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# Lawyer's Manual on Sex Work Litigation



Pursuing Justice for Sex Workers



WOMEN'S LEGAL CENTRE

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## Pursuing Justice for Sex Workers

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FORD FOUNDATION

# Summary contents

|                                  |    |
|----------------------------------|----|
| Detailed contents .....          | 2  |
| Foreword .....                   | 9  |
| Acknowledgements .....           | 13 |
| How to use this manual .....     | 14 |
| Abbreviations and acronyms ..... | 15 |

## Chapters

|    |  |     |
|----|--|-----|
| 1  | Introduction: Legal services for sex workers ..... | 17  |
| 2  | Documenting human rights violations .....          | 35  |
| 3  | What is sex work? .....                            | 99  |
| 4  | What we know about sex workers: Research .....     | 109 |
| 5  | Strategic impact litigation .....                  | 119 |
| 6  | South African law relating to sex work .....       | 153 |
| 7  | International law .....                            | 177 |
| 8  | Addressing police abuse of sex workers .....       | 185 |
| 9  | Civil law and procedure .....                      | 261 |
| 10 | Labour law .....                                   | 299 |
| 11 | Addressing the health rights of sex workers .....  | 345 |
| 12 | Human trafficking .....                            | 369 |
|    | Cases .....  | 382 |
|    | Legislation .....                                  | 386 |
|    | Useful materials .....                             | 389 |

# Contents

|  |           |
|--|-----------|
| Foreword .....   | 9         |
| Acknowledgements .....   | 13        |
| How to use this manual .....   | 14        |
| Abbreviations and acronyms .....   | 15        |
| <b>1. Introduction: Legal services to sex workers .....</b>              | <b>17</b> |
| 1.1 Who is this manual for? .....  | 17        |
| 1.2 Rationale: Providing legal services to sex workers .....             | 17        |
| 1.3 WLC's legal services model .....                                     | 18        |
| <i>Figure 1: Pillars of WLC model</i> .....                              | 18        |
| 1.3.1 Recording human rights abuses .....                                | 18        |
| 1.3.2 Free legal advice .....  | 19        |
| 1.3.3 Legal representation .....   | 19        |
| 1.3.4 Strategic impact litigation .....                                  | 20        |
| 1.3.5 Advocating for decriminalisation of sex work .....                 | 20        |
| 1.4 The role of paralegals .....   | 20        |
| 1.5 Additional legal services .....                                      | 21        |
| 1.6 How do all these activities fit together? .....                      | 22        |
| <i>Figure 2: Roles and role players in WLC model</i> .....               | 22        |
| 1.7 Log frame: Legal services to sex workers .....                       | 23        |
| 1.8 Guiding principles: Legal services to sex workers .....              | 28        |
| 1.9 When your client is a sex worker .....                               | 30        |
| 1.10 Working with paralegals .....                                       | 32        |
| 1.10.1 Paralegals supporting attorneys .....                             | 32        |
| 1.10.2 Tips: Working with community-based paralegals .....               | 33        |
| <b>2. Documenting human rights violations .....</b>                      | <b>35</b> |
| 2.1 Taking a statement .....   | 35        |
| 2.2 Affidavits .....   | 41        |
| 2.3 WLC Human Rights Violations Questionnaires .....                     | 44        |
| 2.4 Human Rights Violations Questionnaire: Police Harassment/Abuse ..... | 45        |
| 2.5 Human Rights Violations Questionnaire: Clients .....                 | 53        |
| 2.6 Human Rights Violations Questionnaire: Sexual Assault .....          | 56        |
| 2.7 Human Rights Violations Questionnaire: Family Law Matters .....      | 60        |
| 2.8 Human Rights Violations Questionnaire: Domestic Abuse .....          | 66        |
| 2.9 Human Rights Violations Questionnaire: Criminal Charges .....        | 70        |
| 2.10 Human Rights Violations Questionnaire: Health .....                 | 74        |

|           |   |            |
|-----------|---|------------|
| 2.11      | Human Rights Violations Questionnaire: Labour Matters.....              | 78         |
| 2.12      | Human Rights Violations Questionnaire: Human Trafficking .....          | 81         |
| 2.13      | Human Rights Violations Questionnaire: Other Matters .....              | 88         |
| 2.14      | WLC questionnaires: Frequently asked questions .....                    | 91         |
| <b>3.</b> | <b>What is sex work? .....</b>  | <b>99</b>  |
| 3.1       | Is sex work legal? .....  | 100        |
| 3.2       | Who does sex work? .....  | 100        |
| 3.3       | Why do people do sex work? .....  | 100        |
| 3.4       | Where is sex work practised?.....                                       | 102        |
| 3.5       | Do sex workers work alone? .....  | 103        |
| 3.6       | How is sex work practised? .....  | 103        |
| 3.7       | What do sex workers get paid? .....                                     | 104        |
| 3.8       | Common misconceptions about sex workers .....                           | 104        |
| 3.9       | Separating myths from facts.....  | 106        |
| 3.10      | The words we use: ‘sex worker’ and ‘prostitution’ .....                 | 107        |
| <b>4.</b> | <b>What we know about sex workers: Research.....</b>                    | <b>109</b> |
| 4.1       | Research studies on the realities of sex work .....                     | 110        |
| 4.2       | Current legal framework in the spotlight.....                           | 112        |
| 4.3       | Condoms as evidence .....   | 115        |
| 4.4       | Why are sex workers vulnerable to abuse?.....                           | 117        |
| <b>5.</b> | <b>Strategic impact litigation.....</b>                                 | <b>119</b> |
| 5.1       | What is strategic litigation?.....                                      | 119        |
| 5.2       | Why is strategic litigation necessary for gender law?.....              | 120        |
| 5.3       | How does strategic litigation help change the law?.....                 | 122        |
|           | 5.3.1 Advantages of strategic litigation .....                          | 122        |
|           | 5.3.2 Disadvantages of strategic litigation .....                       | 124        |
| 5.4       | How do strategic litigation cases arise? .....                          | 125        |
|           | 5.4.1 Methods used in public interest law.....                          | 126        |
|           | 5.4.2 Models of public interest law organisations .....                 | 126        |
| 5.5       | Assessment and relevance of impact.....                                 | 128        |
|           | 5.6.1 How do objectives and priorities facilitate case selection? ..... | 129        |
|           | 5.6.2 Case selection criteria .....                                     | 130        |
| 5.7       | The process of strategic litigation planning .....                      | 131        |
|           | 5.7.1 Is litigation the right strategy?.....                            | 132        |
|           | 5.7.2 What are the issues for litigation? .....                         | 134        |
|           | 5.7.3 What is the appropriate legal forum and jurisdiction?.....        | 137        |
|           | 5.7.4 What is the best remedy?.....                                     | 143        |

|           |   |            |
|-----------|---|------------|
| 5.7.5     | What is the best factual case for litigation?.....  | 145        |
| 5.8       | Litigation support strategies .....   | 150        |
| <b>6.</b> | <b>South African law relating to sex work.....</b>  | <b>153</b> |
| 6.1       | Constitutional rights of sex workers.....   | 153        |
| 6.2       | National legislation .....  | 156        |
| 6.2.1     | Sexual Offences Act .....   | 156        |
| 6.2.2     | Criminal Law (Sexual Offences and Related Matters)<br>Amendment Act .....                           | 168        |
| 6.2.3     | Riotous Assemblies Act .....  | 169        |
| 6.2.4     | Business Act .....  | 170        |
| 6.3       | Municipal by-laws .....   | 172        |
| <b>7.</b> | <b>International law .....</b>  | <b>177</b> |
| 7.1       | International Covenant on Civil and Political Rights .....  | 178        |
| 7.2       | International Covenant on Economic, Social and Cultural Rights .....                                | 178        |
| 7.3       | Convention on the Elimination of All Forms of Discrimination against Women                          | 179        |
| 7.4       | Declaration on the Elimination of Violence against Women .....                                      | 179        |
| 7.5       | Beijing Declaration and Platform for Action .....   | 180        |
| 7.6       | Examples: International case law .....  | 180        |
| 7.7       | African Charter on Human and People's Rights .....  | 183        |
| 7.8       | Protocol to the African Charter on Human and People's Rights on<br>the Rights of Women .....        | 183        |
| 7.9       | Addendum to the Declaration on Gender and Development by<br>SADC Heads of State or Government ..... | 184        |
| 7.10      | SADC Protocol on Gender and Development .....   | 184        |
| <b>8.</b> | <b>Addressing police abuse of sex workers.....</b>  | <b>185</b> |
| 8.1       | Scope of police abuse .....   | 185        |
| 8.2       | Stigma and discrimination .....   | 187        |
| 8.2.1     | If sex work is illegal, why worry about stigmatisation of<br>sex workers?.....                      | 188        |
| 8.2.2     | Effects of stigma and discrimination .....  | 191        |
| 8.2.3     | Addressing stigma and discrimination .....  | 192        |
| 8.3       | Harassment .....  | 194        |
| 8.3.1     | What is police harassment? .....  | 195        |
| 8.3.2     | What laws cover harassment? .....   | 196        |
| 8.3.3     | Strategic impact litigation example .....   | 198        |
| 8.4       | Searches .....  | 200        |
| 8.4.1     | Search with a search warrant .....  | 200        |
| 8.4.2     | Search without a search warrant .....   | 200        |

|            |  |            |
|------------|--|------------|
| 8.4.3      | Invasive searches .....  | 201        |
| 8.4.4      | Searching for condoms .....  | 208        |
| 8.4.5      | Seizure of articles before arrest.....   | 212        |
| 8.4.6      | Seizure of articles on arrest.....   | 214        |
| 8.4.7      | Legal remedies for an unlawful search .....  | 216        |
| <b>8.5</b> | <b>Arrest and detention .....</b>  | <b>216</b> |
| 8.5.1      | Lawful arrest .....  | 217        |
| 8.5.2      | Unlawful arrest.....   | 219        |
| 8.5.3      | Arrest with a warrant.....   | 219        |
| 8.5.4      | Arrest without a warrant.....  | 220        |
| 8.5.5      | Can a police officer use force to arrest? .....  | 222        |
| 8.5.6      | Rights of arrested and detained people.....  | 223        |
| 8.5.7      | What if the case has been referred to court? .....   | 228        |
|            | <i>Figure 3: Steps in a criminal case .....</i>  | <i>228</i> |
| 8.5.8      | First remedy when unlawfully arrested: Criminal charge.....                                | 233        |
| 8.5.9      | Second remedy when unlawfully arrested: Independent Police Investigative Directorate ..... | 234        |
|            | <i>Figure 4: IPID referral form.....</i>   | <i>237</i> |
| 8.5.10     | Third remedy when unlawfully arrested: Complaint to Station Commander .....                | 240        |
|            | <i>Figure 5: Example of complaint letter to Station Commander.....</i>                     | <i>241</i> |
| 8.5.11     | Fourth Remedy when unlawfully arrested: Report to the Department of Community Safety ..... | 242        |
| 8.5.12     | Damages claims .....   | 242        |
| <b>8.6</b> | <b>Profiling.....</b>  | <b>248</b> |
| 8.6.1      | What is profiling? .....   | 248        |
| 8.6.2      | What does the law say about profiling? .....   | 248        |
| 8.6.3      | What remedies are available to address profiling?.....                                     | 251        |
| <b>8.7</b> | <b>Fines.....</b>  | <b>254</b> |
| 8.7.1      | Relevant municipal law.....  | 255        |
| 8.7.2      | Abuse of loitering, spot fines and arrests .....   | 257        |
| 8.7.3      | Legal remedies to challenge by-laws .....  | 258        |
| <b>9.</b>  | <b>Civil law and procedure .....</b>   | <b>261</b> |
| 9.1        | Prescription periods.....  | 261        |
| 9.2        | Preparation for a civil claim .....  | 262        |
| 9.3        | Steps in a civil claim in the Magistrate’s Court .....                                     | 262        |
|            | <i>Figure 6: Steps in a civil case.....</i>  | <i>263</i> |
| 9.4        | Civil claim against unlawful arrest and detention.....                                     | 266        |
| 9.4.1      | How to make a claim for unlawful arrest and detention.....                                 | 266        |
| 9.4.2      | Different kinds of damages claims.....   | 267        |



|            |  |            |
|------------|--|------------|
| 9.4.3      | Steps when bringing an action against the Minister .....                         | 268        |
|            | <i>Figure 7: Example: Notice to Minister</i> .....                               | 269        |
|            | <i>Figure 8: Example: Summons</i> .....  | 272        |
|            | <i>Figure 9: Example: Particulars of Claim</i> .....                             | 276        |
|            | <i>Figure 10: Example: Notice of Intention to Defend</i> .....                   | 282        |
|            | <i>Figure 11: Defendant's Plea</i> .....   | 283        |
|            | <i>Figure 12: Example: Notice of Bar</i> .....                                   | 288        |
|            | <i>Figure 13: Example: Plea in Replication</i> .....                             | 290        |
|            | <i>Figure 14: Example: Discovery Notice</i> .....                                | 292        |
|            | <i>Figure 15: Notice to Compel Discovery</i> .....                               | 294        |
|            | <i>Figure 16: Founding Affidavit supporting Notice to Compel Discovery</i> ..... | 296        |
| <b>10.</b> | <b>Labour law</b> .....  | <b>299</b> |
| 10.1       | The contract of employment .....   | 300        |
|            | 10.1.1 How to use a contract of employment .....                                 | 301        |
|            | 10.1.2 Changing the contract .....   | 302        |
| 10.2       | Laws on terms and conditions of employment .....                                 | 303        |
| 10.3       | Wage regulating measures .....   | 303        |
| 10.4       | How do you know which law applies to a worker? .....                             | 304        |
| 10.5       | Basic Conditions of Employment Act.....  | 305        |
|            | 10.5.1 Prohibited employment.....  | 305        |
|            | 10.5.2 Enforcement of the BCEA.....  | 306        |
|            | 10.5.3 Summary: BCEA .....   | 306        |
| 10.6       | Employment Equity Act .....  | 313        |
| 10.7       | Disputes and ways of settling disputes.....                                      | 314        |
|            | 10.7.1 Remedies for disputes of interest .....                                   | 315        |
|            | 10.7.2 Remedies for disputes of right.....                                       | 316        |
| 10.8       | The Labour Relations Act .....   | 316        |
|            | 10.8.1 What does the LRA cover? .....  | 317        |
|            | 10.8.2 Unfair labour practices .....   | 317        |
| 10.9       | Dismissals .....   | 318        |
|            | 10.9.1 What is a dismissal? .....  | 318        |
|            | 10.9.2 Automatically unfair dismissals.....                                      | 320        |
|            | 10.9.3 When is a dismissal fair or unfair?.....                                  | 320        |
|            | <i>Figure 17: Unfair dismissal</i> .....   | 321        |
|            | 10.9.4 Dismissal for misconduct.....   | 321        |
|            | 10.9.5 Dismissal for incapacity .....  | 323        |
|            | 10.9.6 Remedies against unfair dismissal .....                                   | 325        |
|            | 10.9.7 Disputes under the LRA.....   | 326        |
|            | <i>Figure 18: LRA steps to resolve disputes</i> .....                            | 326        |

|            |  |            |
|------------|--|------------|
| 10.10      | Conciliation by the CCMA or Bargaining Council .....   | 327        |
|            | <i>Figure 19: CCMA conciliation form</i> .....   | 328        |
| 10.10.1    | Applying for condonation .....   | 334        |
| 10.10.2    | The conciliation meeting .....   | 334        |
| 10.10.3    | Who can represent employees and employers in a<br>conciliation meeting? .....                  | 335        |
| 10.10.4    | Successful conciliation .....  | 335        |
| 10.10.5    | Unsuccessful conciliation .....  | 336        |
| 10.11      | Arbitration by the CCMA or Bargaining Council.....   | 337        |
| 10.11.1    | What is arbitration?.....  | 337        |
| 10.11.2    | How to refer a case for arbitration .....  | 337        |
| 10.11.3    | The arbitration hearing .....  | 338        |
| 10.11.4    | Who can represent employees and employers in arbitration? .....                                | 338        |
| 10.11.5    | Arbitration appeals.....   | 338        |
| 10.12      | Adjudication by the Labour Court .....   | 339        |
| 10.12.1    | What is adjudication? .....  | 339        |
| 10.12.2    | How to refer a case for adjudication .....   | 339        |
| 10.12.3    | Who can represent employees and employers in a Labour<br>Court case? .....                     | 339        |
| 10.12.4    | Adjudication appeals .....   | 339        |
| 10.13      | Labour law in action: Kylie’s case.....  | 340        |
| <b>11.</b> | <b>Addressing the health rights of sex workers.....</b>  | <b>345</b> |
| 11.1       | The need to address health care rights of sex workers .....                                    | 345        |
| 11.1.1     | Why are sex workers more vulnerable to HIV? .....  | 346        |
| 11.1.2     | What human rights abuses do sex workers experience? .....                                      | 347        |
| 11.1.3     | How can health workers improve conditions for sex workers? .....                               | 348        |
| 11.2       | Addressing stigma by health care officials .....   | 349        |
| 11.2.1     | What are stigma and discrimination? .....  | 349        |
| 11.2.2     | How is stigma developed? .....   | 350        |
| 11.2.3     | What are the signs of stigma? .....  | 350        |
| 11.2.4     | Why are sex workers stigmatised? .....   | 352        |
| 11.2.5     | What affect does stigma have on sex workers? .....   | 353        |
| 11.2.6     | How can we address stigma towards sex workers? .....   | 354        |
| 11.3       | Health care workers and the law .....  | 355        |
| 11.3.1     | Is providing health care to sex workers illegal? .....   | 355        |
| 11.3.2     | Must health care workers provide medical care to sex workers? .....                            | 355        |
| 11.3.3     | Must health care workers report a patient to the police if he<br>or she is a sex worker? ..... | 356        |
| 11.4       | How does the illegality of sex work affect the health of sex workers?.....                     | 356        |
| 11.4.1     | Lack of disclosure .....   | 356        |



|                         |   |            |
|-------------------------|---|------------|
| 11.4.2                  | Self-esteem and seeking health care .....   | 357        |
| 11.5                    | <b>Confidentiality</b> .....  | <b>358</b> |
| 11.5.1                  | Some rules about confidentiality.....   | 359        |
| 11.5.2                  | Confidentiality and openness .....  | 360        |
| 11.5.3                  | Remedies if a health care worker abuses your right to confidentiality                                   | 360        |
| 11.6                    | <b>HIV testing and informed consent</b> .....   | <b>360</b> |
| 11.6.1                  | General rules about HIV testing and consent.....  | 361        |
| 11.6.2                  | Exceptions to the rule of informed consent .....  | 361        |
| 11.6.3                  | Who can give consent? .....   | 361        |
| 11.6.4                  | What can you do if an HIV test was done without your consent?.....                                      | 362        |
| 11.6.5                  | Examples: International case law .....  | 362        |
| 11.7                    | <b>The right to health care and medical treatment</b> .....   | <b>366</b> |
| <b>12.</b>              | <b>Human trafficking</b> .....  | <b>369</b> |
| 12.1                    | What is human trafficking? .....  | 369        |
| 12.2                    | How does human trafficking work? .....  | 370        |
| 12.2.1                  | Recruitment .....   | 370        |
| 12.2.2                  | Transportation .....  | 371        |
| 12.2.3                  | Exploitation .....  | 371        |
| 12.3                    | Others facilitating trafficking in people .....   | 372        |
| 12.4                    | How does human trafficking differ from smuggling?.....  | 372        |
|                         | <i>Figure 20: Trafficking crimes</i> .....  | 372        |
| 12.4.1                  | The elements of smuggling .....   | 373        |
|                         | <i>Figure 21: Trafficking and smuggling</i> .....   | 373        |
| 12.4.2                  | Difference between trafficking and smuggling .....  | 374        |
| 12.5                    | The impact of trafficking .....   | 375        |
| 12.6                    | International law on human trafficking .....  | 375        |
| 12.7                    | Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially<br>Women and Children ..... | 376        |
| 12.8                    | South African Constitution and laws .....   | 376        |
| 12.9                    | Prevention and Combating of Trafficking in Persons Act .....  | 377        |
| <b>Cases</b>            | .....   | <b>382</b> |
| <b>Legislation</b>      | .....   | <b>386</b> |
| <b>Useful materials</b> | .....   | <b>389</b> |
|                         | Books, articles, reports, submissions and manuals .....   | 389        |
|                         | Online references .....   | 392        |
|                         | Links to Women’s Legal Centre materials .....   | 394        |

## Foreword

The Women's Legal Centre (WLC) is a non-profit, independently funded law centre in Cape Town, South Africa.

The WLC was established in 1999 by the Women's Legal Centre Trust to conduct constitutional and public interest litigation for the advancement of women's human rights, particularly women that experience socio-economic disadvantage.

The WLC also provides legal advice to other women's organisations nationally and in Africa. The WLC is staffed by attorneys, who specialise in gender law and have extensive litigation experience. The WLC is based in Cape Town and has a satellite office for free in Khayelitsha. In 2014, we opened an office in Braamfontein, Johannesburg.

The WLC has a vision of women in South Africa, free from violence, empowered to ensure their own reproductive and health rights, free to own their own share of property, having a safe place to stay, and empowered to work in a safe and equal environment.

The WLC has been at the forefront of legal reform in relation to women's equality since the Constitution of the Republic of South Africa of 1996 (the Constitution) came into effect, having won several precedent-setting cases.

The Centre seeks to achieve its long term goals through litigation. The Centre has identified 5 strategic areas in which to litigate and conduct law reform.

*These areas are:*

- *Fair access to resources:* We will take up cases that ensure that, on dissolution of partnerships, whether by death or separation, women receive a fair share of the assets of the partnership. This involves ensuring that all partnerships are legally recognised, irrespective of religion and custom.
- *Being free of violence:* We will take up cases that improve the access of women and girl children to State protection from gender-based violence, particularly rape and domestic violence, and increase protections for girl children from abuse in schools.
- *Having a safe place to stay:* We will take up cases that extend tenure to women in their own right, and to prevent loss of tenure on dissolution of relationships.

- *Being able to work*: We will take up cases that extend employment protections to vulnerable groups, develop the law on sexual harassment in relation to farm and domestic workers, and ensure equal opportunities in the workplace.
- *Being well*: We will continue to defend legal challenges to the right to make choices around reproductive health, and to litigate to ensure that women have access to reproductive health care. We will take cases related to women's access to health care, and the intersection between HIV, AIDS and our other strategic focus areas.

We support a rights-based approach that focuses on the agency of women and girls to hold justice-promoting institutions accountable. We believe that, when women are aware of their rights and have access to mechanisms that help them to uphold those rights, this goes a long way towards addressing power imbalances and will lead to a more equal society.

*Over the past 15 years, WLC has litigated these cases (starting with the most recent cases):*

Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14 (30 May 2013).

Teddy Bear Clinic for the Abused Children and Another v Minister of Justice and Constitutional Development and Another (73300/10) [2013] ZAGPPHC 1 (4 January 2013).

Director of Public Prosecutions, Western Cape v Prins and Others (369/12) [2012] ZASCA 106; 2012 (2) SACR 183 (SCA); 2012 (10) BCLR 1049 (SCA); [2012] 3 All SA 245 (SCA) (15 June 2012).

Kylie v Commission for Conciliation Mediation and Arbitration and Others (CA10/08) [2010] ZALAC 8 (26 May 2010).

Women's Legal Centre Trust v President, Republic of South Africa and Others (United Ulama Council of SA and others as *amici curiae*) [2009] JOL 23910 (CC).

Gumede (born Shange) v President of the RSA and Other [2008] JOL 22879 (CC).

Govender v Ragavayah NO and Others (Women's Legal Centre Trust as *amicus curiae*) [2008] JOL 22653 (D).

“Kylie” v CCMA and Others [2008] JOL 22261 (LC).

Hassam v Jacobs NO and Others [2008] JOL 22098 (C).

Gasa v The Road Accident Fund SCA: Case No. 579/2006 (WLC as *amicus curiae*).

Van Der Merwe v Road Accident Fund and Another (WLC as *amicus curiae*) 2006 (4) SA 230 (CC).

NK v Minister of Safety and Security [2005] JOL 14864 (CC).

Omar v Government RSA and Others [2005] JOL 15972 (CC).

Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as *amicus curiae*) 2005 (1) SA 580 (CC).

Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA).

Volks v Robinson 2005 (5) BCLR 446(CC).

Dudley v City of Cape Town and Another [2004] JOL 12499 (LC).

Daniels v Campbell NO and Others 2004 (5) SA 331 (CC).

Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA) (*amicus curiae*).

Ferreira and Others v The State, SCA (Case Number 245/03).

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as *amicus curiae*) 2002 (6) SA 642 (CC).

Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (WLC as *amicus curiae*) 2001 (4) SA 491 (CC).

Woolworths (Pty) Ltd v Whitehead (2000) 21 ILJ (LAC).

CTP Ltd and Others v Independent Newspapers Holdings Ltd 1999 (1) SA 452 (W).

Amod v Multilateral Motor vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA).

Christian Lawyers Association of SA and Others v Minister of Health and Others 1998 (4) SA 1113 (T).

The patterns of abuse that sex workers experience are the direct result of their criminal status, which increases their vulnerability to violence. The current legal framework forces sex workers to the margins of South African society, where they are easy targets for abuse at the hands of police and clients.

The only remedy is to change the way in which the sex work industry in South Africa is viewed under the law and by the institutions responsible for its administration. This will ensure that sex workers are afforded the same rights, in law and in practice, as others in the country are given.

In 2009, the WLC , the Sex Worker Education and Advocacy Taskforce (SWEAT) and Sisonke (movement of sex workers) partnered on the Sex Work Human Rights Defender Project. WLC provides SWEAT and Sisonke with legal support in documenting human rights abuses and training, and equipping sex workers to respond to human rights abuses.

Strategic litigation arising out of the project is undertaken by the WLC with the aim of improving sex workers' access to their constitutional rights.

*The aim of the project is to:*

- Provide individual legal assistance to sex workers who wish to challenge the human rights violations they experience.
- Lead human rights defence training.
- Continue to pursue strategic impact litigation to expand legal jurisprudence towards stronger protections of sex worker rights.

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We thank everyone who has contributed towards this Project and this Lawyer's Manual.





# How to use this manual

## Contents

- Overall manual themes: see *Summary contents* on page 1.
- Breakdown of manual topics: see *Detailed contents* on pages 2 to 8.
- For easy access, WLC Questionnaires, useful figures and forms, and examples of pleadings also appear in the *Detailed contents*.

## Helpful lists

- *Abbreviations and acronyms*: see pages 15 to 16.
- *Cases*: references for cases taken up by WLC and SWEAT, and other useful cases: see the *Foreword* from pages 10 to 11 and the full list on pages 382 to 385.
- *Legislation*: see pages 386 to 388.
- *Useful materials*: books and websites used in writing this manual, and for extra reading and research, including WLC materials: see pages 389 to 397.

## Loose leaf file format

We have used this A4 file format to facilitate you adding your own notes, cases, pleadings, translations and updates.

## Abbreviations and acronyms

|        |  |
|--------|--|
| AIDS   | Acquired Immune Deficiency Syndrome  |
| Anex   | Activists Networking against the Exploitation of Children                  |
| APLO   | Anti-prostitution Loyalty Oath (United States)                             |
| ARVs   | Antiretrovirals  |
| BCA    | Bargaining Council Agreements  |
| BCEA   | Basic Conditions of Employment Act   |
| CCMA   | Commission for Conciliation, Mediation and Arbitration                     |
| CEDAW  | Convention on the Elimination of All Forms of Discrimination against Women |
| CGE    | Commission for Gender Equality   |
| COIDA  | Compensation for Occupational Injuries and Diseases Act                    |
| CPA    | Criminal Procedure Act   |
| DCS    | Department of Community Safety   |
| DPP    | Director of Public Prosecutions  |
| DSD    | Department of Social Development   |
| DVA    | Domestic Violence Act  |
| EEA    | Employment Equity Act  |
| HIV    | Human Immuno-deficiency Virus  |
| HPCSA  | Health Professions Council of South Africa                                 |
| ICCPR  | International Covenant on Civil and Political Rights                       |
| ICESCR | International Covenant on Economic, Social and Cultural Rights             |
| ID     | Identity document  |
| ILO    | International Labour Organisation  |
| IPID   | Independent Police Investigative Directorate                               |
| JSC    | Judicial Service Commission  |
| LAC    | Labour Appeal Court  |
| LGBTI  | Lesbian, Gay, Bisexual, Transgender and Intersex                           |
| LRA    | Labour Relations Act   |
| NIA    | National Intelligence Agency   |
| NGO    | Non-government organisation  |
| NPA    | National Prosecuting Authority   |
| PEPFAR | President's Emergency Plan for AIDS Relief (United States)                 |
| PEPUDA | Promotion of Equality and Prevention of Unfair Discrimination Act          |

|        |  |
|--------|--|
| POA    | Power of Attorney                              |
| PTSD   | Post-traumatic Stress Disorder                 |
| SADC   | Southern African Development Community         |
| SAHRC  | South African Human Rights Commission          |
| SANAC  | South African National AIDS Council            |
| SANC   | South African Nursing Council                  |
| SANDF  | South African National Defence Force           |
| SAPS   | South African Police Service                   |
| SARS   | South African Revenue Service                  |
| SASSA  | South African Social Security Agency           |
| SCC    | Small Claims Court                             |
| SOA    | Sexual Offences Act                            |
| S/WDs  | Sectoral/Wage Determinations                   |
| SWEAT  | Sex Worker Education and Advocacy Taskforce    |
| TB     | Tuberculosis                                   |
| TRC    | Truth and Reconciliation Commission            |
| UIF    | Unemployment Insurance Fund                    |
| UN     | United Nations                                 |
| UNAIDS | Joint United Nations Programme on HIV and AIDS |
| WLC    | Women's Legal Centre                           |

# 1

## Introduction: Legal services to sex workers

### 1.1 Who is this manual for?

This Lawyer's Manual is for attorneys working to establish, strengthen or expand legal services to sex workers.

*This manual is primarily for:*

- Lawyers, legal service managers and other staff involved in delivering legal services to sex workers.
- People planning to establish or expand legal services to sex workers.

The purpose of this manual is to provide a practical resource to help improve the quality and impact of legal services provided to sex workers.

### 1.2 Rationale: Providing legal services to sex workers

As a result of the criminalisation of sex work, sex workers experience complex and layered levels of stigmatisation, social exclusion, deprivation and abuse, coupled with lower levels of access to health care, employment, access to justice and economic advancement. They are made vulnerable on a whole number of structural fronts, such as gender, race, class, relative deprivation and education.

The criminalisation of sex work is ultimately ineffective as a deterrent, leads to increased abuse of sex workers, is an inefficient allocation of the State's resources in the fight against crime, results in the stigmatisation of sex workers in society (impacting negatively on their ability to access everyday services and enjoy family lives), and undermines interventions to fight the spread of HIV.

Legal services are an essential component of an effective human rights response to challenging the criminalisation of sex work. Legal services enable sex workers to claim and enforce their rights.

This Lawyer’s Manual may also be useful to civil society organisations seeking to use litigation as part of an advocacy strategy to promote and protect the rights of sex workers. The Manual aims to provide concrete legal arguments for use in litigation before domestic courts.

### 1.3 WLC’s legal services model

WLC is a law centre that provides legal services to sex workers and sex worker-led organisations. In order to gain access to sex workers, we have worked closely with 2 leading organisations in South Africa: SWEAT and Sisonke.

*These are the 5 pillars of the core legal services that form part of our legal assistance model:*



Figure 1: Pillars of WLC model

*We now explain each pillar in more detail:*

#### 1.3.1 Recording human rights abuses

At the beginning of our project, we decided to document the human rights abuses that sex workers experience in order to build evidence for a Constitutional Court challenge.

We developed a Human Rights Violations Questionnaire and when we consult with sex workers, we complete the questionnaire. We created a questionnaire for each area of abuse that sex workers experience, for example: police abuse, labour, health and family-related abuse, and human trafficking.

*At the bottom of the questionnaire, we obtained consent from sex workers to:*

- Share the information in the questionnaire with SWEAT.
- Use this information in the media.
- Use their information in our research.
- Use the information in litigation to further the rights of sex workers.

The questionnaire therefore served a role beyond being a useful case information sheet. For example, in 2012, we produced a research report that collated and analysed all the questionnaires relating to police abuse.

We complete these questionnaires when we attend outreach, host legal clinics, or when sex workers approach us directly for legal assistance through face-to-face consultations at our office or via our 24-hour legal helpline.

### **1.3.2 Free legal advice**

We provide free legal advice to sex workers. We make ourselves available and host legal clinics at all creative spaces.

*A creative space* is an activity hosted by our partner organisations. It is a meeting (safe space) by sex workers to discuss the issues that they face.

We also provide legal advice to sex workers on outreach and through our 24-hour paralegal service helpline. If we are unable to assist, or the issue falls outside our mandate, we refer the sex worker to a partner organisation.

### **1.3.3 Legal representation**

We aim to provide strategic impact litigation that is in the best interests of sex workers. During the course of our project, we were instructed that sex workers needed assistance with their day-to-day legal problems, such as court representation in criminal trials, bail applications and contesting fines.

As a result, we expanded our legal services to provide assistance with day-to-day

court representation when it enhances or expands our strategic impact litigation.

### **1.3.4 Strategic impact litigation**

Our litigation strategy involves a piecemeal approach: we aim to challenge all the human rights abuses that sex workers experience at different courts in order to develop the legal jurisprudence on sex worker human rights.

Our aim with this is that when we go back to the Constitutional Court, we will have a body of evidence from sex workers and legal precedent to provide persuasive value in our arguments to decriminalise sex work.

See Chapter 5: Strategic Impact Litigation for more detail on page 119.

### **1.3.5 Advocating for decriminalisation of sex work**

In addition to litigation, we have been involved in advocacy activities to create awareness of the impact of laws on sex workers.

Our legal advocacy activities include submissions to Parliament on legislation that impacts on sex workers, and letters of complaint to human rights bodies, government and other stakeholders.

Our advocacy activities extend to the training of paralegals, sex workers and partner organisation on legal rights and remedies. Further, we are working towards creating a national network of partners to provide legal assistance to sex workers.

## **1.4 The role of paralegals**

Integral components of our legal model are the community-based paralegals. At the beginning of our project, we employed an attorney to provide legal assistance and carry out of the activities. We quickly realised that sex workers didn't trust anyone in the justice system and this included lawyers.

In addition, we were only accessing sex workers at weekly creative space sessions, and not many sex workers attended. As a result, we were unable to fully access sex worker communities.

We decided to train former or current sex workers as paralegals. We felt that it was important that the paralegals are from the sex worker community, because of trust issues that we previously experienced.

The work of our paralegals falls within all the pillars of our legal services model. The activities are carried out using the paralegal model, where an attorney supervises and trains paralegals to interact with sex workers.

*The paralegals:*

- Provide legal advice.
- Give support to clients at court.
- Do bail applications for sex workers.
- Document human rights abuses.
- Train all sex workers on constitutional human rights and legal remedies.

Community training of sex workers happens at creative spaces or workshops, or when we are invited by SWEAT or Sisonke to speak at their events.

In 2013, the WLC produced a comprehensive Paralegal Manual to assist with the training of paralegals and as a reference for paralegals in their daily work.

## **1.5 Additional legal services**

The core legal services covered by our legal services are supported by additional legal services such as legal and human rights education, legal research, monitoring, law reform and advocacy activities. These activities have the potential to significantly increase the uptake, as well as the social impact, of a legal service programme.

*These additional legal services include:*

- Educating sex workers about their legal and human rights. This is essential to ensure that sex workers accessing legal services are aware of their rights so that they can identify when their rights have been infringed.
- Educating lawyers, paralegals, government, prosecutors, police, media, health care workers, employers, trade unions and other groups about human rights, the law, and effective provision of services.
- Researching trends, including monitoring and documentation of human rights violations.



- Advocacy and campaigning on policy and law reform issues, for changes to practices, and for increased resources. This may include drafting model laws and providing input to law reform processes.

These services are generally provided by lawyers, paralegals, legal researchers, campaign officers and educators who have legal training.

## 1.6 How do all these activities fit together?



The pillars in our legal services model require the capacity of an attorney, administrator, paralegals and partnering with grassroots organisations.

*Here we represent the capacity needed for each pillar diagrammatically:*

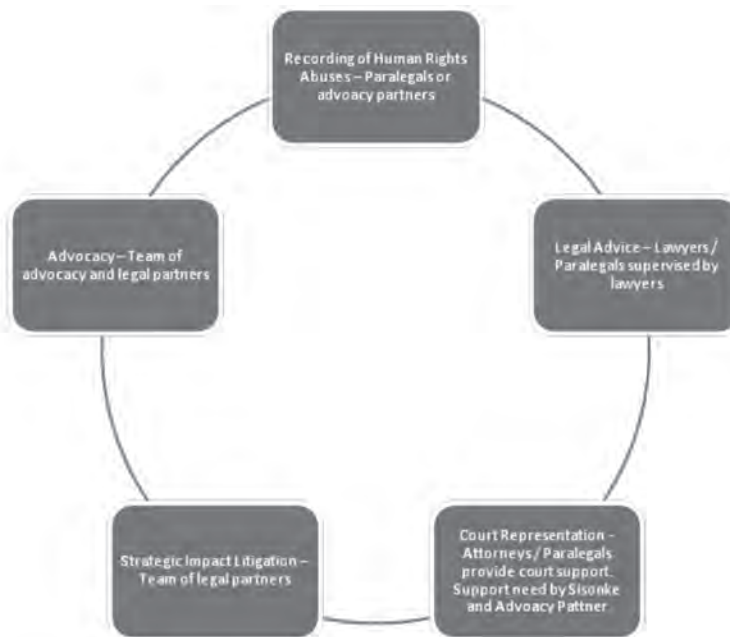


Figure 2: Roles and role players in WLC model

The *attorney* is expected to provide legal advice, legal representation, strategic impact litigation and assist with advocacy.

*Paralegals* will provide legal advice and collect information that will feed into the advocacy, research and litigation.

The *administrator* assists with collating the databases, co-ordinating the follow-ups, and provides general secretarial assistance.

*Partner organisations* are grassroots sex worker-led organisations, or organisations that work closely with sex workers. They provide the legal organisation with access to sex workers and will talk on behalf of and for sex workers.

