerable employees and therefore deserve the protection in terms of the Labour Relations Act, therefore, the

³⁶⁴ *Wyeth SA (Pty) Ltd v Manqele & Others* (2005) 6 BLLR 523 (LAC) at pg 49-50, *see also* National Economic Development.

³⁶⁵ *Supra* note 364 above.

³⁶⁶ *Ibid*.

definition of 'employee' should extend to these workers.³⁶⁷ What is significant about this decision is that it introduces job security in informal sectors, having due regard to the various forms of work.³⁶⁸

What is interesting about this decision is how broadly it has extended the definition of 'employee,' this will ensure that persons employed in any form of employment, particularly those employed in the informal sector, are afforded protection under the Labour Relations Act. This is a positive feature of our law in that, affording workers in an employment contract which the commencement date has been deferred, and workers in any other form of employment, would prevent abuse and exploitation of these workers which are already susceptible to such treatment because of their vulnerability. In essence, this protection will not only protect such employees from abuse and exploitation, but it will also ensure job security.

The issue of illegality also arose in *SITA (Pty) Ltd v CCMA & Others* (2008) 29 ILJ 2234 (LAC).

"An employee who worked for the front company of the South African Defence Force (SANDF) was retrenched and given a severance package in terms of which he could not be employed again by the defence force.³⁶⁹ He continued serving the defence force indirectly through a close corporation.³⁷⁰ The defence force cancelled the project as a result of lack of funding and the employee was effectively dismissed.³⁷¹ He instituted a claim of unfair dismissal.³⁷² The defence force alleged that the appellant was not their employee but the employee of the close corporation."³⁷³

The court had to determine the true employer of the applicant, whether it was the defence force or the close corporation. The court did not concern itself with the existence of a contract of employment between the applicant and the defence force, and held that "an employment relationship was established between the employee and the defence force and ordered payment for compensation."³⁷⁴ The court reasoned that the relationship that was between the applicant and the defence force was that of an employer/employee relationship, which was in a form in which they mutually decided it to be on, and was merely to facilitate a relationship that was already in existence between them. Therefore,

³⁶⁷ L Nevondwe; K Odeku "Exploring Sex Traders Status in Labour Relations." (2014) 5 (1) *Mediterranean Journal of Social Sciences* 774.

³⁶⁸ *Ibid.*

³⁶⁹ *SITA (Pty) Ltd v CCMA & Others* (2008) 29 ILJ 2234 (LAC) par 5.

³⁷⁰ *Supra* note 369 above at par 5.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Supra* note 369 above at par 3.

³⁷⁴ *Supra* note 369 above at par 18.

the respondent was not correct in stating that the applicant was not an employee of the respondent.”³⁷⁵

It is not uncommon, as seen from the *Manqele* case, for an employer to make certain arrangements for the employee, which such arrangement places the employee in a vulnerable situation. In this case, the applicant continued to provide his services to the defence force, but did so indirectly through a close corporation. It may somewhat be a confusing state of affairs for an employee as to his true employer and often threatens job security, as a result of the uncertainty as to who exercises control over. This type of employment is what renders employees potential victims of abuse and exploitation, and this is precisely what the Labour Relations Act seeks to correct.

The decision in *SITA (Pty) Ltd* reinforced the notion that, determining who is an employee, what needs to be established is the existence of employment relationship rather than a valid contract of employment.³⁷⁶

It is notable that South African labour law treats sex workers differently from illegal immigrants, while at the same time taking into consideration that both are vulnerable workers. As we have seen from the *Kylie* case, the Labour Court correctly distinguished between work that is illegal and the illegality of the workers identity. The Labour Court pointed out that:

“Although sex workers may be regarded as employees, bearing in mind that there need not be a valid employment contract for an employment relationship to exist, sex work remains illegal, and if sex workers were to be afforded the right to fair labour practices, then courts would be sanctioning illegal work which would not be in harmony with the Sexual Offences Act.”³⁷⁷

Evident from the what the Labour Court has held, courts are more willing to provide full protection (where circumstances permit) when dealing with an illegal immigrant than when dealing with a sex worker, hence the law is more merciful to illegal immigrants because it is not the work that is being done that is illegal but the identity of the worker.

Although this distinction seems to be the basis for denying sex workers the rights contained in the Labour Relations Act, the Labour Appeal Court has held that the “Constitutional right provided in section 23 which is the right to fair labour practices extends even to sex workers,³⁷⁸ if sex workers cannot be stripped of their dignity by their clients as the Labour court correctly pointed out, then the same protection should apply to their relationship with

³⁷⁵ Ibid.

³⁷⁶ L Nevondwe; K Odeku “Exploring Sex Traders Status in Labour Relations.” (2014) 5 (1) *Mediterranean Journal of Social Sciences*. 775

³⁷⁷ *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others* 2008 (9) BLLR 870 (LC) par 3.5.

