

INTERPRETING THE LEGAL AND SOCIAL IMPLICATIONS OF KYLIE V CCMA: A VIEW ON LOCATING PROSTITUTION IN SOUTH AFRICA'S LEGAL SYSTEM

Mashele Rapatsa, University of Limpopo

ABSTRACT

In Kylie v CCMA, the Labour Appeal Court (LAC) had to determine whether Kylie (pseudonym) was an employee as defined in terms of section 213 of the Labour Relations Act 66 of 1995 (LRA), and depending on the outcome of such an enquiry, whether Kylie was, constitutionally speaking, consequently entitled to access the social protective ambit of labour law. Notwithstanding the fact that Kylie was engaged in proscribed social activity, it was decided that Kylie met the requirements of being an employee, and thus eligible to receive labour law protection. Hence, this article expands the Kylie discussion further, with emphasis being on whether the Kylie matter has expanded the scope of labour law to such an extent that engaging in the practice of prostitution or any sort of illegal activity or work may be construed as being acceptable in South Africa's socio-legal order. It is asserted that a comprehensive interpretation of the Kylie judgment will unavoidably presuppose, by implication, that the judgment has indeed, although hesitantly, legalised prostitution. However, affording protection to contracts that are unenforceable in terms of common law and established community mores is both problematic and unsustainable. Therefore, it is crucial for the legislature to accept that the Kylie matter has expanded the scope of labour law, and that the legal imperatives arising out of this case be extended to afford protection to the most socially vulnerable members of society, especially the highly exploited street sex workers, whose existence is widely known, yet neglected.

Keywords: Constitutional Labour Rights, Social Inequality, Prostitution, Illegal Work, *Kylie v CCMA*.

INTRODUCTION

The judgment in the case of *Kylie v CCMA* 2010 (4) SA 383 (LAC) raised two fundamental questions. First, whether those engaged in prostitution are entitled to be recognised as employees in accordance with section 213 of the Labour Relations Act 66 of 1995 (Legislation, 1995)¹. Further, whether prostitution work entitles those involved in it to have access to the protective ambit of the labour legislation, including the social protection laws regulating basic conditions of employment, unemployment social benefits, social skills development and so forth, to the effect that they may lodge claims of unfair labour practices as may emanate from the environment where their prostitution practice is carried out. Second, whether the Labour Appeal Court's decision to recognise Kylie as meeting the requirements of section 213 of the LRA did ultimately legalise prostitution in South Africa? The article put more

emphasis on the latter question, with the view towards demystifying the social effects of the Kylie judgment on the practice of prostitution and the exploitative tendencies besieging this underground industry, which continues unabated. It should be noted that the entire case illustrated that all tribunals that had the sight of the Kylie matter did in fact recognise the Kylie's activity as having created an employment affair. And it is asserted, that is where issues arose, particularly because once you afford such recognition, impliedly, you are in the end bound to interpret the laws governing employment relations in order to make sense of the Kylie situation, and provide social and legal protection as a result, even though the enforcement part resulted in another conundrum.

At the centre of attention in this article is the question of commercial prostitution work in all its forms, including those who operate on the streets, and whether the South African courts have accepted, and thus inadvertently succumbed to silently legalising the practice of prostitution. Commercial prostitution has been defined as provision of sexual services, performances or products with the sole intention to receive material compensation (Wojcicki, 2002), either in the form of hard cash or in kind benefits as may be prescribed by agreement between such parties.

RESEARCH METHODOLOGY

South Africa is known to be part and parcel of the many countries in the world where unemployment, poverty, social inequalities, under-development and social strife are fast-becoming foremost pervasive impediments to the quest of realising labour peace, socio-economic development, social peace, social justice, and in the end, sustainable human wellbeing. The changes that have become so prevalent in employment relations have resulted in a disproportionate growth of informalised employment arrangements (Cohen, 2012 & 2008), under which workers are thrown on the fringes of the protective ambits of the labour legislation, thus becoming vulnerable and docile to socio-economic exploitation. Under such circumstances, workers or citizens in general, resort to other methods that could assist them towards generating an income and sustaining a livelihood. Hence, various members of society, especially females and mostly youthful ladies whose prospects of achieving better lives diminished, have resorted to engaging in prostitution. Such acts of prostitution or sex work have brought about the need to reconsider the meaning of who is an employee and who ought to be enabled access to the protective ambits of labour law. Such development culminated in the Kylie matter, which compelled the LAC to pronounce on whether those engaged in criminalised activities may claim social protection from the rights-based constitutional provisions and labour laws. The LAC was also considerate of the fact that work has changed and is continuously changing for both better and worse as has been indicated by Clive Thompson, under which majority of workers are displaced into more precarious and less protected jobs (Kalula, 2003), especially because according to the traditional perspective on labour relations, those who render or sell their labour do so under circumstances of subordination (Thompson, 2003).

