

A Labor Law perspective on the Protection of Persons in a Vulnerable Employment Relationship in South Africa

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ABSTRACT

Against the backdrop of South Africa's immense cultural diversity and famously liberal Constitution, the country's statutes, common law and standing legal practice are continuously being challenged and reshaped. One such instance pertains to the issue of illegal contracts of employment and the legal position of those employed in terms of them. The infamous South African *Kylie* and *Discovery Health* court cases have opened the door to much speculation, confusion and debate in this regard, as they have allowed for the possibility that persons employed under an illegal employment contract may claim labor law protection and recognition. This is largely subject to such persons being labeled 'vulnerable' in their employment relationship, with the possibility of their human rights being adversely affected. However, as no formal guidelines have yet been established as to what constitutes 'vulnerability', a lacuna has been created in the South African legal system. This article examines how South African labor law has changed over time in respect of vulnerable employment relationships, highlights important precedents set along the way, while brief reference is also made to employment vulnerability in other jurisdictions to enable comparison. It is eventually concluded that the current lacuna may be resolved in three possible ways. Firstly, to enable greater uniformity in deciding disputes relating to illegal contracts of employment and vulnerable illegal employment relationships, these matters may be diverted from the country's Council for Conciliation, Mediation and Arbitration (CCMA) to a to-be-established, separate forum, which can take the form of a tribunal or a specialized court. Secondly, to provide greater legal certainty, the legislature may wish to lay down certain guidelines and rules upon which such specialized tribunal or court should adjudicate these matters. Finally, it is proposed that the statutory definitions of who qualifies as an employee in terms of the country's Labor Relations and Basic Conditions of Employment acts be expanded or altered.

1. Introduction

It should be noted from the outset that South Africa is a country of immense cultural diversity. The Constitution of the Republic of South Africa, founded on the values of dignity, equality and liberty, is regarded as one of the most liberal in the world, with a comprehensive Bill of Rights. It is in terms of these rights that new possibilities have emerged and statutes, the common law and standing legal practice have been challenged and reshaped.

The infamous South African *Kylie*³ and *Discovery Health*⁴ cases have opened the door to speculation, confusion and debate regarding illegal contracts of employment, while at the same time holding the key to interpreting the current legal position of those employed under such contracts. In particular, the Labor Appeal Court's ruling in *Kylie* has several controversial consequences, moving beyond the bounds of current law and legal solutions. These cases have allowed for the possibility that persons employed under an illegal

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³*Kylie/Van Zyl t/a Brigittes* [2007] 4 BALR 338 (CCMA); *Kylie v Commission for Conciliation, Mediation and Arbitration & Others* [2008] 9 BLLR 870 (LC); *Kylie v Commission for Conciliation, Mediation and Arbitration & Others* [2010] 31 ILJ 1600 (LAC) (hereinafter called "the *Kylie* case").

⁴*Discovery Health v CCMA and Others* [2008] 7 BLLR 633 (LC) (hereinafter called "the *Discovery Health* case").

employment contract may claim labor law protection and recognition. This is largely subject to such persons being labeled 'vulnerable' in their employment relationship, with the possibility of their human rights being adversely affected. However, no guidelines have yet been established as to what constitutes 'vulnerability' in this regard or how far such 'vulnerability' extends. This apparent lacuna in the law has led to much debate, confusion and legal uncertainty.

This article investigates, evaluates and discusses the position and possible protection of persons in vulnerable employment relationships in South Africa. As will become evident, uncertainty with regard to the possible granting of labor protection to certain 'vulnerable' employment groups has been mounting, particularly so for those employment arrangements made under illegal employment contracts, but where valid employment relationships exist.

In a historical as well as evaluative fashion, this research sheds light on how South African labor law has changed over time in respect of vulnerable employment relationships, while brief reference is also made to employment vulnerability in other jurisdictions to enable comparison.

To set the scene, common-law and legislative views on the contract of employment and employment relationships are explored, followed by a discussion of the historical development of employment illegality. Next, the focus shifts to the current South African legal position with regard to illegal employment, statutory labor protection and 'vulnerability'. In order to explore 'vulnerability' and its possible meanings and scope, the various categories of vulnerable persons in employment relationships will be examined, as well as their relation to illegal contracts of employment. Following a brief comparison with the international position in this regard, possible solutions to this lacuna in South African law will be suggested in an attempt to re-establish legal certainty.

2. The Contract of Employment, Statutory Employees, the Employment Relationship and Employment Vulnerability

2.1 Introduction and Definition of a Contract of Employment

As a point of departure, it is important to investigate the common-law contract of employment, being the most important element of the employment relationship. As will be discussed in the subsequent sections, vulnerable employment relationships are often based on illegal and unenforceable contracts of employment. This makes the contract of employment, and concomitantly also the common law, statutory provisions and judicial developments in respect of the contract of employment, an important indicator of vulnerability in employment relationships.

