IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C52/07

In the matter of:

"KYLIE"	**Applicant**
And	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER BELLA GOLDMAN N.O.	**Second Respondent**
MICHELLE VAN ZYL t/a BRIGITTES	**Third Respondent**

Date of judgement 31 July 2008

JUDGEMENT

Introduction

1. The Applicant[1] is a sex worker who was employed in a massage parlour to perform sexual services for reward. She was dismissed by the third respondent, her employer, for misconduct – she says unfairly. She referred a dispute over the fairness of the dismissal to the CCMA. The Commissioner, the second respondent, ruled that the CCMA did not have jurisdiction to resolve the dispute. Hence this application to review.

2. The three Respondents do not oppose this application.[2] The third respondent's decision to abide by the decision of this Court meant that I had only the

[1] The Applicant wants her identity to be protected because of the social stigma and ostracism associated with prostitution. That is why she is cited as Kylie - the name by which she was known to the Third Respondent's clientele.

[2] Although one can understand the CCMA's standpoint not to contest its commissioners' decisions on the merits of their everyday decisions, it should enter into the fray when a review of a decision affects its jurisdiction and when constitutional issues are implicated. It is important for the courts to have the CCMA's standpoints on the issues raised particularly given that it has the expertise and the experience of dealing with conduct and performance related dismissals.

Applicant's submissions before me.[3] The matter raises profoundly difficult issues of law and public policy and this, I hope, explains to some extent the delay in handing down the decision.

3. There is a fundamental principle in our law that courts ought not to sanction or encourage illegal activity. One of the difficulties that this review has to confront is how this principle engages with the constitutional right to fair labour practices and in particular the statutory right not to be unfairly dismissed in the LRA. After giving the background and a summary of the Applicant's argument, the outline of the reasoning for my decision to dismiss the application is as follows:

   3.1. Organised prostitution is prohibited by the Sexual Offences Act, 23 of 1957.

   3.2. There is fundamental principle in our law that courts ought not to sanction or encourage illegal activity. The principle is part of our common law and is now sourced in the Constitution.

   3.3. That principle applies also to claims based on statutory rights. The common law's elaboration of the principle in the law of contract, delict and unjust enrichment is adapted to meet the specific requirements for assessing the enforceability of claims based on statutory rights.

   3.4. Subject to the Constitution, the application of this approach to the enforceability of statutory claims renders a sex worker's claim to the statutory right to fair dismissal in the LRA unenforceable.

   3.5. Because the LRA gives effect to the labour rights under section 23 of the Constitution, it has to be interpreted in accordance with those rights. If the scope of those rights includes sex workers, that constitutional mandate may require a reading in or a legislative amendment to the provisions of the LRA.

[3] There should be a rule or a directive requiring parties who are going to raise important constitutional issues to give proper notice to the Judge President so that, if it is necessary to appoint an amicus, an amicus can be appointed in time to assist the Court.

3.6. As a matter of interpretation, the scope of the labour rights in section 23 does not include sex workers and brothel keepers as bearers of those rights. Alternatively, as a matter of limitation, the Sexual Offences Act justifiably limits the scope of section 23 in excluding sex workers and brothel keepers as rights holders.

3.7. Accordingly, the Applicant's claim for compensation based on the statutory right to fair dismissal is unenforceable.

4. Given the approach taken in argument and the possibility of misinterpretation, it is important to state what this decision does not do. It does not decide that a sex worker is not an employee for the purposes of the LRA just that neither the CCMA nor this Court should enforce the statutory right to a fair dismissal under the LRA. It does not decide that a sex worker is not entitled to the protections under the BCEA, occupational health legislation, workers' compensation or unemployment insurance. Their entitlement to these rights and benefits has to be determined on a statute by statute analysis in order to determine whether by enforcing the right or granting the benefit under the particular statute the courts or the decision maker will be sanctioning or encouraging the prohibited activity of organised prostitution. It also does not decide the issue as to whether the definition of employee in the LRA applies to those in an employment relationship without a valid contract.

The background

5. Kylie was employed as a sex worker at Brigittes, a massage parlour belonging to the 3rd Respondent. Her services included pelvic massage, sexual intercourse, foot fetishes and dominance. She does not shy away from conceding that some, if not most of her work, may be in contravention of two sections of the Sexual Offences Act, 23 of 1957, namely residing in a brothel and committing unlawful carnal intercourse or indecent acts with other people for reward.[4]

[4] Sections 3(a) and 20(1)(1A) respectively.

6. She was paid a salary and worked 14 hours a day and, until just before she was dismissed, 7 days a week. She lived on the premises and was subject to a strict regime of rules and fines. She was dismissed for alleged infractions of that regime.

7. Kylie considered her dismissal to be unfair and so referred a dispute to the CCMA for determination. The third respondent disputes the claim on the merits but abides the outcome of this review because she believes that sex workers should be treated fairly and accordingly protected by the constitutional and statutory rights that protect other workers.

8. At the arbitration hearing to determine the dispute, the second respondent raised the issue whether the CCMA had jurisdiction to arbitrate a dispute between an employer and employee engaged in prohibited activity.

9. After granting the parties an opportunity to make written submissions and taking those submissions into account, the second respondent ruled that the CCMA did not have jurisdiction to arbitrate the dispute. The reasons for her decision boil down to the following. Her work was prohibited by the Sexual Offences Act. Her contract of employment was accordingly invalid. Section 23 of the Constitution and the LRA do not apply to workers who did not have a valid and enforceable contract.

10. It is this decision that is the subject of this review.

The Applicant's argument

11. The Applicant formulated her grounds of review under the Promotion of Administrative Justice Act, 2000 in the light of the Supreme Court of Appeal's decision in *Rustenberg Platinum Mines Limited (Rustenberg Section) v CCMA & others*[5]. That decision was reversed by the Constitutional Court[6] on appeal. The benchmark provision against which a Commissioner's decision is to be reviewed is section 145 of the LRA read with the general review ground that

[5] (2006) 27 *ILJ* 2076 (SCA).
[6] *Sidumo & others v Rustenberg Platinum Mines Ltd (Rustenberg Section)* and others 2008 (2) SA 24 (CC).

the decision is one that no reasonable decision maker could make. Not much turns on this change other than the characterisation of the grounds for review.

12. At the hearing, the detailed grounds listed in the Applicant's founding affidavit were distilled into one ground: the Commissioner committed a legal error in excluding workers who did not have a valid and therefore enforceable contract from the ambit of the LRA because the LRA defines employees to include anyone 'who works for another person' and accordingly the Act applies to all employment relationships irrespective of whether they are underpinned by enforceable contracts or not.

