

Prostitution under the Sexual Offences Act in South Africa: A Constitutional Test

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Abstract

The research will define prostitution in accordance with the South Africa Law Reform Commission, which refers to prostitution as the exchange of any financial or other reward, favour or compensation for the purposes of engaging in a sexual act.¹ A similar understanding of prostitution is demonstrated where prostitution is defined as the practice of engaging in sexual activity, in general with individuals other than a spouse or partner, in exchange for immediate payment of money or other valuables.² It is worth noting that the terms 'prostitutes' and "sex workers" will be used interchangeably in this study. The term "sex work" has been used as a non-stigmatisation term, in an effort to drift away from pejorative words like 'prostitutes' or 'whores', and also to make prostitution sound like other types of work rather than an activity that demeans the service provider. The term "sex work" may then be defined as, "the performance of sex acts for hire".³ The South African Constitution⁴ protects the rights of workers. Section 22 provides that every citizen has the right to choose their trade.⁵ Thereafter, there is Section 23 which guarantees the right to fair labour practices.⁶ These two sections will later be analysed in the light of sex workers in South Africa.

Introduction

Section 20 (1) (a A) of the Sexual Offences Act provides that any person who unlawfully has carnal intercourse or commits an act of indecency with any other person for a reward, is guilty of an offence.⁷

This paper seeks to investigate and determine the constitutionality of the Sexual Offences Act,⁸ basing the debate on the right to freedom of trade, occupation and profession and the right to fair labour practices enshrined in the South African Constitution and in line with international instruments on the subject of prostitution. The South African Constitution is the ultimate standard against which proposals for reforming the law on prostitution must be measured.⁹

The paper will start by tackling the international instruments that address the issue of prostitution and then go on to look at the sections related to the right to work as enshrined in the South African Constitution.

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¹ South African Law Reform Commission, Discussion paper on adult prostitution 0001/2009 Project 107

² Citizen Journalism in Africa: Should adult sex work be decriminalized or regulated, to protect sex work Human rights, 7 July 2009

³ The American Heritage Dictionary of the English Language, 4th edition, 2006

⁴ Act 108 of 1996

⁵ Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

⁶ Everyone has the right to fair labour practices

(2) Every worker has the right –

(a) to form and join a trade union

(b) to participate in the activities and programmes of a trade union, and

(c) to strike

⁷ Act 23 of 1957

⁸ With reference to Section 20(1)(aA) of Act 23 of 1957 and Section 11 of Act 32 of 2007

⁹ N Makonyane 'Constitution applies to prostitutes', unpublished speech, 04 September 2009.

International instruments of relevance to the rights of prostitutes

For the purposes of this work, some of the international instruments that are of relevance to the labour rights of prostitutes will be briefly explored. These instruments include *inter alia* the following: the Universal Declaration of Human Rights, the World Charter for Prostitutes Rights, Convention on the Elimination of All Forms of Discrimination against Women.

The World Charter for Prostitutes' Rights

The World Charter for Prostitutes' Rights calls for the decriminalisation of all aspects of adult prostitution resulting from individual decisions. This shows how the freedom of choice of individuals is acknowledged in that the World Charter for Prostitutes' Rights recognises prostitution where prostitutes enter into the industry voluntarily. This is supported by the statement of the former prostitute and founder member of the Prostitution Information Center¹⁰, where she declared as follows:

“In our [sex worker's] eyes it's a profession, a way of making money; it's important that we are realistic about this, prostitution is not bad; it's only bad if done against one's will. Most women make this decision themselves”.

It is argued therefore that prostitution is indeed considered a legitimate activity, which must be recognised and regulated, in order to protect the workers' rights and to prevent abuse.

The Charter also states that prostitutes should be guaranteed "all human rights and civil liberties," including the freedom of speech, travel, immigration, work, marriage, and motherhood, and the right to unemployment insurance, health insurance and housing."¹¹ Furthermore the World Charter calls for protection of "work standards," including the abolition of laws which impose any systematic zoning of prostitution, and calls for prostitutes having the freedom to choose their place of work and residence, and to "provide their services under the conditions that are absolutely determined by themselves and no one else. Thus, a call for the eradication of all laws that can be interpreted to deny freedom of association or freedom to travel to prostitutes was made."¹²

In her 2003 article, Kimberly Klinger¹³ pointed out that the World Charter has become a template used by human rights groups all over the world. It must however, be pointed out that this does not mean that the said instrument has been well received by the world at large. The World Charter for Prostitutes' rights is not binding. The charter remains controversial more particularly because prostitution is still considered to be a serious problem facing women.

The Universal Declaration of Human Rights (UDHR)

The UDHR provides that everyone has the right to work, to free choice of employment, to just and favourable conditions of work.¹⁴ The word 'everyone' definitely covers the prostitutes, which means they have the right to choose the type of work that they want to get into (provided it does not harm or directly affects another person negatively). Therefore if a person chooses to do prostitution as a form of work, his or her rights should be protected and also the state bears a duty to see to it that the working conditions of that particular person who has chosen to enter into the prostitution industry are protected and regulated by law.

