

**A definition of an employee and the legal protection of sex workers in
the workplace: a comparative study between
South Africa and Germany**

By

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ABSTRACT

The discussion looks at the history of commercial sex and how it has evolved in South Africa. The discussion evaluates the challenges that commercial sex workers face in South Africa and argues that the dignity of sex workers as citizens of South Africa are infringed and it would seem that less is being done to protect these workers due to nature of their work. It is argued that sex workers are still entitled to the rights enshrined in the Constitution despite the illegality of sex work. This discussion argues further that sex work continues to exist in South Africa despite its illegality and it would be prudent to address the challenges that encourage sex work because the criminalization of this type of work does not seem to minimize sex work. The discussion further looks at the case of *Kylie v CCMA* which has been subject to much debate recently. The discussion also makes a comparative study with Germany and determines the lessons which South Africa can learn from this country regarding decriminalization of sex work.

DECLARATION BY STUDENT

I, **Mrs Podu Mdhuli**, declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Masters of Laws in Labour Law, has not been previously submitted by me for a degree at this or any other university, and that this is my own work in design and execution and all material contained herein has been duly acknowledged.

.....

Mrs Podu Mdhuli

2014

DECLARATION BY SUPERVISER

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that this mini-dissertation by **Mrs Podu Mdhuli** for the degree of Masters of Laws (LLM) in Labour Law be accepted for examination.

.....

Adv. Lufuno Tokyo Nevondwe

2014

DEDICATION

This work is dedicated first to my loving, supportive and selfless husband Doctor Mdhuli who encouraged me to go further even when circumstances in my life could not allow me. Thank you “Nuna” for letting me live my dreams and becoming what I always wanted to become. Secondly it is dedicated to my baby boy Bokang Mdhuli who allowed this work to share space and attention with him though he needed all of it at his age. Mommy loves you my first fruit. Thirdly to my awesome parents Isaac and Florina Mamabolo for doing everything in your power to educate me to a point where I could do masters, thank you for your faith in me and for only wanting the best for me. “Ke a leboga dikolobe tsa bjatladi”.

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LIST OF ABBREVIATIONS

AIDS	ACQUIRED IMMUNE DEFICIENCY SYNDROME
BCEA	BASIC CONDITIONS OF EMPLOYMENT ACT
CC	CONSTITUTIONAL COURT
CCMA	COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION
CEDAW	COMMITTEE FOR ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
CGE	COMMISSION FOR GENDER EQUALITY
COIDA	COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT
EEA	EMPLOYMENT EQUITY ACT
ELRA	EDUCATION LABOUR RELATIONS ACT
HIV	HUMAN IMMUNODEFICIENCY VIRUS
ILO	INTERNATIONAL LABOUR ORGANISATION
NGO	NATIONAL GOVERNMENT ORGANISATIONS
LAC	LABOUR APPEAL COURT
LRA	LABOUR RELATIONS ACT
OHSA	OCCUPATIONAL HEALTH AND SAFETY ACT
PEPUDA	PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR

DISCRIMINATION ACT

PSLRA PUBLIC SERVICE LABOUR RELATIONS ACT

SCA SUPREME COURT OF APPEAL

SDA SKILLS DEVELOPMENT ACT

SWEAT SEX WORKERS EDUCATION AND ADVOCACY TASKFORCE

UIA UNEMPLOYMENT INSURANCE ACT

UICA UNEMPLOYMENT INSURANCE CONTRIBUTIONS ACT

VAT VALUE ADDED TAX

LIST OF INTERNATIONAL INSTRUMENTS

Committee for Elimination of All forms Of Discrimination Against
Women

TABLE OF CASES

- Borchers v CW Pearce & F Steward t/a Lubrite Distributors* (1991) 12 ILJ 383 (IC).
- Discovery Health v CCMA & Others* (2008) 29 ILJ 1480 (CC).
- European Court of Justice , Jany et al v Justitie, C-268/99 of 20.11.2001.*
- Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).
- Kylie v CCMA CA10/08* (LAC).
- Kylie v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 1918 (LC).
- Kylie v CCMA* (2010) 31 ILJ 1600 (LAC).
- Kylie v CCMA & Others* 2010 (4) SA 383 (LAC).
- Kylie v Commission for Conciliation, Mediation & Arbitration & Others* (2010) 31 ILJ 1600 (LAC).
- Kylie and Van Zyl t/a Brigittes* (2007) 28 ILJ 470 (CCMA).
- Kylie and Van Zyl t/a Brigittes* (2007) 4 BALR 338 (CCMA).
- Liberty Life Association of Africa v Niselow* (1996) 17 ILJ 673 (AC).
- Mangele v Wythe SA (Pty) Ltd unreported* (LAC) JA50/03.
- S v Jordan and Others* 2002 (6) SA 642 (CC).
- S v Makwanyane* 1995 (3) SA 391 (CC).
- Woolworths (Pty) Ltd v Beverly Whitehead* (1999) 20 ILJ 2580 (LC).

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Defence Act No. 44 of 1957.
Education Labour Relations Act No. 146 of 1993.
Employment Equity Act No. 55 of 1998
Immorality Act No. 5 of 1927.
Immorality and Prohibition of Mixed Marriages Amendment Act No. 72 of 1985.
Immorality Amendment Act No. 21 of 1950.
Labour Relations Act No. 66 of 1995.
Occupational Health and Safety Act No. 85 of 1993.
Prohibition of Mixed Marriages Act No. 55 of 1949.
Prohibition of Mixed Marriages Amendment Act No. 21 of 1968.
Police Act No. 7 of 1958.
Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.
Prostitution Act No. 20 of 2001.
Public Service Labour Relations Act No. 102 of 1993.
Sexual Offences Act No. 23 of 1957.
Sexual Offences and Related Matters Amendment Act No. 32 of 2007.
Sexual Offences Act No. 23 of 1957.
Sexual Offences and Related Matters Amendment Act No. 32 of 2007.
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German Penal Code.

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CHAPTER ONE: INTRODUCTION

1.1. Historical background to the study

Commercial sex is not a new phenomenon in South Africa. Prior to 1866, apart from some legislation to control disorderly conduct in public, the authorities did little to interfere with the practice of commercial sex work and there appeared to be no public outcries against this practice.¹ Commercial sex work was seen as inevitable; a necessary evil to satisfy male desire. Pressure for the legislature to take action came from the British. In 1866 the colonisers threatened to withdraw troops from Cape Town after more than 13 per cent of their troops were hospitalized for STIs.² Until the late 1980s, the exchange of sexual acts for reward was not criminalized (although various acts associated with prostitution, including soliciting, living off the earnings of prostitution and brothel-keeping, were criminalized).³ In 1988 Parliament amended the Immorality Act⁴ - the infamous Act which had criminalized sexual relations between different race groups in apartheid South Africa. It was renamed the Sexual Offences Act.⁵

With the advent of democracy in South Africa, there was a need to address the past imbalances under the apartheid government. This included the human rights abuses experienced by commercial sex workers. Accordingly, the Constitution of the Republic of South Africa was enacted as the supreme law of

¹ Jillian Gardner, "*Criminalising the act of sex: Attitudes to adult commercial sex work in South Africa*" at 330, online www.hsrepress.co.za accessed on 21 February 2013.

² *Ibid.*

³ Pudifin S and Bosch S, "*Demographic and social factors influencing public opinion on prostitution: an exploratory study in KwaZulu-Natal province, South Africa*", 2012 Volume 15 Potchefstroom Electronic Law Journal No 4 at 6.

⁴ Act 23 of 1957.

⁵ Act 23 of 1957.

the Country⁶ and it intends to establish a society that is based on democratic values, social justice and fundamental human right.⁷ The significance of the Constitution, 1996 is that it extends its protection to all citizens living in South Africa. This means that every citizen is equally protected by law. The Constitution, 1996 provides the Bill of Rights, which is the cornerstone of democracy in South Africa.⁸ It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state is required to respect, protect, promote and fulfill the rights in the Bill of Rights.⁹

Karl Klare once remarked that the Constitution, 1996 should be interpreted as a transformative Constitution.¹⁰ This means that the Constitution, 1996 should be interpreted wide enough to accommodate changes that take place in South Africa. The transformative nature of the Constitution, 1996 was further explained by Langa P when he stated that:

“Every nation should deeply consider ways in which the plight of those without a say in the democratic process and with little bargaining power in concluding the social contract may be elevated by sympathetic state intervention”.¹¹

The criminalization of consensual adult sex has a long and unfortunate history in South Africa. The first attempt to criminalize sex across the colour bar came in the form of a Cape law in 1902 which prohibited intercourse ‘for the purpose of

⁶ Section 2 of Act 108 of 1996.

⁷ See Preamble of Act 108 of 1996. .

⁸ Chapter 2 of Act 108 of 1996.

⁹ Section 7 of Act 108 of 1996.

¹⁰ Karl Klare “*Legal Culture and Transformative Constitutionalism*” (1998) 1.

¹¹ Chief Justice Langa *Transformative Constitutionalism and Socio –Economic Rights*; Rhodes House, Oxford (2008).

gain' between white women and black men.¹² This law was also enacted in the Orange Free State, Transvaal and Natal with the latter two provinces omitting the clause on 'gain'. These laws were indirect response of the arrival of British sex workers to the Transvaal mines after the South African War. The laws prohibiting interracial relations were thus from their inception entangled with anxieties surrounding sex work, female sexuality and race.¹³

Apartheid South Africa had a plethora of laws that prohibited and criminalized relationships across the colour bar. As it is stated above, today's laws criminalizing sex work has a common history with many of these apartheid policies that are today universally rejected. The following laws were the most notorious:¹⁴

- (a) The Immorality Act¹⁵ which prohibited extra –marital intercourse between whites and blacks.¹⁶
- (b) The Prohibition of Mixed Marriages Act¹⁷ which prohibited marriage between whites and members of other racial groups.¹⁸
- (c) The Immorality Amendment Act¹⁹ extended the Immorality of Act of 1927's prohibition on extra –marital intercourse between blacks and whites to all non-whites –including Coloureds and Asians.²⁰

¹² Lewin, J 'Politics and Law in South Africa: Essays on Race Relations London', (1963) page 87.

¹³ Boudin, C and Richter, M 'Adult Consensual Sex Work in South Africa-The Cautionary Message of Criminal Law and Sexual Morality', (2009) 25 SAJHR page 182.

¹⁴ Truth and Reconciliation Commission (TRC) of South Africa *TRC of South Africa Report* (1998) page 452.

¹⁵ The Immorality Act No 5 of 1927.

¹⁶ This Act commenced on 30 September 1927 and was repealed by section 23 of the Sexual Offences Act No 23 of 1957.

¹⁷ The Prohibition of Mixed Marriages Act No 55 of 1949.

¹⁸ This Act commenced on the 8 July 1949 and was repealed by section 7 of the Immorality and Prohibition of Mixed Marriages Amendment Act No 72 of 1985.

¹⁹ The Immorality Amendment Act No 21 of 1950.

²⁰ This Act commenced on the 12th May 1950 and was repealed by section 23 of the Sexual Offences Act No 23 of 1957.

(d) The Sexual Offences Act (Immorality Act)²¹ made it an offence for a white person to have sexual intercourse with a black person or to commit any 'immoral or indecent act'.²²

(e) The Prohibition of Mixed Marriages Amendment Act²³ invalidated any marriage entered into outside South Africa between a male citizen and a woman of another racial group.²⁴

The apartheid government went to great lengths to control South Africans' sexual behavior in general and to enforce racial segregation in particular so as to ensure that private relationships reflected the National Party ideal of 'separate development'.²⁵ Indeed, in the period 1950-1980, more than 11, 500 people were convicted of contravening the Immorality Act and more than twice that number were charged. Then, as now with the criminalization of sex work, the state wasted resources and invaded personal privacy and autonomy by policing consensual adult sexual behavior.²⁶

From the above submissions it can be observed and opined that the history of prostitution as a crime emanated from an unconstitutional state wherein human rights were not protected especially with the violations which related to rights to equality,²⁷ privacy,²⁸ discrimination based on race, nationality, profession and association.²⁹ Be that as it may that was then and now things are different to a greater extent. The Republic of South Africa is one, democratic State founded

²¹ The Sexual Offences Act No 23 of 1957 section 16.

²² This Act repealed the Immorality Act of 1927 and the Immorality Amendment Act of 1950 and commenced on 12 April 1957.

²³ The Prohibition of Mixed Marriages Amendment Act No 21 of 1968.

²⁴ This Act commenced on 27 March 1968 and was repealed by the Immorality and Prohibition of Mixed Marriages Amendment Act No 72 of 1985.

²⁵ Boudin, C *et al* 'Adult Consensual Sex Work In South Africa-The Cautionary Message of Criminal Law and Sexual Morality', (2009) 25 SAJHR page 183.

²⁶ Boudin, C *et al* 'Adult Consensual Sex Work In South Africa-The Cautionary Message of Criminal Law and Sexual Morality', (2009) 25 SAJHR page 183.

²⁷Section 9 of the Constitution.

²⁸Section 14 of the Constitution.