13. The crux of the argument advanced by Mr Trengove who appeared on behalf of the Applicant, together with Mr Kahanovitz and Ms Cowan, was that both the Constitution and the LRA, properly interpreted, extended their labour protections to sex workers despite the illegality of their work and that the public policy concerns regarding the enforcement of illegal transactions ought to be left to a decision maker's discretion when the remedy of a statutory claim is being determined. Simply put, a sex worker is an employee under the LRA but an arbitrator faced with an unfair dismissal of a sex worker may for public policy reasons decline to reinstate her and order compensation instead.

14. The constitutional argument is that fair labour practice right in section 23(1) applies to everyone, which in the context of another right is a term of 'general import and unrestricted meaning'[7]. The rights to life and to dignity vest in everyone 'including criminals convicted of the vilest crimes'.[8] Similarly, the right to fair labour practices vests in everyone including sex workers because a denial of fundamental protections against exploitation would be a gross denigration of their dignity.

15. The argument then proceeded to the LRA. It was contended that the LRA has to be interpreted in light of this interpretation of section 23 and accordingly it applies to all workers including sex workers. The Applicant challenged the Commissioner's ruling that the definition of employee in section 213 of the

[7] *Khoza v Minister of Development* 2004(6) SA 505 (CC) at para 111.
[8] *S v Makhanyane* 1995 (3) SA 391 (CC) at para 137

LRA only included employees under a valid and enforceable contract on a number of grounds.

16. The *first* was the definition. The definition is cast widely and focuses on the employment relationship as a matter of fact rather than law.[9] The form or existence of a valid and enforceable contract is not the focus of the definition and accordingly the LRA as a matter of statutory construction should apply to all workers even sex workers.

17. The *second* ground is that the statutory definition of employee has historically been given a wide meaning - wide enough to include former employees.[10] Although counsel for the Applicant conceded that the case law is not directly in point, they submit that it demonstrates that the definition of employee under the LRA is not confined to employees at common law and not dependent on the existence of an enforceable contract of employment.

18. The *third* ground is that the Labour Appeal Court has held that in determining whether or not a person is an employee for the purposes of the LRA, a court should have regard not to the labels but to the realities of the relationship between the parties. It must look at the substance rather than the form of the relationship.[11] The Labour Court has gone further and held that a worker who has entered into an employment relationship with an employer despite not concluding a contract between them is an employee for the purposes of the LRA.[12]

19. The *fourth* and final ground goes to the consequence of the Commissioner's decision. If the definition of employee in the LRA admits only those employees under a valid and enforceable contract of employment, that would have the drastic consequence of excluding workers without such a contract from the basic protection of a raft of employment laws on health and safety, basic conditions of employment, and unemployment insurance.

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[9] See the ILO Recommendation 198 of the Employment Relationship which lays down guidelines on how member states of the ILO must identify employment relationships for purposes of regulation and protection and for combatting disguised employment relationships. See also section 200A of the LRA and the Code of Good Practice: Who is an Employee (Gn 1774 of 1 December 2006).
[10] *NAAWU now known as NUMSA v Borg-Warner SA* 1994 (3) SA 15 (A).
[11] *Denel v Gerber* (2005) 26 *ILJ* 1256 (LAC) at para 93.
[12] *White v Pan Palladium SA* 2005 (6) SA 384 (LC).

20. It was contended that the LRA did not require the existence of a valid and enforceable contract in order for the employee to be entitled to the protections in the LRA. To the extent that there may be an alternative construction of the statute, it was concluded that the one that will conform to the rights in the Constitution ought to be preferred.

21. The approach to the public policy issues raised by the case was dealt with as follows. Although there is a common law principle that courts will not lend their aid to the enforcement of an illegal contract, there are two reasons why the principle should not be applied in respect of sex workers. The *first* is that sex workers have a constitutional and statutory right to fair labour practices. The application of a principle of public policy only arises if the court has a discretion. The interpretation of section 23 of the Constitution and the definition of employee in the LRA admit no such discretion. It is only when determining the remedy for unfair dismissal that a discretion arises and only then do the principles of public policy apply.

22. The *second* reason why it was argued that this principle of common law should not apply is that there are countervailing considerations of public policy. Public policy is informed by the Constitution and since the Constitution has ordained that everyone has the right to fair labour practices, this right 'sets the paradigm of public policy'. While on the one hand it is has criminalised prostitution, it has also given effect to the constitutional guarantee of protection against unfair labour practices in the LRA. There is no reason to subordinate one statute to the other – they operate in different spheres and pursue different purposes. The one concerns the combating of prostitution and the other with promoting social justice by protecting employees against exploitation particularly those who are especially vulnerable to exploitation such as sex workers. Alternatively, the Applicant argues that even if a court has to choose between the two statutes, then the LRA should prevail for the following reasons. The purpose of the LRA is to give effect to a constitutional right whereas the Sexual Offences Act does not. Section 210 provides that in the event of any conflict between the LRA and any other law (except the Constitution or any Act expressly amending the LRA) the provisions of the

LRA apply. The Declaration on the Elimination of Discrimination against Women[13] condemns the exploitation of women and, in particular, requires measures to combat the exploitation of prostitution of women.

23. As the reasoning for my conclusion makes clear, I do not approach this case in the manner that the Commissioner[14] and the Applicant do by hinging the argument on the definition of employee. In my view that is to focus on the wrong issue. The question is not whether the definition of employee is wide enough to include those without a valid contract of employment but whether as a matter of public policy courts (and tribunals), by their actions, ought to sanction or encourage illegal conduct in the context of statutory and constitutional rights.[15] It may be that a non-contractual employment relationship falls within the definition.[16] Indeed the Labour Court has already come to this conclusion in respect of the LRA.[17]

24. There can be little doubt that on the uncontested facts of this case that the relationship between the Applicant and the Third Respondent is an employment relationship. She is paid remuneration for providing services to the customers of the Third Respondent's business. She works set hours and is subject to employer control over her workplace conduct. There is no attempt to disguise the nature of her employment relationship; nor any difficulty in determining its true nature. It is not the lack of a valid contract that is at stake

