

# ‘Kylie’ and the Jurisdiction of the Commission for Conciliation, Mediation and Arbitration

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## 1 Introduction and Background

The resolution of labour disputes is primarily founded on the premises that the parties to the dispute are an employer and employee respectively, and that an employment relationship was in existence when the dispute originated. However, what would the legal position on jurisdiction be if an employment relationship can indeed be proven, but the applicant’s ‘job’ is criminally sanctioned by South African law? Would the applicant in such a matter be protected by the South African labour laws, or would the courts and tribunals refrain from assuming jurisdiction in order not to advance criminal conduct in the country, based on the common-law principle of *ex turpi causa non oritur actio* (the non-advancement of criminal activity by the courts)?

The judgement of the Labour Appeal Court (‘the LAC’) in *‘Kylie’ v CCMA and others* 2010 (4) SA 383 (LAC) significantly changed the legal position in South Africa to allow for employees who perform illegitimate work, as in the case of ‘Kylie’, not only to approach the Commission for Conciliation Mediation and Arbitration (‘the CCMA’), but also to have a ruling made on fairness of procedure should they be dismissed. The LAC ordered that jurisdiction be assumed by the CCMA, even if the particular employment contract is invalid.

In the matter in question, the CCMA was approached by a sex worker called ‘Kylie’, who, discontent with her dismissal from ‘work’ (prostitution), wanted the CCMA to rule in her favour, to confirm that her dismissal had been unfair. She claimed compensation, and not reinstatement, as relief for her alleged unfair dismissal. Her quest for fairness eventually led to three cases in three different fora, and changed the existing law based on the *ex turpi causa* rule (the prohibition of the enforcement of illegal contracts), to allow for the labour law protection of a prostitute – a first in South African law.

This discussion aims to focus on the CCMA, the Labour Court (‘LC’), as well as the LAC judgement on jurisdiction in this matter, and explores the reasoning that led to the three different findings by the aforementioned three bodies, based on the same facts.

## 2 The facts

‘Kylie’ had been working as a sex worker until her ‘employer’ dismissed her in 2006 on allegations of misconduct. The fairness of this dismissal was

subsequently disputed by the applicant, who assumed the pseudonym of 'Kylie' to protect her identity. It should be mentioned that the nature and prohibition of her work were never in dispute. The fact that prostitution could lead to abuse or exploitation was tacitly consented to, also by the LAC: 'Her dignity is not to be exploited or abused . . . the concomitant constitutional protection must be available to her as it would be to any person whose dignity is attacked unfairly' (*Kylie* (LAC) para [54]).

### 3 Arguments and Discussion of Criminality and Public Policy Issues

#### 3.1 Criminality

The first issue to be addressed by all three fora was whether the applicant had indeed engaged in criminalised activity.

It must be noted that both working as a sex worker and living on the premises of a brothel are prohibited by sections 20 and 3(a) of the Sexual Offences Act 23 of 1957. 'Kylie' had done both. Prior to her dismissal, she had received a salary, and had worked fourteen hours a day, seven days a week. In this regard, it is important to note that, from the facts, it appears that her working hours had not conformed to those prescribed by the Basic Conditions of Employment Act 75 of 1997 ('BCEA'). However, this was not the leading cause for the CCMA case. Instead, 'Kylie' alleged that she had been unfairly dismissed based on allegations of transgressing some of the strict rules of the regime to which she had been subjected. It was never disputed that 'Kylie', as she had been known to her 'clients', had at times performed sexual duties in exchange for money, and had also worked as a masseuse at the licensed masseuse parlour known as Brigittes, where she had also resided.

It should however be mentioned that, subsequent to the ruling being handed down in the CCMA, sexual offences were once again regulated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Criminal Law Amendment Act'), which consolidated all crimes relating to sex, and confirmed that prostitution remained criminalised. By the time that this matter was heard by the LC, the Criminal Law Amendment Act had been in operation, as stressed by Cheadle AJ ('*Kylie v CCMA and Others* 2008 (9) BLLR 870 (LC) para [27]), and therefore it was common cause throughout all the 'Kylie' cases that aspects of her job had entailed criminal activity.