The common-law contract of employment – the so called *locatioconductiooperarum* – was introduced in South African labor law as a means to structure and regulate the relationship between an employer and an employee (Van Jaarsveld & Van Eck, 1998). It can thus be viewed as the foundation of the employment relationship.⁵ Several definitions for a contract of employment have been formulated, but the following one postulated by Grogan (2009) is suggested as the preferred option: "A contract of employment is an agreement between two legal personae (parties) in terms of which one party (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable wage, and which entitles the employer to define the employee's duties and (usually) to control the manner in which the employee discharges them."

2.2 The Common Law Governing Contracts

As the contract of employment is but another version of a contract, it remains subject to the rules of the law of contract and must meet the five basic contractual requirements (Van der Merwe *et al.*, 2007), which have become trite law, namely consensus (which must be present between the parties in respect of the content and consequences of the contract), possibility of performance (the performance agreed upon by the employer and employee must be objectively possible), certainty (the contract concluded by the parties must result in certainty regarding its legal consequences), formalities (although these are not a requirement for a contract to be valid, as long as the parties' intention can be inferred therefrom) and legality (the agreement concluded between the employer and employee must be legal in its entirety and, as such, also has legal consequences).

⁵See *MEC for the Department of Health, Eastern Cape v Odendaal* [2009] 5 BLLR 470 (LC) para 52.

A contract of employment found lacking in any of the above mentioned respects will thus be invalid. It follows then that if the contractual requirement of legality has not been complied with, the agreement between the parties will be illegal (Van der Merwe *et al.*, 2007). For example, if there is a statutory provision that prohibits a certain act, such as prostitution, any contract that is concluded to advance prostitution will be illegal. A contract of employment will be illegal if the nature of the services to be rendered by the employee (the purpose of the contract) is contrary to the law or against public policy (Christie, 2001). As this article will show, many vulnerable groups enter into employment contracts of which the purpose is against public policy and, as such, should be invalid and illegal. It then follows that an illegal or invalid agreement will not have any legal consequences, and the parties thereto will not have a valid standing in law (as far as the agreement is concerned) (Van der Merwe *et al.*, 2007).

2.3 Statutory Employees

Over and above the requirement of a legal contract, it is important for employees to be recognized as employees in terms of statute, as only such recognized employees will be protected by labor law if a labor dispute should arise (and also provided that they fall within the scope of labor legislation) (Muswaka, 2011). A statutory definition for those who would qualify as employees is found in South Africa's Labor Relations Act (Republic of South Africa, 1995)⁶ as well as the Basic Conditions of Employment Act (Republic of South Africa, 1997).⁷

The logical conclusion is that the statutory qualification of who stands as an employee and a person employed in terms of an employment contract should be synonymous. However, as will become apparent from the research, this does not always hold true. In certain circumstances, judiciary developments have granted employees statutory protection, irrespective of whether their contracts of employment were legal or not.

2.4 The Employment Relationship

A third aspect that will affect whether an employee is entitled to receive statutory protection in case of a labor dispute is the employment relationship between the parties, which is at best intricate and complex (Cohen, 2012). This is so because the South African judiciary has in recent years tended towards separating the employment relationship from the contract (as in *Discovery Health*), stating that the existence of the one does not depend on the existence of the other. The South African courts have therefore developed a range of tests to determine whether the elements of an employment relationship are present between parties, namely the control test, the organization test and the dominant impression test (Rutherford Smith, 2011; 2010).

2.5 Vulnerability in Employment

Defining employment vulnerability is a complex issue, since the parameters of workers who would qualify as 'vulnerable enough' to receive protection have not yet been determined. Of course, minority groups of any kind are always considered to be vulnerable, as well as groups and individuals whose human dignity is at risk. The chief of the Employment Trends Unit of the International Labour Organization (ILO) defined vulnerable employees as follows (ILO, 2010): "We define workers in vulnerable employment as the sum of own-account workers and contributing family workers. They are less likely to have formal work arrangements, and are therefore more likely to lack decent working conditions, adequate social security and 'voice' through effective representation by trade unions and similar organizations. Vulnerable employment is often characterized by inadequate earnings, low productivity and difficult conditions of work that undermine workers' fundamental human rights."

It may thus be inferred from the above definition that employment vulnerability on the international stage is characterized by a lack of formal work arrangements (contracts of employment and the like), a lack of

⁶ S 213: "... 'employee' means (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer ...", as well as entire s 200A on "Presumption as to who is employee".

⁷ S 83A: "A person who works for or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present: The manner in which the person works is subject to the control or direction of another person; The person's hours of work are subject to the control or direction of another person; In the case of a person who works for an organisation, the person is a part of that organisation; The person has worked for that other person for an average of at least 40 hours per month over the last three months; The person is economically dependent on the other person for whom that person works or renders services; The person is provided with tools of trade or work equipment by the other person; Or the person only works for or renders services to one person."

decent working conditions, alack of legal protection and a risk of human rights infringements. Such elements are relevant to the working conditions of prostitutes and illegal immigrants, as will be discussed below.