[13] Resolution 2236 (XXII) of United Nations General Assembly of 7 November 1967.
[14] Even though this is a review, I do not confine myself to the question of whether the Commissioner's reasoning was correct or not. The facts are common cause and the legal principles were addressed in written and oral argument. There is no need to remit the matter even if I believe I reached the conclusion on other grounds than those relied upon by the CCMA.
[15] Craig Bosch and Sarah Christie in their note *Are sex workers "employees"* (2007) 28 *ILJ* 804 focus exclusively on whether a sex worker is an employee and assume that if so that a sex worker is entitled to the rights under the LRA without interrogating the implications of the statutory prohibition on commercial sex.
[16] I am of the view that there is no general answer to this question but specific answers depending on the context in which the term is used. It includes ex-employees in respect of certain provisions and only those under a contract of employment in others – see section 186 for example of both. Note though that many of the cases cited by the Applicant and the academic writing hark back to the 1956 Act. Although the definition then was similar the 1996 LRA, the provisions in which it was interpreted in those cases were different. It also follows that because the BCEA and the OHSA use similar definitions the ambit of those definitions are statute dependent.
[17] See Van Niekerk AJ in *Discovery Health v CCMA & others* (unreported, Labour Court, case no. JR 2877/06, 28n March 2008) that holds that the LRA applies to employees without a valid contract of employment.

but the reason for its invalidity and the effect that that has on a tribunal or court called upon to enforce a right under the LRA.

25. The Applicant's arguments concerning the scope of section 23 of the Constitution and public policy are not accepted for the reasons that follow.

The prohibition of prostitution

26. Brothel keeping has been prohibited since the turn of the last century. The current Sexual Offences Act, previously called the 'Immorality Act', was enacted in 1957. Like its predecessors, it makes brothel keeping a criminal offence.[18] The concept of brothel keeping casts a wide net, which, for the purposes of this decision, includes persons who reside in a brothel and share in any moneys taken there.[19]

27. The transaction, itself, was not an offence until 1988 when the Act was amended to include the offence of 'unlawful carnal intercourse … for reward'[20]. That provision has now been incorporated into section 20(1A)(a) by Act 32 of 2007. Both offences attract a criminal penalty of imprisonment of no more than 3 years and a fine of no more than R6 000.[21]

The constitutional principle of not sanctioning or encouraging illegal activity

28. There is a fundamental principle of public policy that courts, by their actions, ought not to sanction or encourage illegal activity. The principle is articulated by Innes CJ in the *Schierhout v Minister of Justice* as follows:

> 'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect'.[22]

[18] Section 2.
[19] Section 3(a) and (c).
[20] Section 20(1)(aA).
[21] Section 22(a).
[22] 1926 AD 99 at 109:

29. That principle is reflected in a number of common law rules such as the *ex turpi causa non oritur actio* rule[23], the *in pari delicto potior conditio defenditis* rule, and the unjust enrichment remedy afford by the *condictio ob turpem vel iniustum causam*. It is also the source of the refusal to award damages based on earnings derived from illegal employment or activity.[24]

30. It is a principle that has a long and distinguished progeny. It is applied by courts in all legal systems based on the rule of law.[25] It is a necessary incident of the rule of law in the same way as the doctrines of legality[26] and rationality[27]are. It is one of the fundamental values on which our democratic republic is based.[28] The importance of these values is evident from the fact that section 1 is more firmly entrenched than other provisions of the Constitution.[29] As the Constitutional Court states in *Minister of Home Affairs v NICRO*[30] the 'values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution'.

31. In order to refine and develop the principle for the purpose of this decision, it is necessary to briefly outline the manner in which each of the common law rules or principles have been applied by the courts both generally and in respect of prostitution in particular.

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[23] *Pottie v Kotze* 1954(3) SA 719 (A): ' The usual reason for holding a prohibited act to be invalid is…that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent'(at 726H). See also *Jajbhay v Cassim* 1937 AD 537 at 542.
[24] *Dhlamini v Protea Assurance Co Ltd* 1974(4) SA 906.
[25] *Jajbhay v Cassim* 1939 at 540.
[26] *Affordable Medicines Trust & others v Minister of Health & others* 2006 **(**3) SA 247 (CC) at paragraph 49.
[27] *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of RSA* 2000 (2) SA 674 (CC) at paragraph 85.
[28] Section 1(c) of the Constitution.
[29] See section 74(1) of the Constitution and *Minister of Justice v Ntuli* 1979(3) SA 722 (CC) at paragraph 32.
[30] 2005 (3) SA 290 (CC) at paragraph 21.

32. The *ex turpi causa* rule 'prohibits the enforcement of immoral or illegal contracts'[31]. Accordingly if a contract is illegal, the courts regard the contract as void and therefore unenforceable. A contract is illegal if it is against public policy.[32] It is against public policy to contract contrary to law or morality.[33]

33. At common law, the courts have regarded adultery and commercial sex as immoral and of such turpitude as to render an agreement concerning or linked to that immorality as void and unenforceable.[34] This was the case even though adultery was not a crime at the time.[35] The case law however harks back to an era of stricter sexual morality and it may be that this approach to contracts associated with adultery has, like the crime of adultery, fallen into desuetude.[36] The difference between adultery and commercial sex though is that there are statutory prohibitions, some recently introduced, against brothel-keeping and commercial sex. These prohibitions may serve to confirm the common law's long standing view that commercial sex is immoral.

34. One now turns to the implications of a statutory prohibition in the application of the *ex turpi causa* rule. The rule only applies if the statute, properly interpreted, intends to go beyond the prohibition (and any penalty for the contravention) and to nullify a contract arising from, or associated with, the prohibited activity.[37] That is a matter of statutory construction.[38] The courts have outlined some of the tools for discovering that legislative intent – the use of peremptory or directory language, the purpose of the prohibition and the mischief to be remedied, the imposition of criminal sanctions, and whether the

[31] *Jajbhay v Cassim* at 540.
[32] There are various sub-classifications but all in the end are manifestations of public policy. See Smallberger JA in *Sasfin (Pty) Ltd v Beukes* 1989(1) SA 1 at 8.
[33] See *Sasfin v Beukes* at 8.
[34] See Christie *The Law of Contract of South Africa* 5ed LexisNexis at 382 and Visser *Unjustified Enrichment* Juta at 440.
[35] In *Thornycroft v Vas* 1957 (3) SA 754 the *in pari delicto* defence was upheld in respect of an immoral and adulterous relationship even though the common law of crime of adultery fell into desuetude with the decision in *Green v Fitzgerald & Another* AD 1914 88 .
[36] See Visser *Unjustified Enrichment* Juta at 441.
[37] *Swart v Swart* 1971(1) SA 819 (A).
[38] *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274. See also Visser at 426.

enforcement of the contract will bring about the very situation that the Legislature intended to prevent.[39]

35. While the *ex turpi causa* rule prohibits the enforcement of illegal contracts, the *in pari delicto* rule 'curtails the right of the delinquent to avoid the consequences of their performance or part performance of such contracts'[40] – in other words to sue for the recovery of a performance made under an illegal transaction. This rule too is based on the underlying policy that, subject to the relaxations introduced to that rule by *Jajbhay v Cassim*, courts should not sanction or encourage illegality by assisting parties in undoing the consequences of their illegal acts. Although the harsh application of the *in pari delicto* rule has led to its relaxation by the courts, that relaxation has never compromised the underlying policy of discouraging illegality. So in *Jajbhay v Cassim*, the relaxation is only justified if there are claims of simple justice between individuals to be taken into account and if 'public policy [to discourage illegality] is not forseeably affected by a grant or a refusal of the relief claimed'[41].