The commissioner at the CCMA correctly referred to prostitution being outlawed in South Africa, and stated once again that it was not for the CCMA to decide whether the criminalisation of prostitution is correct or not: that remained the task of the legislature or the Constitutional Court (see '*Kylie and Van Zyl t/a Brigittes* supra at 482). The commissioner found that '[t]he CCMA is an administrative body created by statute and is not there to redress

perceived social unfairness but to apply the law as it stands' (see '*Kylie*' (CCMA) at 479). Important to note is that, at this point, the CCMA had already argued that should it find that it indeed had jurisdiction in this instance, it would imply that the Sexual Offences Act is 'out of sync with the values of modern society, a function not bestowed upon the CCMA' (ibid).

The CCMA further stressed that should jurisdiction be assumed, it would lead to an absurdity, in that any instruction given by an employer to an employee (the sex worker) would amount to an illegal instruction that the sex worker would not need to obey (at 481).

The LC argued that prostitution is and was prohibited by section 20(1)(a) of the Sexual Offences Act, and that courts were still discouraged to promote illegal activity (see '*Kylie*' (LC) paras [3.1]–[3.2]). The LC confirmed that the maxim *ex turpi causa non oritur actio* forms part of the common law entrenched in the Constitution of the Republic of South Africa, 1996. It was argued that, due to the unenforceability of the claims of sex workers in terms of statute, the CCMA could not assume jurisdiction. '*Kylie*'s claim to fair labour practices could not be entertained by the CCMA, as it would by implication promote illegal activity by violating the aforementioned common law principle, which also extends to the enforceability of statutory rights. The LC thus confirmed the criminality of her 'employment' and used it as a ground not to order the assumption of jurisdiction by the CCMA.

The LAC, in turn, found that it did not have the powers to sanction sex work, and that this was an aspect to which the legislature should attend. It was also in full agreement with the LC that sex work was indeed prohibited and that prostitution remained illegal (see '*Kylie*' (LAC) para [54]). However, it did not agree with the LC that the absence of the enforceability element led to an absence of jurisdiction, and subsequently, also the absence of protection granted in terms of the Labour Relations Act (para [55]). The LAC, although acknowledging the illegality of her 'job', did not find that this aspect barred her from protection of our labour laws.

What is profoundly interesting is not that sex work was still found to be illegal in South Africa, but that this finding of illegality was used in both the CCMA and LC as a basis for the perceived absence of jurisdiction to hear the matter at CCMA level – a view with which the LAC disagreed completely, leading it to rule and order that the CCMA did indeed have jurisdiction to entertain the matter, despite the illegality of the applicant's 'job'.

### 3.2 Public policy

The LC defined the essential question to be answered 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' (see '*Kylie*' (LAC) para [5]; '*Kylie*' (LC) para [23]). The existing common-law principle of *ex turpi causa non oritur actio* was invoked by Cheadle AJ in the LC case on the basis that prostitution remains criminalised

in South Africa (*'Kylie'* (LC) paras [43] and [44]). This principle simply prohibits the enforcement of immoral or illegal contracts, and, according to the LC, accordingly renders a contract null and void, and unenforceable, if it is illegal. The LC also found that since prostitution is regarded as immoral by the courts (*'Kylie'* (LC) para [33]), an agreement linked to such morality is void, and, as such, unenforceable (paras [33] and [34]; *'Kylie'* (LAC) para [7]). The LC elaborated on the implications of a statutory prohibition on the application of the *ex turpi causa* rule, and stressed that the rule applies only to those instances where the rule intends to go further than the mere prohibition of the activity – where it also intends to nullify a contract associated with the prohibited activity (*'Kylie'* (LC) paras [34] and [35]). This was an interesting avenue for the LC to explore. With reference to case law, the court came to the conclusion that any relaxation of the rule could only be justified if there were claims of simple justice between individuals, and if 'public policy' was not negatively affected by the granting or refusal of such a claim (para [35]).

The *'Kylie'* matter did not fall within these parameters, and it was found that common law would not enforce a contract to perform a statutorily prohibited activity, or recognise a claim based on such an activity (para [37]). Moreover, Cheadle AJ reasoned that not only should the courts not recognise or sanction illegal activities, but that it was a constitutional imperative, and that further legislation should be interpreted in accordance therewith (para [39]). This reasoning by the LC led to the finding that if the court recognised the contract between sex workers and their clients, it per se afforded such an agreement legal sanctioning, which is precisely what the legislature had sought to prevent through the prohibition (para [47]).

