THE CONSEQUENCES OF UNLAWFUL AND PROHIBITED CONTRACTS OF EMPLOYMENT IN LABOUR LAW

by

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The purpose of having labour laws in South Africa is to regulate employment contracts and the relationship between the employer and the employee. Once a legally binding contract comes into being the Labour Relations Act of 1995 automatically applies alongside the Basic Conditions of Employment Act and various other labour legislations. Common law rules play a vital role in the formation of an employment contract. For an ordinary contract to have legal effect, four basic requirements need to be met. Briefly, parties to the contract must have reached consensus, parties’ performance of their obligations must be possible, the conclusion and objectives of the contract must be lawful and that both parties to the contract must have the necessary capacity to conclude the contract.

Once these requirements have been met one is said to have concluded a valid contract. Nevertheless for the purposes of this study, we focus specifically on the employment contract. Aside from the general common law requirements for a valid contract, for an employment contract to be recognised and protected by labour legislations, it is important to distinguish an employee from an independent contractor since only the former enjoys legal remedies afforded by labour law.

Common law contractual rights and duties automatically apply once an employment relationship is established in addition to the rights and duties specified in the contract itself. Common law rules regarding morality plays a major role in our modern day societies, as shall be discussed the workforce has not been left untouched by this important principle.

Morality greatly influences a society’s view concerning acceptable and unacceptable behaviour or practices. It goes without saying that a contract should not be contrary to the moral views of the society in which the parties find themselves in. A contract can be complying with all the statutory requirements for a valid employment contract; however it may at the same time be tainted with illegality as the object of performance is considered immoral in the society such as an employment contract to perform prostitution.
Conversely, another scenario may involve a party to an employment contract who is a child below the age of 15 years old; the contract is invalid as it contravenes section 43 of the Basic Conditions of Employment Act. Despite clear statutory prohibitions this practice may be perfectly acceptable in the eyes and minds of the society.

The purpose of this study is to evaluate prohibited and unlawful contracts of employments, how the law (both common law and statutory law) treats such contracts in the sense that; whether they are protected or not and to what extent these laws have been developed to influence modern attitudes concerning such contracts. One stark example is illustrated through case law where the court had to determine the validity of an employment contract concluded between an employer and an illegal immigrant.
CHAPTER 1
INTRODUCTION

Changes are constantly witnessed in every aspect of our everyday life, be it financial, economical, personal or moral aspects. Logically the law is a vehicle to facilitate these changes, in the legal sphere public conviction plays a major role in both private and public law. A close concept in relation to public conviction is that of lawfulness.

Three main themes are discussed in this document namely contract of employment with a sex worker, contract of employment with a foreigner not in possession of a valid work permit and child labour.

Focus of this treatise is to establish the role of lawfulness in the above mentioned employment relationships. One of the requirements for a valid and binding contract is the validity of the contract of employment, for a contract to satisfy this requirement the purpose and objective of the contract must be lawful.

A contract concluded for the purpose of committing a crime, for example, will be unlawful and void from the outset. The legality of an employment contract will not only be judged with reference to the purpose and objective of the contract itself, but also whether the contract amounts to a contravention of any law.

This treatise will take us through various statutory law, case law and common law regarding lawfulness of certain employment contract. I will outline to what extent these contracts comply with the law and how the courts have developed the law.

Labour relationships between an employer and an employee has and will always be an important element in democratic nations, it follows quite obviously that it is a major economic sensor for the stability of a nation. Developing countries such as South Africa have made major developments in the labour relations sector; culminating from the need to protect employees from unequal power balance that has always characterised an employment relationship where employee’s heavy economic reliance on the employer has often been exploited.
The law has responded to such misdemeanours by developing legal remedies for employees such as compensations, re-employment, reinstatements and other remedies.

Rights and duties in an employment relationship unthinkable a few years ago are now being created and accepted in South African courts. This document focuses on employment contracts which are contrary to the statutory law or to the common law.

A dramatic change of view will be witnessed through the discussion of cases. Assessment is made of how the statutory law as interpreted by the courts added with the common law rules have sought to protect illegal immigrants working for employees without valid work permits by entitling them with rights afforded in the labour legislation, which just a few years back was quite unthinkable.

1.1 THE STRUCTURE OF THE STUDY

This study has 5 chapters. Chapter 2 discusses the conclusion of a valid contract of employment, the requirements that need to be met and the automatic contractual rights and duties of the parties flowing from the contract whereof.

Chapter 3 discusses the principle of morality in relation to commercial sex and discussion of case law concerning the employment of a prostitute is made; the issue of illegal immigrants is also brought to light through the discussion of a recent case as seen later in the study.

Chapter 5 deals with child labour. This chapter is linked to this study since it falls under prohibited and unlawful employment contracts. Contracting with a minor without the necessary assistance by his or her parents or guardian to perform labour tasks has been outlawed by the labour law in addition to the fact that it does not satisfy the common law requirement for a valid contract that parties must have the capacity to conclude a contract. I found it necessary to include this chapter since child labour is still a great problem in the South African society. I therefore decided
to give a brief discussion to highlight the magnitude of this vice. The study is concluded in chapter 5.
CHAPTER 2
NATURE OF CONTRACT OF EMPLOYMENT

2.1 INTRODUCTION

A contract of employment links the employer and the employee in an employment relationship. Generally, application of the labour law rules depends upon the existence of an employment relationship.

The employment relationship and the employment contract is not a relationship of equality - the employer as a rule will have more economic power than the employee. The common law contract of employment remains relevant in so far as labour legislation applies only to parties in a contract of employment. Relationship remains regulated by the common law to the extent that the legislation is inapplicable. South African common law contract of employment can be traced back to the species \textit{locatio condutio}( letting and hiring) of Roman Law.\footnote{Grogan \textit{Workplace Law} 9\textsuperscript{th} ed (2007) 3.}

Various factors influenced statutory intrusion into the common law contract of employment these were:

- A general realisation that the common law had lagged behind in conditions of commerce and industry.

- Recognition of fundamental human rights (right to fair labour practices) and the entrenchment of these rights into national Constitutions.

- Common law paid no heed to the collective relationship between employees and employers which became increasingly important in the western world amidst the trade union movement.
• Common law does not cater for inherent inequality in bargaining power between employer (as owner of means of production) and employees (who are entirely dependent on supply and demand for their welfare and joint security).

• Common law ignores enduring nature of employment relationship. It gives employees no legal right to determine better conditions of employment as time passes.

• By emphasising freedom of contract the common law can encourage or at least does not discourage exploitation of labour.

• Common law does not promote participative management in which workers have a meaningful say in at least those management decisions which directly affect their working conditions and legitimate interests.2

An acceptable definition in the modern dispensation of a contract of employment denotes a voluntary agreement between two parties in terms of which one party places her personal services or labour potential at the disposal and under the control of the other party in exchange for some form of remuneration which may include money and/or payment in kind.3 It is important to note that it is a voluntary agreement and no one can be subjected to forced labour.4

2.2 CONCLUDING EMPLOYMENT CONTRACTS

2.2.1 REQUIREMENTS FOR A VALID EMPLOYMENT CONTRACT

a. Parties must reach consensus

Parties must agree as to the nature of the contract, they must intend the same thing namely that they are concluding an employment contract. An example is where one

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2 Grogan Workplace Law 5.
4 S 13 of the Constitution, 1996 which provides that no one may be subjected to slavery, servitude or forced labour; s 48 of the Basic Conditions of Employment Act 75 of 1995 (hereinafter referred to as the BCEA).
party is not aware that an employment contract is being concluded while the other party is under the impression that they are concluding an agency contract.\textsuperscript{5}

b. Parties' performance of their obligations must be possible

The object of performance must be capable of performance and should not relate to a non-existing subject matter. This means that it must be possible for the employee to perform his or her obligations in terms of the contract.\textsuperscript{6}

c. The conclusion and the objectives of the contract must be lawful

The contract must be legal for it to be enforceable. Legality is generally measured against statutory or common law and further gauged against public interest and good morals. If a contract is in conflict with the law it is deemed to be illegal and unenforceable.

d. Both parties to the contract must have the necessary capacity to conclude a contract

Parties to the contract must have reached the age of majority. A minor cannot enter into a valid and binding employment contract: a child under the age of seven years has no contractual capacity. Children over the age of seven years can conclude employment contracts only with the assistance of their parents or legal guardians.\textsuperscript{7}

Section 43 of the Basic Condition of Employment Act\textsuperscript{8} (hereinafter referred to as the BCEA) imposes a statutory limitation: an employer may not employ a child under the age of 15. This guards against the exploitation of children as child labour is disruptive to a child’s development and which has recently been a rampant practice among employers.

\textsuperscript{5} Basson \textit{et al} \textit{Essential Labour Law} 36.
\textsuperscript{6} Ibid.
\textsuperscript{7} Ibid.
\textsuperscript{8} 75 of 1997.
e. The negotiation formalities

An employment contract just like any other contract is as a result of an agreement or consensus reached by the employer and the employee. Terms and conditions of employment should ideally be negotiated and agreed upon by both the employer and the employee. Sadly this is not the case as inherent unequal bargaining power places the employer in a position to dictate the contents of the employment contract, and there is very little an employee can do to negotiate the terms of the contract in his or her favour.

There are exceptional instances where some highly skilled and experienced employees may be able to negotiate their own terms and conditions of employment because their unique and rare skills strengthen their bargaining positions.9

It is worth noting that although it is a common practice to have a contract of employment in writing, this is not however, a general requirement for a contract to be valid and binding. An oral employment contract is as binding and valid as a written one.

2.2.2 THE CONTRACTUAL DUTIES OF THE PARTIES

An employment contract basically implies a set of duties to be fulfilled by both the employer and employee. They are the basic duties that need to be complied with, additional duties may be agreed upon by the parties to the contract or labour legislations such as the BCEA which imposes a duty on the employer to give the employee annual leave.