## 1.7 Log frame: Legal services to sex workers

*In the table below, we give an example of an activity log frame for providing legal services to sex workers:*

| Activity  | Person Responsible  | Time Frame   | Funder | Projected Cost | Progress |
|---|---|--------------|--------|----------------|----------|
| <b>1. GROUND WORK</b><br><b>All legal stakeholders to record and document human rights violations</b> |   |              |        |                |          |
| <b>Paralegal to conduct 6 outreaches a month</b><br><b>Participate in outreach sessions</b>           | Paralegals to attend the outreaches<br>Supervised by attorney         | 6 per month  |        |                |          |
| <b>Attorney to attend outreach with paralegals</b>  | Attorney  | Once a month |        |                |          |
| <b>Complete questionnaires</b>  | Paralegals to complete whenever they give legal advice to sex workers | Ongoing      |        |                |          |
| <b>Insert onto database and share databases</b>   | Administrator   | Ongoing      |        |                |          |

| Activity  | Person Responsible  | Time Frame                    | Funder | Projected Cost | Progress |
|---|---|-------------------------------|--------|----------------|----------|
| <b>Collate and share with partners</b>  | Paralegals to complete monthly template and draft analysis of trend   | Send to partners once a month |        |                |          |
| <b>Record referrals and follow-ups</b>  | Paralegals to keep copies of referral forms and follow ups<br><br>Should be inserted into the reporting templates | Ongoing.                      |        |                |          |
| <b>Provide assistance to organisations nationally who seek to record and document human rights abuses</b>   | Attorney  | Ongoing                       |        |                |          |
| <b>Assist organisation regionally who wish to replicate the research and documentation</b>  | Attorney  | Ongoing                       |        |                |          |
| <b>Collate information and update research report that encompasses research collected in all areas</b>  | Paralegals to complete the documents<br><br>Attorney to draft and finalise report                                 | Annually                      |        |                |          |
| <b>2. LEGAL CLINICS</b><br><b>At these legal clinics, you have to train Sisonke members and sex workers on human rights and host a legal clinic</b> |   |                               |        |                |          |

| <b>Activity</b>  | <b>Person Responsible</b>             | <b>Time Frame</b>                    | <b>Funder</b> | <b>Projected Cost</b> | <b>Progress</b> |
|--|---------------------------------------|--------------------------------------|---------------|-----------------------|-----------------|
| <b>Attend creative spaces to:</b><br><b>1. host legal clinics, and</b><br><b>2. present on human rights and legal remedies</b>   | Paralegals and attorney to attend     | 2 per month                          |               |                       |                 |
| <b>Complete all creative space forms where you present on human rights and legal remedies:</b><br><b>1. Form</b><br><b>2. Attendance Register</b><br><b>3. Participants to complete evaluation forms</b> | Paralegals to complete forms and file | At all creative spaces               |               |                       |                 |
| <b>Provide assistance to organisations nationally who wish to set up legal clinics for sex workers</b>   | Attorney                              | Ongoing                              |               |                       |                 |
| <b>3. PARALEGAL 24-HOUR HELPLINE PHONE</b><br><b>Paralegals to provide legal advice and assistance</b>   |                                       |                                      |               |                       |                 |
| <b>Assist with legal advice queries through helpline –after hours helpline</b>   | Paralegals Supervised by Attorney     | Alternate between paralegals monthly |               |                       |                 |
| <b>Assist with bail applications obtained through helpline</b>   | Paralegals and attorney               | Ongoing                              |               |                       |                 |
| <b>Paralegals to record all incoming and outgoing SMSes and telephone calls</b>  | Paralegals to complete the database   | Ongoing                              |               |                       |                 |

| Activity  | Person Responsible      | Time Frame   | Funder | Projected Cost | Progress |
|---|-------------------------|--------------|--------|----------------|----------|
| <b>4. LEGAL ADVICE AND COURT SUPPORT</b><br>Paralegals and attorneys to provide court support and legal advice to sex workers               |                         |              |        |                |          |
| Complete questionnaires   | Paralegals and attorney | Ongoing      |        |                |          |
| Update database   | Administrator           | Ongoing      |        |                |          |
| Provide court support and document it<br>Court support provided to sex workers who are victims or accused                                   | Paralegals and attorney | Ongoing      |        |                |          |
| Provide legal advice and support to organisations nationally, which includes practical legal exposure for attorneys at Sonke Gender Justice | Attorney                | Ongoing      |        |                |          |
| <b>5. PARALEGAL TRAINING</b><br>Paralegals must be trained once a month – on human rights and legal remedies                                |                         |              |        |                |          |
| Monthly training of WLC paralegals  | Attorney                | Once a month |        |                |          |
| <b>6. DE-BRIEFING</b><br>Paralegals should be de-briefed every week to discuss trends, challenges, cases, and plan for upcoming activities  |                         |              |        |                |          |

| <b>Activity</b>   | <b>Person Responsible</b>                  | <b>Time Frame</b> | <b>Funder</b> | <b>Projected Cost</b> | <b>Progress</b> |
|---|--|-------------------|---------------|-----------------------|-----------------|
| <b>Weekly debriefing sessions with paralegals to discuss:</b><br>1. activities for the week<br>2. trends for previous week<br>3. case studies<br>4. assistance with cases | Attorneys to host and paralegals to attend | 4 times a month   |               |                       |                 |
| <b>Share weekly attendances of paralegals with staff</b>  | Attorney                                   | 4 times a month   |               |                       |                 |
| <b>7. LITIGATION</b>  |  |                   |               |                       |                 |
| <b>Identify and litigate appropriate cases for impact and repeat litigation that will improve sex worker's legal position</b>   | Attorney with feedback from paralegal.     | Ongoing           |               |                       |                 |
| <b>Research legal remedies including regional and international obligations</b>   | Attorney                                   | Ongoing           |               |                       |                 |
| <b>Represent sex workers in court</b>   | Attorney                                   | Ongoing           |               |                       |                 |
| <b>Assist sex workers who wish to lay criminal charges</b>  | Paralegals                                 | Ongoing           |               |                       |                 |
| <b>Deploy an advocacy strategy to engage and build relations with key stakeholders</b>  | Attorney                                   | Ongoing           |               |                       |                 |
| <b>8. STAKEHOLDERS WHO MAY INFLUENCE THE NEW LEGISLATION AND THE GENERAL PUBLIC ARE MADE AWARE OF THE DOCUMENTED RIGHTS ABUSES</b>  |  |                   |               |                       |                 |

| Activity   | Person Responsible | Time Frame | Funder | Projected Cost | Progress |
|--|--------------------|------------|--------|----------------|----------|
| Submissions to Parliament on sex worker legislation or legislation that impacts on sex workers | Attorney           | Ongoing    |        |                |          |

## 1.8 Guiding principles: Legal services to sex workers<sup>1</sup>

These guiding principles are drawn from the International Development Law Organisation and United Nations Joint Programme on HIV and AIDS (UNAIDS) *Toolkit: Scaling Up HIV-Related Legal Services* (2009).

*These 8 principles promote legal services that:*

- Support and respect the protection of human rights, and
- Are ethical and effective.

We recommend that legal services are actively monitored for their compliance with these principles.

### Client-centred services

This means that the objective of providing legal services is to enable the client to decide, with full information, how she or he wishes to deal with the problem, and related issues for which the services or advice are provided.

It is the client who should be empowered to decide how to use the legal services that the adviser or practitioner makes available. The individual needs, concerns and best interests of the client remain at the centre of everything that the adviser or practitioner does.

Legal services will ensure that clients understand all their options so that they can make fully informed, independent decisions regarding their legal issues. This requires:

<sup>1</sup> International Development Law Organisation and United Nations Joint Programme on HIV and AIDS (UNAIDS) *Toolkit: Scaling Up HIV-Related Legal Services* (2009).

- Listening carefully and respectfully to clients' instructions.
- Ensuring that clients are able to communicate their instructions clearly.
- Using interpreters to ensure that clients can effectively communicate their instructions.

### **Non-discrimination**

Legal services will not discriminate against clients or staff on the grounds of their HIV status, sex, sexual orientation, transgender status, disability, prisoner status or status as a member of a key population.

*Providers of legal services must adopt a non-judgemental, welcoming attitude towards people living with HIV and key populations, including:*

- Sex workers.
- Men who have sex with men.
- Transgender people.
- People who use illicit drugs.

### **Participation**

Legal services will commit to ensuring the meaningful participation of sex workers in all cases affecting them.

### **Gender equality**

*Legal services will:*

- Promote the equality of women, men and transgender people.
- Ensure that services are accessible, affordable and safe for all, regardless of a person's sexual orientation or gender identity.

### **Confidentiality**

Legal services will respect every individual's rights to have their confidentiality



protected and will not disclose sensitive personal information, including health status, to family members or other third parties without the consent of the person to whom the information relates.

### **Transparency and accountability**

Legal services will be transparent and accountable to the communities they serve.

Communities affected by how legal services are provided will be able to contribute to the decision-making process through appropriate consultation and representation on the governance bodies of services. Staff and communities affected by management decisions will be able to know who made the decisions and why they were made.

Services will be systematically monitored and evaluated, and these findings reported to staff, communities and funders.

### **Sustainability**

Planning for the scale-up of legal services will take into account the capacity of the communities, governments and the legal profession to sustain the services in the future.

### **Do no harm**

Legal services will consider the possible harms that an intervention might cause to individuals and communities, as well as the benefits. Legal services will not implement activities that cause more harm than good.

Legal services should fully advise clients on the possible risks of a course of action and always proceed on the basis of their client's wishes. This should involve securing all available protection where there are risks of harm involved.

## **1.9 When your client is a sex worker**

*Taking into account the stigma that many sex workers face, these are some tips for interacting with a sex worker as your client:*

### **Don't use the word 'prostitute'**

The term 'prostitute' has a negative meaning and reinforces the stigma attached to sex work. Sometimes sex workers refer to themselves as prostitutes because

they may identify with the social stigma. We find that if we refer to them as ‘sex workers,’ they respond more positively during the consultation.

## **Trauma**

Acknowledge that sex workers have experienced many traumatic situations during their work. As a result, it may be difficult to obtain the necessary information promptly. Therefore, consultations may take longer than usual, and you will need to be patient. Remember that the sex worker may also have been sent from pillar to post, and you may be her last resort to access justice.

## **Trust**

Often sex workers do not trust anyone who is linked with the law, perceived to be in authority or part of government structures. Building a trusting relationship with a client may take a few months. It is important to reassure her that everything that is mentioned during the consultation is confidential.

## **Never promise anything more than you can deliver**

If you promise more than you can deliver, it can cause much more harm to your client. It takes a long time for sex workers to access any form of legal assistance. Because of their distrust of the legal system, you may never see them again. Always inform clients of the limitations and difficulties that may arise when claiming their human rights. Also inform your client that there might be delays in the process.

## **Information on basic human rights**

Your client may not be aware of what her basic human rights are and therefore may find it difficult to give you clear instructions. Be aware that you may have to repeat the same thing more than once. Try to give practical examples and use plain language in explaining the law and rights.

### **Note:**

Many sex workers internalise the stigma that they have experienced, and often see human rights violations as a risk that they take when they enter sex work as a profession. For example, many sex workers do not know that they are entitled to a phone call and medication during detention.

## 1.10 Working with paralegals<sup>2</sup>

This section draws on the online toolkit: <http://www.opensocietyfoundations.org/publications/community-based-paralegals-practitioners-guide>.

### 1.10.1 Paralegals supporting attorneys

As a result of criminalisation, sex workers are marginalised and thus have less access to information and justice. Attorneys and paralegals should work very closely together to ensure that sex workers have greater access to justice.

*In our legal services model, paralegals:*

- Assist with all the ground work in preparing the cases for litigation.
- Provide ongoing support to our clients and education on legal rights and remedies.
- Interact with, educate and engage with the community of sex workers in order to provide legal advice and support.<sup>3</sup>

Paralegals attend all creative spaces, outreaches and legal clinics. They assist with the documentation of human rights abuses by using the WLC's Human Rights Violations Questionnaires.

Paralegals also assist with after-hours police bail applications and accompany sex workers to court when they contest fines that they received for contravening Municipal By-Laws.<sup>4</sup>

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2 *Community Based Paralegals: A Practitioner's Guide*, Open Society Justice Initiative: Accessed on 28 October 2014 on: <http://www.opensocietyfoundations.org/publications/community-based-paralegals-practitioners-guide>.

3 Scamell D, Manoek S, Williams J, *Piece by Piece: The Approach of Sex Work Litigation in South Africa*, Interights Bulletin, Volume 17, Number 3 2013, 149.

4 Ibid.

## EXAMPLE

The paralegal completes the human rights violations questionnaire at the first consultation with client, provides initial legal advice, assesses the immediate needs of the client, and completes the consent. The paralegal will meet with the attorney at a de-briefing and will discuss the questionnaire with the attorney.

Thereafter, the attorney should make contact with the client, preferably together with the paralegal. *This serves 3 purposes:*

- Talking to client so that client knows that the case has been escalated to an attorney.
- Checking the legal advice given to the client is understood by the client.
- Confirming the instructions given to the paralegal.

After this follow-up consultation, the attorney may delegate to the paralegal responsibilities such as accompanying the client to the police station, obtaining a statement or making further appointments.

### 1.10.2 Tips: Working with community-based paralegals

1. Community-based paralegals will most likely be trained by yourself or another WLC attorney. Please see our Paralegal Manual (2013), which can be accessed on <http://www.wlce.co.za/index.php/2013-04-30-11-53-09/2013-05-08-11-48-14>.
2. Some paralegals have never been in formal employment before, so you need to be patient and guide them.
3. Consistency is the key in the way in which you carry out activities: try to be a role model for a paralegal to observe.
4. Communication is vital: aim to interact face-to-face with paralegals as much as possible, rather than email.
5. Paralegals are often strongest when interacting orally with clients. Written communication may not be their strength, so it is important to emphasise its importance and guide paralegals when they need to write down the facts of a

case or take a statement.

6. Paralegals often function outside of the office, so you have to set out clear working hours and areas of work.
7. Treat paralegals with respect. They may not have the same legal background as you, but they have a wealth of practical knowledge and language skills in relation to the community that you aim to serve.
8. Conduct regular training sessions. This is to ensure that paralegals are always updated on the law and sharpen their practical skills.
9. Set aside adequate time for working with paralegals. In the beginning, they will need a lot of guidance and assistance from you.
10. Develop easy examples for paralegals to use, for instance: examples of statements adapted for different situations. Refer to the WLC's Paralegal Manual where this is helpful.

# 2

## Documenting human rights violations

Attorneys and paralegals need to document the cases that clients present to them. One of the ways they do this is by completing the WLC's *Human Rights Violations Questionnaires* (see these from page 45 onwards).

These questionnaires, which cover all the areas of law in this Lawyer's Manual and our Paralegal Manual, should be kept in the client's file.

### 2.1 Taking a statement

The material in this section is drawn from our Paralegal Manual (2013) to guide paralegals in taking accurate statements.

The statement is recorded in WLC's *Human Rights Violations Questionnaires*. You will do all of your work on the case using the information you wrote down in the first statement. Therefore, it is very important for you to write down accurate and complete information.

*Your client's statement is divided into 4 parts:*

- Personal details, for example: name, age, home, work, contact number.
- Description of the problem.
- What advice you gave to the client.
- What action can be taken to help the client.

At the *beginning of the questionnaire* you will find this:

|                 |             |
|-----------------|-------------|
| DATE: _____     | NAME: _____ |
| PROVINCE: _____ | AREA: _____ |

Please insert the date that you have consulted with the client. In the 'name' section, add *your* name.

Also insert the province that the client is from and the area where you consulted with the client, for example: Western Cape (province) in Bellville (area).

### PERSONAL DETAILS

This part is vitally important because it covers all the personal details of your client:

|    |   |
|----|---|
| 1. | Name/ the name you are known by (pseudonym)<br>(optional): _____  |
| 2. | Age (optional): _____   |
| 3. | Telephone no/contact number you can be reached at (optional):<br>_____  |
| 4. | Address: _____<br>_____<br>_____  |
| 5. | Where do you work? _____<br>_____   |
| 6. | Please circle/tick:<br><br><b>Gender:</b> Male                                  Female<br><br>Transgender man                  Transgender woman<br><br>Indoor                                  Street-based<br><br>Both: (explain) _____ |

*Brief explanation of the items needed:*

1. **Name:** Here you write the name of your client. Record the client's name and surname as in their Identity Document (ID). You can also add their working name.
2. **Age:** To record the person's age and date of birth.
3. **Telephone number:** Write the client's telephone number, as well as a second number that the client can be contacted on, perhaps a next-of-kin.
4. **Address:** Record the address where the client lives and also a second address. If the attorney is unable to telephone the client, then the attorney will be able to send written letters to the client.
5. **Where do you work?** Write down the area where the client works, for example: Kenilworth or Cape Town CBD.
6. **Gender/Indoor/Street-based:** Please circle or tick your client's gender, and if your client works indoors (brothels, bars or hotels) or is street-based (gets clients on the street). If you ticked 'both', add details.

Another way of getting information from your client is by taking a statement from her/him. You can also take the information that you collected in the Human Rights Violations Questionnaire and convert it into a statement.<sup>5</sup> This is important, because if this is a case that the attorney will litigate on, you will have to convert the information from the questionnaire into a statement for the attorney, who will in turn convert it into an affidavit.

#### DESCRIPTION AND DETAILS OF THE PROBLEM

The details you need will be different, depending on the problem the client faced.

*In a complaint about the police, you will need:*

- Exactly when and where the incident happened, including road names.
- Full details of the police officers, including their names.
- Exact details of treatment by the police and where the client was held, including conditions of cells.

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<sup>5</sup> Information on taking a statement and producing an affidavit comes from the ETU/Black Sash Paralegal Manual: <http://www.paralegaladvice.org.za/docs/chap16/03.html>.



- A description of exactly what the client was doing at the time of the arrest or complaint, so that we can see whether the police had reasonable grounds to approach, question or arrest your client.

Write down every detail. It is always better to include information even if you are not sure whether this information is important or not. It might be useful at a later stage.

Write down all the details in the correct date and time order that things happened.

#### **EXAMPLE**

- On 16 December 2009 Sara was dismissed from her job.
- On 17 December she returned to get her notice pay.
- On 20 December she went to the union about her dismissal.

#### **ADVISING THE CLIENT**

Tell the client what his or her rights are. You must then explain what steps can be taken to help the client. Then you must *listen* to your client to find out exactly what they want you to do. These are the 'instructions' that your client gives you.

For example, if your client was dismissed from a job, don't just take it for granted that she wants the job back, even if you feel that the dismissal was unfair. On the other hand, if your client says she only wants notice pay, this may be because she does not know anything about unfair dismissal and reinstatement. It is up to you to explain to your clients about all their rights, and then let them make their own choices.

If there is something that the client is not clear about, ask them to find out that information and bring it to you later.

Write down details of the advice that you gave and the 'instructions' that your client gave you.

## TAKING ACTION TO SOLVE THE PROBLEM

*Discuss with your client what steps you will take to try and solve the problem:*

- Make sure the client understands what you are going to do.
- Be realistic about how much you think you can do for your client and how long it will take to sort out the problem. Do not raise false hopes.
- You should then agree on how you are going to report back to your client. This could be by writing a letter to the client or the client coming back to you on a set date.

Write down everything that you do. For example, if you make a telephone call, write this down and what was said in the telephone call. Keep copies of all letters that you write for your client.

Keep copies of all documents in connection with your client's claim, for example: a UIF card in a complaint about UIF benefits, or the Instalment Sales Agreement in a problem with hire purchase. Do not write on original documents. Documents should be stapled to the statement of the client so that they do not get lost.

### EXAMPLE

#### **Statement**

1. My name is Benjamin Ngwane. I am a 30 year old male living at 52 Indwe Road, Langa, Cape Town. I am unemployed.
2. On Monday 26 September 2002, at about 20h00 I was walking on my way home after visiting a friend. I was walking alone on the pavement past Kentucky Fried Chicken.
3. A group of men crossed the road and came towards me. I recognised one of them. His name is Patrick Xegwana. He lives a few streets away from me in Pele Street.
4. The group stopped me and Patrick Xegwana grabbed me by my shirt and asked me where I was going.
5. I tried to answer that I was going home but before I could finish, Patrick Xegwana slapped me on my left cheek with his left hand.

6. One of the other men assaulted me by punching me in the stomach and kicking me where I lay on the ground. He was wearing a dark blue overall which was very torn. He was also wearing glasses. I recognised this man's face although I do not know his name. I also don't know where he lives. He is about 30 years old. I would recognise him if I saw him again.
7. I think there were 5 men altogether. I do not know the names of any of them except for Patrick Xegwana, but I recognised all of their faces. I would recognise them if I saw them again.
8. They were all crowding around me while I was lying on the floor being assaulted by the man in the blue overall. One of the men had a gun and was poking it in my side. I was very scared and I didn't say anything to them. They did not say why they were assaulting me. They only told me that I must not come near their area again.
9. Everything was happening so quickly. The last thing I remember is a hard blow on my head.
10. I was dizzy at the time and only remember being picked up. I was looking around to see where the men were, but they were gone. One of the people helping me was a man called Vuyani. He telephoned the Langa Day Hospital. They sent an ambulance to come and fetch me.
11. In hospital I was treated for 2 broken ribs, severe bruising all over my body, and my eye was bleeding. I had to stay in hospital for 3 days. My hospital card number is 5487. I was treated by Dr Wyngaard.
12. I do not know if there were any witnesses to the assault on me. I do not know if Vuyani witnessed the whole assault on me.
13. I do not know why I was assaulted by the group. I feel that I have been wronged and I want to make a claim against the people who assaulted me.

Date on which the statement was taken: 28 September 2009

Name and address of person who took the statement:

Lawrence Ndlovu

Langa Advice Office

Cape Town telephone number of Langa Advice Office: (021) 642 0202

## 2.2 Affidavits

An *affidavit* is a written statement which you swear is the truth. Another name for an affidavit is a sworn statement. You sign this statement (with your name, or X if you cannot write) in front of someone called a Commissioner of Oaths.

A Commissioner of Oaths can be a magistrate, postmaster, bank manager, attorney, members of the South African Police Service (SAPS), and some priests and social workers.

For example, when you need to prove something (like your age to qualify for a pension) and you do not have any written proof that what you are saying is true, then you can put this information in an affidavit.

Usually the same information that is used for an ordinary statement will be used in an affidavit. All that happens is that an attorney will turn the statement into an affidavit by adding some formal words at the beginning and at the end of the statement.

### How to draw up an affidavit

|    |   |
|----|---|
| 1. | I _____(name of person)<br>do hereby make oath and say:           |
| 2. | I am an adult _____ (male/female)<br>and I live at _____(address) |
| 3. | I am _____<br>(married /single)(unemployed/employed at...)        |
|    | The statement .....<br>(fill in what you know is true)            |

**DEPONENT** (the person making the statement is the deponent and must sign here but only in front of the Commissioner of Oaths) (then the Commissioner of Oaths fills this next part in:)

THUS SIGNED AND SWORN TO at \_\_\_\_\_.

This day of \_\_\_\_\_ 2002 the Deponent having acknowledged

1. That she/he has no objection to taking the oath
2. She/he deems the oath binding on her/his conscience;
3. She/he understands the contents of this Affidavit and stated that same was all true and correct and uttered the words 'So help me God'.

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### COMMISSIONER OF OATHS

Commissioner of Oaths signs here after raising the deponent to swear with your hand in the air that you are telling the truth; the name and address of the Commissioner will be given here, and the office held by the Commissioner, for example: postmaster)

### EXAMPLE

#### Affidavit

1. I, Benjamin Ngwane, do hereby make oath and say:
2. I am an adult male and I live at Hostel number 52 Indwe Street, Langa, Cape Town.
3. I am unmarried. I am presently unemployed.
4. On Monday, 26 September 2002, at about 20h00 I was walking on my way home after visiting a friend. I was walking alone on the pavement past Kentucky Fried Chicken going in the direction of Hostel 52.
5. A group of men crossed the road and came towards me. I recognised one of them. His name is Patrick Xegwana. He lives in Pele Street.
6. The group stopped me and Patrick Xegwana grabbed me by my shirt and asked me where I was going.
7. I tried to answer that I was going home but before I could finish, Patrick Xegwana slapped me on my left cheek with his left hand.

8. One of the other men then assaulted me by punching me in the stomach and kicking me where I lay on the ground. He was wearing a dark blue overall which was very torn. He was also wearing glasses. I recognised this man's face although I do not know his name. I don't know where he lives. He was about 30 years old. I would recognise him if I saw him again.
9. I think there were 5 men altogether. I do not know the names of any of them except for Patrick Xegwana but I recognised all of their faces. I would recognise them if I saw them again.
10. They were all crowding around me while I was lying on the floor being assaulted by the man in the blue overall. One of the men had a gun and was poking it in my side. I was very scared and I didn't say anything to them. They did not say why they were assaulting me. They only told me that I must not come near their area again.
11. Everything happened so quickly. The last thing I recall is a hard blow on my head.
12. I was dizzy at the time and can only remember being picked up. I was looking around to see where the men were but they were gone. One of the people helping me was a man called Vuyani. He telephoned the Langa Day Hospital for an ambulance to come and fetch me. I stayed there until the ambulance arrived and took me to hospital.
13. At hospital I was treated for 2 broken ribs, severe bruises all over my body, and my eye was bleeding. I had to stay in hospital for 3 days. My hospital card number is 5489. I was treated by Dr Wyngaard.
14. I do not know if there were any witnesses to the assault on me. I do not know if Vuyani witnessed the whole assault on me.
15. I do not know why I was assaulted by the group.

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BENJAMIN NGWANE

THUS SIGNED AND SWORN TO at LANGA this 30<sup>th</sup> day of September 2009,  
the Deponent having acknowledged:

1. That he/she has no objection to taking the oath;
2. He/she deems the oath binding on his/her conscience;
3. He/she understands the contents of this Affidavit and stated that same was all true and correct and uttered the words 'So help me God'.

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COMMISSIONER OF OATHS

## 2.3 WLC Human Rights Violations Questionnaires

For documenting the human rights violations that sex workers experience, we developed a *Human Rights Violations Questionnaire* for each issue that sex workers may present:

- Police harassment/abuse.
- Clients (background on sex worker and nature of case).
- Sexual assault.
- Family law matters.
- Domestic abuse.
- Criminal charges.
- Health.
- Labour matters.
- Human trafficking.
- Other matters.

We attach each of these questionnaires below.

## 2.4 Human Rights Violations Questionnaire

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### POLICE HARASSMENT/ABUSE

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

Name (Optional): \_\_\_\_\_

Age (optional): \_\_\_\_\_

Telephone number (Optional): \_\_\_\_\_

Where do you work: \_\_\_\_\_

Gender: \_\_\_\_\_

#### Market base:

- Indoor
- Street-based
- Internet-based

Were you arrested or fined?       Arrested       Fined

Which police force or SAPS?       Municipal       SAPS

Date and time of arrest/fine: \_\_\_\_\_

Where were you arrested/fined? *Please mention street names if you can.*

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What were you doing at the time of the arrest/fine?

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Name and/or description of the officer?

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Description of police rank. How many stars or stripes?

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Description of police van?

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Were you told you were being arrested/fined?  Yes  No

If yes, what were you arrested/fined for?

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Which police station were you taken to?

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How long did you drive around in the police van before being taken to the police station?

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Describe how you were treated by police when you were arrested/fined and at the police station?

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Did the police take pictures of you and your fingerprints when you were at the police station?

Yes  No

If so, did they charge you before they took pictures and your fingerprints?

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Did you see your picture on a wall in the police station?  Yes  No

Did you see the pictures of other sex workers in the police station?  Yes  No

If Yes, where were they?

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Did you need a doctor while you were in the police cells?  Yes  No

Did you notify the police that you required medical attention?  Yes  No

If Yes, did they provide you with medical attention?  Yes  No

Are you on any medication?  Yes  No

If Yes, did the police allow you to take your medication?  Yes  No

Did they provide medication for you?  Yes  No

If No, did you get sick after you were released?  Yes  No

How long were you held? \_\_\_\_\_

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Were you given the option to pay a fine?  Yes  No

If Yes, how much? \_\_\_\_\_

If Yes, did you pay it?  Yes  No

What happened when you wanted to pay?

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Were you given food and water?

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Please describe the condition of the cell in which you were held?

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Did they allow your family or friends to give you food or clothes?  Yes  No

Did they allow you to make a phone call?  Yes  No

Did the police taken any of your things before putting you in the cells?  Yes  No

Did you get all your things back?  Yes  No

Did you get a receipt?

Yes  No

Which court were you taken to? \_\_\_\_\_

Did you appear in front of the magistrate?

Yes  No

If Yes, please describe the events following your appearance or the outcome of the case if it is finished.

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Please provide us with any documentation like Written Notice to Appear in Court or Notice of Rights.

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What legal remedies are you seeking?

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**Plan of Action**

WLC: \_\_\_\_\_  
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\_\_\_\_\_

SWEAT: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Attach any additional case notes.**

**Paralegal advice:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Assent / Confidentiality**

Does the source give his/her assent to share the information (with the authorities, the media)?  Yes  No



Can the source's name be used?

Yes  No

Is it necessary for any information to be confidential?

Yes  No

Until when? Why?

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## 2.5 Human Rights Violations Questionnaire

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### CLIENTS

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

Name (Optional): \_\_\_\_\_

Age (optional): \_\_\_\_\_

Telephone number (Optional): \_\_\_\_\_

Where do you work: \_\_\_\_\_

Gender: \_\_\_\_\_

#### Market base:

- Indoor
- Street-based
- Internet-based

Please select from following list:

- Breaking agreement regarding payment
- Physical violence
- Sexual assault (*If this matter refers to sexual assault by a client please also fill out the sexual assault questionnaire.*)

Other: please specify: \_\_\_\_\_

\_\_\_\_\_



Details of incident or complaint: \_\_\_\_\_

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What legal remedies are you seeking? \_\_\_\_\_

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***Plan of Action***

WLC: \_\_\_\_\_

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SWEAT: \_\_\_\_\_

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***Attach any additional case notes.***

**Paralegal advice:**

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**Assent / Confidentiality**

Does the source give his/her assent to share the information (with the authorities, the media)?

Yes  No

Can the source's name be used?  Yes  No

Is it necessary for any information to be confidential?  Yes  No

Until when? Why?

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## 2.6 Human Rights Violations Questionnaire

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### SEXUAL ASSAULT

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

**Name (Optional):** \_\_\_\_\_

**Age (optional):** \_\_\_\_\_

**Telephone number (Optional):** \_\_\_\_\_

**Where do you work:** \_\_\_\_\_

**Gender:** \_\_\_\_\_

**Market base:**

- Indoor
- Street-based
- Internet-based

Please identify the perpetrator:

|                          |          |
|--------------------------|----------|
| Police                   | Client   |
| Ex-partner               | Pimp     |
| Current personal partner | Stranger |

Other: please specify: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

What was the nature of the assault? \_\_\_\_\_

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When and where did the assault occur? \_\_\_\_\_

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**Actions taken:**

- Laid a charge
- Seen a doctor
- Counselling

**Do you require us to assist you with:**

- Laying a charge
- Seeing a doctor
- Accessing counselling

What legal remedy are you seeking? \_\_\_\_\_

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***Plan of action***

WLC: \_\_\_\_\_

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SWEAT: \_\_\_\_\_

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***Attach any additional case notes.***

**Paralegal advice:**

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**Assent / Confidentiality**

Does the source give his/her assent to share the information (with the authorities, the media)?  Yes  No

Can the source's name be used?  Yes  No

Is it necessary for any information to be confidential?  Yes  No

Until when? Why? \_\_\_\_\_

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## 2.7 Human Rights Violations Questionnaire

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### FAMILY LAW MATTERS

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

**Name (Optional):** \_\_\_\_\_

**Age (optional):** \_\_\_\_\_

**Telephone number (Optional):** \_\_\_\_\_

**Where do you work:** \_\_\_\_\_

**Gender:** \_\_\_\_\_

#### Market base:

- Indoor
- Street-based
- Internet-based

#### Divorce

Does your spouse know that you are a sex worker?  Yes  No

Is your spouse using the fact that you are a sex worker against you?  Yes  No

Explain the reasons for the breakdown of the marriage: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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Was your spouse ever abusive towards you?  Yes  No

*If Yes, please fill out domestic abuse questionnaire.*

Do you have children together?  Yes  No

Children's details. Age/names/where are they living: \_\_\_\_\_

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Was your spouse ever abusive towards the children?  Yes  No

*If Yes, please fill in section on children below*

Is your spouse fighting for custody of the children?  Yes  No

Your spouse's contact details:

Name: \_\_\_\_\_

ID Nr: \_\_\_\_\_

Home address: \_\_\_\_\_

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Work details: \_\_\_\_\_

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When were you married? \_\_\_\_\_

How long have you been separated? \_\_\_\_\_

Relationship status

- married in community of property
- anti-nuptial contract
- accrual
- customary/religious

What legal remedies are you seeking? \_\_\_\_\_

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**Children**

Please select from list:

- Issues of child abuse
- Underage sex work
- Child custody *If custody, please refer to divorce section above.*
- Other: please specify: \_\_\_\_\_

Is this involving your own children?  Yes  No

If not your own children, please provide details of whose children are involved.

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Has this matter been reported to any child welfare organisation?  Yes  No

What legal remedies are you seeking? \_\_\_\_\_

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***Plan of Action***

WLC: \_\_\_\_\_  
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SWEAT: \_\_\_\_\_  
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\_\_\_\_\_

***Attach any additional case notes.***

**Paralegal advice:**  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## Assent / Confidentiality

Does the source give his/her assent to share the information (with the authorities, the media)?  Yes  No

Can the source's name be used?  Yes  No

Is it necessary for any information to be confidential?  Yes  No

Until when? Why? \_\_\_\_\_

\_\_\_\_\_

## 2.8 Human Rights Violations Questionnaire

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### DOMESTIC ABUSE

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

**Name (Optional):** \_\_\_\_\_

**Age (optional):** \_\_\_\_\_

**Telephone number (Optional):** \_\_\_\_\_

**Where do you work:** \_\_\_\_\_

**Gender:** \_\_\_\_\_

**Market base:**

- Indoor
- Street-based
- Internet-based

Are you married to the perpetrator?  Yes  No

Do you have children together?  Yes  No

How long have you been together?

What is the nature of the abuse?

|               |           |
|---------------|-----------|
| Physical      | Verbal    |
| Psychological | Sexual    |
| Financial     | Emotional |

Other: please specify: \_\_\_\_\_

Have you ever made a case before?  Yes  No

Details: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Do you currently have a protection order?  Yes  No

Would you like to apply for a protection order?  Yes  No

Are you currently at risk of ongoing abuse?  Yes  No

Do you require us to assist you with:

- |  |   |
|--|---|
| <input type="checkbox"/> Laying a charge | <input type="checkbox"/> Obtaining a protection order |
| <input type="checkbox"/> Women's shelter | <input type="checkbox"/> Medical services             |
| <input type="checkbox"/> Counselling     |   |

What legal remedies are you seeking?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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***Plan of Action***

WLC: \_\_\_\_\_  
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SWEAT: \_\_\_\_\_  
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\_\_\_\_\_

***Attach any additional case notes.***

**Paralegal advice:**

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\_\_\_\_\_  
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\_\_\_\_\_  
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### **Assent / Confidentiality**

Does the source give his/her assent to share the information (with the authorities, the media)?  Yes  No

Can the source's name be used?  Yes  No

Is it necessary for any information to be confidential?  Yes  No

Until when? Why? \_\_\_\_\_

\_\_\_\_\_



## 2.9 Human Rights Violations Questionnaire

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### CRIMINAL CHARGES

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

**Name (Optional):** \_\_\_\_\_

**Age (optional):** \_\_\_\_\_

**Telephone number (Optional):** \_\_\_\_\_

**Where do you work:** \_\_\_\_\_

**Gender:** \_\_\_\_\_

**Market base:**

- Indoor
- Street-based
- Internet-based

What are the criminal charges against you? \_\_\_\_\_

\_\_\_\_\_

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When and where is your next court appearance? \_\_\_\_\_

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Do you have legal representation? \_\_\_\_\_

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What legal remedies are you seeking? \_\_\_\_\_

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***Plan of Action***

WLC: \_\_\_\_\_  
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SWEAT: \_\_\_\_\_  
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***Attach any additional case notes.***

**Paralegal advice:**  
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### **Assent / Confidentiality**

Does the source give his/her assent to share the information (with the authorities, the media)?  Yes  No

Can the source's name be used?  Yes  No

Is it necessary for any information to be confidential?  Yes  No

Until when? Why? \_\_\_\_\_

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## 2.10 Human Rights Violations Questionnaire

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### HEALTH

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

**Name (Optional):** \_\_\_\_\_

**Age (optional):** \_\_\_\_\_

**Telephone number (Optional):** \_\_\_\_\_

**Where do you work:** \_\_\_\_\_

**Gender:** \_\_\_\_\_

**Market base:**

- Indoor
- Street-based
- Internet-based

What hospital / clinic did you go to: \_\_\_\_\_

What is the issue?

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How were you treated by the hospital / clinic staff?

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Did they give you the medication that you need?  Yes  No

Any other issue relating to access to health care that you would like to draw attention to?

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What legal remedies are you seeking? \_\_\_\_\_

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***Plan of Action***

WLC: \_\_\_\_\_  
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SWEAT: \_\_\_\_\_  
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***Attach any additional case notes.***

**Paralegal advice:**

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## Assent / Confidentiality

Does the source give his/her assent to share the information (with the authorities, the media)?  Yes  No

Can the source's name be used?  Yes  No

Is it necessary for any information to be confidential?  Yes  No

Until when? Why? \_\_\_\_\_

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## 2.11 Human Rights Violations Questionnaire

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### LABOUR MATTERS

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

**Name (Optional):** \_\_\_\_\_

**Age (optional):** \_\_\_\_\_

**Telephone number (Optional):** \_\_\_\_\_

**Where do you work:** \_\_\_\_\_

**Gender:** \_\_\_\_\_

**Market base:**

- Indoor
- Street-based
- Internet-based

Describe the issue: \_\_\_\_\_

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What legal remedies are you seeking? \_\_\_\_\_

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***Plan of Action***

WLC: \_\_\_\_\_

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SWEAT: \_\_\_\_\_

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**Attach any additional case notes.**

**Paralegal advice:**

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**Assent / Confidentiality**

Does the source give his/her assent to share the information (with the authorities, the media)?  Yes  No

Can the source's name be used?  Yes  No

Is it necessary for any information to be confidential?  Yes  No

Until when? Why? \_\_\_\_\_

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## 2.12 Human Rights Violations Questionnaire

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### HUMAN TRAFFICKING

DATE: \_\_\_\_\_ NAME: \_\_\_\_\_

PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

**Name (Optional):** \_\_\_\_\_

**Age (optional):** \_\_\_\_\_

**Telephone number (Optional):** \_\_\_\_\_

**Where do you work:** \_\_\_\_\_

**Gender:** \_\_\_\_\_

**Indoor or street-based:** \_\_\_\_\_

1. Did you see a male or female?

|        |      |
|--------|------|
| FEMALE | MALE |
|--------|------|

2. Please provide the date and time that you saw her / him?

|      |  |
|------|--|
| DATE |  |
| TIME |  |

3. Did you speak to her?

|     |    |
|-----|----|
| YES | NO |
|-----|----|

If no, please state why you could not speak to her

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4. If yes, please arrange another date for a consultation.

|      |  |
|------|--|
| DATE |  |
| TIME |  |

5. If you consulted with her, please provide in detail the full contents of your discussion.

|                              |  |
|------------------------------|--|
| Real name:                   |  |
| Age:                         |  |
| Where is she from:           |  |
| How did she get to Cape Town |  |
| Who brought her to Cape Town |  |
| Who is she living with       |  |

|   |  |
|---|--|
| List human rights violations, eg, assault |  |
| How long has she been in Cape Town        |  |
| What is her living conditions like        |  |
| Does she want to go home                  |  |
| Any other information                     |  |

6. Please provide a description of the area where you saw her working as a sex worker. Include name of the area, street name and any visible landmarks.

|                          |  |
|--------------------------|--|
| Area                     |  |
| Street Name              |  |
| Number on the house      |  |
| Colour of the house      |  |
| Description of the house |  |
| Directions to the house  |  |

|                   |  |
|-------------------|--|
| Visible landmarks |  |
|-------------------|--|

7. Did you see where she lives?

|     |    |
|-----|----|
| YES | NO |
|-----|----|

8. If yes, please provide a description of her place of residence. Include name of the area, street name and any visible landmarks.

|                          |  |
|--------------------------|--|
| Area                     |  |
| Street Name              |  |
| Number on the house      |  |
| Colour of the house      |  |
| Description of the house |  |
| Directions to the house  |  |
| Visible landmarks        |  |

9. Please provide a description of her or him. Please include height, colour of complexion, eye colour, hair colour, description of clothing and an estimation of age.

|                         |  |
|-------------------------|--|
| Gender                  |  |
| Height                  |  |
| Colour of complexion    |  |
| Eye colour              |  |
| Hair colour             |  |
| Description of clothing |  |
| Age / estimation of age |  |

10. Please provide any information that you may have received from other people about the female or male, for example, information that other sex workers can provide you with.

|  |  |
|--|--|
| Name and contact details of Witness / Informer 1 |  |
| Name and contact details of Witness / Informer 2 |  |
| Name and contact details of Witness / Informer 3 |  |

Any other information: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



11. Please provide a description of the pimp.

|                         |  |
|-------------------------|--|
| Gender                  |  |
| Height                  |  |
| Colour of complexion    |  |
| Eye colour              |  |
| Hair colour             |  |
| Description of clothing |  |
| Age / estimation of age |  |

Any other information. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

What legal remedies are you seeking? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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***Plan of Action***

WLC: \_\_\_\_\_  
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SWEAT: \_\_\_\_\_

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***Attach any additional case notes.***

**Paralegal advice:**

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**Assent / Confidentiality**

Does the source give his/her assent to share the information (with the authorities, the media)? \_\_\_\_\_

Can the source's name be used? \_\_\_\_\_

Is it necessary for any information to be confidential? Until when? Why? \_\_\_\_\_

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## 2.13 Human Rights Violations Questionnaire

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### OTHER MATTERS

DATE: \_\_\_\_\_ PROVINCE: \_\_\_\_\_ AREA: \_\_\_\_\_

SWEAT and the Women's Legal Centre are attempting to monitor the human rights violations experienced by sex workers. We will be collating the information to monitor trends and your confidentiality will be protected.

**Name (Optional):** \_\_\_\_\_

**Age (optional):** \_\_\_\_\_

**Telephone number (Optional):** \_\_\_\_\_

**Where do you work:** \_\_\_\_\_

**Gender:** \_\_\_\_\_

**Market base:**

- Indoor
- Street-based
- Internet-based

Describe the issue: \_\_\_\_\_

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What legal remedies are you seeking? \_\_\_\_\_

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***Plan of Action***

WLC: \_\_\_\_\_

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SWEAT: \_\_\_\_\_

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***Attach any additional case notes.***

**Paralegal advice:**

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**Assent / Confidentiality**

Does the source give his/her assent to share the information (with the authorities, the media)?  Yes  No

Can the source's name be used?  Yes  No

Is it necessary for any information to be confidential?  Yes  No

Until when? Why? \_\_\_\_\_

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## 2.14 WLC questionnaires: Frequently asked questions

Many sex workers will ask: “Why is this question important?”

To answer, we have developed a range of questions that may come up during consultations relating to our WLC questionnaires and the answers.

⋮ **Note:**

⋮ Q is the question that the sex worker may ask.

⋮ A is an example of an answer to give to the sex worker.

**Q: Why do you need to share my information with people?**

**A:** It is necessary to share the information you provide us with the police so that they can find out which officer did this to you and discipline or charge them. SWEAT and WLC would like to know the information in order to advocate on your behalf and sex workers in general. The lawyers need your consent so that they can file a case or complaint with the police on your behalf. It is completely up to you how much information you want to share. If you do not give me permission to share your information, then everything between us will be confidential.

**Q: Do I have to give the police officers my name?**

**A:** Generally yes, but only if the police officer follows procedure. If you ask the police officer to show you their ID card and they refuse, then you do not have to share your name and details. Under the Criminal Procedure Act (CPA), a police officer can ask you for your name and ID if they suspect you of a crime and/or have the power to arrest you and/or think you may have evidence about a crime. If you don't provide the officer with your full name and address, they have the power to arrest you. They can also arrest you if they think you are giving them a wrong name. They can hold you for up to 12 hours while they verify your name.