The LAC took a completely different view on this, and found, also based on case law, that courts have a discretion to relax the rule, and should relax the rule if it was necessary 'to prevent injustice or to satisfy the requirement of public policy', as had been found by the Appellate Division (*'Kylie'* (LAC) para [34], with reference to *Henry v Branfield* 1996 (1) SA 244 (D) at 252–3). It was argued that if the rule was so inflexible, a court would actually be disempowered from exercising its discretion in favour of a party (para [37]), and found that the courts had not always employed such an inflexible approach to illegal contracts as adopted by the court below (para [46]). The LAC further argued that, based upon the constitutional protection granted to prostitutes as a category of vulnerable persons whose dignity may be at stake, the court had to exercise discretion in deciding whether an employment relationship between sex workers and their employers held some implications for the parties to the relationship (*ibid*).

## 4 Constitutional Issues

### 4.1 The 'constitutional' argument

The LAC's argument proved to be the strongest argument in establishing the CCMA's jurisdiction in this matter.

It is trite law that the Labour Relations Act ('LRA'), in particular section 1(d)(iv), was primarily passed to give effect to the rights entrenched in section 23 of the Constitution, and to advance social justice (s 1 of the LRA). It follows that the CCMA would not have jurisdiction to entertain the plight of the applicant resulting from an employment relationship if the interpretation of the word 'everyone' was not broad enough to include sex workers. If sex workers as a category did not qualify under this definition, the provisions of the Labour Relations Act regarding jurisdiction would not come into play, as the purpose of the Act clearly is to protect the rights of those in an employment relationship, and 'to promote the effective resolution of disputes' (s 1(d)(iv) of the Act).

The CCMA rightfully referred to the fact that section 23 of the Constitution grants *everyone* the right to fair labour practices, but disagreed with counsel's argument that because sex workers were not expressly excluded by section 2 of the LRA, they were automatically protected by it.

The commissioner found that 'Kylie' had indeed performed work that was prohibited by an act of Parliament (s 29(1)(a) of the Sexual Offences Act), and thus by implication inferred that section 23 of the Constitution, although interpreted more widely than employees only, did not apply to her, as her 'work' had lacked the legality element.

The LC found, as a matter of interpretation, that section 23 of the Constitution did not include sex workers, as they could not legally be the owners of rights to fair labour practices; if the rights contained in section 23 of the Constitution could be conferred to sex workers, it required a 'reading in or a legislative amendment to the provisions of the Labour Relations Act' ('Kylie' (LC) para [3.5]). Interestingly enough, the LC did not stop there, but added that its alternative reasoning was that, at least, the rights entailed in section 23 of the Constitution were rightfully limited by the Sexual Offences Act, which excludes sex workers as rights holders pertaining to section 23 of the Constitution (para [3.6]). This was seen to be a justifiable limitation, essentially because it gave effect to the fundamental rule-of-law principle that courts should not by their actions and sanctions encourage illegal activity (paras [61] and [63]).

Albeit on different grounds, both the LC and the CCMA accordingly found that section 23 of the Constitution did not apply to sex workers. It is then submitted that both the CCMA and the LC were of the view that sex workers did not enjoy full constitutional protection in terms of the employment relationship, due to the absence of the element of legality, namely a valid employment contract. The applicant had performed 'work' of an illegal nature, and the principles of the LRA could not be invoked to protect the sex worker in this instance.

The LC referred not only to the common law principle that 'prohibits the enforcement of immoral or illegal contracts' (see 'Kylie' (LC) para [32]), but also referred to the courts' view of commercial sex as immoral – a kind of immorality also prohibited by statute, rendering contracts arising from this

prohibited activity null and void (para [34]). The question that the court below had asked was answered in the affirmative – the ‘mischief that the Act seeks to address is the social ills associated with commercial sex’ (para [43]), thereby confirming the legitimacy of the prohibition by means of statute.