3. The Historical Development of the Illegal Contract of Employment

Almost as if governed by Isaac Newton's third law of motion – that every action has an equal but opposite reaction – the introduction of the legal contract of employment seems to have opened the door to the illegal contract of employment as well, operating within the structure of the employment relationship but in conflict with the law. The one may thus be seen as a shadow of the other, existing ever since the initial concept was incorporated into the South African legal system.

South African labor law has a strong Roman-Dutch (common-law) foundation (Van Jaarsveld & Van Eck, 1998) and may be seen as the initiation point of the contract of employment in South African legal history. It is also noteworthy that the master-servant relationship is the basis of the employment relationship and may be described as a person (the servant) subjecting himself to the supervision and direction of the employer (the master), with the obligation to obey the employer's instructions with regard to the tasks which he has to accomplish, as well as the time and manner in which he must accomplish them (Willie & Millin, 1967; Van Jaarsveld & Van Eck, 1998).

The common-law position governing illegal contracts of employment may be closely associated with the legal maxim *ex turpicausa non orituractio*. This maxim seeks to discourage the South African courts from promoting or upholding illegal activity (Smit & Du Plessis, 2011), and further enforces that if an act is contrary to the law, such an act will be void and of no effect.⁸ As a consequence, illegal contracts should not be upheld or enforced, but rather declared null and void (Smit & Du Plessis, 2011). This principle and its consequences can be connected with the rule of law, and is as necessary an incident thereof as the doctrine of legality (Selala, 2011).

Historically, the contract of employment was viewed as the official commencement of the employment relationship between parties (Henrico & Smit, 2010). A contract of employment will be classified as illegal if the nature of the services to be rendered is in conflict with any statute, the common law or if it is *contra bonos mores* (against public policy). This may be illustrated by way of the Sexual Offences Act (Republic of South Africa, 1957), as amended, which has since been consolidated and revised by the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Republic of South Africa, 2007), in terms of which the legislature intended to criminalize prostitution.

Section 20(1) of the amended Sexual Offences Act states the following with regard to prostitution: "(1) Any person who (a) knowingly lives wholly or in part on the earnings of prostitution; or (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person forreward; or (b) in public commits any act of indecency with another person; or (c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person, shall be guilty of an offence."

Therefore, a contract of employment concluded by a prostitute to perform sex work is in direct conflict with the act, and should consequently be illegal and unenforceable (Grogan, 2010).

Although South African labor law is strongly rooted in the common law, several shifts and changes in both legislation and judicial precedent have altered its functioning under the new constitutional dispensation (Van Jaarsveld & Van Eck, 1998). One such area that has been affected is the contract of employment. Under the common law, an employment relationship used to be synonymous with a valid contract of employment, but under the constitutional dispensation, the courts have developed the common law, beginning to afford recognition to employment relationships without a valid contract of employment and changing the legal position of certain categories of 'employees' who would previously not have enjoyed any labor law protection.

⁸See *Schierhout v Minister of Justice* [1926] AD 99 109.

The judicial decisions that have led to this change are as follows: In the case of *South African Defence Union v Minister of Defence*,⁹ the Constitutional Court found that even if a person did not qualify as an employee in the full contractual sense, such an individual is still entitled to the constitutional right to fair labor practices (Republic of South Africa, 1996, section 23(1)), as long as a relationship of employment exists (Rutherford Smith, 2011). In the matter of *Jordan and Others v S and Others*,¹⁰ the court found that prostitutes have the right to be treated with dignity. The right to dignity can also be regarded as the basis of the constitutional right to fair labor practices (Republic of South Africa, 1996), since section 23(1) of the Constitution aims to preserve dignity in the employment relationship (Rutherford Smith, 2011). In the case of *SITA (Pty) Ltd v CCMA and Others*,¹¹ the Labor Appeal Court confirmed that the primary emphasis in employment has indeed shifted to the existence of a valid employment relationship (Le Roux, 2009). Finally, in the *Discovery Health* case, it was decided that whether a person qualifies as an employee or not does not depend on whether or not a legal contract of employment exists, but rather on whether or not a person falls within the statutory definition of an employee and on whether an employment relationship exists between the parties (Muswaka, 2011).

From the above, it may be deduced that the primary shift from the common-law position of illegal contracts of employment is mainly due to section 23(1) of the South African Constitution, which states: "Everyone has the right to fair labour practices." Via its varied interpretation, this constitutional provision has allowed for the possibility that a person may still be regarded as an employee and may receive protection under the law, whether or not such a person concluded an illegal contract of employment. This is possible, as the Constitution enables the judiciary to develop the common law in order to give effect to the right to fair labor practices (Republic of South Africa, 1996, section 8(3) & 39(2); Cohen, 2012). It is thus argued that this separation of the contract of employment from the employment relationship has allowed for the circumvention of the requirement of legality where an illegal contract of employment is concerned (Smit & Du Plessis, 2011). As a result, prohibited and criminalized activities that form part of an employee's work may be ignored, and the employee may be protected by applicable labor laws.