36. The principle, as a matter of public policy, has also been put to use to determine liability for damages arising from loss of income.[42] In *Dhlamini v Protea Assurance Co Ltd* 1974 SA 906 (A) at 915 the Court refused to award damages if the delictual claim for loss of earnings was based on income derived from illegal activities. In *Booysen v Shield Insurance Co Ltd* 1980 (3) SA 1211 (E), the Court extended this approach to a dependant's claims for loss of support.[43] Albeit obiter, that Court stated that 'it is difficult to conceive that our Courts would allow the husband or child of a deceased prostitute to recover compensation for loss of support based on the claim that during her

[39] *Swart v Swart* 1971(1) SA 819 (A) at 829C – 830C. See generally Christie *The Law of Contract in South Africa* at 337 – 343 and Visser at 427 – 430. This is also the approach adopted by Van Niekerk AJ in the Labour Court in deciding that the prohibition on the employment of unauthorised workers in the Immigration Act does not invalidate the contract – *Discovery v CCMA & others* (unreported, Labour Court, Case no. 2877/06, 28 March 2008. See also Craig Bosch *Can Unauthorised workers be regarded as employees?*, (2006) 27 *ILJ* 1342. It is also the basis on which Barney Jordaan in *Influx Control and Contracts of Employment: A Different View* criticises the decision in *Lende v Goldberg* (1983) 4 *ILJ* 271.

[40] *Jajbhay v Cassim a*t 540-1.

[41] *Jajbhay v Cassim* at 545.

[42] As opposed to liability for damages based on a loss of earning capacity –see Neethling, Potgieter & Visser, *Law of Delict*, (5ed) LexisNexis at 220-1.

[43] The approach was approved and applied in *Santam Insurance Ltd v Ferguson* 1985 (4) SA 843 (A).

lifetime she maintained then – and would have continued to entertain them – on the proceeds of her prostitution'[44].

37. It follows from this that the courts have not enforced contracts that directly or indirectly involve prostitution or recognise a claim based on the earnings from prostitution. It also follows that the common law will not enforce a contract to perform statutorily prohibited activity or recognise a claim based on such activity if it is the intention of the statute to do so.

Application of the principle to statutory claims

38. The common law rules that give effect to the principle are directed towards the court's enforcement of private law claims based on contract, delict and unjust enrichment. The question that this case raises though is not the enforcement of a contractual right but the enforcement of a statutory right, namely the right not to be dismissed unfairly and a statutory claim based for compensation for the violation of that right.

39. The principle that the courts should not sanction or encourage illegal activities must be as applicable to statutory rights as it is to private law rights. It is not just a logical extension of the principle, it is a constitutional imperative – the principle is a fundamental constitutional value and all legislation must be interpreted in accordance with that value. The test for the application of the principle that can be distilled from the common law rules is that the entitlement to a statutory right should be circumscribed if (a) the legislative intention of the statutory prohibition is to go beyond its own penalties; (b) the person pursuing the right has knowingly sought to violate the prohibition; and (c) the grant of the right will sanction or encourage the prohibited conduct.

40. Depending on the manner in which the statutory right is framed, the articulation of the principle with the statute may differ. If the grant of the statutory right is dependent on the exercise of a discretion (either implied or

[44] At 1217H. Although there is merit in the criticism that the claim for support is not an aquilian action but one derived from germanic customary law and that the public policy considerations applied in aquilian actions do not necessarily apply to this kind of action (see *Minister of Police: Transkei v Xatula* 1994 (2) SA 680), the point relied on for this decision is the Court's evaluation of the turpitude associated with commercial sex.

express) then the decision maker must first determine whether the statutory prohibition was intended to deny such a person relief and, if so, then refuse the relief. If the right is not subject to a discretion, the application of the principle will require the statute to be interpreted so as to exclude such persons as holders of the right either specifically or by excluding them from the application of the statute as a whole.

41. Counsel for the Applicant argued that the Sexual Offences Act and the LRA should either be considered separately – each governing their own terrain – or that the LRA should trump because it is mandated by a constitutional right. But this fails to recognise that the two cannot be considered separately if the the legal consequences of a contravention of the prohibition extend beyond the confines of the statute. It also fails to recognise that the role of the constitutional rule of law value in determining which law trumps. It is not a simple balancing of one statute against another.

Application of the principle to the Sexual Offences Act

42. The question that next arises is whether the two statutory prohibitions in the Sexual Offences Act implicated in this case[45] were intended to void any transactions associated with the prohibited activity or deny any statutory remedy based on such a transaction. Since the Act is silent on the issue (other than in respect of leases), the determination of this question requires an interpretation of the statute with the tools developed by the courts to do so.

43. The mischief that the Act seeks to address is the social ills associated with commercial sex: violent crime, exploitation, trafficking, and the spread of sexually transmitted diseases. [46] The Act 'pursues an important and legitimate constitutional purpose, namely to outlaw commercial sex'. [47] Nearly all open and democratic societies condemn commercial sex.[48] That purpose has been given effect to by criminalizing commercial sex in its organised form (brothels and pimping) and its supply.

[45] Sections 3(a) and 20(1)(1A).
[46] *S v Jordan and others* 2002 (6) SA 642 at 652 and 677-9.
[47] *Jordan* at 651-2.
[48] *Jordan* at 679

44. The prohibitions are cast in the form of an offence and are clearly peremptory. The fact that the contravention of the prohibition is a criminal offence is generally an indication that the legislature intended the transaction itself to be void. It is not automatic because in some statutes the provision of a criminal penalty may be an indication that the legislature intended to go no further. Such a construction must give way in the light of the object of the Act, namely to protect the public[49] and combat the identified mischief, and the common law's approach to prostitution.