**Q: Why are you asking me about the police uniform? You should know what they wear?**

**A:** As you know, the SAPS wear all blue and metro police wear blue and brown. The reason why we are asking about the uniform is so that we are sure that we know whether it was SAPS or a Metro Police officer that harassed you.

**Q: What happens if I give the police officers a wrong name or a different name?**

**A:** It is a criminal offence under the CPA to give an officer a false name and/or address or to refuse to give your details. You could be fined up to R300 or imprisoned for up to 3 months. However, if you request that an officer show you his or her ID card and they refuse, you do not have to give them your details.

**Q: Does a police officer have to tell me his name and/or show me his identity card?**

**A:** A police officer cannot refuse to give you their name or show you their ID card. You should always ask the officer to show you an identity card. If they refuse, you do not need to give them any of your details.

**Q: Why is it important that I give you the officer's description?**

**A:** We need to be able to identify him or her in order to take legal action. If you don't know the officer's name, please describe their physical features like eye colour, hair colour, skin colour or height.

**Q: Why do you need a description if you have the name of the officer on the fine?**

**A:** Because the officer who wrote the fine could be different from the arresting officer. It is important because the police department has a roster of who is supposed to work when and with whom. So, if we give them a description, this will help them figure out who was working when and if they were doing the wrong thing.

**Q: Why are you asking me if I was told why I was being arrested/fined/harassed?**

**A:** The reason for your arrest must be explained to you. If you were not informed of the reason for the arrest or the fine, then it is in breach of your human rights, constitutional rights under Section 35 of the Constitution and the CPA.

**Q: Why does it matter how the police searched me?**

**A:** If the police search you, then it must be done in a way that is dignified, in a private area, by a person who is of the same gender, and the search must be done with your permission unless they have already arrested you. If these

things were not done when you were searched, then the police have violated your constitutional rights.

**Q: Can I deny the police the right to search me?**

**A:** You have a right to be informed for the reason of the search. If they do not arrest you and you do not give your consent to the search, then they cannot search you unless they have reasonable basis for suspecting you of committing a crime or having evidence on you related to a crime. If you are arrested, then the police can search you without your permission, but they must still follow procedure or else it is unlawful. It is important that we have as much information as possible about the search so that we can figure out if it was unlawful.

**Q: Do they need a warrant to search me?**

**A:** No, they do not. They can search you if they have reasonable grounds to suspect that you have committed an offence, they suspect you have drugs on you or that you have evidence on you that is related to a crime. If you have not been arrested, they will need your consent to conduct a search but they do not need consent if they arrest you.

**Q: Why are you asking me about condoms?**

**A:** It is your right to carry condoms and protect your health. Police cannot arrest you for carrying condoms or use the fact that you are carrying condoms as evidence that you were illegally performing sex work. The Constitution protects your right to freedom from unfair discrimination, and your right to life, security and access to health services.

**Q: Why does it matter that the police read me my rights?**

**A:** Section 35 of the Constitution protects your right to not be arrested without being informed of your rights in a way that you understand.

**Q: What are the rights they should have read me?**

**A:** They are supposed to read you the notice of rights and you are expected to sign only when you have fully understood those rights. You should not sign until your rights have been read to you in a language that you understand. The rights are from Section 35 of the Constitution and include the right to remain silent and the consequences of not remaining silent. The police are also not allowed to make you confess to anything that may hurt your case in



the future. For example, they cannot force you to tell them you were waiting for clients and/or that you are a sex worker.

**Q: What if I signed the form but I didn't understand it?**

**A:** It is okay – it will not damage your case. You must just explain what happened and the reason that you signed. Reasons you signed could be you were forced to by the officers or you were told that you would be taken into custody if you didn't sign. It is very important that you tell us who exactly forced you or bribed you into signing, so that we can explain why you signed the form without understanding your rights.

**Q: Do the police have to take me straight to the police station? How long can they drive me around in the van?**

**A:** Section 50 (1) (a) of the CPA and the Constitution give you the right to be taken immediately to the police station as soon as possible. This means that the police should not be driving around with you.

**Q: What happens if the officer said derogatory things to me?**

**A:** The officers are violating your constitutional rights. Here we want to know if the police officers called you names, for example: we often hear with gay people that the police call them "moffies". This is a derogatory name and the person can challenge the police because police officers must treat you with respect and with dignity. We can take your case to the Equality Court and possibly get money damages for you. That is why it is important that you tell us everything that you remember them saying to you.

**Q: What happens if the officers physically or sexually assaulted me?**

**A:** The officer who did that to you has committed a criminal offence and you can prosecute him or her criminally as well possibly bringing a case or complaint against the police station. If you think you may have been raped, you should go to the doctor immediately. This will help you protect your health and assist us in gathering the information we need to bring a criminal charge.

**Q: Why do you want to know about what happened when I arrived at the police station?**

**A:** Because that way we can know if your rights have been violated. For example, under the Constitution and the CPA, the police officers must treat you with respect and dignity. They must inform you as soon as possible of the

reason for your detention, your right to legal representation and your right to start the bail process.

**Q: Why do you want to know about if the police took my fingerprints and/or pictures?**

**A:** Because Section 37 of the CPA says that the police cannot take your fingerprints or take pictures of you until after you are charged.

**Q: Why do you want to know if I saw any pictures on the wall in the police station?**

**A:** Because the CPA says that police cannot publish your picture without your consent unless they have permission from a magistrate. Section 37 of the CPA also says if you are found not guilty or the charges are dismissed, then they must destroy your picture. We need to know if you saw your picture so that we can figure out if your rights have been violated.

**Q: Why is it important whether I got medical attention while I was detained?**

**A:** Under Section 349.2 of the SAPS Standing Orders, Section 35 of the Constitution and the National Health Act, while you are in police custody if you are ill or injured, you must be visited and treated as often as necessary by a medical officer and receive the medical services and medicines you need. If you did not receive the medical attention you needed while you were detained, then your rights were violated.

**Q: Am I allowed to make a phone call?**

**A:** Yes, from the moment you are detained and/or charged, you have a constitutional right to make a phone call to contact a legal adviser. Section 35 of the Constitution also gives you the right to communicate and be visited by your spouse or partner, close family, religious counsellor and medical provider. If they don't allow you to make a phone call, then it is a breach of your constitutional right.

**Q: I was told that I can't call a cell phone from the police station: is that true?**

**A:** No, it is your constitutional right to make a call to a legal adviser, spouse, family, religious counsellor or doctor on any type of phone, including a cell phone.

**Q: Why do you need to know about the fine?**

**A:** Because if the police arrest you, the purpose of the arrest is to take you to court. But if they only gave you a fine, then the arrest was unnecessary and therefore unlawful. If you paid the fine, you need to get a receipt. If not, the police probably stole the money.

**Q: Even if they give me a receipt for my fine, what does that mean?**

**A:** It mainly shows that you were in police custody. The police are supposed to record you in all of their books to create a record of your detention, which prevents police misconduct like stealing the money you paid for your fine. The books that the police have are:

- ~ Pocket Book – here they are supposed to record what they see when they patrol.
- ~ Occurrence Book – here they must record when they have arrested someone.
- ~ Custody Register – here they must list the people they have detained.
- ~ Pepper Spray and Gun Book – in these books they must record when and where they used their gun and/or pepper spray gun.

**Q: Why does it matter how long I was held for?**

**A:** Section 35 of the Constitution says the police cannot keep you in detention longer than 48 hours without taking you to court. However, if you are detained over a weekend or a holiday, they can keep you until the courts re-open. If they keep you longer, then they are breaching your constitutional rights.

**Q: How long can the police hold me?**

**A:** Section 35 of the Constitution says you must be taken to court or be released within 48 hours. However, if you are detained over a weekend or a holiday, the police can keep you until the courts re-open.

**Q: I was arrested at night and released in the morning, were the police supposed to feed me and give me water?**

**A:** Yes, no matter what the time you are brought to the police station, you must be given food and water. The law says that you must be fed, but does not say what kind of food you get. However, the food must be edible and consistent

with the officer's duty to treat you with dignity.

**Q: Is the cell in which I am held and the bedding that I am given required to be clean?**

**A:** Yes, you must be placed in a clean cell with clean bedding and supplies. The SAPS Standing Orders (G) 361 says that the cell you are held in must be clean and have enough light and fresh air.

**Q: Am I allowed to have visitors?**

**A:** Yes, Section 35 of the Constitution says you must be allowed to receive a visit from your spouse or partner, family, your religious counsellor, your doctor and your legal representative.

**Q: Do the police have to take me to court?**

**A:** Under the Constitution, the police have to either take you to court within 48 hours or release you. We are interested in knowing if they didn't take you to court because it shows that the police most likely intended to unlawfully harass you.

**Q: What happens if I was taken to court and then released without seeing a magistrate?**

**A:** If you were taken to court and your fingerprints were taken, but you were released without seeing a magistrate, then we have to further investigate what happened with your case. It is possible that the police did not have enough evidence against you and that you were unlawfully detained. We may be able to lay a charge or file a complaint for unlawful arrest and/or detention.

**Q: What are my rights in court?**

**A:** Your rights in court are listed in Sections 34 and 35 of the Constitution, which say that everyone has the right to a fair trial. This includes your right to be informed in detail of the charge against you, time to prepare your defence, to have your trial conducted in a proper court in a timely manner, to have an attorney who is paid for by the State if you cannot afford one, to be presumed innocent, to not incriminate yourself and to have the court proceedings conducted in a language that you understand.

When you appear before a magistrate, there should be a Legal Aid officer ready to represent you. If there is not, the magistrate should ask you if you

need a lawyer and one will be organised for you. The magistrate should ask you whether you can afford the bail that is set by the court.

**Q: The court didn't ask me about bail: what does that mean?**

**A:** The magistrate must ask you if you can afford the bail. Under the Constitution and the CPA, the magistrate must consider whether you can afford the bail.

**Q: What is bail?**

**A:** Bail is the amount of money that you, or someone on your behalf, will pay the court to allow you to be released from police custody before your trial. It is meant to make sure that you attend all the hearings related to your case and follow all of the conditions the court sets on you related to your bail. If you do not appear on your court date or violate any of the conditions, the court will keep this money and issue a warrant for your arrest to make sure you appear in court. If you appear on your court date and follow all the conditions of your bail, then the money will be returned to you at the end of the trial whether you are found guilty or not.

**Q: What will happen if I don't go to my court date?**

**A:** A warrant for your arrest will be issued and you will be arrested. It is important that you go to court to make sure your rights are protected, and that you are not arrested and find yourself in more legal trouble. There are people available who can attend your court date with you who are familiar with the process, such as a paralegal like me or an attorney if your case requires it.

# 3

## What is sex work?<sup>6</sup>

Sex work is the act of providing some type of sexual service in exchange for reward.

Selling sex is a regular income-generating practice for many people in South Africa. You may be familiar with the type of sex work that involves a man paying a woman to have sex with him. This is one example of sex work, but there are also many others.

Many, but not all, sex workers define their service as penetrative sex with a condom in exchange for cash. Sex workers consistently emphasise that they perform a service and a job for the sexual pleasure of their clients.

Sex workers clearly identify their actions as legitimate work because they are providing a good or resource to their clients and receiving compensation in exchange. There is also an expectation that the sexual exchange will take place within a particular time frame, and include certain agreed-upon standards between the sex worker and the client.

Sex work should not be confused with transactional sex, which occurs when some type of sexual service is exchanged for gifts, shelter or drugs.

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<sup>6</sup> Manoek S, Mbwana J, Ludwig S, Kheswa S, Brown B, *Police Sensitisation Training Manual: A Guide for South African Police Service (SAPS) Officers to the Rights of Sex Workers and the LGBTI Community*, Women's Legal Centre, 2014, 18.

### 3.1 Is sex work legal?

In South Africa, sex work is criminalised, with both the sex worker and the client committing criminal offences.

The Sexual Offences Act currently prohibits the act of having sex for reward [Section 20(1) (aA)]. This section only targets the sex worker and not the client.

The new Criminal Law (Sexual Offences) Amendment Act 32 of 2007 now also criminalises the act of buying sex (Section 11).

### 3.2 Who does sex work?<sup>7</sup>

Sex workers are a diverse community. Most sex workers in South Africa are women – this includes sex workers who were born female and those who were born male but who live as females.

Men also do sex work. Male and female sex workers may accept male or female clients, or both.

There are sex workers of every race and ethnicity, cultural background, sexual orientation and gender identity. Many sex workers are migrants from other places within South Africa or from other countries.<sup>8</sup>

### 3.3 Why do people do sex work?<sup>9</sup>

*People become sex workers for many different reasons:*

- Typically, sex workers are motivated by economic need. For example, a significant number of women in South Africa have difficulty finding employment or supporting their families.
- Many sex workers say that sex work has allowed them to survive and “put food on the table” for themselves and their families.

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7 Ibid.

8 Brown B, Duby Z, Bekker LG, *Sex Workers: An Introductory Manual for Health Care Workers in South Africa*, Desmond Tutu Foundation, 2012, 6.

9 Ibid,19.

- Education and training are other factors that can influence a person's decision to go into sex work. Sex work does not require the formal education or training that may be required to do other types of work.

The reality is that there is a financial incentive for doing sex work. Sex workers often can earn more money than if they were engaged in other forms of employment.

*An expert study on sex worker rights found that there are often a complex range of reasons and circumstances behind a person's choice to do sex work:*

“Most people choose sex work because they see it as the best option among a limited range of economic opportunities. In this regard, sex workers make calculations and weigh choices – just as all people do who need to make money to care for themselves and their families.

For example, many people choose sex work because it offers flexible working hours. This is a significant factor for people who want or need to spend time caring for their children. Sex workers are often self-employed and can choose when, where and how to work.

Sex workers can often earn more money in less time than when engaged in other types of work, such as domestic work or manual labour. Finally, for some, earning money from sex work feels more empowering and dignified than cleaning someone's house or performing backbreaking physical labour.

Regardless of why people do sex work, they have the right to self-determination, should be treated with dignity and deserve equal protection under the law.”<sup>10</sup>

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<sup>10</sup> *Sex Worker Rights. (Almost) Everything you wanted to know b. But were afraid to ask*, American Jewish World Service, July 2013, 4



### 3.4 Where is sex work practised?<sup>11</sup>

Sex work happens in every village, every town and in every city in South Africa. In fact, sex work exists in every culture around the world and has occurred throughout history. A rapid study by SWEAT and the South African National Aids Council (SANAC) estimates that there are between 132,000 and 182,000 sex workers in South Africa. A common image of a sex worker in South Africa is a woman who is paid by a man to have sex. This exchange usually occurs at night in a dark alley or car.

While some sex work in South Africa does fit this description, there are actually many different settings where sex work is practised.

#### **Street-based**

Some sex workers practise street-based sex work. This means that they wait or walk along certain streets or highways, and engage with clients from the street. Sex work does not require a specific location, although many sex workers have identified locations within their community where it is easier for them to find clients and for the clients to locate them. While this may be an established meeting place, sex workers may travel with the client to other locations.

#### **Venue-based**

Not all sex workers work on the street. There are also sex workers who work from establishments such as massage parlours, bars or clubs. This is referred to as *venue-based sex work*. Often sex workers who work in clubs will be forced to pay a cover charge for working there.

Some sex workers may work within an established venue for sex work, sometimes referred to as a *brothel*. A brothel is an establishment or building where multiple sex workers live and can host clients. In some cities, brothels may also be referred to as *hotels*. Often brothels are overseen by a manager who also coordinates the clients for the sex workers.

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11 Manoek S, Mbwana J, Ludwig S, Kheswa S, Brown B, *Police Sensitisation Training Manual: A Guide for South African Police Service (SAPS) Officers to the Rights of Sex Workers and the LGBTI Community*, Women's Legal Centre, 2014, 23.

## Advertisement

Some sex workers work privately, using the Internet to advertise their services and find clients, or placing advertisements in newspapers' classifieds sections. These sex workers are sometimes referred to as *call girls*, and they tend to visit a client at his/her home or hotel room.

### 3.5 Do sex workers work alone?<sup>12</sup>

Some sex workers work alone, but others may work in association with some type of manager who is responsible for organising clients for them. The term *manager* should be used instead of *pimp* because pimp is a term commonly associated with violence and drug use. Managers are responsible for attracting clients and negotiating with them for the sex workers' services.

Sex workers, in turn, are compelled to pay the manager a portion of the money they earn from each client. For sex workers in brothels, this manager – sometimes called a *madam* if the manager is female – is responsible for running the brothel and organising clients for the sex workers who are based there.

### 3.6 How is sex work practised?<sup>13</sup>

Sex work begins when a sex worker identifies a client. After meeting, the sex worker will determine what activities the client is interested in and will negotiate a price with that client. If both the sex worker and client agree to the activity and the price, the client will pay the sex worker and they will then engage in the agreed-upon activity.

Different sex workers sell different types of sexual activities. Some sex workers may only perform certain types of sex – the most common types being penile-vaginal penetrative sex, manual masturbation and penile-oral sex. Some sex workers, both male and female, also engage in penile-anal sex with their clients.

The majority of sex workers have a set of services that they provide and services that they refuse to provide. For example, many sex workers refuse to perform anal sex or group sex. Others specialise in non-penetrative sex.

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

### **3.7 What do sex workers get paid?<sup>14</sup>**

Most sex workers get paid in cash and not with items (for instance, clothes, gifts, cell phones). The amount that sex workers get paid varies greatly and depends in part on where the sex worker works.

For example, a sex worker who works on the side of the road in a small town may get paid very little, whereas a 'high class' sex worker who visits clients in their hotel rooms in a big city may get paid a large amount.

### **3.8 Common misconceptions about sex workers**

#### **Do sex workers use drugs?<sup>15</sup>**

Not all sex workers use drugs, but some do. Many sex workers find themselves in circumstances where illegal substances are readily available.

Sometimes managers (pimps) will encourage sex workers to take drugs so that they become addicted and easier to control. In such situations, sex workers become dependent on pimps for drugs since the pimps can control their supply. In this situation, sex workers will often become more compliant with the pimp's demands, even if those demands put their health at risk.

In addition, some sex workers take drugs as a coping mechanism. They use drugs as a way to forget about their difficult circumstances, to numb themselves to traumatic events they have faced, or to ease the shame or depression they may feel about what they are doing.

#### **Do all sex workers have HIV?<sup>16</sup>**

Not all sex workers have HIV, but the HIV prevalence among sex workers is significantly higher than in the general population. People engaged in sex work are at increased risk for acquiring HIV because of limited access to health care services and through exposure to:

- More sexual partners.
- Higher threat of violence in sexual encounters.

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14 Ibid.

15 Ibid, 24.

16 Ibid, 24-5.

- Riskier sex.
- The use of substances during sexual encounters.

While many sex workers are committed to using condoms with clients, following through on this commitment requires the cooperation of clients, and this is not always easy to achieve. Sometimes clients offer more money for sex without a condom, including riskier sexual practices such as anal sex without a condom, or threaten to go to other sex workers who will agree to sex without a condom.

Sex workers are forced to weigh their need for clients and income against the risks to their own health. This means sometimes immediate survival needs take precedence over safer sex practices. For many sex workers, ensuring that they are able to provide for themselves or people who depend on them at the end of the night can be more important than their long-term health.

Sex workers can also be put at risk for HIV if their boyfriends and husbands do not use condoms. Compounding these other risks, sex workers are also vulnerable to violence by clients and partners, and have difficulty accessing protection from the State or holding their attackers accountable when they experience violence.

### **Are sex workers mentally ill?<sup>17</sup>**

Not all sex workers are mentally ill. Many sex workers, just like many people in the general population, are affected by mental health issues such as anxiety, depression, and substance dependency.

Mental health issues can affect sex workers for many reasons. For instance, many sex workers experience traumatic situations such as a rape by a client or physical assault. A single violent attack can have serious mental health consequences for the survivor, but many sex workers have repeated exposures to such traumatic events.

Because sex work is illegal in South Africa, it is challenging for sex workers to seek justice for these crimes or access mental health treatment.

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<sup>17</sup> Ibid, 25.

### 3.9 Separating myths from facts<sup>18</sup>

1. All sex workers were abused as children. Many people believe that child abuse is the primary reason that people engage in sex work, but this is untrue. Most sex workers engage in sex work for economic reasons.
2. *Sex work and human trafficking are the same thing.* While some victims of human trafficking are forced to sell sex, not all sex workers are victims of trafficking.
3. *Sex workers are all drug addicts.* Some sex workers do use drugs, but not all sex workers engage in drug use or are drug addicts.
4. *All sex workers are immigrants.* Some sex workers are migrants from other places in South Africa or other countries, but not all sex workers are immigrants.
5. *Sex workers do not use condoms.* Sex workers are put under many pressures to engage in sex without condoms, but not all sex workers engage in unprotected sex. In fact, many sex workers use condoms with all their clients.
6. *Sex workers are all uneducated.* Sex workers have a wide variety of education backgrounds. Some sex workers may have received little formal education, but many others are formally educated.
7. *Sex workers are not parents.* Many sex workers have families and engage in sex work in order to support their children.
8. *Sex workers are victims of Post-traumatic Stress Disorder (PTSD).* While some sex workers do experience PTSD, not all sex workers do sex work because of it.
9. *Sex workers are all teenagers.* Sex workers span a variety of ages.
10. *Sex workers are not able to have stable, loving relationships.* Many sex workers form long-term relationships and partnerships.

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<sup>18</sup> Ibid, 25-6.

### 3.10 The words we use: ‘sex worker’ and ‘prostitution’

The words we use to talk about people, and about what people do, can reinforce discrimination and abuse. Words such as ‘prostitution’ and ‘prostitute’ bear intense social stigma. This is one reason why many people involved in prostitution, and groups fighting for human rights, prefer to use the terms ‘sex work’ and ‘sex worker’ instead.

Naturally, just changing terminology is insufficient to eliminate the deep-seated stigma sex workers are confronted with on a systematic basis. The transformation needed is much wider.

*Nevertheless, it is important to use language sensitively:*

- The terms ‘sex work’ and ‘sex worker’ emphasise the fact that this is work. Thus, sex workers should be entitled to the same rights and protections workers in other sectors enjoy.
- We use the term ‘sex worker’ instead of ‘prostitute’ out of respect for the dignity and human rights of the people who exchange sexual services for money or other things of value.
- The term ‘sex work’ is broader than ‘prostitution’, as it includes other activities such as stripping, phone sex lines and pornography. Many of the activities that are ‘sex work’ are illegal in South Africa.<sup>19</sup>
- Sometimes we use the term ‘prostitution’ or ‘unlawful carnal intercourse’ because these are used in the legislation that criminalises sex work.

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<sup>19</sup> Canadian HIV/AIDS Legal Network, *Sex, work, rights, Changing Canada’s criminal laws to protect sex workers’ health and human rights*, 2: 200.5.



# 4

## What we know about sex workers: Research

The current legal framework is conducive to the violation of the human rights of sex workers, such as the right to freedom from violence, equality before the law, access to justice, health, unfair labour practices, privacy, dignity, right to not be detained without a trial, and not to be tortured or treated in a cruel and degrading manner.

Sex workers' criminal status in society increases vulnerability to violence in a number of ways. Sex workers around the world continue to be murdered at rates higher than the general population. In fact in some places, standardised mortality rates for sex workers are 6 times those seen in the general population.<sup>20</sup> In Cape Town and Hillbrow, there have been many reports of sex workers who have been murdered.<sup>21</sup>

Due to the fact that they are by and large female, sex workers remain particularly vulnerable to all crimes of violence against women. The incidence of physical violence, including rape, is higher among sex workers than among the general population.

<sup>20</sup> SWEAT submission to the South African Law Reform Commission (SALRC), 2009, 27.

<sup>21</sup> Hlangani S (2012) *SA needs to repeal laws which criminalise escort*, SWEAT, The New Age: Available at: [http://www.thenewage.co.za/mobi/Detail.aspx?NewsID\\_48855&CatID\\_1007](http://www.thenewage.co.za/mobi/Detail.aspx?NewsID_48855&CatID_1007); Site accessed 26 April 2012; and Lanir L (2012) 'Sex worker strangled to death, eyes poked out' in SWEAT Digital Journal, 17 April: available at: [http://www.sweat.org.za/index.php?option=com\\_k2&view=item&id\\_236:sex-workerstrangled-to-death-eyes-poked-out&Itemid\\_139](http://www.sweat.org.za/index.php?option=com_k2&view=item&id_236:sex-workerstrangled-to-death-eyes-poked-out&Itemid_139): Site accessed 25 April 2012.



Violence operates together with social stigma and discrimination to produce disempowerment and in some situations learned helplessness, giving sex workers the message that their lives do not matter.<sup>22</sup>

Then a police officer unzipped his pants and put a condom on. I got a shock. They started speaking to me rudely. They told me that I must give each one of them a blow job, which I did. He put me on the floor. The police officer raped me, then the second one, after that the third one did it again. I was crying after the three left without saying anything. Then the first one appeared again. I said, "Please not again." Then he said I must go with him. I asked him for the time, but he never answered. He let me out by the back gate without my property. I was so scared that my family would find out."  
(Female sex worker, Cape Town)<sup>23</sup>

## 4.1 Research studies on the realities of sex work

In 2008 and 2009, the WLC, SWEAT and Sisonke conducted a two-year research study with 308 sex workers in Cape Town, Johannesburg, Pretoria, Durban and Limpopo.<sup>24</sup>

Seven out of 10 sex workers who approached the WLC for legal advice and assistance reported some form of police abuse. Many sex workers reported more than one violation.

The findings in this report highlight the gap between the rights enshrined in the South African Constitution and reality of the treatment meted out to sex workers. Even under the present, imperfect law, there is a stark contradiction between the actions of police and the due process laid out by the law for them to follow.

"Then the policemen started shooting at us. They shot me twice with rubber bullets in my shoulder. But I kept running. I did not want to stop. Later I went to the clinic to bandage my wounds." (Female sex worker, Johannesburg)<sup>25</sup>

<sup>22</sup> SWEAT submission to the SALRC, 27.

<sup>23</sup> Manoek S, "Stop Harassing Us! Tackle Real Crime!, A Report on Human Rights Violations by Police Against Sex Workers in South Africa", Women's Legal Centre, 2012, 9: Can be accessed on: [http://www.wlce.co.za/index.php?option=com\\_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84](http://www.wlce.co.za/index.php?option=com_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84).

<sup>24</sup> Research report on sex worker human rights violations: <http://www.wlce.co.za/index.php/2013-04-30-11-53-09/2013-05-08-11-48-14/violence-against-women/314-stop-harassing-us>.

<sup>25</sup> Manoek S, "Stop Harassing Us! Tackle Real Crime!, A Report on Human Rights Violations by Police Against Sex Workers in South Africa", Women's Legal Centre, 2012, 4: Can be accessed on: [http://www.wlce.co.za/index.php?option=com\\_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84](http://www.wlce.co.za/index.php?option=com_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84).

*Based on the complaints of 308 sex workers, the WLC found:*

- Almost one in 6 of the sex workers who approached the WLC had been sexually or physically assaulted, and one in 3 had been harassed, by the police.
- Of the 45% of sex workers that had been arrested, more than 85% of those arrests had been carried out by a police officer who was not wearing proper identification.
- Almost half of those who had been arrested were held beyond the 48-hour maximum permitted by law, and nearly 70% had been denied access to food or water whilst in detention.
- Almost half of all sex workers who were arrested and 40% of sex workers who were fined, reported that police did not follow the formal procedure required.
- Almost half of all sex workers who were arrested reported being placed in cells that were dirty, wet and smelled bad, that had toilets that did not work, and/or mattresses and blankets that were dirty.

Also, in a cross-sectional survey with 1636 female sex workers in Johannesburg, Rustenburg and Cape Town, between 26-31% of sex workers noted that they have had negative police interaction in the preceding year.<sup>26</sup>

“Then one of the policemen grabbed me and started beating me. He hit me with his fist in my face. He pepper sprayed me in my face. And they kicked me all over my body. They beat me for about 10 to 15 minutes, even though it felt like a very long time.” (Female sex worker, Johannesburg)<sup>27</sup>

Criminalising sex work in South Africa has not eradicated it. Instead, the illegal status of sex work creates conditions in which exploitation and abuse can thrive.<sup>28</sup>

26 Richter M, Chersich MF, Vearey J, Sartorius B, Temmerman M, Luchters S, *Migration status, work conditions and female sex work in three South African cities*, Journal of Immigrant and Minority Health: Accessed on: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3895178/>.

27 Manoek S, “*Stop Harassing Us! Tackle Real Crime!*, A Report on Human Rights Violations by Police Against Sex Workers in South Africa”, Women’s Legal Centre, 2012, 4: Can be accessed on: [http://www.wlce.co.za/index.php?option=com\\_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84](http://www.wlce.co.za/index.php?option=com_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84).

28 Gould C and Fick N, *Selling Sex in Cape Town, Sex work and Human Trafficking in a South African City*, 69; Fick N, *Sex workers experiences with the local law enforcement in South Africa. Research for Sex Work*, 2005;8:4-8.; Fick N, *Enforcing Fear - Police abuse of sex workers when making arrests*, SA Crime Quarterly. 2006;16:27-33.; Fick N, *Sex Workers Speak Out - Policing and the sex industry*, SA Crime Quarterly. 2006;15 (March):13-18; Pauw I, Brener L, ‘*You Are Just Whores: You Can’t Be Raped’: Barriers to Safer Sex Practices among Women Street Sex Workers in Cape Town*, Culture, health & sexuality, 2003, Nov-Dec: 465-481.

Currently there is great scepticism about the police as an avenue of redress, especially in light of the fact that some police officers are themselves perpetrators. Sex workers experience violence during arrest by police officers who routinely beat them, pepper spray them, and sexually assault them.

Sex workers are also assaulted by clients, particularly around payment and condom negotiation. Unsurprisingly, most sex workers are reluctant to approach the police to report crimes committed against themselves or others. Unreported crimes include verbal abuse, refusal by clients to pay, being robbed, threats of physical assault, physical assault and rape.<sup>29</sup>

Sex workers are heavily stigmatised: being named, shamed and labelled as “immoral,” “abhorrent” and a “threat to society.” Sex workers are a popularly “accepted” target of hate crime – people feel justified in harassing and abusing them.

Sex workers often function as targets for people’s hatred and at the same time, these people often feel justified in their violence and have no sense of accountability.<sup>30</sup>

## 4.2 Current legal framework in the spotlight

Further, the existing legal framework is also unacceptably liable to police discretion and encourages police corruption due to the spin-offs, for example: bribes and demands for sex.

In reality, a system of *de facto* decriminalisation exists in South Africa, in that police do not often enforce the provisions of the Sexual Offences Acts of 1957 and 2007.

In our various meetings with police officers, many have indicated that when they target sex workers, they do so because they are responding to a complaint from a

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29 Manoek S, *Stop Harassing Us! Tackle Real Crime!*, A Report on Human Rights Violations by Police Against Sex Workers in South Africa, Women’s Legal Centre, 2012, 4: Can be accessed on: [http://www.wlce.co.za/index.php?option=com\\_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84](http://www.wlce.co.za/index.php?option=com_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84).

30 Overs and Hawkins note: “Indeed, serial murderers of sex workers have sometimes invoked the anti-sex work aim of the law by claiming to be ridding society of such women. The ‘Green River Killer’ of sex workers in the US said to police “I thought I was doing you guys a favour, killing prostitutes... you guys can’t control them, but I can.” The Yorkshire Ripper in the UK said “The women I killed were filth, bastard prostitutes who were just standing round littering the streets. I was just cleaning the place up a bit.” Overs C, Hawkins K, *Can rights stop the wrongs? Exploring the connections between framings of sex workers’ rights and sexual and reproductive health*, BMC international health and human rights, 2011;11 (Suppl 3):S6.

community member. To satisfy the complaint, they use the by-laws to remove the sex worker. In these instances the targets are the most visible elements, namely street-based or outdoor sex workers, and municipal by-laws are used in the majority of arrests.<sup>31</sup>

The Sexual Offences Act 23 of 1957 is a very difficult law to prosecute under and requires intensive and intrusive police methods such as entrapment to secure a conviction. The indoor industry is rarely targeted, except when the brothel tends to become too high profile or there are community complaints. In these instances entrapment procedures are used.<sup>32</sup>

The reality is that sex workers are seldom prosecuted under the criminal law, and are more likely to be arrested, harassed and then released. To our knowledge, no client has been prosecuted under the old or the amended laws.

“The policemen refused to provide me with reasons for my arrest, and they forced me into the police van.” (Transgender sex worker, Cape Town)<sup>33</sup>

“I could not identify them because they were not wearing name tags. They told me to get into the police van.” (Female sex worker, Cape Town)<sup>34</sup>

In our documenting of human rights abuses, many sex workers reported that they are either arrested or fined for offences that they did not commit. For example, one sex worker reported that she was fined after she left the grocery store. She was not soliciting clients at the time.

The continued arrest of sex workers when they have not committed the acts for which they have received fines is indicative of a practice of abusing the law to deliberately persecute a specific group of people. This practice violates the right to

31 SWEAT Submission to the SALRC, 26.

32 Ibid, 27.

33 Manoek S, *Stop Harassing Us! Tackle Real Crime!, A Report on Human Rights Violations by Police Against Sex Workers in South Africa*, Women’s Legal Centre, 2012, 12: Can be accessed on: [http://www.wlce.co.za/index.php?option=com\\_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84](http://www.wlce.co.za/index.php?option=com_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84).

34 Manoek S, *Stop Harassing Us! Tackle Real Crime!, A Report on Human Rights Violations by Police Against Sex Workers in South Africa*, Women’s Legal Centre, 2012, 13: Can be accessed on: [http://www.wlce.co.za/index.php?option=com\\_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84](http://www.wlce.co.za/index.php?option=com_content&view=article&id=150:new-report-a-report-on-human-rights-violations-by-police-against-sex-workers-in-sa&catid=64:latest-news&Itemid=84).

be equal before the law and amounts to unfair discrimination.

*Sex workers further complain of the violations of their constitutional rights:*

- To be informed promptly of the reason for being detained.
- To choose and consult with a legal practitioner.
- To challenge the lawfulness of the detention.
- To communicate with or be visited by next of kin or a doctor.
- To be held in conditions of detention that are consistent with the right to human dignity.

Sex workers frequently report being assaulted, raped and pepper sprayed<sup>35</sup> during the arrest even though they do not resist arrest.

The fact that sex workers report incidences of being raped, sworn at and assaulted at police stations indicates that not only individual police officers, but their colleagues and superiors are involved in or condone such criminal behaviour.

In addition, sex workers report being detained in conditions which deprive them of medical treatment, which are unhygienic, without food or adequate bedding, suggesting a disregard for Police Standing Orders and for the basic rights to which all detainees are entitled.

These practices of lawlessness by the police must be addressed. It should be noted that, even where individual police officers perpetrate crimes against sex workers such as rape, assault and robbery, the State should be held accountable and vicariously liable for these actions.

The fact that sex workers are arrested without a warrant but charged for loitering, clearly indicates that arresting officers guilty of this practice are unable to prove that any of the requirements for an arrest without a warrant are present.

It is WLC's experience in Cape Town and Johannesburg that the procedures required by the municipal by-laws are seldom followed. Once arrested, sex

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<sup>35</sup> "A random survey of street-based sex workers [in Cape Town in 2008 showed that 47% have been threatened with violence by police, 12% have been raped by police officers, and 28% have been asked for sex by policemen in exchange for release from custody. Unsurprisingly, most sex workers are wary of the police and mistrust them, and are thus unlikely to report cases of violence or abuse by clients (or others) to the police, regardless of whether they are victims or witnesses." Gould and Fick: see note 28 above.

workers are required to pay a “spot fine” to the arresting officer. Alternatively, they are taken to the police cells where they are kept overnight and on the following day they are given an option to pay a fine (the amount is dependent on the province and area, and these fines range from R300 to R1,000).

When arrested (whether in terms of the national legislation or the by-laws), the sex workers are seldom brought to court, nor do they receive any receipts for the fines paid. Even if the arrest is justified, no charges are properly laid which would warrant arrest.

In the circumstances, it is incomprehensible why the police would regularly resort to the most drastic remedy available to them to secure sex workers’ attendance in court, especially if the cases are never deemed real or serious enough to end up in court. The decision to arrest is accordingly heavy-handed and in blatant disregard for the departmental benchmark set out in Police Standing Orders.

*Summary:*

- The experience of sex workers typically testifies to the human rights violations that occur during and after arrest, and the devastating impact that this has on their lives.
- The regular arrest of sex workers when they have not committed the acts for which they have received fines for conveys a practice of abusing the law to deliberately persecute a specific group of people. This practice violates the right to be equal before the law and amounts to unfair discrimination.

### **4.3 Condoms as evidence**

SWEAT, Sisonke and WLC participated in a 7-country research study to illustrate the way in which the police use condoms as evidence against sex workers, and the effects that this has on sex workers’ rights to health and to access health services.<sup>36</sup>

*The key findings of this research are:*

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<sup>36</sup> *Criminalizing Condoms. How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, The United States and Zimbabwe*, Acacia Shields, Open Society Foundations (2012): Accessed on <http://www.opensocietyfoundations.org/reports/criminalizing-condoms>.



- Police confiscate and destroy sex workers' condoms, putting sex workers and their clients' health at risk.
- Police cite condom possession as justification to detain or arrest people on charges related to sex work.
- Police harass and abuse sex workers who carry condoms, and use the threat of arrest on the grounds of condom possession to extort and exploit them.
- Some sex workers opt not to carry condoms because they fear police harassment and detention.
- Police harass and arrest outreach workers, limiting their ability to distribute and educate sex workers about safer sex practices.

In Cape Town, SWEAT has indicated a number of instances when the South African Police Service harassed outreach workers who handed out condoms and safer sex materials to sex workers.

The outreach workers reported that the police were hostile towards them and accused them of promoting sex work because they were distributing condoms and related materials. Police often keep outreach workers under surveillance and tail them in order to identify and target sex workers.

Similar instances of interference and harassment have been reported to SWEAT by outreach workers offering health services to sex workers in the TB/HIV mobile clinic. Sex workers are deterred from approaching the mobile clinic for TB and HIV testing or counselling by the presence of a police van following them, or are targeted by the police after making use of the health services.

The police practice of shadowing outreach workers in order to target sex workers for detention and abuse has a chilling effect on the relationship between sex workers and outreach workers,<sup>37</sup> and potentially life-threatening repercussions on sex workers' health. This practice makes outreach ineffective and can lead to situations in which outreach programs function to endanger sex workers, and might lead to sex workers not trusting outreach workers.

By hindering sex worker's ability to carry and use condoms, police actions increase sex workers' risk of exposure to HIV and other sexually transmitted infections, as well as unwanted pregnancies. This compromises sex workers'

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<sup>37</sup> SWEAT Submission to the SALRC, 22.

health and the health of their sexual partners.

Sex workers whose condoms are taken by police are more likely to have unprotected sex and to be at risk for contracting HIV. Individual sex workers who were interviewed for this study said that they had unprotected sex after police took away or destroyed their condoms and, in one case, tested positive for HIV as an apparent direct consequence.

#### **4.4 Why are sex workers vulnerable to abuse?**

In Cape Town, 88% of street-based and 90% of indoor sex workers were female.<sup>38</sup>

Both international and national instruments, including our Constitution, recognise the particular human rights protections that need to be extended to women, and further call for the achievement of gender equality and the elimination of unfair discrimination based on gender, sex or sexual orientation.

Due to the fact that sex workers are by and large female, and that due to their unlawful status they are further marginalised and vulnerable, policy makers and those tasked with the protection, development and attainment of gender equality should have particular regard to these legal protections when considering sex workers.

*Particular additional factors that increase the likelihood of abuse are:*

- Due to their unlawful and marginalised status, the incidence of physical violence, including rape, is higher among sex workers than among the general population, as is the incidence of murder.
- Sex workers have a 5 to 6 times higher prevalence of HIV compared to the general population.<sup>39</sup>
- The stakeholders involved in sex work are very diverse. They include many migrants, facing further social isolation, language barriers, the threat of violence, and fear of immigration authorities and police, increasing their risk of exploitation.<sup>40</sup>

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38 Gould C and Fick N, *Selling Sex in Cape Town, Sex Work and Human Trafficking in a South African City*, 24 and 27.

39 South African National AIDS Council (2011), *Know Your Epidemic / Know Your Response*, Pretoria, South Africa: Available at: <http://www.sanac.org.za/files/uploaded/03%20KYE%20Chapter3a.pdf>.

40 Miller E. et al, 2007, *Migration, Sexual Exploitation, and Women's Health*, Violence against Women 13(5): 486-497.



- Sex workers also range in age, and socio-economic status, and are of diverse sexual orientations and gender identities. Their diverse sexual orientations and gender identities add a further layer of stigma to their position in society. This increases their vulnerability from a uniquely gendered perspective and makes them even more deserving of protection.
- Due to the negative effects of social stigma on their sexual and gender status, transgender sex workers experience lower levels of social support and economic opportunities. They are at a heightened risk of HIV infection due to receptive anal intercourse and possibly drug, hormone, and silicone injection practices.<sup>41</sup>

Sex workers thus experience complex and layered levels of stigmatisation, social exclusion, deprivation and abuse, coupled with lower levels of access to health care, employment, access to justice and economic advancement. They are made vulnerable on a whole number of structural issues, such as gender, race, class, relative deprivation and education.