It is further argued that this exception to the rule of law, as well as our courts' duty not to promote illegal activity, has potentially opened a floodgate of unpredictability in the South African legal and general society. The drastic action of explicitly and finally separating the contract of employment from the employment relationship has therefore created a lacuna of legal uncertainty in the employment relationship, as no specified guidelines exist to distinguish so-called 'vulnerable' employment groups from other illegal employment situations. There are also no criteria for distinguishing between the various categories of 'vulnerability' in deciding which vulnerable groups should be afforded labor law protection.

4. The Current Legal Position of the Illegal Contract of Employment and Employment Relationships of Vulnerable Persons: The *Kylie* and *Discovery Health* Cases

The current legal position in South Africa regarding vulnerable employment relationships and the illegal contract of employment has been established by judicial precedent, including the so-called *Kylie* and *Discovery Health* cases. A main starting point for the current legal position has also been section 23(1) of the South African Constitution, which states that everyone has the right to fair labor practices.

4.1 The *Kylie* case

The salient aspects of the current legal position in South Africa regarding the illegal contract of employment and the standing of vulnerable groups are primarily illustrated by the *Kylie* case set, the facts of which were as follows (Smit, 2012).

A sex worker, one 'Kylie' (a pseudonym established to protect her identity), was dismissed by her employer, the owner and manager of Brigittes (a brothel masquerading as a massage parlor), for alleged misconduct. 'Kylie' believed her dismissal to be unfair and approached the Commission for Conciliation Mediation and Arbitration (CCMA) for relief. The commissioner dismissed the matter on the grounds that the CCMA did not have jurisdiction to hear the dispute, as 'Kylie' did not qualify as an employee because her contract of

⁹[1999] 20 ILJ 2265 (CC) para 28.

¹⁰[2002] 11 BCLR 1117 (CC) para 74.

¹¹2008 29 ILJ 2234 LAC.

employment had been illegal. The CCMA would only have jurisdiction to entertain unfair dismissal matters if the first hurdle, namely employee status, had been successfully crossed. (Smit, 2012) Aggrieved by this decision, 'Kylie' had the decision of the CCMA reviewed by the Labor Court, who found that it was a constitutional imperative not to promote illegal activities and, as such, the judge decided that section 23(1) of the Constitution did not extend to persons engaged in illegal employment relationships (in this case, 'Kylie') for fear of promoting criminalized activities. Kylie was thus once again unsuccessful. She appealed this decision in the Labor Appeal Court, whose finding has led to the current legal position in South Africa. (Smit, 2012)

The Labor Appeal Court found that the term 'everyone' in section 23(1) of the Constitution should be interpreted in the widest possible fashion, being a term of unrestricted meaning (Selala, 2011), and, as such, should extend to all persons in the country having the right to fair labor practices (Smit & Du Plessis, 2011). This conclusion was based on the fact that section 23 stems from the constitutional right to dignity. The court also found that prostitutes were entitled to be treated with dignity by their clients. Furthermore, it was stated that just because illegal activities were engaged in, this did not deprive this category of people of all their constitutional rights, including their right to dignity.¹² In this regard, the Labor Appeal Court referred to an approach that had been used in the matter of *Goldberg and Others v Minister of Prisons*,¹³ which provides that convicted and sentenced prisoners will retain all their basic rights and liberties, which they would have enjoyed as ordinary citizens, except for those deprived by law (expressly or by implication), or those rights and liberties which are inconsistent with their imprisonment circumstances.

As the Constitutional Court had also previously decided that the rights contained in the Bill of Rights extended to all persons and would continue to do so until a law of general application was enacted to limit the reach of the relevant right,¹⁴ the Labor Appeal Court in *Kylie* believed that section 23(1) of the Constitution included prostitutes under the definition of employees.

The Labor Appeal Court also confirmed the decision reached in the *Discovery Health* case, which will be discussed in more detail below, namely that an employment relationship no longer depended on a valid contract of employment. The contract of employment had however not become obsolete but was still relevant (Van Staden & Smit, 2010), even though the employment relationship was now the primary consideration.

The court drew a clear distinction between an illegal contract of employment and illegal work, in the sense that an illegal job did not necessarily deprive a person of his/her status as an employee. Furthermore, the court concluded that prostitutes stood as a beacon of vulnerability in both society and the 'employment' arena, which consequently allowed for an infringement of their right to dignity (Smit, 2012). As such, they should be afforded protection from exploitation, and their constitutional rights should be safeguarded.