45. The common law regards commercial sex of such turpitude to render its transactions as void. The legislature is taken to know the common law when it legislates. If it intended that the penalty for participation in a brothel was to be limited to that provided in the Act, it would have had to expressly undo the common law's approach to prostitution. It did not. The fact that it did not do so either in respect of the new crime of prostitution in section 20(1)(1A) suggests too that the legislature, as recently as 1988 (when the crime was introduced) and 2007 (when the Act was amended to expand the crime to clients) did not see any reason to alter the common law's take on the legality of the contracts that facilitate the prohibited activity.

46. There is one provision that may be read to counter this logic. Section 6 states that any contract of letting and hiring of a house which subsequently becomes a brothel shall become null and void. It may be argued that since the common law already regards such a contract as void and unenforceable, it was unnecessary to include such a provision. But the very terms of the provision make it clear that it departs from the common law in that it only voids the contract from the date at which the owner became aware that the house was being used as a brothel. At common law, lack of knowledge is no defence to the application of the *ex turpi causa* rule. At common law the contract is void *ab initio*. This provision tempers the harsh application of the *ex turpi causa* rule in respect of innocent lessors.

[49] An important guide proposed by Christie at page 339.

47. Finally, it is self evident that the recognition by a court of a contract between a brothel keeper and a sex worker or between a sex worker and a client will give legal sanction to the very situation that the Legislature sought to prevent.

48. Accordingly, it is difficult to escape the conclusion, taking into account the purpose of the legislation, the language used, and the common law's approach to prostitution that the Legislature intended the general rule to apply in respect of the Sexual Offences Act, namely that a contravention of a prohibition results in nullifying a contract in pursuit of, or associated with, the prohibition.

49. If the contract of employment between a brothel keeper and a sex worker is invalid, then any statutory right that is linked to or flows from that contract requires interrogation: will the recognition of the right sanction or encourage prostitution. If it does, then a court or tribunal ought not to recognise the right. How it does that depends on the specific provision.

50. Before considering the statutory right not to be unfairly dismissed and to claim compensation under the LRA, it is necessary to consider the ambit of section 23 of the Constitution and any impact that it may have on this analysis.

The scope of section 23

51. The scope of the labour rights in section 23 extends to workers, employers and their respective associations. The question, here, is whether that scope includes sex workers, their employers and the associations to which they belong.

52. The scope of a constitutional right is either a matter of interpretation of the right itself[50] or a matter of limitation arising from a law of general application. Either way, the answer is the same: sex workers (and brothel keepers) are not rights holders for the purposes of section 23.

Scope as a matter of interpretation

53. In order to understand the scope of section 23 it is necessary to briefly explore the purposes of constitutionalising labour rights. One of the primary purposes

[50] This is illustrated by *Jordan & others v S & others* 2002 (11) BCLR 1117 (CC) in which the Constitutional Court determined that prostitution and brothel keeping were not protected by section 26 of the Interim Constitution – see paragraph 26.

of section 23 is to protect workers and their associations. The reason for the protection is that workers are vulnerable to exploitation. That vulnerability flows from the structural inequality that characterises employment in a modern developing economy. The main object of the constitutional right and the legislation giving effect to that right is to structure employment in a manner that counteracts the inequality of bargaining power that is inherent in the employment relationship.[51] The right does this by guaranteeing fair labour practices, the right to form trade unions, engage in collective bargaining and strike.

54. The rights in section 23 do not apply to everyone who works. In *South African National Defence Force v Minister of Defence and Another*[52], the Constitutional Court used the kind of employment relationship contemplated by the common law contract of employment as the benchmark for determining the kind of working person protected by the right. It determining whether or not a soldier was a worker for the purposes of section 23, the court held that the relationship between a member of the permanent force and the Defence Force is 'akin to an employee relationship' and 'in many respects mirrors those of people employed under a contract of employment'.[53] It follows then that the rights in section 23 do not apply to persons who genuinely own and work in their own businesses – such as independent contractors, partners, and the self-employed[54]. It does not apply to judges[55] or to cabinet ministers for that matter. Not everyone who works is a worker for the purposes of section 23.

55. It is also important to note the reason for the focus on the employment relationship in the jurisprudence and instruments to which the Court was referred. The modern labour market has given rise to a bewildering array of contractual forms – some for reasons driven by new forms of work organisation and others to avoid labour legislation. It is for this reason that ILO Recommendation 198 on Employment Relationship was introduced – to

[51] *Sidumo* at paragraph 72.
[52] 1999 (6) BCLR 615 (CC).
[53] At paragraph 24.
[54] This clearly does not include those work arrangements deliberately structured under these legal forms in order to avoid the duties flowing from the labour rights entrenched in the Constitution and given effect to in legislation.
[55] *Hannah v Government of the Republic of Namibia* 2000 (4) SA 940 (NmLC).

introduce certainty as to when an employment relationship exists and to combat disguised employment. This is also clear from the Code of Good Practice: Who is an employee. That Code too is concerned with promoting clarity and certainty as to who is an employee for the purposes of labour legislation and to ensure that those who work in a subordinate relation to their employer are not deprived of protection of the labour laws by contractual arrangements.[56] These instruments are not concerned with illegal employment but rather with the nature of the employment relationship rather than its contractual form.

56. I have already found that the relationship between the Applicant and the Third Respondent is an employment one. But for the statutory prohibition, it would be an enforceable contract. But it is not the lack of a valid contract that is at stake in this matter but the reason for its invalidity. The ILO Recommendation and the measures introduced by the LRA to comply with those recommendations do not address this issue.

57. If section 23 does not apply to everyone who works, the question that must now be addressed is: does it apply to a person who would otherwise be covered by the right but is engaged in illegal employment. The scope of section 23 goes to both who has the right and to content of the right. In this case it goes to both: whether sex workers and brothel keepers are rights holders and whether the right to fair labour practices applies to prohibited sex work.

58. It is an often repeated refrain that the Constitution is not merely a 'formal document regulating public power…[it] also embodies…an objective, normative value system'[57]. That value system begins with the foundational values in section 1 of the Constitution, namely dignity (including the advancement of human rights), equality (including non sexism and non racism), supremacy of the constitution, the rule of law and democracy. As the Constitutional Court states in *Minister of Home Affairs v NICRO*[58] the 'values

[56] GN 1774 of 1 December 2006. The same can be said for the presumptions introduced by section 200A of the LRA.
[57] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 54.
[58] 2005 (3) SA 290 (CC) at paragraph 21.

enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution'.