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41 Bockting, WO, Robinson, BE and Rosser BRS, 1998, *Transgender HIV Prevention: A Qualitative Needs Assessment*, AIDS Care 10(4): 505-525.

# 5

## Strategic impact litigation

### 5.1 What is strategic litigation?

The Concise Oxford Dictionary (10th Edition) defines 'strategic' as:

“Forming part of a long-term plan or aim to achieve a specific purpose.”

Wordnet web (<http://wordnetweb.princeton.edu/perl/webwn?s=litigation>) defines 'litigation' as:

“Judicial proceeding: a legal proceeding in a court or a judicial contest to determine and enforce legal rights.”

This section draws on the work of Andrea Coomber of Interights (London):

*Strategic litigation of race discrimination in Europe: from principles to practice.*<sup>42</sup>

**Strategic litigation** is a method used by lawyers, particularly non-governmental and non-profit organisations to advance human rights:

- Strategic or impact litigation (terms are used interchangeably) uses the court/judicial system to attempt to create broad social change.
- The aim of the litigation is to use the law to create long-term positive effects.
- Strategic litigation falls within the ambit of public interest litigation.

<sup>42</sup> Interights, MPG and European Roma Rights Centre, based on a research paper by Kevin Kitching): <http://www.errc.org/cms/upload/media/00/C5/m000000C5.pdf>.

- The primary focus is law or public policy reform, rather than the individual client's interests (as is the case in ordinary litigation), although they may both be objectives. Within this, lawyers are bound to act on their client's instructions and in the client's best interest.<sup>43</sup>

## 5.2 Why is strategic litigation necessary for gender law?

Poverty and inequality in South Africa are characterised by race and gender. Women are in a constant cycle of unfair discrimination. Black women continue to face higher unemployment and lower incomes than their white and/or male counterparts. They remain the group most at risk and have relatively poor access to training and promotion.

Undoubtedly, institutionalised racism and sexism contribute to a racial and gendered dimension of poverty and unemployment.

*Patriarchy entrenches gendered roles for women, which disempowers them by ensuring that they:*

- Are the primary care givers.
- As sole providers, are financially drained.
- Don't have access to education – when women do work, the labour is menial where these sectors are difficult to unionise, leaving women more vulnerable to unfair work practices.
- Have less access to basic services such as sanitation, refuse collection and electricity in urban and semi-urban areas, compared to their male counterparts.
- Are further economically disadvantaged by the discriminatory application of customary law, lack of access to land rights and the failure of the government to recognise religious marriages and domestic partnerships.
- Bear the burden of caring for children, particularly in poorer households.
- Lack economic independence, which prevents them from leaving abusive domestic situations in cases of domestic violence.

<sup>43</sup> Andrea Coomber, *Strategic litigation of race discrimination in Europe: from principles to practice* (Interights, MPG and European Roma Rights Centre), based on a research paper by Kevin Kitching), *ibid.*

- Have a significantly higher risk of HIV infection when in violent relationships.
- Lack access to legal advice and representation, which is also a problem in the area of child support and maintenance.

Women continue to experience oppression in their relationships with male partners, within families and within the wider community as a result of their low social status, economic marginalisation, and also in some cases, because of their HIV status.

*These manifestations of women's inequality are associated with a range of consequences, including:*

- Abandonment.
- Loss of their homes.
- Failure to complete their education.
- Inability to secure maintenance for their children.
- Violations of their sexual and reproductive rights, with an associated increased risk of HIV infection.
- Barriers to access to HIV-related health services and treatment adherence.

Highly uneven levels of rights awareness in society means that ensuring access to justice for poor and marginalised communities remains a major challenge. Women suffer multiple levels of discrimination because of their gender, race, class and ethnic status.

Women face numerous barriers in the enjoyment of their human rights, attributed to factors such as race, language, ethnicity, culture, religion, disability or socio-economic class, and/or because they are indigenous people, migrants, displaced persons or refugees.

*Inter-sectional discrimination* may be reinforced by the belief in many sectors of society that women are, or should be, a subordinate class. Because of a lack of and/or access to information and recourse mechanisms, women are left more exposed to discrimination and marginalisation, resulting in further violations of their human rights.

## 5.3 How does strategic litigation help change the law?

The most common method of achieving the objectives of strategic litigation is through the establishment of effective and enforceable law through creating ground-breaking precedents.

*In successful litigation, this may arise through:*

- The interpretation of existing laws, constitutions and international law instruments to either substantiate or redefine rights OR to enforce or apply favourable rules that are underused or ignored (implementation problems).
- Challenges to existing laws detrimental to social justice or individual rights, for example, based on conflict with internal law or constitutional law. The majority of cases are probably of this type. This is because of the use of civil and political rights to challenge the State's restriction of personal rights or freedoms (constitutional rights).
- Highlighting (and pressing for the need) for urgency in remedies for human rights violations. This arises where existing law prohibits the human rights violations complained of, but the local, judicial and executive systems fail to provide a remedy for the wrong.
- An example is the official toleration of political violence against minorities by certain regimes. Where this is condoned by practice or there is a weak judicial system, litigation in international tribunals might help to highlight and document the human rights situation domestically.

### 5.3.1 Advantages of strategic litigation

*Strategic litigation has several advantages over other strategies:*

#### **Supporting the rule of law**

Strategic litigation can contribute to the stabilisation and clarification of the legal system or its laws (procedural and substantive). This establishes the foundation for further litigation or provides the basis for government reform and the legal parameters within which this must occur.<sup>44</sup>

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44 Ibid, 39.

## **Legal education**

Strategic litigation raises the level of legal and human rights literacy by educating the judiciary and legal profession. This benefits future claimants.<sup>45</sup>

## **Documenting injustices**

In many jurisdictions, the aim of strategic litigation is to document or expose institutionalised injustice even when the lawsuit is unlikely to succeed.

By creating a record of official practices, strategic litigation documents official abuse, damages the perception of the legality of government action, and lays the foundation for future efforts.<sup>46</sup>

## **Government accountability**

Strategic litigation, even if unsuccessful, promotes government accountability. It creates awareness by government of its legal duties and the possible consequences of failing to comply with these duties, for example, by educating staff and improving service.<sup>47</sup>

## **Changing social attitudes and empowering vulnerable groups**

By raising an issue publicly that affects a vulnerable social group, strategic litigation may contribute both to a public understanding of the issues (legal education and human rights consciousness) and ultimately to the empowerment of that group. It increases the capacity for people to help themselves in the future, for example: when challenging hate crimes against lesbian women.<sup>48</sup>

As a result, strategic litigation can also open up the way for the use of the law to protect or decriminalise vulnerable groups, for example: advocacy to decriminalise sex work.

*A single strategic litigation case can have an extensive legal and social impact:*

- It uses judicial power to defend and promote the rights of minority, deprived or marginalised groups. In a system where there is an independent judiciary and credible legal system, but where the executive and legislature reflect only the view of the majority or the political and economic elite (for example:

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45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid.

South Africa under Apartheid), this may be the only way to get redress for wrongs.

- It establishes precedent that benefits future claimants. This is particularly relevant in common law jurisdictions where *stare decisis* (legal precedent) is the rule.
- It raises public issues and general public awareness.
- In international tribunals or courts, it may create political pressure from abroad, and will thus have an international impact.
- In many cases, especially with group claims through class or group action, it raises an issue socially and politically unlike other means.
- It broadens access to justice.
- It tests and clarifies the content of existing laws, thus furthering government accountability by establishing the parameters within which government must operate.

### 5.3.2 Disadvantages of strategic litigation<sup>49</sup>

- By its very nature, the outcome of any litigation can rarely be assured. Hence, a ‘trial and error’ approach has been used. This means that several cases can be taken to court before obtaining the desired judgment.
- Because of the need for a decision of precedential value, there may be no judgment below that of the highest available court that is fully satisfactory. Given that in most legal systems it is only very few disputes that reach trial and fewer still appeal, settlement out of court is not an option – settlement does not bring about change. Yet attorneys need to act on instructions from clients.
- Litigation does not necessarily reflect public opinion and may achieve a result that does not have public support. The objective of strategic litigation may be more properly achieved through debate in the political system rather than judicial decision.
- Impact litigation is dependent on finding the ‘right’ client. Ideal clients are not easily found in the real world. Many client problems, such as fear, lack

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49 Ibid, 45-6.

of resources, inability to understand the process and inconsistencies in testimony, may need to be addressed through client management rather than case selection.

- Where legal protections and enforcements are weak, strategic litigation may not achieve the desired impact. Implementation is fundamental.
- Where there is no independent judiciary, attempting to use the judicial power for policy ends may be redundant.
- Often the process of strategic litigation is difficult to control, particularly in class action procedures, where the claimant class is not fixed.
- Strategic litigation may not actually benefit the affected community. As a strategy, it has been criticised for being lawyer-centred and lawyer-defined, and having the effect of disempowering affected communities and not improving their well-being. This is because policy-oriented strategies do not always focus on the client as an individual, but rather as the means to further a social reform strategy.
- Litigating may be a costly method of raising issues. Publicity or political lobbying may be cheaper. Litigation expenses include Counsel's fees, attorneys' fees and court costs. Due to funding issues, the resources of NGOs and public interest legal centres must be used wisely and effectively. Often, funders require full reports on strategy to be employed to ensure a high probability of litigation success.

## **5.4 How do strategic litigation cases arise?**

*Broadly, the origin of strategic litigation cases depends on:*

- The structure of the NGO or public interest law centre.
- The available funding.
- The nature of the work conducted or services provided.

Those organisations that have their own fully staffed branch offices on location are capable of generating cases internally, for example: through helplines or client queries. Other organisations rely largely on referrals from community groups, NGOs or other local partners. Cases can also be identified through the media.



### 5.4.1 Methods used in public interest law

*Legal methods and practices of public interest law organisations include:*

- Strategic litigation.
- Advice.
- Counselling.
- Case referral.
- Legislative advocacy.

Non-legal strategies are often used in conjunction with, or instead of, legal methods. *These include:*

- Community service referrals.
- Education and training programmes.
- Use of publicity or the media.
- Monitoring government action.
- Networking and capacity-building.
- Collecting and disseminating of information.

Alternative methods are particularly useful in following up on the litigation effort to ensure proper implementation of a victory in court. One of the greatest historical failings of strategic litigation has been the failure to ensure proper implementation of favourable decisions.

The methods used by an organisation will depend on the objectives, the nature of service the organisation provides and funding availability.

### 5.4.2 Models of public interest law organisations

Traditional legal aid organisations generally provide direct legal assistance to those who cannot afford private lawyers, for example: the provision of Legal Aid in South Africa.

More policy-oriented organisations such as the Women’s Legal Centre, aim to affect broad social change to eliminate particular human rights abuses.

*Two models of public interest law organisations have emerged:*

- The high-volume or ‘routine’ legal service provider, which provides assistance in a large number of cases within a given area of the law or certain areas of the law. Case selection is aimed at reducing caseload to a reasonable number. There is always a tension between the quality and quantity of representation.
- The law reform or ‘impact’ organisation takes a relatively small number of cases affecting large numbers of people and/or with precedential significance for the law.

Many NGOs realise that they cannot secure rights for people on their own. Most NGOs are quite specialised, and do not have expertise in all the necessary strategies and methods that can be used in a particular case. Partnerships and collaboration within a network of NGOs are vital to ensure that issues are presented properly in court and implemented thereafter.

#### **EXAMPLE**

Amnesty International is highly skilled in campaigning work, but does not have a similar level of experience in strategic litigation. Its experience of campaigning, however, may be extremely useful in supporting any strategic litigation effort. Resources outside of the organisation can help leverage the organisation’s resources to maximum effect.

## 5.5 Assessment and relevance of impact

There remains a lack of research on what difference NGOs actually make and how. NGOs themselves do not seem to measure impact in any kind of scientific way.

*Key indicators may include:*

- Anecdotal evidence from the country in question illustrating that the pressure or litigation has had an effect.
- Resulting law reform or policy reform of key State institutions (although without implementation, this may have little effect in practice).
- The level of community reaction (positive or negative).

With *client-oriented* litigation (where relief is sought for an individual), success can be measured in terms of the number of victories, or the level of compensation or damages.

Strategic litigation poses greater difficulties. Strategic litigation is one of various methods to achieve social change. As the primary aim is social change and not success in litigation, when an organisation decides to pursue strategic litigation it is important to make some attempt to assess its impact compared to any of the other available strategic methods.

Organisations use a combination of approaches to achieve their objectives, and the choice of approach depends on the nature of the problem. *Impact is often assessed by:*

- Continued ability to attract funding.
- Success in establishing standards in another province or region.
- Reputation, even if actual implementation is not examined at all.

## 5.6 Why we need case selection criteria<sup>50</sup>

Good case selection and strategy overcome many of the disadvantages of strategic litigation and maximise its usefulness. They can also assist in the process of identifying the goals and values of the organisation.

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<sup>50</sup> Ibid, 46-7.

## Management issues

From a management perspective, organisations require case selection criteria for 2 main reasons:

- **Efficiency**  
Case selection criteria are necessary in order to ensure an efficient allocation of resources within an organisation.<sup>51</sup> To achieve the objectives of the organisation in the most efficient manner, its resources must be directed to where they have the most benefit.
- **Case filtering**  
Objective criteria are necessary to exclude cases that will not be successful in terms of impact or are outside the chosen priorities of the organisation. Case filtering helps to justify the refusal to undertake particular cases, to comply with funders' conditions and organisational founding documents, or to earn or maintain a reputation as equitable and transparent.

## Moral hazard

Legal service NGOs provide their services at no charge. This creates a moral hazard with some potential clients who may abuse the facility because it costs them nothing.<sup>52</sup> Case selection criteria based on merit helps to resolve this issue.

## Success

A timely and thorough due diligence investigation of any prospective case should also assist in developing appropriate legal strategies to select the cases most likely to succeed and to meet the organisation's objectives.<sup>53</sup>

### 5.6.1 How do objectives and priorities facilitate case selection?<sup>54</sup>

The organisation's objectives, priorities and nature of work largely shape its case selection.

A key preliminary question is: where does the organisation find the case?

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51 Ibid 46.

52 Ibid, 47.

53 Ibid, 47.

54 Ibid, 47.

*Client-oriented* organisations receive most of their cases from individuals who walk in the door.<sup>55</sup> Their selection of cases is usually limited only by the means of the client, the merit of the case, and available organisational resources.

By contrast, *policy-oriented* organisations might advertise for and recruit clients to advance a particular programmatic objective or issue, and thus have a stricter list of applicable criteria.

*Human rights organisations specialise in dealing with:*

- Cases of violation of particular rights (*the thematic model*), OR
- All of the areas of interest to a particular minority or marginalised group (*the minority-focused model*).

With the thematic model, there is a natural limitation on the cases that the organisation might undertake. For example, the organisation might prioritise certain issues within freedom of expression, such as restrictions on the media or defamation. Once priority issues are established, it is a question of strategy to achieve that objective – to find a good case and deliver it in an appropriate forum.

With minority-focused NGOs, because of the breadth of issues that arise, prioritisation is vital. Again, the question then becomes how to best achieve that goal.

### **5.6.2 Case selection criteria**

*Broad-based criteria applied by many organisations in choosing cases include:*

- A client's financial means.
- The prospective merits of the case.
- The type of client (for example: women, children, workers, refugees).
- The type of case (for example: civil, criminal, labour, death penalty).
- Group rights, as opposed to individual rights cases.
- The likely effect of the case based on an impact assessment.

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<sup>55</sup> Ibid, 47.

## EXAMPLE

*The case selection criteria used by a number of NGOs is:*

1. The case addresses issues of substantial importance to a large number of people.
2. The issue is relevant to one or more thematic priorities.
3. The issue cannot be adequately addressed by an individual case.
4. The involvement is in the best interests of the minority group generally.

## 5.7 The process of strategic litigation planning<sup>56</sup>

Any organisation that wishes to initiate a strategic litigation programme must identify its specific goals and how it will achieve them.

*For convenience, we divide the process of strategic litigation planning into 5 core areas:*

- Is litigation the right strategy?
- What are the issues for litigation?
- What is the appropriate legal forum and jurisdiction?
- What is the best remedy?
- What is the best factual case for litigation?

It may be appropriate to consider these criteria at more than one point in the planning process or once a case is underway.

It is important to examine at the outset all of the possible consequences of litigation in order to be prepared for every possible event during the litigation.

Different strategies, techniques or methods (even apart from litigation) may be necessary at various points in the process to bolster the overall campaign.

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<sup>56</sup> Ibid, 48.

## 5.7.1 Is litigation the right strategy?

After an organisation has determined that a particular project or case is aligned with its objectives and current priorities, the project or case must be examined for its suitability for court proceedings.

Can the underlying issue or problem be addressed by legal means? Is litigation appropriate in all the surrounding circumstances?

*We outline 11 key questions to consider:*

### 1. Objectives and method

What are the specific objectives to be achieved through the litigation? Litigation may be only one of many available tools. For example, publicity or political lobbying (legislative advocacy) may be more effective, depending on the circumstances.

### 2. Impact assessment

What is the overall potential impact of a successful or unsuccessful case on:

- The creation of a future legal precedent, any deterrent effect on the State, its agents, and other private actors, AND
- The community or group whose interests are being represented.

### 3. Community perception

How will the relevant community perceive the case? Will the case be divisive? If the abuses at issue are universally abhorrent practices, the organisation may go ahead despite public opposition. The organisation must try to understand the opposition to change – is it well articulated or well-informed?

### 4. Public hostility

If there is public hostility to a minority, the objective is to set an example through a strong sanction or to use criminal law. Use of media campaigning and education may soften up public opinion and create a groundswell of support.

### 5. Difficulty in getting evidence

If there is difficulty in collecting evidence to support a court case, then the aim of

litigation may be to persuade the courts to accept different types of evidence.

## **6. Low awareness among affected group**

If there is low awareness among the affected community or group, publicity and education can be used alongside litigation.

## **7. Lack of funding**

Are there sufficient funds to finance a court case? It will be necessary to develop a strategy to fund the case.

## **8. Fear of retaliation**

If there is a fear of retaliation against claimants, the organisation might prioritise cases concerning retaliation and harassment. In these cases, it may often be better to run the case from outside the relevant jurisdiction to avoid local threats or pressure.

## **9. Ineffective sanctions**

If there is ineffective enforcement of court sanctions in practice, you can argue for a court judgment that imposes enforceable and realistic sanctions, such as:

- Compliance training.
- A good system of monitoring.
- Punitive and not just compensatory damages.

## **10. Judges' human rights literacy**

If judges are unaware of human rights or unwilling to utilise them, then consider providing training/re-training and education programmes for them.

## **11. Overall strategic approach**

If there is a lack of an overall strategic approach in your area of interest, then it will be helpful to co-ordinate with other networks to discuss strategy and get their assistance in using a number of different methods to push the issue forward.



## 5.7.2 What are the issues for litigation?<sup>57</sup>

Case selection is mostly driven by an awareness of laws or gaps in the law that can be used to develop the law in a way that is beneficial to your cause. Practitioners are often aware of the most relevant issues to the groups they represent, and the legal instruments and legal fora that are available.

In other cases, a survey or audit of the legal and political landscape is necessary to reveal priority issues and needs, and to identify inadequacies in the existing legal protections afforded to the relevant group.

*Such a survey can be based on independent research, for example:*

- A review of jurisprudence nationally and internationally.
- A review of the country reports of international human rights organisations.
- Discussions with other lawyers and NGOs.

Case selection criteria are used to identify the gaps in the law which have the potential to be developed to the advantage of a particular cause.

*We identify some of the issues you may wish to litigate around:*

- **Existing laws not enforced**

Is there a law or regulation that is relevant, but is not being upheld or enforced? Look at relevant domestic laws and relevant international jurisprudence.

- **Compliance with international standards**

Study the interpretation of national standards by governments and the courts to see to what extent, if at all, their interpretation accords with national and international standards. Is there evidence of non-compliance with the relevant standards that might be open to a legal challenge?

- **Best practices**

Look for best practices nationally and internationally (in other words: examples of the most advantageous application of existing legal standards):

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<sup>57</sup> Ibid, 50.

- ~ Have the relevant legal standards been tested at a national, regional, or international level and, if so, with what results?
- ~ Are judges or lawyers in your national courts familiar with these standards?
- ~ Can these standards be used or developed to your advantage?

- **Clarity of existing law**

Is the law unclear? Clear law allows marginalised groups to know and assert their rights, and encourages potential plaintiffs to come forward and challenge abuses. A strategy of prosecuting violations of clear and accepted laws may ensure easy wins and develop momentum in the context of a campaign.

A more challenging and high risk strategy would be to try to use less clear or more controversial laws to create a new legal precedent.

- **Application of existing law**

How is the relevant law applied in practice? Do the State authorities need guidance from the courts on how to comply with international human rights standards? Has the application of a particular law by government officials been arbitrary and inconsistent, and might it benefit from clarification by the courts?

- **Economic, social and cultural rights**

Framing a human rights violation in terms of *civil and political* rights rather than *economic, social or cultural* rights has proved more successful in human rights cases.

This is because historically civil and political rights are regarded as being more *justiciable* (capable of legal enforcement). Generally, national courts are reluctant to decide cases in which the recognition of an economic, social or cultural right could mean the reallocation of public resources and, arguably, involves the court in making policy choices that are normally left to the government.

There are now, however, some notable exceptions to this general rule. Some national courts (such as in South African and India) appear prepared to consider cases involving such rights in certain circumstances. The best

advice, as always, is therefore to assess the relevant State's likely approach to the issue.

- **Likelihood of success**

In each case, where gaps or issues are identified, ask: what is the likelihood of the success of litigation on the relevant issue? This will largely be determined by an analysis of the particular facts of the proposed case.

Even at the domestic litigation stage, it is important to bear in mind the possibility of an appeal from national courts to an international forum. This consideration should influence both strategy and the ways of documenting the human rights violations.

*In choosing between a number of issues, each of which has the potential to be successful in setting a precedent, you can consider:*

- ~ Focussing on under-utilised laws that can be used in other contexts as well.
- ~ Going for the easiest issue or the one with the most impact.
- ~ Choosing clients whose case raises multiple issues.

- **Procedural goals**

Strategic litigation may also be used to advance more technical or procedural points of law, such as:

- ~ Testing procedural or evidential barriers of the court.
- ~ Introducing alternative (and better) legal remedies for individuals seeking redress.
- ~ Encouraging more positive and progressive action by the court.

For example, the aim of litigation could be to educate the court in the use of a new standard or to establish techniques to shift the burden of proof.

- **Negative court decisions**

Even if it is clear that the court is likely to reject the claimant's case, it is sometimes possible that the overall strategy could benefit from a glaringly unjust decision by the court. There may be indirect benefits of the litigation,

such as publicity, education of the judiciary and lawyers, and client empowerment.

While the case itself is lost, an important technical or procedural issue of law may be developed by the court in a way that can be used to your advantage in a future case.

- **Interim goals**

If litigation is the chosen method, it is important to be clear about its goals. It is important that each campaign have a set of tangible objectives and shorter-term goals along the way. Some NGOs litigate not in the expectation of victory, but to raise an issue publicly, educate lawyers and judges, or compel government authorities, agencies or public institutions to take action.

As part of an overall strategic campaign to address the needs of a particular minority group, litigation may have a number of objectives short of ultimate victory.

### **5.7.3 What is the appropriate legal forum and jurisdiction?<sup>58</sup>**

This is not only a question of which courts or tribunals have jurisdiction to hear the case, but also which offer the most beneficial jurisprudence, procedures and remedies.

#### **Choosing the appropriate forum**

##### **RELEVANT LAW**

The primary criteria will be whether or not the relevant national or international law permits a complaint to the chosen forum on the facts of your case.

##### **AVAILABILITY OF APPEALS**

Because of its law reform objectives, appeals are a key to the success of strategic litigation. It is therefore important to consider whether the relevant national courts have a good appeals procedure. Also, is there a possibility of an appeal to an international or regional court or tribunal? How long does it take before the case reaches the appeal stage?

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<sup>58</sup> Ibid, 52.

## ASSESSMENT OF POTENTIAL IMPACT

Will success in the chosen forum have widespread effect or just limited local effect? If the effect will be limited, is that sufficient?

## ONGOING CASES

Are there cases on this subject already ongoing in the chosen courts? If so, it may be possible to take immediate advantage of this by offering your services or information to the lawyers in that case. It is also important to cooperate together to ensure that any such case does not prejudice a future case that your organisation may be contemplating.

## PREVIOUS JUDGEMENTS OR DECISIONS

What is each court's record in dealing with this type of case? Do previous decisions indicate a favourable disposition towards particular issues?

## QUICK WINS

Bringing your case to a jurisdiction where you can get early and quick wins to gain momentum and lay successful groundwork is a good idea. You may not want a hard case, at least to begin with, because it may be a setback to the whole process.

## COMMON LAW AND CIVIL LAW SYSTEMS

Are common law precedents worth more in strategic terms and in civil law victories? Civil law jurisdictions give less recognition to previous judicial decisions. Here there is less opportunity for systematic change through litigation than in common law systems that may use existing case law as future precedents.

## DUALIST AND MONIST SYSTEMS

States take a 'monist' or 'dualist' approach to the application of international human rights treaties in their law:

- In *monist* systems a treaty becomes effective in international law and in national law simultaneously, although even then international treaties may still be subject to interpretation in accordance with national constitutions and national law.
- In *dualist* systems, a treaty does not become part of national law until it has been incorporated into law by national legislation.

The weight particular national courts give to principles of international human rights law must therefore be assessed on a case-by-case basis.

## NATIONAL COURTS

If there is a choice of jurisdiction in which to bring the case, then choose the national court with the more influential judgments nationally and internationally. This will ensure wider impact. If there is a choice of a national court or tribunal, choose the one that is likely to give the most advantageous judgment.

Some national courts have a progressive approach to public interest law. For example, India, Bangladesh, Sri Lanka and Pakistan have a long history of public interest litigation in the highest courts. This includes establishing whether the contemplated national court has procedures that are favourable to the circumstances of your case, for example: is legal aid available?

## REGIONAL AND INTERNATIONAL COURTS

It is important to determine how efforts in international courts or tribunals should interact with other efforts. Is the treaty body more likely than a regional court to push forward the jurisprudence on this issue? Are there jurisdictions from which certain questions or issues are likely to get better outcomes in an international tribunal?

International litigation may be more effective than domestic litigation if, for example, the offending State is concerned about its international or regional reputation, or the international community is likely to be more sympathetic.

## THE COURT AND JUDICIARY

A competent, independent and impartial judiciary is a precondition to any litigation strategy seeking to establish precedent. Because of its policy element, strategic litigation also requires a proactive and progressive judiciary. Thus, it will be more difficult to get favourable judgments in those legal systems that take a more formal, rather than a dynamic, approach to interpreting the law.

## POLITICAL AND SOCIAL CONTEXT

### *Corruption*

What is the level of corruption in the State? Will it affect the case? Will the judgement be enforced?

### *Responsible government*

How good is the current government on human rights issues? What is the economic situation in the country? Is the government under political pressure (for example: pending elections)? Is the culture in the State one of acceptance and understanding of human rights issues?

## **Applicable laws**

It is vital to know in advance what law or standards will be applied in the case by the chosen tribunal.

### *Important questions include:*

- Can you use international law in domestic proceedings? Besides the UN and the regional treaties, the law and case law of other countries (mainly the judgements of the Supreme Courts and Constitutional Courts) might be successfully used.
- Has the State ratified the relevant international instruments? Are there reservations to the ratification? Has it incorporated them into national law?
- Are there international enforcement bodies?
- Is there a written constitution with human rights protections?

## Procedural criteria

### LEGAL COSTS

The possibility that a litigant in an impact litigation case could lose their home because of an adverse costs order is a significant deterrent in prosecuting these cases.

*Relevant issues around costs include:*

- How much are legal costs estimated to be (including lawyers' fees, court costs, and other disbursements such as witness expenses, experts' fees and travel). Can they be reduced?
- Are there procedural requirements such as 'security for costs'? A claimant may have to provide a large amount of money up front to cover the other parties' legal expenses if the case be unsuccessful.
- Can the claimant recover fees if the State is successfully sued?
- Is there any loosening of the rule that the losing party pays the winner's costs? This rule is a strong deterrent to public interest litigants who may be required to pay substantial costs if they lose. There may be exceptions to the general rule, where the courts have discretion not to award costs against an unsuccessful litigant.

### TIME LIMITS

Time limits can debar claims and therefore must be seriously considered when choosing a forum. Many international tribunals have a time limit of 6 months for the submission of a case after the exhaustion of domestic remedies. You must determine whether there are tight time limits for submitting the case (statutory or practice limitations). Will they affect the quality of presentation of the case? Can the court waive time limits?

Are there innovative approaches to time limitations? The Indian Supreme Court's relaxation of the doctrine of *laches*<sup>59</sup> in public interest litigation cases is an example of an innovative approach. Is the doctrine of *laches* applicable?

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<sup>59</sup> Based on the maxim that equity aids the vigilant and not those who procrastinate regarding their rights, the doctrine of *laches* provides that applicants must assert their claim or right within a reasonable and justified period of time, so as not to disadvantage the other party.



## RULES OF STANDING

Because of the nature of public law litigation with its law reform element, private law rules of standing are not fully appropriate. However, many jurisdictions still require private law proof of standing.

### *Third party intervention*

A key question for NGOs is whether the tribunal permits third parties to intervene in cases (or even bring the cases themselves on behalf of the victim). Much NGO litigation work involves intervention as *amicus*.<sup>60</sup> Are NGOs permitted to file complaints or to intervene and if so, in what circumstances?

### *Innovations*

Is there any relaxation of rules of standing, for example: Indian public interest litigation allows persons not personally affected by the action to make a claim.

### *Class actions*<sup>61</sup>

What are the possibilities for a class type claim? Because of the controversial nature of some personal injury class actions, it is advisable to determine who the class actions would benefit or hurt, and what public benefit might be achieved.

## RULES OF EVIDENCE

Human rights litigation involves some of the most vulnerable and excluded groups in society. These groups are often worst placed to document and prove the violations they have endured. Rules of evidence, particularly when they exclude or question the value of certain types of evidence, may operate to prejudice legitimate claims.

Certain abuses such as indirect discrimination or institutionalised racism can be extremely difficult to prove. If permitted by procedural rules, it might be necessary to submit less commonly used types of expert evidence (for example: sociological studies).

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<sup>60</sup> An amicus is a 'friend of the court' who assists the courts in points of law in a specific case. Amicus are generally not parties to the proceedings.

<sup>61</sup> A class action is a representative action in which one or more plaintiffs are named in the complaint. They pursue a case for themselves and the defined class against one or more defendants. The claims of the 'class representatives' must arise from facts or law common to the class members. Most class actions are called 'plaintiff class actions.' However, in limited circumstances a class action can be filed against one or more defendants representing a group of defendants, in other words: a 'defendant class' action.

Establish at an early stage how to marshal evidence to establish the wrong complained of, and whether the evidence will be admissible. Are there rules that prevent the gathering of evidence from government defendants (such as on grounds of national security or public policy)?

### *Corporate cases*

Corporate cases raise separate and complex issues of private international law. Specialist advice should be sought.

### *Exhaustion of domestic remedies or other alternative venue doctrines*

To what extent will the court insist on formal application of such doctrines? Whether the court will insist on first exhausting the remedies available will determine strategy.

### *Method of pleading*

How formal is the method of pleading? For example, in Indian public interest litigation, a simple letter is enough to commence proceedings.

## **5.7.4 What is the best remedy?**

A vital component linked to the choice of forum and jurisdiction is the choice of remedy for the affected group or person.

If the goal of the litigation requires a particular type of remedy, this will determine the type of procedure and the court. The type of action to be taken must be decided by the client together with a lawyer and the NGO involved.

### **Civil remedies**

*These are factors in favour of civil remedies:*

- The client's lawyer has more control over the proceedings and is free to organise and conduct the trial.
- The client benefits from compensation for damages. What is the amount of damages available?
- The standard of proof is easier to meet in civil cases (on a balance of probabilities).

*Considerations against civil remedies are:*

- Court costs can be high and may not always be recoverable.
- Criminal remedies arguably have a greater deterrent effect.
- Evidence is theoretically gathered more quickly in criminal cases.
- Compensation claims are primarily for the benefit of the individual who pursues them.
- Lawyers in some jurisdictions may be passive or reluctant to investigate thoroughly on their own.
- There are procedural rules in many countries that suspend civil actions while awaiting the result of any criminal proceedings. These rules may be open to interpretation. The best course of action may be to bring as many cases as possible by also arguing for an independent civil action.
- There are concepts in civil law such as *domicile* that might impede some human rights claims.

## **Criminal charges**

*Obstacles to criminal charges include:*

- A high standard of criminal proof required to get a conviction (beyond reasonable doubt).
- The rate of prosecution is low – as a result, criminal remedies are less likely to be successful.
- Lack of resources allocated to prosecution.
- Inadequacy of criminal fines which pose no deterrent (for example: a large corporation would rather pay a fine than pay regular health and safety costs).
- With multinational corporations, the parent companies may be beyond the criminal jurisdiction of the local courts.
- Difficulty in initiating procedures.
- The danger of the defendant becoming a martyr and being targeted for retribution.

## **Innovative remedies**

The Indian courts do not just give redress with public interest law actions, but also correctives for the future. For example, they design relief plans, oversee implementation and send officials to periodically check on the progress of remedies.

### **5.7.5 What is the best factual case for litigation?<sup>62</sup>**

The purpose of this exercise is to identify the set of facts or case scenario that will best use the laws and means of litigation chosen to achieve the litigation goal.

Choosing the right case scenario that will appeal to the court and will best use the particular laws is a difficult issue.

*For example, the organisation must assess whether:*

- There are particular issues which are better litigated by a particular applicant or class of applicants because the court may be more willing to find in favour of them, OR
- A particular group (such as non-nationals because of their vulnerability everywhere) requires a departure from the previous rule.

Similarly, the defendant must be chosen carefully to maximize success and impact.

Often, it may be easier to litigate in a jurisdiction with a diverse community because there may be individuals with multiple grounds of discrimination.

### **How do you find a client?**

Clients may be 'recruited' from key local partners, other NGOs, through training or education programmes, fieldwork or via community networks. For example, you may choose to identify applicants with multiple grounds of discrimination or violations.

In many countries, lawyers are not allowed to advertise for clients. This may inhibit the ability of the organisation to formulate a winnable case.

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<sup>62</sup> Coomber, *ibid*, 58.

## The plaintiff or applicant

The characteristics and personal circumstances of the plaintiff or applicant need to be carefully assessed in strategic litigation cases, particularly as the chief aim of the case is to further the client's interests.

### PERSONAL CHARACTERISTICS

To facilitate successful litigation, the personal characteristics of the client must find favour with the court, for example: in its perception of the level of violation and the credibility of the client.

*Factors to consider in identifying an 'ideal' applicant include:*

- Age, race, gender, sexual orientation, language, nationality or residence may sway the court, depending on the facts of the case.
- The client's level and quality of education, sophistication and understanding of the process may make the burden of litigation easier and ensure a more successful campaign.
- The client's personality – credibility, confidence, friendliness, trustworthiness, perseverance, determination or resilience – may appeal to the court and make the process easier. For example: will the client see the case through? What is the level of trust and co-operation between client and attorney?
- The personal history of the client, even if unrelated to the specific facts of the case, may sway the court (for example: a past history of suffering and torture). But previous history can have negative effects too (for example: a previous history of torture may impact on the memory of the client and thus have implications for case strategy).

### PERSONAL CIRCUMSTANCES

The client's personal circumstances must be considered both in terms of the likelihood of success in the case, and the effects a success or failure might have on the client's life.

*Questions may include:*

- How will the client finance the case (if they have to)?
- Do they have a job, family support and can they get time off work?
- What kind of community support is available to them – financial, practical and emotional?
- What are their future prospects with or without the case?
- What damage might a successful case do to the client and his/her life?

There are moral considerations to weigh, outside of the human rights objectives of the litigation – the case may be successful, but what if it destroys the client's life.

## GROUP CLAIMS

Would the objectives of the case be better served by a group claim rather than an individual claim? Is there a class of applicants that finds favour with the court? Does the group have a recognised leader or procedures for making decisions as a whole? How are decisions for the group reached? Is the group complete? Are key members of the group missing? Why? Will their absence affect the claim?

## **The defendant**

The defendant must be chosen based on the substance of the relevant laws, the procedural requirements of the case, the likelihood of success and the potential impact of a positive decision.

## THE NATIONAL GOVERNMENT

The national government is one of the most common defendants in impact cases in smaller jurisdictions.

*Relevant questions are:*

- Is the government against the proposed change? Why?

- Is the political opposition organised? Vocal? Will they pressurise the government in this field?
- Are other political parties and leaders supportive?
- How good are the State's lawyers? What strategy are they adopting?
- Are there elections pending which may affect the resolution of the issue – positively or negatively?

## LOWER LEVELS OF GOVERNMENT

Provincial authorities, local authorities, or government agencies or institutions may be appropriate defendants. Apart from questions regarding their ability to defend themselves in court, lower levels of government are usually the organs charged with implementing any changes in policy.

*Some considerations include:*

- Are there funds or infrastructure available to effect the change in policy?
- Is there institutional opposition? How can this be overcome?
- At which level is the defendant? What kind of support does the defendant have from higher levels of government?
- How good are government relations with the media? How have they handled this issue so far?
- Is it part of government policy? What are the reasons for delay? Can we put it on the agenda?

## COMPANIES

Legal actions against large companies may set an example and create huge impact (particularly when accompanied by a publicity campaign that might hit profits). There are legal and tactical obstacles to targeting a private as opposed to a public actor. Most companies can marshal huge legal resources. Jurisdictional

arguments make these cases particularly difficult. Expert legal advice should be sought.

However, exposing corporate wrongdoing is a powerful tool to force reform. The reactions of stakeholders in a company will be an important factor in the success or failure of strategic litigation against companies – for example: the responses of management, the workforce, shareholders, creditors, the competition and the public.

## INDIVIDUAL DEFENDANT

Individual defendants are rare in impact cases. Individuals do not have the deep pockets of companies nor the public policy reform potential of governments.

### **Fact patterns**

*Useful pointers in choosing the most appropriate case:*

- Choose impact cases that cannot be ignored by the courts, for example: something serious or close to the core civil and political, or economic and social rights.
- Look at the most important issue for a particular group, or the easiest because of established case law. Try to get a historical understanding of past rulings in order to find the factors most likely to influence the relevant court or tribunal.
- Link the case's strengths and weaknesses with the court's inclinations. This is particularly vital where there is a risk of setting an unhelpful precedent, which might be detrimental rather than beneficial to the advancement of the cause.
- Be aware of fact patterns that would appeal to regional bodies and understand their past decisions, and how to use and access their decisions.

### **The evidence**

Success in strategic litigation will depend not only on the quality of the issue for presentation to the court, but on the quality of evidence supporting the claimant's case. A good case in theory may not prove to be so in fact once all the evidence has been collected.



## 5.8 Litigation support strategies<sup>63</sup>

Litigation support strategies include NGO networks, media campaigns, international pressure, popular support, legislative reform and education.

### Friendly legal or factual assistance

The assistance of other specialists in the human rights field might be important in providing legal or factual research, or otherwise supporting the arguments made on behalf of the applicant or the overall campaign.

### NGOs

NGOs can provide general assistance in campaigning, fact-finding, networking, research or as *amicus curiae*. Find out the strength of the NGO community in the relevant jurisdiction and internationally on the relevant issue. If it is a work-related matter, trade union support may be necessary.

### Other *amicus curiae*

*Amicus curiae* must be assessed based on factors such as prestige, knowledge, reputation, motive and the weight of its contribution and perceived weight for the particular court. Examine whether *amicus* contributions are allowed in a particular jurisdiction, how many are allowed, and if there is no limit, how many to include.

### Research

Research is a powerful tool to substantiate the factual bases for high impact cases and to provide innovative legal arguments. Use academics to write law review articles on the new standards.

### National human right institutions

National human rights institutions or specialised equality bodies may be important in fact-finding or acting as *amicus*.

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<sup>63</sup> Ibid, 64.

## **Publicity and getting public support**

Publicity is a tool that can be used alone by organisations such as Amnesty International or in conjunction with a strategic litigation campaign. Publicity contributes greatly in educating the community in human rights ideology and in the understanding of particular human rights abuses.

### THE MEDIA

It may be possible to collaborate with another NGO with expertise in media campaigning to support your litigation effort.

### POLITICIANS

Politicians may be used to generate publicity. Extremist politicians may do damage by publicising the case. More mainstream politicians may shy away from it.



# 6

## South African law relating to sex work

### 6.1 Constitutional rights of sex workers

Every person is entitled to certain rights simply by the fact that they are a human being.

They are human rights because they are things you are allowed to be, to do or to have. These rights are there for your protection against people who might want to harm or hurt you. They are also there to help us get along with each other and live in peace.