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2.3 DUTIES OF THE EMPLOYEE

2.3.1 TO TENDER HIS OR HER SERVICES

The employee must place his or her labour potential at the disposal of the employer at the time and place agreed upon by the parties. The employee complies with his or her primary contractual duty if he or she tenders or offers his or her services.

An employee who arrives at the agreed workplace at the agreed time and date but the employer indicates that there is no “work” for the employee the fact that the employee is doing nothing does not mean that the employee is in breach of the contract. The employee has abided by the terms of employment.

2.3.2 TO WORK COMPETENTLY AND DILIGENTLY

An employee has a duty to exercise due care and diligence when performing the work agreed upon in terms of the contract. If a worker is incompetent or negligent, the employer may terminate the contract of employment after giving the employee several warnings and affording him or her an opportunity to improve, if there are no improvements appropriate procedures need to be followed for dismissing the employee.

2.3.3 TO OBEY LAWFUL AND REASONABLE INSTRUCTIONS OF THE EMPLOYER

This means that an employee is only required to comply with lawful orders and not orders which are contrary to the law. For example it would be quite lawful for the employee to instruct his employee to tidy up his work area – but it would be unreasonable if he’s summoned by his employer at home at midnight to come to work.

In addition to that, instructing an employee to perform tasks which he clearly does not have skills and knowledge for or to obey orders which fall outside the ambit of the contract is unfair and unreasonable.

10 Basson et al Essential Labour Law 39.
11 Ibid.
On the other hand serious insubordination as a result of wilful and persistent refusal to comply with lawful and reasonable instruction of the employer amounts to a breach of contract on the part of the employee which entitles the employer to terminate the employment contract.

2.3.4 TO SERVE THE EMPLOYER’S INTERESTS AND ACT IN GOOD FAITH

The employee owes his employer a fiduciary duty not to work against his employer’s interests. An employment relationship is built on trust and confidence. For example an employee may not use or divulge for his personal benefit, the employer’s confidential information. The employee’s primary duty is to serve the interests of the employer, not only does this mean promoting the employer’s business but avoiding conflicts of interests. The employee must place the business interests of the employer above his own.\(^\text{12}\)

2.4 CONTRACTUAL DUTIES OF THE EMPLOYER

2.4.1 TO REMUNERATE THE EMPLOYEE

Remuneration is one of the essential features of an employment contract. The payment of wages is the primary duty of the employer in terms of an employment contract. The salary is determined in the contract by the parties themselves. Section 51 of the BCEA empowers a Minister of Labour to issue a sectoral determination describing minimum wages for a particular sector. Wages are normally paid in cash but may also be paid in kind.

2.4.2 A DUTY TO PROVIDE WORK

It is common knowledge that the employer has to provide work for the employee, this however is not essential; the employer is not compelled to provide the employee with tasks to perform if the employee tender his services. As long as the employer pays

\(^\text{12}\) Basson et al Essential Labour Law 40.
the employee the remuneration agreed upon, the employer will still be fulfilling his contractual duties even if the employee does not have any work to do.

In cases where the employee’s wage depends on work being provided by for the employer, such as where an employee is remunerated on a commission basis - the employee must be provided with work and failure on the part of the employer to provide work will amount to a breach of contract.\textsuperscript{13}

2.4.3 SAFE WORKING CONDITIONS

The employer has a common law duty to provide employees with a safe place of work, safe machinery and tools and to ensure that safe procedures and processes are followed. Section 8 of the Occupational Health and Safety Act\textsuperscript{14} imposes a general duty on every employer to provide and maintain as is reasonably practical, a working environment that is safe and without risk to the health of his employees.

In addition to these duties, parties to an employment contract are still free to stipulate terms and conditions of employment as long as they fall within the ambit of the law.

2.5 STATUTORY DEFINITION OF AN “EMPLOYEE”

It is essential to distinguish employment contracts from other contractual relationships,\textsuperscript{15} to establish this we must have a clear understanding of the legal meaning attached to persons regarded as “employees”.

Section 213 of the Labour Relations Act\textsuperscript{16} (hereinafter referred to as the LRA) defines an employee:

\begin{quote}
\textbf{“a. As 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 }
\end{quote}

\textsuperscript{13} Basson et al Essential Labour Law 43.
\textsuperscript{14} 85 of 1993.
\textsuperscript{15} Basson et al Essential Labour Law 19.
\textsuperscript{16} 66 of 1995.
b. Any other person who in any manner assists in carrying on or conducting the business of an employee.”

This definition has brought about different views which have prompted courts to develop tests for distinguishing an employee from an independent employee.

The first test to be formulated was (a) the control test, this test confers an employer with the right to prescribe to the workplace what work has to be done and the manner in which it has to be done.\(^{17}\)

The second test is (b) the organisational test, it entails that a person is part and parcel of the organisation whereas the work of an independent contractor although done for the business is not integrated into it, but is only accessory to it.\(^{18}\)

Criticism for this test is that it is not always possible to measure the extent of the integration and the degree of integration that would be sufficient for one to qualify as an employee. The test was finally rejected as being too vague to be of any use.\(^{19}\)

The third test is (c) the dominant impression test; it regards no single indicator as decisive but requires an examination of the employment relationship as a whole. It examines a number of factors such as the right to supervision, extent to which the worker depends on the employer in the performance of duties, whether the employee is allowed to work for another, or is required to devote a specific time to his or her work, or perform his duties personally or whether he is paid according to a fixed rate or by omission and lastly whether he provides his own tools and equipment, and the right of the employer to discipline the worker.\(^{20}\)

In the case of Medical Association of SA v Minister of Health\(^{21}\) the court used the above-mentioned factors to establish the dominant impression that part-time district surgeons were in fact employees of the State.

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\(^{17}\) Basson et al Essential Labour Law 24.
\(^{19}\) Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw Labour Relations Law: A Comprehensive Guide 5\textsuperscript{th} ed (2006) 75.
\(^{20}\) Basson et al Essential Labour Law 27.
\(^{21}\) (1997) 18 ILJ 528 (LC).
The State argued that part-time surgeons were independent contractors and that the State was not therefore, bound by the procedures set out in the LRA, for a dismissal for operational requirements. The medical association of South Africa claimed that there was an obligation on the State to consult and negotiate with the doctors prior to terminating their services. The court took into consideration various factors of the dominant impression tests and held that part-time surgeons were indeed employees of the State.

In 2002, a new presumption was added to the LRA, this assumption provides guidelines as to the identity of an employee. Section 200A of the LRA\(^\text{22}\) lists a number of factors to be used as a guideline in determining an “employee”, where one or more of the factors are present the person is presumed to be an employee unless and until the contrary is proven.

Section 200A(2) provides that the provision of subsection (1) do not apply to persons earning more than the amount determined by the Minister of Labour in terms of sections 6(3) of the BCEA.

A contract labelled as an independent contractor’s contract is not necessarily one. A court will examine the contract extensively to determine the actual relationship between the parties.

It is a well established principle of our law and endorsed in the Constitution that International Law may be taken into account in interpreting the law.

\(^{22}\) S 200A(1) of the LRA states as follows:

“a person is presumed to be an employee if any one or more of the following factors are present:

(a) The manner in which the person works is subject to the control or direction of another person;
(b) The person’s hours of work are subject to the control or direction of another person;
(c) In the case of a person who works for an organisation, the person forms part of that organisation;
(d) The person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) The person is economically dependent on the other person for whom he works/renders services;
(f) The person is provided with tools or work equipment by the other person; or
(g) The person only works for or renders services to one person.”
It is on this note that I mention the ILO Recommendation 198 on the Employment Relationship which requires member states:

“to consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship”.23

The indicators contained in the Recommendation are similar to the ones mentioned above.

2.6 UNDERSTANDING THE CONCEPT OF LAWFULNESS IN RELATION TO EMPLOYMENT CONTRACTS

Any agreement purporting to create obligations must be lawful in order to create a valid contract. The notion that legality is a requirement for a valid contract expresses the interests or convictions of a society in a way that recognises transactions between individuals. Generally, employment contracts which comply with all requirements and which are not in conflict with the interests and convictions of the society should be enforced.24

The expression public interest and good morals does not introduce an additional criterion rather it provides a basis upon which a decision on the question of illegality is made in law. The law absorbs moral content, to some extent into legal doctrine so as to enhance justice in our societies.25

Contracts can be illegal from its conclusion especially where it is expressly or impliedly forbidden by law. Courts have been applying this principle strictly so as to effect the intention of the applicable legislation, courts do not lend its aid to enforcement of unlawful contracts.26 Such prohibitions are usually contained in statutes such as those relating to the sale or distribution of alcohol, drugs and dangerous weapons.

25 Ibid.
Common law prohibitions vary diversely from attempts to oust jurisdiction of the courts prostitution, child labour to marriage brokering agreements for reward, to mention but a few.

It may be that a contract is not illegal at its inception but only the performance which is the subject matter of the contract is unlawful. An example is the sale of a firearm by a licensed dealer to a person licensed to possess a firearm, this transaction would normally be legal however, it becomes automatically illegal if the buyer binds himself to use the pistol to kill a third person.

Illegality associated with the purpose for which a contract is concluded, in the example above occurs in the following manner. Suppose the buyer does not bind himself as against the seller to commit a murder, but the seller knows that the buyer intends to kill the third person, the agreement is illegal for its purpose. Both parties must have the same illegal purpose.27

2.7 COMMON LAW RULES REGARDING ILLEGALITY OF A CONTRACT

In contract law solutions to determine the illegality of a specific agreement are neither uniform nor always apparent. It is however, important to have a brief discussion on rules of contract which determine consequences of illegal contracts.

The turpi causa non oritur actio rule prohibits immoral or illegal contracts. This rule applies to contracts that are said to be illegal, are not regarded as invalid but merely unenforceable.28 A contract is illegal if it is against public policy. It is against public policy to enter into a contract which is contrary to any applicable law. It is important to note that this rule is inflexible and does not admit any exception, as it applies even where the parties are not aware of the illegality of their agreement.29

The rule will only apply:

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27 Van der Merwe et al Contract: General Principles 181.
28 Van der Merwe et al Contract: General Principles 183.
29 Van der Merwe et al Contract: General Principles 183-184.
“... if the statute, properly interpreted, intends to go beyond the prohibition (and any penalty for the contravention) and to nullify a contract arising from, or associated with, the prohibited activity.”