59. Three sets of values are directly implicated in this analysis: dignity, equality and the rule of law. The dignity and equality values are inherently part of the right being considered. To the extent that the right to fair labour practices is a more direct expression of the right to dignity in the workplace, the dignity value is already part of that equation. To the extent that the scope of the right to fair labour practices can *justifiably* exclude those doing illegal work, the equality value has been taken into account. In other words, the dignity and equality values are not values that are assessed independently. They are inextricably part of the analysis of the impact of the rule of law on the scope of the right to fair labour practices.

60. The application of the rule of law value does not have the automatic effect of withholding constitutional rights to those engaged in illegal activity. So for example in *Jordan* the Constitutional Court was at pains to point out that the fact that prostitution is criminalised does not mean that sex workers are not entitled to be treated with dignity by the police and by their clients. It does not mean that they are not entitled to the rights in section 35 when arrested and tried for their criminal activity. It does not mean that they are not entitled to equality[59] or access to courts.

61. On the other hand, the majority of the Constitutional Court held in *Jordan* that the privacy rights of sex workers do not extend to the commission of crimes committed in private.[60] What is the basis for distinguishing rights that a person engaging in prohibited activity may assert and those that such a person may not? It seems to me that like the approach taken by the common law in assessing the impact of a statutory prohibition on the validity of a contract, the guiding principles should begin with whether the legislature intended that the legal consequences of a contravention extend beyond the confines of the

[59] Although the majority did not consider that sex workers were treated unequally by criminalising only the supply side of the relationship, there was no doubt that sex workers have as much a claim to equality as anyone else. Indeed the minority held that their equality rights had been infringed by the one-sided prohibition.
[60] *Jordan* at para 28.

statute. The second is whether by recognising a claim to a constitutional right (whether directly or through legislation giving effect to the right) the courts are sanctioning or encouraging the prohibited activity. The third is whether the denial of the constitutional right will undermine the right's deepest purposes.

62. I have decided that the legislature intended that the Sexual Offences Act not only penalises the prohibited activity but intends that courts will not recognise any rights or claims arising from that activity.

63. The second principle is informed by the fundamental constitutional value of the rule of law: whether in recognising a claim based on a constitutional right, the courts will be sanctioning or encouraging the prohibited activity. That is the unarticulated premise on which the majority in *Jordan* refused to recognise that sex workers had a privacy claim in so far as the pursuit of their profession was concerned: 'I do not accept that a person who commits a crime in private, the nature of which can only be committed in private, can necessarily claim the protection of the privacy clause. What compounds the difficulty is that the prostitute invites the public generally to come and engage in unlawful conduct in private. The law should be as concerned with crimes that are committed in private as it is with crimes that are committed in public.' On the other hand, the impact of requiring the police to treat sex workers with dignity during arrest and detention does not sanction nor encourage prostitution. The critical question is whether the enforcement of the constitutional right to fair labour practices will sanction or encourage the prohibited activity, in particular the right to be compensated for an unfair dismissal.

64. In section 23(2) and (3) workers and employers have the right to form and join trade unions and employer organisations respectively. Section 23(5) guarantees the right to engage in collective bargaining. These rights has been given effect to by the LRA through the mechanisms of the registration of unions, the grant of organisational rights, the regulation of union security agreements, the binding nature of collective agreements and the facility to establish sector wide bargaining councils.

65. The inference is irresistible that the registration of a trade union of sex workers or an employer's organisation of brothel owners representing members actively and deliberately contravening the law sanctions those activities. Since the principal purpose of trade unions, employer organisations and bargaining councils is to regulate relations between employers and employees and in particular set terms and conditions of employment the recognition of the rights of a trade union of sex workers and brothel owners or an organisation of brothel owners to regulate such relations is an approach to the commercial sex industry that is wholly at odds with the approach adopted by Parliament for this sphere of economic activity. As the Constitutional Court pointed out in *Jordan*, open and democratic societies vary enormously in the manner in which they characterise and respond to prostitution. Some chose to prohibit it and others to regulate it. Parliament opted for prohibition and in so doing eschewed regulation of the industry as its preferred choice.

66. If enforcing a contract between a client and a sex worker constitutes sanctioning, if not encouraging, the prohibited activity, it is difficult not to conclude that the enforcement of a collective agreement setting terms and conditions of employment for sex workers would suffer the same fate. The right to enforce a collective bargaining agreement clearly falls within the compass of the constitutional right to engage in collective bargaining in section 23(5).

67. The guarantee of fair labour practices in section 23(1) is unchartered territory. The concept of the fair labour practice draws sustenance from the jurisprudence developed by the industrial court, the labour appeal courts and the Appellate Division under the 1956 LRA. The collective aspects of that jurisprudence are set out in section 23(2) to (6) and discussed above. Section 23(1) deals with the individual aspects of the right. The unfair labour practices identified in the LRA are unfair dismissal and 'unfair acts that arise between an employer and an employee involving…unfair conduct by an employer' relating to, for example, promotion, demotion, probation, training, benefits, suspension and discipline.[61] The extent of the judicial or quasi-judicial

[61] Section 186(2).

supervision of the employment relationship guaranteed under section 23(1) and given effect to in Chapter X of the LRA gives a sense of the degree that courts and tribunals will be implicated in regulating an employment relationship if the right to fair labour practices extends to sex workers and brothel keepers.

68. The central purpose of dismissal legislation is to provide work security – that is to create conditions for continued employment and to prevent unnecessary dismissal because of the social harm that it can cause. That is why the Code of Good Practice: Dismissal[62] makes it clear that employers must apply progressive discipline in misconduct cases and in poor performance cases, the employer must consult, counsel and give the employee the opportunity to improve. In retrenchments, the employer must consider measures to avoid dismissal and the possibility of future re-employment.[63] It is also why reinstatement or re-employment is the primary remedy. Nothing illustrates the conflict between the objective of the right to a fair dismissal and the objectives of the Sexual Offences Act than the issue of reinstatement. An order of reinstatement is the primary remedy for an unfair dismissal. Reinstating a person in illegal employment would not only sanction the illegal activity but may constitute an order on the employer to commit a crime.[64] The difficulties are also illustrated by the example given by the Commissioner. If the CCMA has to arbitrate disputes over the dismissal of sex workers, it will have to deal with the anomoly that a sex worker who refuses to obey an instruction sanctioned by the purported contract will have the right to refuse to obey that instruction because it is illegal.

69. Accordingly, the enforcement of the right to fair labour practices will lead to the Labour Court and the CCMA sanctioning or encouraging organised prostitution in contravention of the Sexual Offences Act.