³⁷⁸ *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others* (2010) 4 SA 383 (LAC) at par 26.

their employers.”³⁷⁹ The effect of this notion is that sex workers have the right to fair labour practices and therefore cannot be unfairly dismissed.

Important to note however is that, even though sex workers are vulnerable to exploitation and vicious abuse, such protection “will mean sanctioning and encouraging activities that the legislature has constitutionally decided should be prohibited.”³⁸⁰ 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.”³⁸¹

It is notable that both the Labour Court and the Labour Appeal Court shared the same views in that, it is the illegality associated with sex work that makes it hard to provide sex workers with full protection under the Labour Relations Act. The Labour Court pointed out that because of this illegality, “the CCMA would not be able to grant an effective remedy which is reinstatement.”³⁸²

However, the Labour Appeal court held that, “when it comes to the issue of a remedy, each case will have to be decided in terms of its facts.”³⁸³ The Labour Appeal Court correctly stated that, where a sex worker is unfairly dismissed, the court has the discretion to order any competent remedy contained under section 193 of the LRA. The court in this regard stressed that full range of remedies contained under section 193 do not necessarily have to be granted in every case.³⁸⁴

The court expressed that, while it agrees with the Labour Court in that it cannot provide an effective remedy, the court has the discretion to utilise other remedies set out under section 193. By doing so, the Labour Appeal Court does not sanction illegal work, but it acknowledges the appellant’s constitutional rights, therefore an alternative remedy would give effect to those rights.

It is important not to misconstrue the LAC’s judgement, therefore, in essence, the court held that the judgement cannot and does not sanction sex work because that is the role of the legislature.³⁸⁵ The crux of the LAC’s finding was that the involvement of the applicant in

³⁷⁹ Supra note 378 above at par 26.

³⁸⁰ L Nevondwe; K Odeku “Exploring Sex Traders Status in Labour Relations.” (2014) 5 (1) *Mediterranean Journal of Social Sciences* 773.

³⁸¹ Ibid.

³⁸² *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others* (2010) 4 SA 383 (LAC) at par 52.

³⁸³ Supra note 382 above at par 52.

³⁸⁴ Ibid.

³⁸⁵ Supra note 382 above at par 54.

illegal work did not exclude her from the protection afforded to everyone under the Constitution.³⁸⁶

It is important to note, however, that the LAC's finding merely confirmed that sex workers are labour right entities, nothing in the LAC 's judgement suggests that compensation was the appropriate sanction that the CCMA should have granted in this case or in similar cases in the future, moreover, it did not dismiss reinstatement as a sanction in the future.³⁸⁷ The LAC merely noted that, reinstatement could be problematic, as, by granting such a remedy, one would be encouraging a sex worker to continue engaging in illegal activity.³⁸⁸ Even so, the court did not indicate whether compensation granted would not also lead to the sanctioning or encouraging of an illegal activity.³⁸⁹

It is worth mentioning at this point that, there is some grey area in the law regarding the unfair dismissal of sex workers and illegal immigrants in that these workers, although falling within the category of vulnerable workers who are victims of exploitation and vicious abuse at work, there is still a distinction on the type of remedy that a court may grant in each case. Although the LAC has gone as far as extending section 23 of the Constitution to sex workers, sex workers cannot be placed on an equal footing as illegal immigrants, solely because of the illegality element associated with their job and the considerable fact that there is no way to remedy this defect.

Sex work is illegal and that is the current legal position in South Africa. On the other hand, in the case of illegal immigrants, it is only the status of the worker that is illegal, which can in any case be remedied. It is possible, where there are compelling reasons, that the illegal immigrant can be reinstated, after establishing the factors surrounding his/her inability to possess a valid work permit. It may also be unfair for an employer to dismiss a foreign worker on the basis that he/she does not possess a valid work permit (after considering all the facts) where he/she can apply for a permit and change her status to being one of a legal employee. However, in the case of a sex worker, the work remains a criminal offence that is prohibited by existing legislation.

³⁸⁶ D Smit, V Du Plessis "Kylie and the Jurisdiction of the Commission for Conciliation, Mediation and Arbitration." (2011) 23 (3) *SA Merc LJ* 486.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Ibid.

CHAPTER 6

CONCLUSION

Much of the debate for the protection of the rights of illegal workers emanates from their vulnerability. It is therefore on this basis that much more is still needed to address this problem. Evidently from the cases discussed above, the law has been progressive with providing protection to these workers, however, the right to job security under the Labour Relations Act will never be met. If we argue on the basis of the vulnerability of these workers, it is hard to reconcile with the fact that reinstatement cannot be afforded to them because of the illegality of their contract of employment. We have to draw the line between criminal acts that are harmful to society and need to be punished and those acts which done for the purposes of making an honest living.