Application of this rule depends on how the court construes the intention of the statute. If an illegal agreement is invalid because it does not create any obligations, performance already rendered in terms of the agreement may be reclaimed, on the basis of unjust enrichment and will be brought by means of the *condictio ob turpem vel iniustam causam*.

The right to reclaim performance rendered is subject to the qualification, that in general a party to an illegal agreement who acted wrongly in concluding the agreement and performing the object of the contract is precluded from reclaiming his share of performance. The limitation is explained by the *in pari delicto potior conditio defendantis* rule.

This rule precludes a party to an illegal agreement from claiming the return of his performance. The rule underpins the policy of the law that our courts should discourage illegal transactions. The rule was in the past regarded as a strict rule that admitted no exception.

However, in the decision of *Jajbhay v Cassim*, the Appellate Division found that the rule cannot always be rigidly applied in all circumstances. It pointed out that its strict enforcement may sometimes give rise to unfair or inequitable results. The court was of the view that where public policy and “simple justice between man and man” so required, a court should relax the rule so as to prevent unjust enrichment.

One example where the rule can be relaxed due to, what was termed in the *Jajbhay* case, as the overriding consideration of public policy is where the defendant would

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30. “Kylie” v CCMA (LC) 2008-7-30 case no C52/07 34 (hereinafter referred to as the “Kylie” case).
31. Van der Merwe *et al* *Contract: General Principles* 187.
32. Ibid.
33. 1939 AD 537.
34. Van der Merwe *et al* *Contract: General Principles* 190; Kaganas “Exploiting Illegality: Influx Control and Contract of Service” (1983) 4 *ILJ* 254, she is of the view that by withholding assistance from the plaintiff, the court in *Lende v Goldberg* condoned the defendants exploitation of the illegality of the contract. She suggests relaxation of the *par delictum* to allow a claim for enrichment was warranted and would best have served the interests of public policy.
be unjustly enriched at the plaintiff’s expense. Relaxation of this rule is on a case to case basis taking into consideration the principles of fairness and public policy.

Application of this rule in statutory claims depends on the intention of the applicable legislation.

The court in the “Kylie” case was of the view that granting of a statutory right depends on the decision maker's discretion. Firstly a court has to determine whether a statutory prohibition intended to deny such a person relief, if so, refuse the relief. If the right is not subject to a decision-maker's discretion, the application of the principle will require the statute to be interpreted so as to exclude such persons as holders of the right either specifically or by excluding them from the application of the statute as a whole.35

35 “Kylie” case par 40.
CHAPTER 3
ILLEGAL IMMIGRANTS AND LABOUR LAW

“In view of the fact that South Africa is often seen as a land of employment opportunities, citizens of neighbouring states often succumb to the temptation of working for employers without the required documentation, often oblivious of the fact that that illegal status generally disentitles them to the protection of South African labour legislation.”36

3.1 CASE LAW PERTAINING TO ILLEGALITY IN EMPLOYMENT CONTRACTS

In the case of Georgieva-Deyanova v Craighall Spar37 the applicant had been working for the respondent for more than a year, she was not a South African Citizen and was not in possession of a valid work permit nor a residence permit during the course of her employment. The employer requested the employee to provide documents necessary to acquire a work permit as required by the Immigration Act, alternatively one needs to be a holder of a South African identity document to be able to work in the country. The employee failed to comply with these requirements and was subsequently dismissed.

The applicant took the matter to the CCMA for unfair dismissal. The issue to be decided was whether there was a valid and binding employment contract between the applicant and the employer. After referring to the provisions of the Immigration Act,38 the CCMA made a ruling that it did not have jurisdiction because the contract of employment was void from the outset.

The same conclusion was reached in the case of Vundla v Millies Fasions39 which had similar facts. It is worth noting that in both cases no problem existed as to the validity of the employment contract or the employee’s performance, but, for the work permit. This marked the beginning of a highly contentious debate to be discussed in our courts in the future as later seen in this study.

38 Ss 38(1) and 49(3) of 2002.
In the case of Maila v Pieterse\textsuperscript{40} the applicant was a citizen of the United States of America, she was offered the position of being an adviser for the employer, but this offer was subject on her obtaining a work permit. After two months the employment relationship ended and the matter was referred to the CCMA. The arguments raised by the applicant include the following:

- The wide definition as it appears in section 213 of the LRA is inclusive of illegal immigrants. The commissioner responded to this argument by stating that the literal interpretation favours the inclusion of illegal immigrants. However, the commissioner was of the view that the word “employee” did not cover foreign employees who were not in possession of a valid work permit.

- The right to fair labour practices as contained in section 23(1) of the Constitution applied to everyone and not only to South African citizens. The court’s response was that the right to fair labour practices was not unlimited, however in this instance these rights were limited by the Aliens Control Act of 1991 and that by limiting this right, courts are preventing a floodgate of legal proceedings from illegal immigrants challenging the fairness of their dismissal.

A rather old but significant case, but which inputs greatly on this discussion is the case of Lende v Goldberg\textsuperscript{41} the appellant was employed by the respondent as a domestic worker until her dismissal in February in 1980. She instituted proceedings in which she claimed her salary for that month and or payment in lieu of notice. She relied on the law of unjustified enrichment.

The essence of her dismissal was due to the fact that the plaintiff was not in possession of the permit required by section 10(bis) of the Black (Urban Areas) Consolidation Act (a statute that prohibited employers from engaging Black people in the absence of permission granted by a labour bureau).

The court decided that Black employee cannot claim to be lawfully employed despite the fact that the section is not explicitly directed at the Black employee.

\textsuperscript{40} (2003) 12 BALR 1405.
\textsuperscript{41} 1983 (2) SA 284 (C).
The court was of the view that by implication the section did not afford a black employee lawful employment contrary to the terms of the subsection, and it follows that such an employee could not claim specific performance of the contract itself or any relief involving enforcement of the terms of, or the contractual incidents of the contract. The court therefore rendered the contract void for illegality.

An article entitled “Exploiting Illegality: Influx Control and Contracts of Service” by Felicity Kaganas criticises this decision. She argued that despite the peremptory tone of section 10bis, it could be argued that the legislature was content with criminal sanctions and that it did not intend the offending transaction to be void. Influx control laws violated personal liberty and should be narrowly construed.

A different view of this decision was expressed by Barney Jordaan, he submitted rightly in my opinion that a contract of employment entered into in contravention of section 10bis(1) of the Urban Areas Act is not void and that the section merely imposes a penalty on an employer who contravenes it.

Peremptory wording of a section and the provision of a penalty for its contravention are only indicia of legislative intent, and that neither is conclusive. Jordaan also suggests that the distinction between the prohibition of the performance of a contract rather than prohibition of the contract itself is significant.

He was of the view that to hold otherwise would result in the penal provisions of section 10bis(2) being rendered ineffective. This would do justice to an employee who is already disadvantaged by the fact that his employment falls outside the scope of the previous Labour Relations Act. It would be untenable if they should be deprived of their common-law contractual rights.

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44 28 of 1956.  
3.2 PROSTITUTION AND LABOUR LAW

A common understanding of prostitution usually encompasses the exchange of sexual acts for money or goods. In the African context, exchange of sexual services for money is only one of many actions that may lead to one being labelled a prostitute. On the contrary, exchange of sexual services for money is not always considered as an act of prostitution.46

In earlier years prostitutes were defined as persons who engage indiscriminately in sexual relations for pecuniary rewards. This definition was however, found to be insufficient, as sexual services are occasionally rendered for rewards other than financial reward.

3.3 NATURE OF PROSTITUTION

Two conflicting thoughts exists concerning the practice of prostitution, one side viewing prostitution as work, while the other construe prostitution as exploitative.

a. Prostitution-as-work

Proponents of this view hold that one have a right to engage in whatever form of work they so wish, this includes prostitution. That sex workers should not be discriminated against and should have the same rights as other workers. This movement aims to construct (voluntary) prostitution as a legitimate occupation, and argues that where some adult prostitutes make a relatively free decision to go into prostitution, they should be at liberty to do so.

Proponents of this argument view laws prohibiting sex work violate sex workers’ rights and that there is no evidence that show any right being violated by the prostitutes.47

They argue that sex workers suffer harsh treatment from authorities as they are denied a number of rights such as the right to freedom and security of the person, the right to dignity, the right to privacy, the right to equality and the right to freedom of trade, occupation and profession all of which are entrenched in the Constitution.

Their further argue that not all sex workers are forced into prostitution, the choice exercised by sex workers signify expression of sexual liberation, the sale of sexual services being no different to that of workers who supply other services or labour in the marketplace. Supporters want prostitution to be recognised and protected by the law just like any other form of employment.

b. Prostitution as exploitative

Proponents of this view categorise prostitution as inherently exploitative and that violence is often accompanied with this activity, according to this view sexual acts per se constitutes violence, even where the prostitute “consents” to such acts.48

It is argued that the physical and sexual abuse inherent in prostitution results in many health complications and lasting damage, ranging from physical injuries such as gunshot wounds, knife wounds and broken bones to depression and post-traumatic stress disorder.49

They refute the notion of women freely choosing to enter into prostitution, maintaining that most women are coerced or physically forced into a life of prostitution and cannot escape. This occurs directly or in the form of economic marginalisation of women because of illiteracy and job discrimination, which ultimately render them vulnerable to recruitment into prostitution.

3.4 ROLE OF MORALITY (RELATIONSHIP OF LAW AND MORALITY)

“[T]he term ‘morality’ can be used descriptively to refer to a code of conduct put forward by a society or, some other group, such as a religion, or accepted by an

48 Ibid.
49 Ibid.
individual for her own behaviour or normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational persons.”