Also, Article 20¹⁵ of the UDHR allows the right to freedom of assembly. This means sex workers have a right to associate, just like any other individual. Therefore the laws that prohibit them from working in a house together or from working together in brothels can be challenged on the basis of the UDHR. However, as stated above, this would only be possible if the right to freedom of assembly has become part of customary international law.

¹⁰ M Majoor, from Amsterdam in 'Forced prostitution and human trafficking'. www.wikipedia.org/wiki. Accessed 1 April 2012

¹¹ http://en.wikipedia.org/wiki/sex_workers'_rights#cite_note_Charter-9

¹² L L Lim, 'The sex sector: the economic and social bases of prostitution in Southeast Asia', 1998

¹³ K Klinger, 'Prostitution, Humanism, and a Woman's Choice: Perspectives on prostitution', *Humanist*(2003) 63

¹⁴ Article 23

¹⁵ Everyone has the right to freedom of peaceful assembly and association

Based on these arguments, South Africa also has a responsibility to protect the rights of everyone including the prostitutes since the core provisions of the UDHR are binding international customary law regardless of the existence of treaty ratification such as the prohibitions against slavery, genocide, torture, and cruel inhuman treatment of war prisoners.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

State parties shall take all appropriate measures to eliminate discrimination against ¹⁶women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to work as an inalienable right of all human beings.¹⁷ Since prostitution may be regarded as employment it therefore implies that prostitutes deserve to work under free, safe and fair working conditions just like any other class of employees.

The protection of labour rights in terms of the South African Constitution.

The protection of the workers' rights is stipulated in Sections 22 and 23 of the South African Constitution. This work analyses these rights with specific reference to the work done by the sex workers.

The right to freedom of trade, occupation and profession

Section 22 of the South African Constitution guarantees every South African citizen the freedom of trade, occupation and profession. This implies that sex workers should be allowed to freely choose and practice their trade or profession. One may argue that prostitution can never be a trade of free choice. However, Rosaan Kruger¹⁸ seems to hold a different view as she mentions that in South Africa, women from all walks of life, from different social and cultural backgrounds, for different reasons, with different ethnic origins and speaking different languages are working in the diverse commercial sex industry.

In the case of Jordan¹⁹ (South Africa's controversial case which became a landmark case on criminalisation of prostitution), the appellants, a brothel owner, a brothel employee and a prostitute who were convicted in the Magistrates' Court for contravening the Sexual Offences Act of 1957 appealed to the High Court on the basis that the relevant provisions of the Sexual Offences Act were unconstitutional. The case involved the *amici* who filed affidavits from sex workers to support their submissions, and it was clear from these affidavits that the women, although most of them were motivated by the money to be made from sex work, are at peace with the work they do (prostitution).

This shows that there is a difference between voluntary and coerced prostitution and the former is the one that is referred to in this paper. Therefore, those who engage in prostitution voluntarily should be awarded the freedom to practice their trade, occupation and profession freely.

The right to fair labour practices

Section 23 of the South African Constitution provides that everyone has the right to fair labour practices. At the end of 2006 The Commission for Conciliation, Mediation and Arbitration²⁰ heard the case of 'Kylie'²¹ (as the sex worker was dubbed) wherein Kylie, a sex worker who was fired from her employment at a brothel in Cape Town, took her case to the CCMA, arguing that she was unfairly dismissed. The CCMA said it did not have jurisdiction over the case, since the work Kylie was doing – sex work – was illegal in South Africa. And it was held that she could not be protected from unfair dismissal under the Labour Relations Act²² and that the CCMA therefore had no jurisdiction to hear the case against Kylie's employer.

¹⁶ R Kruger, "Sex Work from a feminist perspective : a visit to the Jordan case" (2004) 20 South African Journal of Human Rights, page 138

¹⁷ Article 11(1)

¹⁸ R Kruger ' Sex work from a feminist perspective: a visit to the *Jordan* case' (2004) 20 *South African Journal of Human Rights*, page 138

¹⁹ *Jordan v The State* 2002 (6) SA 642 (CC)

²⁰ Hereinafter referred to as the CCMA

²¹ *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC)

²² Hereinafter referred to as the LRA

The CCMA Commissioner argued that although sex workers are not explicitly excluded from protection by the LRA, this cannot mean that they are included either, because it would mean that any person who is paid by another to undertake an activity which is criminalised would be able to access the protection of the LRA. This meant that an unpaid assassin contracted to kill another person and is then not paid for the job could also approach the CCMA for relief?

It can be said that even if sex work remains criminalised, there are good constitutional reasons why the CCMA Commissioner got it wrong. Most notably, section 23 of the Constitution guarantees everyone a right to a fair labour practice while section 39(2) of the Constitution requires any tribunal when it interprets legislation to take into account the “spirit, purport and objects” of the Bill of Rights.