Therefore, considerate of the above social and labour dynamics, it is crucial to determine whether the courts, through their rights-orientated judgments, have expanded the scope of protective labour law. The main research question is whether a person engaged in prostitution, which is currently an illegal activity, is or ought to be entitled to a remedy at law? And, whether by granting such access to the labour law's protective ambits, through invoking the constitutional

values such as dignity and equality, does not, in effect, condone and or legalise such an illegal practice? The article adopts a traditional doctrinal approach, which relies on constitutionally derived legal norms, also entrenched through statutes, to proffer some explanation to the existing legal and social gaps resulting from the Kylie judgment.

Kylie V CCMA and Others at Glance

In *Kylie v CCMA & others*,² the Labour Appeal Court 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 as shown by Judge Cheadle at paragraphs 5-9.

In *Discovery Health Ltd v CCMA* ILJ 1480, at paragraph 49, 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, and this was also relied upon in the Kylie matter. Furthermore, at paragraph 21 of Kylie matter, 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 of the Republic of South Africa, 1996 that courts ought not to sanction or encourage illegal activity (Legislation, 1996 & 1993). This was emphasised in *S v Jordaan & Others* 2002 (6) SA 642 at paragraph 69. Kylie then referred the matter to the LAC which surprisingly overruled the Labour Court's judgment and found in her favour, to the effect that sex workers can now claim protection from the LRA and section 23 of the Constitution.

The Kylie matter has had far-reaching social and legal implications to the labour market than it was ever thought. Although it remains unimaginable how the precedence flowing from this matter will be affected to favor several other similar cases. But it is generally clear that the courts have opted to emphasize that because section 23(1) of the Constitution of the Republic of South Africa, 1996 intends to provide coverage to everyone, "*everyone has the right to fair labour practices*,"³ the term everyone, which follows the wording of section 7(1) of the Constitution support a broader interpretation and approach favouring Kylie, and those engaged in similar job arrangements⁴. By and large, the courts relied on various interpretive approaches which were employed in various jurisprudence, most of which concerned socio-economic rights, their realization and enforcement being the prime attractions⁵.

The Sexual Offences Act 23 of 1957 and Sex Work

In terms of section 3(a) and (c), it is a criminal offence to keep a brothel⁶. Accordingly, those who reside in a brothel also commit a criminal offence. 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 R6000⁷. In addition to these provisions there is a common law principle that courts ought not to or seem to sanction or encourage illegal activity. This principle is now embedded 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* (2003) 24 ILJ 95 (CC) at paragraph 40, the Constitutional Court emphasized 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 (Legislation, 1957).

The courts have reiterated that in order to determine whether parties are employer and employee, less regard must be had on locating a valid contract between the parties. Instead, a regard must be on ascertaining the existence of an employment relationship. Further that the most fundamental approach should be on determining 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 definition⁸.

This resonates the determination made in *Kylie*, which is supported by *Chipenete v Carmen Electrical CC & another* (Legislation, 1998) 19 ILJ (LAC). The *Chipenete* case was more concerned with conferring social and legal remedies for unfair discrimination and exploitation of foreigners in deterring employers from employing aliens with no valid permits (Bosch, 2006). This was also evident in *Discovery Health Ltd v CCMA* where the Labour Court had to determine a matter of the employer who employed Mr Lanzetta who was in South Africa on a temporary residence permit, whose employment with Discovery Health Ltd was terminated summarily on the 14th January 2006 when the employer realized that he did not have a valid work permit. Upon referring the matter to the CCMA claiming unfair dismissal, it was 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.’ What is deducible from the above jurisprudence is that a meaningful effect of the law depends on human circumstances, and the interaction with either their victims or perpetrators of wrongdoing. This suggests that the effectiveness of the Sexual Offences Act will hardly get tested in the instances where commercial sex work, resembling employment relation subsist.