Discussions on morality dates back to 1957 in Britain where a commission was convened (known as the Wolfenden Committee) to establish whether the use of criminal sanction is justifiable in enforcing sexual morality with specific reference to prostitution and homosexuality.

The Wolfenden Committee Report dealt with the broad question concerning a State’s entitlement to intervene when its citizens engage in behavioural patterns that appear to be harmful. It urged that homosexual behaviour cease to be criminal, that the religious sanctions against it were not grounds for bringing it to the attention of secular law and that there “must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.”

The committee condemned homosexuality as immoral and destructive to individuals, but acknowledged that outlawing homosexuality impinged on civil liberties.

It is important to distinguish law from morality; these two often overlap as laws are often evaluated on moral grounds. Moral criticism is often used to support a change in law. As shall be discussed below prostitution has often attracted great debates in our courts, the guiding factor often being morality and the society’s moral opinion concerning prostitution.

On matters of child labour diverse moral opinions have been voiced, some viewing children as equal members of the community and that they have a moral duty to support his or her family and others viewing child labour as a major destroyer to a child’s development. More will be discussed in the paragraphs to follow.

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51 Ibid.
3.5 SEXUAL OFFENCES ACT\textsuperscript{53}

The Act seeks to outlaw commercial sex. South Africa just like other States prohibits commercial sex.

Section 20(1) of the Sexual Offences Act penalises:

“unlawful carnal intercourse ... with any other person for reward”.

Unlawful carnal intercourse is defined as carnal intercourse other than between husband and wife.

Section 2 of the Sexual Offences Act makes it an offence to keep a brothel. This Act defines a brothel as including:

“any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse ...”

In terms of section 3 of the Act, certain persons are deemed to keep a brothel. They include:

“(a) ...  
(b) any person who manages or assists in the management of any brothel;  
(c) any person who knowingly receives the whole or any share of any moneys taken in a brothel.”

These provisions have been put in place to deter people from engaging in sexual activities which promote prostitution in the country by subjecting heavy penalties to sex workers, brothel owners and clients if apprehended.

3.6 MORALITY AND LABOUR LAW

A common contract contrary to public policy in both common law and statutory law is a contract promoting sexual immorality. Older decisions in both South African and English law treat such contracts as void.

\textsuperscript{53} 23 of 1957.
In the case of *Dlamini v Protea Assurance Co Ltd*, the court refused to award damages to the plaintiff because the delictual claim for loss of earnings was based on income derived from illegal activities.

In *Booysen v Shield Insurance Co Ltd*, the court extended this approach to a defendant’s claims for loss of support. The Court stated that

> “It is difficult to conceive that our Courts would allow the husband or child of a deceased prostitute to recover compensation for loss of support based on the claim that during her lifetime she maintained them – and would have continued to maintain them – on the proceeds of her prostitution”.

In the English case of *Pearce v Brooks*, the plaintiff agreed to hire a horse and carriage to a prostitute, with full knowledge that the carriage would be used in some way to assist her in her enterprise. It was held that the plaintiff could not recover the hire charge when the defendant refused to pay it.

Such conclusions are common, but it is debatable how widely the notion of immorality should be interpreted.

> “The attitudes of societies to such issues constantly changes and behaviour that is regarded as shocking to one generation may not seem so outrageous to a later generation.”

Modern attitudes regarding the law and immorality is illustrated in the English case of *Armhouse Lee Ltd v Chappell* where publishers brought an action to recover payments for advertisements for telephone dating and sex lines which had been placed in one of their magazines. The defendant was according to the court a “a self proclaimed pornographer” who refused to repay and argued that the subject matter of the contract to advertise was immoral, therefore it should not be enforced.

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54 1974 (4) SA 906 (A) at 915.
55 1980 (3) SA 1211 (E).
The Court of Appeal rejected this defence taking the view that there was an absence of a generally accepted moral code against sex lines, and that the sex lines were in fact regulated by law. The court also rejected a general public decency role in this area on the ground that it was not for individual judges to impose their own moral attitude on others.

The Court of Appeal accepted that some aspects of the telephone sex lines might be unenforceable, for instance calls by a subscriber who dialled the line. However, the court finally concluded that the contract between the provider and the advertiser was not tainted by illegality.\textsuperscript{58}

3.7 KEY AUTHORITY ON RECENT DEVELOPMENTS ON THE ILLEGALITY OF EMPLOYMENT CONTRACTS

3.7.1 “KYLIE” v CCMA, COMMISSIONER BELLA GOLDMAN NO AND MICHELLE VAN ZYL T/A BRIGITTES (hereinafter referred to as the “Kylie” case)

a. The facts

The applicant, ‘Kylie’ is a sex worker who was employed at a massage parlour (Brigittes) belonging to the third respondent to perform sexual services for reward. Her services included pelvic massage, sexual intercourse, foot fetishes and dominance.

She does not shy away from conceding that some, if not most of her work, may be in contravention of two sections of the Sexual Offences Act 23 of 1957, namely residing in a brothel and committing unlawful carnal intercourse or indecent acts with other people for reward. She lived on the premises and was subject to a strict regime of rules and fines.\textsuperscript{59} She was dismissed for alleged misconduct. She referred a dispute over the fairness of the dismissal to the CCMA.

In assessing whether sex worker are entitled to fair labour practices, the discussion evaluates the judgement in light of all the facts, principles and legislation applicable.

\textsuperscript{58} Applebey \textit{Contract Law} 355.
\textsuperscript{59} “Kylie” case par 6.
b. Decision at the CCMA

It was argued for the applicant that, excluding sex workers from the scope of the LRA is not justified on a proper reading of the LRA and that the CCMA should not limit the scope of its jurisdiction if it was not required to do so by the relevant law.

The commissioner disagreed with this view, he was of the opinion that should the CCMA resolve disputes concerning the enforceability of illegal contracts, meant that the CCMA placed itself in a position where it would be making policy decisions for the legislature.60

The commissioner considered the fact that the CCMA could not ignore the principle of statutory interpretation that legislation does not intend to change existing law more than necessary.

The fact that sex workers are not specifically excluded in terms of section 2 of the LRA does not mean that they are protected by the LRA. The court held that if this was indeed the case, it meant that any person who is paid by another to undertake an activity which is criminalized would be able to access the LRA as well as other statutes enacted to protect workers.

An application was made for review of the CCMA’s decision at the Labour Court.

c. Review

The argument forwarded by the applicant on review was that the Constitution protects all workers and that a worker should still be protected in spite of the fact that the contract of employment is invalid. The court was asked to extend the protections afforded by the LRA to sex workers.

The argument submitted by the applicant was that the commissioner committed a legal error in excluding workers who did not have a valid contract from the ambit of

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60 “Kylie” case par 10-11.
the LRA because the LRA defines employees to include anyone “who works for another person”, accordingly the Act should apply to all employment relationships irrespective of whether they are underpinned by enforceable contracts or not.\textsuperscript{61}

This case was dealt with by considering the stance of public policy in relation to commercial sex, and assessing the fundamental principle of our law that courts ought not to sanction or encourage illegal activity. The purpose for the review was to establish how this principle interacts with the constitutional right to fair labour practices, in particular the statutory right not to be unfairly dismissed contained in the LRA.

The Labour Court's approach focused on whether as a matter of public policy courts, by their actions, ought to sanction or encourage illegal conduct in the context of statutory and constitutional rights and not whether the definition of employee is wide enough to include those without a valid contract of employment.\textsuperscript{62}

The court highlighted the importance attached to this principle by courts in all legal systems based on the rule of law as one of the fundamental values, that the importance of the principle is evident from the fact that section 1 of the Constitution is firmly entrenched than other provisions of the Constitution.

The Labour Court sourced support of this principle through various common law principles discussed earlier, these are the \textit{ex turpi causa non oritur actio} rule, the \textit{in pari delicto potior conditio defenditis} rule, and the unjust enrichment remedy afforded by the \textit{condictio ob turpem vel iniustum causam}. These rules formed basis for the refusal to award damages based on earnings derived from illegal employment or activity.

The Labour Court came to the conclusion that courts have not enforced contracts that directly or indirectly involve prostitution or recognise a claim based on the

\textsuperscript{61} “Kylie” case par 12.

\textsuperscript{62} In the case of \textit{Discovery Health v CCMA} the Labour Court came to the conclusion that the LRA applies to employees without a valid contract of employment.
earnings from prostitution, and that common law will not enforce a contract to perform statutorily prohibited activity or recognise a claim based on such activity.

The court had to decide on the issue of whether the two statutory prohibitions contained in the Sexual Offences Act were intended to void any transactions associated with the prohibited activity or deny any statutory remedy based on such a transaction since the Act is silent on the issue.

3.7.2 SECTION 23 OF THE CONSTITUTION

The court had to consider the ambit of section 23(1) in conjunction with the definition of “employee”. Section 23(1) extends to workers, employers and their respective associations. The question that had to be answered was whether that scope includes sex workers, their employers and the associations to which they belong to.

The court could not sustain the view that “everyone” extends only to people who perform work that is legal. This issue has been addressed in the Constitutional Court which decided that rights contained in the Bill of Rights extends to all, until a law of general application limits the reach of the relevant right.63

One of the main objects of section 23 was to protect workers who are vulnerable to exploitation. The court highlighted some categories of employees not covered by the LRA such as a member of the permanent force and the defence force, independent contractors, partners, and the self-employed as well as judges or cabinet ministers.

The ambit of section 23 was explored on a value based system applicable in interpreting provisions of the Constitution. Focus was on the foundational values entrenched in section 1 of the Constitution namely dignity, equality, supremacy of the constitution, the rule of law and democracy.

The dignity and equality values are inherently part of the right to fair labour practices.

63 Khosa v Minister of Social Development; Mahlaule v Minister of Social Development & Development 2004 (6) BCLR 569 (CC) 590 and 611.
“To the extent that the right to fair labour practices is a more direct expression of the right to dignity in the workplace, the dignity value is already part of that equation. To the extent that the scope of the right to fair labour practices can justifiably exclude those doing illegal work, the equality value has been taken into account. In other words, the dignity and equality values are not values that are assessed independently. They are inextricably part of the analysis of the impact of the rule of law on the scope of the right to fair labour practices.”