In reaching its decision, the court focused more on the Constitution (Republic of South Africa, 1996) and the Labor Relations Act (Republic of South Africa, 1995) than on the common-law principle of *ex turpicausa non orituractio*. The Labor Appeal Court believed that the courts had discretion to relax this principle if necessary to prevent injustice or to uphold the requirements of public policy (Smit & Du Plessis, 2011; Van Staden & Smit, 2010).

The final decision reached by the Labor Appeal Court was that the case should be referred back to the CCMA for determination. However, the matter was not decided by the CCMA, as the parties reached a settlement, the terms of which remained undisclosed.

Discussion and evaluation of the 'Kylie' cases in relation to the current legal position

It is suggested that this judgment by the Labor Appeal Court has introduced a lacuna of uncertainty and confusion in South African law, which will inevitably allow illegal activities such as prostitution to stand, even though that is probably not what the legislature intended (Smit, 2012; Smit & Du Plessis, 2011). The finding has paved the way for other vulnerable and illegal employment groups in South Africa also to seek statutory protection and judicial relief (Smit, 2012).

¹²See *S v Makwanyane* [1995] 3 SA 391 (CC).

¹³[1979] 1 SA 14 (A).

¹⁴See *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] 6 BCLR 569 (CC) para 590, 611.

Consequently, it is argued that the courts will, at least at first, have considerable diversity of opinion in their judgments if more such cases should come before them. The fact that a valid contract of employment has been separated from the employment relationship has in effect removed some of the legal certainty as to who qualifies as an employee and who does not, as well as which persons may now qualify for statutory labor protection. The matter will be decided by the individual or body charged with determining which persons are vulnerable enough to qualify for labor rights and protection (Smit, 2012). This is expected to increase legal uncertainty and criticism at every turn.

A valid question and criticism of the Labor Appeal Court's reasoning is raised by Grogan (2010): "What then of the LAC's conclusion that sex workers enjoy general rights to dignity, equality and the like, as well as the fact that they must fall within the statutory definition of 'employee'? The point has already been made that the mere fact that individuals possess rights under the Constitution does not mean that they must be deemed employees. That would be akin to arguing that, because prisoners and children enjoy rights to dignity, equality and the like everybody else that enjoys those rights must be deemed a prisoner or a child."

4.2 The *Discovery Health* Case

In the *Discovery Health* matter,^a a foreign national was relieved of his employment when his employer, Discovery Health, discovered that he did not have a valid work permit. Aggrieved by this, the foreign national approached the CCMA for relief. Discovery Health believed that the CCMA lacked jurisdiction to hear the dispute: For want of a valid work permit, they argued, there was no legal reason to continue with the contract. However, the commissioner ruled that the foreign national was an 'employee', and that the CCMA did indeed have jurisdiction to hear the matter. The commissioner reached this decision in support of the argument that a valid employment relationship did exist, which transcended the existence of a valid contract.

Discovery Health took this decision on review, upon which the Labor Court decided that to "sanction a claim of contractual invalidity in the present circumstances would defeat the right to fair labour practices". The court further decided that the term 'everyone' in section 23(1) of the Constitution included the foreign national without a valid work permit, which qualified him as an 'employee' in terms of statute. Most important, however, was the conclusion reached that a valid employment relationship no longer depended on a valid contract of employment.

Discussion and evaluation of the 'Discovery Health' case in relation to the current legal position

It appears that *Discovery Health* aimed to differentiate between a common-law employee, in which case a valid employment contract is required, and a 'statutory employee', in which case a valid employment contract is not necessarily required (Vettori, 2009).

The case drew support from the matter of *Ingwane v Med-Afriq*¹⁵ (Du Plessis & Fouche, 2012), in which the court emphasized that a contract of employment did not have to be in writing for it to be valid. Since the *Discovery* matter, in the case of *Ndikumdavayi v Valkenberg Hospital & Others*¹⁶ (Du Plessis & Fouche, 2012), the court again decided that in cases where an employment contract was concluded contrary to statute although it involved lawful work, a valid employment relationship was indeed created.

4.3 Where do the *Kylie* and *Discovery Health* judgments Leave us?

As the law currently stands, the jurisdiction of the CCMA depends on a valid employment relationship, which eclipses a valid contract of employment. It has been suggested that case law and constitutional imperatives promote an interpretation of the law that encourages fundamental rights, even if this has as a consequence that illegal contracts of employment are not *void ab initio*. (Vettori, 2009; Salim, 2009).

Indeed, in the words of American novelist Ellen Glasgow (1873-1945): "All change is not growth, as all movement is not forward."¹⁷ Even though these two judgments can be seen as having changed the legal landscape and moved the boundaries of the law in South Africa, the confusion and legal uncertainty created along the way seem to indicate that this change and movement have not necessarily been positive.

¹⁵[1997] 2 BLLR 210 (CCMA).

¹⁶[2012] 8 BLLR 795 (LC).

¹⁷ www.brainyquote.com.

