Economics of Illegal Work and Illegal Workers (Immigrants): Are They Protected under South African Labour Law and the Constitution, 1996?

Mashele RAPATSA[1]

Abstract: This article analyses whether prostitution (illegal work) and illegal immigrants have access to the protective ambits of statutory framework regulating employment relations. Its objective is to examine the scope of labour law, considerate of ever changing trends in the modern world of work. It utilizes the two notable precedents founded in *Kylie v CCMA* and *Discovery Health v CCMA.* This is considerate of inherent dynamics in contemporary labour relations where the majority of workers have been displaced into grey areas that offer little or no protection, thus rendering workers vulnerable to exploitation. The article highlights a rising tension arising out of exploitative labour practices and socio-economic factors, and the need for labour law to respond. It has been found that courts have creatively invented strategic methods that have successfully aided efforts of protecting vulnerable workers engaged in economic activities under precarious circumstances. This is to the extent that the Constitution, 1996 and the Labour Relations Act 66 of 1995 have been interpreted in a manner that enhances worker protection, which fulfils the purpose for which labour law was enacted.

Keywords: Illegal work(ers); democracy and socio-economic development; right to fair labour practices; employee; social transformation

1. Introduction

Society yearns for sound, stable and harmonious social and economic relations among the people. This constitutes an indispensable ideal for greater social order across all spectrums of society. It is an all-encompassing social philosophy which is also applicable to those who engage in a variety of economic activities, work which is mainly regulated through labour laws. Thus, the Constitution of the Republic of South Africa, 1996 (*hereinafter, the Constitution, 1996*), as per its

[1] Lecturer, School of Law, University of Limpopo (South Africa). PhD in progress, "Globalisation Studies and Humanitarian Action" University of Groningen, Netherlands. Address: Marktstraat 2, 9712PC Groningen, Tel.: +31618672558. Corresponding author: m.j.rapatsa@rug.nl

agenda of transformative constitutionalism necessitates that every person be treated with respect to safeguard the right to human dignity of persons, right to equality and enjoyment of all fundamental freedoms (Sections 1(a), 9 & 10). This implores that sex workers and illegal immigrants should also benefit from the tenets of the Constitution, because it is the supreme law of the Republic which largely entrenches non-derogable rights and obligations. In the contemporary South Africa, it is common place that every worker, sex workers and illegal immigrants inclusive, yearns to receive protection in terms of labour law and other statutory establishments. After all, sex workers and illegal immigrants are humans just like anybody else, except for their involvement in proscribed work and lack of legally recognized resident status. The issue of prostitution or sex trade remain a common phenomenon notwithstanding widespread negative attitude towards it by members of the public. Indeed, the conservative traditionalist perspectives consider the act of sex trade as being immoral, unethical, inhumane and thus taboo. But we all are fully aware that it thrives. On the other hand, the problem of illegal immigrants is also a widespread phenomenon world over. As it happens everywhere, illegal immigrants would search for ways of survival in any country they arrive, including engaging in paid work whenever such opportunity arises. Indubitably, these categories of workers are in dire need of legal protection, be it in working environments or other social interfaces.

Thus, a fundamental factor in this regard pertains to work, which is fundamental for economic stability and sustainable development in any country. That is, because these categories of persons do engage in work for survival, we need to establish if labour laws proffer some legal protection even though their working is tainted by illegality. As a result of the presence of illegality in their engaging in economic activity, they become precarious workers whose rights as human beings are least or not protected at all. And, this is the precise point where the transformative ambition of the Constitution is indicted to be responsive.

At the centre of attention in this article is the problem of precarious work(ers), otherwise described as insecure economic activity. The article is considerate of challenges affecting people who engage in economic activities that are tainted by illegality. This regards widespread anecdotal evidence of exploitation meted out to such workers, who are often desperate, and even worse, finding themselves docile to exploitation. And because of fear of reprisals, such workers often do not report abusive and exploitative practices by those regarded as their employers.

2. Overview and Theoretical Framework

South Africa's socio-economic labour relations are inundated with a multiplicity of challenges that essentially sits at the centre of socio-economic realities widely felt by people on a daily basis. This includes problems of high poverty levels (Frye, 2013), worsened by high unemployment crisis (Statistics South Africa, 2014) and spiralling inequalities (Appolis and McKinley, 2009; Mattes, 2012). These factors compound a dismal lack of opportunities thereby giving rise to obscure forecast on future prospect for many people. This has subsequently resulted in people being desperate to secure work of any kind, hence we have people willingly doing sex trade and others crossing borders to just engage in work of any kind. But being engaged in work is a multifaceted phenomenon which goes beyond just working. It is for this reason that exploitation of illegal immigrants and sex workers requires much bigger attention.

