Who Is (Should) Be Covered By Labour Law?

Lessons From Kylie v CCMA

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Abstract

This article explores the meaning of an employee in the light of Kylie v CMMA and Others, and the living jurisprudence, guided significantly by the definition in the Labour Relations Act, 66 of 1995 and section 23(1) of the Constitution. The article further analyses whether the LRA affords protection to an employee engaging in an illegal activity, particularly with reference to the practice of prostitution in South Africa. The article is a product of the difficulties faced by the majority of workers, brought about by atypical forms of employment in the contemporary world of work. It is asserted that the labour law developments have reached a stage where identifying an 'employee' or a 'worker' should be by fully appreciating and accommodating the diversity in the modern world of work. This can be attained by transcending finding a contract of employment with establishing the existence of an employment relationship, irrespective of the nature of the contract. The transformative nature of the Constitution provides succinct direction in that regard.

Keywords: an employee, labour protection, right to fair labour practice, employment contract, transformation

Introduction

Pius Langa, the former Chief Justice of the Constitutional Court of South Africa once pronounced that the Constitution of the Republic of South Africa, 1996 should be interpreted as a transformative tool.¹ This means that the Constitution should be interpreted widely to accommodate changes that happen within the Republic, considerate of the diverse nature of the society. Pius Langa offered a further illumination on the notion of transformative nature of the Constitution by indicating that: “Every nation should deeply consider ways in which the plight of those without a say in the democratic process and with little bargaining power in concluding the social contract may be elevated by sympathetic state intervention”.²

The definition of an employee has been a subject of scrutiny, intense debate and interpretation at the CCMA, the Labour Court and Labour Appeal Court, particularly with regard to employees’ right to fair labour practices as entrenched in the Constitution.³ The aspect of determining who is an employee is important in that it determines who gets protection as afforded by our labour laws in South Africa. This is to an extent that those not covered by labour laws would not be entitled to receive protection and as such cannot claim such a protection, hence they will remain the vulnerable members of the society.⁴

The issue of defining an employee has been the subject of scrutiny in the case Kylie v CCMA and Others,⁵ particularly with regard to employees’ right to fair labour practices, and the vulnerability of illegal workers.⁶ The definition of an employee interpreted in Kylie v CCMA and Others has brought some far reaching implications for labour law.⁷ This case explored whether a sex worker can claim protection against unfair dismissal in terms of the Labour Relations Act (LRA),⁸ a right enjoyed comprehensively by employees.

At the centre of attention in this article is identifying who qualifies or should qualify as an employee for purposes of benefitting from the labour protective legislation aimed at protecting employees against various of abuse in labour relations, particularly by the employers. Therefore, the article shall provide a succinct definition of an ‘employee’ in terms of the LRA and other conforming legislation as a point of departure. It also explains what the labour law is and the purpose it is purported to serve, necessitated by the outcomes in Kylie. This will be followed by the analysis of recent jurisprudence with emphasis on Kylie case, considerate of the implications it has in view of the challenges posed by the

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¹ Chief Justice Pius Langa, ‘The challenges facing transformative constitutionalism in South Africa’ Prestige Lecture delivered at Stellenbosch University on 9 October 2006 at p2.
⁵ 2010 (4) SA 383 (LAC).
⁶ Bosch, C ‘Can Unauthorized Workers Be Regarded as Employees for the Purposes of the LRA? ILJ 1353.
⁷ 2010 (4) SA 383 (LAC).
diverse modern world of work, characterized by disguised and atypical forms of employment. In the light of this case, the article shall establish and/or reflect on whether the judgment has expanded the boundaries of labour law and how this could facilitate the diversification of work in the interest of precarious workers.

Who Is (Should Be) An Employee?
The Labour Relations Act, 1995 serves as a prime source of a definition of an ’employee’. Workers who are not employees fall outside the scope of the LRA and are not entitled to protection against unfair dismissal. The LRA defines an employee as follows:

a) Any person, excluding an independent contractor, who works for another person or the state and who receives, or is entitled to receive, any remuneration; and

b) Any other person who in any manner assists in carrying on or conducting the business of an employer.  