The LAC referred to the LC’s judgement, and summarised the latter’s constitutional argument as follows: Firstly, ‘if a contract is illegal, courts must regard the contract as void, and hence unenforceable’. Secondly, ‘a contract is illegal if it is contrary to public policy, and it is against public policy to engage in a contract which is contrary to law or morality’ (see ‘*Kylie*’ (LAC) par [7]). Thirdly, it was asked whether the constitutional protection of fair labour practices, as enshrined in section 23 of the Constitution, applies to a person who would, but for an engagement in illegal employment, enjoy the benefits of this constitutional right. This question was answered in the negative by the court below, primarily because of the argument that if such rights were to be granted, a court would undermine a fundamental constitutional value of the rule of law by sanctioning or encouraging legally prohibited activities (para [10]).

In addition to the above on the constitutional argument, the court below argued in the alternative that, even if section 23 of the Constitution granted constitutional rights to the appellant, these were limited judicially, essentially because the limitation ‘gives effect to the fundamental rule of law principle: courts should not by their actions sanction or encourage illegal activity’ (para [12]).

The LAC, however, reasoned differently on this aspect, and investigated the applicability of section 23 of the Constitution to the present question – the jurisdiction of the CCMA. It found that section 23 of the Constitution did apply to sex workers, even though their ‘work’ is criminalised by statute (see ‘*Kylie*’ (LAC) paras [16]–[17]). The LAC confirmed that the South African law as it stands, namely ‘everyone has the right to fair labour practices’ (as per s 23 of the Constitution), had to be read as incorporating ‘all people of the country’ (ibid, with reference to *Khoza v Minister of Social Development* (2004 (6) SA 505 (CC) para [111]). From this judgment, it is assumed that the term ‘everyone’ in section 23 of the Constitution carries a wide and unrestricted meaning (para [19]), and is thus not limited to legal employees alone. The term ‘everyone’ that follows the wording of section 7(1) of the Constitution, which provides that the Bill of Rights enshrines the right of ‘all the people in the country’, supports an extremely broad understanding of the scope of the right guaranteed in the Constitution (para [16]). Reference made to the dictum in *S v Jordan and Others* (2002 (6) SA 642 (CC)), that prostitutes do not lose their legal protection, even if the character of their work degraded the very aspect that the Constitution seeks to protect, and that the remedy in law was not to strike down the law but to ‘require that it be applied in a constitutional manner’ (*Jordan* para [74]).

## 4.2 The 'dignity' argument

Hand in hand with the above runs the LC's argument that prostitutes, as a category of people, are entitled to have their dignitas protected (see '*Kylie*' (LC) para [60]):

'[T]he application of the rule of law does not have the automatic effect of withholding constitutional rights to those engaged in illegal activity . . . with reference to *Jordan* the Constitutional Court was at pains to point out that the fact that prostitution is criminalised does not mean that sex workers are not entitled to be treated with dignity by the police and by their clients.'

The LC cited *Jordan*, which found that '... the privacy rights of sex workers do not extend to the commission of crimes committed in private' (see '*Kylie*' (LC) para [61]), and thus, by implication, do not enter the arena of the employment relationship, as the protection of prostitutes' rights does not legitimise their illegal private actions and solicitations.

Interestingly enough, the LAC, also with reference to *Jordan*, albeit with reference to the minority judgement, came to a different finding – that because the rights of prostitutes were protected despite the illegitimacy of the nature of their work, it should follow that their constitutional rights too, specifically their right to dignity, should be protected by those in an employment relationship.

In summary, the LAC found that since sex workers could not be stripped of their right to be treated with dignity by their clients, it must follow that in their other relationship, namely that with their employers, the same protection should apply (see '*Kylie*' (LAC) para [26]). On appeal, the judge held that it would automatically follow that section 23 of the Constitution should also apply to prostitutes, as that provision centres on the dignity of those in an employment relationship. The LAC went on and found that since the protection of the dignitas of prostitutes as a group is acknowledged by the application of case law, it should follow that this protection flows over to the employment arena as well. John Grogan correctly sees this as a major jump, as it affects numerous other employment relationships that fall outside the scope of labour legislation (see [http://www.za.lexisnexis.co.za/form/Labour – Law- in-the-sex-industry.pdf](http://www.za.lexisnexis.co.za/form/Labour-Law-in-the-sex-industry.pdf), accessed on 15 September 2010). This finding by the LAC was in stark contrast to the finding by the LC. Although the two fora cited the exact same case, they employed different reasoning: the LAC referred to the minority judgement, whereas the LC referred to the majority judgement.