The contemporary labour relations are clearly being characterized by an embodiment of a contestation of power between employers and employees. Whilst employers continue to wield immense prerogatives in terms of how the working relationship unfolds, employees or workers equally maintain legitimate expectations to be treated with respect and be protected against all forms of unfair labour practices. However, it has been noted according to Clive Thompson (2003) that work has changed and is continuously changing for both better and worse. Clive Thompson further asserted that while these widespread changes have created more varied options for workers, they have also resulted in many workers being displaced into more precarious, less protected and less rewarded jobs. This resonate the plight faced by many workers stuck in slavery like working arrangements such as sex workers and illegal immigrants. What it entails is that these changes have rendered workers somewhat powerless and desolate. Paul Benjamin (2005), Sandra Fredman (1997) and Fourie, (2008) also observe that the dramatic changes of workforce over the last decades have resulted in the majority of workers being rendered susceptible to exploitations in many grey areas of employment. According to Paul Benjamin (2005) these changes have and drastically continue to erode workers' enjoyment of labour laws' protective ambits.

These notable changes in labour relations have indicted full attention on studying the meaning of labour law and its purpose. This is significant because when we know the role to be played by labour law, we are better placed to generate informed deliberations on who should have access to protective ambits of labour law. Labour

law refers to a collection of regulatory techniques and values that are properly applied to any market that, if left unregulated, will reach socially sub-optimum outcomes because economic actors are individuated and cannot overcome collective action problems (Kalula, 2004; Hyde, 2006). In simple terms, labour law refers to that branch of the law which regulates the relationship of work between the employer and an employee. The purpose of labour law is premised on the theory of employment relationships as posited by Sir Otto Kahn-Freund decades ago. According to Davies and Freedland (1983), in the context of Kahn-Freund's theory, labour law is aimed at establishing a countervailing power in the labour market which assures equality of position between employers and the collective organization of workers, while leaving room for the continuing effects of market forces. It is also a stratagem to uphold crucial values in labour relations with the view of intervening to achieve justice which otherwise will not prevail in unregulated working relationships (Hyde, 2006). Now, it is crucial to ask if labour law is still capable of performing its function, especially considering the contentious debates with regards to protecting those engaged in illegal work or with illegal status. Perhaps to get appropriate answers to this, it is essential to understand work itself and its importance in the society. This assist in differentiating between work and those economic activities that are or should be within the confines of labour protective ambits.

Work constitute an essential everyday phenomenon which influences society's socio economic circumstances and direction, effectively determining people's extent of success and how a country's developmental objectives are realized (Rapatsa, 2014). According to Houngbo (2014) and Kallerberg (2009), work enables the populace to comprehend how the societal phases of transformation unfolds, and attempts to shape such changes while identifying what problems need to be resolved for social stability. Thus, work meets society's crucial psychosocial needs, whilst being central to individual identity, social roles and social status (Waddel and Burton, 2006: 9). Most importantly, work is good for physical and psychological health. Indeed, from these reflections on work, it is discernible that the need to protect those engaged in work is an indispensable tenet for a properly functional society. Workers need protection because work functions as a panacea against social turbulences that threaten stability in social order. In the main, this framework reveal that we have the phenomenon of work, which faces multiplicity of changes that displaces workers, most of whom end up engaging in works under exploitative circumstances. It is within this context that labour law gets indicted to

demonstrate its in-depth strength that resonates with its traditional purpose of protecting workers, in accordance with the ideals of the Constitution's transformative ambitions.

3. Rationale and Methodology

This article takes into account the International Labour Organization's (ILO) prominent decent job agenda. This agenda is centred on promoting better human welfare across nations in the modern world of work (Cohen & Moodley, 2012). The modern world of work can best be described as a battlefield where the weak continuously contest for terrain against the strongest, in order to earn a better living. The weak is invariably a subject of exploitation, whereas the strongest prioritizes generation of profit. This is posited as a contestation of bargaining power in labour relations. Subsequently, the weak succumbs to doing work of any nature owing to weak bargaining position. Thus, this article is written with a consideration of the pervasive problems faced by the majority of workers owing to the discreet nature of their status in doing work. These are precarious workers. The article addresses these research questions; *First*, the scope and purpose of labour law. That is, whether sex workers and illegal immigrants are protected as employees for purposes of labour laws? *Second*, whether such protection, if any, legalizes any such activities as prostitution and whether illegal immigrants by virtue of such protection acquire the status of being lawful residents? *Third*, whether the interpretations adopted in the *Kylie* and *Discovery Health* matters unwittingly expanded the scope of coverage to bring it within the reach of precarious workers? And *fourth*, whether (validity/invalidity) of contract of employment play any role in determining who get access to the protection proffered by labour law and the Constitution?