In terms of the proposed amendments to the Labour Relations Act, an employee will be defined as “any person employed by or working for an employer, who receives or is entitled to receive any remuneration, reward or benefit and works under the direction or supervision of an employer”. The present legislative framework makes no reference to contract of employment. The presumption in s200A of the LRA has a crucial effect that not only common law contract of employment serves to establish employment relationship. It further guides on relationships that qualify for labour protective legislation. Cohen argues that the presumption was promulgated to protect employees who have little or no protection under the sanctity of the contract of employment.  

It follows from the definition that people who meet the requirements set out in the LRA would qualify for protection under South African Labour Laws. This is evident from the case of Denel (Pty) Ltd v Gerber, where the court emphasised the need to have regard to the realities of the situation when deciding on the existence or otherwise of an employment relationship.  

The International Labour Organisation defines an employee on two premises; i.e. employee with stable contract and regular employees. Employees with stable contracts are employees who have had, and continue to have an explicit written or oral or implicit contract of employment or a succession of such contracts with the same employer on a ‘continuous basis’ which notion implies a period of employment which is no longer than a specified minimum period determined according to national laws.

9 Ibid, s 213.
10 The Basic Conditions of Employment Act 75 of 1997 (BCEA), Employment Equity Act 55 of 1998 (EEA) and the Skills Development Act 97 of 1998 (SDA) provide the same definition which is also in line with s200A of LRA, s83A of BCEA and the Code of Good Practice on the presumption of an employee - Gazette no 29445, “Code of Good Practice: Who is an employee?” Notice 1774 of 2006 Part 2 at p5.
13 At para1296G. See also SABC v McKenzie (1999) 1 BLLR (LAC) at para10.
16 Ibid at para27271 – 2728A.
What Is Labour Law And Its Purpose?
In South Africa, labour law is largely concerned with the regulation of formal labour markets to the exclusion of informal sector workers. Amongst the critical phenomena in the informal sector is lack of employment security and protection. Workers fall beyond the protection against unfair dismissal among others.Labour law and its purpose must be well defined. Labour law is a collection of regulatory techniques and values that are properly applied to any market that, if left unregulated, will reach socially sub-optimum outcomes because economic actors are individuated and cannot overcome collective action problems.

The purpose of labour law has been and shall be, to establish a countervailing power in the labour market which assures equality of position between employers and the collective organizations of workers, while leaving room for the continuing effects of market forces. It also has a distinct role of upholding important values in the market and intervening in markets to achieve justice that will not emerge from unregulated contracting.

The case of Kylie set a precedent that sex workers can now approach the relevant CCMA or Bargaining Council or the Labour Court where the arbitrator or a judge would then have to consider if the sex worker has been treated unfairly and what an appropriate remedy would be.

Kylie V CCMA And Others: Background To The Facts
The Labour Appeal Court in Kylie v CCMA & others, had to grapple with the question of whether the definition of an employee extends to persons engaged in unlawful activities. Kylie was employed in a massage parlor as a sex worker, her employer was (Michelle Van Zyl who was trading as Brigitte’s). In 2006, Kylie was informed by her employer that her employment was terminated, apparently without a prior hearing. In 2007, Kylie referred the dispute to the CCMA. In the CCMA, the legal question was whether the CCMA had jurisdiction to hear the matter in the light of the fact that Kylie had been employed as a sex worker and accordingly her employment was unlawful. The Commissioner handed down a ruling in which she concluded that the CCMA did not have jurisdiction to arbitrate on an unfair dismissal in a case of this nature. It was against this ruling that Kylie approached the Labour Court for review.

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

Kylie Case.

‘Kylie’, is a pseudonym, the name with which she was known to her employer’s clientele as she wanted her identity to be protected.

Kinkle Case.

S v Jordaan & Others 2002 (6) SA 642 (CC) para69.

Kylie Case.

Kylie v CCMA, para49.

Kylie v CCMA, para21.

The Constitution, 1996.