5. Vulnerable Employment Groups and Illegal Contracts of Employment

In many instances, employment relationships are tainted with illegality and are thus not recognized by law. Certain groups of persons in society resort to unsound employment situations in terms of legitimacy and legality in order to earn some form of income. These persons are often left vulnerable, as the law affords little or no protection to those in illegal employment relationships.

As is evident from the above, however, the position on illegal contracts of employment has shifted from absolute illegality and unenforceability to a position where enforceability may be possible. The fact that the Labor Appeal Court in *Kylie* confirmed that a valid contract of employment is no longer required for a person to qualify as an employee (Smit & Du Plessis, 2011) implies that protection and recognition may be afforded to any individual or group who qualifies as employees, particularly vulnerable employment groups (Smit & Du Plessis, 2011), irrespective of whether their employment contracts are legal or illegal (Smit, 2012). It is suggested that this may lead to absurdities such as labor recognition being extended to other illegal employment contracts, including, for example, illegal gambling, drug peddling, child labor and contract killers. It is however also argued that due to the criminal liability of such activities, it is not likely that such groups will emerge from the shadows and seek recognition; yet, the possibility for it now exists. As previously stated, a contract of employment remains an ordinary contract, which must conform to the law of contract and may be declared illegal and invalid if contrary to statute or the common law. Christie (2001) deduced the following propositions concerning the declaration of such illegality from the matters of *Sasfin (Pty) Ltd v Beukus*¹⁸ and *Botha v Finanscredit (Pty) Ltd*.¹⁹ "The power to declare a contract or a term in a contract contrary to public policy and therefore unenforceable should be exercised sparingly and only in the clearest of cases. Nevertheless a contract or term in a contract may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or run counter to social or economic expedience, or is plainly improper and unconscionable, or unduly harsh or oppressive."

In light of the above, it may be deduced that just because a contract appears to contain elements of illegality, it does not automatically render the contract invalid. Every such contract must be assessed and decided on its own merit, and a court will have to investigate the level to which a contract encourages unlawful activity and, if the level is unacceptably high, prevent such a contract from being enforced (Christie, 2001). It is thus argued that a balance between the constitutional rights of the parties to the contract and the interests of justice and society will have to be weighed up against each other to find the most equitable solution.

The Constitutional Court has stated that constitutional rights extend to 'everyone', even the vilest of criminals (Grogan, 2010).²⁰ In *Kylie*, the Labor Appeal Court stated that the word 'everyone' in section 23(1) of the Constitution is a term of general import and unrestricted meaning, and "that it conveys what it means". It would therefore make no difference, in the court's reasoning, if the employee was a criminal or involved in any other form of criminal activity as employment (Selala, 2011).

It is important to note at this time, however, that not all illegal contracts of employment would be considered worthy of protection under the Labor Relations Act – something that is also evident from Grogan's criticism cited earlier. It appears that such protection is only reserved for illegal employment groups that contain an element of vulnerability (Muswaka, 2011), although there are as yet no guidelines to establish which employment groups qualify as vulnerable or what would constitute vulnerability.

6. 'Vulnerability', and the Informal Employment Arena and Poverty as Indicators thereof

6.1 The Informal Economy and Poverty as Indicators of Vulnerability In Employment

In interpreting international law in the realm of employment law, the South African judiciary is encouraged to seek guidance from the conventions and recommendations of the ILO, and therefore, information from the ILO will be afforded due consideration here (Norton, 2009). Vulnerable and illegal employment relationships also generally classify as atypical employment relationships and often form part of the 'informal economy' (Van Staden & Smit, 2010), as indicated by the definition of vulnerable employment suggested by the ILO (mentioned earlier). The ILO defines the term 'informal economy' as "all economic

¹⁸[1989] 1 SA 1 (A).

¹⁹[1989] 3 SA 773 (A).

²⁰ See, for example, *S v Makwanyane* [1995] 3 SA 391 (CC).

activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements”. These activities are not usually included in the law, and consequently operate outside the formal reaches of the law. These activities could also not be covered in practice, meaning that although they operate within the formal reach of the law, the law is not applied or not enforced (Van Staden & Smit, 2010).

Thus, as the informal employment sector is not regulated by the law, protection granted to employees in this sector is little or non-existent (ILO Department of Statistics, 2012). It then follows that employees in the informal economy are in a position that makes the possibility of their basic human rights being infringed more likely, thereby rendering them ‘vulnerable’. From this, therefore, it is clear that the informal employment sector is in itself an indicator of vulnerability. It also logically follows that the higher the percentage of people who form part of the informal economy, the more people possibly form part of vulnerable groups.

South Africa has an unemployment rate of 24,9%, while 23% of the country’s population live below the poverty line (ILO Department of Statistics, 2012). Furthermore, 32,7% of employees in South Africa form part of the informal employment sector (ILO Department of Statistics, 2012), constituting almost a third of the country’s workforce. Such employees perform their services for remuneration, without proper legal regulation or protection from labor laws.