²⁹Section 9 (3) of the Constitution.

on the following values:³⁰ human dignity,³¹ the achievement of equality and the advancement of human rights and freedom,³² non-racialism and non-sexism,³³ supremacy of the Constitution and the rule of law.³⁴ This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.³⁵ Section 9 of the Constitution³⁶ provides that everyone is equal before the law and has the right to equal protection and benefit of the law.³⁷ Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.³⁸

1.2. Statement of the research problem

Sex work is very rife and practiced actively though informally in South Africa with these employees having no protection whatsoever because our South African law does not cover or protect contracts tainted with illegality. This is in accordance with the principle of *ex turpi causa non oritur actio* which 'prohibits the enforcement of immoral or illegal contracts', accordingly sex work in South Africa is regarded as immoral and of such turpitude so as to render an agreement concerning or linked to such immorality as void and thus unenforceable.³⁹ Moreover, because sex work is illegal in South Africa sex workers are not protected in their work places. This conduct I find inconsistent

³⁰Section 1 of the Constitution.

³¹Section 10 of the Constitution.

³²Section 1(a) of the Constitution.

³³ Section 1 (b) of the Constitution.

³⁴ Section 1 (c) of the Constitution.

³⁵ Section 2 of the Constitution.

³⁶ The Constitution of the Republic of South Africa, Act No 108 of 1996.

³⁷ The Constitution of the Republic of South Africa, Act No 108 of 1996, section 9 (1). See also *S v Jordan 2002 (6) SA 642 (CC) at 5-35*.

³⁸Section 9 (2) of the Constitution.

³⁹ See also Nevondwe, L 'The Interpretation of a Definition of an Employee in the Modern World: A *Kylie* Experience, International Labour Law and Social Protection Conference, Johannesburg, 27-30 August 2012, pages 10-11.

with the intents and purposes of the Constitution⁴⁰ especially the provisions which relate to equality and intolerance of discrimination on any level including profession or trade.

Criminalization of prostitution in South Africa does more harm to the nation than legalizing it. Because of its decriminalization women and children in particular find themselves involved in this trade without any protection whatsoever from the law or anyone which exposes them to abuse and exploitation by brothel owners, their clients and the police who are entrusted with the duty to protect those who are vulnerable in society as well. Moreover, they are exposed to high contraction of HIV AIDS.

Though this trade is not legal in South Africa it does not in any way stop people from participating in such. Prostitution is practiced anyway all over South Africa in big cities, small towns and rural villages.

It is evident that sex work continues to exist in South Africa despite its illegality. This has resulted in sex workers being vulnerable to all sorts of crimes, ranging from physical abuse from their clients and law enforcement officials who take advantage of this vulnerability. Sex workers often offer law enforcement officials sexual favours in order to escape prosecution. We opine that this is an unlawful exercise of public power. In *SWEAT v Minister of Safety & Security*⁴¹ it was argued that sex workers are often arrested in violation of the principle of legality and, secondly, that members of the South African Police Service and the City Police routinely use the powers of arrest conferred by the Criminal Procedure Act

⁴⁰ Constitution of the Republic of South Africa, Act No 108 of 1996.

⁴¹ *SWEAT v Minister of Safety & Security* 2009 (6) SA 513 WCC.

(CPA) ⁴² to arrest sex workers for the ulterior purpose of harassing them rather than for the lawful purpose of having them prosecuted.⁴³

South Africa must consider legalizing sex work in order to regulate and provide adequate protection of sex workers as citizens of South Africa who are entitled to adequate protection of the law. However legalizing this practice will face challenges because of the resistance of religious and cultural practices in South Africa.

Whilst sex work remains criminalized, the decision of the Labour Appeal Court (LAC) in *Kylie* case has put clarity to the definition and interpretation of the employee but has equally left a vacuum both in the field of labour law and criminal law. The cardinal question is what remedy is there for a sex worker who is unfairly dismissed by the employer. In terms of section 193(2) of the LRA, in the case of an unfair dismissal the primary remedy is reinstatement or re-employment. An order of reinstatement is the primary remedy for an unfair dismissal. We opine that reinstating a person in illegal employment would not only sanction illegal activity but may constitute an order on the employer to commit a crime.

The decision in *kylie* has classified a sex worker as an employee and can thus approach the relevant CCMA or Bargaining Council or the Labour Court where the arbitrator or a judge would then have to consider if the sex worker has been treated unfairly and what an appropriate remedy would be. As employees, would sex workers be eligible to pay tax and if so wouldn't that be promoting legality with illegality?

1.3. Literature review

⁴² Act 51 of 1977.

⁴³ *SWEAT v Minister of Safety & Security* 2009 (6) SA 513 WCC at Para 3.

Commercial sex work is generally deemed as against public policy. It is viewed as against good morals and as a result it should not be sanctioned. Often those who practice are incorrectly viewed as having forfeited their constitutional rights.⁴⁴ The most recent matter before our courts and tribunals was the matter of *Kylie v CCMA*⁴⁵ which may be viewed as having set a crucial precedent to the labour law jurisprudence. In this matter, *Kylie* was a sex worker employed at a massage parlour offering amongst others sexual services. She claimed that she was unfairly dismissed by her employer and she referred the dispute to the CCMA for adjudication. The CCMA was tasked to consider whether it had jurisdiction to hear the matter as it was an illegal activity.

Commissioner Goldman found that the CCMA had no jurisdiction to hear the matter, as *Kylie* had been employed as a sex worker, which employment was per se unlawful in terms of the Sexual Offences Act.⁴⁶ The Commissioner further said that if the law forbids the contract, no obligations arise from that contract. The Commissioner also noted that the Labour Relations Act⁴⁷ (hereinafter referred to as the 'LRA') did not intend to change the common law relating to illegal unenforceable employment relationships. Finally Commissioner Goldman held that it is not for an administrative body such as the CCMA to change the law. This is a function of the legislature or the Constitutional Court.⁴⁸

At the Labour Court, Cheadle Acting Judge (AJ) rejected the notion that the CCMA did not have jurisdiction. It was found that the definition of 'employee' in section 213 of the LRA⁴⁹ was wide enough to include a person whose contract of employment was enforceable at common law. However, despite this

⁴⁴ This would include their constitutional rights to fair labour practice, dignity and equality amongst others.

⁴⁵ *Kylie v CCMA and Others (2010) 31 ILJ 1600 (LAC)*.

⁴⁶ The Sexual Offences Act No 23 of 1957.

⁴⁷ The Labour Relations Act No 66 of 1995.

⁴⁸ Selected Summaries for the CCMA Arbitration Awards: July- December, 2006, page 10.

⁴⁹ The Labour Relations Act No 66 of 1995.

Cheadle AJ found that a sex worker was not entitled to protection against unfair dismissal as provided in terms of section 185 (a) of the LRA⁵⁰ because it would be contrary to a common law principle which had become entrenched in the Constitution⁵¹ that courts 'ought not to sanction or encourage illegal activity'.⁵²

Davis AJ says that section 23⁵³ provides that 'everyone has the right to fair labour practices'. The term 'everyone', which follows the wording of section 7(1) of the Constitution⁵⁴ which provides that the Bill of Rights enshrines the right 'of all people in the country', is supportive of an extremely broad approach to the scope of the right guaranteed in the Constitution.⁵⁵ Davis JA's point was confirmed by Ngcobo J (as he then was) in the case of *Khosa v Minister of Social Development*⁵⁶ when he found that "the word 'everyone' is a term of general import and unrestricted meaning. It means what it conveys. Once the State puts in place a social welfare system, everyone has a right to have access to that system".⁵⁷

The Honourable Chaskalson P (as he then was) in the case of *S v Makwanyane*⁵⁸ said that the right to life and dignity 'vests in every person, including criminals convicted of vile crimes'. The learned president went on to say that these

⁵⁰ The Labour Relations Act No 66 of 1995.

⁵¹ The Constitution of the Republic of South Africa, Act No 108 of 1996.

⁵² *Kylie v CCMA and Others (2010) 31 ILJ 1600 (LAC)* at 3.

⁵³ Section 23 of the Constitution of the Republic of South Africa, Act No 108 of 1996.

⁵⁴ The Constitution of the Republic of South Africa, Act No 108 of 1996. See also Nevondwe, L 'The Interpretation of a Definition of an Employee in the Modern World: A Kylie Experience, International Labour Law and Social Protection Conference, Johannesburg, 27-30 August 2012, pages 10-11.

See also Nevondwe, L 'International Labour Law and Social Protection Conference, Johannesburg South Africa, 27-30 August 2012: The Interpretations of a Definition of an Employee in the Modern World: A Kylie Experience, 8/17/2012 page 8.

⁵⁵ *Kylie v CCMA and Others (2010) 31 ILJ 1600 (LAC)* at 16.

⁵⁶ *Khosa v Minister of Social Development 2004 (6) SA 505 (CC)*.

⁵⁷ *Kylie v CCMA and Others (2010) 31 ILJ 1600 (LAC)* at 111.

⁵⁸ *S v Makwanyane 1995 (3) SA 391 (CC)*.

criminals 'do not forfeit their rights under the Constitution⁵⁹ and are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment'.⁶⁰

Davis JA (Zondo and Jappie JJA concurring) hearing an appeal on Cheadle AJ's decision examined the question-'does a constitutional protection of fair labour practices as enshrined in section 23 of the Constitution⁶¹ apply to a person who would, but for an engagement in illegal employment, enjoy the benefits of this constitutional right?'⁶² Davis JA answered in the affirmative. He held that the scope of the section 23 right, and particularly the use of the word 'everyone', indicated the 'generous' and 'extremely broad' approach to fair labour.⁶³ The word 'everyone' included not only parties to a contract of employment but also those persons in an employment or quasi-employment relationship.⁶⁴

Davis AJ relied on the minority dicta of Sachs and O'Regan JJ in *S v Jordan*⁶⁵ when they held the following:

'... as sex workers cannot be stripped of their right to be treated with dignity by their clients, it must follow that, in their other relationship namely with their employers, the same protection should hold. Once it is recognised that they must be treated with dignity not only by their customers but by their employers, s 23 of the Constitution, which, at its

⁵⁹ The Constitution of the Republic of South Africa, Act No 108 of 1996.

⁶⁰ *S v Makwanyane* 1995 (3) SA 391 (CC), at 137.

⁶¹ The Constitution of the Republic of South Africa, Act No 108 of 1996.

⁶² *Kylie v CCMA and Others* CA 10/08 (LAC) at 10.

⁶³ *Kylie v CCMA and Others* CA 10/08 (LAC) at 16 and 21.

⁶⁴ *Kylie v CCMA and Others* CA 10/08 (LAC) at 21.

⁶⁵ *S v Jordan* 2002 (6) SA 642 (CC) at 74.

core, protects the dignity of those in an employment relationship, should also be of application'.⁶⁶

In short, it was held that criminalisation of prostitution does not entail a denial to a sex worker of the Constitution's protection in particular section 23(1), and its legislative implementation in the form of the LRA. While explicitly stating that the judgement 'does not and cannot sanction sex work',⁶⁷ the Labour Appeal Court's decision in *Kylie* is a significant jurisprudential development in respect of sex workers' rights.⁶⁸

Nevondwe aligns himself to the judgement of Davis AJ by stating that by affording a sex worker a protection, it simply means that one can go to the extent of giving relief. However, the fact that prostitution is rendered illegal does not, for the reasons destroy all the constitutional protection which may be enjoyed by someone as *Kylie*, a sex worker. After all, *Kylie* is also a human being who is also entitled to constitutional protection in the Bill of Rights.⁶⁹ The sex worker's dignity should not be exploited or abused. This remains intact and the concomitant constitutional protection must be available to her as it would to any other person whose dignity is attacked unfairly. By extension from section 23(1),⁷⁰ the LRA ensures that an employer respects these rights within the context

⁶⁶ *Kylie v CCMA and Others CA 10/08 (LAC) at 26*. See also Du Plessis, M, Penfold, G and Pudifin, S 'Bill of Rights Jurisprudence: Annual Survey SA Law', page 114.

⁶⁷ *Kylie v CCMA and Others CA 10/08 (LAC) at 54*. See also Du Plessis, M, Penfold, G and Pudifin, S 'Bill of Rights Jurisprudence: Annual Survey SA Law', page 115.

⁶⁸ Du Plessis, M, Penfold, G and Pudifin, S 'Bill of Rights Jurisprudence: Annual Survey SA Law', page 115.

⁶⁹ See also Nevondwe, L 'The Interpretation of a Definition of an Employee in the Modern World: A *Kylie* Experience, International Labour Law and Social Protection Conference, Johannesburg, 27-30 August 2012, page 20.