Discovery Health Ltd v CCMA (2008) 29 ILJ 1480 (LC) para49.


Ibid, para89. See also, Discovery Health Ltd v CCMA (2008) 29 ILJ 1480 (LC) para49.

Kylie v CCMA, para21.

ILJ 1918 (LC) para5 to 9.

Discovery Health Ltd v CCMA (2008) 29 ILJ 1480 (LC) para49.


Ibid, para89. See also, Discovery Health Ltd v CCMA (2008) 29 ILJ 1480 (LC) para49.

Ibid, para21.

The Constitution, 1996.

Kylie v CCMA, para21.

26 Kylie Case.

27 ‘Kylie’, is a pseudonym, the name with which she was known to her employer’s clientele as she wanted her identity to be protected.


29 Ibid, para89. See also, Discovery Health Ltd v CCMA (2008) 29 ILJ 1480 (LC) para49.

30 Kylie v CCMA, para21.


32 S v Jordaan & Others 2002 (6) SA 642 (CC) para69.
Linking Kylie And The Living Jurisprudence: Implications To Labour Law

The issue in Kylie was whether s23(1) of the Constitution is applicable to a sex worker and further, whether a sex worker falls within the ambit of s213 of the LRA which defines an employee. In response to these questions, varying interpretative approaches to these provisions are adopted and in so doing, the recent and old jurisprudence play a crucial role in illuminating on the issues. Section 23(1) of the Constitution provides that “everyone has the right to fair labour practices.” The term ‘everyone’, which follows the wording of section 7(1) of the Constitution which provides that the Bill of Rights enshrines the right “of all people in the country”, is supportive of an extremely broad approach to the scope of the right guaranteed in the Constitution.34

In Khosa v Minister of Social Development35 it was also held that the word ‘everyone’ is a term of general import and unrestricted meaning.36 It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system.”37

The Constitutional Court has been consistent in interpreting the ‘everyone’ meaning. In S v Makwanyane38 it was said that the right to life and dignity ‘vests in every person, including criminals convicted of vile crimes. The court further said that these criminals ‘do not forfeit their rights under the Constitution and are entitled, as all in the country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment’.39

In Chirwa v Transnet and Others40 the court held that the objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must inform the interpretation process and the provisions of the LRA must be read in the light of its objects. Thus where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA.41

The Sexual Offences Act42 makes brothel keeping a criminal offence and this includes residing in a brothel.

33 The LRA, in ss185 & 186(2) provide and guarantee a protection against unfair labour practices as amongst the fundamental apparatus invented to curb arbitrariness in the workplace, giving effect to s23(1) of the Constitution. The notion of unfair labour practice was imported from the USA during 1970s subsequent to recommendations by the Wiehahn Commission of Inquiry into Labour Legislation, Professor Nic Wiehahn. The notion has since crept into the heart of our South African labour law jurisprudence and it may be expected that it will persist as it is currently driving the developments of labour law. The LRA defines unfair labour practice as: ‘any unfair conduct arising between the employer and employee relating to promotion, demotion, probation, training and the provision of benefits; the unfair suspension or any other disciplinary action short of dismissal; failure or refusal of an employer to reinstate or reemploy a former employee in terms of any agreement; and an occupational detriment short of dismissal on account of that employee having made a protected disclosure in terms of Protected Disclosures Act (PDA).

In interpreting the entitlement of the right to fair labour practices, it should be noted that the Constitution serves as a point of departure necessarily because this right is founded on it and given effect to by the LRA. When literally interpreted, the right to fair labour practice will vest in ‘everyone’ in an employment like relationship.