It has also been suggested that poverty may be an indicator of vulnerability, as poverty-stricken persons are often forced to resort to survivalist activities, without regard for employment benefits and labor law protection, which renders them a severely disadvantaged and vulnerable group in the labor market (McLean, 2000). In this vein, McLean (2000) suggests the following characterization of vulnerability: Vulnerability implies that an individual, a household or a community is at risk, being unable to plan for or cope in times of crisis, and having a predisposition to poverty as a result of a lack of assets.

6.2 An International Perspective

Even though this article is not primarily comparative in nature, the following sections briefly examine the international state of affairs regarding vulnerable persons in employment relationships, mainly to enable a better assessment of the appropriateness of the position in South Africa.

In the United States of America, prostitution is still outlawed and ostracized. There is however one case, decided some 50 years ago, that is interesting to note in relation to the matter at hand. This is the matter of *Carroll v Beardon*,²¹ which involved a brothel owner, being an employer of sex workers, who had sold his business to another brothel owner in terms of a contract. Although the contract itself was not illegal, the underlying purpose thereof was, as it related to illegal employment activities (Spanbauer, 2011). The employment activities were in direct conflict with the American criminal law as well as the country’s public policy considerations (Spanbauer, 2011). The Supreme Court of Montana was called upon to decide the dispute, and eventually decided to uphold the contract. Although undoubtedly not its intention, the decision of the court implies that illegal activity may possibly be tolerated, depending on the circumstances, of course. This strongly reminds of the situation that presented itself with the *Kylie* case in South Africa, as it relates to the same vulnerable group of employees and the illegality of their employment. As far as illegal immigrants in the United States are concerned, it was recently decided in the case of *Lucas et al v Jerusalem Café*²² that undocumented (illegal) workers are allowed to sue for back pay, and that illegal immigrants who are hired in contravention of immigration law should be paid what they are owed for services rendered (Beck, 2013). This protection of illegal workers in the United States is comparable to the recognition afforded to illegal workers in South Africa in the *Discovery Health* case.

As stated before, vulnerable employment groups are often subject to the infringement of their human dignity (such as in cases of prostitution), and consequently fall prey to disadvantage, social prejudice and social stereotyping. As in South Africa, the basic human rights of equality and human dignity have however become primary considerations in Canada, where the protection of the dignity of persons (including employees) as well as their right to equality has received increasing attention (Small & Grant, 2005). In Canada, there is a move to prevent the infringement of human dignity through disadvantage, social

²¹381 P.2d 295.

²²*Lucas, et al., v. Jerusalem Café, et al.*, No. 12-2170, 8th Cir. 2013.

prejudice and stereotyping, and to encourage a society in which all persons receive equal recognition under the law as human beings (Small & Grant, 2005). It is interesting to note that the Canadian Supreme Court has now struck down the country's prostitution laws as being "grossly disproportionate" and have recognized prostitutes as a vulnerable group (BBC News, 2013). The Supreme Court of Canada went further than the South African Labor Appeal Court by fully striking down prostitution laws and removing the illegality element altogether, as opposed to giving employment recognition to prostitutes only on the ground of vulnerability.

Using the informal economy and poverty as indicators of vulnerability in employment, as established above, an international assessment of these two aspects may shed some light on how South Africa compares to other countries in terms of vulnerable 'employees'.

Table 1 below contains statistics published by the ILO's Department of Statistics in 2012:

Table 1: Country analysis of percentage of population living below the poverty line and partaking in informal employment

Country	Poverty – % of the population living below the poverty line	% persons in informal employment (non-agricultural employment)
Argentina	n/a	49,7
China	2,8	32,6
Egypt	22,0	51,2
India	27,5	83,6
Lesotho	56,6	34,9
Macedonia	19,0	12,6
Mali	47,4	81,8
Mexico	47,4	53,7
Namibia	38,0	43,9
Pakistan	22,3	78,4
Philippines	26,5	70,1
South Africa	23,0	32,7
Turkey	18,1	30,6
Vietnam	14,5	68,2

Bar one, all the countries mentioned above have more than 30% of people employed in the informal sector. Thus, an extremely high number of people across the world seem to enjoy little or no labor law protection and recognition, and are consequently left vulnerable. In comparison, therefore, it appears that participation in the informal employment sector and, thus, vulnerability in employment is by no means restricted to South Africa, but is a worldwide phenomenon.

The fact that the majority of countries mentioned above also have more than 20% of their nations living below the poverty line further indicates that employment vulnerability is a challenge across the world, as poverty leaves people exposed, creating possibilities for their human rights to be infringed.

On neither of the two counts, therefore, the position with regard to vulnerability in employment in South Africa seems to be exceptional or extreme when compared to the rest of the world.