The court held that the rule of law value does not have an automatic effect of withholding constitutional rights to those engaged in illegal activity. The court expressed support for the decision in *S v Jordan*, where the Constitutional Court decided 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 rather they are entitled to the rights contained in section 35 of the Constitution when arrested and tried for their criminal activity. They are entitled to equality and access to courts.

The court acknowledged that sex workers were indeed a vulnerable group, their exploitation was compared to that of illegal immigrants and child workers who are exploited by employers seeking cheap labour.

The court however held that allowing sex workers to benefit from labour rights would be sanctioning and encouraging activities that the legislature has constitutionally decided should be prohibited, and that section 23(1) does not include persons engaged in prohibited work such as sex workers and brothel keepers. In the court’s opinion section 23(1) was limited.

The court had to consider whether limitation on the right contained in section 23 was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the factors listed in section 36(1) of the Constitution.

The court considered factors limiting a fundamental right and provided reasons for each factor:

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64 “Kylie” case at par 59.
65 2002 (6) SA 642.
66 “Kylie” case par 60.
a. **Nature of the right**

Proper justification is required because limiting a fundamental right undermines labour rights of others. Illegality of employment of sex workers does not have this effect and accordingly the level of justification will not have to be as demanding.

b. **The importance of the purpose of the limitation**

Sexual offences Act aims at eradicating social ills of violence, sexual exploitation, drug abuse and child trafficking, these are compelling reasons to limit the right to freedom of trade, occupation and profession and the right to privacy.

c. **Nature and extent of the limitation**

The limitation would exclude sex workers and brothel keepers from the category of rights holders.

d. **The relation between the limitation and its purpose**

The purpose is to discourage organised prostitution by refusing to sanction their business arrangements and any constitutional or statutory rights that may flow from organised prostitution.\(^{67}\)

e. **Whether there are less restrictive means to achieve the same purpose**

The court agreed with the view of the Constitutional Court in the *Jordan* case whereby the court refuted submissions that there are less restrictive ways of regulating prostitution. The court averred that open and democratic societies had varying opinions regarding commercial sex. This was a constitutionally permissible legislative choice and the court could decide on more stringent measures.

\(^{67}\) “Kylie” case par 86.
The court came to the conclusion that the limitation is justifiable as it gives effect to the fundamental rule of law principle: courts should not by their actions sanction or encourage illegal activity.\textsuperscript{68}

The court was of the view that if sex workers are not constitutionally entitled to the right to fair labour practices under section 23, the same will hold true for the legislation that gives effect to the right.

That this interpretation is probable only if the definition of the employee is narrowly interpreted, on the other hand, if it was widely interpreted it would include those without a valid contract of employment. The court did not however, conclusively decide on the matter.

3.7.3 SECTION 213 OF THE LRA

The applicant challenged the commissioner’s ruling that the definition of employee in section 213 of the LRA applied only to employees under a valid and enforceable contract on a number of grounds:

The first ground was the definition. The applicant argued that the definition of the employee is cast widely and focuses on the employment relationship as a matter of fact rather than law.

That the form or existence of a valid and enforceable contract is not the focus of the definition and accordingly the LRA as a matter of statutory construction should apply to all workers including sex workers.\textsuperscript{69}

The second ground was that the statutory definition of employee has historically been given a wide meaning - wide enough to include former employees. This meant that the definition of “employee” under the LRA is not confined to employees at common law and not dependent on the existence of an enforceable contract of employment.\textsuperscript{70}

\textsuperscript{68} “Kylie” case par 88.
\textsuperscript{69} “Kylie” case par 16.
\textsuperscript{70} “Kylie” case par 17.
The third ground was that in determining whether or not a person is an employee for the purposes of the LRA, a court should have regard not to the labels but to the realities of the relationship between the parties.

The applicant emphasised on the point that one must look at the substance rather than the form of the relationship. The applicant supported her contention by citing the case of *White v Pan Palladium SA*\(^71\) where the Labour Court held that a worker who has entered into an employment relationship with an employer despite not concluding a contract between them, is an employee for the purposes of the LRA.\(^72\)

It was rightly submitted in my opinion that the LRA does not require the existence of a valid and enforceable contract in order for the employee to be entitled to the rights contained in the LRA. Arguing that if an alternative interpretation of the statute existed, the interpretation that gave effect to the rights in the Constitution ought to be preferred.\(^73\)

### 3.7.4 THE PRINCIPLE OF PUBLIC POLICY

The approach followed with regards to public policy issues raised in the case was dealt with in terms of the common law principle that a court does not lend its aid to the enforcement of an illegal contract.

The court was of the view that the principle should not be applied in employment contracts involving commercial sex. Reasons given were as follows:

1. The principle of public policy applies when the court has discretion. That the interpretation of section 23 of the Constitution and the definition of employee in the LRA admit no such discretion. The discretion arises only when determining the remedy for unfair dismissal.\(^74\)

\(^71\) 2005 (6) SA 384 (LC).
\(^72\) “Kylie” case par 18.
\(^73\) “Kylie” case par 20.
\(^74\) “Kylie” case par 21.
2. Public policy is informed by the Constitution and since the Constitution has afforded everyone the right to fair labour practices, this right forms the basis of public policy.

According to the court, there exists no reason to subordinate one statute to the other because they operate in different spheres and pursue different purposes. The purpose of the LRA is to give effect to a constitutional right whereas the Sexual Offences Act does not.75

The court further reinforced its argument by noting section 210 of the Constitution which states that in the event of any conflict between the LRA and any other law (except the Constitution or any Act expressly amending the LRA) the provisions of the LRA apply.

3.7.5 THE CONSTITUTIONAL PRINCIPLE OF NOT SANCTIONING AND ENCOURAGING ILLEGAL ACTIVITIES

The court cited the case of Schierhout v Minister of Justice wherein Innes CJ described the principle as follows:

“It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.”76

3.7.6 APPLICATION OF THE PRINCIPLE TO STATUTORY CLAIMS

The court was of the view that entitlement to a statutory right applies when:

(a) the legislative intention of the statutory prohibition goes beyond its own penalties;

(b) the person pursuing the right has knowingly sought to violate the prohibition; and

75 “Kylie” case par 22.
76 “Kylie” case par 28.
(c) the grant of the right will sanction or encourage the prohibited conduct.

The court pointed out indicators that a decision maker ought to determine when applying the principle:

- If the grant of the statutory right is dependent on the exercise of a discretion (either implied or express) then the decision maker must first determine whether the statutory prohibition was intended to deny a person relief and, if so, then refuse the relief.

- If the right is not subject to discretion, the application of the principle will require the statute to be interpreted so as to exclude such persons as holders of the right either specifically or by excluding them from the application of the statute as a whole.

### 3.7.7 APPLICATION OF THE PRINCIPLE TO THE SEXUAL OFFENCES ACT

The court made an assessment of the Sexual offences Act to determine whether the prohibitions contained in sections 3(a) and 20(1)(1A) intended to void any transactions associated with the prohibited activity or deny any statutory remedy based on such a transaction.

The court could not find a clear answer to this issue. However it commented on the fact that the contravention of the prohibition as a criminal offence generally indicates that the legislature intended the transaction itself to be void.

The court was quick to point out that this is not an unqualified solution because in some statutes the provision of a criminal penalty indicates that the legislature intended to go no further.

The court did not make any clarity on the issue of whether the principle applies to prostitution, it merely suggests an interrogation into the contract of employment between a brothel keeper and a sex worker and any statutory right that is linked to or flows from that contract.
3.7.8 THE RIGHT TO FAIR DISMISSAL

The court was of the view that if sex workers are not constitutionally entitled to the right to fair labour practices under section 23, the same should hold true for the legislation that gives effect to that right.

The court was quick to point out that this inference is not determinative, because a narrow interpretation of section 23 does not prevent the legislature from extending the right statutorily to those workers who are not constitutionally entitled to. And that the wording of the definition of employee in the LRA is wide enough to include those without a valid contract of employment.\(^{77}\)

Section 186(1) of the LRA defines the meaning of unfair dismissal as a condition which requires the existence or prior existence of a valid contract of employment in order to claim the statutory right to fair dismissal.\(^{78}\) The court emphasised on the fact that section 186(1) is not open ended, according to the court the opening phrase “dismissal means that” - limits the definition to the specific instances provided in the section.\(^{79}\)

\(^{77}\) “Kylie” case par 89.
\(^{78}\) S 186 of the LRA highlights instances which constitutes unfair dismissal, it provides the following:

(1) “Dismissal’ means that -
(a) an employer has terminated a contract of employment with or without notice;
(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
(c) an employer refused to allow an employee to resume work after she -
   (i) took maternity leave in terms of any law. collective agreement to her contract of employment;
(d) an employer who dismissed a number of employee for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;
(f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 r sections 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.”

\(^{79}\) “Kylie” case par 90.
The court concluded that the LRA does not intend to protect an unenforceable employment relationship especially that of prostitution.

### 3.7.9 CONCLUSION

The court did not find a constitutional imperative that interpreted the LRA to include illegal employment relationships in relation to fair labour practices. The court further held that the rule of law principle dictates against the approval of a sex worker’s claim for compensation. In supporting its decision the court highlighted the provision contained in section 193 dealing with the remedy of reinstatement:

The court established that a decision-maker is required to reinstate an employee subject to four exceptions:

- That the employee does not wish to be reinstated.
- The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.
- That it is not reasonably practicable to reinstate.
- Finally, that the dismissal is unfair only because the employer did not follow a fair procedure.\(^{80}\)

The court finally decided to deny the applicant’s claim for compensation.

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\(^{80}\) "Kylie" case par 92.
3.8 **DISCOVERY HEALTH v CCMA**\(^{81}\) (HEREINAFTER REFERRED TO AS THE **DISCOVERY CASE**)

### a. The facts

The matter before the court concerned employment of a foreign national without a valid work permit issued under the immigration Act.