34 Kylie v CCMA 2010 (4) SA 383 (LAC), para 16.
35 2004 (6) SA 505 (CC) para111.
36 Kylie v CCMA at para 17.
37 Kylie v CCMA 2010 (4) SA 383 (LAC), para15.Thus, in Khoza & Others v Minister of Social Development & Others, the Constitutional Court has held that the scope of ‘everyone’ in the Bill of Rights means available to all, and therefore should extend to all individuals (for purposes of this note; in employment like relationships), until limited by the law of general application. Further that it is a term of general import and unrestricted meaning, so it means what it conveys. This tack is in accordance with the Constitution. The wording ‘everyone’ is used immensely in the Constitution. This is inclusive of amongst others, ‘everyone’s right to have his/her dispute resolved by application of law decided in a fair public hearing before court or any impartial tribunal. It is asserted therefore that the fact that a person is involved in an invalid contract of employment or is an illegal immigrant should not deprive such person his/her constitutional rights in any manner, unless limited by the law of general application. It is on this basis that the LAC found in favour of Kylie, a move not opposed at all. Nevertheless, this sends a strong message to the legislature and all relevant stakeholders to consider broadening the scope of coverage to include the masses of our population exploited in the informal sector. Therefore, the finding by Cheadle AJ that protection afforded by s23(1) is not available to sex workers proved controversial and was worth tested, necessarily because there is nowhere to discern that the intention of the Constitution was to limit the rights in s23(1) only to persons engaged in works carried out on the basis of a (valid) contract of employment. Nor, does it expressly exclude those in the informal sector. In the absence of such restriction any exclusion of sex workers from the protective ambit of this provision should not be countenanced, subject only to a limitation placed by a law of general application.
38 1995 (3) SA 391 (CC) at para137.
39 Kylie v CCMA 2010 (4) SA 383 (LAC), para18.
40 2008 (4) SA 367 (CC) at para 110;
41 See also Kylie v CCMA 2010 (4) SA 383 (LAC), in para 15.
42 Act 23 of 1957 (‘the Act’)
for purposes relating to prostitution activities.\(^{43}\) In terms of section 20(1)(A)(a) of the Act, unlawful carnal intercourse for reward constitutes a criminal offence which attracts a criminal penalty of imprisonment of no more than three years and a fine of no more than R6000.\(^{44}\) In addition to these provisions there is a common law principle that courts ought not to sanction or encourage illegal activity. This principle is now incorporated into the Constitution, entrenched as an element of the rule of law, and set out in section 1 of the Constitution. The question arises thus as to whether section 23 affords protection to a sex worker. In NEHAWU \(v\) UCT\(^{45}\) the Constitutional Court emphasised that the focus of section 23(1) of the Constitution was on the ‘relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both’.\(^{46}\)

That approach followed upon the judgment in SANDU \(v\) Minister of Defense\(^{47}\) where it was held that even if a person is not employed under a contract of employment that does not deny the ‘employee’ all constitutional protection. This conclusion is reached despite the fact they ‘may not be employees in the full contractual sense of the word’ but because their employment ‘in many respects mirrors those of people employed under a contract of employment’.\(^{48}\)

In the contemporary world of work, courts in determining whether the parties are employer and employee are increasingly less concerned in finding a valid contract between the parties as opposed to discerning an employment relationship. In Rumbles \(v\) Kwa Bat Marketing (Pty) Ltd,\(^{49}\) the court stated that what is required in determining whether a worker is an employee is a conspectus of all relevant facts including any contractual terms and a determination whether these holistically viewed establish a relationship of employment as contemplated by the statutory definition.\(^{50}\)

This approach is in line with the findings of the LAC in Kylie. It also finds proponents from Chipenete \(v\) Carmen Electrical CC \& another.\(^{51}\) In Chipenete, the Court was more concerned with conferring legal remedies for unfair discrimination and exploitation of foreigners in deterring employers from employing aliens with no valid permits.\(^{52}\)