This article used the two notable cases of *Kylie v CCMA and Others* (2007) 28 *ILJ* 470 (CCMA), (2008) 29 *ILJ* 1918 (LC), 2010 (4) SA 383 (LAC) and *Discovery Health Ltd v CCMA* (2008) 29 *ILJ* 1480 (LC) to analyse laws regarding protection of precarious workers' labour rights. The study adopts a descriptive qualitative research method. It relies on data derived from written texts in the form of statutes, policies and scholarly publications. Both primary and secondary sources were used as source material.

4. Results

It has been found that courts have opted to interpret the labour legislative framework in a manner that resonate with foundational constitutional tenets geared towards safeguarding human dignity, equality and fundamental freedoms of workers. Subsequently, this has enabled courts to posit that worker protection ought to be dependent on establishing the existence of an employment relationship, than agreements between parties. In this regard, attention is essentially given to the definition of an employee, which determines who can access the protective ambits of labour law. Thus, it has been found that both a sex worker and illegal immigrant in the circumstances fell within the threshold as determined by section 23(1) of the Constitution and sections 213 and 200A of the Labour Relations Act, and were eligible to be protected against unfair labour practices.

5. Discussion

5.1 What Economic Activity is (should) be Protected by Labour Law?

Determining who qualifies to be protected by labour law is achieved through a closer look at the Labour Relations Act 66 of 1995 (LRA). The LRA proffers a foundational statutory framework for the regulation of employment relationships between employers and employees. In terms of section 1, the primary objective of the LRA is founded on the need to advance social justice, labour peace, economic development and democratization of the workplace. It was founded on the basis of giving effect to section 23(1) of the Constitution, which entrenched protection of workers' labour rights. This section 23(1) provides that 'everyone has the right to fair labour practices'. It entails that workers ought to be protected against unfair dismissal and other forms of unfair occupational detriments. The LRA provides similar expression in sections 185 and 186(2) with the view of curbing arbitrariness in the workplace, especially on the part of employers.

Now that the framework of the LRA is clear, who benefits from it? It has been shown that to access the protective ambits of labour law, a person should first qualify as an employee. Section 213 of the LRA defines an employee in the following terms: "*any person employed by or working for an employer, who such person receives or is entitled to receive any remuneration, reward or benefit and works under the direction or supervision of an employer"*.

Accordingly, any person who is not covered by this definition has little or no legal protection (Benjamin, 2008). However, to ensure that workers' vulnerability does not escape legislative attention, the LRA moreover included section 200A regarding a 'presumption on who is an employee', which provides a broader guideline on employment relationships that should qualify for protection. The presumption is in accordance with the Code of Good Practice No. 29445 Notice 1774 of 2006.

Most importantly, this definition of an employee makes no mention of the legal validity or invalidity of any such employment relationship, and/or the basis upon which such relationship is founded. This resonates with section 23(1) as stated above, which explicitly seeks to protect 'everyone' who works for another. Thus, it illustrates that any person falling within this threshold would qualify for protection under labour laws and the Constitution. It further implores that in view of the primary objectives of the LRA and the Constitution's transformative agenda, we should have regard to the realities than preferences as may be expressed by employers in particular. This finds proponent from the case of *Denel (Pty) Ltd. v Gerber* (2005) 26 *ILJ* 1256 (LAC): 1296G where the court explicitly emphasized the importance of establishing the existence of an employment relationship, which can primarily be achieved through recognizing the realities in relationships formed by employer and employee. This is essential to realize effective protection of workers who are susceptible to exploitation.

In a nutshell, it suffices to indicate that labour law and the Constitution protects everyone who is in an explicit employment relationship. Thus, to qualify for protection, it is insignificant to enquire on the nature of employment contract existing or which does not exist between such parties to work. So, what is the role of contract of employment in workers' protection?

5.2 Contract of Employment

Does contract of employment influence discussions on who should get protection from labour law? First and foremost, contract of employment, refers to an agreement between two or more persons wherein one pledges to offer labour in exchange for some remuneration (Basson, et al 2002). Such may be express or tacit. Traditionally, employment contract was premised on common law principle of *locatio conductio operarum*, premised on governing master (employer) and servant (employee) relationship. This created problems because common law fails

to address inequalities between parties to employment (Du Bois, 2007), while also being hostile to encouraging collective regulation of work (Munyaradzi, 2006). Thus, while it is acknowledged that employment contract somewhat forms the basis of employment relationship, it is crucial to note that it does not supersede both constitutional and legislative imperatives. Because in terms of *ex turpi* principle, the law regards illegal contracts as unenforceable. It means workers (sex workers and illegal immigrants) relying on employment contracts would be left in the cold notwithstanding the fact that very often than not, they are simply subjected to exploitation owing to their vulnerability.