70. The third principle requires a court to determine whether the withholding of the labour rights from sex workers will undermine or frustrate the core

[62] Schedule 8 to the LRA.
[63] Section 189(2) and (3).
[64] I say 'may' because the employer is not obliged to require the employee to provide the services only to pay on tender of those services. In other words the employer may avoid the illegality but it would nevertheless establish an enforceable contract (or employment relationship) which is precisely what the legislature has set its face against.

purposes of the right. There is no question that sex workers are a vulnerable group and subject to exploitation but so are those illegally employed as foreign workers[65] and child workers. It is a consequence of illegality that they are exploited. The difference is that the prohibition in respect of foreign workers and child workers is a prohibition aimed at who does the job rather than the job itself. This means that illegally employed foreign workers and child workers compete with workers in legal employment for jobs. The withdrawal of labour rights in these instances will create an incentive to employ illegal workers in place of legal ones. The ability to pay less than the established rates of pay in respect of foreign and child workers doing the same work as those in legal employment without the risk of having to be held to the established rate of pay undermines the established rate, threatens the employment and pay security of those in legal employment and encourages the employment of illegal workers – the very thing that the Immigration Act and the prohibitions on the employment of children seek to prevent.

71. The exploitation of sex workers does not have this consequential effect on the right for those in legal employment. Sex workers are exploited – just like many others who engage in organised crime. To protect them from exploitation will mean sanctioning and encouraging activities that the legislature has constitutionally decided should be prohibited. It is the application of the foundational principle to this prohibition that excises sex workers and brothel owners as holders of section 23 rights.

72. It follows from this analysis that I am of the view that the scope of the protection guaranteed by section 23(1) does not include those engaged in prohibited work and that means for so long as Parliament considers organised prostitution to be a crime, sex workers and brothel keepers do not fall within its protective embrace.

73. If I am wrong on my interpretation of the scope of section 23 and the arguments raised by the Applicant as to its universality are correct, the

[65] I am aware of the judgement of Van Niekerk AJ in which held that the employment of foreigners without a valid permit did not have the effect of rendering the contract with such a foreigner invalid - *Discovery Health v CCMA & others* (unreported Labour Court decision under case number JR 2877/06 dated 28 March 2008)

question (not argued or raised but necessary to consider) remains as to whether the Sexual Offences Act infringes the rights in section 23 and, if so, whether that infringement constitututes a reasonable and justifiable limitation for the purposes of section 36 of the Constitution.

Scope by limitation

74. A limitations analysis involves first an enquiry into whether the law of general application infringes the right. That is a scope of right analysis. On the assumption that the right applies to all workers and employers – legal and illegal – the Sexual Offences Act infringes the right because the legislature intended that it do so. I have held that the legislature was not content with limiting the legal consequences of the prohibition to a criminal penalty. It intended the law to go further and where appropriate to limit the rights that might, if enforced, sanction or encourage the prohibited activity. It follows therefore that the statutory prohibitions in the Sexual Offences Act infringes section 23 by preventing sex workers and brothel keepers from enforcing those rights.

75. Before engaging in a limitations clause analysis of the Sexual Offences Act, it is necessary to refer to certain aspects of the decision in *S v Jordan & others* [66] in upholding the constitutionality of the prohibitions in the Sexual Offences Act.

76. There were several attacks to the constitutionality of the Act's prohibition of brothel-keeping and prostitution. The grounds were an unjustifiable violation of the rights to equality, economic activity, dignity and privacy. The equality analysis turned on the relationship between the sex worker and the client rather than the legality of the business itself. The majority found that it was permissible to criminalise the supply side of the transaction while the minority considered it otherwise. Those concerns and their resolution by the Constitutional Court are not relevant in this matter. But the analysis of the other three grounds are.

[66] 2002 (6) SA 642.

77. The Sexual Offences Act was challenged as a violation of the right to economic activity in the interim Constitution on the grounds that it unjustifiably prohibited commercial sex. Unlike section 22 of the final Constitution, the right to economic activity under the interim Constitution had an internal limitation clause that permitted measures to promote various social goals, one of which was quality of life. The measures, however, had to be justifiable in an open and democratic society based on freedom and equality. The Constitutional Court held that the prohibition of commercial sex constituted such a measure and accordingly did not constitute an infringement of the right to economic activity. That reasoning would apply equally under the final Constitution albeit that there are differences in the language of the two rights. This is because the Court's reasoning in respect of the internal limitation clause under the interim Constitution would be, to a large extent, reproducible under section 36.[67]

78. The most obvious difference is the intensity of the justification for the limitation - the internal limitation clause required no more than a rational connection. This difference is more apparent than real because the intensity of the justification under the final Constitution is affected by the interplay of the factors listed in section 36(1), in particular the importance of the purpose of the limitation, nature of the right and the extent of the limitation. Since the nature of the right in this case is inextricably dependent on legislative recognition, support and control, the application of proportionality will allow more extensive limitation. Accordingly, the Sexual Offences Act is likely to withstand a constitutional challenge based on the right to economic activity under the final Constitution.

79. The Act was also challenged on the grounds that it unjustifiably violated the privacy rights of sex workers. The Constitutional Court held that if the Sexual Offences Act infringes the right to privacy[68], that infringement constitutes a

[67] See *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) in which the Constitutional Court construed section 26 in a manner that gave effect to both the internal limitation clause and the general limitation clause in section 33 of the Interim Constitution – para 30.

[68] The majority held that the Act did not violate the right to privacy but that if it did, the violation constituted a justifiable limitation of the right. Two members of the Court held that the Act did trench on the right to privacy but that the limitation was justifiable.

justifiable limitation. The important factor in determining the intensity of the justification (and the corresponding freedom of action on the part of the state to take measures) is the nature of the right.

80. The right to privacy is a continuum of rights 'starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life, and ending in a public realm where privacy would only remotely be implicated'[69]. The breach, in this case, did not reach into the core of privacy, but only touched on its penumbra and accordingly 'less difficult for the State to establish that the limitation is justifiable'[70].

81. The purpose of the statutory prohibitions in the Sexual Offences Act is to combat the social ills of violence, drug abuse and child trafficking.[71] Although the means used - criminal prohibition rather than regulation or abstention – were contested, the Court held that this was a legitimate matter for the legislature to determine. The infringement of the right to privacy was accordingly held to be a justifiable limitation.

82. The challenge in respect of dignity was dismissed because it was not the prohibition that caused the loss of dignity but the nature of the work itself[72].