A similar approach was adopted in Discovery Health Ltd \(v\) CCMA\(^{53}\) in which the Labour Court dealt with a case where the employer had employed Mr German Lanzetta, an Argentinean national, who was in South Africa on a temporary residence permit. Mr Lanzetta’s employment with Discovery Health Ltd was terminated summarily on the 14\(^{th}\) January 2006 when the employer realized that he did not have a valid work permit. Mr Lanzetta then referred an unfair dismissal claim to the CCMA which ruled that he was an employee in terms of the LRA. Dealing with an unfair dismissal matter, the Labour Court, on review, evinced that ‘…a contract of employment is not the sole ticket for admission into the golden circle reserved for employees.’\(^{54}\) The judgment in casu serve to demonstrate clearly that establishing the existence of an employment relationship transcends finding contract of employment and that the invalidity of a contract does not automatically invalidate the employment relationship.\(^{55}\) This therefore is in concord with the findings of both the Labour Court and LAC that it was not in dispute that Kylie was an ‘employee’, because an employment relationship was established, inconsiderate of the nature of the work involved nor the validity of whatever contract which might have existed between them. Therefore this inform an effective extension of protection to the majority of workforce in the informal sector, considerate of the matrix of different forms of work and the absence of security associated with those, characterized by a dire lack of legal protection.

It is accepted that the constitutional right to fair labour practices vests in ‘everyone’ and, further that it includes not only parties to a contract of employment but those persons in an employment relationship. This can also be supported by two decisions of the LAC in which the court ‘approached the vexed question of employment relationship on the basis of the substance of the arrangements between the parties as opposed to the legal form so adopted’.\(^{56}\)

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

\(^{43}\) Ibid, Section 3 (a) and (c).
\(^{44}\) See Kylie \(v\) CCMA 2010 (4) SA 383 (LAC), para 6.
\(^{45}\) (2003) 24 ILJ 95 (CC) at para 40.
\(^{46}\) See Kylie \(v\) CCMA 2010 (4) SA 383 (LAC), para 21.
\(^{47}\) (1999) 20 ILJ 2265 (CC) at paras 28-30.
\(^{48}\) Kylie \(v\) CCMA 2010 (4) SA 383 (LAC), para 21.
\(^{49}\) (2003) 24 ILJ (LC).
\(^{50}\) Ibid, at para 1592.
\(^{52}\) Christie, S & Bosch, C (2007) 28 ILJ 804 at p810.
\(^{54}\) Discovery Health Ltd \(v\) CCMA (2008) 29 ILJ 1480 (LC) at para 51.
\(^{55}\) Ibid, at para 54. See also Craig Bosch, ‘Can unauthorized workers be regarded as employees for purposes of the labour Relations Act’? (2006) ILJ 1342.
That question was answered in the negative by the Labour Court, primarily because, were such rights to be granted, a court would undermine a fundamental constitutional value of the rule of law by sanctioning or encouraging legally prohibited activity. In the view of the learned judge in the court a quo, that conclusion was supported by the Constitutional Court in its decision in S v Jordan and others.53

In terms of section 193(2) of the LRA, in the case of an unfair dismissal the primary remedy is reinstatement or re-employment. An order of reinstatement is the primary remedy for an unfair dismissal. It is asserted that reinstating a person in illegal employment would not only sanction illegal activity but may constitute an order on the employer to commit a crime.54 It is clear that section 23 of the Constitution does afford constitutional protection to Kylie. The illegal activity of a sex worker does not per se prevent the latter from enjoying a range of constitutional rights. Even though the character of the work she undertook devalues the respect that the Constitution regards as inherent in the human body. This is not to say that as sex workers they are stripped of the right to be treated with respect by law enforcement officers.

But any invasion of dignity, going beyond that ordinarily implied by an arrest or charge that occurs in the course of arrest of incarceration cannot be attributed to section 200(1A)(a) but rather to the manner in which it is being enforced. The remedy is not to strike down the law but to require that it be applied in a constitutional manner. Neither is a sex worker stripped of the right to be treated with dignity by their customers.55 The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the sex worker.56

It is also important to bear in mind the fact that the unfair labour practice jurisdiction was introduced to counter the arbitrariness of lawfulness, in particular, termination by lawful notice. Furthermore, as suggested earlier, it is conceivable that a labour practice may well impact on the position of either prospective or retired employees. For these reasons, and in the absence of an internal limitation clause, it is suggested that labour practices in s 23(1) ought to be approached dispassionately and be given a broad construction. An act of terminating employment, the structuring of working hours, or discipline at work remain labour practices, irrespective of whether they are done in the context of legal or illegal work.57 Once it is recognised that they must be treated with dignity not only by their customers but by their employers, section 23 of the Constitution which, at its core, protects the dignity of those in an employment relationship, should also be of application.58