⁷⁰ The Constitution of the Republic of South Africa, Act No 108 of 1996, section 23(1).

of an employment relationship. However, each case will have to be decided in terms of the facts thereof.⁷¹

According to Nevondwe not all persons who are in an employment relationship which is prohibited by law will enjoy the remedy in terms of the LRA. In so deciding, a tribunal or court is engaged with the weighing of principles; on the one hand the *ex turpi causa* rule which prohibits enforcement of illegal contracts and on the other public policy sourced in the values of the Constitution,⁷² which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community. The *ex turpi causa* rule is, as is evident from its implementation by the court, a principle of law for it guides rather than dictates a single result.⁷³

According to Nevondwe the judgement of *Kylie* has expanded the boundaries of labour law, such that our legislative authorities, courts and competent tribunals should now devise creative responses towards extending labour protective legislation to those in desperate need.⁷⁴

Nevondwe arrived at the conclusion that labour laws in South Africa are to a large extent much concerned with the regulation of formal labour markets to the exclusion of workers in the informal sector. Hence exploitation and insecurity is so ubiquitous. Amongst the critical phenomena in the industry is lack of

⁷¹ See also Nevondwe, L 'The Interpretation of a Definition of an Employee in the Modern World: A *Kylie* Experience, International Labour Law and Social Protection Conference, Johannesburg, 27-30 August 2012, page 20.

⁷² See also Nevondwe, L 'The Interpretation of a Definition of an Employee in the Modern World: A *Kylie* Experience, International Labour Law and Social Protection Conference, Johannesburg, 27-30 August 2012, page 20.

⁷³ See also Nevondwe, L 'The Interpretation of a Definition of an Employee in the Modern World: A *Kylie* Experience, International Labour Law and Social Protection Conference, Johannesburg, 27-30 August 2012, pages 20-21.

⁷⁴ See also Nevondwe, L 'The Interpretation of a Definition of an Employee in the Modern World: A *Kylie* Experience, International Labour Law and Social Protection Conference, Johannesburg, 27-30 August 2012, page 21.

employment. In this forms of employment relationships, workers fall beyond the protection against unfair dismissal. This case of *Kylie* has successfully laid a foundation that all persons in an employment relationship, inclusive of those in the informal sector, should also have access to labour protective legislation against unfair dismissal and other labour relations (employees) predicaments.⁷⁵ Having said that Nevondwe however, further opined that section 39 of the Constitution⁷⁶ stipulates that when you interpret any legislation and developing common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. In this case, if the CCMA awards compensation or reinstatement to Kylie, it will be creating a wrong precedent in our South African law.

Section 39 of the Constitution⁷⁷ also provides that when the court or tribunal is interpreting the Bill of Rights it must consider international and may consider foreign law. Against this background, the Sex-Worker Forum in Germany, voluntary sex work of adults is not a crime, but an accepted form of labour. When the United Nations urged Germany to protect the labour and social rights of sex workers,⁷⁸ the State Party introduced the Prostitution Act,⁷⁹ in force since 1 January 2002. It permits voluntary sex work of adults, allows employment of sex workers, grants sex workers access to a court, if clients fail to pay for their services, and gives sex workers access to social security (sick pay, pension, unemployment benefits). This protection extends to citizens of other member states of the European Union: if they are able to support themselves as self-

⁷⁵ See also Nevondwe, L 'The Interpretation of a Definition of an Employee in the Modern World: A *Kylie* Experience, International Labour Law and Social Protection Conference, Johannesburg, 27-30 August 2012, page 21.

⁷⁶ The Constitution of the Republic of South Africa, Act No 108 of 1996.

⁷⁷ The Constitution of the Republic of South Africa, Act No 108 of 1996.

⁷⁸ Committee on the Elimination of all forms of Discrimination Against Women /C/DEU/2-3 of 04.02.2000.

⁷⁹ The Prostitution Act No 20 of 2001.

employed sex workers, then they must be given residents' permits, as sex work is labour in the full juridical sense.⁸⁰

According to the Forum German laws replaced formerly mandatory health checks and registration of sex work by anonymous and voluntary public health services, open to sex workers and their clients.⁸¹ Criminal law severely penalizes activities relating to the "exploitation of prostitution", pimping and trafficking in persons,⁸² and it prohibits the abuse of children or adolescents in pornography or prostitution. However, at the provincial level, legislation by the Lander and their administration by communities may restrict and *de facto* prohibit and criminalize voluntary sex work by defining narrow conditions. At a communal administration's request the provincial government is authorized to completely prohibit sex work in communities with less than 50,000 inhabitants. In communities with more than 20,000 residents, and in districts without communities, sex work may be confined to "red light zones. By contrast, Northern provinces, e.g. Berlin, permit sex work also in certain private apartments, and some other provinces tolerate unobtrusive sex work, but do not permit it.⁸³

1.4. Aims and objectives of the study

This study is aimed at conducting a concrete analysis of the current laws, policies, regulations and guidelines regulating sex work in South Africa. This study

⁸⁰ European Court of Justice , Jany et al v Justitie, C-268/99 of 20.11.2001.

⁸¹ Submission from Sex Worker Forum to the United Nations Committee against Torture, ' Germany's 5th periodic report' CAT/C/DEU/5, Vienna, 12/10/2011. Accessed on en.wikipedia.org/wiki/prostitution in Germany, accessed on 12/10/12 at 13h32.

⁸² Sections 180a, 181, 232 and 233a of the German Criminal Penal Code.

⁸³ Submission from Sex Worker Forum to the United Nations Committee against Torture, ' Germany's 5th periodic report' CAT/C/DEU/5, Vienna, 12.10.2011. Accessed on en.wikipedia.org/wiki/prostitution in Germany, accessed on 12/10/12 at 13h32.

will also evaluate the impact which the decriminalization of sex work has on the field of labour law in South Africa.

The aims of the study are to educate and empower women who belong to the minority groups which have suffered as a result of the character of their work despite the existence of their constitutional rights.

Furthermore, the aim is to influence the state and the legislature to revisit the statute criminalizing sexual work and come to a point of legal reform which will eventually decriminalize it and regulate the trade in our country.

Firstly that will be done by conducting workshops and awareness in the communities. Secondly, same will be done by legal reform and enactment of statutes. Last but not least the objective can also be achieved by the decriminalization of the prostitution.

Furthermore, the study will benefit the following people will *inter alia* academia, legislators, labour practitioners, community centres, National Government's Organisations (hereinafter referred to as "NGO"), women, Department of Justice and Constitutional Development, National Prosecuting Authority, Sexual Offences Courts and Department of Women, Children, Youth and People with Disability this is for your making South Africa a better place in terms of protection of employees in the work place.

This study will also benefit the students who are studying labour law, criminal law, and constitutional law. It will assist young and emerging researchers who are investigating on the same topic to bring insight into their programmes.

1.5 Research Methodology

The research methodology used in this study is qualitative as opposed to quantitative. Consequently, a combination of legal comparative and legal historical methods, based on jurisprudential analysis, is employed. Legal comparative method will be applied to find solutions, especially for the interpretation of the definition of an employee and protection of sex workers in the workplace. This research is library based and reliance is on library materials such as textbooks, reports, legislations, regulations, case laws, articles published in journals and internet. The study established the development of legal rules, the interaction between law and social justice, and proposed solutions or amendments to the existing law or constitutional arrangement, based on practical or empirical and historical facts. Concepts were analysed and arguments based on discourse analysis were developed. A literature and case law survey of the constitutional prescriptions and interpretation of statutes were done.

1.6 Scope and limitation of the study

The study consists five interrelated chapters. Chapter one is the introductory chapter laying down the foundation. Chapter two deals with the definition of an employee while chapter three deals with legislative framework and case law jurisprudence. Chapter four deals with comparative study between South Africa and Germany. Finally, chapter five deals with the summary of conclusions drawn from the whole study and make some recommendations.

CHAPTER TWO: DEFINITION OF AN EMPLOYEE

2.1 Introduction

In a labour dispute, the first question is whether the person claiming relief is actually an employee. If the person is an employee, the next question is whether he or she falls within the scope of the applicable legislation such as the LRA,⁸⁴ the Basic Conditions of Employment Act⁸⁵ and the Employment Equity Act.⁸⁶ The importance of identifying whether the person claiming relief is actually an employee lies in the fact that only person defined as 'employees' have recourse to the dispute resolution provisions of the LRA.⁸⁷ Further, only persons classified as employees can be victims of unfair labour practice.⁸⁸

The LRA⁸⁹ defines an employee as follows: (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any other manner assists in carrying on or conducting the business of the employer.⁹⁰ This definition is exactly identical to the definition of an employee contained in section 1 of the Basic Conditions of Employment Act⁹¹ (hereinafter referred to as 'BCEA'). A somewhat different definition appears in section 1 of the Employment Equity Act⁹² (hereinafter referred to as the 'EEA') this section defines an employee as 'any person other than an independent contractor

⁸⁴ Labour Relations Act No. 66 of 1995.

⁸⁵ Basic Conditions of Employment Act No. 75 of 1997.

⁸⁶ Employment Equity Act No. 55 of 1998.

⁸⁷ Labour Relations Act No. 66 of 1995.

⁸⁸ Muswaka, L' Sex Workers and the Right to Fair Labour Practices: *Kylie v Commissioner for Conciliation Mediation and Arbitration*, (2011) 23 SA Merc LJ, page 536.

⁸⁹ Labour Relations Act No 66 of 1995.

⁹⁰ Section 213 of the Labour Relations Act No 66 of 1995.

⁹¹ Basic Conditions of Employment Act No 75 of 1997.

⁹² Employment Equity Act No 55 of 1998.

who (a) who works for another person or the State and who receives, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer.⁹³ Moreover, for purposes of sections 6, 7 and 8 of the Act⁹⁴ 'employee' includes an applicant for employment.

2.2. Definition of an employee.

For the first time, the LRA⁹⁵ includes employees in the public service and in the education sector. Before 1993, people working for the State were excluded from the ambit of labour legislation.⁹⁶ During 1993, two pieces of legislation: the Public Service Labour Relation Act⁹⁷ (hereinafter referred to as 'PSLRA') and the Education Labour Relations Act⁹⁸ (hereinafter referred to as 'ELRA') came into force, giving employees in these sectors the right to belong to a trade union and to bargain collectively⁹⁹. But now, in terms of the LRA¹⁰⁰ these employees also fall within the ambit of labour legislation and the State, in respect of the public sector and educators, is now regarded as an employer¹⁰¹.

For some time before the LRA,¹⁰² domestic workers and farm workers were excluded from the ambit of general labour legislation. Given the wide scope of

⁹³ Bassoon A.C, Christianson M.A, Garbers C, le Roux P.A.K, Mischke C and Strydom E.M.L, *Essential Labour Law*, (2005), pages 22-23.

⁹⁴ Section 9 of the Employment Equity Act No 55 of 1998.

⁹⁵ Labour Relations Act No 66 of 1995.

⁹⁶ Bassoon A.C, Christianson M.A, Garbers C, le Roux P.A.K, Mischke C and Strydom EM.L, *Essential Labour Law*, Fourt Combined Edition, Labour Law Publication, 2005, pages 23.

⁹⁷ Public Service Labour Relations Act No of 1993.

⁹⁸ Education Labour Relations Act No 1993.

⁹⁹ Bassoon et al, *ibid*, page 23.

¹⁰⁰ Labour Relations Act No 66 of 1995.

¹⁰¹ Bassoon, *ibid*.

¹⁰² Labour Relations Act No 66 of 1995.

the definition an 'employee' in the LRA,¹⁰³ these workers now also fall within the scope of the definition of an employee. They are expressly included within the ambit of the BCEA.¹⁰⁴ At the core of these statutory definitions, however, lies a reference to the contract of employment. One person working for another in exchange for some form of remuneration.¹⁰⁵

At first glance, part (b) of the definition quoted above appears very wide indeed. What does the legislation mean if it refers to a person who 'in any manner assists in carrying on or conducting' the employer's business?¹⁰⁶ In *Borcherds v CW Pearce & F Steward t/a Lubrite Distributors*¹⁰⁷ a decision pre-dating the LRA¹⁰⁸ the Industrial Court held that the 'assistance' should be rendered with some form of regularity and there should be a legal obligation to render such 'assistance'. Going further in its attempt to limit the wide scope of a similar definition, the Industrial Court also held that a distinction should be made between, on the one hand, assisting an employer in carrying on his business, and, on the other hand, doing work that is of assistance to an employer in the conducting of his business. It was argued that work 'of assistance to' the employer would not be work done by an employee, but done in terms of some other contractual arrangement, such as that of an independent contractor¹⁰⁹.

Also referring to part (b) of the definition, the Labour Appeal Court, in *Liberty Life Association of Africa v Niselow*¹¹⁰ held as follows: ' The latter part in particular may seem to extend the concept of employment far beyond what is commonly

¹⁰³ Ibid.

¹⁰⁴ Basic Conditions of Employment Act No 75 of 1997.

¹⁰⁵ Bassoon et al, *ibid*.

¹⁰⁶ Bassoon et al, *ibid*.

¹⁰⁷ *Borcherds v CW Pearce & F Steward t/a Lubrite Distributors* (1991) 12 ILJ 383 (IC).

¹⁰⁸ Labour Relations Act No 66 of 1995.

¹⁰⁹ Bassoon et al, *ibid*, page 23.