The third respondent, Lanzetta, is an Argentinean national, who was on a temporary work permit issued only for the company he was working for previously, (Multi-Path Customer Solutions (Pty) Ltd) which was valid until December 31 of 2005. He later commenced work with Discovery Life after accepting a job offer.

Lanzetta avers that during September 2005 he requested his manager to provide him with the necessary documentation to enable him to renew his work permit. He submits that Discovery Health's management gave him the necessary documents on 2\(^{nd}\) December 2005 and that this delay resulted in his work permit expiring at the end of December 2005.

On 4\(^{th}\) January 2006 Discovery Health managers handed him a letter of termination of employment for reasons of not having a valid work permit. Lanzetta thereafter invoked the dispute resolution mechanisms of the LRA and referred an alleged unfair dismissal dispute to the CCMA.

The parties agreed that the commissioner should determine, as a preliminary point, whether the CCMA had jurisdiction to arbitrate Lanzetta’s claim.

### b. Decision at the CCMA

Discovery Health’s argument revolves around the definition of employee as contained in section 213 of the LRA, counsel for the applicant argued that the

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\(^{81}\) (LC) 2008-3-28 case no JR 2877/06 (hereinafter referred to as Discovery case).
employment contract between Discovery Health and Lanzetta was *void ab initio* because it was in conflict with the Immigration Act.\(^{82}\)

Therefore Lanzetta was not an employee for the purposes of the LRA and could not claim the right to fair dismissal. The applicant further argued that the CCMA had no jurisdiction to arbitrate the dispute.\(^{83}\)

The commissioner in my opinion correctly agreed with Lanzetta’s argument that the definition of “employee” in the LRA contemplates an employment relationship that transcends contract, and that while a contract of employment entered into with a foreign national who is not in possession of a valid work permit is invalid, the employment relationship is not.\(^{84}\)

The commissioner made a ruling that Lanzetta was an employee, and that the CCMA had the jurisdiction to determine his unfair dismissal dispute. Further that in accordance with section 186 of the LRA, the existence of a dismissal had been established.\(^{85}\) Despite the obvious fact that an employer is not required to continue the employment of an illegal foreign national or a foreign national whose specific work permit does not permit the employer to employ him.

Discovery Health then instituted a review application to review and set aside the commissioner’s ruling.

c. **Grounds for review**

The LRA was set out to resolve conflicts in the workplace effectively through its various institutions like the Labour Court.

The power to review is conferred on a court of law to supervise compliance by an administrative organ or similar body with requirements of legality. Review process guards against arbitrary functioning of legal institutions.

\(^{82}\) 13 of 2002.  
\(^{83}\) “Discovery” case par 3.  
\(^{84}\) “Discovery” case par 13.  
\(^{85}\) “Discovery” case par 14.
Appeal deals with the correctness of a result, it is appropriate where it is thought that the decision maker came to the wrong conclusion on the facts or law whereas review is not concerned with the merits of the decision but whether it was arrived at in an acceptable fashion by following correct procedures.

The LRA does not provide for any appeal against an award made by a commissioner exercising commissioner’s functions of arbitration in terms of LRA.

Power to review courts’ decisions emanate from the common law which no longer exists as it is subsumed by various specialised legislation and also incorporated into the Constitution.

The Labour Court cited several cases in establishing the grounds for review of the commissioner’s ruling.

Those pertinent to this case include the observations that a commissioner conducting arbitration under the LRA engages in administrative action in circumstances where the Promotion of Administrative Justice Act 3 of 2000 does not apply.

The court cited the case of *Carephone (Pty) Ltd v Marcus NO*\(^6\) where the court held that the ground of justifiability no longer applied as a basis for a review brought under section 145 of the LRA, and that the grounds for review under that section are suffused by the criterion of reasonableness and the constitutional requirement that arbitration awards be lawful, reasonable and procedurally fair.

### 3.8.1 IS A VALID CONTRACT OF EMPLOYMENT NECESSARY FOR THE LRA TO APPLY?

The commissioner's ruling does not reflect any definitive finding on the validity of the contract concluded between Discovery Health and Lanzetta.

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The commissioner preferred to decide the matter on the basis of an “employment relationship” not solely dependent on a contract.

The court submitted that if the contract between the Discovery Health and Lanzetta was never invalid, that presented a perfect reply to Discovery Health's contention that the CCMA had no jurisdiction because of the underlying validity of the contract.

The Labour Court in reviewing this decision made the following enquiries:

Whether the contract of employment concluded between Discovery Health and Lanzetta was invalid because the applicant was not in possession of a valid permit issued under the Immigration Act. If the contract was invalid, the question that arises then, according to the court was whether the conclusion of the contract is of any consequence.

This enquiry further raises the question whether the definition of an ‘employee’ contained in section 213 of the LRA is necessarily underpinned by a common law contract of employment:

- If it is not the court was of the view that the illegality of a contract in terms of which a person is engaged to perform work does not necessarily nor decisively determine whether that person is an “employee”.

- If the statutory definition of “employee” is necessarily predicated on a valid common law contract of employment, then the argument that a person engaged to perform work in terms of a an underlying contract that is invalid can never be an “employee”, must succeed.

The court had to determine whether the LRA intended that a contract of employment concluded in circumstances where the party was in breach of the Immigration Act, is necessarily invalid.
The court further scrutinised the wording of sections 36(1) and 49(3) of the Immigration Act to determine its intention concerning illegal immigrants in relation to employment contracts.

Section 38(1) of the Immigration states:

“Employment –
(1) No person shall employ -
(a) an illegal foreigner;
(b) a foreigner whose status does not authorise him or her to be employed by such person; or
(c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.”

Whereas;

Section 49(3) of the Act states:

“(3) Anyone who knowingly employs an illegal foreigner or a foreigner in violation of the Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year, provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding three years without the option of a fine.”

After careful examination, the court was of the view that, both sections 38(1) and 49(3) do not directly declare a contract of employment concluded without the necessary permit as void, and that a person does not commit an offence by accepting work from or performing work for another without a valid work permit.87

Discovery’s argument was based on section 49(1)(a) of the Act, which makes it an offence for a foreign national to enter, remain in or depart from the Republic of South Africa in contravention of the Act. However this section was inapplicable because at the time of dismissal Lanzetta was lawfully resident in South Africa. In my opinion the court was correct in its finding that section 49(1)(a) does not apply.

87 “Discovery” case par 24.
3.8.2 THE JUDGMENT

The court was of the view that the legislature does not explicitly criminalise a contract of employment with an illegal immigrant, but only the conduct of an employer who employs a foreign national without a valid permit.

The court held that the underlying contract was valid, and that the CCMA has jurisdiction in this dispute as this was a way to expose any illegality that exists and therefore deter it.

The court pointed out that if employers were aware that foreign nationals who do not have work permits had rights of recourse to the LRA and the BCEA, they would be less likely to breach section 38(1) of the Immigration Act by entering into contracts in these circumstances.

Another issue that the court considered was whether the definition of “employee” in section 213 of the LRA applied only to persons who render work in terms of common law contracts of employment. If not, does the concept of an “employment relationship” properly define the boundaries of the statutory definition? The Court discussed this issue in relation to section 23(1) of the Constitution.

The Court held that the protection against unfair labour practices established by section 23(1) of the Constitution is not dependent on a contract of employment. Protection potentially extends to other contracts, relationships and arrangements in terms of a person performing work or providing personal services to another.

The boundary between performing work “akin to employment” and the provision of services as part of a business is a matter regulated by the definition of “employee” in section 213 of the LRA.

The court concluded that a person who renders work on a basis other than that recognised as employment by the common law may be an employee for the

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88 “Discovery” case par 34.
89 “Discovery” case par 41.
purposes of the definition. The fact that Lanzetta's contract was invalid only because Discovery Health had employed him in breach of section 38(1) of the Immigration Act did not automatically disqualify him from that status. Consequently the matter was taken back to the CCMA to determine fairness of the dismissal.

3.9 CONCLUSION

The implications of this judgment for employers is that foreign nationals who do not have valid work permits, are still considered to have valid contracts of employment and are therefore “employee[s]” for the purposes of the LRA. Furthermore, even if the contracts of employment are invalid because of section 38(1) of the Immigration Act, foreign nationals will nevertheless constitute “employee[s]” in terms of the LRA because that definition is not dependent on a valid contract.

This case serves as a deterrent and an eye opener for employers, that before engaging a foreign national, they should ensure that such a person has the relevant work permit to render the contemplated services.

Failure to do so exposes the employer to criminal sanctions in terms of the Immigration Act, while the foreign national would still enjoy protection afforded by the LRA, the BCEA and the Constitution.
CHAPTER 4
CHILD LABOUR

4.1 INTRODUCTION

This last chapter focuses on the issue of child labour. In order to understand how this topic is linked to the other themes discussed in this document it is important to briefly reiterate one of the requirement for a valid contract of employment.

For a contract of employment to be valid parties to the contract must have the capacity to conclude a contract. This implies that parties must have attained a certain minimum age to be able to create a valid contract. It is on this note that I chose to briefly discuss the prevalent practice of child labour. A child is often exploited when they are employed. It is for this and more reasons that the law has declared a contract with a minor whose age is less than the required age contemplated in any legislation to be void ab initio.

4.2 DEFINITION OF CHILD LABOUR

A legal definition defines child labour as forms of work that are prohibited by law, on a national or international level.

“Legal definitions are however, product of political settlements which results from social, cultural, political and economic positions taken by drafters of legal documents.”

Article 32 of UN Convention on the Rights of the Child, defines Child Labour as:

“… work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child’s health or physical, mental, moral or social development.”


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90 Cullen The Role of International Law in the Elimination of Child Labour (2007) 76.
Inconsistency exists with regards to the age in which a person is said to be working as a child. This is because of an absence of a standard age dealing with minimum age work restrictions. Childhood is often viewed against factors such as gender, class, ethnic or historical locations of particular individuals.