The Constitution and Protection of the Precarious Worker

It is crucial to understand the constitutional framework and context within which the social protection of labour rights was conceptualised, and how this would aid the transformative perspectives of the Constitution. Fundamentally, this entails adopting interpretive approaches that put the Constitution in its best light, as propounded by Ronald Dworkin (2002). But equally, it means interpreting the Constitution and its conforming labour legislation in such a manner that they indeed ensure the reach by the most vulnerable segments in society, while particularly advancing the quest of finding solutions to the existing socio-economic challenges afflicting the

worker in the modern political economy. But what happens when the courts set precedence that appear to be legitimately predicated on protecting and advancing the rights of vulnerable citizens, while on the other hand, simultaneously appearing to be taking a rather insensitive activist stance that disregards foundational moral underpinnings of what defines a stable and sane society as in accordance with established community mores? To deal with these questions expansively, it is important to understand exactly who the Constitution actually intended to cover. In other words, who ought to benefit from 23 of the Constitution and the subsequent labour legislation enacted to give effect to the Constitution? Whereas there has been a general consensus that the word ‘everyone’, socially means all those in working arrangements are covered by section 23 (Le-Roux, 2009), it is discernible that the legislature would not, in the ordinary course of business, have intended to extend protection to those engaged in illegal work or activities. It goes without saying that once an act is proscribed by the law; any action arising out of it ought to be punishable by law.

Of course, section 2 of the Constitution provides that the Constitution is the supreme law of the Republic, that any law or conduct that is inconsistent with it must be declared invalid. Further that all obligations imposed by it must be fulfilled. And indeed the Constitution went on to entrench fundamental labour rights, which would subsequently be the yardstick in the interpretation and application of such legal norms as it pertains to the protection of workers across all sectors. As a result, the Constitutional Court has held that the term works in section 23(2) of the Constitution is broader than the statutory category of employee and covers even members of the South African Defence Force (SANDF) (Benjamin, 2008), with the primary objective of ensuring the reach of labour protection by all those that are engaged in work. This is particularly crucial because the Constitutional Court has held that the scope and application of the word everyone extends to everyone (Bosch and Christie, 2007), which entails that it is available to all individuals engaged in work. Unwittingly, this necessitates ascertaining the justification of extending labour protective ambit to those engaged in prostitution, and the social and legal implications of such access of protective labour laws, especially in terms of whether the practice is enabled to thrive or not, and in the context of its impact on society’s social stability and developmental perspectives, and which invokes numerous moral issues, at least sociologically speaking.

A practical example is in the case of child labour. Section 43 of Basic Conditions of Employment Act 75 of 1997 expressly states that no one may employ a child under the age of 15 (Legislation, 1997). This prohibition emanates from section 28 of the Constitution. By implication, any employer found to be employing children will be committing a prosecutable offence. Now, imagine a child lodging a claim of unfair labour practice! That will certainly be absurd, at least constitutionally speaking. How and where do you begin if you have to entertain it? In the first place, a child should not have been in the employ because the law proscribes that. But as soon as the courts are willing to entertain such claim, it means such an illegal act of employing children becomes legal in the face of the exploitative perpetrator, and those docile vulnerable citizens. Therefore, the mere fact that the courts were prepared to give audience to Kylie is an indication that the practice is nearly legalised. If not, it leaves those engaged in prostitution even more vulnerable to social and economic exploitation at the hands of unscrupulous law breakers.

A Socio-Legal Conundrum of those Engaged in Prostitution, the Most Loved Human Beings

Irrefutably, it is difficult to ascertain the precise nature and extent of the prevalence of commercial prostitution activity, especially because it takes place underground. Thus, those who exploit vulnerable females engaged in prostitution evade prosecution, whereas females that are exploited in the industry are constantly ashamed of being vilified at a social level. Therefore, prostitution presents two notable challenges. First, a legal challenge, which is that perpetrators are difficult to find and hold accountable. Second, at a social level, where females doing prostitution's moral containment will be questioned lest they come forward seeking refuge from the law. But as a matter of fact, sex workers are loved by many, and I dare say, including those in the legislature.