7. Possible Solutions to the Problem

7.1 Pinning down the problem: The *lacuna*

As has become evident from the above, a *lacuna*, or void, has come to exist in South African labor law. The Labor Appeal Court's wide interpretation of section 23(1) of the Constitution in *Kylie* has allowed for an existing employment relationship to be widely interpreted and to take precedence over a valid contract of employment. As a result of this, legality may be circumvented in certain circumstances, with the consequence that certain illegal employment activities may receive statutory labor protection.

The apparent *lacuna* in the law is widened even further by the fact that the measure by which it should be determined whether these illegal employment relationships will receive protection is the 'vulnerability' of the person or group. As there are no guidelines or criteria as to what constitutes 'vulnerability', how far it may extend or who may qualify as 'vulnerable, exacerbates the problem.

7.2 Possible Solutions: Separate Forums; Legislation, Rules and Guidelines; Expansion of Statutory Definitions

The *Kylie* and *Discovery Health* cases have established that the CCMA does have jurisdiction to hear disputes relating to illegal contracts of employment. The CCMA is an independent juristic body that serves as a statutory dispute resolution forum, with the primary purpose of mediating disputes between employers and employees, and to resolve such disputes, via conciliation, arbitration and bargaining councils (Van Niekerk & Linstrom, 2006). It has jurisdiction in all the provinces of the country, and operates through its head office (Van Niekerk & Linstrom, 2006).

As, according to current South African law, the CCMA has been granted jurisdiction to hear disputes relating to illegal contracts of employment, and may thus decide when a person or group in such an illegal employment relationship should receive recognition and protection (Grogan, 2010), CCMA commissioners and arbitrators will now have to continue to make decisions on such disputes under a cloud of confusion and uncertainty (Selala, 2011). The lack of a code or guidelines in this regard will most probably lead to subjective and incongruent awards, which will in turn catapult the legal fraternity into even greater uncertainty in this respect.

Therefore, as a first potential solution, it is suggested that disputes relating to illegal contracts of employment and vulnerable illegal employment relationships be diverted from the CCMA or bargaining councils in so far as dispute resolution, recognition and labor protection are concerned. It is recommended that a separate forum be established to deal with such matters, which can take the form of a tribunal or a specialized court. It is further suggested that this forum be given exclusive jurisdiction to hear such matters in order to promote some degree of uniformity of decisions on these issues and bring about greater legal certainty. Another possible, and perhaps preferable, solution could be to equip CCMA commissioners and arbitrators with greater specialized knowledge to deal with such matters. A uniform education amongst these decision makers will decrease the possibility of conflicting judgments and subjective interpretations. It will also have the benefit of expanding the skills of already recognized commissioners and arbitrators, as opposed to creating and establishing an entirely new forum.

As a second potential solution to fill the void and promote a sense of legal certainty, it is suggested that the legislature lay down certain guidelines and rules upon which the specialized tribunal or court recommended above may adjudicate such matters before it. This is suggested, as the legislature knows its own intentions with regard to the acts that criminalize certain employment activities, and will be able to give the best indication as to what circumstances will allow the relaxation of the *ex turpicausa non orituractio* rule. If the legislature were to lay down such rules and guidelines, legal practitioners would also have a better understanding of when it will be in the client's best interests to pursue such a matter. The judicial precedent set by the specialized forum will also have this effect.

Finally, it is proposed that the statutory definitions of who qualifies as an employee in terms of the Labor Relations Act (Republic of South Africa, 1995, section 200A) and the Basic Conditions of Employment Act (Republic of South Africa, 1997, section 83) be expanded or altered. This will help achieve legal certainty on who will qualify as an employee and who not. It will further clarify which persons are entitled to statutory protection and relief.

It is believed that if the above proposed solutions were to be implemented, legal certainty on this subject will be achieved over time, the legal lacuna will close, and the law will once again be in harmony with regard to illegal contracts of employment and vulnerable employment relationships.

8. Conclusion

As the preceding sections have confirmed, particularly following the *Kylie* and *Discovery Health* cases, vulnerability in employment relationships is clouded by ambiguity and open possibility. This is especially so when a vulnerable employment relationship has arisen without a valid contract of employment.

The various judicial precedents that have been set in these cases have only served to amplify the existing ambiguity. There are no clear parameters to indicate or define what exactly 'vulnerability' in employment entails or how far it extends to afford protection to persons in such employment relationships.

In addressing this lacuna in the South African legal system, we may be well advised to draw a lesson from the words of Confucius (551-471 BC): "When it is obvious that the goals cannot be reached, don't adjust the goals; adjust the action steps."²³ By considering and hopefully implementing the proposed solutions above, we will be adjusting the steps through which the prickly matter of vulnerability in employment and labor law protection has been approached thus far. And such an adjustment might just be what brings the South African labor law system back on course towards the ultimate goal of certainty concerning vulnerable employment groups.

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²³ www.brainyquote.com.

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