*Below is a list of the human rights guaranteed by our Constitution's Bill of Rights applied to sex workers:*

| <b>BILL OF RIGHTS<br/>Section</b> | <b>RIGHT</b>   | <b>WHAT DOES THIS MEAN FOR SEX WORKERS?</b>  |
|-----------------------------------|--|--|
| S9                                | <b>Equality</b><br>Everyone is equal before the law and has equal benefit and protection of the law.               | Sex workers should be treated equally and may not be unfairly discriminated against. Laws that protect all citizens should also protect sex workers. |
| S10                               | <b>Human dignity</b><br>Everyone has inherent dignity and the right to have their dignity respected and protected. | No persons or institution may insult you or take away your self-respect by words or actions.   |

|     |  |  |
|-----|--|--|
| S12 | <p><b>Freedom and security of the person</b></p> <p>Everyone has the right to be free and not to be tortured or treated in a cruel, inhuman or degrading way.</p>            | You may not be arrested without a good reason. You should not be treated badly whilst in police custody.   |
| S14 | <p><b>Right to privacy</b></p> <p>Everyone has the right to privacy.</p>   | You have the right to keep your HIV or AIDS status to yourself. No person or institution may force you to tell them your HIV status or take an HIV test.                       |
| S16 | <p><b>Freedom of expression</b></p> <p>Everyone has the right to freedom of expression which includes the right to give or receive information or ideas.</p>                 | You have the right to express your views on issues as long as they do not hurt another person.   |
| S18 | <p><b>Freedom of association</b></p> <p>Everyone has the right to freedom of association.</p>  | You have the right to join clubs, groups or organisations, and may not be forcefully separated from people.  |
| S21 | <p><b>Freedom of movement and residence</b></p> <p>Everyone has the right to move about freely, to live in or leave the country and to live anywhere within the country.</p> | You may move around the country as you wish, and may not be forced to move to a separate place away from society.  |
| S22 | <p><b>Freedom of trade, occupation and profession</b></p> <p>Everyone has the right to choose their work freely.</p>   | You may choose what kind of work you wish to do.   |
| S23 | <p><b>Labour relations</b></p> <p>Everyone has the right to fair labour practices.</p>   | You may not be unfairly discriminated against at work.   |
| S24 | <p><b>Environment</b></p> <p>Everyone has the right to an environment that is not harmful to their health or well-being.</p>   | You have the right to live in a clean environment and everyone, including the government, has a responsibility to protect and preserve the environment for future generations. |

|     |  |  |
|-----|--|--|
| S26 | <p><b>Right to housing</b></p> <p>Everyone has the right to access adequate housing. No one may be evicted from their home or have their home demolished without a court order.</p>  | <p>You may not be refused a subsidy or loan to buy a house because you are a sex worker. It is unlawful to be evicted from your home because of the kind of work you do.</p>   |
| S27 | <p><b>Right to health care, food, water and social security</b></p> <p>No one may be refused emergency medical treatment. Everyone has the right to access health care services such as reproductive care as well as social security benefits, which include appropriate social assistance, if they are incapable of supporting themselves and their dependents.</p> | <p>Hospitals or medical people may not refuse to treat you.</p>  |
| S29 | <p><b>Right to education</b></p> <p>Everyone has the right to basic education, which includes adult basic education.</p>   | <p>A school may not refuse to educate you or your child because you are a sex worker.</p>  |
| S32 | <p><b>Access to information</b></p> <p>Everyone has the right to see information held by someone which would be needed to enable such a person to exercise or protect their rights.</p>  | <p>If you feel your rights are being violated in any way, for example under an employment policy, you may ask to see the policy and may then challenge it in court. This is the same for other places or institutions.</p> |
| S33 | <p><b>Just administrative action</b></p> <p>Everyone whose right has been negatively affected by administrative action has the right to be given written reasons, such as reasons for the delay in the action.</p>   | <p>If you feel you are being refused a social service for unfair or unjust reasons, you may demand to see the reasons and decide whether you wish to challenge the decisions.</p>  |
| S35 | <p><b>Arrested, detained or accused people</b></p> <p>Everyone who is detained including convicted prisoners has the right to conditions of detention which respect his/her right to dignity</p>   | <p>Prisoners may not be treated in an unfair or undignified manner because they are sex workers.</p>   |

Our Constitution says that the fundamental rights of all South Africans will be protected and respected. These rights are listed in the Bill of Rights along with the circumstances when it may be permissible to limit these rights. Various government bodies and institutions have been set up to ensure that rights are protected.

*If the rights of sex workers have been violated, you can report the case to one of these bodies:*

- South African Human Rights Commission.
- Independent Police Investigative Directorate.
- Public Protector.
- Commission for Conciliation, Mediation and Arbitration.
- Commission on Gender Equality.

Below, we will discuss the laws that currently criminalise sex work in South Africa.

## **6.2 National legislation**

### **6.2.1 Sexual Offences Act**

Sex work is currently criminalised in South Africa. It is an offence to sell sex, buy sex, and to engage in certain sex work-related behaviour. In 1957, various laws regulating sexual acts or relations were repealed and re-enacted in a consolidated Immorality Act 23 of 1957.

This Act, subsequently renamed the Sexual Offences Act 23 of 1957 (SOA), is still in force and contains the current provisions regulating various aspects of sex work. The SOA penalises sex work, the keeping of brothels, and the procurement of women as sex workers, soliciting by sex workers, and living off the earnings of sex work.

The SOA as it stands is a very difficult law to prosecute under and requires intensive and intrusive police methods such as entrapment to secure a conviction. The indoor industry is rarely targeted, except when the brothel tends to become too high profile or there are community complaints. In these cases, entrapment

procedures are used.<sup>64</sup>

*We will list each provision that criminalises sex work and discuss what the section intends to do, as well as the elements of the crime:*

## **Section 20**

Section 20(1A) (a) is the primary prohibition against sex work which provides that any person who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward commits an offence. The section says:

“(1A) Any person 18 years or older who –

(a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or

(b) in public commits any act of indecency with another person,

shall be guilty of an offence.”

Section 20(1A) (a) effectively prohibits the core function of the sex worker’s work, but it does not penalise “being” a sex worker. A person cannot therefore be arrested for being known to the police as a sex worker – there has to be at least a reasonable suspicion that he/she had engaged in sexual intercourse or had performed an indecent act for reward (at a specified time with a specified person).

*The elements that have to exist in order to be considered guilty of contravening this section are:*

- The person must have had unlawful carnal intercourse, which is defined as sexual intercourse (but excludes sex between a husband and wife).
- There must have been a reward: the reward could be financial or in kind.
- This act of the unlawful carnal intercourse must have been intentional.
- There must be reasonable suspicion that the person engaged in sexual intercourse or had performed an indecent act for reward.

See more on Section 20 on page 167.

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<sup>64</sup> “*Maybe it will be better once the this World Cup has passed*”, UNFPA, Research Findings regarding the impact of the 2010 Soccer World Cup on Sex Work in South Africa, 27.



## Section 2

- Section 2 of the SOA says:

“Any person who keeps a brothel shall be guilty of an offence”.

- Section 1 describes a brothel as:

“Any house or place kept or used for purposes of sex work or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose.”

- A place is further defined as:

“Any field, enclosure, space, vehicle, or boat or any part thereof.”

- A house is defined as:

“Includes a dwelling – house, building, room, out-house, shed or tent or any part thereof”.

- As a result, the house or place will be considered a brothel if it is used with the intent to conduct unlawful carnal intercourse or for indecent acts.
- Therefore a person can only be charged for committing this offence if he or she knowingly used the house or place for unlawful carnal intercourse or for indecent acts in a manner in which they receive a reward, either financial or in kind.
- This section is aimed at persons who intentionally and knowingly use their house or place as a residence for unlawful carnal intercourse and indecent acts to take place, for example, brothel owners.
- Section 22 says that, on conviction for contravening this section, the person will be liable to imprisonment for a period up to 3 years without a fine of up to R6,000 in addition to the imprisonment.

## Section 3

- Section 3 of the SOA says:

“The following persons shall for the purposes of Section 2 be deemed to keep a brothel:

- a) Any person who resides in a brothel unless he or she proves that he or she was ignorant of the character of the house or place;
  - b) Any person who manages or assists in the management of the brothel;
  - c) Any person who knowingly receives the whole or any part share of any moneys taken in a brothel;
  - d) Any person who, being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;
  - e) Any person who, being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel;
  - f) Any person found in a brothel who refuses to disclose the name and identity of the keep or manager thereof;
  - g) Any person whose spouse keeps or resides in or manages or assists in the management of a brothel unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive the whole or any share of the moneys taken therein.”
- This section is aimed at people who manage and own brothels, and therefore provides circumstances in which people will be deemed to have kept a brothel.

*We will discuss each subsection in more detail below:*

### **Subsection (a) of Section 3**

Subsection (a) is aimed at persons who reside in a brothel. If a person is charged with contravening this subsection, you will have to prove that you were unaware that in the house or place, unlawful carnal intercourse and acts of an indecent nature were being conducted for reward.

### **Subsection (b) of Section 3**

Subsection (b) is aimed at the managers of the brothel. If you oversee the general business, books clients and assists in the running of the brothel in any way, you will be guilty of an offence.

### **Subsection (c) of Section 3**

Subsection (c) is aimed at people who accept money in the brothel. This could be the managers or staff, for example: A, who is the manager, can be charged for committing this offence, as well as the sex worker who works in the brothel and who accepts the money. This subsection is also aimed at people who may not be in the brothel to accept the money, but receive a share of the income of the business.

### **Subsection (d) of Section 3**

Subsection (d) says that it is an offence if an occupier or tenant of a house or place allows unlawful carnal intercourse and indecent acts for reward to occur on the premises. In order to be convicted under this section, the State will have to prove that you are either a tenant (living on the premises), or knowingly allowed the house or place to be used as a brothel.

We assume that this section could extend to persons mentioned on a lease agreement, and then the onus lies on that person to prove that he/she did not know that the house or place was being used as a brothel.

### **Subsection (e) of Section 3**

Subsection (e) extends the prohibition further by stating that owners of premises (houses or places) who use it as a brothel, or rent out the premises with the knowledge that it will be used as a brothel, will also be guilty of the offence of “keeping a brothel”.

‘Owner’ is defined in Section 1 as:

“Includes any person who lets or sub – lets or permits the occupation of any house or place whether in his own right or that of another”.

In order to be guilty of contravening this section, the State will have to prove that the owner knew that the house or place is being kept as a brothel.

### **Subsection (f) of Section 3**

Subsection (f) is aimed at staff or clients in the brothel. It says that it is an offence to refuse to disclose the identities of the owners or managers of the brothel to the relevant authorities. This section uses the presumption that the staff and clients know the true identity of the owners and managers. If you are accused of contravening this section, the onus is on you to prove to the State that you did not

know who the owner or manager is.

### **Subsection (g) of Section 3**

Subsection (g) is extended to spouses of managers or owners of brothels. This section says that spouses who are aware that their partner manages or assists in the daily management of a brothel will be guilty of an offence.

To defend a charge of contravening this section, the onus is on the spouse to prove that he/she did not know that the spouse managed or assisted in the daily management of a brothel. You will also have to prove to the court that you did not receive any money or shares of money that was received as income in the brothel.

### **Section 5**

Section 5 says:

“Any contract to let any house or place to be kept or used as a brothel shall be null and void.”

Therefore any lease agreement entered into wherein the premises are leased for the purposes of a brothel will not be accepted.

#### **EXAMPLE**

A enters into a lease agreement with B wherein B agrees that A can use the premises as a brothel. If A does not pay the rent, B will have no redress because the contract of lease is null and void, which means that it does not exist and it cannot be enforced.

### **Section 6**

This section says:

“Any contract of letting and hiring of any house or place which subsequently to the making of such contract becomes a brothel shall as from the date of such event be determined and become null and void.”

### **EXAMPLE**

This means that, if B rents out his property to A and later A converts the premises into a brothel, then from the date that A converted the premises into a brothel, the contract of lease will no longer exist and it will not be enforceable.

However, the section further says:

“Upon proof by the owner of his ignorance that the house or place was so kept or used, he shall be entitled to recover the rent up to the date upon which he became aware that the house or place was being kept or used as a brothel.”

Therefore, B will be able to recover any rent that A owes up until the date that he discovered the house was being used as a brothel.

### **Section 7**

Section 7 says:

“The owner of any house or place kept or used as a brothel shall be entitled to apply to the magistrate of the district in which such house or place is situated for the summary ejection of any person who may be keeping or using such house or place as a brothel and such magistrate shall be entitled after enquiry to order the summary ejection of such person.”

This means that if the owner of the premises becomes aware that the tenant or occupier is using the house or place as a brothel, he/she may apply to the Magistrate’s Court in the area where the house is situated to evict the tenant from the premises.

The Magistrate will have to hold an enquiry and therefore both parties have to appear before the court.

### **EXAMPLE**

For example, if B becomes aware the A has been using the property in Sea Point as a brothel, B can apply to the Cape Town Magistrate’s Court for an order to evict the A.

## Section 8

Section 8 says:

“If it appears to any magistrate on sworn information laid before him by not less than two householders of good repute that any house or place in the vicinity of the dwellings of such house-holders is being kept or used as a brothel or on similar information upon oath laid before him by any police officer not below the rank of sergeant, or by welfare officer employed by a department of State responsible for Health and Welfare, a local authority or a welfare organisation registered under the National Welfare Act, 1978 (Act 100 of 1978), the magistrate may –

(a) issue a warrant for the arrest if the person alleged to be the keeper of such brothel; or

(b) issue a warrant authorising any police officer not below the rank of sergeant –

(i) to enter at any time and within such period as shall be stated in such warrant, such house or place for the purpose of ascertaining the name and identity of the keeper of such house or place;

(ii) to interrogate, and to demand the name and address of any person found in or upon such house or place; and

(iii) to demand, search for, and seize any account book, receipt, paper, document or thing likely to afford evidence of the commission by any person of an offence under this Act.”

Section 8 also says that if *at least 2* complaints have been received from reputable persons living within the vicinity of a house or place that is suspected of being a brothel, that the police may apply to a magistrate for a warrant to arrest the person who is deemed to keep a brothel or a warrant to search the premises.

Section 8 further states that anyone who is found in the house or place when the police conduct a search and who is asked for his or her personal details, and who either provides the incorrect information or refuses to give the information of the manager or owner, and/or refuses to hand over any information in the form of books or receipt to the officers, will be guilty of an offence and upon conviction will be liable to a fine up to R1,000 and if they don't pay, to imprisonment for a period up to 6 months.

## Section 10

Section 10 deals with “procuring” persons. *Procuring* in this section means to recruit persons to have unlawful carnal intercourse or conduct indecent acts for reward, and says:

“Any person who –

- a) Procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or
- b) Inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or
- c) Procures or attempts to procure any female to become a common prostitute; or
- d) Procures or attempts to procure any female to become an inmate of a brothel; or
- e) Applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female, shall be guilty of an offence.”

Subsection (a) says that anyone who recruits a woman to have unlawful carnal intercourse or in any way assists someone who does so will be guilty of an offence.

## EXAMPLE

If A tells B that she should have sexual intercourse with C for reward and in doing this A assists by booking the hotel and by putting B in contact with C.

“Inveigle’ in subsection (b) means that the procurer deceived the female to work in the brothel. This section also makes provision for procurers who enticed women to work in the brothel. *This section creates 2 offences:*

- It is an offence to obtain female to work in the brothel. For example, it is an offence if A deceives B and B ends up working in the brothel.
- It is an offence to conceal any female from authorities in the brothel. For example, it is an offence if C keeps B hidden from authorities and the public by keeping her in the brothel.

Subsection (c) says that it is an offence to recruit women to work in the brothel to provide sexual intercourse for reward.

Subsection (d) states that it is an offence to recruit women to live in the brothel.

Subsection (e) says that it is an offence to give the female alcohol or drugs in order to overpower her so that the procurer or a third party can have unlawful carnal intercourse with her.

## Section 12

Section 12 provides that it is an offence to detain any female against her will with the intention that another male can have unlawful carnal intercourse with her, or keep her against her will in a brothel:

“Any person who takes or detains any female against her will – (a) to or in or upon any house or place with the intent that she may be unlawfully carnally known by any male, whether a particular male or not; (b) to or in a brothel, shall be guilty of an offence.”

In order to be found guilty of contravening this section, the accused must have committed an act wherein he detains the woman in a way that she does not have a choice but to stay there.

Subsection 3 states that the accused will be deemed to have detained the female without her free will if he holds any of her personal clothing or property with the



intention of keeping her at the house or place:

“Any person shall be deemed to detain a female in or upon any house or place or in a brothel if, with the intent to compel or induce her to remain in or upon such house or place or in such brothel, such person withholds from her any wearing apparel or other property to the possession of which she is entitled or which has been lent or supplied to her by such person or for the purposes of prostitution; and any such female shall be justified in taking away such wearing apparel as is necessary to enable her to leave such house or place or brothel.”

## **Section 12 A**

It seems that Section 12A is aimed at persons who assist third parties to conduct unlawful sexual intercourse or indecent acts with women:

“Any person who, with intent or while he reasonably out to have foreseen the possibility that any person, who is 18 years or older, may have unlawful carnal intercourse, or commit and act of indecency, with any other person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person, who is 18 years or older, shall be guilty of an offence.”

### **EXAMPLE**

For example, if A assists B in obtaining clients, or communicating with clients with the intention that B can have sexual intercourse or commit an act of indecency for reward. If you are convicted for contravening this section, the penalty is imprisonment for a period up to 5 years.

## **Section 17**

This section states that any person who manages, owns, occupies or assists with regards to a particular premises and knowingly allows a third party to use the premises to commit any offence that is listed in the Act, shall be guilty of an offence. If you are convicted for contravening this section, the penalty is imprisonment for a period up to 6 years with or without a fine up to R12,000. It says:

“Any person who being the owner or occupier of any house or place or having or acting or assisting in the management or control thereof knowingly permits the use of such house or place for the purpose of any

offence against any provision of this Act, shall be guilty of an offence.”

## Section 19

Section 19(1) makes it is an offence to solicit third parties or clients in order to have unlawful carnal intercourse or to commit an indecent act for reward. This section does not allow sex workers to advertise their services. It says:

“Any person who entices, solicits or importunes in any public place for immoral purposes, shall be guilty of an offence.”

If you are convicted for contravening this section, the penalty is a fine up to R4,000 or imprisonment for a period up to 2 years, or both the fine and imprisonment.

Section 19 (2) says that it is an offence to wilfully and openly dress in an indecent manner in the public view. *Public view* in this section refers to any door or window or within view of any public street or in any area where the public may have access. If you are convicted for contravening this section, the penalty is a fine up to R4,000 or imprisonment for a period up to 2 years, or both the fine and imprisonment.

This section is similar to the crime of “flashing” listed in Section 9 of the 2007 Criminal Law Amendment Act (Sexual Offences Act), which states:

“A person (A) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (C) or not, exposes or displays or causes the exposure or display of the genital organs.”

### EXAMPLE

For example, A cannot wear her underwear and stand in a window or door that is overlooking a street or pavement where the public will see her. She will also not be allowed to wear only her underwear in any public area, for example: a street, or any place where the public may have access, for example: a park or parking area.

## Section 20

Section 20(1)(a) says that it is an offence for someone to knowingly live wholly or in part on the earnings of sex work, or in the public or in private to receive commission by a third party who received sexual intercourse or committed an indecent act with a female.



behaviour of the clients of sex workers. In this manual, we have referred to this Act as the 2007 Sexual Offences Act.

### **Section 11:**

“A person (“A”) who unlawfully and intentionally engages the services of a person 18 years or older (“B”), for financial reward or other reward, favour or compensation to B or to a third person (“C”) –

(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or

(b) by committing a sexual act with B,

Is guilty of engaging the sexual services of a person 18 years or older.”<sup>65</sup>

### **6.2.3 Riotous Assemblies Act**

The Riotous Assemblies Act 17 of 1956 also impacts on sex work.

Historically under Apartheid, this Act prohibited any outside gathering that the Minister of Justice saw as a threat to public peace. It included banishment as a form of punishment and allowed the government to ban any newspaper or any other “documentary information” that would cause hostility between “Black” and “White” people. It suppressed freedom of speech and assembly, and even punished actions that could bring racial groups together.<sup>66</sup>

The Riotous Assemblies Act was never completely revoked and is still on our statute books. It was however repealed in part by the Internal Security Act 74 of 1982.

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<sup>65</sup> Engaging in child prostitution is a separate offence in the Criminal Law Amendment Act, which forms part of the comprehensive offence of sexual exploitation of a child. Section 17 of the Act creates an offence of sexual exploitation of a child which criminalises all role-players engaging in child prostitution. It gives effect to the Commission’s recommendations contained in its Report on Sexual Offences (2002) on child prostitution. The key recommendations were that:

- A complete ban should be placed on child prostitution and that anyone involved in the sexual exploitation of a child should face severe criminal sanction.
- The child prostitute should be regarded as a victim in need of care and protection and should not be prosecuted.
- Living off or benefiting from the earnings of child prostitution should be penalised.
- Sex tourism involving children should be criminalised.

<sup>66</sup> <http://www.sahistory.org.za/dated-event/riotous-assemblies-act-commences>.

**Section 18** of the Act is still relevant. It refers to:

“Attempt, conspiracy and inducing another person to commit an offence.

(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

(2) Any person who—

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

Section 18(2) provides that the customer of a sex worker is liable to the same punishment to which the sex worker is liable.

Thus, a man who pays for sex and the woman who receives the payment are equally guilty of criminal conduct and liable to the same penalties.

Both at common law and under the Riotous Assemblies Act, the customer commits an offence. Under the Riotous Assemblies Act, the customer is liable to the same punishment to which the sex worker is liable.

#### **6.2.4 Business Act**

The Business Act 71 of 1991’s main aim is to ensure that every business is registered with the necessary municipal council and government department.

*The law governing brothels is in **Section 2(3)** of the Business Act:*

“No person shall, with effect from the date specified in a notice under

subsection (1) in respect of a specific licensing authority, carry on any business in that area of that licensing authority –

(a) unless, in the case of a business referred to in item 1(1) or 2 of Schedule 1 he is the holder of an apposite licence issued to him by the licensing authority in respect of the business premises concerned,

(b) Unless, in the case of a business referred to in item 3(1) of Schedule 1, he is the holder of a hawker's licence issued to him by the licensing authority;

(c) Contrary to a condition.”

This means that you cannot conduct a business without the necessary licences. Sex work is currently illegal and therefore no licence exists in order to operate a brothel.

In reality, many brothels have licences to conduct a massage parlour or escort agency and when they are raided they often get a fine under Section 2(3) for not operating a business in accordance with the licence.

The penalty for contravening this section is listed in Section 5(1): if found guilty, you are liable on conviction to a fine up to R1,000 or imprisonment for a period up to 3 months.

#### **EXAMPLE**

*The procedure to get a licence is:*

- Go to the City of Cape Town to obtain the necessary forms.
- Before you can submit an application, you will have to get a zoning certificate, which will state whether you can have the business in the area.
- Take an ID and get an SAPS police clearance certificate, which costs R20.
- Once the zoning is approved, and you submit the application, then it will be forwarded to the municipal sub-council which will decide.

## 6.3 Municipal by-laws

### What are municipal by-laws?

*Municipal by-laws* are a set of rules passed by the council of a municipality to regulate issues they have the power to administer within the area of jurisdiction of the municipality.

A municipality gets powers to pass a by-law from our Constitution, which gives listed powers to local government. Just like the national and provincial laws, municipal by-laws must also be obeyed.

The main functions of by-laws are to ensure that each city is orderly to live and work in. By-laws range from regulating sex workers to the keeping of animals and poultry.

### How do you find municipal by-laws?

To find a comprehensive list of the by-laws of each municipality, you can research the area you are looking for on Google and it will draw up a list of all the municipal by-laws you need. You can also use Saflii if you know the specific municipal by-law you need, and the database will take you directly to the desired by-law.

### EXAMPLE OF MUNICIPAL BY-LAWS: WESTERN CAPE

In the Western Cape, municipal by-laws contain articles regulating sex workers.

#### Article 2

“Article 2(1) - No person, excluding a peace officer or any other official or person acting in terms of the law, shall-

(a) when in a public place-

(i) intentionally block or interfere with the safe or free passage of a pedestrian or motor vehicle; or

(ii) intentionally touch or cause physical contact with another person, or his or her property, without that person’s consent;

2(2) Any person who blocks, occupies or reserves a public parking space, or begs, stands, sits or lies in a public place shall immediately cease to do so when directed by a peace officer or member of the Cape Town Metropolitan

Police Department.

3(f) perform any sexual act;

3(g) appear in the nude or expose his or her genitalia, except where designated by the City as areas where nudity is permitted, provide that this shall not apply to children below the age of seven;

3(j) solicit or importune any person for the purpose of prostitution or immorality.”

*A public place and public road is defined as:*

“ ‘Public place’ means-

(a) a public road;

(b) any parking area, square, park, recreation ground, sports ground, sanitary lane, open space, beach, shopping centre on municipal land, unused or vacant municipal land or cemetery which has-

(i) in connection with any subdivision or layout of land into erven, lots or plots, been provided, reserved or set apart for use by the public or the owners or occupiers of such erven, lots or plots, whether or not it is shown on a general plan, plan of subdivision or diagram;

(ii) at any time been dedicated to the public;

(iii) been used without interruption by the public for a period of at least thirty years expiring after 31 December 1959; or

(iv) at any time been declared or rendered as such by the City or other competent authority; or

(c) a public transportation motor vehicle,

(d) but will not include public land that has been leased or otherwise alienated by the City.”

“‘Public road’ means any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access, and includes-

(a) the verge of any such road, street or thoroughfare;



(b) any bridge, ferry or drift traversed by any such road, street or thoroughfare; and

(c) any other work or object forming part of or connected with or belonging to such road, street or thoroughfare.”

## **Article 23**

“(l) Any person who contravenes or fails to comply with any provision of this By-law or disobeys any instruction by a peace officer or a member of the Cape Town Metropolitan Police Department, enforcing this By-law, shall be guilty of an offence and with the exception of a contravention of Sections 2(3)(g), (h), (i), (j) and (k), where there is a maximum penalty as provided for in analogous national legislation, be liable to a fine or imprisonment for a period not exceeding six months, or to both a fine and such imprisonment.

(2) Any person who contravenes Sections 2 (3) (g), (h), (i), (j) or (k) shall be liable to a fine as the court may deem fit to impose or to imprisonment as the court may deem fit to impose or to both a fine and imprisonment, not exceeding the maximum penalty as provided for in analogous national legislation. Where there is no maximum penalty as provided for in analogous national legislation the maximum penalty provided for in subsection (l) applies.

(3) A court convicting a person of an offence under this By-law may impose alternative sentencing in place of a fine or imprisonment.”

In other areas, you have to approach the local municipality and ask them for a copy of their by-laws so that you can make yourself familiar with the sections that the police use to fine sex workers.

## Application of municipal by-laws

Often municipal by-laws<sup>67</sup> are used to arrest sex workers instead of the Sexual Offences Acts because of the difficulties involved in proving the elements of the offences in the SOA, particularly in relation to the client.

In the by-laws, a person is only guilty of Section 2(2) if he/she is actually obstructing traffic. Therefore a person should not be arrested, charged or fined for contravening Section 2(2) if they have not actually committed this act as defined in the by-laws. The only way to convict the client is by entrapment or if the sex worker testifies against him. Sex workers would be unlikely to testify against their clients as they would also be implicating themselves.

The most common by-laws used are those dealing with loitering, drunken behaviour, soliciting and importuning any person for the purposes of prostitution. In many cases, sex workers have not committed the offence in question.

*Even where the sex worker is guilty of the offence, the by-laws set out procedures relating to the arrest of a person that has allegedly violated the by-law:*

- The correct response would be to give you a written notice to stop the offending activity and only if you do not obey the notice, can you be fined or given a notice to appear in court.
- The remedy that is available to you as a person who has been fined is that you will receive an opportunity to make representations if you feel that the fine was incorrectly levied against you (similar to the current system for traffic fines).

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67 Regulation 2 of the Western Cape By-Laws PG 6469 of 28 September 2007 says:

- “No person, excluding a peace officer or any other official or person acting in terms of the law, shall:
- (a) when in a public place –
    - (i) intentionally block or interfere with the safe passage or free passage of a pedestrian or motor vehicle; or
    - (ii) intentionally touch or cause physical contact with another person, or his property, without that person’s consent.”

Regulation 2(3)(f) says: “No person shall in a public place, perform any sexual act.”

Regulation 2(3)(j) says: “No person shall in a public place, solicit or importune any person for the purpose of prostitution or immorality.”

Section 12 of the City of Johannesburg Metropolitan Municipality’s Road and Miscellaneous By-Laws, states the following in relation to loitering:

“No person may –

- (a) lie, sit stand, congregate, loiter or walk, or otherwise act, on any public road in any manner that may obstruct traffic;
- (b) jostle or loiter at or within twenty metres of the entrance of any place of public worship during the time of divine service or during an assembly at the place of worship or departure from such place of the congregation so as to obstruct or annoy any person going to, attending at, or leaving such place of worship.”

- Where a fine has not been paid after it becomes due, arrest would be allowed only as a last resort if necessary to be able to secure your attendance in court. In most cases, a summons would be sufficient to ensure attendance in court.<sup>68</sup>

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68 Memorandum to Gauteng Premier Nomvula Mkanyane and the MEC for Community Safety from Tswaranang Legal Advocacy Centre, the Women's Legal Centre and Others, 2009.

# 7

## International law

International human rights laws aim to ensure that human rights guarantees are realised by States, as subjects of international law, for all the people within their territories.

The focus should be on respecting, protecting and fulfilling the human rights of the most vulnerable people – those who are marginalised by social institutions and subject to human rights abuses.<sup>69</sup>

Sex workers deserve to be treated with dignity and to enjoy human rights guaranteed to all people. In addition, as women, sex workers should be afforded those particular human rights that are extended to women under international treaties and agreements.

South Africa has signed and ratified many international treaties relating to human rights. However, international instruments that were drawn up expressly to address sex work do not reflect adequate respect for the human rights of sex workers.

The reason is that sex work-specific instruments only address the rights of sex workers who have been trafficked and are being exploited, and do not protect the rights of those who work voluntarily as sex workers.

In contrast, non-sex work specific human rights instruments potentially offer sex workers more protection from violence.

*We will highlight these treaties as examples of South Africa's international obligation to protect all women from violence:*

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<sup>69</sup> South African Law Reform Commission, Discussion Paper, 0001/2009, "Adult Prostitution", 87: para 5.1.

- International Covenant on Civil and Political Rights of 1966 (ICCPR).
- International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).
- Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW).
- Declaration on the Elimination of Violence against Women of 1993.
- Beijing Declaration and Platform for Action of 1995.

## 7.1 International Covenant on Civil and Political Rights

South Africa ratified the ICCPR of 1966 in 1998.

The ICCPR guarantees ‘all peoples,’ and thus all sex workers, certain civil and political rights. *These include:*

- The right to life, which must be protected by law (Art. 6).
- The rights to liberty and security of the person, and the right not to be subject to arbitrary arrest or detention (Art. 9).
- The right to equality before the law and equal protection under the law (Art. 26).
- The right to an effective remedy for violations of rights or freedoms, notwithstanding that the violation has been committed by persons acting in an official capacity (Art. 2.3).

## 7.2 International Covenant on Economic, Social and Cultural Rights

South Africa has signed but not yet ratified the ICESCR of 1966.

Parties to the ICESCR are obligated to take steps towards the progressive realisation of the rights set out in the Covenant. *These include:*

- The right to work, including the right of everyone to the opportunity to gain his/her living by work which he/she freely chooses or accepts, with

appropriate safeguards for this right (Art. 6.1).

- The right to enjoy just and favourable conditions of work, including a fair wage and decent living, and safe and healthy working conditions (Art. 7).

### **7.3 Convention on the Elimination of All Forms of Discrimination against Women**

South Africa has signed and ratified the CEDAW of 1979.

CEDAW calls on States to eliminate all forms of discrimination against women, defined in Article 1 as:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women [...] of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

*CEDAW sets out a number of specific obligations aimed at achieving this objective:*

- Article 6 states that Parties must take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.
- Article 21 empowers the UN Committee on CEDAW to make suggestions and general recommendations relating to the Convention’s implementation.
- In General Recommendation 19, the Committee specifically addresses the issue of violence against women, including sex workers, stating:

“Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence.”

### **7.4 Declaration on the Elimination of Violence against Women**

South Africa has signed and ratified this 1993 Declaration.

*The Declaration defines gender-based abuse as:*

“Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

The Declaration provides that Parties ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women, receive training to sensitise them to the needs of women.

These provisions are clearly relevant for women sex workers.

## 7.5 Beijing Declaration and Platform for Action

The Beijing Declaration of 1995 identifies the issues and concerns of the world’s women at the end of the 20<sup>th</sup> century, including women’s human rights, women and poverty, women and decision-making, the girl-child, and violence against women.

*Governments and the UN agreed to:*

- Promote “gender mainstreaming” in policies and programmes.
- Undertake other concrete actions in an effort to eliminate all forms of discrimination against women in both public and private life.

## 7.6 Examples: International case law

**Protecting citizens’ rights under the First Amendment in the United States:**

**AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL. V. ALLIANCE FOR OPEN SOCIETY INTERNATIONAL INC. ET AL.**

In 2003, the President’s Emergency Plan for AIDS Relief (PEPFAR) was amended to include the anti-prostitution loyalty oath (APLO).<sup>70</sup>

The APLO required non-governmental organisations working to improve global health to adopt a policy opposing prostitution as a condition of receiving US

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<sup>70</sup> Pieklo JM, *Supreme Court Strikes Anti-Prostitution Pledge for American Organizations Fighting HIV/AIDS*, RH Reality Check: <http://rhrealitycheck.org/article/2013/06/20/supreme-court-strikes-anti-prostitution-pledge-for-american-organizations-fighting-hiv-aids/>.

funding.<sup>71</sup> The APLO required organisations to state in their policy that they do not “promote” or “advocate” “the legalisation or practice of prostitution,” and required them to explicitly oppose prostitution and sex trafficking.<sup>72</sup>

In 2005, the Alliance for Open Society International sued, arguing that the APLO violated the organisation’s First Amendment rights, specifically their right to be free from government-controlled speech.<sup>73</sup> The First Amendment prohibits any law that infringes on the freedom of speech.

In a 6-2 decision, the Supreme Court held that the Policy Requirement violates the First Amendment by “compelling as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government programme.”<sup>74</sup> The APLO requires funding recipients to present the government’s views as their own, and that violates the First Amendment.<sup>75</sup>

The organisations involved in the case do work in Kenya, India, Uzbekistan, Tajikistan, and Kyrgyzstan.<sup>76</sup>

The case is significant because the APLO, by placing a condition on the funding of these organisations, would have affected sex workers’ access to HIV and AIDS programmes. By striking down the APLO, the Supreme Court’s decision means that, regardless of the government’s stance on prostitution, the government cannot force other organisations to adopt its views.

## **BEDFORD V CANADA**

In *Bedford v. Canada*, several sex workers brought an action seeking declarations that 3 provisions of the Canadian Criminal Code, R.S.C. 1985, c. C-46, which criminalise various activities related to prostitution, infringe their rights under Section 7 of the Canadian Charter of Rights and Freedoms.<sup>77</sup>

Section 7 provides that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.<sup>78</sup>

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71 Ibid.

72 Ibid.

73 Ibid.

74 *Agency for International Development et al. v. Alliance for Open Society International Inc. et al.* 570 U.S. 2013.

75 Ibid.

76 Ibid: note 4.

77 *Bedford v. Canada* <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do>

78 Constitution Act, 1982. <http://laws-lois.justice.gc.ca/eng/const/page-15.html>.



They argued that these Criminal Code restrictions on prostitution “put the safety and lives of prostitutes at risk by preventing them from implementing certain safety measures – such as hiring security guards or ‘screening’ potential clients – that could protect them from violence”.<sup>79</sup>

*The court held that:*

- The restrictions violate Section 7 of the Charter because they negatively impact security of the person rights,<sup>80</sup> and undermine the principles of fundamental justice.<sup>81</sup>
- Section 210, the bawdy house law, violates sex workers’ constitutionally protected right to security of the person because this law prevents sex workers from working at a fixed location that is safer than working on the street or meeting clients at different locations.<sup>82</sup>

*The court struck down:*

- Section 212, which prohibits living on the avails of prostitution, as a violation of sex workers’ right to security of the person.<sup>83</sup>
- Section 213, which prohibits public communication for the purposes of prostitution, holding that it also violates the right to security of the person.<sup>84</sup>

Various organisations lauded the decision as an important step forward in securing sex workers’ rights.

The Supreme Court gave the federal government a year to replace the old prostitution law with a new one that would comply with the Charter or Rights and Freedoms.<sup>85</sup>

The government has since proposed a new bill that does not criminalise prostitutes, but creates new offences for pimps and clients, cracks down on

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79 Ibid: note 83.

80 Ibid

81 Ibid: note 30, at 10.

82 Bennett D, *Canada v. Bedford- the decision in 705 words*, Pivot: [http://www.pivotlegal.org/canada\\_v\\_bedford\\_a\\_synopsis\\_of\\_the\\_supreme\\_court\\_of\\_canada\\_ruling](http://www.pivotlegal.org/canada_v_bedford_a_synopsis_of_the_supreme_court_of_canada_ruling).

83 Ibid.

84 Ibid.

85 Payton L, *Former Sex Workers make their cases in prostitution bill debate*, CBC News: <http://www.cbc.ca/news/politics/former-sex-workers-make-their-cases-in-prostitution-bill-debate-1.2698425>.

advertising, and selling sexual services in public.<sup>86</sup>

During debates about the new bill, Justice Minister Peter MacKay stated:

“The government maintains that prostitution’s inherent harms and dangers would only grow and be exacerbated in a regime that perpetrates and condones the exploitation of vulnerable individuals through legalised prostitution.”<sup>87</sup>

We now focus on regional treaties and case law in Africa.

## **7.7 African Charter on Human and People’s Rights**

South Africa ratified the African Charter of 1986 in 1995.

The African Charter is a regional human rights instrument designed to reflect the history, values, traditions and development of Africa.

Although it makes no specific reference to sex workers, the African Charter guarantees the rights of all individuals to equality, dignity, work under equitable and satisfactory circumstances, health and freedom from exploitation.

## **7.8 Protocol to the African Charter on Human and People’s Rights on the Rights of Women**

South Africa has ratified the Protocol on the Rights of Women of 2005.

The Protocol stems from the African Charter to focus on the need to promote and protect women’s rights. It calls for an end to violence against women, and specifically recognises protection from sexual violence as inherent in the right to dignity.

Article 3 obligates Parties to protect women from all forms of violence “particularly sexual and verbal violence”.

Article 4(2) calls for the enactment and enforcement of laws prohibiting all forms of violence against women “including unwanted or forced sex whether the violence takes place in private or public”.

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86 Ibid.

87 Ibid.

## **7.9 Addendum to the Declaration on Gender and Development by SADC Heads of State or Government**

South Africa endorsed the 1997 Declaration on Gender and Development.

The Addendum was adopted by members of the Southern African Development Community (SADC) in 1998.

The Addendum strongly condemns all forms of violence against women and children. Paragraph 5 of the Addendum makes specific reference to sexual abuse, sexual harassment and intimidation, trafficking in women and children and forced prostitution.

## **7.10 SADC Protocol on Gender and Development**

South Africa endorsed the SADC Protocol of 2008.

The Protocol calls for the empowerment of women, the elimination of discrimination and the achievement of gender equality.

Article 7 requires Parties to take action, including the enactment of legislation, to promote and ensure equality for women. This includes measures aimed at ensuring equality for women in the criminal justice system, and addressing gender bias and stereotypes

# 8

## Addressing police abuse of sex workers

When a sex worker approaches you with a query relating to the police, please complete the WLC's *Human Rights Violations Questionnaire: Police Harassment/Abuse*.

For this questionnaire, see page 45.

### 8.1 Scope of police abuse

When you are faced with cases relating to sex worker human rights violations, police abuse appears to be common practice. Members of the police force frequently violate the rights of sex workers in their implementation of the law.

Sex workers in particular suffer from police abuse due in part to South Africa's current legal framework surrounding sex work. This framework fails to conform to international, regional and domestic law in relation to violence against women and equality. More importantly, this system is conducive to high levels of abuse by law enforcement officials.

*The main types of police abuse are:*

- Assault and harassment.
- Arbitrary arrest.
- Violations of procedures and Police Standing Orders.
- Inhumane conditions of detention.

- Unlawful profiling (for more on profiling, see page 248).
- Exploitation and bribery.
- Denial of access to justice.

Research studies point to the immense gap between the rights enshrined in the South African Constitution and treatment meted out to sex workers. For more on examples and patterns of police abuse of sex workers revealed by research studies, see page 109.

Even under the present, imperfect law, there is a stark contradiction between the actions of police and the due process laid out by the law for them to follow. This contributes to a system where sex workers are afraid that if they lay charges against police officers, the police will make more trouble for them.

The current legal system must be reformed to bring the treatment of sex workers in line with constitutional obligations and to end police abuse of sex workers.

In addressing police abuse, we wish to highlight the particular constitutional rights which are often violated by law enforcement officers.

*We have found that police officers mainly violate these constitutional rights of sex workers:*

| <b>Section in the Bill of Rights</b> | <b>Right</b>   | <b>What does this mean for sex workers?</b>   |
|--------------------------------------|--|---|
| 9                                    | <b>Equality</b><br>Everyone is equal before the law and has equal benefit and protection of the law.   | Sex workers should be treated equally. Laws that exist to protect all citizens should also protect sex workers. |
| 10                                   | <b>Human dignity</b><br>Everyone has inherent dignity and the right to have their dignity respected and protected.                                     | No persons or institution may insult you or take away your self-respect by words or actions.                    |
| 12                                   | <b>Freedom and security of the person</b><br>Everyone has the right to be free and not to be tortured or treated in a cruel, inhuman or degrading way. | You may not be arrested without a good reason. You cannot be treated badly whilst in police custody.            |

|    |   |  |
|----|---|--|
| 35 | <p><b>Arrested, detained or accused people</b></p> <p>Everyone who is detained including convicted prisoners has the right to conditions of detention which are not inconsistent with his/her right to dignity.</p> | <p>Prisoners may not be treated in an unfair or undignified manner because they are sex workers.</p> |
|----|---|--|

For more on the Bill of Rights in the Constitution, see page....