¹¹⁰ *Liberty Life Association of Africa v Niselow* (1996) 17 ILJ 673 (AC).

understood thereby. To adopt a literal interpretation though would clearly result in absurdity. I think that the history of the legislation which has culminated in the present statute, and the subject matter of the statute itself, lends support to a construction which confines its operation to those who place their capacity to work at the disposal of others, which is the essence of employment. It is not necessary in this case to decide where the limits of definition lie. It is sufficient to say that in my view the "assistance" which is referred to in the definition contemplates that form of assistance which is rendered by an employee, though the person he assists may not necessarily be his employer. In my view it does not include assistance of the kind rendered by independent contractors.'¹¹¹

According to Skills Development Act¹¹² (hereinafter referred to as 'SDA') "Employee" means:

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assist in carrying on or conducting the business of the employer, and "employed" and "employment" have a corresponding meaning.¹¹³

Whereas Unemployment Insurance Act¹¹⁴ (hereinafter referred to as 'UIA') defines an employee as follows: "Employee" means any natural person who receives remuneration or to whom remuneration accrues in respect of services

¹¹¹ Bassoon et al, *ibid*, page 24.

¹¹² Skills Development Act No 97 of 1998.

¹¹³ Butterworths Statutes of South Africa, Classified and Annotated from 1910, Volume 5, (2010), Part 23, Section 1, pages 313.

¹¹⁴ Unemployment Insurance Act No 63 of 2001.

rendered or to be rendered by that person, but excludes any independent contractor.¹¹⁵

According to Unemployment Insurance Contributions Act ¹¹⁶ (hereinafter referred to as 'UICA') "Employee" means any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.¹¹⁷

According to Compensation for Occupational Injuries and Diseases Act ¹¹⁸ (hereinafter referred to as 'COIDA') "employee" means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes:

- (a) a casual employee employed for the purpose of the employer's business;
- (b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;
- (c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;

¹¹⁵ Butterworths Statutes of South Africa, Classified and Annotated from 1910, Volume 5, (2010), Part 23, Section 1, page 351.

¹¹⁶ Unemployment Insurance Contributions Act No 4 of 2002.

¹¹⁷ Butterworths Statutes of South Africa, Classified and Annotated from 1910, Volume 5, (2010), Part 23, Section 1, pages 367-368.

¹¹⁸ Compensation for Occupational Injuries and Diseases Act No 130 of 1993.

(d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee; but does not include-

(i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act¹¹⁹, and who is not a member of the Permanent Force of the South African Defence Force;

(ii) a member of the Permanent Force of the South African Defence Force while on "service in defence of the Republic" as defined in section 1 of the Defence Act¹²⁰,

(iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act¹²¹, on "service in defence of the Republic" as defined in section 1 of the Defence Act¹²²,

(iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;

(v) a domestic employee employed as such in a private household.¹²³

In the same way according to Occupational Health and Safety Act ¹²⁴ "Employee" means, subject to the provisions of subsection (2), any person who is employed by or works for an employer and who receives or is entitled to receive

¹¹⁹ Defence Act No 44 of 1957.

¹²⁰ Ibid.

¹²¹ Police Act No 7 of 1958.

¹²² Ibid.

¹²³ Butterworths Statutes of South Africa, Classified and Annotated from 1910, Volume 5, (2010), Part 23, Section 1, page 54.

¹²⁴ Occupational and Safety Act No 85 of 1993.

any remuneration or who works under the direction or supervision of an employer or any other person.¹²⁵

2.3. The presumption as to who is an employee.

The 2002 amendments to the LRA¹²⁶ and BCEA¹²⁷ introduced a provision into each Act creating a rebuttable presumption as to when a person is an employee. These provisions are found in section 200A of the LRA¹²⁸ and section 83A of the BCEA¹²⁹. As indicated in paragraph 3, these provisions only apply to persons with annual earnings of less than the threshold amount determined by the Minister in terms of section 6(3) of the BCEA.¹³⁰

The presumption that a person is an employee comes into operation if the employee is able to establish that one of seven factors listed in the provision is present in the relationship with the person for whom they work or render services. Before examining the list of seven factors, it is necessary to describe the general operation of the presumption.¹³¹

The presumption applies in any case in which there is a dispute as to whether the applicant is an employee. For the presumption to come into operation, the

¹²⁵ Butterworths Statutes of South Africa, Classified and Annotated from 1910, Volume 5, (2010), Part 23, Section 1, page 34

¹²⁶ Labour Relations Act No 66 of 1995.

¹²⁷ Basic Conditions of Employment Act No. 57 of 1997.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Workinfo.com Human Resources for Today's Workplace, 1998, 2010, Workplace Performance Technologies (PTY) LTD (Online February 2012) www.workinfo.com.

¹³¹ Du Plessis JV, Fouche MA, Van Wyk MW, 'A Practical Guide to Labour Law', LexisNexis, Butterworths, 5th Edition, Durban, pages 50-51. See also Code of Good Practice: Who is an employee, volume 498, Government Gazette No.29445, (2006), pages 8-11.

person who alleges they are an employee ('the applicant') is required to demonstrate two things¹³²:

(a) that they work for or render services to the person or entity cited in the case as their employer;

(b) that one of the factors listed in either section 200A(1)¹³³ or section 83A(1)¹³⁴ is present in their relationship with that employer.

The presumption applies regardless of the form of the contract. Accordingly, the fact that the applicant may have agreed to a term in a contract stating that he or she is not an employee or that he or she is an independent contractor, is not relevant for the purposes of determining whether the presumption comes into play. The person applying the presumption must evaluate evidence as to the actual nature of the employment relationship, and not determine the matter by reference to a statement as to the form that the relationship takes in a contract¹³⁵.

Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present¹³⁶:

(a) the manner in which the person works is subject to the control or direction of another person,

¹³² *Ibid.*

¹³³ Labour Relations Act No 66 of 1995.

¹³⁴ Basic Conditions of Employment Act No 57 of 1997.

¹³⁵ *Ibid.*

¹³⁶ Section 200A (1) of the Labour Relations Act No 66 of 1995.

The criterion of control or direction will generally be present if the applicant is required to obey the lawful and reasonable commands, orders or instructions of the employer or the employer's personnel as to the manner in which they are to work. This criterion is not present where the person is hired to perform a particular task or produce a particular product and is entitled to determine the manner in which the task is to be performed or the product produced. The fact that an employer is entitled to take disciplinary action against the person (including terminating the contract) as a result of the manner in which the person works is a strong indication of the presence of control or direction;¹³⁷

(b) the person's hours of work are subject to the control or direction of another person,

This factor will be present if the person's working hours are a term of the employment relationship;

(c) in the case of a person who works for an organisation, the person forms part of that organisation, this factor will apply in the case of an employer that constitutes a corporate entity. It will not apply in situations such as the employment of a domestic worker or in a situation where the employer operates as a "one person" business. The factor will be present if the applicant forms an integrated part of the organisation of the employer. This integration will be evident in different ways such as whether the person's position is considered in the long-term planning of the company; whether the person's position appears

¹³⁷ Workinfo.com Human Resources for Today's Workplace, 1998, 2010, Workplace Performance Technologies (PTY) LTD (Online February 2012) www.workinfo.com.

in company organograms; whether the person attends regular staff meetings and receives circulars or emails directed at staff of the company¹³⁸ etc;

(d) "the person has worked for that other person for an average of at least 40 hours per month over the last three months"

Where the applicant is still in the employment of the employer, this should be measured over the three months prior to the case commencing. If the employment relationship has been terminated, it should be measured with reference to the three-month period preceding its termination;

(d) "the person is economically dependent on the other person for whom he or she works or renders services". Economic dependence will be present if the applicant depends upon the employer for the supply of work. Economic dependence relates to the "market" position of the applicant rather than to, for instance, the fact that they depend upon their income for their survival. In general terms, economic dependence will be present unless the applicant is truly independent of the employer. The applicant will be truly independent if he or she is entitled to offer his or her skills to others. Where a person remains entitled to contract his or her services with others at the same time as working for the employer he or she is unlikely to be economically dependent. A person is unlikely to be truly independent of the employer if the person does not assume any responsibility for the risks of failure and the benefits of success. An employee is generally paid a fixed wage or salary regardless of the quality of work while an independent contractor may only be entitled to receive a reduced fee or no fee if there is poor quality work or incompetence. The fact that an employee may receive payments in addition to salary or wages (e.g. an attendance

¹³⁸ Workinfo.com Human Resources for Today's Workplace, 1998, 2010, Workplace Performance Technologies (PTY) LTD (Online February 2012) www.workinfo.com.

bonus or a bonus dependant on the profitability of the employee) does not remove them from being an employee. An independent contractor who agrees on a fee or price may have to bear the risk of loss if performance costs exceed that fee or price or if there are increases in raw material prices. Employees do not bear any equivalent risk. An independent contractor may make business decisions that directly affect profitability while an employee typically does not make these decisions¹³⁹;

(f) "the person is provided with the tools of trade or work equipment by the other person"

This provision applies regardless of whether the tools or equipment are supplied free of cost or their cost is deducted from the applicant's earnings or the applicant is required to re-pay the cost. The term "tools of trade or work equipment" covers the means by which the applicant performs his or her work and extends beyond tools in the narrow sense to include items required for work such as books¹⁴⁰;

(g) "the person only works for or renders services to one person"

This factor will not be present if the person works in any other manner for or supplies services to another. It is not relevant whether that work is permitted by the relationship between the two or whether it is "moonlighting"¹⁴¹.

If any of the factors listed in the preceding paragraph are established, the applicant is presumed to be an employee. The onus will then rest on the employer to produce evidence to the contrary establishing that the relationship is in fact one of independent contracting. If the employer is unable to produce

¹³⁹ Workinfo.com Human Resources for Today's Workplace, 1998, 2010, Workplace Performance Technologies (PTY) LTD (Online February 2012) www.workinfo.com.

¹⁴⁰ Ibid.

¹⁴¹ Ibid

such evidence or if the evidence is not convincing, the applicant is presumed, for the purposes of the case, to be an employee.¹⁴²

¹⁴² Section 200A of the Labour Relations Act No. 66 of 1995, page 210, of Juta's Pocket Statutes.

CHAPTER THREE: LEGISLATIVE FRAMEWORK AND CASE LAW JURISPRUDENCE

3.1. Introduction

South Africa has several legislation currently dealing with sex work inter alia the Sexual Offences Act¹⁴³ and the Sexual Offences Amendment Act.¹⁴⁴ However, since we are not really looking into the criminal side of things only, we will look into all relevant legislative frameworks starting with our very own Constitution¹⁴⁵ seeing that we are a democratic country and move to labour statutes.

3.2 The Constitution

The South African Constitution¹⁴⁶ outlines the rights guaranteed by the State and forms the basis for all laws passed in the country. Of special importance to individual citizens is the Bill of Rights in Chapter of the Constitution.¹⁴⁷ The most important sections of the from the employment perspective are those relating to equality, human dignity, slavery, servitude and forced labour, privacy, freedom of expression and assembly and freedom of association.¹⁴⁸ Furthermore, the Constitution¹⁴⁹ provides that 'everyone' has a right to fair labour practice'.¹⁵⁰ I submit that 'everyone' must include every employee irrespective of the type of work one does, and this must be upheld as it is a constitutional right afforded to every citizen in the country. More especially because this Constitution¹⁵¹ is the

¹⁴³ Sexual Offences Act No. 23 of 1957.

¹⁴⁴ Sexual Offences Amendment Act No. of 2000.

¹⁴⁵ The Constitution of the Republic of South Africa, Act No. 108 of 1996.

¹⁴⁶ The Constitution of the Republic of South Africa, Act No. 108 of 1996.

¹⁴⁷ The Constitution of the Republic of South Africa, Act No. 108 of 1996, Chapter 2: Bill of Rights.

¹⁴⁸ Bendix, S 'Labour Relations In Practice: An Outcome- Based Approach', 1st Edition, Juta, Cape Town, (2010), page 25. See also sections 9, 10, 12, 13, 14, 16 and 18 of the Constitution of the Republic of South Africa, Act No. 108 of 1996.

¹⁴⁹ The Constitution of the Republic of South Africa, Act No. 108 of 1996.

¹⁵⁰ Section 23 of the Constitution of the Republic of South Africa, Act No. 108 of 1996.

¹⁵¹ The Constitution of the Republic of South Africa, Act No. 108 of 1996.

supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.¹⁵²

3.3 Labour Relations Act

The purpose of the Act¹⁵³ is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act,¹⁵⁴ which are:

- (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution,¹⁵⁵
- (b) to give effect to obligations incurred by the Republic as a member State of the International Labour Organization,
- (c) to provide a framework within which employees and their trade unions, employers and employers' organizations can-
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - (ii) formulate industrial policy; and
- (d) to promote-
 - (i) orderly collective bargaining;
 - (ii) collective bargaining at sectoral level;
 - (iii) employee participation in decision-making in the workplace; and
 - (iv) the effective resolution of labour disputes.¹⁵⁶

The overall purpose of this Act¹⁵⁷ is to promote the peaceful and orderly conduct of the employment relationship by bestowing certain rights and

¹⁵² The Constitution of the Republic of South Africa, Act No. 108 of 1996, Chapter 1, section 2.