The definition of childhood can differ from one country to another, from one culture to another and even within the community. It is very difficult to reconcile the Western notion of ‘childhood’ with that of developing countries.93

Child Labour is a wide topic; however, focus of this treatise is to establish the unlawfulness of a contract of employment with a child and the consequences arising from such a contract in relation to public policy.

4.3 FORMS OF CHILD LABOUR
4.3.1 UNPAID DOMESTIC LABOUR

It is a common belief in many households in South Africa that children ought to help with household chores and on farms as soon as they are physically and mentally able to do so.94 Activities in this category may include fetching provisions like wood, food and water especially in rural areas.

Child labour may involve performance of domestic duties, such as child care and housekeeping. The girl child is at particular risk of engaging in this type of labour, particularly in the case of an arranged marriage at a young age, where the child resides in the home of her in-laws.95

92 Article 15(1) of the African Charter of Rights and Welfare of the Child of OAU Document CAB/LEG/24.9/49 of 1990 provides that child labour constitutes work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral or social development.
4.3.2 ECONOMIC ACTIVITIES

Although the roles of children change as they move into a monetary economy and a formal system of schooling, expectations persist that children should contribute to the family’s needs. This ranges from involvement in the entertainment and agricultural industries, to assisting with a family-run business or begging. In some instances children are allowed to enrol in schools and at the same time work so as to meet basic household needs.

In Harare (Zimbabwe) suburbs, young girls help their mother run informal vending stalls and in the rural areas children spend hours before and after school in family entrepreneurial activities.96

4.3.3 SCHOOL LABOUR

This involves a child performing activities related to the maintenance and caretaking of a school, while in the school environment. Alternatively, through the so called “earn and learn” schools which provide opportunity for education to children who could not otherwise afford school fees in return for the pupils to work for companies controlled by the school especially in the agriculture sector.97

4.3.4 FORCED LABOUR

Slavery, military recruitment, prostitution and other illegal activities are commonly classified as forced labour. Often children are forced into these vices against their will. Females are likely to be forced into prostitution, while males are likely to be recruited against their will into military/militia regimes.

96 Weston Child Labour and Human Rights 148.
97 Weston Child Labour and Human Rights 149.
4.3.5 DEBT BONDAGE

Bonded labour, also known as debt bondage, occurs when a child is exchanged as payment for debt by a parent or guardian. The child is forced into virtual enslavement; until the debt has been paid in full.

4.3.6 FAMILIAL OBLIGATIONS

Child labour often results from tragic background, whereby familial ties obligate to engage in labour. Familial obligations sadly begin when children are orphaned, and as a result tasked with taking care of younger siblings, forcing them to perform various working tasks in order to provide for their family members.

4.4 WORST FORMS OF CHILD LABOUR

Convention of Worst Forms of Child Labour\textsuperscript{98} was adopted at the International Conference in Geneva by a wide range of delegates from employers’ organisations, trade unions and governments of the 175 member states of the ILO.

This has been the most rapidly accepted agreement by a large number of countries depicting the magnitude of this problem by attracting a growing international consensus that certain forms of child labour are so fundamentally at odds with children’s basic human rights that they must be eliminated as a priority.\textsuperscript{99}

Article 3 of the Convention on the prevention and elimination of worst forms of child labour states as follows:

“… the term ‘worst forms of child labour’ comprises:

(a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.

\textsuperscript{98} ILO Convention No 182 on the Worst Forms of Child Labour.
(b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances.

(c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties.

(d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”

The categories of work falling within paragraphs (a) to (c) are considered automatic worst forms of child labour.

A brief discussion of the some of the most prevalent worst forms of child labour in South Africa will be discussed below.

4.5 CHILD TRAFFICKING

A child has been trafficked if he or she has been moved within a country, or across borders, whether by force or not, with the purpose of labour exploitation. In case of a child it is not relevant whether the child consented to the movement or the exploitation. This is different in case of an adult, where failure to consent is a requirement for trafficking to exist (unless the adult's "consent" was obtained through deception).100

4.6 PROSTITUTION

It is known that children have been used for sexual gratification of adults. Young girls are the major victims to this atrocity, however, there is a rising trend of boys succumbing to such activities as has been observed in many countries where local boys are in great demand by rich men and women especially in the tourism industry, where they are easily attracted with money, new clothing, food and the security of having constant flow of pay from their clients.

Children are often drawn into this net through trafficking, peer pressure or damaging events that made it difficult for them to live normal live due to trauma or stigma for example early rape which reduces their chance of marriage.

Shockingly in some instances commercial sex among children is sometimes encouraged by parents who either tend to ignore the child’s whereabouts and the fact that he/she comes home with money or goods unexplained for, or in other instances the parents directly encourage a child to pursue this activity, by for instance coercing a child to befriend tourists for monetary aims.\textsuperscript{101}

\section*{4.7 HAZARDOUS WORK}

It is defined in article 3(d) of the Convention of worst forms of child labour as:

\begin{quote}
\ldots work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.\end{quote}

The Worst Forms of Child Labour Recommendation\textsuperscript{102} gives a more concrete sense of what this work is likely to encompass. It highlights:

- Work that exposes children to physical, psychological or sexual abuse.

- Work with dangerous machinery, equipment and tools, and work entailing the handling of heavy loads.

- Work in unhealthy environments, where there is exposure to hazardous substances or processes, or to extreme temperatures, noise levels or vibrations.

- Work involving long hours, night shifts or unreasonable confinement at the workplace.

\textsuperscript{101} \url{http://www.ilo.org/wcmsp5/groups/public/---ed_norm/documents/publication/wcms_067258.pdf} (accessed on 19 of November 2008).

\textsuperscript{102} No 190, 1999.
4.8 WHY DO CHILDREN WORK?

For the majority of working children, work is an essential part of life, perceived as conveying important benefits for the children and their families and even as being enjoyable.

What truly underlies the notion of working children in South Africa consists of the following:

4.8.1 POVERTY

In most parts of South Africa and Africa at large, child labour is caused by poverty. In many instances working children hail from households where their parents are unemployed, forcing the children to seek employment to help the family. High demand for child labourers as opposed to adults is due ease of exploiting children and the inability by a child to bargain on issues such wage, hours of work or conditions of employment. In other circumstances children are deliberately kept out of school and forced to beg for money to support their parent’s unwillingness to seek employment themselves. 103

4.8.2 FAMILY EXPECTATIONS AND TRADITIONS

In the African context it is widely believed that children should provide assistance to their parents especially those residing in rural areas. They are often expected to help with farming duties such as herding of cattle, tending to crops and general household chores. This is part of the cultural customs. Although such activities are not typically considered to be forms of child abuse or exploitation. The deciding factor should be the extent and frequency of such work and how it affects the development of the child. 104

4.8.3 HIV/AIDS EPIDEMIC

Many children have been orphaned as a result of the death of their parents due to HIV/AIDS. As a result children take to the street to fend for themselves and their siblings or in other instances are taken in by relatives, only to find they are unable to cope well for because of abuse they suffer in the hands of their relatives, or forced to leave school and start working as domestic slaves. Succumbing to this pressure children take off to the streets to beg and escape ill treatment at the hands of relatives.\(^\text{105}\)

4.9 PUBLIC OPINION

It has been suggested that attitudes towards child labour in South Africa may also be linked to the increase of child labour. Indifference by certain communities, employees and indeed parents themselves often translates to insufficient attention directed to the practice of child labour. Such attitudes perpetuate the cycle of labour, and reinforce opinions about the acceptability of child labour. Public opinion plays a great role in the eradication of child labour, more campaigns need to be set in play to sensitise people about the risks of child labour and the importance attached to childhood that every child needs to experience. Childhood is precious and once lost can never be recovered.

4.10 STATUTORY PROHIBITION ON CHILD LABOUR

The essence of strict requirements for a valid employment contract had foreseen potential possibility of exploiting terms and conditions of employment, for instance children lack the ability to bargain on various matters from wages, conditions of employment, hours of work and other terms of employment. In fact most child workers are not aware of any labour rights. For this reason unscrupulous employers prefer exploiting their vulnerability.

\(^{105}\) \textit{Ibid.}\n
51
Aside from that, child labour takes away an important phase of childhood which in all likelihood will eventually destroy the betterment of the future of a child.

4.11 THE CONSTITUTION

Children have been afforded extensive protection in the Bill of Rights contained in the Constitution. They are given special protection due to their delicate position they find themselves in. Section 28 provides that:

(1) Every Child has the right-

(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter. Basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that -

(i) are inappropriate for a person of that child’s age or;
(ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

... (i) not to be used directly in armed conflict, and to be protected in armed conflicts.

(2) A child’s best interest is of paramount importance in every matter concerning the child.

(3) In this section ‘child’ means a person under the age of 18 years.”

Unlike other socio-economic rights contained in the Constitution, those relating to children are not subject to the availability of state resources and are not to be realised progressively as resources permit. They are regarded as a priority that should be immediately met.

4.12 BASIC CONDITIONS OF EMPLOYMENT ACT

Chapter six of the BCEA explicitly deals with prohibition of employment of children and forced labour, setting an absolute minimum age limit on the employment of children and setting conditions for the employment of older children.

106 Act 108 of 1996.
Section 43 prohibits a person from employing a child who is under 15 years of age or who is under the minimum school-leaving age in terms of any law, if this is 15 or older until the last day of the school year in which the child turns 15 years.

The Act also prohibits the employment of any child who is over 15 but under 18 years old, if the employment is inappropriate for the age of the child or if the work:

- Places at risk the child’s well-being, education, physical or mental health, or spiritual, moral or social development.

- Has been prohibited by the Minister of Labour through regulations.

In terms of section 46 of the Act, it is a criminal offence to assist an employer to employ a child in contravention of the Act. It is also an offence to discriminate against anyone who refuses to allow a child to be employed.

The Minister has the power, in terms of the Act, to vary child work provisions for any category of employer within the fields of advertising, sport, artistic activity and cultural activity. So far this has only been applied in relation to the performing arts where anyone wanting to employ a child under the age of 15 years must apply for a permit. The permit is granted on an individual basis and specifies the conditions of work.