We concur with the LAC in holding that Kylie meets the threshold requirement so that she is a beneficiary of the applicable constitutional rights.59 The enquiry now turns to whether she is entitled to any legal relief. In refusing to recognise the possibility of a remedy in terms of the LRA, the Labour Court based its decision on the view that the legislature intended that the Act not only penalised prohibited activity but precluded courts from recognising any rights or claims arising from that activity. In terms of his approach, where courts recognise a claim based on ‘a constitutional right’ that court would be sanctioning or encouraging the prohibited activity. Whereas foreign and child workers, who are prohibited from assuming certain forms of employment, can be afforded protection because the prohibition is aimed at ‘who does the job rather than the job itself’, the prohibition with regard to sex work concerns the nature of the job. Even though they are vulnerable to exploitation, such protection ‘will mean sanctioning and encouraging activities that the legislature has constitutionally decided should be prohibited’.60

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.61 In Sasfin (Pty) Ltd v Beukes62 the court held that the principles underlying contracts contrary to public policy and contra bonos mores may overlap.63

Generally, where performance had been made in terms of an illegal contract, a court will also not assist a party who has performed to recover his or her performance by the use of an enrichment based remedy. However, the courts have acknowledged that they have an equitable discretion to relax the operation of the so called par delictum rule in order to allow one party to utilise an enrichment based remedy, an approach which is sourced

54 See as per Cheadle AJ in Kylie v CCMA 2010 (4) SA 383 (LAC) para 11.
55 See Kylie v CCMA 2010 (4) SA 383 (LAC) para26.
56 Ibid at para 19.
57 Ibid at para 29.
58 Macqueen and Cockrell ‘Illegal Contracts ’ in Zimmermann et al Mixed Legal Systems in Comparative Perspective 143 at 144.
59 1989 (1) SA 1(A) at 8F.
60 See Kylie v CCMA 2010 (4) SA 383 (LAC), at para 33.
back to Jajbhay v Cassiem. In this case, the Appellate Division held that the court should relax the rule if it was necessary ‘to prevent injustice or to satisfy the requirements of public policy’. Our law is not wholly inflexible in its refusal to relax the pari delictum rule. The criminalisation of prostitution does not necessarily deny to a sex worker the protection of the Constitution and, in particular section 23(1) thereof, and by extension its legislative implementation in the form of the LRA.

The LRA came into effect as a result of section 23 of the Constitution which affords everyone the right to fair labour practices. The purpose of the LRA ‘is to advance economic development, social justice, labour peace and the democratisation of the work place. The LRA was designed to ensure that the dignity of all workers should be respected and that the workplace should be predicated upon principles of social justice, equality and fairness.’

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

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

In South Africa, many sex workers are particularly vulnerable and are exposed to exploitation and vicious abuse. It may be that this categorisation is not applicable to all cases of sex workers but there is, at the very least, a prima facie case that Kylie falls within such a vulnerable category. In the circumstances, where a sex worker forms part of a vulnerable class by the nature of the work that she performs and the position that she holds and she is subject to potential exploitation, abuse and assaults on her dignity, there is, on the basis of the finding in this judgment, no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity and which protection by extension has now been operationalized in the LRA.

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

The Constitution’s commitment to freedom, equality and dignity and its concern to protect the vulnerable, exploited and powerless should always be encouraged. The Constitution reflects the long history of brutal exploitation of the politically weak, economically vulnerable and socially exploited during three hundred years of racist and sexist rule.

Conclusion

It is clear that Kylie enjoys protection in terms of the Constitution and the LRA. However, it is asserted that the findings of the LAC in maintaining that its judgment cannot and does not sanction sex work cannot be without critiques. It is submitted that by affording a sex worker a protection, it simply means that one can go to the extent of giving a relief. Crucial to be to be noted is the fact that although prostitution is rendered illegal, that does not destroy all the constitutional protection which may be enjoyed by someone as Kylie, a sex worker. After all, Kylie is also a human being who is also entitled to constitutional protection in the Bill of Rights. The approach adopted in Goldberg and others v Minister of Prisons which is sourced from common law is equally applicable. In casu, the court held that fundamentally, a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. This point was reinforced by the Constitutional Court in Minister of Home Affairs v NICRO.