## 4.3 The employment and vulnerability of prostitutes as a group of employees

The LAC's decision in the '*Kylie*' matter confirmed that section 23(1) of the Constitution clearly emphasises the regulation of the 'relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both' (see '*Kylie*' para [21], with reference to *Sandu v Minister of Defence* 1999 (20) ILJ 2265 (CC) paras [28]–[30]).



The CCMA found that it was not their task to change the common law relating to illegal, unenforceable employment relationships, as in this instance. As per the CCMA award, 'Kylie' had been employed to undertake illegal work, which differed from instances where an illegal person was employed to undertake legal, enforceable work. In this instance, the work itself had been illegal; 'Kylie', the person, was not illegal, but had undertaken illegal work (see 'Kylie' (CCMA) at 478–9). The commissioner made it clear that the CCMA was an administrative body that had to apply the law as it stands, and not redress perceived social unfairness (at 479). If the CCMA were to assume jurisdiction, the law, according to the CCMA, was clear, namely that the contract itself, being the product of an employment relationship, had to be legal and enforceable. In this instance, both legality and enforceability were lacking (at 479–80).

The LC, by contrast, was of the view that an employment relationship could take on many different forms in modern society (see 'Kylie' (LC) paras [54] and [55]), and that not everyone who works is an employee for the purposes of section 23 of the Constitution. The LC subsequently found that 'Kylie' and her employer had indeed been in an employment relationship (para [56]).

Being an employee, either in terms of statute or the common law, or being presumed to be an employee had always been a prerequisite for the CCMA to assume jurisdiction. If the relationship was not one of employer and employee, the CCMA would refuse to have heard the matter in that the first hurdle to jurisdiction had not been crossed. The findings in *Discovery Health Limited v CCMA and Others* (2008) 17 LC 1.11.12 p 9 with reference to *Rumbles v Kwa-Bat Marketing* (2003) 24 ILJ 1587 (LC) and other case law changed this position for good in that it was found that the contract of employment no longer determines whether a person is an 'employee' as defined. In the *Discovery* case, a foreign national who was not in possession of a valid work permit was appointed into a position and once it came to light that the employee was not in possession of a valid working permit, his services were summarily terminated. The commissioner and LC judge found that he was an employee and was thus entitled to have his dismissal evaluated in terms of fairness by the CCMA. The reasoning in short was that the definition in section 213 of the LRA was not dependant on or rooted in the contract of employment and that a person who rendered work for another on a basis other than that recognised as employment by the common law may be employees of purposes of the definition as per the LRA and would such a person necessarily be entitled to the protection granted by section 23 of the Constitution as the interpretation of section 23 of the Constitution warranted a wide interpretation. Even if the contract concluded between the parties were invalid, a person could still be an employee as defined by the LRA since the interpretation of that definition is not dependant on a valid and enforceable contract.

As a matter of interest, the views expressed by Smit and Van Staden in an article aptly named 'The regulation of the employment relationship and the



re- emergence of the contract of employment.’ (TSAR 2010. 4 p708) where was stated that the findings in ‘Kylie’ should not be seen as a move towards status and that there are many forms of non standard employment in existence can be supported.

It seems to be mentioned that the proposed new definition of employee in the new proposed Employment Services Bill slants heavily towards the old common law description of employee and is currently defined as follows: a 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’. If this definition is compared to the definition of employee as per section 213 of the LRA which reads: ‘any person who works for another 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 any other person who in any manner assists in carrying on or conducting the business of an employer’, it will be seen that many differences could be shown, the effect which could be dramatic in practice.

Who an employee is and what an employment relationship is had always been important and the influences of the common law and legislation thereon should not be underestimated in the quest to promote the purpose of the LRA (see also R Henrico & N Smit ‘The Contract Of Employment In Labour Law’ – 2010 *Obiter* 247).

However, all three fora agreed that prostitutes, as a group, were vulnerable and deserved protection (see ‘Kylie’ (LAC) paras [29], [41], [43] and [52]). It is interesting to note is that the LC admitted that sex workers were exploited (see ‘Kylie’ (LC) paras [70] and [71]), such as many others who engage in illegal activities or organised crime. Here, it should be mentioned that at no time did the ‘employer’, Brigittes, tender counsel and stipulate that she believed that prostitutes deserved fair treatment (see ‘Kylie’ (CCMA) at 474). Even on appeal, no counsel appeared on behalf of the respondent (see ‘Kylie’ (LAC) at 383).