It should be noted that since the advent of democracy, South Africa has been associated with better employment opportunities and an improved levels of human wellbeing. Factors that influenced such perceptions range from reality to fictions. For instance, it is perceived that urban migration from rural to urban and emigration to bigger cities such as Johannesburg, Cape Town and Durban will increase chances of realising a better social and economic life. This has largely been due to various factors, which necessitates that it is crucial to understand the contextual dynamics and the varied social reasons that compel individuals, females in particular, into the prostitution industry. Often, lack of opportunities, poverty and desolation are the prime factors leading to females succumbing to prostitution participation. It is for this reason that various researches have established that majority of those engaged in prostitution originate from rural areas with dire material social disadvantage, and from neighbouring countries (Stadler and Delaney, 2006), with broken socio-economic backgrounds. In fact, it has been found that economic desperation is essentially responsible for females who take decisions to take risks in an attempt to earn extra cash.

CONCLUSION

This article set out to demonstrate that, sociologically speaking, there is no significant difference between the practice of prostitution in formalized environments such as a brothel setting, and prostitution in an informal setting, which mostly takes place on the streets of big cities such as Johannesburg, Durban and Cape Town. The amount of social and economic exploitation that both categories experience is similar. Therefore, the Kylie matter has largely demonstrated that for the constitutional values of dignity and social (both formal and substantive equality) to be wholly realised, the legislature should be prepared to accept that Kylie has expanded the scope of labour law, with the effect that legal social protection afforded to Kylie should also be extended to reach majority of vulnerable and docile sex workers roaming and operating on the streets of big cities. But what is clear is that the main push factors of social and economic exploitation in prostitution are poverty and lack of opportunities in the main, which if averted, may capacitate law enforcement agencies in terms of effectuation of legal norms. Notwithstanding the fact that Sexual Offences Act constitute strict normative framework within which to punish perpetrators of transactional prostitution, those engaged in prostitution are yet to be prosecuted for the act. In fact, if it was, Kylie herself would have been subjected to prosecution post her claim of unfair labour practice. Therefore, the only plausible conclusion to

draw is that the LAC effectively built a cutting-edge precedent which presupposes that the legislature ought to legislate and afford social protection those who engage in prostitution. The existing widespread anecdotal evidence suggests that majority of women enters the industry of commercial prostitution mainly owing to the marked social and economic disadvantages inherited from the past. Thus, it is amenable that a continued criminalisation of prostitution, while fully accepting its widespread existence does indeed compounds the lives of its victims. The mere fact that the courts were prepared to intervene, relying significantly on the rights-based approaches such as protection of human dignity and social equality as foundational legal norms, is testament of the need for the legislature to expressly make a considerate determination regarding the possibility of legalising the industry, which also finds proponent from continued discernible failure to completely eliminate it. Indubitably, I conclude that Kylie has inadvertently expanded the scope of labour law, and so it should be allowed to determine the fate of vulnerable females engaged in prostitution who for decades, have been docile to socio-economic abuse and exploitation.

ENDNOTE

1. The LRA defines an employee as follows;
 1. Any person, excluding an independent contractor, who works for another person or the state and who receives, or is entitled to receive, any remuneration;
 2. Any other person who in any manner assists in carrying on or conducting the business of an employer.

Similar definitions are also contained in 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 p.5.
2. Kylie is a pseudonym, the name with which she was known to her employer's clientele as she wanted her identity to be protected.
3. 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.
4. *Kylie v CCMA* 2010 (4) SA 383 (LAC), para.16.
5. For instance, The Constitutional Court has constantly unpacked the word everyone in a manner that supported protecting even the worst of criminals, as seen in *S v Makwanyane*, 1995 (3) SA 391 (CC) at para137. Further, in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para.111, it was also held that the word everyone is a term of general import and unrestricted meaning, and that everyone must benefit from state funded social assistance.
6. *Ibid*, Section 3 (a) and (c).

7. *Kylie v CCMA* 2010 (4) SA 383 (LAC), para.6.
8. *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 24 ILJ (LC) at para. 1592.

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