This means that any tribunal called upon to interpret the definition of ‘employee’ in the LRA, is constitutionally required to do so with reference to the section 23 guarantee that *everyone* is entitled to fair labour practice. What is paramount here is the *constitution*, not the *common law*.²³ While it is correct to say that the common law prevents the enforcement of illegal contracts, it can be argued that as far as the protection of vulnerable groups such as sex workers are concerned, the Bill of Rights now requires jettisoning this principle of the common law. Instead, it requires an expansive interpretation of the definition of employer in the LRA to include protection for vulnerable groups like sex workers who harm no one when they engage in the illegal activity of prostitution. This view was confirmed by Ngcobo J (as he then was) in *Khosa v Minister of Social Development*²⁴ Para 111, which reads as follows:

“The word ‘everyone’ is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system.”

Thus, based on the arguments advanced in this study prostitutes should also be protected under the constitutional right to fair labour practice as the type of work that they engage in is not in any way violent to anyone. Support for the view being canvassed above may be found In the Israel case of *Ben-Ammi v Galitzansy*²⁵ a different approach from the one taken by the South African courts in the case of *Kylie* was followed. The case involved injuries caused when a number of men attacked a brothel in Beersheva on November 2000. One of the injured women who was a citizen of Uzbekistan was recognised by the National Insurance Institute as the victim of a work-related accident. The plaintiff had initially argued that she worked in the brothel only as a cleaner; on the other hand the defendant who managed the brothel denied that but instead averred that the plaintiff actually worked as a prostitute. Despite this, the court ruled that even if the plaintiff worked as a prostitute she still deserved the protection of the labour law. This shows how far some countries have gone in an endeavour to recognise and protect the rights of the sex workers.

In *Discovery Health Limited v CCMA*²⁶, German Lanzetta, an Argentinean national who was employed by Discovery Health, referred an unfair dismissal dispute to the CCMA when Discovery Health terminated his employment.

Discovery Health contended that Lanzetta was not an employee as envisaged by the Labour Relations Act, 1995 (the LRA) because he was not in possession of a valid work permit at the time he was appointed. In other words, the contract of employment concluded between the parties was not valid and therefore, Lanzetta was not an employee as defined in the LRA. Judge Van Niekerk, however, held that even if the contract between Lanzetta and his employer was invalid, Lanzetta would still fall within the definition of an ‘employee’ in terms of the Labour Relations Act 66 of 1995 and accordingly the definition would have to be reconciled with the fair labour practice conferred on every employee by the Constitution.

The right to fair labour practice includes the right to form unions. If sex workers may fall under the scope of employees then they may also be allowed to unionise.

²³ Pierre De Vos, ‘Sex workers and the right to a fair labour practice’, Feb 5th, 2008. www.constitutionallyspeaking.co.za. Accessed 2 April 2012

²⁴ 2004 (6) SA 505 (CC)

²⁵ 28 LC (Beersheva) 56 180-3

²⁶ case number JR 2877/06

Drucilla Cornell²⁷ recognises self-organisation and self-representation as the heart of the matter for the feminist programmes. She argues convincingly that denying women this solidarity is tantamount to treating them as unworthy of equal citizenship thus, refusing them their basic respect.

Thus, it can be said that prostitutes may be recognised as employees where an agreement has been reached with the brothel owner regardless of the legality of such an agreement. This will then be owing to the protection of their labour rights.

Conclusion

The South African Constitution is the ultimate standard against which proposals for reforming the law on prostitution must be measured. Prostitutes should be afforded those particular human rights that are extended to women under international treaties and the South African Constitution.²⁸

Based on what has been said in this work, it is obvious that sex workers are firstly human beings before they can be labeled prostitutes, which means they deserve to be treated equally to other human beings. They are only rendered vulnerable to abuse by the type of work that they engage in. However, when we refer to the supreme law of the country (the Constitution) it expressly states that every citizen has the right to choose their trade, occupation or profession freely. It then goes on to say the practice of a trade, occupation or profession may be regulated by law. This should be taken to include the sex workers. They should be free to engage in their practice for as long as they enter the industry voluntarily. The police officers may only be involved where one is compelled to enter into prostitution, which will then mean that they would be dealing with the one who compels the sex worker to enter into the industry and not the sex worker herself. In this case the sex worker would be a victim in need of protection.

Even though radical feminists argue that all prostitution is sexual exploitation and should never be seen as work, their argument stands to be countered as this study focuses only on adult voluntary sex work. There is a distinction between forced and voluntary prostitution, and it is voluntary prostitution that deserves protection. Child prostitution and coerced prostitution are forms of exploitation which should remain criminalised at all times.

Section 23 of the Constitution²⁹ affords everyone the right to fair labour practice. Sex workers are included in the ambit or in the scope of the term 'everyone'. This means that the law making body in South Africa has to consider coming up with legislation that would cover even sex workers in their scope of employment.

²⁷ D Cornell, *Feminism and Pornography*, Oxford University Press, 2000

²⁸ Prostitution is not an activity exclusively engaged in by women, but women are disproportionately represented in the sex industry, including prostitution

²⁹ See fn. 6 above