## 5 The Remedy Issue

The fact that reinstatement, which is usually the ‘primary remedy’, could not be granted in a matter such as the ‘Kylie’ case formed the basis of an argument by the LC to rule that the CCMA would not have jurisdiction to entertain the matter at hand, on grounds of the working of the *ex turpi causa* rule as discussed below (see ‘Kylie’ (LC) para [92]). The LC found as follows (ibid):

‘[I]t is difficult to divine discretion not to reinstate if the employee insists on reinstatement. That may be requiring the employer to break the law or reinstate a contract that the courts consider to be void. And that would be requiring a court or arbitrator to sanction a transaction prohibited by law.’

It is trite law that, but for four reasons, reinstatement should be afforded if the applicant requests it. The four reasons why reinstatement should not be

granted by the hearing body are clearly outlined and stipulated in section 193 of the LRA. In short, reinstatement is generally not granted when an employee does not ask for reinstatement as a remedy; when a future employment relationship would be intolerable; when reinstatement would not be practicable, or when only substantive fairness was proven but procedural fairness lacked (see *'Kylie'* (LC) para [92]). Still, this was raised as an argument even though, at all times, the relief sought was compensation only, and the LC ordered that 'the Commissioner ought to have refused to grant the relief sought by the Applicant because by doing so the CCMA would have been sanctioning or encouraging prohibited commercial sex' (para [93]).

Again, the LAC argued differently, and found that not all remedies available in terms of the Labour Relations Act should necessarily be available in every case (*'Kylie'* (LAC) para [52]), and further found that section 193 of the Act allows for flexibility in terms of the choice of remedy. The LAC did however agree that reinstatement in this case would 'manifestly be in violation of the provisions of the Act' (ibid). It is thus argued that, although reinstatement would not be suitable in this instance, it was not absolutely prohibited as a means to afford *'Kylie'* a type of protection, which could reduce her vulnerability, exploitation and the erosion of her dignity.

The CCMA did not have to reason on this issue, as it only had to decide on the issue of jurisdiction (see *'Kylie'* (CCMA) at 473).

## 6 What These Judgments Do not Do or Purport to Do

It should be noted that both the LC and LAC specifically stated that the judgement had certain provisions, and should thus not be used as a blanket on which to base future decisions. The LC acknowledged that a possibility of misinterpretation could exist, and these provisions therefore put the judgements in perspective for future reference, and clearly do not purport to alter legislation or legalise prostitution.

The LC qualified its findings by stating that the decision does not imply that '... a sex worker is not an employee for purposes of the LRA' (see *'Kylie'* (LC) para [4]), but merely finds that neither the LC nor the CCMA should enforce the statutory right to a fair dismissal under the LRA.

A further qualification was that the finding does not purport to imply that sex workers are not entitled to protection under the BCEA (ibid), but merely finds in this instance that their entitlement to these and other rights should be determined by statute.

Lastly, it was mentioned that the finding does not purport to decide whether the 'definition of employee in the LRA applies to those in an employment relationship without a valid contract' (ibid).

Out of fear of possible misinterpretation (see *'Kylie'* (LAC) para [54]), the LAC in turn stated that the court 'did not sanction sex work', but found that, although prostitution is illegal, not all constitutional protection is forfeited by the performance of illegal work by someone such as *'Kylie'* (ibid). It was

further stipulated that the judgement did not hold or order that an unfairly dismissed sex worker should be reinstated (para [52]).

## 7 What the Judgments Concluded

The LAC held that the fact that 'Kylie' had been involved in illegal work did not per se exclude her from the protection granted to 'everyone' in terms of section 23 of the Constitution, and thereby in effect disagreed with the findings of both the LC and the CCMA. It is important to note, however, that the LAC's finding did not go any further than merely to confirm the aforementioned principle. It did not find that compensation was an appropriate sanction; it did not dismiss reinstatement as a sanction, and it surely did not find that the CCMA should afford either compensation or reinstatement in this case or similar cases in future. The LAC merely mentioned that reinstatement could be problematic, as, by passing such a sanction, one would compel the employee and employer to continue with an illegal activity. This was merely an obiter remark. However, it did not allude to whether compensation granted would not also lead to the sanctioning of a crime.