¹⁵³ Labour Relation Act No. 66 of 1995.

¹⁵⁴ Labour Relation Act No. 66 of 1995.

¹⁵⁵ The Constitution of the Republic of South Africa, Act No. 108 of 1996.

¹⁵⁶ Labour Relation Act No. 66 of 1995, section 1, pages 21-22.

¹⁵⁷ Labour Relation Act No. 66 of 1995.

obligations on employers and employees, providing for the establishment of institutions for self-regulation in the form of bargaining councils and workplace forums, and for procedures to be followed in the event of disputes arising between the parties.¹⁵⁸ The LRA in the main provides a framework for the collective relationship between employers and unions or between employers' associations and representative unions. Nevertheless the Act¹⁵⁹ does take cognisance of the fact that the employment relationship also encompasses the relationship between the individual employee and the employer.¹⁶⁰

Any person applying this Act¹⁶¹ must interpret its provisions-

- (a) to give effect to its primary objects;
- (b) in compliance with the Constitution;¹⁶² and
- (c) in compliance with the public international law obligations of the Republic.¹⁶³

3.3 Basic Conditions of Employment Act

The purpose of this Act¹⁶⁴ is to advance economic development and social justice by fulfilling the primary objects of this Act¹⁶⁵ which are:

- (a) to give effect to and regulate the right to fair labour practice conferred by section 23 (1) of the Constitution¹⁶⁶-
 - (i) by establishing and enforcing basic conditions of employment; and
 - (ii) by regulating the variation of basic conditions of employment;

¹⁵⁸ Bendix, S 'Labour Relations In Practice: An Outcome Based Approach', 1st Edition, (2010), Juta, Cape Town, page 34.

¹⁵⁹ Labour Relation Act No. 66 of 1995.

¹⁶⁰ Bendix, S 'Labour Relations In Practice: An Outcome Based Approach', 1st Edition, (2010), Juta, Cape Town, page 34.

¹⁶¹ Labour Relation Act No. 66 of 1995.

¹⁶² The Constitution of the Republic of South Africa, Act No. 108 of 1996.

¹⁶³ Labour Relation Act No. 66 of 1995, section 3, page 22.

¹⁶⁴ Basic Conditions of Employment Act NO. 75 of 1997.

¹⁶⁵ Basic Conditions of Employment Act NO. 75 of 1997, section 2 (a) and (b).

¹⁶⁶ The Constitution of the Republic of South Africa, Act NO. 108 of 1996.

(b) to give effect to the obligations incurred by the Republic as a member State of the International Labour Organization.

Furthermore, the purpose of this Act¹⁶⁷ is to ensure that employees enjoy certain minimum conditions of employment, thereby protecting the most vulnerable workers from exploitation by employers.¹⁶⁸

3.4 Employment Equity Act

The purpose of this Act¹⁶⁹ is to achieve equity in the workplace by-

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.¹⁷⁰

This Act¹⁷¹ was introduced in order to prevent discrimination at the place of work and to attempt to redress the demographic imbalances caused by previous discriminatory practices.¹⁷² The Act¹⁷³ has two legs: the one prohibiting any form of discrimination, and the other promoting equity and affirmative action. The first part of the Act¹⁷⁴ that dealing with discrimination contains an item not often found in labour law in that it includes an applicant for a job under the definition

¹⁶⁷ Basic Conditions of Employment Act No. 75 of 1997.

¹⁶⁸ Bendix, S 'Labour Relations In Practice: An Outcome Based Approach', 1st Edition, (2010), Juta, Cape Town, page 33.

¹⁶⁹ Employment Equity Act No. 55 of 1998.

¹⁷⁰ Employment Equity Act No. 55 of 1998, section 2 (a) and (b).

¹⁷¹ Employment Equity Act No. 55 of 1998.

¹⁷² Bendix, S 'Labour Relations In Practice: An Outcome Based Approach', 1st Edition, (2010), Juta, Cape Town, page 37.

¹⁷³ Employment Equity Act No. 55 of 1998.

¹⁷⁴ Employment Equity Act No. 55 of 1998.

of 'employee'.¹⁷⁵ This means that job applicants are also covered by this section of the Act,¹⁷⁶ that they may claim that they have been discriminated against and institute action, in terms of the LRA¹⁷⁷ against the employer.¹⁷⁸

This Act¹⁷⁹ must be interpreted –

- (a) in accordance with the Constitution;¹⁸⁰
- (b) so as to give effect to its purpose;
- (c) taking into account any relevant code of good practice issued in terms of this Act¹⁸¹ or any other employment law; and
- (d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organization Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.¹⁸²

3.5 The International Labour Organization

In formulating labour legislation, the government is bound to take heed of the guidelines established by the International Labour Organization (hereinafter referred to as "ILO"). This body, of which South Africa is a member, is constituted of employer, employee and government representatives from most industrialised countries.¹⁸³ The ILO's guidelines take the form of conventions and declarations on a vast number of labour related issues, ranging from the right of

¹⁷⁵ Bendix, S 'Labour Relations In Practice: An Outcome Based Approach', 1st Edition, (2010), Juta, Cape Town, page 37.

¹⁷⁶ Employment Equity Act No. 55 of 1998, section 9.

¹⁷⁷ Labour Relations Act No. 66 of 1995.

¹⁷⁸ Bendix, S 'Labour Relations In Practice: An Outcome Based Approach', 1st Edition, (2010), Juta, Cape Town, page 37.

¹⁷⁹ Employment Equity Act No. 55 of 1998.

¹⁸⁰ The Constitution of the Republic of South Africa, Act NO. 108 of 1996.

¹⁸¹ Employment Equity Act No. 55 of 1998.

¹⁸² Employment Equity Act No. 55 of 1998, section 3 (a) - (d).

¹⁸³ Bendix, S 'Labour Relations In Practice: An Outcome Based Approach', 1st Edition, (2010), Juta, Cape Town, page 25.

employees to organise and bargain collectively, to discrimination, dismissals, working hours and other conditions of service, to name but a few.¹⁸⁴

The founding principles of the ILO are contained in the Declaration of Philadelphia which states, *inter alia*, that:

- (a) labour is not a commodity;
- (b) freedom of expression and association are essential to sustained progress;
- (c) poverty anywhere is a danger to prosperity everywhere;
- (d) the war against poverty should be carried out unrelentingly, in an atmosphere of free discussion and democratic decision making.¹⁸⁵

3.6 The Sexual Offences Act

Prostitution is prohibited by the Sexual Offences Act¹⁸⁶ (hereinafter referred to as “the Act”). This Act, previously called the Immorality Act¹⁸⁷, was enacted in 1957. The Act initially only prohibited brothel keeping, residing in a brothel and the sharing in any profits thereof, until 1988 when the actual transaction of “unlawful carnal intercourse for reward” was made a criminal offence. The Act now penalizes *inter alia* prostitution, the keeping of brothels, the procurement of women as prostitutes, soliciting by prostitutes, and living off the earnings of prostitution.

The primary prohibition of prostitution is contained in section 20(1A) of the Act¹⁸⁸, which provides that any person 18 years or older who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward;

¹⁸⁴ Bendix, S ‘Labour Relations In Practice: An Outcome Based Approach’, 1st Edition, (2010), Juta, Cape Town, page 25.

¹⁸⁵ Bendix, S ‘Labour Relations In Practice: An Outcome Based Approach’, 1st Edition, (2010), Juta, Cape Town, page 25.

¹⁸⁶ Sexual Offences Act No. 23 of 1957.

¹⁸⁷ The Immorality Act No.23 of 1957.

¹⁸⁸ Sexual Offences Act No. 23 of 1957

or in public commits any act of indecency with another person, shall be guilty of an offence ¹⁸⁹. The penalty for the contravention of this section is imprisonment for a period not exceeding three years, with or without a fine not exceeding R6 000 in addition to such imprisonment.¹ The same penalty is also extended to persons who knowingly live wholly or in part on the earnings of prostitution.¹

Section 2 of the Act¹⁹⁰ provides that any person who keeps a brothel shall be guilty of an offence. The 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 or for any other lewd or indecent purpose”.¹ The concept of a “place” is further defined as including “any field, enclosure, space, vehicle, or boat or any part thereof”. Section 3 of the Act¹⁹¹ extends the concept of brothel “keeping” by providing the following list of persons who will be deemed to be keeping a brothel:

- “(a) any person who resides in a brothel unless he or she proves that he or she was ignorant of the character of the house or place;
- (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;
- (d) any person who, being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
- (e) any person who, being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel;

¹⁸⁹ Muswaka, L ‘Sex Workers and the Right to Fair Labour Practices, page 533.

¹⁹⁰ Sexual Offences Act No. 23 of 1957

¹⁹¹ Sexual Offences Act No. 23 of 1957

- (f) any person found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof;
- (g) any person whose spouse keeps or resides in or manages or assists in the management of a brothel unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive the whole or any share of the moneys taken therein.”¹

The Act also makes provision for the “procuring” of prostitutes, which in the context of the Act refers to the recruitment of persons for the purpose of working as prostitutes.¹ Section 22 of the Act provides in this regard that the procurement of any women for sexual intercourse, for a brothel, to become a common prostitute, to become an inmate of a brothel or by stupefaction, will constitute a criminal offence.

Section 12A of the Act¹⁹² provides that Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person who is 18 years or older, may have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward; performs for reward any act which is calculated to enable such other person to communicate with any such person who is 18 years or older, shall be guilty of an offence. This provision appears to have been enacted by the legislature with the aim of criminalising the activities of “escort agencies”, which are establishments that introduce clients to an escort who will accompany the client for an agreed period.

The proper interpretation of the Act¹⁹³, in particular section 20(1A)¹⁹⁴, was considered by the Constitutional Court (hereinafter referred to as “CC”) in the

¹⁹² Sexual Offences Act No. 23 of 1957

¹⁹³ Sexual Offences Act No. 23 of 1957.

¹⁹⁴ Section 20 (1A) of the Sexual Offences Act No 23 of 1957.

case of *S v Jordan*¹⁹⁵ where the CC was required to determine whether the High Court was correct in concluding *inter alia* that the provision was unconstitutional, given that it criminalised only the conduct of prostitute and not that of the client. In doing so, the CC had to consider whether there is a constitutionally compatible interpretation of the section, which interpretation should not be unduly strained, but must be one which the provision is reasonably capable of bearing¹⁹⁶.

The CC noted that it has generally been accepted in our law that section 20(1A) criminalises only the conduct of the prostitute and not that of the client, and not a single case of the prosecution of a customer since 1988 (when section 20(1A) was introduced into the statute) was brought to the courts attention in this matter, nor did the state attempt to challenge the assertion that in practice only the prostitutes were charged in terms of the section¹⁹⁷.

The CC considered what range of conduct falls within the scope of section 20(1A), as the High Court had held that its terms were too wide. It was pointed out that the question to be determined is whether the phrase “unlawful sexual intercourse or indecent act for reward” is capable of being read to include only activity ordinarily understood as prostitution¹⁹⁸.

The CC concluded that the section is reasonably capable of a restrictive interpretation and that the proper interpretation of section 20(1A) is that the provision criminalises the conduct of prostitutes but not that of customers¹⁹⁹. This

¹⁹⁵ *S v Jordan and Others* 2002 (6) SA 642 (CC).

¹⁹⁶ Section 40 of the Sexual offences Act No. 23 of 1957.

¹⁹⁷ Section 42 of the Sexual offences Act No. 23 of 1957.

¹⁹⁸ Section 48 of the Sexual offences Act No. 23 of 1957.

¹⁹⁹ Section 50 of the Sexual offences Act No. 23 of 1957.

was found to be unconstitutional by O'Regan J and Sachs J in their minority judgment.

Subsequent to the finding of the CC in the above-mentioned case, the Sexual Offences Amendment Act²⁰⁰ was enacted, which makes provision for the commission of an offence by the clients of prostitutes. Section 11 thereof criminalizes the actions of clients of adult prostitutes by providing that a person who engages the services of a person 18 years or older for financial or other reward, favour or compensation; for the purpose of engaging in a sexual act, irrespective of whether the act is committed or not; or by committing a sexual act with the person, is guilty of the offence of engaging the sexual services of a person 18 years or older.

In South Africa, sex work is criminalised by section 20 (1A)(a) of the Sexual Offences Act,²⁰¹ as amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act²⁰². This provision states that "any person 18 years or older who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward shall be guilty of an offence.

The Appellant, Kylie, was employed in a massage parlour to perform sexual services for reward. Effectively, Kylie, engaged in sex work in a brothel. She was dismissed by her employer for misconduct without a prior hearing. She considered her dismissal to be unfair and so referred the dispute to the Commission for Conciliation Mediation and Arbitration (hereinafter referred to as the "CCMA") for determination.²⁰³ Section 23 (1) of the Act²⁰⁴ provides that

²⁰⁰ The Sexual Offences Amendment Act No. 23 of 2007.

²⁰¹ Sexual Offences Act No. 23 of 1957.