83. Turning now to section 23, the question is whether the limitation of this right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the factors listed in section 36(1). The Constitutional Court has already found that nearly all open and democratic societies condemn commercial sex and respond in a range of ways to the phenomenon from prohibition, through regulation to abstention.[73] And that this choice of response is a permissible constitutional choice.

84. The first factor to consider is the nature of the right. The right to fair labour practices operates horizontally. The legislation that gives effect to the right primarily imposes duties on employers (although the extent of some of those

[69] *Jordan & others v S & others* at paragraph 77.
[70] At paragraph 86.
[71] The majority in *Jordan* found these to be legislative facts – paragaph 24.
[72] *Jordan* at paragraph 74.
[73] *S v Jordan & others* 2002 (6) SA 642 at paragraphs 90 and 91.

duties is tempered by the requirement of fairness). Although there are social and economic benefits for the society as a whole flowing from the imposition of these duties, they impose costs on individual employers. There is therefore an incentive to avoid these duties and one of the ways of doing so is to employ illegal labour. Accordingly, the nature of the right is such that it would require a more intense justification for limiting a labour right if the effect of doing so would undermine the labour rights of others. I have already held that the illegality of the employment of sex workers will not have this effect and accordingly the level of justification will not have to be as demanding.

85. The second factor is the importance of the purpose of the limitation. The Constitutional Court has already ruled on the purpose and importance of the Sexual Offences Act: it is to combat the social ills of violence, drug abuse and child trafficking.[74] The combating of those social ills was sufficiently important to justify the limitation of the right to freedom of trade, occupation and profession and the right to privacy. The third factor is the nature and extent of the limitation. The limitation would exclude sex workers and brothel keepers from the category of rights holders.

86. The fourth factor is the relation between the limitation and its purpose. The relation is clear. The limitation is to discourage organised prostitution by refusing to sanction their business arrangements and any constitutional or statutory rights that may flow from those business arrangements.

87. The fifth factor is whether there are less restrictive means to achieve the same purpose. Effectively this is what the Constitutional Court in *Jordan* was invited to hold when it was submitted that there were more appropriate and less restrictive ways of regulating prostitution. The Court declined the invitation holding that there was a great variance in responses by open and democratic societies to the commercial sex. This was a constitutionally permissible legislative choice. Although there may be less restrictive means to achieve the purpose, the legislature was permitted to decide on more stringent measures.

[74] The majority in *Jordan* found these to be legislative facts – paragaph 24.

88. Taking these factors into account and particularly that, given the legislative choice made to outlaw commercial sex, the limitation is justifiable because it gives effect to the fundamental rule of law principle: courts should not by their actions sanction or encourage illegal activity.

The right not to be unfairly dismissed in the LRA

89. If sex workers are not constitutionally entitled to the right to fair labour practices under section 23, there is a strong inference that the same will be true for the legislation that gives effect to that right. It is not determinative because a narrow construction of section 23 does not prevent the legislature from extending the right statutorily to those workers who are not constitutionally entitled to it. The wording of the definition of employee in the LRA is certainly wide enough to encompass those without a valid contract of employment. But that does not mean that the right not to be unfairly dismissed applies to those without a valid contract of employment. Just as each statute must be separately interrogated so must each provision of that statute.[75] In other words, it will be for the Registrar of Labour Relations to decide whether to register a trade union of sex workers.

90. It is clear from the definition of dismissal in section 186(1) of the LRA that the existence or prior existence of a valid contract of employment is the necessary condition to found the statutory right to fair dismissal. Section 186(1)(a) states that dismissal means that 'the employer has terminated a contract of employment with or without notice'. Section 186(b),(e),(d), and (f) are all premised on the existence of a contract of employment. Paragraphs (c) and (d) relate to defined circumstances relating to the failure to re-engage or re-employ employees that were in employment. The definition in section 186(1) is not open ended because it's opening phrase – 'dismissal means that' - limits the definition to the specific instances recorded in paragraphs (a) to (f).

[75] In other words if a sex worker pursues a claim of unfair discrimination under the Employment Equity Act, 55 of 1998 or a claim for workers compensation under the Compensation for Occupational Injuries and Diseases Act, 130 of 1993, those claims must be assessed under their respective provisions to determine whether by upholding the claim the court or tribunal concerned will be sanctioning or encouraging the prohibited activity.

91. Any reading of the LRA that included an unenforceable employment relationship would do violence to the plain meaning of the text. Quite apart from twisting the plain meaning of section 186(1) out of all recognisable shape, there are two compelling reasons for not engaging in such an enterprise. Firstly, there is no constitutional imperative to interpret the section to include illegal employment relationships given my interpretation of the scope of the right to fair labour practices. Secondly, the rule of law principle militates against any such construction. If a court will not enforce a sex worker's contractual right to a fair procedure before dismissal[76] on grounds that the contract is void, it is difficult to conclude that the enforcement of a statutory right to a fair pre-dismissal procedure[77] should not be treated the same way. If a court will not recognise a sex worker's claim for damages for a material breach of his contract of employment with a brothel, why should a court or arbitrator recognise his claim for compensation for unfair dismissal grounded on that breach.

92. It is also important to note that, in section 193, reinstatement is the primary remedy. If a dismissal is substantively unfair, a judge or an arbitrator is required to reinstate the employee subject to four exceptions. The first is that the employee does not wish to be reinstated. The second is that circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. The third is that it is not reasonably practicable. The fourth is that the dismissal is unfair only because the employer did not follow a fair procedure. Given the manifest purpose of each of these exceptions, it is difficult to divine a discretion not to reinstate if the employee insists on reinstatement. That may be requiring the employer to break the law or reinstating a contract that the Courts consider to be void. And that would be requiring a court or arbitrator to sanction a transaction prohibited by law.

[76] In *Old Mutual Life Assurance Co South African v Gumbi* [2007] 8 BLLR 699 (SCA), the SCA has constitutionalised the common law contract of employment by importing the right to a fair hearing into every contract of employment.
[77] The right to a fair procedure before dismissal is a constituent element of the right to fair labour practices. It is given effect to in sections 181(1)(b), 189 and 189A.

Order

93. Accordingly, the Commissioner ought to have refused to grant the relief sought by the Applicant because by doing so the CCMA would have been sanctioning or encouraging prohibited commercial sex.

94. There is no reason to refer the matter back to the Commissioner and accordingly, the Commissioner's ruling is substituted with the following: 'The Applicant's claim for 12 month's compensation is refused'.

CHEADLE AJ

30 July 2008

Attorney for Applicant:	Woman’s Legal Centre
Advocates for Applicant:	Advocate W Trengove SC with Advocates C Kahanovitz and S Cowan