## 8 Conclusion: Arguments Against the Finding on the Assumption of Jurisdiction by the CCMA

The criticism against the finding that the CCMA should assume jurisdiction in the 'Kylie' cases must be seen against the backdrop that it had been found that she is an employee for purposes of the LRA, that in the very least she was in an employment relationship with her employer and that her 'job' need not be legal to have her dismissal evaluated for fairness by the CCMA and that is was entitled to the protection granted under section 23 of the Constitution. That a dismissal could be proven even in the absence of a contract of employment and that the *ex turpi* rule could be relaxed in certain instance of which 'Kylie' formed part, all of which could lead to absurdities in our labour law system.

In the first instance, it is argued that the granting of compensation in instances such as the 'Kylie' matter would invariably lead to the recouping of unlawful earnings, which differs only slightly from ordering an illegal activity to continue. Surely, ordering unlawful earnings to be recouped is not what the legislature had intended for commissioners to do? The purpose of compensation awarded for procedural unfairness has always been to compensate for hurt feelings, which prostitutes do have. However, the absurdity that unlawful earnings may be used as compensation surely could not have been the legislature's intention. The question remains whether the LAC intended for commissioners to pass a sanction that in effect is contrary to the Sexual Offences Act? The fact that the CCMA now has jurisdiction in matters of the like of 'Kylie' can lead to an absurd result once an appropriate award is to be awarded.

Secondly, the finding and subsequent sanction in the LAC case of 'Kylie' could see sex workers starting to organise themselves into unions, strike, claim constructive dismissal, refuse to adhere to instructions given by their 'employers' in an illegal setting and could the order to the CCMA to assume jurisdiction invariably lead to absurd results, such as reinstatement to an illegal job or compensation ordered from the spoils of an illegal trade. Dismissals effected due to insubordination because the employee refused to perfume certain illegal acts could form the basis of section 191(5) LRA dismissal referrals in the CCMA since the CCMA has been compelled by the highest labour court to assume jurisdiction. Surely this was an unintended consequence by ordering the CCMA to assume jurisdiction?

Thirdly, the mere argument that the finding in 'Kylie' is restricted to prostitutes due to their vulnerability cannot hold water, in that mafia activities, hit man activities, illegal gambling and others all fall under the umbrella of illegal work- who then decides if those employees are prone to exploitation or not? Where do you draw the line post 'Kylie'? How far would the CCMA go to protect those engaged in illegal jobs?

Fourthly, the fact that the LAC disregarded the reference to a 'contract of employment' where a dismissal had to be proven is material to the criticism of the LAC finding. John Grogan referred to this aspect ('The Wages of Sin, Labour Law in the Sex Industry', an editorial to *Employment Law*, November 2010) in that employment status post 'Kylie' is now independent of a contract of employment, but the dismissal definition as per section 86(1) of the LRA still refers to a dismissal as: 'the termination of a contract of employment, with or without notice'. It is common knowledge that a dismissal has to be proven for the CCMA to assume jurisdiction in instances of alleged unfair dismissals and that being in an employment relationship, in the very least, also has to be proven before the CCMA could assume jurisdiction where a dismissal came to play. An absurdity presents itself now in that the CCMA in 'Kylie' had to assume jurisdiction where the dismissal definition still refers to a dismissal but the 'employment status' does not require a contract of employment. Only time will tell how this will permeate into the labour field. This is yet another example of an absurdity to compel the CCMA to have assumed jurisdiction in 'Kylie'.

It is said with great piety that the fact that the CCMA attained jurisdiction in matters such as 'Kylie', legal jurisprudence will suffer to accommodate those perceived to be in need of protection and redeems a promise that South African labour laws are the most stringent in the world (<http://databank.worldbank.org>, accessed on 15 January 2010).

Due to the undisclosed financial settlement reached in the CCMA after the referral back thereto by the LAC, we are still in want of answers and do we wait in anxious anticipation for the next 'lady of the night' to follow suit and to see how the CCMA deals with the matter at hand.

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