²⁰² Sexual Offences and Related Matters Amendment Act No. 32 of 2007.

²⁰³ *Kylie / Van Zyl t/a Brigittes (2007) 4 BALR 338 (CCMA)*.

²⁰⁴ Constitution of the Republic of South Africa, Act No. 108 of 1996.

everyone has the right to fair labour practices. Section 185 of the Act,²⁰⁵ in turn, confers on everyone the right not to be unfairly dismissed. Save for disputes concerning alleged unfair discrimination, the LRA²⁰⁶ is intended, generally, to regulate all disputes arising from alleged unfair labour practices and dismissals.²⁰⁷

At the CCMA, the issue was raised as to whether the CCMA had jurisdiction to arbitrate a dispute between an employer and an employee engaged in prohibited activity. The Commissioner ruled that the CCMA did not have jurisdiction to arbitrate the dispute. The decision was based on, *inter alia*, the fact that as Kylie's work (sex work) was prohibited by the Sexual Offences Act²⁰⁸

²⁰⁵ Labour Relation Act No. 66 of 1995.

²⁰⁶ Labour Relations Act No. 66 of 1995.

²⁰⁷ Muswaka, L 'Sex Workers and the Right to Fair Labour' (2011) 23 SA Merc LJ, page 534.

²⁰⁸ Sexual Offences Act No. 23 of 1957.

CHAPTER FOUR: COMPARATIVE STUDY SOUTH AFRICA AND GERMANY

4.1. Introduction

Prostitution in Germany is legal, and so are brothels.²⁰⁹ In 2002, the government changed the law in an effort to improve the legal situation of prostitutes. However, the social stigmatization of prostitutes persists and many prostitutes continue to lead a double life.²¹⁰ Authorities consider the common exploitation of women from Eastern Europe to be the main problem associated with the occupation.

4.2. Historical Background

Imperia statue in Konstanz, commemorating the 15th century Council of Constance with a courtesan holding the naked pope and emperor. Prostitution in historically German lands has been described since the middle ages. Since the 13th century, several German cities operated brothels known as *Frauenhäuser* ("women's houses");²¹¹ the practice of prostitution was considered a necessary evil, a position already held by Saint Augustine. Emperor Sigismund (1368–1437) thanked the city of Konstanz in writing for providing some 1,500 prostitutes for the Council of Constance which took place from 1414 to 1418. Prostitutes were more vigorously prosecuted beginning in the 16th century, with the start of the reformation and the appearance of syphilis.

4.3. The Confederations (1815-1871), German Empire (1871-1918) and Republic (1918-1933)

²⁰⁹ <http://www.cahrv.uniosnabrueck.de/reddot/BroschuereProstGenglish.pdf>.

²¹⁰ <http://www.amnestyforwomen.de/notes.FInal%20Report%20TAMPEP%208%20BRD%202009.PDF>.

²¹¹ P Schuster, *Das Frauenhaus. Stadtische Bordelle in Deutshlant (1350-1600)*, Paderborn 1992.

Beginning in the 19th century, prostitutes in many regions had to register with police or local health authorities and submit to regular health checks to curb venereal diseases.

In Imperial Germany (1871–1918) attitudes to prostitution were ambivalent. While prostitution was tolerated as a necessary function to provide for male sexuality outside of marriage, it was frowned on as a threat to contemporary moral images of women's sexuality. Therefore state policy concentrated on regulation rather than abolition. This was mainly at the municipal level²¹². The state regulation at the same time created an atmosphere which at the same time defined what was considered proper, and proper feminine sexuality. Controls were particularly tight in the port city of Hamburg. The regulations included defining the dress and conduct both inside and outside of brothels, of prostitutes. Thus their occupation defined their lives as a separate class of women, on the margins of society²¹³.

4.4. Third Reich (1933-1945)

During the Nazi era, street prostitutes were seen as "asocial" and degenerate and were often sent to concentration camps, especially to the Ravensbuck camp²¹⁴. The Nazis did not entirely disapprove of prostitution though and instead installed a centralized system of city brothels, military brothels, brothels for foreign forced laborers, and concentration camp brothels²¹⁵. Between 1942 and 1945, camp brothels were installed in ten concentration camps, including Auschwitz. Himmler intended these as an incentive for cooperative and hard-

²¹² Julia Bruggemann, 'Prostitution, Sexuality and Gender Roles in Imperial German Hamburg', A case study. First Global Conference on Sexualities, 2004.

²¹³ Julia Bruggemann, 'Prostitution, Sexuality and Gender Roles in Imperial German Hamburg', A case study in Genealogies of Identity, Interdisciplinary readings on sex and sexuality. Peters F (ed) Rodopi, Amsterdam, 2005.

²¹⁴ "Auf einem vergessenen Lager im Lager, taz, 5 February 2007. (German)

²¹⁵ "Die verfluchten Stunden am Abend", *Sueddeutsche Zeitung*, 19 June 2009.

working non-Jewish and non-Russian inmates, in order to increase productivity of the work camps²¹⁶. Initially the brothels were staffed mostly with former prostitute inmates who volunteered, but women were also put under pressure to work there²¹⁷. In the documentary film, *Memory of the Camps*, a project supervised by the British Ministry of Information and the American Office of War Information during the summer of 1945, camera crews filmed women who stated that they were forced into sexual slavery for the use of guards and favored prisoners. The film makers stated that as the women died they were replaced by women from the concentration camp Ravensbrück²¹⁸.

None of the women who were forced to work in these concentration camp brothels ever received compensation, since the German compensation laws do not cover persons designated as "asocial" by the Nazis²¹⁹.

In a famous case of espionage, the Nazi intelligence service SD took over the luxurious Berlin brothel Salon Kitty and equipped it with listening devices and specially trained prostitutes. From 1939 to 1942 the brothel was used to spy on important visitors.

4.5. German Democratic Republic (GDR 1945–1990)

After World War II, the country was divided into East Germany and West Germany. In East Germany, as in all countries of the communist Eastern Block, prostitution was illegal and according to the official position it didn't exist. However there were high-class prostitutes working in the hotels of East Berlin and the other major cities, mainly targeting Western visitors; the Stasi employed some

²¹⁶ [New Exhibition Documents Forced Prostitution in Concentration Camps Spiegel Online](#), 15 January 2007.

²¹⁷ ["Die verfluchten Stunden am Abend"](#), *Sueddeutsche Zeitung*, 19 June 2009.

²¹⁸ [Memory of the Camps](#), Frontline, PBS.

²¹⁹ ["Die verfluchten Stunden am Abend"](#), *Sueddeutsche Zeitung*, 19 June 2009.

of these for spying purposes. Street walkers and female taxi drivers were available for the pleasure of visiting Westerners, too²²⁰.

4.6. Federal Republic of Germany (BRD 1945–2001)

In West Germany, the registration and testing requirements remained in place but were handled quite differently in the various regions of the country. In Bavaria, in addition to scheduled STD check-ups, regular HIV tests were required since 1987, but this was an exception. Many prostitutes did not submit to these tests, avoiding the registration. A study in 1992 found that only 2.5% of the tested prostitutes had a disease, a rate much lower than the one among comparable non-prostitutes²²¹.

In 1967, Europe's largest brothel at the time, the six-floor *Eros Center*, was opened on the Reeperba in Hamburg. An even larger one, the twelve-floor building now called *Pascha* in Cologne was opened in 1972. The AIDS scare of the late 1980s was bad for business, and the *Eros Center* as well as several other brothels in Hamburg had to close.²²² The *Pascha* continued to flourish however, and now has evolved into a chain with additional brothels in Munich and Salzburg.

²²⁰ "Die verfluchten Stunden am Abend", *Sueddeutsche Zeitung*, 19 June 2009.

²²¹ B. Leopold, E. Steffan, N. Paul: *Dokumentation zur rechtlichen und sozialen Situation von Prostituierten in der Bundesrepublik Deutschland*, Schriftenreihe des Bundesministeriums für Frauen und Jugend, Band 15, 1993. (German)

²²² A Red-Light District Loses Its Allure, *The New York Times*, 14 May 1988. See also <http://working-in-germany.com/employee-definition-0266.html>. Accessed 28/09/13.

Anything done in the "promotion of prostitution" (*Förderung der Prostitution*) remained a crime until 2001, even after the extensive criminal law reforms of 1973. This put the operators of brothels in constant legal danger. Most brothels were therefore run as a bar with an attached but legally separate room rental. However, many municipalities built, ran and profited from high rise or townhouse-style high-rent *Dirnenwohnheime* (lit.: "whores' dormitories"), to keep street prostitution and pimping under control. Here prostitutes sell sex from a room that they rent by the day. These establishments are now mostly privatized and operate as *Eros Centers*.²²³

The highest courts of Germany repeatedly ruled that prostitution offends good moral order (*verstößt gegen die guten Sitten*), with several legal consequences. Any contract that is considered immoral is null and void, so a prostitute could not sue for payment. Prostitutes working out of their apartment could lose their leases. Finally, bars and inns could be denied a license if prostitution took place on their premises.

In 1999, Felicitas Weigmann²²⁴ lost the license for her Berlin cafe *Psst!*, because the cafe was being used to initiate contacts between customers and prostitutes and had an attached room-rental also owned by Weigmann. She sued the city, arguing that society's position had changed and prostitution no longer qualified as offending the moral order. The judge conducted an extensive investigation and solicited a large number of opinions. In December 2000 the court agreed with Weigmann's claim. This ruling is considered as precedent and important factor in the realization of the Prostitution Law of 1 January 2002. Only after an

²²³ [Willi Bartels ist tot](#), *Spiegel Online*, 5 November 2007. German.

²²⁴ German Wikipedia, [Felicitas Weigmann](#), version 2 September 2009. German.

appeal process though, filed by the Berlin town district, was Weigmann to regain her café license in October 2002²²⁵.

The compulsory registration and testing of prostitutes was abandoned in 2001. Since then, anonymous, free and voluntary health testing has been made available to everyone, including illegal immigrants. Many brothel operators require these tests²²⁶.

4.7 Legislative reform (2002)

In 2002 a one page law sponsored by the Green Party was passed by the ruling coalition of Social Democrats and Greens in the Bundestag. The law removed the general prohibition on furthering prostitution and allowed prostitutes to obtain regular work contracts. The law's rationale stated that prostitution should not be considered as immoral anymore²²⁷.

The law has been criticized as having not effectively changed the situation of the prostitutes, often because the prostitutes themselves don't want to change their working conditions and contracts²²⁸. The German government issued a report on the law's impact in January 2007, concluding that few prostitutes had

²²⁵ German Wikipedia, [Felicitas Weigmann](#), version 2 September 2009. German.

²²⁶ [A Red-Light District Loses Its Allure](#), *The New York Times*, 14 May 1988.

²²⁷ [Horizontales Gewerbe noch lange nicht legal](#), *taz*, 21 October 2006.

²²⁸ [Horizontales Gewerbe noch lange nicht legal](#), *taz*, 21 October 2006.

taken advantage of regular work contracts and that work conditions had improved only slightly, if at all²²⁹.

4.8 Aftermath

Between 2000 and 2003, the visa issuing policies of German consulates were liberalized. The opposition claimed that this resulted in an increase in human trafficking and prostitutes entering the country illegally, especially from Ukraine. The episode led to hearings in 2005 and is known as the German Visa Affair 2005²³⁰.

In 2004 the Turkish gang leader Necati Arabaci was sentenced to 9 years in prison for pimping, human trafficking, assault, extortion, weapons violations and racketeering²³¹. His gang of bouncers controlled the night clubs in Cologne's entertainment district, the Ring, where they befriended girls in order to exploit them as prostitutes²³². After Arabaci's arrest, informants overheard threats against the responsible prosecutor, who received police protection and fled the country in 2007 when Arabaci was deported to Turkey²³³.

²²⁹ Bericht der Bundesregierung zu den Auswirkungen des Gesetzes zur Regelung der Rechtsverhältnisse der Prostituierten, 24 January 2007. German.

²³⁰ "Rotlicht-Pate muss neun Jahre hinter Gitter" (in German), *Kölner Stadt-Anzeiger*, 1 October 2004, <http://www.ksta.de/html/artikel/1096374340433.shtml>.

²³¹ "Rotlicht-Pate muss neun Jahre hinter Gitter" (in German), *Kölner Stadt-Anzeiger*, 1 October 2004, <http://www.ksta.de/html/artikel/1096374340433.shtml>

²³² Peter Schran (2004), "Bandenkrieg – Die geheime Welt der Türsteher" (in German), *WDR*, <http://www.youtube.com/v/PcEF7Wb7hIY>.

²³³ "Alle ausradieren" (in German), *Focus*, 30 April 2007, http://www.focus.de/panorama/welt/verbrechen-alle-ausradieren_aid_222954.html

In 2004, the large FKK-brothel *Colosseum* opened in Augsburg, and police suspected a connection to Arabaci's gang, which owned several similar establishments and was supposedly directed from prison by its convicted leader²³⁴. After several raids, police determined that the managers of the brothel dictated the prices that the women had to charge, prohibited them from sitting in groups or using cell phones during work, set the work hours, searched rooms and handbags, and made them work completely nude (charging a penalty of 10 euros per infraction). In April 2006, five men were charged with pimping. The court quashed the charges, arguing that the prostitution law of 2002 created a regular employer-employee relationship and thus gave the employer certain rights to direct the working conditions. *Colosseum* remained in business²³⁵.