The sex worker’s dignity should not to be exploited or abused. It should remain intact and the concomitant

68 1939 AD 537.
69 Kylie v CCMA 2010 (4) SA 383 (LAC), at para 34. See also, Henry v Brandfield 1996 (1) SA 244 (D) at 252 – 253.
70 See NEHAHU v UCT 2003 (2) BCLR 154 (CC) at 33 – 40.
71 Kylie v CCMA 2010 (4) SA 383 (LAC), at para 41.
72 This declaration was adopted on 7th November 1967.
73 Kylie v CCMA 2010 (4) SA 383 (LAC), at para 41.
constitutional protection must be available to her as it would to any person whose dignity is attacked unfairly. By extension from section 23(1), the LRA ensures that an employer respects these rights within the context of an employment relationship. However this would normally have to be a case by case issue thereof.

In essence, not all persons who are in an employment relationship which is prohibited by law will enjoy a remedy in terms of the LRA. In so deciding, a tribunal or court is engaged with the weighing of principles; on the one hand the ex turpi causa rule which prohibits enforcement of illegal contracts and on the other public policy sourced in the values of the Constitution, which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community. The ex turpi causa rule is, as is evident from its implementation by the courts, a principle of law necessarily because it proffers a guideline rather than dictating a single result.

This case of Kylie has successfully laid a foundation that all persons in an employment relationship, inclusive of those in the informal sector, should also have access to labour protective legislation. It offers a precedent that all those in employment relationship should be covered by labour law and enjoy all the benefits. It is asserted that the judgment of Kylie has expanded the boundaries of labour law, such that our legislative authorities, courts and competent tribunals are now better positioned to devise creative responses towards extending labour protective legislation to those in desperate need.

The remaining questions which we can ask is/are; does the LRA afford legal remedy to contracts tainted with illegality? If so, to what extent? By ordering reinstatement or reemployment, are we not licensing someone to further such a crime? By awarding compensation are we not paying someone for committing a crime? Hence, the interpretations proffered by the LAC provide a ground-breaking precedence for the contemporary world of work and creates a good jurisprudence for South African Labour Law. The LAC referred the Kylie matter to the CCMA for a fresh decision on the remedies available for Kylie since the question of jurisdiction has already been clarified. It is asserted that it would be appropriate for LAC to give a judgment and the appropriate remedy or relief available for Kylie. Since this matter raised a new precedent in labour law, this enquiry cannot be left in the hands of the CCMA. It could even be argued that the LAC shifted the responsibility of its actions (findings) to the CCMA and why that was/is so remain a question? This case of Kylie has successfully expanded the labour legislative scope of coverage.

Acknowledgements
Whereas it takes extraordinary efforts to undertaking and completing an article, crucial contributors cannot go unnoticed. Work of this magnitude would hardly emerge without their backing. We are intensely indebted to Prof. Evance Kalula of the LAPO, University of Cape Town for his continued and sustained support. We also appreciate the support of Prof. Joost Herman, Prof. Andrej Zwitter, Prof. Michel Doortmont & Dr. MW Mhlaba for their academic mentorship.

Our sincere gratitudes also go to our colleagues who helpfully shared their valuable thoughts towards this work and socially kept us lively. We are grateful for the support of Phutiane Rapatsa, Mabusha, Rahman Khan, Gitonga Wantjiku, Gichohi, Ramesh Thabo, Mohamed Rashid, Jerry Makhene, Walter Thobejane, Velly Bogopa, Costarica Mnisi, Seganka Ramalema, Sefenya H Letsoalo, AT Thoka, L Monnye, Thupane Kgopa, Nthuse Lebepe, Costarica Mnisi, Jarno Hoving and many more.

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