*Below we detail police abuse of sex workers in these areas:*

- Stigma and discrimination.
- Harassment.
- Searches.
- Arrest and detention.
- Profiling
- Fines.

In each area, we will discuss the constitutional right that was violated, the laws that apply to the particular violation, legal arguments to challenge the violation, and useful case law and precedents.

## 8.2 Stigma and discrimination

This section draws on the WLC's *Police Sensitisation Training Manual: A Guide for South African Police Service (SAPS) officers to the Rights of Sex Workers and the LGBTI Community*.<sup>88</sup>

<sup>88</sup> Manoek S, Mbwana J, Ludwig S, Kheswa S, Brown B, *Police Sensitisation Training Manual: A Guide for South African Police Service (SAPS) Officers to the Rights of Sex Workers and the LGBTI Community*, Women's Legal Centre, 2014.

## 8.2.1 If sex work is illegal, why worry about stigmatisation of sex workers?

All people, including those who do work that is not legally sanctioned, are entitled to respect for their fundamental rights and dignity. Unfortunately, sex workers are often unfairly discriminated against and disrespected, in part because of the criminalisation of sex work in South Africa.

Members of the SAPS often stigmatise and discriminate against sex workers. Sex workers have reported that they have been harassed, manipulated, assaulted, and even raped by SAPS members. These actions harm sex workers, poison SAPS members' relationship with the sex worker population, and are in violation of the South African Constitution and human rights law.

Understanding what stigma is and how it negatively affects sex workers is an important step to improving interactions with them and more justly upholding the law.

### What is stigma?

*Stigma* refers to strong negative feelings or significant disapproval of a specific person, group, or trait. For example, because of the stigma associated with HIV and AIDS people felt fear, hostility or disapproval of people living with HIV.

*Stigmatisation* is when you connect negative feelings, specifically feelings of disapproval, with something or someone:

- *External* stigmatisation is disapproval of a person by others.
- *Internalised stigma* is when a person is ashamed of himself/herself because of some characteristic or trait that the outside world disapproves of.

### How is stigma developed?

Stigma often develops as an expression of a society's beliefs and values. Some traits or actions are held up as marks of honour and others are stigmatised and regarded with disapproval. When a person is different from what is generally considered to be 'normal' or desirable, then that person may be stigmatised by others.

### What is discrimination?

Disapproval of a person or a group often leads to unfair discrimination, which is when a person or group is treated differently because of a specific immutable

characteristic or status, such as their race, gender or sexual orientation.

### **EXAMPLE**

Sipho, who is 25, and Bongi, who is 40, are both being interviewed for the same job. Even though Bongi has more experience, the boss offers the job to Sipho because the boss thinks that Bongi is getting “too old”. Here Bongi is being unfairly discriminated against because of his age.

### **What are stereotypes?**

*Stereotypes* are characteristics that become associated with certain groups or individuals, often because of their race, nationality, culture, religion, or sexual orientation.

Stereotypes are usually negative and often inaccurate – for example: the common stereotypes that women are not as smart as men in maths and science, and that men are aggressive and violent

### **What is prejudice?**

A *prejudice* is a preconceived idea or opinion about a person or group because of a personal trait or characteristic. Prejudices are usually negative and generally connected to significant characteristics, such as sex, age, ethnicity, or religious background.

### **Why are sex workers stigmatised?**

Sex workers experience stigmatisation by others in society who disapproves of them for selling sex.



## EXAMPLES

*Many sex workers experience multiple layers of stigma, and this overlapping stigmatisation makes sex workers an extremely vulnerable population:*

- Women sex workers face gender-based stigma, and as women with an unlawful working status, are at increased risk for physical violence, including rape and murder.
- Sex workers may be stigmatised and unfairly discriminated against because they engage in frequent sexual activity. Many societies have conservative views or taboos about sexual behaviour. For instance, people may consider sex workers to be immoral because they engage in sex outside of marriage or because they have sex with many different people.
- As sex workers engage in frequent sex, they are often unfairly seen as ‘spreaders’ of HIV, even when sex workers are HIV negative. In some cases, health care workers or police stigmatise sex workers after assuming that they are HIV positive.

### Stigma as women

Most sex workers are women, and women often experience prejudice and discrimination in many places around the world.

In some cultures, women are not seen as being equal to men and are expected to willingly consent to the men’s directions. Female sex workers are viewed as “cheap” women who do not deserve respect or who have given up their right to dignity by becoming sex workers.

### Migration and xenophobia

Some sex workers are migrants from other communities in South Africa or immigrants from other countries. Some people may view migrant sex workers as outsiders who do not belong in the community and thus shun them as foreigners or exclude them from work and other opportunities.

### The illegality of sex work

One of the most powerful sources of stigmatisation of sex workers is the illegality of sex work in South Africa. The country’s laws against sex work mean that sex

workers are perceived as individuals who are breaking the law. When people view sex workers only as law breakers, they ignore the complex situations sex workers face, and often fail to consider alternatives to the criminalisation of sex work.

### **Homophobia and male/transgender sex workers**

Many communities discriminate against same-sex sexual behaviour, and many individuals may have a very strong aversion to homosexuals, known as *homophobia*.

Male and female transgender sex workers may engage in sex with male clients, and may therefore experience homophobia and stigma because of this behaviour.

Transgender sex workers may display – through their clothing, make-up, hairstyle, and behaviour – a gender identity that is in contrast to the gender role that is expected of them according to their biological sex. Intolerance of transgender people on the basis of their gender identity is known as *transphobia*.

### **8.2.2 Effects of stigma and discrimination**

- Stigma can often lead to a person being excluded from society, feeling devalued and shamed. Both internal and external stigma can gravely affect the health and well-being of sex workers.
- Sex workers may experience abuse by their clients or pimps. Because of past experiences of discrimination, they may not expect that others are likely to help them. Due to internalised stigma (shame), they may also not feel worthy of seeking justice.
- When sex workers do seek justice, but then are stigmatised or unfairly discriminated against, it causes them suffering and may discourage them from seeking help in the future. For example, a police officer may use insulting language toward a sex worker or blame a sex worker for being raped. Sex workers have often stated that, when reporting a rape, police laugh at them and say: “That was what you were looking for”.
- Since sex work is illegal in South Africa, sex workers are always at risk of being the targets of arrest or other punishment, and are easily forced to adhere to the directions of the police, even when the police officers themselves are acting against the law or are corrupt.

- Some sex workers may pay police officers to let them continue working. This takes the form of a so-called ‘fine’, when in reality the money that is paid to the police is simply pocketed.
- Some sex workers are coerced or forced to have sex with police officers in order to avoid getting arrested.
- Various studies have reported the reluctance of sex workers to report rape and abuse to authorities because they fear the police or expect they will receive unsympathetic treatment by the police. Street-based sex workers are most vulnerable to crime and violence by clients, thugs or the police.

### 8.2.3 Addressing stigma and discrimination

Unfair discrimination and prejudice can lead to human rights violations against sex workers and challenges to the South African Constitution.

These accounts by sex workers of their interactions with SAPS officers illustrate the real-life effects of stigmatisation and discrimination against sex workers by law enforcement officers.<sup>89</sup>

The names of the sex workers have been changed and the names of the police officers or police stations involved have been withheld.

#### Sex worker voices

“I was arrested for one night by the police officers who work for the South African Police Service. On that night, I was at the 711 store in the [...] Road. When I walked into the 711 store, I saw a SAPS police van following me. My friend and I ignored them and we went into the store to buy ourselves something to eat.

After we paid for our groceries, the two policemen, whose full names are unknown to me, approached us and told us to get into the police van. The policemen refused to provide me with reasons for my arrest, and they forced me into the police van. They took me to the [...] Police Station.

When I got to the police station, the policemen asked me questions about my sexuality, and when I told them, they made fun of me. The policemen put me into a cell with other males, and the inmates also ridiculed me about

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89 Ibid, 33.

my sexuality. The police cells were filthy. The policeman arrested me only because they knew that I work as a sex worker.

At no time was I told that I had a right to remain silent or of the consequences of not remaining silent. I was also not told of my right to choose and to consult with a legal practitioner. I did not receive a Notice of Rights, and I was not taken to court, or provided with a Notice to Appear in Court”.

*(Amber)*

“I received a fine from SAPS. I was standing in [...], the police officer named [...] in a SAPS police van came to me and told me that I am a nuisance and that is why he is arresting me. He said that I was being a nuisance and an annoyance to other people as they claim. They took me to the [...] Police Station.

I was kept at the police station for 4 to 5 hours. I was treated badly at the police station because I am transgender, they were telling me to take off my wig and make-up, which I did, and asked if I had real breasts. They told me to pay a fine at the police station and they said that I would go to court.

While I was there I did not get food or water. The cell was dirty. The toilet could not flush and it was filled with poo. They did not allow me to make a phone call or for people to visit me. I didn't go to court. They said that I must appear in court but didn't give me a court date. I want the police to treat us as human beings”.

*(Bernadine)*

“In February 2011, I was standing in the [...] area when I was approached by a female police officer and arrested for prostitution. I was taken to the [...] Police Station after driving in the police van for approximately 2 hours. Then, the police officers tried to force me to have sex with the superintendent for free. The police took pictures of me while I was in their custody. The pictures were later published in a newspaper”.

*(Cathy)*

“I was chatting with a friend in [...] Road, [...], when a white Quantum van approached me. There were approximately 2 to 3 female officers and 2 to 3 male officers, who told me to get into the van. They searched my bag for

drugs and asked me a range of questions, such as my full name, address, telephone number, if I use drugs, and an address for a next of kin.

Then the police officers took pictures of me, one of the front of my face, and the other of the side of my head. I asked them why they have to take the pictures and they told me that in the event of my death or if I am reported missing, they will be able to identify me and contact my next of kin. They then told me to leave the streets and if they see me then I am going to get a fine.”

*(Dianne)*

Be informed about the different types of people involved in sex work, and do not make false assumptions about their behaviours.

Not all sex workers are the same and, as mentioned throughout this manual, there are a wide variety of behaviours and actions in which sex workers engage.

All questions addressed to sex workers should remain professional and related to potential violations.

### **8.3 Harassment**

Based on our engagement with sex workers, we identify a typical scenario to illustrate the kind of harassment that sex workers experience by police.

#### **CASE STUDY**

Mavis is a 23-year old sex worker. She lives in Khayelitsha and works in Voortrekker Road, Parow on most weekends. She has been a sex worker for approximately 3 years. Because she has been in the industry for so many years, the police from the Bellville District know her.

One Friday evening at about 23h00, she is waiting for clients in Voortrekker Road. She is sitting on the pavement with a couple of friends. Before they started working, they went for drinks at a nearby bar. By this time, they are quite tipsy and talking quite loudly. Because they are working, they are also dressed provocatively.

While they are sitting and talking, a police van with 2 male police officers approach them. They pull up right against the curb. One male officer gets out of the van. He starts shouting and swearing at them, saying: “You *magoshas* get away here, you can’t work here. If I come back and see you here, then I am going to arrest you.”

They are upset this police officer is chasing them away, so they tell the police officer: “We are just sitting here, we are not doing anything. We are waiting for our friends to pick us up.”

The police officer gets angry, and he shouts back at them and threatens to arrest them. They become afraid and decide to walk away, and they disappear into the shadows. Once they are out of sight, the police officers drive off.

### 8.3.1 What is police harassment?

*Police harassment* refers to instances when police officers abuse their power or authority.

Police officers or law enforcement officers have a duty to protect and serve the general public. Within this mandate, police officers have the power to question people and to investigate possible crimes.

However, excessive questioning may qualify as harassment when the intention isn’t to investigate a possible crime, but instead to threaten or make someone afraid of them.

#### **What does our Constitution say?**

Laws that exist to protect all people should also work to protect sex workers. Sex workers are frequently denied the right to equality and dignity in their interactions with the police. Police rationalise the unequal treatment of sex workers based on the fact that the work they engage in is illegal.

When police officers continually harass individuals when they have not committed the acts for which they have received fines for, this indicates a practice of abusing the law to deliberately persecute a specific group of people. This practice violates the right to be equal before the law and amounts to unfair discrimination.

### 8.3.2 What laws cover harassment?

*Police have the power to:*

- Ask you to produce your ID.
- Question you at any time without arresting you.
- Ask you to give your full name and address if they:
  - ~ Suspect you have committed a crime.
  - ~ Suspect you may commit a crime.
  - ~ Think you can give them some information about a crime.

#### **What can you advise sex workers to do?**

- You can ask the police officer to show you his/her identity card. If the police officer refuses, you do not need to give your details.
- If the officer gives you his/her details, then you must give your information. If you do not, it is a criminal offence.
- If the police officer asks you other questions, you have the right not to answer. It is your right to say that you will only answer these questions with an attorney present. The police can ask you at that point to go to the police station. You do not need to go unless they arrest you.
- If a police officer does not show his badge, you can lodge a complaint with the Station Commander.

#### **Can a sex worker be arrested if he/she is not working but is known to be a sex worker?<sup>90</sup>**

No, if a person has not been caught in the act of breaking a law and there is insufficient evidence of a violation to support prosecution, then no arrest should be made.

In the case *SWEAT v Minister of Safety and Security*,<sup>91</sup> the High Court found that the arrest of sex workers, where the arresting officers knew that no prosecutions would result, was unlawful. There must be a high degree of probability that an arrest will result in the prosecution of the sex worker for the arrest to be lawful.

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<sup>90</sup> Ibid, 55.

<sup>91</sup> *SWEAT v Minister of Safety and Security and Others* 2009 (6) SA 513 (WC).

Even if the sex worker is known to the police, it would not be sufficient to arrest him or her for being a sex worker. There must be evidence that corroborates the accusation that he/she is a sex worker, and that evidence must be sufficient to support a prosecution.

Failing this, an arrest would be unlawful, and a claim for unlawful arrest and detention can be brought against the Minister of Safety and Security.

In the *SWEAT v Minister of Safety and Security* case, the High Court issued an interdict “preventing police officers from arresting sex workers within the relevant area, unless with the intention of bringing them before a court of law”.<sup>92</sup>

Section 20(1A)(a) of the Sexual Offences Act of 1957 effectively prohibits the core function of the sex worker’s work, selling sex, but it does not penalise “being” a prostitute.

Thus, a person cannot be arrested for being known to the police as a sex worker. For a lawful arrest without a warrant, there has to be at least a reasonable suspicion that he or she had engaged in unlawful carnal intercourse or had performed an indecent act for reward (at a specific time with a specific person).

### **What remedies are there?**

If a sex worker approaches you with this scenario, you can advise her to lodge a complaint to one or more of these bodies:

- The Station Commander of the police station the police responsible work at.
- The Independent Police Investigative Directorate (IPID).
- The Department of Community Safety.

The complaint should address the ongoing harassment and abuse of power, for an ulterior purpose, possibly to frighten or intimidate the sex worker.

*A sex worker also has the right to apply for a protection order under the Protection from Harassment Act:*

- The sex worker must complete the form (including the section relating to urgency) and hand it to the clerk of the Domestic Violence Court at the Magistrate’s Court in the area where she resides.

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92 Ibid.



- Once she submits the form to the clerk of the court, the clerk will hand it to the Magistrate, who will decide whether or not to give her an interim order.
- If she is successful, the Magistrate will give her an interim order and will authorise a suspended warrant of arrest. She will also receive a return date, when the formal hearing will occur.

### 8.3.3 Strategic impact litigation example

One way of addressing the regular harassment of sex workers is to obtain an interdict to prevent this practice.

On 20 March 2007, SWEAT brought an application to the Western Cape High Court under Section 38 of the Constitution, seeking an order declaring that no member of the SAPS or Cape Town Police is entitled to arrest or harass sex workers for ulterior purposes.

To support their claim, SWEAT submitted affidavits from former and current sex workers, which included detailed information of mistreatment and inappropriate behaviour by SAPS and Cape Town Metro Police officers.

The respondents opposed the application arguing that there were material disputes in fact. In response, SWEAT stated that they sought relief from the court only on a matter of principle.

#### **The Sex Worker Education and Advocacy Task Force v The Minister of Safety and Security and Others<sup>93</sup>**

##### FACTS

Cape Town and Cape Metropolitan area police arrest outdoor sex workers with the knowledge that they would not be prosecuted.

##### ARGUMENT

SWEAT applied for an order that interdicts or restrains the Cape Town Police and Cape Metropolitan area police from arresting sex workers when they have no intention to prosecute them in court, or where they arrest sex workers to harass, punish and intimidate them, or for any other ulterior purpose not sanctioned by law.

<sup>93</sup> Ibid.

SWEAT also requested from the respondents to do everything necessary to prevent these arrests.

The Cape Town Police and Cape Metropolitan area police argued against the interdict, saying that they carry out arrests of sex workers as part of their crime prevention duties and that the failure to prosecute the arrested people lies with the National Prosecuting Authority.

## JUDGEMENT

In April 2009, the Court gave an order stopping the Cape Town Police and Cape Metropolitan area police from arresting sex workers for any purpose other than prosecution, and in particular while knowing that no prosecution would follow.

## UNLAWFUL ARRESTS

Arrests made without legitimate purpose are unlawful. The purpose of an arrest must be to bring the suspect before a court of law to face prosecution. The burden of proof that the arrest was lawful is with the arrestor.

The Court held that the arrestor in this case knew with the high degree of probability that there would be no prosecution, hence making the arrest unlawful.

## ENOUGH EVIDENCE OF HARASSMENT FOR AN INTERDICT

An unlawful arrest is a constitutional issue because it is an infringement of the arrested person's rights to dignity and freedom under Sections 10 and 12 of the Constitution. To grant an interdict, the injury (in this case, unlawful arrests) must be a continuing one.

The Court concluded that the past infringement of rights constituted evidence that arrests of sex workers without the lawful purpose would probably continue in the future.

Therefore, the Court granted an interdict and an order restraining Cape Town City Police and the SAPS in the Cape Metropolitan area from arresting sex workers for a purpose other than to bring the persons arrested before a court of law, particularly while knowing that no prosecution would follow.

## MEANING OF JUDGEMENT

This means that the police are not allowed to harass sex workers and arrest them to scare them. If the police arrest sex workers, they must have the intention to bring them to court.

## 8.4 Searches

When police officers approach sex workers, they are almost always searched. Police officers use their powers to search sex workers as a form of harassment. Often police officers will stop and conduct searches of sex workers, when they are unable to arrest them for a particular charge, looking for drugs, stolen items or condoms.

Sex workers have the right to keep their body and property private. But sometimes the police are allowed to search to collect evidence, and to seize things from your clients.

### 8.4.1 Search with a search warrant

*Searching with a search warrant happens when the police get permission to search:*

- The search warrant is usually signed by a magistrate.
- The warrant must describe the place to be searched and the things that the police may seize.
- The police must carry out the search during the day, unless the warrant says that they can search at night.
- The police can only search the people and the places that are set out in the warrant.
- The person has the right to demand to see the search warrant.

### 8.4.2 Search without a search warrant

*The police do not need a search warrant to search if:*

- The person agrees to let them search their person.
- The police have reasonable grounds for thinking that a magistrate would issue a warrant, but that the delay in getting the warrant would give you time to get rid of evidence.
- You are arrested.
- The search is at a roadblock – but they must still have reasonable grounds

for thinking that a magistrate would issue a warrant.

- The police suspect that you have drugs, illegal liquor, guns, ammunition or stolen crops or animals with you.
- The police reasonably suspect that you may have information that can help an investigation.

The police can use force to enter premises if you refuse to allow them in. A policeman can only search a male person and may not search a woman.

### **What can you do?**

If a police search is not carried out in a dignified manner or by a person of the opposite sex, a sex worker can claim damages.

### **8.4.3 Invasive searches**

Often police officers searching for drugs will conduct invasive cavity searches.

#### **CASE STUDY: NANCY**

The “Nancy” case involves a warrantless body cavity search of 2 women and their possessions by police.

On 16 February 2012, at about 21h45, Nancy was present in an apartment in Green Point, Cape Town with 2 people. The occupants heard a knock on door and enquired as to who it was. They were informed that it was the neighbours and they opened the door to find 7 police officers (6 male and one female) entering the apartment.

The officers did not identify themselves as police officers before entering the apartment. The instructions do not specify whether they were members of SAPS or the Metro Police. Additionally, some of the officers did not wear name tags, while others wore name tags concealed with brown tape.

The officers neither had a search warrant nor asked for consent prior to entering the apartment. There appeared to be confusion among the officers as to whether they were at the correct apartment. This caused one officer to make a phone call in order to confirm that they were indeed at the correct apartment.

Based on this occurrence, it appears that the search of the apartment and those present in the apartment, was based on some prior information obtained or received by the officers.

The female officer asked Nancy to undress. The male officers left the room, but could still see into the room. One of the other occupants, “Lolitha”, was scolded by the female officer for taking too long, and was then assaulted and choked by the female officer and one of the male officers. During the assault, a glass door was broken.

Upon removal of her clothing, Lolitha revealed “half a lollipop of *tik*” that she had on her person. After finding the *tik*, the officers shouted at Levi and ordered her to remove the remainder of her clothing, and lie on the bed with her legs open while moving up and down.

Nancy noticed a flash and thought that it was caused by a type of recording device. Nancy was then ordered to undress and to move up and down, bend over and to manually open her vagina and anus for inspection. The female officer used a flash light during the course of the inspection.

Nancy and Lolitha remained standing naked while male officers looked through both women’s bags and wallets. The police officers did not search the rest of the apartment. The female officer indicated that a “crystal” was found on Lolitha during the search.

The police officers took Lolitha with them indicating they were taking her to the hospital. Nancy was allowed to leave, after being admonished to clean the apartment.

It is not indicated whether the police officers asked Nancy and Lolitha to consent prior to the search of their persons or belongings.

### **What does the law say about invasive searches?**

Legislative provisions providing for search and seizure powers of police officials must be read with the *SAPS Instruction on Search and Seizure*.

**Section 2(1)(e) of the SAPS Instruction** defines the term ‘search’ as:

“*Search*” means any act whereby a person, container or premises is visually or physically examined with the object of establishing whether

an article is in, on or upon such person, container or premises.

The term ‘article’, denoting that which may be seized by officials, is described as “anything” in Section 2(1)(a) of the SAPS Instruction.<sup>94</sup>

**Section 20 of the CPA** states:

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence

(b) which may afford evidence of the commission or suspected commission of an offence

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

**Sections 21(2) and 25(1)(b)(ii) of the CPA** provide for search people under the terms of a search warrant. The elements required for the issuing of these warrants are that:

- There must be information under oath of a reasonable belief that a Section 20 article is in the possession or control of a person or on premises,<sup>95</sup> OR
- An offence is being committed, planned or is likely to be committed on relevant premises.<sup>96</sup>

Under **Section 8(3) of the SAPS Instruction**, the warrant must be shown to any person whose rights will be affected by the search prior to the start of the search.

Also, under **Section 8(4) of the SAPS Instruction and Section 21(4) of the CPA**, a copy of the warrant must be handed to the person after the search, if the person demands a copy.

**Section 8(4) of the SAPS Instruction** further provides that, where a search warrant authorises the search of a specific person, only that person may be

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<sup>94</sup> See also Section 3 of the SAPS Instruction.

<sup>95</sup> Section 21(1)(a).

<sup>96</sup> Section 25(1)(b). See also Section 2(2) of the SAPS Instruction for a description of the phrase “reasonable belief”, Section 6 which provides for procedural rules on applying for search warrants, and Section 8, which provides for rules applicable searches under a search warrant.

searched<sup>97</sup> and that where a search warrant authorises the search of specific premises “only persons linked to the activities on the premises must, as far as possible, be searched”.<sup>98</sup>

**Section 21 of the CPA and Section 5(1) of the SAPS Instruction** provide for a general principle that searches must only be conducted after a search warrant has been obtained. However:

- The CPA and other legislation<sup>99</sup> explicitly provides for the search of persons without search warrants.
- Section 11(1)(b) of the Drugs and Drugs Trafficking Act 140 of 1992 provides for the search of persons without a search warrant where there is a reasonable belief that an offence has been committed or is about to be committed under the Act.

**Section 22 of the CPA** provides for the search of persons, without a search warrant, in connection with the seizure of a Section 20 article in 2 situations:

- Where consent is given for the search, AND
- Where an official has a reasonable belief that:
  - ~ A search warrant in terms of Section 21(1) would be issued if applied for; and
  - ~ That the delay in obtaining such a warrant would defeat the object of the search<sup>100</sup>.

**Section 25(3) of the CPA**<sup>101</sup> also provides for the search of a person without a search warrant, where it is reasonably suspected that an offence is being committed,<sup>102</sup> planned or is likely to be committed. However, this section only

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97 Section 8(4)(a).

98 Section 8(4)(b).

99 See Section 5(2) of the SAPS Instruction. Please note that the current Liquor Act 59 of 2003 does not provide for similar powers to search persons as is indicated under Sections 143 and 144 of the 1989 Act.

100 See Sections 10 and 12(5) of the SAPS Instruction as it relates to Sections 22(b) and 25(3) of the CPA.

101 Section 25(3) provides:

“A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he on reasonable grounds believes-

(a) that a warrant will be issued to him under paragraph (a) or (b) of subsection 1 if he applies for such warrant; and

(b) that the delay in obtaining such warrant would defeat the object thereof.”

102 As referred to in Section 25(1)(b) of the CPA.

provides for a warrantless search in the second instance (relating to reasonable belief).

**Section 9(3) of the SAPS Instruction** sets out the requirements for valid consent under Section 22 of the CPA:

- The person who consents must be capable of understanding the nature of what they are consenting to.
- The consent must be given voluntarily and not as the result of threats or violence.
- Consent can be given explicitly or by implication, but mere submission to a search does not constitute valid consent.
- Consent must be given before the search is conducted.
- The person who consents must be aware of the implications of her consent.

**Section 9(4) of the SAPS Instruction** states that a search that follows after consent must remain within the limits of the terms of the consent. A police official may therefore not go further than what was consented to.

### **Commentary**

The provisions of the SAPS Instruction supports the notion that a Section 22 search based on consent must be the result of an informed consent as discussed by Steytler<sup>103</sup> (See also *Magobodi v Minister of Safety and Security and Another* 2009 (1) SACR 355 (Tk)<sup>104</sup>).

This is similar to the requirements for informed and valid consent. *This is a constitutional prerequisite for all invasive medical treatment, namely:*

- Knowledge,
- Comprehension,
- Understanding, AND.
- Consent in respect of the entire procedure and its consequences (See for example *Christian Lawyers Association v National Minister of Health* 2005 1 SA 509 (T)<sup>105</sup>).

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103 See Steytler, *Constitutional Criminal Procedure: A Commentary on the South African Constitution of 1996*, Butterworths, 1998, 96.

104 At para.13.

105 At 516.



*The CPA contains little direction governing the manner of conducting a search:*

- **Section 27 of the CPA** allows for the use of “such force as may be reasonably necessary” to overcome any resistance to a lawful search.
- **Section 29** simply states that a search must be done with “strict regard to decency and order,” and also provides that a woman may only be searched by a woman.
- **Section 16 of the SAPS Instruction** does not add much to Section 29 of the CPA, except to state that consent to a search by a male is not a valid exception to the rule that women can be searched by another woman only.

The SAPS Instruction contains more detail on the use of reasonable force as provided for in Section 27 of the CPA:

- **Section 14(1)(c) of the SAPS Instruction** says the authorised use of force must be limited to the “minimum force which is reasonable in the circumstances”.
- **Section 14(1)(d)** further relates the use of reasonable force to the concept of proportionality. It provides that a police official must choose an alternative which will ensure that the object of the search is accomplished in a way that least impacts on the rights of affected persons.

*These are stated as considerations to be taken into account in deciding to use force:*

- ~ The nature and seriousness of the crime.
- ~ The resistance offered.
- ~ The urgency with which the search has to be conducted.
- ~ Alternative ways to gain entry or to overcome resistance.

## **How should police conduct searches and seizures with sex workers?<sup>106</sup>**

*Police Standing Orders say:*

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<sup>106</sup> Manoek S, Mbwana J, Ludwig S, Kheswa S, Brown B, *Police Sensitisation Training Manual: A Guide for South African Police Service (SAPS) officers to the Rights of Sex Workers and the LGBTI Community*, WLC, 2014, 58-59.

1. Police officers must only seize articles of clothing if there are reasonable grounds to believe that the person in custody may use such articles to cause physical injury to her/himself or any other person, damage property or assist escape (Standing Order (G) 361). Police officers may also seize articles if it will be evidence in the commission of an offence – Standing Order 361 (G) (4) (a) (i) and (ii).
2. Police officers must tell the person in custody why an article is being seized (Standing Order 361 (G) (4) (b)).
3. When an article of clothing is seized under Standing Order 361 (G) (4) (a), the community service centre commander must ensure that the person in custody is issued with suitable replacement clothing. (Standing Order 361 (G) (4) (c)).
4. A search of a person in custody must be conducted with strict regard to decency (Standing Order 361 (G) (11) (1) (c)).
5. A person in custody can only be searched by a person of the same gender. If no police officer of the same gender is available, the search must be conducted by any person of the same gender designated for that purpose by a police officer (Standing Order (G) 361, Clause 11 (c)).
6. Intimate searches can only be conducted by a registered medical practitioner/nurse or if the station commissioner authorises (Standing Order 361 (G) (11) (2) (b)).
7. The Station Commander can only authorise police officers to conduct an intimate search if there are reasonable grounds to believe the person in custody is concealing a dangerous weapon or is concealing an article which may afford evidence of the commission of an offence (Standing Order 361 (G) (11) (2) (a)).

On the searching of transgender sex workers, in addition to Standing Order (G) 341 and Standing Order (G) 361, *Section 9.1 of the SOP*, relating to detention of transgender prisoners mentioned above, *states that*:

“All searches must be conducted in terms of Section 29 of the Criminal Procedure Act 51/1977 with strict regard to decency.

a) To determine from the transgender detainee in a sensitive manner what is his/her sex and gender;

b) the member must explain to the detainee that a biological male person will be searched by a male police officer and a biological female person will be searched by a female police officer;

c) the member will proceed to conduct the search in a decent manner having due regard for the status of the person;

d) transgender persons should not be subjected to unnecessary undressing and that in the event a transgender person needs to be subjected to an intimate search the provisions of SOP (G) 361 par 11(2) [apply] that states that:

‘(a) An intimate search may only be authorized by a Station Commander, if he or she has reasonable grounds to believe- (i) that a person in custody has concealed a dangerous weapon on his or her person; (ii) that such a person has concealed on his or her person an article which may afford evidence of the commission of an offence; or (iii) that such person has concealed on his or her person an article which may be used in attempt to effect an escape.

(b) An intimate search must be conducted by a registered medical practitioner or a registered nurse”.

#### 8.4.4 Searching for condoms

##### **Can sex workers be arrested and charged for prostitution if they have condoms in their possession?<sup>107</sup>**

No, possession of condoms will not satisfy the elements of the offence required to conduct a successful prosecution.

*Yet, many sex workers report that:*

- Police confiscate and destroy their condoms.
- Police have cited possession of condoms as justification to detain or arrest people on charges related to sex work.
- Police harass and abuse sex workers who carry condoms, and use the threat of arrest on the grounds of condom possession to extort and exploit them.

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<sup>107</sup> Ibid, 56.

In addition, there are reports that police harass and arrest outreach workers, limiting their ability to distribute condoms and educate sex workers about safer sex practices.

Police treatment of condoms as contraband forces sex workers to make a choice between safeguarding their health and staying safe from police harassment or detention.

*By hindering sex workers' ability to carry and use condoms, police actions:*

- Increase sex workers' risk of exposure to HIV and other sexually transmitted infections, as well as unwanted pregnancies.
- Compromise sex workers' health and the health of their sexual partners, as sex workers whose condoms are taken by police are more likely to have
- unprotected sex and to be at risk for HIV.
- Make sex workers afraid to carry condoms.

Sex workers express fear about being 'caught' with condoms by police, and the risk that police will use their possession of condoms as a pretext to take them into custody or demand a bribe. Police officers should remember that carrying condoms is itself not an offence.

#### **EXAMPLE**

In South Africa, a 37-year old female sex worker reported that she had been harassed by police "uncountable times" for doing sex work. Recalling a notable run in with the police, she said:

"Two years ago I was strolling on Milnerton beach, cops asked me if I had condoms. I replied yes and he made me give them to him and said I wasn't permitted to carry condoms."<sup>109</sup>

For more on this research study and the use of condoms as evidence, see page 115.

#### **What does this mean for sex workers?**

In all instances, the police officers should be obtaining warrants to search people.

<sup>108</sup> Ibid, 11.

The law makes provision for police officers to search without a warrant.

**Chapter 2 of the CPA** provides for search and seizure. This must be read with the *SAPS National Instructions on Search and Seizure*.<sup>109</sup>

Any seizure of property constitutes an infringement of an individual's rights to privacy and ownership, and therefore, as a general principle, the powers to seize property should only be exercised when necessary and should be interpreted restrictively in favour of the individual.<sup>110</sup>

Seizure of property requires justification under Section 36 of the Constitution. The Section 36 enquiry relates to the requirement of proportionality and calls for the balancing of interests on an incremental basis.<sup>111</sup> In *Magobodi v Minister of Safety and Security and Another* 2009 (1) SACR 355 (Tk), Miller J stated:<sup>112</sup>

“Sections 14(b) and (c) of the Constitution of the Republic of South Africa, 1996, provide that everyone has a right to privacy, which includes the right not to have their property searched or their possessions seized. This right is, in terms of the limitation clause (Section 36), subject to reasonable and justifiable limitation. This limitation has to be weighed against the fundamental right to privacy and a balance must be struck between the protection of the individual's right and the maintenance of law and order. The courts are duty-bound to critically regard search and seizure actions, which invariably entail an invasion of privacy, to ensure that such action was reasonable and justifiable in the circumstances.” (own emphasis)

**Section 20 of the CPA** provides for the general power of the State to seize certain articles in order obtain evidence for instituting a prosecution or considering instituting a prosecution.

*The section has a wide ambit and provides that literally anything may be seized,<sup>113</sup> if it falls within one of these 3 categories:*

- Anything may be searched which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected

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109 2/2002.

110 See for example *Mahomed v National Director of Public Prosecutions and Others* 2006 (1) SACR 495 (W), 502-503.

111 See *S v Makwanyane and Another* 1995 (2) SACR 1 (CC), para.104 and *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC), para 24.

112 At para 7.

113 The term 'article', denoting that which may be seized by officials, is also described as "anything" in Section 2(1)(a) of the SAPS Instruction.

commission of an offence. Under Section 3(3)(a) of the SAPS Instruction, articles must be reasonably necessary to prove the offence or be an article that will probably be declared forfeited to the state.<sup>114</sup>

- An article may be seized which may afford evidence of the commission or suspected commission of an offence. Section 3(3)(b) of the SAPS Instruction states that this category refers to an article which, if presented in court, will provide evidence of the commission of a crime.
- An article which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence. Section 3(3)(c) of the SAPS Instruction states that it must be clear that this article will be used to commit an offence.

The question whether the suspicion or belief is reasonable is an objective question. Our courts have also found that an article may be subject to seizure in under Section 20 where it is suspected of indirect use in the commission of a crime.<sup>115</sup>

Section 20 must be read with Sections 30 and 31 of the CPA which provide for disposal of articles seized.<sup>116</sup>

*Here is a summary of the relevant provisions of these sections:*

- Police may dispose of an article seized that is perishable, with due regard to the interests of the people involved.
- If an article was stolen, police may return it to the person from whom it was stolen.
- If not disposed of or returned:
  - ~ The article must be retained in police custody, AND
  - ~ If no criminal proceedings are instituted or the article is not required for the purposes of trial, the article must be returned to the person from whom it was seized, if this person may lawfully possess the article.<sup>117</sup>

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114 Basdeo argues that the term “concerned” is too wide and that this section should be interpreted in accordance with the SAPS instructions. See Basdeo: *A constitutional perspective of police powers of search and seizure: The legal dilemma of warrantless searches and seizures*, SACJ (2009) 3, 407.

115 See for example: *Ndabeni v Minister of Law and Order and Another* 1984 (3) SA 500 (D) and *Mnyungula v Minister of Safety and Security and Others* 2004 (1) SACR 219 (Tk).

116 See for example: *Choonara v Minister of Law and Order* 1992 (1) SACR 239 (W), 244 and 246.

117 For more information on this, refer to: “*The Constitutional Validity of Search and Seizure Powers*” in *South African Criminal Procedure*, 2009, Volume 12, No.4.

#### 8.4.5 Seizure of articles before arrest

As a general principle of the constitutional protection of the rights to privacy and ownership, Section 20 articles may only be seized with a warrant issued under Section 21 or 25 of the CPA.<sup>118</sup>

*The elements required for the issuing of these warrants are that there must be information under oath of a reasonable belief that:*

- A Section 20 article is in the possession or control of a person or on the premises,<sup>119</sup> OR
- An offence is being committed, planned or is likely to be committed on relevant premises.<sup>120</sup>

Despite this general prescript, the CPA and other legislation<sup>121</sup> provides for the search of persons without search warrants. In *Magajane v Chairperson, North West Gambling Board and Others* 2006 (2) SACR 447 (CC), the Constitutional Court reinforced the warrant requirement in stating:<sup>122</sup>

*“Exceptions to the warrant requirement should not become the rule. A warrant is not a mere formality. It is the method tried and tested in our criminal procedure to defend the individual against the power of the State and ensuring that police cannot invade private homes and businesses upon a whim, or to terrorise.”* (own emphasis)<sup>123</sup>

**Section 22 of the CPA** provides for the search of persons, without a search warrant, in connection with the seizure of a Section 20 article in 2 situations:

- Where consent is given for the search, AND
- Where an official has a reasonable belief that

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118 See Basdeo: *A constitutional perspective of police powers of search and seizure: The legal dilemma of warrantless searches and seizures*, SACJ (2009) 3, 404.

119 Section 21(1)(a).

120 Section 25(1)(b). See also Section 2(2) of the SAPS Instruction for a description of the phrase “reasonable belief”, Section 6 which provides for procedural rules on applying for search warrants, and Section 8 which provides for rules for searching with a search warrant.

121 See Section 5(2) of the SAPS Instruction for a list of other legislation.

122 At para 74. See also *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC), para 29.

123 Basdeo goes so far as to state that search and seizure without warrant is to be considered *prima facie* unreasonable and unjustifiable under the Constitution. See Basdeo, “A constitutional perspective of police powers of search and seizure: The legal dilemma of warrantless searches and seizures,” SACJ (2009) 3, 414.



- ~ A search warrant under Section 21(1) would be issued if applied for; and
- ~ That the delay in getting a warrant would defeat the object of the search.<sup>124</sup>

**Section 25(3) of the CPA** also provides for the search of a person without a search warrant, where it is reasonably suspected that an offence is being committed,<sup>125</sup> planned or is likely to be committed. However, this section only provides for a warrantless search in the second instance relating to reasonable belief.

The consent required under **Section 22(a) of the CPA** must be of a particular quality.

**Section 9(3) of the SAPS Instruction** states these requirements for valid consent under Section 22:

- The person who consents must be capable of understanding the nature of what they are consenting to.
- The consent must be given voluntarily and not as the result of threats or violence.
- Consent can be given explicitly or by implication, but mere submission to a search does not constitute valid consent.
- Consent must be given before the search is conducted.
- The person who consents must be aware of the implications of her consent.

**Section 9(4) of the SAPS Instruction** further states that a search following consent must remain within the limits of the terms of the consent. A police official may therefore not go further than what was consented to. The provisions of the SAPS Instruction support the notion that a Section 22 search based on consent must be the result of an informed consent.<sup>126</sup>

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124 See Sections 10 and 12(5) of the SAPS Instruction, as it relates to Sections 22(b) and 25(3) of the CPA.

125 As referred to in Section 25(1)(b) of the CPA.

126 See Steytler, *Constitutional Criminal Procedure: A Commentary on the South African Constitution of 1996*, Butterworths, 1998, 96. See also *Magobodi v Minister of Safety and Security and Another* 2009 (1) SACR 355 (Tk), para 13.



In *Magobodi v Minister of Safety and Security and Another*, 2009 (1) SACR 355 (Tk), the court found<sup>127</sup> that, where there is no probable cause for a search, informed consent can only follow where the subject of the search was informed that they have the right not to be searched *and* have the right to refuse consent for the search.

#### 8.4.6 Seizure of articles on arrest

**Section 23(1)(a) of the CPA** provides that, on the arrest of any person, the person making the arrest may:

“If he is a peace officer, search the person arrested and seize any article referred to in Section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he shall forthwith deliver any such article to a police official.”

**Section 11(2)(a) of the SAPS Instruction** provides that *Section 23(1)(a) of the CPA must be interpreted to include:*

- The person of the arrestee.
- Her clothing that she is wearing or carrying.
- Anything that is within her immediate control, such as a bag or container carried at the time of arrest.

The arrest must be lawful. Therefore, it is important to read Section 23 of the CPA within the context of the discussion of arrest below (see page 216).