Early in 2005, English media reported that a woman refusing to take a job as a prostitute might have her unemployment benefits reduced or removed altogether²³⁶. A similar story had appeared in mid-2003; a woman received a job offer through a private employment agency. In this case however, the agency apologized for the mistake, stating that a request for a prostitute would normally have been rejected, but the client misled them, describing the position as "a female barkeeper." To date, there have been no reported cases of women actually losing benefits in such a case, and the employment agencies have stated that women would not be made to work in prostitution²³⁷.

²³⁴ Klaus Wiendl and Oliver Bendixen: Millionengeschäfte mit Zwangsprostitution – Das europaweite Netzwerk der Bordellmafia, report MÜNCHEN, *Bayerischer Rundfunk* (German TV), 9 January 2006. [transcript](#). German.

²³⁵ "Richter kapitulieren vor Bordellbetreibern", *Süddeutsche Zeitung*, 1 September 2006. German.

²³⁶ ['If you don't take a job as a prostitute, we can stop your benefits'](#), *The Daily Telegraph*, 30 January 2005.

²³⁷ [Snopes](#) Debunking the claim that "Women in Germany face the loss of unemployment benefits if they decline to accept work in brothels."

In March 2007 the brothel in Cologne announced that senior citizens above the age of 66 would receive a discount during afternoons; half of the price of 50 euros for a "normal session" would be covered by the house. Earlier, in 2004, a 20% discount for long-term unemployed had been announced by a brothel in Dresden²³⁸. Also in 2007, authorities in Berlin began to close several apartment brothels that had existed for years. They cited a 1983 court decision that found that the inevitable disturbances caused by brothels were incompatible with residential areas. Prostitutes' organizations and brothel owners fought these efforts. They commissioned a study that concluded that apartment brothels in general neither promote criminality nor disturb neighbors.²³⁹

The economic downturn of 2009 has resulted in changes at some brothels. Reduced prices and free promotions are now found. Some changes, the result of modern marketing tools, rebates, gimmicks. Brothels introducing all-inclusive flat-rates, free shuttle buses, discounts for seniors and taxi drivers. "Day passes." Some brothels reportedly including loyalty cards, group sex parties, rebates for golf players. Clients have reported reducing their number of weekly visits²⁴⁰.

In 2009, the Bundessozialgericht ruled that the German job agencies are not required to find prostitutes for open positions in brothels. The court rejected the complaint of a brothel owner who had argued that the law of 2002 had turned

²³⁸ German Brothel Offers 50-Percent Discount to Senior Citizens, *Spiegel Online*, 15 March 2007.

²³⁹ Bordelle machen Bezirksamt an, *taz*, 6 September 2007. (German).

²⁴⁰ Global economic crisis hits German sex industry, Reuters (20 April 2009).

prostitution into a job like any other; the judges ruled that the law had been passed to protect the employees, not to further the business²⁴¹.

4.9. Legal Situation

Prostitution is legal in Germany. Prostitutes may work as regular employees with contract, though the vast majority work independently²⁴². Brothels are registered businesses that do not need a special brothel license; if food and alcoholic drinks are offered, the standard restaurant license is required.

Prostitutes have to pay income taxes and have to charge VAT for their services, to be paid to the tax office. In practice, prostitution is a cash business and taxes are not always paid, though enforcement has recently been strengthened. The Lander North Rhine-Westfalia, Baden Wurttemberg and Berlin have initiated a system where prostitutes have to pay their taxes in advance, a set amount per day, to be collected and paid to tax authorities by the brothel owners. North Rhine-Westfalia charges 25 euros per day per prostitute, while Berlin charges 30 euros. In May 2007 authorities were considering plans for a uniform country-wide system charging 25 euros per day²⁴³.

The first city in Germany to introduce an explicit prostitution tax was Cologne. The tax was initiated early in 2004 by the city council led by a coalition of the conservative CDU and the leftist Greens. This tax applies to striptease, peep shows, porn, cinemas, sex fairs, massage parlors, and prostitution. In the case of prostitution, the tax amounts to 150 euros per month and working prostitute, to

²⁴¹ Callgirl vom Amt, *sueddeutsche.de*, 7 May 2009. German.

²⁴² Auswirkungen des Prostitutionsgesetzes, IV Internationale Perspektive. Sozialwissenschaftliches Frauenforschungsinstitut, Freiburg. July 2005. German.

²⁴³ Staat will Prostituierte stärker zur Kasse bitten, *Die Welt*, 23 May 2007. German.

be paid by brothel owners or by privately working prostitutes. (The area *Geestemünder Straße* mentioned above is exempt.) Containment of prostitution was one explicitly stated goal of the tax. In 2006 the city took in 828,000 euros through this tax²⁴⁴

Until 2002, prostitutes and brothels were technically not allowed to advertise, but that prohibition was not enforced. The Bundesgerichtshof ruled in July 2006 that, as a consequence of the new prostitution law, advertising of sexual services is no longer illegal²⁴⁵. Before the law and still now, many newspapers carry daily ads for brothels and for women working out of apartments. Many prostitutes and brothels have websites on the Internet. In addition, sex shops and newsstands sell magazines specializing in advertisements of prostitutes ("Happy Weekend", "St Pauli Nachrichten", "Sexy" and many more).

Every city has the right to zone off certain areas where prostitution is not allowed (*Sperrbezirk*). Prostitutes found working in these areas can be fined or, when persistent, jailed. The various cities handle this very differently. In Berlin prostitution is allowed everywhere, and Hamburg allows street prostitution near the Reeperbahn during certain times of the day. Almost the entire center of Munich is *Sperrbezirk*, and under-cover police have posed as clients to arrest prostitutes²⁴⁶. In Leipzig, street prostitution is forbidden almost everywhere, and the city even has a local law allowing police to fine customers who solicit

²⁴⁴ Sex Tax Filling Cologne's Coffers. *Spiegel Online*, 15 December 2006.

²⁴⁵ Kontaktanzeigen Prostituierte in Zeitungen wettbewerbsrechtlich nicht generell unzulässig, press release of the *Bundesgerichtshof*, 13 July 2006. German.

²⁴⁶ "Polizei überführt über 800 illegale Prostituierte". *Abendzeitung*. 23 December 2008.
<http://www.abendzeitung.de/muenchen/75632>.

prostitution in public²⁴⁷. In most smaller cities, the *Sperrbezirk* includes the immediate city center as well as residential areas. Several states prohibit brothels in small towns (such as towns with fewer than 35,000 inhabitants).

Foreign women from European Union countries are allowed to work as prostitutes in Germany. Women from other countries can obtain three-month tourist visas for Germany. If they work in prostitution, it is illegal, because the tourist visa does not include a work permit²⁴⁸.

Pimping, admitting prostitutes under the age of eighteen to a brothel, and influencing persons under the age of twenty-one to take up or continue work in prostitution, are illegal. It is also illegal to buy sex from any person younger than 18. (Before 2008 this age limit was 16.) This law also applies to Germans traveling abroad, to combat child prostitution occurring in the context of sex tourism²⁴⁹.

4.10. Health

Regular health checks for prostitutes are not mandated by law in Germany. In Bavaria (*Bayern*), law mandates the use of condoms for sexual intercourse with prostitutes, including oral contact²⁵⁰.

4.11. Definition of an employee

²⁴⁷ Auswirkungen des Prostitutionsgesetzes, IV Internationale Perspektive. Sozialwissenschaftliches Frauenforschungsinstitut, Freiburg. July 2005. German.

²⁴⁸ "Polizei überführt über 800 illegale Prostituierte". *Abendzeitung*. 23 December 2008. <http://www.abendzeitung.de/muenchen/75632>.

²⁴⁹ Prostitutionsbroschuere, Munich.

²⁵⁰ Prostitutionsbroschuere, Munich.

By definition, an employee is someone who is “obliged by a civil law contract to work in service of another person in personal dependency”. As soon as an employment contract has been signed, the former jobseeker, therefore, becomes an employee who provides labour service to the employer for remuneration. In contrast, a self-employed does not have any employment-relationship with someone else²⁵¹.

The distinction of employees and self-employed is not always clear, e.g. in cases of false self-employment. In some cases, it is not clear whether someone is an employee or not, and it is a matter of perspective. E.g. managing directors are not employees in terms of labour law but are employees in terms of social security law since they deduce contributions to social insurance and therefore are entitled e.g. to receive unemployment benefit.²⁵²

4.12. Who counts as an employee (in the broader sense)

The following people according to German law are regarded as employees: employed, workers, apprentices, interns, work council members, managing directors and managers, mini jobbers and minor employed²⁵³.

4.13 Characteristics of an employee in Germany

(a) A civil-law employment relation is contracted, in an employment contract

²⁵¹ <http://working-in-germany.com/employee-definition-0266.html>. Accessed 28/09/13.

²⁵² <http://working-in-germany.com/employee-definition-0266.html>. Accessed 28/09/13.

²⁵³ <http://working-in-germany.com/employee-definition-0266.html>. Accessed 28/09/13.

- (b) The employee is embedded in the organization of the employer
- (c) The employee is subject to the employer's directives concerning content, exerting, time, duration and place of work
- (d) The employee requires social protection

4.14 Rights of employees

The rights and obligations of an employee are defined in his or her employment contract, as well as in the collective agreement, in the company agreement and in acts of law. Basically, those are the following²⁵⁴:

- (a) To receive remuneration for supplied labour.
- (b) Right to be employed
- (c) Freedom of expression whereas interests of employers, clients and co-contractors must be respected.
- (d) Right to equal treatment.
- (e) Right to view one's personnel file.
- (f) Right to vacation, parental leave and to undisturbed recreation.
- (g) Right to breaks, e.g. lunch break.
- (h) Right to be handed out an employment certificate after being dismissed.
- (i) Right to be cared for according to the employer's obligation of care.
- (j) Right to dismissal protection as soon as the employment relation has been lasting for 6 months.
- (k) Right to co-determination if there are 5 or more permanently employed, as defined in Labour Management Relations Act.²⁵⁵

²⁵⁴ <http://working-in-germany.com/employee-definition-0266.html>. Accessed 28/09/13.

²⁵⁵ <http://working-in-germany.com/employee-definition-0266.html>. Accessed 28/09/13.

4.15 comparison

South Africa like Germany then have a problem of violence against women, human trafficking, illegal work, health problems to the extent of HIV/AIDS and lack of proper prosecution of sex work offenders. From the above submissions South Africa could learn a lot from Germany in that decriminalization of sex work is working for them and their economy and as a result makes it easy for them to regulate it. Regulations which are from the national to the provincial levels, as well as to the allocated areas set apart for such work, health checkups, payment of taxes, age restrictions of sex workers allowed.

However, the national government has also given lieu to the provincial government to set up laws and regulations in addition to the existing ones which suit each state, and this also covers the conservative state as they are able to put more stringent rules and regulations particular and suitable to them.

South Africa could make so much money out of this trade considering our unstable economy with regulating the trade, because it is very rife in all our cities to the townships too. I submit further that the South Africa could save a while lot of its money which is wasted in the police trying to arrest the sex workers only to be not prosecuted as there is usually no prima facie case for this crime.

South Africa, like Germany could also put up restricted areas for sex workers who want to work either independently and/or through pimps and brothels. Then should a worker be found working out of the restricted area, then we could use regulatory measures to prosecute that worker. South Africa can also put the

designated machinery for collection of taxes from the workers at those designated areas.

Above all this South Africa would save a lot of lives by implementing health checkups for the workers without them feeling embarrassed and harassed by the health workers and practitioner and this will help the country towards its fight against the spread and elimination of the growing number of people living with HIV/AIDS from which most of it I submit comes from this trade as women have no power and protection against violation from their abusive clients.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

It is my recommendation that prostitution must be legalized to protect the minority and marginalized people in the country which are the previously disadvantaged individuals which are women as well as children. Sex work remains a common practice throughout South Africa, and whilst viewed as immoral by a large part of our society, it is generally tolerated. As long as there is a demand for sexual services in exchange for cash, the prostitution industry will continue to exist and sex workers will continuously be employed by brothels and agency owners who are, in the absence of applicable labour legislation, able to exploit these workers.

There can be little doubt that an employment relationship exists between sex workers and brothel owners, despite the illegality of their employment contract. However, given that sex work is illegal and prohibited, sex workers in South Africa have previously been unable to access the protective measures contained in our labour legislation. This position has now changed as a result of the recent Labour Appeal Court judgment in *Kylie v CCMA & Others*²⁵⁶ which confirmed that sex workers are entitled to the constitutional right to fair labour practices as well as the provisions of the LRA which give effect to this right. The *Kylie* judgment has a controversial element given that it can be argued that by affording these rights to sex workers, who are effectively committing crimes on a daily basis, the courts are sanctioning or encouraging their illegal conduct and the very situation which the legislature sought to prevent. However on the other hand, by failing to afford these workers the protection of our labour legislation, are we not sanctioning the illegal conduct of their employers?