For the longest time, women have been and remained the most vulnerable members of society mainly because of the gender roles of the past and the patriarchal system that hasn't completely left our society. The redressing of the imbalances of the past is a very long walk and not to mention the high levels of employment that our country is still faced with. What we really need is a system that is more sympathetic to the challenges faced by women of our society, one that considers that even though most women are liberated today there is still a very large number that is struggling to break away from poverty. Moreover, a very large number of women are the primary care takers of their family and their children and it would seem, based on the high number of unemployed women who turn to sex work that it is a quicker option.

Since the employer is the dominant party in the relationship, the Act should only seek to punish the employer and not the employee. If an employee is desperately seeking employment, it is easy for an employer to take advantage of the employee because the employer knows that the employee will do just about anything to survive. An employee is in a desperate situation and sometimes cannot make rational decisions with regards to what is right and what is wrong, especially when he is hungry and has a family to care for.

It is therefore the employer who is in control of the situation, moreover, he is not vulnerable, the worker is already a vulnerable member of society, yet the employer continues to violate the worker's rights because he knows the worker will not seek protection from the law as she might face criminal prosecution or get deported and lose her job. Deporting someone or sending them to jail does not solve the problem and it turns a blind eye to employee's vulnerability, putting them in a far worse position than they were in. Most of these workers would rather not seek protection because they believe that their jobs are more secured if they remain silent, how then is this problem addressed? Can we then say the law has done all it can to protect these vulnerable workers? The answer cannot be to the affirmative.

With regards to illegal immigrants we have seen from the United States that it has decided to provide full protection for its workers regardless of their status. The Fair Labour Standards Act is there to ensure that. Anything less than the full protection approach is not enough and violates the human rights of workers, mainly because it causes a chilling effect on their right to bring unfair labour practice claim to court. These workers still remain vulnerable for the fact that they know they are not fully protected and their employers continue to use this to their advantage. We can therefore conclude that an approach less than the full protection approach does not solve the problem, something more needs to be done by South Africa, we need legislation in place that we expressly provide for this full protection on a national level and we need to be part of the necessary International Conventions.

Regrettably, there is differential treatment by law between sex workers and illegal immigrants, and it is this factor that strengthens sex worker's vulnerability. Although the

Labour Appeal Court has noted that sex workers are to be recognised as employees for the purposes of fair labour practices and that they deserve some form of protection and remedy provided in the Labour Relations Act, it should be born in mind that this does not amount to adequate protection for these employees. It is not everyone who works as a sex worker that will be confident to seek redress should their rights be violated, and as a result this causes a considerable chilling effect in the effective role of the LRA when it comes to the victimisation of workers in employment. Sex workers find it difficult to come to the fore about the abuse they experience at work, mainly under circumstances where they are casted out by society at large for the fact that their job is clouded with a sense of immorality, reinforced by the law through the Sexual Offences Act.

The Kylie case was in fact a special case in this regard as much as it is one of a kind, it is however not without doubt that more cases of this kind will suffice in the future and the dilemma is that there is no cast and stone law with regards to sex workers and as the Labour Court pointed out, it is a matter of concern that courts cannot render an effective remedy when it comes to sex workers. The inability of a court to render an effective remedy raises the questions as to whether any remedy in a case of this nature is in fact an appropriate remedy. The LAC pointed out that not all cases of this kind will be afforded protection, we can conclude that it is the vulnerability element that is the deciding factor of whether or not the employee deserves protection and most importantly each case has to be decided on its own merits. It is

In the case of illegal immigrants, their position currently affords them adequate protection as vulnerable employees, as discussed earlier, the illegality is associated with their status and the work that they do. This makes their situation a little less burdensome on the courts in that in some situations dismissal would not be an appropriate remedy, it is therefore the duty of the CCMA or court to decide what is reasonable in the circumstances, unless it is the employee himself who by his own fault failed to apply for a work permit. Adding to that, an employer may be the reason why an illegal immigrant finds himself not being able to get one, like we have seen from cases discussed above, where the employer had a duty to assist him to apply for one. The LRA's goal is to ensure that employers who enjoy the fruits from an illegal immigrant while he/she does not have a work permit and then only when the immigrant seeks recourse after the violation of his employment rights, tries to escape the consequences of his action by saying that the employee is working illegally, does not go unpunished.

The effectively eliminate the violence against sex workers and any other form of violation of their human rights is to afford them full labour rights, although it is beyond the scope of this article to provide extensive grounds and reasoning in favour of decriminalising sex work, it seems more of a solution than a problem, as we have seen from the countries mentioned above. We as a country need to ask ourselves if there are other ways of providing full protection without decriminalising sex work. Sex workers are at a far worse position than

illegal immigrants in that there is not work permit they can acquire which would enable them to work legally.

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