The definition of ‘employee’ contained in the Act is defined widely as discussed in the previous chapter, the part which includes a person who assist to carry on or conduct business of another even if he is not paid for this assistance would include a child helping his or her parents in a family business. This serves as a caution to parents who seek assistance from their children in running family business, not to misuse a child by for instance compelling a child not to attend school so as to help his or her parents.

The BCEA empowers the Minister to make regulations:
• Clarifying what kinds of work are considered inappropriate for 15 – 17-year-old children.

• Setting working conditions for the above category of children.

• Dealing with the medical examination of working children.

No such regulations have yet been published; however, there is still a pressing need to define inappropriate work for children in the relevant age group.

4.13 THE CHILD CARE ACT

The Act strives to ensure the well being of a child by preventing unlawful employment of children of a certain age.

The Act covers the prevention of ill-treatment and prohibition of employment of children. Section 52A of the Act provides that:

“... no person may employ or provide work to any child under the age of 15 years”.

4.14 SKILLS DEVELOPMENT ACT

The Skills Development Act of 1998 and the Skill Development Levies Act of 1999 were designed to stimulate job creation and promote skills development for those already in employment. They impact on child labour in terms of expanding training and employment opportunities for children over the age of 15 years, including those who might previously have been involved in child labour.

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1983.
4.15 NATIONAL LIQUOR ACT\textsuperscript{108}

Children have often been involved in the sale of liquor by unscrupulous persons seeking to exploit children especially those coming from disadvantaged backgrounds. One can find children working in bars or any entertainment sports unsuitable for a child, serving drinks to revellers. This exposes a child to great risks of abuses such as beatings, rape and forceful consumption of alcohol and many other vices associated with alcohol.

The aim of the National Liquor Act is to reduce socio-economic and other costs of alcohol abuse in South Africa by setting essential national norms and standards in the liquor industry, regulating the manufacture and wholesale distribution of liquor, setting essential national norms and standards for regulation of the retail sale and micro-manufacture of liquor and providing for public participation in the consideration of applications.\textsuperscript{109}

Section 8 prohibits the employment of persons under the age of 16 in liquor industries and engaging in any activity relating to the manufacture or distribution of liquor or methylated spirits unless the employee is undergoing training or a learnership contemplated in section 16 of the Skills Development Act.

The Act further prohibits the supply of liquor or methylated spirits to minors. Section 10 provides:

“(1) A person must not sell or supply liquor or methylated spirits to a minor.

(2) Despite subsection (1), the parent, adult guardian of a minor or a person responsible for administering a religious sacrament, may on occasion supply to that minor a moderate quantity of liquor to be consumed by the minor in the presence and under the supervision of that parent, guardian or other person.

(3) A person must take reasonable measures to determine accurately whether or not a person is a minor, before selling or supplying liquor or methylated spirits to that person.

\textsuperscript{108} 59 of 2003.
\textsuperscript{109} \url{http://www.thedti.gov.za/nla/nationalliquorlaw.htm} (accessed on 13 January 2009).
(4) A minor must not make a false claim about age in order to induce a person to sell.

(5) A person must not make a false claim about the age of a minor in order to induce a person to sell or supply liquor or methylated spirits to the minor.

(6) A minor must not -

(a) produce liquor;
(b) import liquor; or
(c) supply liquor to any other person.”

It is worth noting that an exception to the supply of alcohol to a minor occurs only for religious purposes and that the consumption needs to be moderate and under supervision by a responsible adult.

The Act also places advertising restrictions by prohibiting any form of advertising of liquor or methylated spirit in a manner that targets or attracts minors.\textsuperscript{110}

\section*{4.16 SECTORAL DETERMINATIONS}

The Minister of Labour is empowered to make a sectoral determination establishing basic conditions of employment for employees in a sector and area.\textsuperscript{111} In an effort to fight against child labour in various sectors of the economy especially those that have previously been off radar such as the domestic workers and farm workers sectors. It has been established that child labour practice is rife hence the government’s need to regulate these sectors to deter child labour practices.

One example is the Sectoral Determination 7 on Domestic Workers. Section 23 provides:

“(1) No Person may employ as a domestic worker a child -
(a) who is under 15 years of age; or
(b) who is under the minimum school leaving age in terms of any law, if
this is 15 or older.

(2) No person may employ a child in an employment –

(a) that is inappropriate for a person of that age;

\textsuperscript{110} S 9(1)(a) of the National Liquor Act 59 of 2003.

\textsuperscript{111} S 51 of BCEA.
Employers are further obliged to maintain for three years a record of the name, date of birth and address of every domestic worker under the age of 18 years employed by them. The same is provided for in Sectoral Determination 13 which deals with the Farm Worker Sector.

4.17 REMARKS

Common law concept of lawfulness although not an explicit requirement in statutory law as discussed earlier, plays a major role in employment contracts. Interpretation of statutes inevitably requires us to measure an employment contract in question against public conviction of the particular object of performance for the contract.

This enquiry unfortunately does not provide a definitive answer as different societies have different norms, for instance, on the issue of prostitution there are diverse views such that what the law regards as immoral is now restricted in light of modern attitudes and differs from one society to another. The same holds true on the issue of child labour.

Discovery case serves as an example of an excellent deterrent to unscrupulous employers seeking cheap labour by exploiting desperate foreigners seeking livelihood in South Africa, previously employers employing foreigners avoided complying with labour legislations.

The position has changed since the Discovery case judgement, an employer engaging in employment of foreigners without valid work permits risk criminal sanctions while the foreign employee enjoys protections afforded by the LRA, BCEA and the Constitution.

What is plausible is the Labour Court’s reasoning for denying the enforceability of a sex worker’s contract in the ‘Kylie’ case. Although the court accepted the submission that ‘Kylie’ was an employee. Cheadle’s finding to deny her claim for compensation
due to unfair dismissal was based on the reasoning that bowing to her prayer would be sanctioning and or encouraging prohibited commercial sex.

Nevertheless, one cannot help from feeling a sense of disappointment in the “Kylie” case; she once again goes home empty handed while her employer in a sense escapes paying her former employee for the suffering she subjected her to.

There is still a pressing need to address this issue, because prostitution although greatly frowned upon in most societies, in my opinion, is far from being eliminated, taking into account job scarcity currently experienced worldwide and economic difficulties that have been witnessed recently, the poor are getting poorer. It has come to a point where most people would go to any length to sustain themselves financially be it through prostitution, child labour or even consciously entering into an employment contract fully aware that one is lacking a valid work permit.
CHAPTER 5
CONCLUSION

5.1 RECOMMENDATIONS

Conclusion of prohibited and unlawful employment contracts remain a major problem in South Africa. As pointed out indeed laws exists to curb various vices which the states proclaims unlawful and/ or prohibited, this is however not satisfactory. For instance even though commercial sex is explicitly outlawed in the Sexual Offences Act, perpetrators of the business are still considered “employee[s]” as discussed in the “Kylie” case, I find it ironical in the sense that these same “employee[s]” are still precluded from claiming compensation upon having been dismissed unfairly, it is a mere consolation by the justice system to “Kylie” by awarding her with the “employee” status without really implementing the rights that flow with that same status. A solution has to be found regarding this matter.

On the issue of illegal immigrants, we have seen as finally concluded in the Discovery case that aside from the Immigration Act prohibiting employment of foreigners without valid work permits, an employer nevertheless faces criminal sanctions for employing such a foreigner whereas the ‘employee’ is still entitled to the LRA and other labour law remedies. This decision serves as a first step to protect vulnerable foreigners, however much more needs to be done especially on laws pertaining to immigrants who comply with refugee status need to be afforded more protection and their employment should be recognised just like that of an employer and a national of South Africa.

Further on the issue of Child Labour, again the Constitution explicitly prohibits employers from employing children, as seen almost all the legislation set the minimum age for a child to work at 15 years. However as highlighted in the study, it is not specified what work children between age of 15-18 years are lawfully allowed to perform. This is one of the missing vital information absent from all the legislations outlawing child labour in South Africa.
Overall on all the three themes discussed in this treatise, a complete deterrent needs to be established in the sense that legislation should provide proper solution that will prevent these seemingly lucrative employment relationships from growing.

5.2 CONCLUSION

Validity of a contract is one of the most important features of an employment contract. This serves as the basic point of departure to establish whether an employment contract is protected by the law. An important enquiry that needs to be made in relation to parties to a contract is to establish whether an in fact an “employer” and “employee” exists.

The object of performance of the contract of the employment contract also need be scrutinised. These are just a few of the most important features that play a vital role in employment contracts. In the case of commercial sex, the object of performance is clearly contrary to the common law principles of morality in South Africa and the Sexual Offences Act among other legislations discussed in previous chapters. Earlier it was noted that there are different views regarding the issue of prostitution some pressing for the legalisation of this business others strongly against it. To date the legislature has chosen to criminalise commercial sex.

This matter was on the spot by the judiciary in the “Kylie” case as discussed, despite of all the very interesting arguments forwarded by the applicant that generally sought to equalise commercial sex as just another employment which deserved recognition. The court just acknowledged the applicant as an “employee” but refused to give an order of compensation arising from unfair dismissal from her employer. This decision was ultimately based on the principle that courts should not sanction or encourage illegal activities.

The court had to deal with the intersession of the common law and labour legislation especially on the principles of morality and public policy. The code of conduct of a society in general plays a vital role in the acceptability of any activity in a particular society. Indeed such norms later translate to laws, in South Africa legalising of commercial sex still has a long way to go.
With the current influx of immigrants from neighbouring countries flocking into South Africa, employment of illegal immigrants is still a threat to proper functioning of the labour system more has to done to ensure immigrants are protected and as earlier mentioned a relaxation of immigration laws is incumbent.

Child labour as discussed is highly destructive to a child’s future it is therefore extremely important for the public to realise the risks a child is exposed to while working. It is up to authorities in various levels from the government to the local leaders in our communities to educate people on the risks of this practice especially in rural areas where child labour is widely practiced.
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