The seizure of condoms from sex workers infringes upon their constitutional rights, specifically the right to privacy, as it encompasses the right not to have one's possession seized, as protected by Section 14(c) of the Constitution.<sup>128</sup>

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<sup>127</sup> Section 20 must be read with Sections 30 and 31 of the CPA, which provides for disposal of articles seized. In summary, these sections say:

- Police may dispose of an article seized that is perishable, with due regard to the interests of persons concerned.
- If an article was stolen, police may return it to the person from whom it was stolen.
- If not disposed of or returned, the article must be retained in police custody, and if no criminal proceedings are instituted or the article is not required for the purposes of trial, the article must be returned to the person from whom it was seized, if this person may lawfully possess the article.

<sup>128</sup> Other relevant constitutional rights may include the right to freedom and security of the person, as it encompasses the rights to be free from all forms of violence, not to be treated in an inhuman or degrading way, and the right to make decisions concerning reproduction (Section 12(1)(c) and (e) and Section 12(2)(a)).

Also, consent from sex workers to searches of their person and belongings, as an exception to the warrant requirement, must fulfil the requirements of valid and informed consent, as discussed.

Specifically, following the decision in *Magobodi*, the sex worker must be informed of her right not to be searched and her right not to consent to a search where there is no probable cause for the search. This would be the case where a sex worker is searched simply for being a known sex worker.

As mentioned, **Section 23 of the CPA** allows for the seizure of Section 20 articles upon arrest. However, the arrest must be lawful. The situation specifically relevant is where a sex worker is arrested without warrant under Section 40(1)(a) of the CPA.

As was found by the Supreme Court of Appeal in *Sekhoto*,<sup>129</sup> an arrest without warrant can only follow once the required jurisdictional facts are established.

*Within this context, note:*

- **Section 40(1)(a) of the CPA** requires that an offence be committed (or attempted) in the presence of a peace officer. As this jurisdictional fact is extremely difficult to prove in cases of the prohibited conduct under the Sexual Offences Act, sex workers are often arrested, without warrant, for other offences, specifically the contravention of municipal by-laws. They are then searched under Section 23 of the CPA and it is in this context that condoms are seized upon arrest.
- A person can only be arrested without warrant by a peace officer, as set out in the CPA and its Regulations. The latter has important implications for the lawfulness of arrests without warrant. Members of municipal police forces *do not* have the power to arrest someone for prohibited conduct in the Sexual Offences Act or the contravention of municipal by-laws in the absence of a warrant. Any seizure following such an arrest would therefore be unlawful.

Even where the required jurisdictional facts are established in cases of arrest without warrant by members of SAPS, it is doubtful, following the decisions in *Sekhoto*, the *SWEAT* case and the *Coetzee* decision,<sup>130</sup> whether these arrests would be regarded as lawful due to the arrests being made for ulterior purposes, and the irrationality and disproportionality of arrests without warrant for minor offences.

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<sup>129</sup> *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA).

<sup>130</sup> *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA).

Similarly, therefore, the seizure of condoms under Section 23 of the CPA, following such an arrest, would be unlawful.

#### 8.4.7 Legal remedies for an unlawful search

**Section 28 of the CPA** makes an unlawful search a statutory criminal offence.

Under this section, a police official who is found guilty of this offence may be liable upon conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding 6 months.

**Section 15 of the SAPS Instruction** lists these as further possible consequences of an unlawful search:

- A SAPS member may, in addition to Section 28 of the CPA, be charged with common law offences such as *crimen iniuria*, assault, malicious damage to property, theft, trespassing and housebreaking with the intent to commit an offence.
- Evidence obtained as a result of such an unlawful search may be excluded under Section 35(5) of the Constitution.
- Any person whose rights were violated by the search may institute a civil claim against the relevant police official.

Unlawful searches must be reported to the police station. A sex worker can also sue the Minister of Safety and Security for damages for violations of constitutional rights.

For more on claiming civil damages, see page 266.

### 8.5 Arrest and detention

*Under the Constitution, arrested persons have these rights:*

- The right to remain silent.
- The right to an attorney.
- The right to appear in court within 48 hours of being arrested.

- The right not to be forced to make a confession.
- The right to be told what you are being arrested for.
- The right to communicate with and be visited by family, clergy and a medical practitioner.
- The right to be held in decent conditions.

Bail, called *police bail*, can be given by the police without having to go to court to ask for bail.

### 8.5.1 Lawful arrest

*There are 4 things the police must do to make an arrest lawful:*

1. **The arrest must have been properly authorised with a warrant. If you are arrested without a warrant, conditions must be followed.**

Sometimes, the police ask sex workers to go with them to the police station without saying that they are arresting you. If you go with them voluntarily, then the police will not have to arrest you. Every person has a right not to go with the police unless they arrest you.

#### **WHAT ARE THE CONDITIONS TO ARREST WITHOUT A WARRANT?**

**Section 35 of our Constitution** sets out the rights of arrested, detained and accused persons, such as:

- The right to be brought to court as soon as reasonably possible, but not later than 48 hours after the arrest.
- The right to be informed of the reason for their arrest and detention.
- The right to be released from detention if the interests of justice allow this.

Our courts have been very clear that the right to personal liberty is one of the most fundamental rights that a person has a right to claim. The courts have repeatedly pointed out that arrest is drastic and may have far-reaching consequences for the detainee.

Accordingly, the police are only allowed to violate your constitutional rights when affecting arrest to the extent that they are acting within the provisions of the CPA.

**Section 40 of the CPA** provides for the arrest of a person without a warrant of arrest. Section 40(1) says that the police may only arrest any person without a warrant:

- a. “Who commits or attempts to commit any offence in his presence;
- b. Whom he reasonably suspects of having committed an offence referred to in Schedule 1;
- c. Who has escaped or who attempts to escape lawful custody;
- d. Who has in his possession a housebreaking or car-breaking instrument and can’t account for such possession;
- e. Who is found in possession of property suspected to be stolen;
- f. Who is found at any place by night in circumstances which afford reasonable grounds for believing that such a person committed or is about to commit an offence;
- g. Who is suspected of having committed a drug or arms-related offence;
- h. Who wilfully obstructs him in the execution of his duty;
- i. Who is reasonably suspected of having failed to observe any condition imposed in postponing or suspending a sentence;
- j. Who is reasonably suspected of having failed to pay any fine or part thereof on a date fixed by court;
- k. Who is reasonably suspected of having committed an act of domestic violence which constitutes an offence in respect of which violence is an element.”

Where any of the offences set out in Section 40(1) are present and justify an arrest without a warrant, the person arrested should be charged for that particular offence.

**2. The police must have physical control over you when they arrest you.**

This means the police must make sure that you as the sex worker can't get away. If you do not try to run away, the police do not have to use force to control you. But if you do try to run away, the police can use reasonable force to keep control of you – in other words, they can use only as much force as is necessary.

**3. The police officer must inform you of the reasons for the arrest.**

This means the police must tell you what offence they think you have committed. But if the police catch you while you are committing an offence, they do not have to give you details about why they are arresting you, because you already know why.

**4. The police officer must take the arrested person to the appropriate authorities as soon as possible.**

This means that the police officer must take you as the sex worker as soon as possible to the nearest police station. If the arrest was made with an arrest warrant, then the police officer must take you as soon as possible to the place set out in the warrant.

### **8.5.2 Unlawful arrest**

*Here are some examples of unlawful arrest:*

- If there was no good reason to suspect that you committed an offence.
- If the purpose of the arrest was not to charge you, but just to scare you.
- If the police officer did not tell you that you were under arrest.
- If you were not caught while committing an offence.
- If the arrest is to solicit a bribe or intimidate you into doing something.

### **8.5.3 Arrest with a warrant**

A warrant for the arrest of a person is a written order directing that the person described in the warrant can be arrested by a peace officer for an offence that he/she may have committed. The offence must be named on the warrant, and the police have to ensure that the arrested person appears in court as soon as possible.

## Issuing a warrant of arrest

A magistrate or justice of the peace may issue a warrant for the arrest of a person upon the written application of a Director of Public Prosecutions, a public prosecutor or a police officer. *This application must:*

- Set out the offence alleged to have been committed.
- Allege that the offence was committed within the area of jurisdiction of the magistrate or peace officer.
- State that, based on information taken under oath from witnesses, there is a reasonable suspicion that the person has committed the offence.

A warrant may be issued on any day, and remains in force until it is cancelled by the person who issued it or until it is executed. Warrants are valid in all other districts throughout South Africa.<sup>131</sup>

## Executing a warrant of arrest

Under Section 44 of the CPA, a warrant of arrest is executed by a peace officer. A *peace officer* includes a magistrate, justice of the peace, police official, member of correctional services and certain persons declared by the Minister of Justice to be peace officers for listed purposes.

When there is a valid warrant of arrest, and the police official is in plain clothes when she/he arrests the person, the arrest will still be valid as long as the police official produced the warrant to the arrested person.<sup>132</sup>

### 8.5.4 Arrest without a warrant

*Under Section 40 of the CPA, a peace officer may, without a warrant, arrest:*

- Any person who commits or attempts to commit any offence in his/her presence.
- Any person who he/she reasonably suspects of having committed an offence referred to in the First Schedule (to the Act), except for the offence of escaping from lawful custody.

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<sup>131</sup> Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe, Van Rooyen, *Criminal Procedure Handbook*, 97.

<sup>132</sup> *Ibid.*

- Any person who has escaped or who attempts to escape from lawful custody. A *reasonable suspicion* that a person has escaped is not sufficient for an arrest under this provision. The person who makes this arrest must know that the person he/she arrests has escaped from lawful custody.
- Any person who has in her/his possession any housebreaking implement or car-breaking implement, and who is unable to account for this possession to the satisfaction of the police officer.
- Any person who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence related to the property.
- Any person who is found at any place at night in circumstances which give reasonable grounds for believing that the person has committed or is about to commit an offence. The purpose of this arrest is to enable the peace officer to conduct an investigation to find out whether the person has in fact committed the offence. If it appears that no offence has been committed, then the person can be released.
- Any person who is reasonably suspected of being or having been in unlawful possession of stock or produce relating to the theft of stock or produce.
- Any person who is reasonably suspected of committing or having committed an offence under any law governing the making, supply, possession or conveying of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms of ammunition.
- Any person found in a gambling house or at a gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance.
- Any person who obstructs the officer in the execution of her/his duty.
- Any person who has been involved in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been involved in any act committed outside South Africa, which if committed in South Africa, would have been punishable as an offence, and for which he is, under any law relating to extradition of fugitive offenders, liable to be arrested or detained in custody in South Africa.



- Any person who is reasonably suspected of being a prohibited immigrant in South Africa in contravention of any law regulating entry into or residence in South Africa.
- Any person who is reasonably suspected of being a deserter from the South African National Defence Force (SANDF).
- Any person who is reasonably suspected of not observing any condition imposed in postponing the passing of a sentence or in suspending the operation of any sentence under the Act. The purpose of this arrest is to bring the person before the court to enable the court to determine whether the sentence should be carried out.
- Any person who fails to surrender him/herself to periodic imprisonment.
- Any person who is suspected of having committed an act of domestic violence.<sup>133</sup>

Thus, the police officer does not need to have a warrant to arrest a sex worker, but must still meet the requirements explained above in the point about arrest without warrant.

### 8.5.5 Can a police officer use force to arrest?

Section 49 of the CPA states that, when the police make a lawful arrest, they can use force if you try to fight or run away. The law says that the amount of force must be just enough to stop you from fighting or running away. It further says that the force must be reasonable.

*Here are some examples of the unlawful use of force:*

- If the arrest itself is unlawful, any force that the police use is unlawful.
- If you did not try to fight or run away, and the police used force in making the arrest.
- If the police used more force than necessary.
- If the police pepper spray a sex worker when she is in the police van.
- If the sex worker did not hurt the police officer and he physically assaults her.

<sup>133</sup> Ibid, 98-101.

## 8.5.6 Rights of arrested and detained people

- You have the right to remain silent.
- You have the right to an attorney.
- You have a right to appear in court within 48 hours of being arrested.
- You have a right not to be forced to make a confession.
- You have a right to be told what you are being arrested for.
- You have the right to communicate with and be visited by family, clergy, and a medical practitioner.
- You have a right to be held in decent conditions. The police have to read you your rights.

### Reasons for arrest?

When police arrest sex workers, they may fail to inform them of the reason for their arrest, as often police officers arrest sex workers simply with the intent to intimidate and harass them.

Police officers can be aggressive and violent when sex workers request the reason for their arrest. *This aggressive behaviour can include:*

- Using pepper spray in circumstances when individuals are not resisting arrest or posing any threat.
- Pressurising a sex worker to confess to being an active sex worker.
- Bribing a client with release if they provide sex.

Sex workers report that they are never brought to court after arrest even though the Constitution provides for the right to be brought to court as soon as reasonably possible, but no later than 48 hours after the arrest. They are frequently held in custody for an extended period of time in unfit, inhumane conditions.

In the case of *Manase*<sup>134</sup> the court said that “the words *reasonably suspected* must be interpreted objectively, and the grounds of suspicion must be those which would induce a reasonable man to have the suspicion”.

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<sup>134</sup> *Manase v Minister of Safety and Security* [2002] JOL 10101 (2003 (1) SA 576) Ck.

In the case of *Mabona and Another v Minister of Law and Order and Others*,<sup>135</sup> Jones J assessed how a reasonable person should analyse, assess and evaluate the evidence at his disposal when deciding whether the reasonable suspicion he holds is reasonable:

“It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie. something which otherwise would be an invasion of private rights and personal liberty.

The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest.

This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty.

However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”<sup>136</sup>

Many times, sex workers are arrested when they are walking along the road or sitting on the pavement. They were not committing any offences at the time of the arrest.

The Judge in *Mabona* states that, before an arrest is made, the police officer should assess the evidence placed before him or her. In the case, it seems the arrests were made simply because they know that the women are sex workers, and not because they have committed an offence.

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<sup>135</sup> *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE).

<sup>136</sup> *Ibid*, 658F-H.

## CASE STUDY

Sandy was arrested by a police officer. Sandy is a female sex worker. She was arrested Friday night. During the arrest, she did not receive food and water. When she asked for water, she was told to drink from the toilet pot.

Later on Saturday evening, the police officers brought her food and threw it in the cell. Sandy had her period and asked if she could get a sanitary towel, and the police officer refused to give her one. The cell itself was wet, because they wet it before she entered. The mattresses and blankets were dirty and smelly.

Sandy asked for clean mattresses and the police officers laughed at her. During her detention, she was refused a telephone call too and none of her family knew where she was.

### What does the law say about conditions of detention?

**Section 35 of the Constitution** sets out the rights of arrested and detained persons, including in Section 35(2)(e) a right to humane conditions of detention.

This principle is reflected in the *SAPS Policy on the Prevention of Torture and the Treatment of Persons in Custody of South African Police*, which formed the basis of the SAPS Standing Orders dealing with conditions of detention.<sup>137</sup>

**Section 13(2) of the Standing Order (G) 361** lists some of the conditions to meet the standard of humane detention:

- The number of people in a police cell must be reasonable.
- Blankets and mattresses of reasonable standard must be provided, be in good condition and be changed often enough to ensure cleanliness.
- You must have adequate light and ventilation.
- You must get a mattress and blanket, and a chair or bench.
- Your cell must be clean and sanitary and if the cells are unoccupied, the windows must be left open.

<sup>137</sup> Standard Operational Procedure: Detention of Transgender Prisoners, SAPS: Western Cape, 2013.

## MEDICAL ATTENTION

**Standing Orders (G) 341 and 349** state that police officers must take all reasonable steps to ensure that you see a doctor if you need medical attention.

## OFFICERS CHECKING UP ON THE CELLS

**Standing Order (G) 361.6** states that a police officer must check up on detainees every hour.

### **What do Police Standing Orders say about handling people in custody?**

- Police officers must not torture sex workers in custody.
- Police officers should not punish sex workers by withholding food, water and/or medical attention.
- Police officers have a duty to ensure that people are safe when they are detained.
- Officers must write down any injuries to detained persons in their official books (Standing Order (G) 341).
- All steps taken relating to getting medical treatment for a person in custody as provided for in Standing Order (G) 349, including the steps taken to allow such person to consult with a medical practitioner of his or her choice, must be fully recorded in the Occurrence Book.
- If someone is injured, a police officer has a legal and constitutional duty to ensure that the person receives medical attention (Standing Order (G) 349.2).
- Police cells must allow detainees a sufficient amount of light and fresh air (Standing Order (G) 361).
- Police cells must be clean (Standing Order (G) 361.2 (d)).
- Officers must take blankets, mats and other bedding out during fine weather to be aired thoroughly. Folded articles must be opened up and inspected closely before being returned to the cells. Standing Order (G) 361.2 (e).

## TRANSGENDER PEOPLE

Section 9.2 of the Standard Operational Procedure: Detention of Transgender Prisoners,<sup>138</sup> states:

“All arrested persons must be detained in terms of SO (G) 361; however, the following additional principles apply in respect of transgender persons:

a) all transgender persons should be detained in separate detention facilities at the police station where the person was arrested;

b) in the event of a separate detention facility not being available at the police station where the arrest was effected, the transgender person must be transported and be detained at the identified detention facility within the cluster;

c) an arrested transgender person must be recorded in the gender column of the Custody Register (SAPS 14) with a red pen as ‘T’.

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138 Ibid.

### 8.5.7 What if the case has been referred to court?

If the police officers lawfully arrested the sex worker, and referred the case to court, the usual criminal case process should follow.

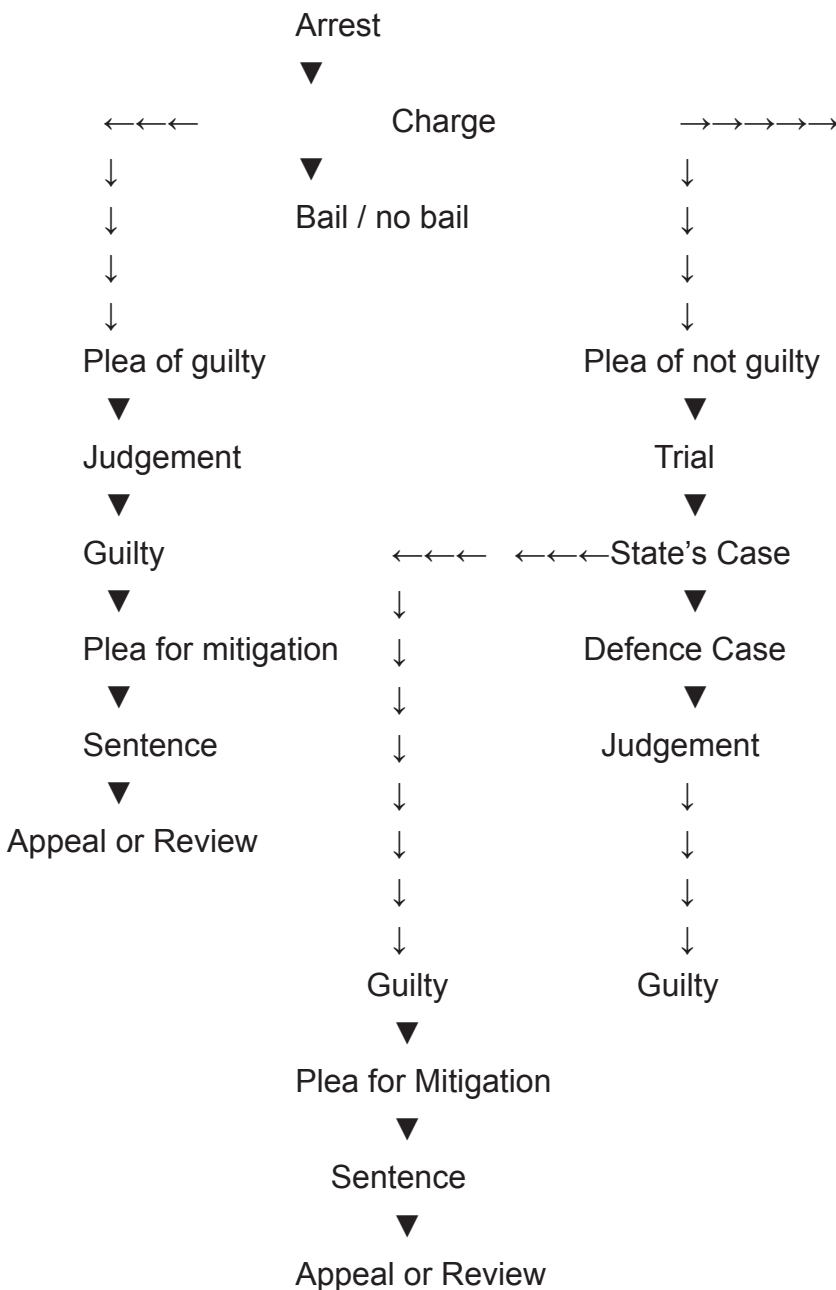


Figure 3: Steps in a criminal case

#### First day in court

If a sex worker is arrested, she must appear in court within 48 hours of the arrest. Often sex workers are arrested on a Friday night and she has to stay in police custody until Monday morning. This poses many problems for herself and her family members, especially if she has children at home.

## OPENING STEPS IN COURT:

- When the prosecutor calls your name as the accused, you go to the stand at the front of the court. The Prosecutor will start by telling the Magistrate what the charge is, for example: “The accused stands before us today, because she has been arrested for soliciting a male on the 29 November 2011 at 22h00 on Voortrekker Road for the purposes of engaging in unlawful carnal intercourse.”
- Then the prosecutor will ask you if you would like to appoint your own attorney or if you would like Legal Aid. There is a Legal Aid officer in every court and they will be there to take on your case immediately.
- Then the Legal Aid Officer will come to you and will ask you if you plead ‘guilty’ or ‘not guilty’.
- Do not plead ‘guilty’ unless you are sure that:
  - ~ You did what the prosecutor says you have done, and
  - ~ You did not have a good reason to do what you have done.
- You will plead ‘not guilty’ if:
  - ~ You did not commit the crime, or
  - ~ You did what the prosecutor said you have done, but you had a good reason for doing it – this reason will then be used in your defence.

The Legal Aid Officer will tell the court what the plea is and then the case will be postponed. If you are not happy with the Legal Aid Officer, you can contact Legal Aid South Africa.

If you have pleaded guilty, the attorney will complete a plea with you, and then the magistrate will go on to sentencing. If you have pleaded not guilty, you will have an opportunity to request that the court release you on bail.

### **Bail**

On the first day in court after you have pleaded, the magistrate will ask the prosecutor about bail. The magistrate will have to decide whether or not to release you on bail.



*You can be released in one of 3 ways:*

- You can be released into the care of your parents or guardian if you are under 18.
- You can be released with a warning to appear in court on a certain date.
- You can be released on bail.

Bail money is paid to the court or to the police. Bail money must be paid in cash and whoever pays the bail must ensure that they receive a receipt. If you appear at all the court hearings, and at the end of the trial, you will get the bail money back.

When clients do not have money, they should speak up in court and tell the magistrate or their attorney that they cannot afford it.

There are 3 types of bail: police bail, bail agreed to by the prosecutor, or court bail.

#### POLICE BAIL

You can ask the police for bail as soon as you have been arrested and taken to the police station. If they agree, they will decide how much bail you must pay and you must pay this in cash. The police cannot grant bail if you were arrested for a serious crime, such as murder, rape or robbery.

#### BAIL AGREED BY THE PROSECUTOR

For some crimes, a prosecutor can agree to bail. You must ask the police to telephone the duty prosecutor to check whether you can get bail. Alternatively, your attorney can speak to the prosecutor to see if they will agree to bail without having to apply for bail in court.

#### COURT BAIL

When you are brought to court, the court case usually does not finish the same day. You have a right to ask the court to release you on bail until the case is completed. You can ask for bail at any time on or after the first day in court.

*When you ask for bail, you must convince the magistrate that:*

- You will not run away.

- You have a valid address.
- You are not a danger to other people.
- You will not commit any other crimes.
- You will not intimidate witnesses.

If you have pleaded not guilty and the court has allowed you out on bail, the case may be postponed for further investigation. Once the investigation is complete, the case will be postponed for trial.

It may be possible to bring an action for damages if the police refuse to release a sex worker accused on bail on malicious grounds, or where the police officer authorised to give bail simply refused.

## **Trial**

The trial will start after the investigation is complete and the sex worker's attorney has received a copy of the police docket (which contains all the statements and evidence).

### THE STATE WILL PRESENT ITS CASE

The prosecutor will present the State's case to the magistrate to show that you are guilty. They will call witnesses to give evidence to prove beyond a reasonable doubt that the accused is guilty of the offence. As the attorney, you will have an opportunity to cross-examine the witnesses. The prosecutor will then be able to re-examine the witnesses. Then the State will close its case.

### DISCHARGE

If there is not enough evidence against you, your attorney can ask the court for a discharge. This means you ask the court to set you free. If the court does not agree on a discharge, the case will continue.

### THE CASE IN YOUR DEFENCE

As the attorney, you will have the opportunity to present your case to the court. You will be able to call witness. You can be a witness. The prosecutor cross-examines your witnesses, and then you will have an opportunity to re-examine the witness.

## ARGUMENT

The prosecutor will then sum up their case and give reasons why you should be guilty. You will also be able to summarise your defence case.

## JUDGEMENT

The magistrate will give judgement after considering all the evidence that has been presented, and then say whether you are guilty or not guilty. In order to be found not guilty, you must convince the magistrate that there is a reasonable doubt that you could not have committed the offence.

## SENTENCING

If you are found guilty, the court will have to impose a sentence. The prosecutor will give aggravating reasons to the court in order to justify the sentence the State wants.

You will be able to provide mitigating reasons why the sex worker should not get a harsh sentence. *These can include:*

- She is sorry for what she did.
- She did something to correct the wrong.
- She is under 18 years old.
- This is her first offence.
- Many people depend on her (if she is the bread winner in the family).
- She has young children.
- She may lose her job.
- She has other responsibilities, for example: looking after an aging parent.
- Imprisonment will be bad for her, for example: for her health.

## APPEAL OR REVIEW

You will have an opportunity to appeal or review:

- You may be able to appeal the conviction or sentence.

- You may be able to review the case because procedures were not correctly followed.

Below we deal with options if a case is not referred to court by the police.

### **8.5.8 First remedy when unlawfully arrested: Criminal charge**

#### **How to lay a criminal charge**

When the action of the police officer amounts to a criminal offence, a sex worker can lay a criminal charge against that police officer. We now explain how a sex worker can make a criminal charge.

#### **REPORT AT THE CHARGE OFFICE**

Go to the charge office at the nearest police station to make a complaint. You may want to go with a friend or someone like a priest, teacher or social worker to help you.

*The police must take a statement from you:*

- You must be very careful what you say because you have to swear under oath that you are speaking the truth.
- Do not sign your statement if you are not happy with the way the police wrote it down. Ask to change it before you sign.
- It is not up to the police in the charge office to decide whether a complaint is serious enough to be investigated. They have to take a statement from anyone who comes into the police station to make a complaint.

After you have made your statement, ask for a copy of it before you leave the charge-office. You have the right to get a copy.

#### **GET THE POLICE CASE REFERENCE NUMBER**

Ask for the police reference number. This is the police register number where they are supposed to keep a record of all complaints made at the charge office. This is your proof that you reported the crime to the police. The reference number is also called an OB number (Occurrence Book number) or VB-nommer (Voorvalleboeknummer).

## GO TO A DOCTOR: J88 MEDICAL REPORT

If you want to lay a charge, you will need to go to the doctor for an examination. You have to go as soon as possible before the marks and bruises disappear. Go to your own doctor or to a government doctor (called *a district surgeon*).

If you are injured and you need medical treatment, the police will ask you to get a medical report form filled in. This form is called *a J88 medical report*. Your own doctor or the district surgeon can fill this form in. Then you must take the filled-in form back to the police in the charge office.

If you can, it is a good idea to make a copy of the filled-in J88 form and keep this copy for yourself.

## A CASE DOCKET IS OPENED

After you make a statement to the police, they must open a case docket, and investigate a criminal charge against the person or people who committed a crime against you.

*These are the next steps:*

- The police officer will refer the case to the prosecutor, who will then decide if the State will prosecute the case.
- Once the prosecutor decides to prosecute and the perpetrator can be identified, then he/she will be arrested.
- Your client (the complainant) usually receives a subpoena stating the date and time that she/he must be present at court. Sometimes when your client was present at court at the previous hearing and warned to be in court on the next date and time, he/she will not get a formal subpoena.
- Your client must be present at every court appearance – if not, there is a good chance the charges will be withdrawn against the police because the complainant is absent.

### **8.5.9 Second remedy when unlawfully arrested: Independent Police Investigative Directorate**

If a sex worker is assaulted, verbally assaulted, badly treated or unlawfully arrested by a police officer, you can assist her/him in completing a complaint at the Independent Police Investigative Directorate (IPID).

The IPID is the regulatory body that watches over the police – the IPID is meant to ‘police the police.’ Whenever a client has experienced a human rights violation, the case can be referred to the IPID to investigate the complaint. For this to succeed, it is vital for your client to be able to identify the police officers or the police van, or at least give an accurate description of one of the police officers.

### **How to refer a complaint to the IPID**

The IPID has a form that has to be completed when you refer the case. The form is shown below. Also remember that the client must provide accurate contact information so that the investigating officer can contact her/him for further information on the complaint.

*The form of the IPID has to contain these details:*

- The sex worker’s full details.
- Address.
- Contact details.
- ID number. If she/he does not remember her/his ID, then she/he can write down her date of birth.
- Living area.
- Directions to her/his house.
- Her/his occupation. If the client does not want to disclose that she/he is a sex worker, then you do not have to include this information.
- Directions to the workplace. If the client agrees to write that she is a sex worker, then you can include what area she usually works in.
- Work address.
- Details of closest living relative or someone she/he lives with.
- Date of incident.
- Exact or approximate time of the incident.
- Specific location of the incident including exact street names.







**Complainant Details (includes third party complaints)**

|   |   |                 |  |
|---|---|-----------------|--|
| Role in the case                                  | <input type="checkbox"/> Complainant <input type="checkbox"/> Third Party |                 |  |
| ID Number   |   | Passport Number |  |
| Title   |   | First Name      |  |
| Middle Name                                       |   | Surname         |  |
| Landline  |   | Mobile          |  |
| Fax   |   | Email           |  |
| Nationality                                       |   | Gender          | <input type="checkbox"/> Male<br><input type="checkbox"/> Female |
| Disabled status                                   |   |                 |  |
| Address   |   |                 |  |
| Country   |   | City            |  |
| Suburb  |   | Postal Code     |  |
| Preferred contact Method (E.g. E-mail, SMS, Post) |   |                 |  |

**Victim Details**

|                 |   |             |  |
|-----------------|---|-------------|--|
| Passport Number |   |             |  |
| First Name      |   | Middle Name |  |
| Surname         |   |             |  |
| Gender          | <input type="checkbox"/> Male <input type="checkbox"/> Female | Race        |  |
| Age             |   |             |  |

**Service Member's Details**

|               |   |                   |  |
|---------------|---|-------------------|--|
| Identified    | <input type="checkbox"/> Yes <input type="checkbox"/> No      | Rank              |  |
| Persal Number |   | ID Number         |  |
| Initials      |   |                   |  |
| First Name    |   | Middle Name       |  |
| Surname       |   |                   |  |
| Gender        | <input type="checkbox"/> Male <input type="checkbox"/> Female | Race              |  |
| Duty Station  |   | Duty Station Unit |  |

|               |   |                   |  |
|---------------|---|-------------------|--|
| Identified    | <input type="checkbox"/> Yes <input type="checkbox"/> No      | Rank              |  |
| Persal Number |   | ID Number         |  |
| Initials      |   |                   |  |
| First Name    |   | Middle Name       |  |
| Surname       |   |                   |  |
| Gender        | <input type="checkbox"/> Male <input type="checkbox"/> Female | Race              |  |
| Duty Station  |   | Duty Station Unit |  |

|               |  |           |  |
|---------------|--|-----------|--|
| Identified    | <input type="checkbox"/> Yes <input type="checkbox"/> No | Rank      |  |
| Persal Number |  | ID Number |  |

|                             |   |                   |  |
|-----------------------------|---|-------------------|--|
| Initials                    |   |                   |  |
| First Name                  |   | Middle Name       |  |
| Surname                     |   |                   |  |
| Gender                      | <input type="checkbox"/> Male <input type="checkbox"/> Female | Race              |  |
| Duty Station                |   | Duty Station Unit |  |
| Contact Number              |   |                   |  |
|                             |   |                   |  |
| On Duty                     | <input type="checkbox"/> Yes <input type="checkbox"/> No      |                   |  |
| Vehicle Registration Number |   |                   |  |

| Details of Witnesses to Incident |  |            |  |
|----------------------------------|--|------------|--|
|                                  |  |            |  |
| Title                            |  | First Name |  |
| Middle Name                      |  | Surname    |  |
| Landline                         |  | Mobile     |  |
|                                  |  |            |  |
| Title                            |  | First Name |  |
| Middle Name                      |  | Last Name  |  |
| Landline                         |  | Mobile     |  |
|                                  |  |            |  |
| Title                            |  | First Name |  |
| Middle Name                      |  | Surname    |  |
| Landline                         |  | Mobile     |  |
|                                  |  |            |  |
| Title                            |  | First Name |  |
| Middle Name                      |  | Surname    |  |
| Landline                         |  | Mobile     |  |

**COMPLAINANT'S FULL NAMES:**

**COMPLAINANT'S SIGNATURE:**

**DATE:**

### **8.5.10 Third remedy when unlawfully arrested: Complaint to Station Commander**

If the perpetrator is a police officer, you can also lodge a complaint with the Station Commander. If you do this, you need to send in a letter and attach a statement.

Complete our *WLC Human Rights Violations Questionnaire: Police Harassment/Abuse*. This should give you the information you need for the statement you will attach to your letter to the Station Commander.

For this questionnaire, see page 45.

*These are the details you will need for the statement to the Station Commander:*

- Full personal details of your client.
- Client's full contact details.
- Date of incident.
- Time of incident.
- Exact location of where the incident took place.
- Details or description of the perpetrator (police member responsible).
- Details of the vehicle that the perpetrator used.
- Full details of exactly what happened before and during the incident.
- Full details of the extent of the injuries sustained.

**Figure 5: Example of complaint letter to Station Commander**

15 March 2011

Musina Police Station

No 8 Geldenhuys Street

Musina

**Attention: Station Commander [name of officer]**

**Per Fax: 015 5347410**

Dear Colonel [name of officer]

**COMPLAINT ON BEHALF OF (name of client)**

We write on behalf of (name of client).

She instructs us that on the 10<sup>th</sup> March 2011 at or around 12pm, she approached the Musina Police Station to lodge a charge of assault against a police officer.

She instructs further that there were three (3) police officers in the charge office, two (2) females and one (1) male police officer. Our client instructs that she reported the assault to the male police officer. The assault occurred on the 4 March 2011 at or around 11 am, outside the ABSA Building which is situate next to the Limpopo River Lodge. Ten (10) police officers and six (6) soldiers confronted our client and her friends and proceeded to beat her with a shambok.

She instructs that the police officers at the charge officer refused to assist her be opening up the charge of assault, and instead reprimanded her for being a Zimbabwean and humiliated her.

Accordingly, we request that you assist (name of client) who can be contacted on (insert telephone number)

Your assistance in this matter will be greatly appreciated.

Yours faithfully,

### **8.5.11 Fourth Remedy when unlawfully arrested: Report to the Department of Community Safety**

To lodge a complaint with the Department of Community Safety (DCS), you will have to complete our WLC questionnaire: *Human Rights Violations Questionnaire: Police Harassment/Abuse*. Then you will have to convert the information into a statement.

For this questionnaire, see page 45.

*You will need this information for the statement to the DCS:*

- Full personal details.
- Full contact details.
- Date of incident.
- Time of incident.
- Exact location of where the incident took place.
- Details or description of the perpetrator (the police member responsible).
- Details of the vehicle that the perpetrator used.
- Full details of the background to the incident and what exactly happened.
- Full details of the extent of the injuries sustained.

### **8.5.12 Damages claims**

When a person get arrested unlawfully (under Section 35 of the Constitution), you have to bear in mind the substantive and procedural aspects of the unlawfulness.

#### **Substantive aspects of unlawfulness**

##### **ARREST FOR BEING A SEX WORKER**

Section 20(1A) (a) of the Sexual Offences Act 23 of 1957 (SOA) criminalises being a sex worker in providing that:

“Any person who knowingly lives wholly or in part on the earnings of prostitution shall be guilty of an offence.”

This is different from the provisions in the City of Cape Town by-laws<sup>139</sup> directed at sex workers. These require positive action from the sex worker, in other words: to perform a sexual act in a public place,<sup>140</sup> or to solicit or importune any person for the purpose of prostitution or immorality.<sup>141</sup>

Strictly speaking therefore, police officers are entitled to arrest if there is a reasonable suspicion that the suspect is a sex worker.<sup>142</sup>

The more serious issue however is whether in fact there is ever an intention to charge and prosecute for this offence, or whether the arrests are merely to harass. This leads to the discussion of the next ground of unlawfulness.

### ARRESTS WITH AN ULTERIOR PURPOSE

There is undoubtedly a case for the unlawfulness of the arrests, if there is no intention, to bring the clients before court and prosecute for the offences.

In the case of *Olivier*,<sup>143</sup> the judge stated that:

- The purpose of an arrest should be to bring a person to court.
- Issuing a summons is better than arresting someone.
- There is no rule of law that requires the milder method of bringing a person to court.

So we have to interpret it based on facts and precedents in practice. If someone has a permanent address, then there is no reason to arrest the person in order to secure that person's attendance at court. If the person fails to appear in court, the police officers will know where to find the person.

In the case of *Zealand*,<sup>144</sup> it was argued that Sections 82 and 83 of the International Covenant on Civil and Political Rights state that there is no reason why an unjustified breach of Section 12(1)(a) would not be sufficient to establish unlawfulness or wrongful detention. So, if we can prove that the breach of the

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139 City of Cape Town By-law relating to Streets, Public Places and the Prevention of Nuisances, Promulgated 28 September 2007, PG 6469.

140 Regulation 3(f).

141 Regulation 3(j).

142 Whether or not there were grounds present at the point in time to support that suspicion, is another question.

143 *Olivier v Minister of Safety and Security and Another* [2008] JOL 21471 (W).

144 *Zealand v Minister of Justice and Constitutional Development and Another* [2008] JOL 21448 (CC).

right to freedom and security was unjustified because the police officer did not have reasonable suspicion, then we can persuade the court that the actions of the police amounted to wrongful or unlawful detention and arrest.

Then we can look at whether the deprivation was “arbitrary or without just cause”. In *Zealand* the court stated that “it is now well established in our constitutional jurisprudence that the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against deprivations”.

As Justice O’Regan stated in the *Coetzee*<sup>145</sup> case:

“There are two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom (the substantive component); and the second concerned with the manner whereby a person is deprived of freedom (the procedural component).

Our Constitution recognises that both aspects are important in a democracy: the State may not deprive its citizens of liberty for reasons that are not acceptable. When its deprives its citizens of freedom for acceptable reasons, it may not do so in a manner which is procedurally unfair.”<sup>146</sup>

*Applying this approach to the arrest of sex workers:*

- If we look at the reasons why the State deprived the sex workers of freedom, it was because they know that they are sex workers, and not because they have in fact committed an offence. You cannot arrest someone in anticipation that she may commit an offence. So the substantive component is not complied with.
- If we look at the procedural aspect, the arrest was done without a warrant, so we have to deal with the reasonable suspicion. They may not have had reasonable suspicion that the person committed an offence. And even if they did, arrest was too extreme. If we consider what the main purpose of an arrest is, it is to ensure the person’s attendance at court. And the police only take very few sex workers to court. So in this sense, they don’t comply with the procedural aspect too.

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145 *S v Coetzee and Others* (CCT50/95) [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA 527 (6 March 1997).

146 *Ibid*, para 159, quoted in *De Lange v Smuts* NO 1998 (3) SA 785 (CC), para 18.



As stated in the *Van Rensburg*<sup>147</sup> case, if procedures are properly followed, then there is no need to arrest someone. On the strength of *SWEAT v Minister of Security*<sup>148</sup> and all the authorities cited there, there is a clear argument to be made that arrest with an intention other than to prosecute the arrested person is unlawful.

*The Court went even further and stated that:*

“A peace officer who arrests a person, knowing with a high degree of probability that there will not be a prosecution, acts unlawfully even if he or she would have preferred a prosecution to have followed the arrest.”<sup>149</sup>

The Court in the SWEAT case correctly upheld the principle that arrest for an ulterior purpose is unlawful.

If the purpose of the arrest is to bully, intimidate and harass, then these actions constitute a fundamental violation of dignity.

### **Procedural aspects of unlawfulness**

If sex workers get arrested without a warrant, the arrest can only be justified by the presence of reasonable grounds that the clients were committing or attempting to commit an offence.<sup>150</sup>

*You can make out cases for procedural unfairness on the basis that:*

- Most of the clients are not informed of the reason for their arrest or continued detention as required by Section 35(1)(e) of the Constitution. The police officers are often aggressive and violent in response to the client's request for reasons. In many cases they use pepper spray in circumstances when the clients are not resisting arrest or posing any threat, in contravention of the SAPS Standard Operating Procedure for the use of pepper spray.
- The procedures for lawful arrest are not complied with, if the sex worker was not issued with a Notice of Rights or entered into the Occurrence Book. These omissions are in contravention of Standing Order G 361(1) and (6) respectively.