²⁵⁶ *Kylie v CCMA and Others* (2008) 29 ILJ 1918 (LC).

The Constitutional Court has already recognised in *S v Jordan*²⁵⁷ that sex workers are entitled to be treated with equality and dignity, as are other criminals who are also afforded the rights in section 35 of the Constitution when being arrested and tried for criminal activity. In this regard Cheadle AJ raised the following question in Kylie's review application - what is the basis for distinguishing between rights that illegal workers may assert, and those which they may not?²⁵⁸ In my view there is no basis for doing so. If criminals who commit the vilest crimes are still afforded the right to dignity then there can surely not be a justifiable basis for denying a sex worker the right to fair labour practices. However, in reaching its conclusion the Labour Appeal Court emphasized that its judgment does not and cannot sanction sex work and that those rights which are necessary for the implementation of the provisions of the Sexual Offences Act²⁵⁹ are to be removed from the enjoyment of the appellant. Furthermore, it was emphasized that when it comes to deciding the appropriate remedy, each case will have to be decided in light of its facts and that not all persons who are in an employment relationship which is prohibited by law will enjoy a remedy in terms of the LRA²⁶⁰.

One may also concede that section 2 of the LRA²⁶¹ gives us the list of the people or employees who are excluded from the provisions and protection of the LRA²⁶². The Act²⁶³ does not apply to members of:

(a) the National Defence Force;

²⁵⁷ *S v Jordan* (2002) 6 SA 642 (CC).

²⁵⁸ *Discovery Health v CCMA & Others* (2008) 29 ILJ 1480 (CC).

²⁵⁹ Sexual Offences Act No 23 of 1957.

²⁶⁰ Labour Relations Act No 66 of 1995.

²⁶¹ Labour Relations Act No 66 of 1995.

²⁶² Labour Relations Act No 66 of 1995.

²⁶³ Labour Relations Act No 66 of 1995.

- (b) the National Intelligence Agency
- (c) the South African Secret Service;
- (d) the South African National Academy of Intelligence;
- (e) Comsec.

From the above exclusions there is no mention of any other 'employees'. For the legislature to mention and list the above it means that their intention was only to exclude these and not any other category of employees from the scope of the LRA²⁶⁴. From the above we can see that there is no mention of either illegal employees and or sex workers as part of the exclusions. It is my conclusion that that should be the case if the legislature wants the status quo of sex workers not enjoying protection of the law in their work place. If such is not done then the sex workers must enjoy the protection of the law. I therefore recommend that the illegal workers or 'illegal employees' must be added into the list of the exclusions as contained in section 2 of the LRA²⁶⁵. The aforementioned is in case the State insists on the criminalization of the trade.

This is because in terms of section 3 of the LRA²⁶⁶ any person applying the Act must interpret its provisions:

- (a) to give effect to its primary objectives; in compliance with the Constitution; and
- (b) in compliance with the public international law obligations of the Republic.

²⁶⁴ Labour Relations Act No 66 of 1995.

²⁶⁵ Labour Relations Act No 66 of 1995.

²⁶⁶ Labour Relations Act No 66 of 1995.

If South Africa has to comply with the above provisions then it would be duty bound and obligated to effect the directives and regulations of the United Nations especially those on the CEDAW's paper.

From the above it is safe to opine and/or conclude that Germany has nationally legalized sex work. However, having done that, the provincial governments may still deviate from the national laws depending on the size and demographic position of their territory which is something that can work in our country. Looking into the position of Germany South Africa can learn a lot from their jurisprudence and regulations because South Africa is also a member State to the United Nations. Moreover, because the purpose and application of the basic statute regulating employment law in South Africa, the LRA²⁶⁷ in its section 1(b) provides the following: the purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the this Act, which is amongst others 'to give effect to obligations incurred by the Republic as a member state of the International Labour Organization.

South Africa is a state member of both the International Labour Organization and the United Nations is obligated by its regulations and directives. By South Africa not complying with the United Nations paper on Committee for Elimination of all forms of Discrimination Against Women. Criminalization of sex work is a perpetuation of further unfair discrimination against women who belong to the previously marginalized group on one or more of the prohibited grounds by the Constitution namely gender, sexual orientation, profession.

²⁶⁷ Labour Relations Act No. 66 of 1995.

Furthermore, the violations of the rights to privacy, dignity, equality, freedom of association and the right to fair labour practices as contained in the Act²⁶⁸.

According to section 213²⁶⁹ an employee is defined as follows: 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 any other person who in any manner assists in carrying on or conducting the business of the employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'. From the above definition only one can come to the conclusion that sex workers fall within the definition of an employee because "any person" denotes only that and that "any person" may be a sex worker.

Moreover, most of the sex workers in South Africa render sexual services on behalf of and on instruction from their employers being the pimps or brothel owners for a remuneration or some kind of payment in cash or in kind. The Labour Relations Act²⁷⁰ does not only stop at section 213 with defining an employee. According to section 78 of the LRA²⁷¹ it defines an employee as any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to represent the employer in dealings with the workplace forum *inter alia*.

The above definition actually forces us to define what a workplace is since our work is on the protection of sex workers in the work place. As far as the LRA²⁷² is concerned refers to the workplace as the place or places where the employees of an employer work. If an employer carries on or conducts two or more

²⁶⁸ Constitution of the Republic of South Africa Act No. 108 of 1996.

²⁶⁹ Section 213 of the Labour Relations Act No. 66 of 1995.

²⁷⁰ Labour Relations Act No. 66 of 1995.

²⁷¹ Labour Relations Act No. 66 of 1995.

²⁷² Labour Relations Act No. 66 of 1995.

operations that are independent of one another by reason of their size, function or organization, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.

I agree with the sentiments held by Chi Mgbako that “African governments must reconsider their legal and policy posture towards sex work in order to respect and uphold sex workers’ human rights and Gould Chandre who submitted above herein that “ sex work should be decriminalized and regulated by the same labour legislation as other sectors of the economy”. This is basically because whether we like it or not sex work has always been and is around and the trade will always be. Regulation will benefit not only the workers but also the economy as we have learned that Germany as a result of decriminalization has gained economically. Legal reform is inevitable in South Africa if we want to uphold the rights as contained in our Constitution²⁷³ which is the supreme law of the land.

²⁷³ The Constitution of the Republic of South Africa, Act No. 108 of 1996.

BIBLIOGRAPHY

BOOKS

Du Plessis JV, Fouche MA, Van Wyk MW, 'A Practical Guide to Labour Law', 5th Edition, (2002), LexisNexis, Durban.

Bendix S, 'Labour Relations in Practice: An Outcomes-Based Approach', 1st Edition, (2010), Juta, Cape Town.

Snyman CR, Criminal Law, 5th Edition, (2008), LexisNexis, Durban.

Grogan J, Workplace Law, 10th Edition, (2009), Juta, Cape Town.

Butterworths Statutes of South Africa, Classified and Annotated from 1910, Volume 5, (2010), LexisNexis, Part 25,

Bassoon AC, Christianson MA, Garbers C, Le Roux PAK, Mischke C and Strydom EML, 'Essential Labour Law', (2005), pages 22-23.

Klare K, "Legal Culture and Transformative Constitutionalism" (1998), p 1.

Articles published in journals

Lewin J, 'Politics and Law in South Africa', Essays on Race Relations London, (1963), page 87.

Boudin C and Richter M, 'Adult Consensual Sex Work in South Africa-The Cautionary Message of Criminal Law and Sexual Morality', SAJHR, (2009), Volume 25, page 182.

Truth and Reconciliation Commission of South Africa Report, (1998), page 452.

Selected Summaries for the CCMA Arbitration Awards: July-December, (2006) page 10.

Nevondwe L, 'The Interpretation of a Definition of an Employee in the Modern World: A Kylie Experience', International Labour Law and Social Protection Conference, (2012).

Du Plessis M, Penfold G and Pudifin G, 'Bill of Rights Jurisprudence', Annual Survey SA Law.

Committee on the Elimination of all forms of Discrimination Against Women/C/DEU/2-3, (2000).

European Court of Justice, Jany et al v Justitie, C-268/99, (2001).

Submissions from Sex Worker Forum to the United Nations Committee against Torture, Germany's 5th Periodic Report, Vienna, (2011).

Mgbako C, 'Africa: A call for Sex Workers' Rights in Continent, (2010).

Muswaka L, 'Sex Workers and the Right to Fair Labour Practices: Kylie v CCMA', SA Merc LJ, (2011), Volume 23, pages 539-

Hengeveld ME, 'Sex Work in South Africa: Shaming Sex Workers Away from Human Rights'.

Gould C, 'Sex work should be legal', Institute for Security Studies.

Schuster P, '*Das Frauenhaus. Stadtische Bordelle in Deutschland*', Paderborn, (1992), 1350-1600.

Bruggemann J, 'Prostitution, Sexuality and Gender Roles in Imperial German Hamburg', A Case Study, First Global Conference on Sexualities, (2004).

Bruggemann J, 'Prostitution, Sexuality and Gender Roles in Imperial German Hamburg', A case study in Genealogies of Identity, Interdisciplinary readings on sex and sexuality. Peters F (ed) Rodopi, Amsterdam, (2005). "*Auf einem vergessenen Lager im Lager*, taz, (2007).

"*Die verfluchten Stunden am Abend*", Sueddeutsche Zeitung, (2009).

New Exhibition Documents Forced Prostitution in Concentration Camps *Spiegel Online*, (2007).

Memory of the Camps, Frontline, PBS.

Leopold B, Steffan E, Paul N: *Dokumentation zur rechtlichen und sozialen Situation von Prostituierten in der Bundesrepublik Deutschland*, Schriftenreihe des Bundesministeriums für Frauen und Jugend, Band 15, (1993).

A Red-Light District Loses Its Allure, *The New York Times*, (1988).

Willi Bartels ist tot, *Spiegel Online*, (2007).

German Wikipedia, *Felicitas Weigmann* (2009).

Horizontales Gewerbe noch lange nicht legal, *taz*, (2006).

Horizontales Gewerbe noch lange nicht legal, *taz*, (2006).

Bericht der Bundesregierung zu den Auswirkungen des Gesetzes zur Regelung der Rechtsverhältnisse der Prostituierten, (2007).

"Rotlicht-Pate muss neun Jahre hinter Gitter" (in German), *Kölner Stadt-Anzeiger*, (2004).

Peter Schran (2004), *"Bandenkrieg – Die geheime Welt der Türsteher"*, WDR,¹ "Alle ausradieren", *Focus*, (2007),

Klaus Wiendl and Oliver Bendixen: Millionengeschäfte mit Zwangsprostitution – Das europaweite Netzwerk der Bordellmafia, report MÜNCHEN, Bayerischer Rundfunk (2006).

"Richter kapitulieren vor Bordellbetreibern", *Süddeutsche Zeitung*, (2006).

'If you don't take a job as a prostitute, we can stop your benefits', *The Daily Telegraph*, (2005).

Snopes Debunking the claim that "Women in Germany face the loss of unemployment benefits if they decline to accept work in brothels."

German Brothel Offers 50-Percent Discount to Senior Citizens, *Spiegel Online*, 15 (2007).

Bordelle machen Bezirksamt an, taz, (2007).

Sex Tax Filling Cologne's Coffers. Spiegel Online, (2006).

Kontaktanzeigen Prostituierte in Zeitungen wettbewerbsrechtlich nicht generell unzulässig, press release of the Bundesgerichtshof, (2006).

"Polizei überführt über 800 illegale Prostituierte". Abendzeitung. (2008).

Auswirkungen des Prostitutionsgesetzes, IV Internationale Perspektive. Sozialwissenschaftliches Frauenforschungsinstitut, Freiburg. (2005).

Prostitutionsbroschuere, Munich.

Policies and documents

Government Gazette No. 29445, Code of Good Practice: who is an employee, Volume 498, 1 December 2006.

Websites

en.wikipedia.org/wiki/prostitution_in_Germany.

<http://allafrica.com/stories/201006241074.html>

<http://www.women24.com/Wellness/WomensHealth/Why-decriminalise-sex-work>, (2011).

<http://thefeministwire.com>, (2013).

<http://www.desireealliance.org/conference/Sex%20Work%20and%20the%20Law%20-%20case%20decrim-2.pdf>.

www.workinfo.com

<http://www.cahrv.uniosnabrueck.de/reddot/BroschuereProstGenglish.pdf>.

<http://www.amnestyforwomen.de/notes.Final%20Report%20TAMPEP%208%20BRD%202009.PDF>.

<http://working-in-germany.com/employee-definition-0266.html>.

<http://www.ksta.de/html/artikel/1096374340433.shtml>.

<http://www.youtube.com/v/PcEF7Wb7hIY>.

http://www.focus.de/panorama/welt/verbrechen-alle-ausradieren_aid_222954.html.

<http://www.abendzeitung.de/muenchen/75632>.