It is in this spirit that the LRA and the Constitution takes precedence. This is fundamental to ensure that employers who opt to hide behind labels created through contracts are still obligated to account for exploitative practices meted out to workers. This approach was adopted in *White v Pan Palladium SA (Pty)* (2006) 27 *ILJ* (LC): 2727J-2728A, where it was held that conclusion of a contract recognized as valid and enforceable is not the sole ticket for worker protection. Further that to qualify for protection, only the existence of an employment relationship need to be proven. This concurs with the view that to be an employee, a person must work for another person or assist that person to conduct business, for remuneration (Benjamin, 2004).

5.3 Kylie v CCMA

In this matter, a dispute involving a sex worker tested the abilities of labour law, its statutory framework and the Constitution to dispense justice in line with South Africa's transformative norms. The Labour Appeal Court (LAC) had to decide whether a sex worker, whose work activity is criminalized in terms of sections 3(a) and (b) and 20(1)(A)(a) of Sexual Offences Act 23 of 1957, is protected in terms of section 213 of LRA and 23(1) of the Constitution.

Kylie (a pseudonym), worked in a massage parlour as a sex worker. During 2006, she was summarily dismissed. In 2007, she declared a dispute with the Commission for Conciliation, Mediation and Arbitration (CCMA) on claims of unfair labour practice (unfair dismissal). At the CCMA, Commissioner Goldman argued that CCMA lacked jurisdiction since *Kylie* was engaged in an unlawful activity. *Kylie* approached the Labour Court (LC) where Judge Cheadle ruled that the definition of an employee was wide enough to cover even those whose contract of work was deemed unenforceable at common law. However, LC held that she

was not entitled to protection because that would be contrary to public policy and common law principle that 'courts, by their actions, ought not sanction or encourage illegal conduct', a principle which has moreover become entrenched in the Constitution. *Kylie* appealed to the Labour Appeal Court (LAC) which found that even though *Kylie* was engaged in illegal activity, she remained part of those vulnerable sects of the society requiring greater attention and protection of the law. Further that there was a *prima facie* case that she is entitled to constitutional protection designed to safeguard her dignity which has also been operationalized even in the LRA. The argument was that section 23(1) of the Constitution and section 213 of LRA purports to protect 'everyone' in employment. Therefore, being engaged in illegal activity as a sex worker should not *per se* deprive a person of constitutional entitlements to enjoy a range of her human rights.

5.4 Discovery Health v CCMA

This case involved an illegal immigrant. The question was whether Mr. Lanzetta, an Argentinian national, was entitled to protection in terms of labour law whilst his temporary resident permit had expired? During 2006, his employment was terminated summarily when the employer realized that he did not have a valid work permit. He declared a dispute at the CCMA claiming unfair dismissal. The CCMA ruled that he was an employee, but ran short of providing remedies contending lack of jurisdiction because his contract of employment was rendered unenforceable due to his illegal status in the country. On review, the LC held that'…an employment contract is not the sole ticket for admission into the golden circle reserved for employees', effectively affording him labour protection (reinstatement or compensation). The LC relied on the dictum in *Chipenete v Carmen Electrical CC & Another* (1998) 19 *ILJ* (LAC) where the court availed remedies to an illegal immigrant against unfair discrimination. The court emphasized the need to protect illegal immigrants who suffer maltreatments, exploitation and discrimination at the hands of unscrupulous employers.

6. Conclusion

This article intended to reveal a rejection of the argument that workers who engage in illegal economic activity or workers who work with illegal status wilfully contracts themselves out of protection against unfair labour practices and unfair

dismissal. This is because the issue of tilted bargaining power between employers and workers remain a relevant concern. This entails that at all times, we have to take into account the fact that labour legislation was enacted to protect workers. Therefore any attempt to arbitrarily exclude or deprive workers a protection owing to labels attributable to the nature of work, in disregard of realities, will defeat the purpose for which labour legislation exists. Hence, it is asserted that approaches adopted in the two cases illustrates that, because the definition of an employee does not expressly exclude workers whose contract is tainted with illegality, it serves no justice to exclude such workers from labour protective ambits under instances where it is clearly discernible that their economic activity appropriately qualify as an employment relationship. These approaches substantiate that essential labour rights should meaningfully filter through in these areas to advance worker protection, and in the interest of socio-economic development. These cases have successfully expanded the scope of labour law to benefit precarious workers in desperate need for protection.

Most importantly, the reasoning of courts in both *Kylie* and *Discovery* matters ought to be construed as those merely emphasizing on the significance to protect vulnerable workers engaged in economic activities in grey areas, often not benefiting from labour law's protective ambits. These decisions do not legalise prostitution or uncontrolled emigrations. Rather, they simply illustrates that workers protection is the main function of labour law; *to protect the weakest*. It also serves the purpose of deterring employers from exploiting workers, preying on the susceptibility of desperate and precarious workers.

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