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147 *Van Rensburg v City of Johannesburg* [2008] JOL 21164 (W).

148 2009 (6) SA 513 (WCC).

149 At para 27.

150 Sections 40(a) and 40(f) of the CPA.



- In many of the instances of arrest, the police don't take the sex workers to the police station as soon as it is reasonably possible. This contravenes Section 50(1)(a) of the CPA which states:

“Any person who is arrested with or without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.”

### **Quantum for the civil damages claim**

In *Ntshingana v Minister of Safety and Security and another*,<sup>151</sup> the approach to the assessment of damages for wrongful detention was correctly summarised by Erasmus J:

“The satisfaction in damages to which plaintiff is entitled falls to be considered on the basis of the extent and nature of the violation of his personality (*corpus, fama and dignitas*). As no fixed or sliding scale exists for the computation of such damages, the Court is required to make an estimate *ex aequo et bono*.”<sup>152</sup>

Visser and Potgieter have extracted from our case law factors which can play a role in the exercise:<sup>153</sup>

*These are the factors listed by Visser and Potgieter:*

- The circumstances under which the deprivation of liberty took place.
- The presence or absence of improper motive or malice on the part of the defendant.
- The harsh conduct of the defendants.
- The duration and nature (for example: solitary confinement) of the deprivation of liberty.
- The status, standing, age and health of the plaintiff.

<sup>151</sup> Unreported, case no. 1639/01, ECD, 14 October 2003.

<sup>152</sup> Ibid, para 28.

<sup>153</sup> Visser and Potgieter, *Law of Damages*, 2<sup>nd</sup> ed, 475.

- The presence or absence of an apology or satisfactory explanation of the events by the defendant
- Awards in previous comparable cases.
- The fact that, in addition to physical freedom, other personality interests such as honour and good name have been infringed.
- The high value of the right to physical liberty.
- The effect of inflation.
- The fact that the *action injuriaru*, also has a punitive function.

*Neethling adds these factors:*<sup>154</sup>

- The circumstances surrounding the deprivation of liberty.
- The duration of the deprivation of liberty.

In the case of *Osche v King Williams Town Municipality*,<sup>155</sup> the court stated that, in common law, the unlawful deprivation of liberty, with its accompanying infringement of the right to human dignity, is a grave wrong.

In *Olgar v Minister of Safety and Security*,<sup>156</sup> the judge stated that the award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom. *It should properly take into account:*

- The facts of the case.
- The personal circumstances of the victim.
- The nature, extent and degree of the affront to dignity and sense of a person's worth.

The judge in *Olgar* said that these considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth.

<sup>154</sup> Neethling, *Law of Personality*, 130-1.

<sup>155</sup> 1990 (2) SA 855 (E).

<sup>156</sup> ECD 18 December 2008 (case no. 608/07) unreported, para 16.

There is no set standard of what amount to provide as quantum for damages.

Successful judgments in unlawful detention cases for alleged loitering provide a useful guide. In most instances, they claimed between R40,000 and R80,000. Many of them are analogous in that the detainees were detained either overnight or for a few hours in inhumane conditions. The court granted awards from between R10,000 and R65,000. The higher end was for longer detentions of 2 days or more.

⋮ **Note:**

⋮ If you decide to proceed with a claim against the Minister of Safety and  
⋮ Security for unlawful arrest and wrongful detention, we include information  
⋮ in the chapter below relating to civil procedure, together with examples of  
⋮ pleadings (see page 261.)

## 8.6 Profiling

### 8.6.1 What is profiling?

Many sex workers report that they are often approached by police officers. When this happens, pictures are taken of them either on the street, or when they are detained at the police station.

When querying this practice, sex workers are usually informed that the police are collecting a database of sex workers so that they can identify them upon death or use their picture if they go missing.

This is contradictory to what actually occurs in practice. Sex workers report that when they are arrested, they often see their own picture or that of their colleagues, posted in the charge office with the words “prostitute” written across it.

### 8.6.2 What does the law say about profiling?

*The applicable legal provisions of the CPA fall into 3 categories:*

- Arrest.
- Taking photographs.
- Searching arrested people.

## ARREST

### Under **Section 39(1) of the CPA:**

“Arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.”

Under **Section 39(2) of the CPA** the person effecting the arrest “shall at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest.”

**Section 50(1)(a) of the CPA** requires that any person arrested without a warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station.

## PHOTOGRAPHS

### **Section 37(1) of the CPA provides:**

“Any police official may-

- (a) take the finger-prints, palm prints or foot-prints or may cause any such prints to be taken-
  - (i) of any person arrested upon any charge;
  - (ii) of any such person released on bail or on warning under Section 72;
  - (iii) of any person arrested in respect of any matter referred to in paragraph (n), (o) or (p) of Section 40(1);
  - (iv) of any person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; or
  - (v) of any person convicted by a court or deemed under Section 57(6) to have been convicted in respect of any offence which

the Minister has by notice in the Gazette declared to be an offence or for the purposes of this subparagraph; ...

- (b) Take a photograph or may cause a photograph to be taken of a person referred to in paragraph (a)(i) or (ii).”

**Section 37(5) of the CPA** provides that fingerprints or photographs shall be destroyed if the person concerned is, amongst other things:

- Found not guilty at his/her trial.
- If his/her conviction is set aside by a superior court.
- If no criminal proceedings with reference to which such prints or photographs were taken are instituted against him/her.
- If the prosecution declines to prosecute him/her.

It is apparent from Section 37(1) that a police official may only take a photograph or cause a photograph to be taken of a person who has been arrested upon a charge.

A police official may only take fingerprints of the same category of person or of persons listed in Sub-sections (1)(a)(iii) to (v).

The purpose of empowering police officials to take photographs of arrested persons appears to be to assist in the investigation of a crime with a view to instituting a prosecution or obtaining a conviction, by for example compiling a photographic identification parade to be shown to witnesses.<sup>157</sup>

Although police officials may take fingerprints from a more comprehensive list of people than those in respect of whom photographs may be taken, this list is still limited to people against whom proceedings are pending, and those convicted of an offence.

The only (legitimate) uses that the taking of fingerprints can have are to link a suspect to an offence at a crime scene at which fingerprints were found or could be found, or to build up a fingerprint register of convicted persons to assist with the future identification of suspects or to trace previous convictions.<sup>158</sup>

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<sup>157</sup> Du Toit et al, *Commentary on the Criminal Procedure Act 3-32C to 3-35*.

<sup>158</sup> Kruger *Hiemstra's Criminal Procedure* 3-4.

## SEARCHING ARRESTED PEOPLE

**Section 23(1)(a) of the CPA** provides that on the arrest of any person, a peace officer may search the person arrested and seize a defined category<sup>159</sup> of articles.

*Apart from constituting violations of the CPA, the actions of the police in profiling sex workers breach several constitutional rights, including at least:*

- The right not to be deprived of freedom arbitrarily or without just cause (Section 12(1)(a)).
- The right to dignity (Section 10).
- The right to privacy, which includes the right not to have their person searched (Section 14(a)).
- The rights of arrested and detained persons (Sections 35(1) and (2)).
- The right to administrative action that is lawful, reasonable and procedurally fair (Section 33(1)).

### 8.6.3 What remedies are available to address profiling?

*There are 2 options:*

- Choose one, or perhaps a handful, of cases with particularly strong facts, and institute one or more actions for damages against the Minister of Safety and Security based on the *actio iniuriarum*.<sup>160</sup>
- Bring an application for declaratory and interdictory relief under the Constitution, relying on the continued violation of the applicants' constitutional rights.

#### **The *actio iniuriarum***

1. In order to establish liability under the *actio iniuriarum*, there must be a wrongful and, in most cases, intentional infringement of one or more of the 3 personality rights, physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*).

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<sup>159</sup> Contained in Section 20 of the CPA.

<sup>160</sup> These would be delictual rather than contractual damages: see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), paras 66 to 74.

2. In the circumstances of the present case, there are 3 grounds upon which an *actio iniuriarum* could be brought:
  - The wrongful deprivation of liberty (either as ‘false imprisonment’ or ‘wrongful arrest’).
  - The unauthorised exploitation of identity (a species of ‘*dignitas*’).
  - The wrongful invasion of privacy (a species of ‘*dignitas*’).

## WRONGFUL ARREST

3. An infringement of the physical liberty of a person in the absence of a ground of justification, is wrongful and constitutes an *iniuria*. Once deprivation of liberty has been proved, it is for the defendant to allege and prove the existence of grounds of justification.<sup>161</sup>
4. *Animus iniuriandi* (the will to cause a particular consequence and consciousness of the wrongfulness of conduct) is ordinarily a requirement for liability under the *actio iniuria*. With the wrongful deprivation of liberty, knowledge of wrongfulness is not a requirement.<sup>162</sup>
5. The advantage of bringing an action under this head is that once it has been admitted or proved that the sex worker in question was deprived of liberty (by for example being driven around in a police van before being released, or being taken to the police station and incarcerated), it would be for the defendant to allege and prove the existence of grounds to justify the breach.

There would be no valid justifying grounds in the absence of a lawful arrest. It would also *not* have to be shown by the plaintiff that the member of SAPS or the City police knew that what they were doing was wrongful.

## EXPLOITATION OF IDENTITY

6. *Grutter v Lombard and Another* 2007 (4) SA 89 (SCA) is authority for the fact that the unauthorised exploitation of identity could constitute an *actio iniuriarum*, depending on whether the intrusion on personality rights was wrongful.

Although this case concerned the unauthorised use of a person’s name in association with a business with which he was no longer associated, there

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<sup>161</sup> *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 156; *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E) at 136.

<sup>162</sup> *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 156.

can be little doubt that the principle would be of application to the present circumstances, particularly in light of the value placed by the Constitution on dignity and privacy. The unlawful photographing of sex workers would clearly constitute a wrongful intrusion on personality rights.

## INVASION OF PRIVACY

7. There is some common law authority for the fact that the illegal searching of a person amounts to an invasion of privacy.<sup>163</sup> There would certainly be scope for developing the law in this area given the express prohibition in Section 14(a) of the Constitution and the wealth of jurisprudence relating to the constitutional right to privacy.<sup>164</sup>

## CONCLUSION

8. On balance, an action based on the wrongful deprivation of liberty is probably the most likely to be successful because of the presumption of wrongfulness which comes into play. It also strikes more directly at the problem, which is that sex workers continue to be taken off the streets in circumstances not amounting to lawful arrest. However an action could be based on all three of these *iniuria*.<sup>165</sup>
9. A drawback to proceeding in this direction is that it involves the institution of action proceedings. This means that the plaintiff would have to give evidence in court and face cross-examination. Much would depend on the quality of evidence the plaintiff can produce, and the credibility of the plaintiff when under cross-examination.

Although the case might attract symbolic significance, the more appropriate course in this instance, where there appears to be an ongoing violation of the constitutional rights of sex workers, may well be to apply for relief aimed at declaring the conduct of the police unlawful, and obtaining a prohibitory and possibly a structural interdict.<sup>166</sup>

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<sup>163</sup> Neethling's *Law of Personality*, 2<sup>nd</sup> ed, 224.

<sup>164</sup> Section 39(2) of the Constitution directs every court when developing the common law to promote the spirit, purport and objects of the Bill of Rights. Thus the courts have been more than ready to do in a delictual context: see *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC). A useful case in relation to privacy in the context of search and seizure is *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

<sup>165</sup> The principle in *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) that the same conduct cannot render a defendant liable by dint of more than one *actio iniuriarum*, does not apply since the acts complained of are related but separate acts.

<sup>166</sup> Currie and De Waal *The Bill of Rights Handbook*, 5<sup>th</sup> ed, 219.



## Constitutional remedies

*Under Section 172 of the Constitution:*

“When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable....”

*There are 4 potential options:*

1. Declaring that profiling actions of the police invalid as a violation of the constitutional rights described. This would be relief of a symbolic kind.
2. Interdicting the unlawful action: the ordinary principles applicable to final prohibitory interdicts would apply. *Thus there would have to be shown:*
  - A clear right for the applicants.
  - An injury actually committed or reasonably apprehended.
  - The absence of any other satisfactory remedy available to the applicants.
3. Obtaining a structural interdict directing the Minister and SAPS to rectify the breach of fundamental rights under court supervision. This could involve requiring the Minister to produce a report setting out the steps taken to prevent the ongoing violation of the rights of sex workers.
4. Applying to the Court for constitutional damages as a remedy for the violation of fundamental rights. Although constitutional remedies should be forward-looking, community-oriented and structural,<sup>167</sup> you can argue that this type of relief has not worked to stop the ongoing violation of the rights of sex workers.

## 8.7 Fines

Municipal by-laws are created to deter the sex industry from operating through arrests and particularly the imposition of fines.

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<sup>167</sup> Currie and De Waal, *The Bill of Rights Handbook*, 5<sup>th</sup> ed, 219.

### **CASE STUDY**

Portia is working in Woodstock. She has been working there for over 10 years. One Saturday night, she was walking to her usual spot. Just as she arrives, a police van with 2 male officers approaches her and gets out of the vehicle. When they approach her, she says, “I have not done anything. I am waiting for a friend”.

The police officers respond, “Portia don’t lie to us, here is a fine”. They hand her a fine of R500 for loitering. They get back into their vehicle and drive off.

### **8.7.1 Relevant municipal law**

The by-laws of a municipal council are legislative acts.

**Section 40(1) of the Constitution** gives municipal councils power to make law:

“In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.”

Subsections 43(c ) and 151(2) give them original legislative and executive authority.

**Section 151 (3)** provides:

“A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.”

**Sections 152 and 153** set out the objects and duties of local government:

“152 (1) The objects of local government are –

- a) to provide democratic and accountable government for local communities;
- b) to ensure the provision of services to communities in a sustainable manner;
- c) to promote social and economic development;

- d) to promote a safe and healthy environment; and
- e) to encourage the involvement of communities and community organisations in the matters of local government.”

“153. A municipality must –

- a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- b) participate in national and provincial development programmes”.

These obligations have been further defined in legislation such as the Municipal Structures Act 117 of 1998, the Municipal Systems Act 32 of 2000 and other national legislation.

### **Example: Western Cape by-laws**

The *By-Law relating to Streets, Public Places and The Prevention of Nuisances* was approved on 24 May 2007, and promulgated on 28 September 2007 under reference number PG 6469; LA 44559.

**Section 2** of the By-law lists a range of prohibited behaviour. *The ones used most commonly against sex workers are:*

### **Regulation 2:**

“No person, excluding a peace officer or any other official or person acting in terms of the law, shall –

- (a) when in a public place –
  - (i) intentionally block or interfere with the safe passage or free passage of a pedestrian or motor vehicle; or
  - (ii) intentionally touch or cause physical contact with another person, or his property, without that person’s consent.”
- (b) approach or follow a person individually or as part of a group of two or more persons, in a manner or with conduct, words or gestures intended to or likely to influence or to cause a person to fear imminent bodily harm or damage to or loss of property or otherwise to be intimidated into giving money or other things of value.”

**Regulation 2(3)(f):**

“No person shall in a public place, perform any sexual act”.

**Regulation 2(3)(g):**

“No person shall in a public place, appear in the nude or expose his or her genitalia, except where designated by the City as areas where nudity is permitted, provided that this shall not apply to children below the age of seven.”

**Regulation 2(3)(j):**

“No person shall in a public place, solicit or importune any person for the purpose of prostitution or immorality”.

**Regulation (3):**

“No person shall in a public place –

- (a) cause or permit to be caused a disturbance by shouting, screaming or making any other loud or persistent noise or sound, including amplified noise or sound.”

**8.7.2 Abuse of loitering, spot fines and arrests**

The fact that sex workers are arrested without a warrant but charged for “loitering” clearly indicates that arresting officers guilty of this practice are unable to prove that any of the requirements for an arrest without a warrant is present.

The procedures required by the municipal by-laws are seldom followed in practice. Once arrested, sex workers are required to pay a *spot fine* to the arresting officer. Alternatively, they are taken to the police cells where they are kept overnight and on the following day given an option to pay a fine. The amount is dependent on the province and area, and these fines range from R300 to R1,000.

With arrests (under national legislation or by-laws), the sex workers are seldom brought to court nor do they receive any receipts for the fines paid. Even if the arrest is justified, no charges are properly laid which would warrant arrest.

In the circumstances, it is incomprehensible why the police would regularly resort to the most drastic remedy available to them to secure sex workers’ attendance in court, especially if the cases are never deemed real or serious enough to end up in court.

The experience of sex workers typically testifies to the human rights violations that occur during and after arrest and the devastating impact that this has on their lives. The regular arrest of sex workers when they have not committed the acts for which they have received fines for, conveys a practice of abusing the law to deliberately persecute a specific group of people. This practice violates the right to be equal before the law and amounts to unfair discrimination

**Regulation 23 of the Western Cape by-laws** relating to public spaces states that, even if the sex worker is guilty of the offence, *the by-laws set out procedures that should be followed:*

- The appropriate response would be to give the person a written notice to stop the offending activity.
- Only if he/she fails to adhere to the terms of the notice, can the person be fined or given a notice to appear in court.
- Where a person has been fined, they should have an opportunity to make representations if they feel the fine was incorrectly levied against them, similar to the current system allowed for traffic fines.

Where a fine has not been paid after it becomes due, arrest would be allowed only as a last resort if necessary to be able to secure a person's attendance in court. In most cases, a summons would be sufficient to ensure attendance in court.

### 8.7.3 Legal remedies to challenge by-laws

The cases of *Fedsure Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*<sup>168</sup> and *City of Cape Town and Other v Robertson and Other*<sup>169</sup> are authority that the passing of by-laws is a proper legislative act.

This means that, while by-laws can be challenged on grounds of legality, including consistency with the Constitution, they cannot be challenged on administrative review grounds.

This changes the position, prior to the Constitution, when by-laws made by a municipality could be challenged on the same grounds as you might challenge an executive act of the municipality.

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<sup>168</sup> 1999 (1) SA 374 (CC).

<sup>169</sup> 2005 (2) SA 323 (CC).

The new position under the Constitution was usefully summarised by Moseneke J in *Robertson*:

“The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, inviolable and possesses the constitutional latitude within which to define and express its unique character subject to constraints permissible under our Constitution.

A municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys ‘original’ and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits.”<sup>170</sup>

In *Fose v Minister of Safety and Security*<sup>171</sup>, Kriegler J held in a concurring judgment that the supremacy clause, namely Section 2 of the Constitution<sup>172</sup> automatically made any unconstitutional law or conduct a nullity.<sup>173</sup>

Therefore the applicant must allege that law or conduct is inconsistent with the Constitution. Section 172(1) provides that, when deciding a constitutional matter, court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. A court is obliged to declare a law or conduct invalid.

## SUCCESSFULLY CHALLENGING BY-LAWS

A good example of a successful challenge to a by-law is the case of *City of Cape Town v Ad Outpost*.<sup>174</sup> The by-law challenged in this case required that any person who intends to display a sign must make a written application for prior approval from the municipality. The conditions for approval required that the sign describe the trade or activity conducted on the site. The by-law thus effectively prohibited third party advertising on vacant land.

<sup>170</sup> *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC), at para 60. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 26 and 38 and *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* [2007] ZASCA 1; 2007 (4) SA 276 (SCA) at paras 37-40.

<sup>171</sup> 1997 (3) SA 38 (CC), para 27.

<sup>172</sup> “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

<sup>173</sup> *Fose*, *ibid*, note 5, para 94.

<sup>174</sup> 2000 (2) SA 733 (C).

Ad Outpost challenged this by-law on the basis of the right to freedom of expression, and the Cape Town High Court upheld their claim. The Court held that the by-law breached Ad Outpost's right to freedom of expression, and was too extensive and rigid in its approach to be saved as reasonable and justifiable in an open and democratic society, as required by Section 36(1) of the Constitution. Accordingly, the by-law was declared invalid.

Similarly, in the case of *Joseph and Others v City of Johannesburg and Others*,<sup>175</sup> a by-law was held to be unconstitutional and therefore invalid. In this case, one of the by-laws permitted the local authority responsible for providing electricity to citizens to disconnect power without notice being provided to consumers.

It was argued successfully that, under the Constitution and the Promotion of Administrative Justice Act 3 of 2000, citizens receiving electricity from the local authority had a right to receive this basic municipal service, and a right to procedural fairness if a decision was taken to materially and adversely affect this right. Therefore, to the extent that the by-law purported to do away with the procedural fairness requirement of notification prior to disconnection, it was unconstitutional and invalid.

However, in order to eradicate the conduct perpetrated by the police, the declaration of invalidity may not be enough. Positive action may be required from government and it may therefore be necessary to grant a *mandamus* or even a structural interdict.

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175 2010 (4 ) SA 55 (CC).

# Civil law and procedure

This section is drawn from the WLC's Paralegal Manual, 2013.

## 9.1 Prescription periods

All claims fall away (*prescribe*) after a certain period of time (*prescription period*). In other words, you will lose your right to claim against another person if you wait too long to make the claim.

If you are helping someone with a case, it is very important that you do not delay in taking follow-up action and that you advise the person immediately of the time-limits. The Prescription Act 68 of 1969 says that all civil claims prescribe 3 years from the date of the incident.

*Examples of prescription periods:*

- A motor vehicle insurance claim form must be sent in within 2 years from the date of the accident.
- If you have been unfairly dismissed and wish to apply for reinstatement, the application for reinstatement must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) within 30 days of the unfair dismissal.
- For claims against the State, the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 says you must give notice of your intention to bring legal action against a government department within 6 months from the date of the incident.



If you do not give notice within 6 months, then you have to give good reasons for the delay in applying for *condonation*. This means that you ask the court to allow you to continue with the claim even though it has officially prescribed.

## 9.2 Preparation for a civil claim

*Before the steps in a civil claim can begin, this is what you must do:*

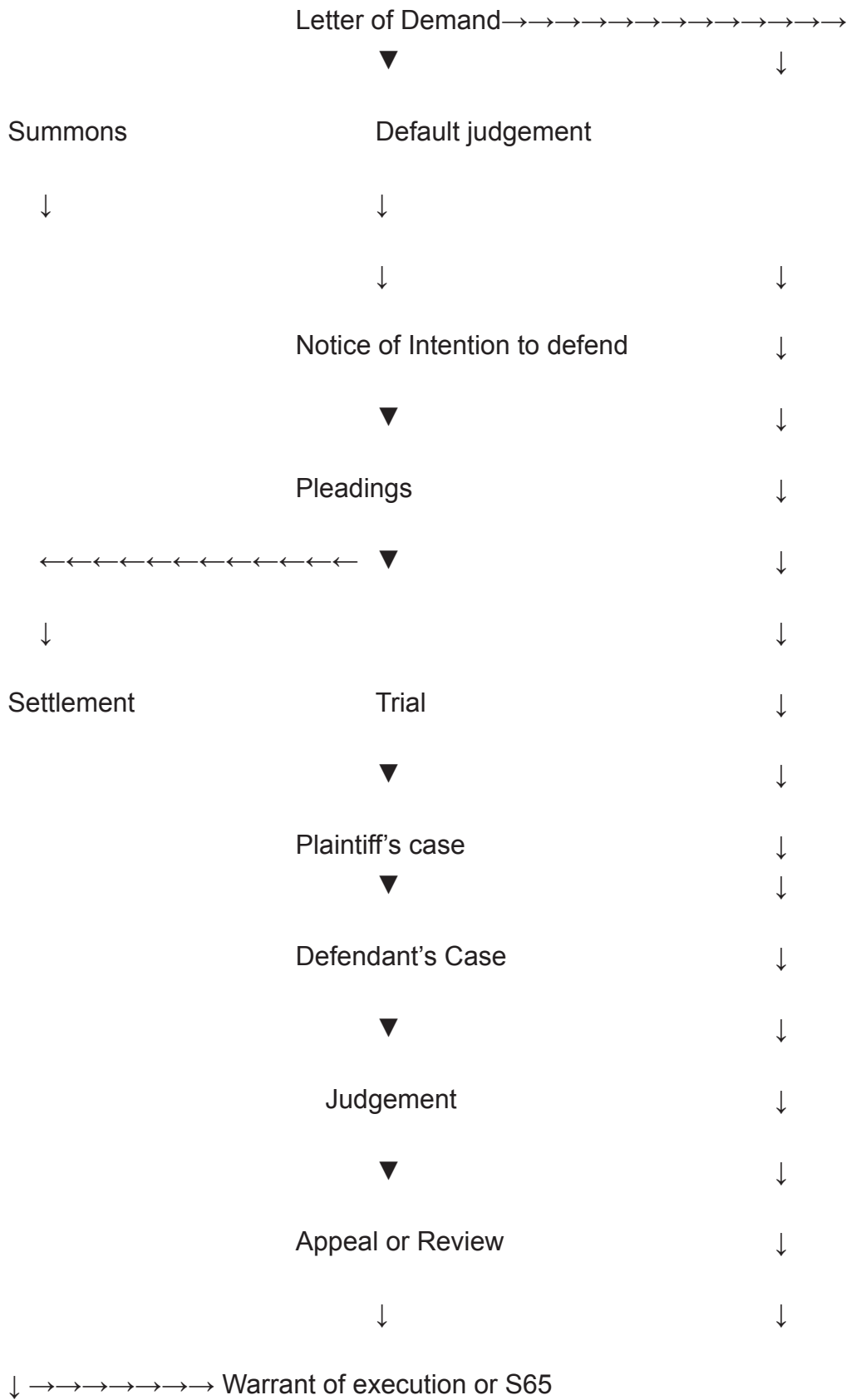
1. Draw up a detailed statement about what happened.
2. Collect evidence to support the case. For example: take pictures of injuries, go to a doctor for treatment and a medical certificate, get the names, addresses and statements of witnesses who saw the incident.
3. Take the statement and evidence to an attorney.
4. Make a criminal case at the same time if the act against you is also a crime.

## 9.3 Steps in a civil claim in the Magistrate's Court

The aim in a civil claim is for the plaintiff to prove to the court that his/her case is 'more likely' than the case of the defendant. In court this is called proving a case *on a balance of probabilities*. This is different from the criminal case, where the State has to prove guilt *beyond a reasonable doubt*.

We will now go through the steps involved in civil claims:

Figure 6: Steps in a civil case



## LETTER OF DEMAND

The plaintiff's attorneys write a letter to the defendant. This letter states what the plaintiff wants, and gives the defendant a certain number of days to do it. It is a warning that the plaintiff plans to take the other person to court unless the defendant agrees to his/her demands.

## ISSUING A SUMMONS

If there is no reply to the letter of demand, the attorney draws up and issues a summons. The *summons* is a document stamped by the court, setting out the details of the plaintiff's claim. It also tells the defendant to tell the court within 5 days whether the case will be defended.

*The defendant can answer the summons in one of these ways:*

- Admit to owing the money and pay immediately.
- Try to settle the case by reaching an agreement with the other side after discussing it with the plaintiff's attorney.
- Defend the claim: complete the form called a Notice of Intention to Defend at the back of the summons and return it to the court within 10 days.

## DEFAULT JUDGEMENT

In all cases, it is very important not to ignore the summons or to wait until after its *return date* has expired. If the defendant does not tell the court that the case will be defended, in other words, if the defendant does nothing about the summons, then judgement will be given in favour of the plaintiff. This type of judgement is called a *default judgement*.

If the court gives default judgment, the plaintiff can claim the defendant's property with a Warrant of Execution. The court will take some of the defendant's possessions and sell them to get the money to pay the plaintiff.

## THE DEFENCE

If the defendant wants to defend the case in court, then he/ she must fill in a form called a Notice of Intention to Defend on a form at the back of the summons. It gives the reasons why the defendant does not want to pay what the plaintiff claims in the summons. The form must be stamped at the court. Then a copy is given to the plaintiff's attorneys.

## PLEADINGS

The legal documents in a civil claim are called pleadings. These pleadings are difficult to understand and are written according to the rules of each court. At any time during the pleadings stage, the defendant can decide to settle the case. In other words, both sides can reach an agreement without the magistrate or judge having to decide the case. The aim of *settling* a case is usually to save both sides time and money. If the case is not settled this way, then it will go to court.

## THE TRIAL

At the trial, the plaintiff's attorney and the defendant's attorney each present their side of the case. This is done by giving evidence and calling witnesses. As in criminal cases, witnesses can be cross-examined and re-examined. When the attorneys decide that they have led enough evidence, they close their client's case. The aim of leading evidence is to persuade the court that the attorney's client should win.

## JUDGEMENT

The magistrate or judge decides which side is right and gives judgement in favour of that side.

## REVIEW OR APPEAL

The plaintiff or defendant can apply for an appeal or review, if he/she is not satisfied with the outcome of the case or the way in which the proceedings were conducted.

## COSTS

Usually the party losing the case must pay their own legal costs and most of the legal costs of the other side. This is up to the magistrate or judge to decide as part of the court's judgement.

## ENFORCING A CIVIL JUDGEMENT

*Enforcing* a judgement means making sure that the side that lost the case pays. It is usually necessary to use an attorney to enforce a judgement. There are different ways to enforce a judgment, including paying instalments and getting a warrant of execution.

## PAYING INSTALMENTS

If the defendant cannot pay the sum of money all at once, he/she can offer to pay it off in instalments.

## WARRANT OF EXECUTION

*If the defendant still does not pay after the judgement has been given, the plaintiff can ask the court to issue a Warrant of Execution:*

- This is a court order allowing the Sheriff of the Court to go to the defendant's home and list the items owned by him/ her like a television and fridge, and use these to pay off the debt. This is called *attaching* the property. The Sheriff of the Court can also attach the whole house if necessary.
- The court attaches the defendant's property because this is the only way it can force the defendant to pay the judgement costs and any other amounts the defendant owes.
- The Sheriff of the Court then takes the attached property and sells it. The amount of the judgement plus legal costs is then paid to the plaintiff from what is made at the sale. If anything is left over, it will be paid back to the defendant.
- If the defendant does not have enough property which can be sold to pay off the plaintiff's claim, the plaintiff can ask the court to look into the defendant's financial position. The court can then order the defendant to pay a certain amount from his/her employer and send it to the plaintiff. If the defendant refuses to obey this court order, she/ he can be arrested for *contempt of court*.

## 9.4 Civil claim against unlawful arrest and detention

A sex worker can make a civil claim for unlawful arrest or unlawful detention. She can claim compensation money for pain and suffering and any medical costs. This is a different procedure from bringing a criminal charge.

### 9.4.1 How to make a claim for unlawful arrest and detention

*When you come across a problem like this, find out:*

- Did the police inform your client that she is under arrest?
- Did the police have a warrant of arrest?
- When she got to the police station, did they inform her of the charge?

- Did the police read her rights in the Notice of Rights or inform her of her rights in a language that she understands?
- When she was detained, were the cell, blankets and mattresses clean?
- While she was detained, was she allowed to make a phone call?
- Was she allowed to speak to an attorney?
- How long was she detained for?
- Did she appear in court?
- Was she allowed to get bail?
- What was the outcome of the court appearance?

If your client answers NO to even ONE of these questions, then the arrest is unlawful and she/he can bring a civil action against the Minister of Safety and Security for unlawful arrest and wrongful detention.

Use our WLC Human Right Violations Questionnaire: Police Harassment/Abuse as your source for checking this information.

See this questionnaire on page....

When you advise sex workers on bringing a civil action, it is important to inform them that a damages claim is an action proceeding: she/he will have to stand up in court to testify about what happened.

#### **9.4.2 Different kinds of damages claims**

*You can advise your client that she can sue for damages for things like:*

- *Breach of her right to freedom* because it was taken from her for no good reason. Ask her if she has proof of her detention, for example, a property slip or a copy of the Notice of Rights. If she has no proof, you can ask the State to provide this when you ask them for documents before the case goes to court.
- *Contumelia* (physical, verbal or sexual assault): she must be able to describe what happened and the identity of the police officer who assaulted her. If she

is unable to provide the identity of the police officer, you may find a name on the Notice of Rights, or ask her to at least describe what he looked like.

- *Inconvenience and discomfort:* for example, for bad conditions in the cell. Ask for details of the conditions she experienced.

### 9.4.3 Steps when bringing an action against the Minister

If a police officer committed a crime during the course and scope of their duties, the sex worker can sue the Minister of Safety and Security. She/he will have to consult with an attorney to assist with the claim. The reason why the claim is made against the Minister is because the Minister is the police officer's employer and is therefore liable for his/her actions.

#### **NOTICE**

You have to give notice to the Minister within 6 months after the unlawful arrest. The notice is given under Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

In this notice, you will set out the contents of the claim and demand the money within 30 days. If the Minister does not pay within 30 days, you will have to go to court to continue with the claim.

See the example of a Notice on the next page.

Figure 7: Example: Notice to Minister

25 November 2011

Minister of Safety and Security

**PER REGISTERED MAIL**

Mr Nathi Mthethwa

Wachthuis, 7<sup>th</sup> Floor

231 Pretorius Street

PRETORIA 0001

Dear Minister

**NOTICE OF LEGAL PROCEEDINGS IN TERMS OF SECTION 3(1)(A) OF THE  
INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF  
STATE ACT 40 OF 2002**

We act for (insert name of client), ("our client").

1. Our client instructs that on the 02 June 2011 at (include address) she was arrested without a warrant, where after she was taken to (name of police station) Police Station. Our client was detained until approximately 19h00 on the 02 June 2011, when she was released. (Here one has to set out the reasons why you are suing the police. One has to give a summary of the facts)



2. We attach a copy of a Notice of Rights issued to our client. It is annexed hereto as Annexure "1".
3. You are hereby given notice in term of Section 3(1)(A) of the Institution of Legal Proceedings Against Certain Organs State Act 40 of 2002 ("the Act") of our client's intention to bring a civil claim against the Minister of Safety and Security ("the Minister") for damages arising out of an unlawful arrest and detention.
4. As a result of the unlawful arrest and detention of our client, she has sustained damages in the amount of R100 000.
5. Accordingly we are instructed to demand, as we hereby do, payment of the sum of R100 000 within 30 days of your receipt of this letter, failing which action will be instituted against you for inter alia, wrongful arrest and detention.
6. Our client reserves her right to apply for condonation in terms of Section 3(4) of the Act in the event of this notice being delivered out of time. Our client further reserves her right to raise any alternative and/or additional claim(s) that may be necessary for purposes of instituting the action.
7. In consideration of the nature and extent of our client's claim and the fact that this matter is in the public interest due to its human rights implications, we request, in the event that you do not comply with our demand as stated above, that you kindly furnish us with your consent to proceed with instituting this claim by no later than 09 January 2011.

Yours faithfully,

## SUMMONS

If you did not receive the money within 30 days, then an attorney has to issue a summons with Particulars of Claim.

The *Particulars of Claim* will list the client's story. This is why it is important that you obtain as much information as possible from the client, because the client's statement will be converted into the Particulars of Claim.

*This is the key information that you need to put into your client's statement:*

- Full name of client.
- Contact details and address.
- Client's background: includes where she comes from and when she started working as a sex worker.
- Full details of the event: date, time, street name, what the officers told her, what she said when she responded, and full details or description of the police officers.
- Full details of her drive to the police station – how the police got her into the van. Did they assault her? Did they swear at her?
- Full details of what happened at the police station – did they inform her of her rights? Did they inform her of the reasons for her arrest? Did they take pictures of her? Did they take her fingerprints? Did she sign any documents? Can she name or describe the documents that she signed? Did they allow her to make a phone call?
- Did she go to court, and what happened at court.

See the examples of a Summons on the next page and a Particulars of Claim on page 276.

Figure 9: Example: Particulars of Claim

|  |                  |
|--|------------------|
| <b>BOX 679</b>                           |                  |
| <b>COMBINED SUMMONS</b>                  |                  |
| <b>In the High Court of South Africa</b> |                  |
| (Western Cape High Court Cape Town)      |                  |
| <b>Case No.</b>                          |                  |
| In the matter between:                   |                  |
| <b>NAME SURNAME</b>                      | First Plaintiff  |
| <b>NAME SURNAME</b>                      | Second Plaintiff |
| <b>NAME SURNAME</b>                      | Third Plaintiff  |
| <b>NAME SURNAME</b>                      | Fourth Plaintiff |
| <b>NAME SURNAME</b>                      | Fifth Plaintiff  |
| <b>NAME SURNAME</b>                      | Sixth Plaintiff  |
| and                                      |                  |
| <b>MINISTER OF SAFETY AND SECURITY</b>   | Defendant        |
| <hr/>                                    |                  |
| <b>TO THE SHERIFF OR HIS DEPUTY:</b>     |                  |

INFORM **NATIONAL MINISTER OF SAFETY AND SECURITY  
(DEFENDANT) ONLY**

care of the State Attorney, 22 Long Street, Cape Town.

(hereinafter called the **DEFENDANT**) that

**NAME SURNAME**, an adult female sex worker with her workplace in Voortrekker Road, Bellville, **WESTERN CAPE**.

**NAME SURNAME**, an adult female sex worker residing at no ABC, KTC, Nyanga, **WESTERN CAPE**.

**NAME SURNAME**, an adult female sex worker residing at DEF, Gugulethu, **WESTERN CAPE**.

**NAME SURNAME**, a homeless adult female sex worker with her workplace in Voortrekker Road, Bellville, **WESTERN CAPE**.

**NAME SURNAME** known as GHI, an adult female sex worker with her residential address at JKL, Gugulethu, **WESTERN CAPE**.

**NAME SURNAME**, an adult female sex worker with her residential address at Malawi Camp, Airport, Bishop Lavis, **WESTERN CAPE**.

(hereinafter called the **PLAINTIFFS**),

hereby institutes action against **DEFENDANT** in which action the **PLAINTIFFS** claims the relief and on the grounds set out in the particulars annexed hereto.

**INFORM the DEFENDANT** further that if **DEFENDANT** dispute the claim and wish to defend the action, the **DEFENDANT** shall-

- (i) within **20 [TWENTY]** days of the service upon **the DEFENDANT** of this summons, file with the Registrar of this Court at Keerom Street, CAPE TOWN notice of **DEFENDANT'S** intention to defend and serve a copy thereof on the **PLAINTIFF'S** Attorneys, which notice shall give an address (not being a post office box or poste restante) in terms of Rule 19(3) for the service upon the **DEFENDANT** of all notices and documents in the action;
- (ii) thereafter, and within **(20) TWENTY** days after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the PLAINTIFF a Plea, Exception, Notice to strike out, with or without a counterclaim.

**INFORM the DEFENDANT** further that if the **DEFENDANT** fail to file and serve notice as aforesaid, Judgment as claimed may be given against the **DEFENDANT** without further notice to the **DEFENDANT**, or if having filed and served such notice, the **DEFENDANT** fail to plead, except, make application to strike out or counterclaim, Judgment may be given against the **DEFENDANT**.

AND immediately thereafter serve on the **DEFENDANT** a copy of this Summons and return same to the Registrar with whatsoever you have done thereupon.

**DATED at CAPE TOWN this            day of AUGUST 2012.**

\_\_\_\_\_  
**PER:**  
**NAME of ATTORNEY**  
**(an attorney with the right to appear**  
**in the High Court and certified as**

**such in terms of Section 4(1) of Act  
62 of 1995)**

Attorney for Plaintiff

[ADDRESS]

[TELEPHONE NUMBER]

[EMAIL]

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION)**

**CASE NO:**

In the matter between:

**[INSERT NAME]**

First Plaintiff

**[INSERT NAME]**

Second Plaintiff

and

**MINISTER OF SAFETY AND SECURITY**

Defendant

---

**PARTICULARS OF CLAIM**

---

The Parties

1. The First Plaintiff is [INSERT NAME] (born on [INSERT DATE OF BIRTH]), a major female residing at [INSERT RESIDENTIAL ADDRESS].
2. The Second Plaintiff is [INSERT NAME] (born on INSERT DATE OF BIRTH), a major female residing at [INSERT RESIDENTIAL ADDRESS].
3. The Defendant is the MINISTER OF SAFETY AND SECURITY, cited in his official capacity as the Minister of State responsible for the conduct and affairs of the South African Police Service and who accepts processes at the care of the State Attorney, situated at 22 Long Street, Liberty Building, Cape Town.

Jurisdiction

4. The causes of actions of the Plaintiffs arose within the jurisdiction of the above Honourable Court.

Acting within the course and scope of their employment

5. The police officers referred to herein were at all material times acting within the course and scope of their duty as such or acting within the interests of

the Defendant.

#### Notice in terms of Section 3 of Act 40 of 2002

6. The First and Second Plaintiffs have given notice to the Defendant of their intention to institute legal action in accordance with Section 3 of Act 40 of 2002, attached hereto, marked "XX 1".

#### The Facts

7. On or about 25 October 2013 on Saturday morning at approximately 03h30, at or near Voortrekker Road, Bellville, the First and Second Plaintiffs were arrested without a warrant, by two (2) police officials ,a female and male, whose name and ranks are unknown to the Plaintiffs.
8. Thereafter the Plaintiffs were detained at XYZ Police Station at the instance of the abovementioned police officials. The cells upon which Plaintiffs were kept were dirty and wet. The Plaintiffs did not receive any blankets for the night nor were they given food and water. The Plaintiffs were not allowed to make a phone call to inform their family members of the arrest and detention.
9. The First Plaintiff was required to take her Anti Retro Viral (ARV) medication whilst detained. She asked the police officer on duty, whose full and further particulars are unknown to the First Plaintiff, if she could have food so that she could take her medication. The police officer refused. As a result of failure to take her medication on that night, the First Plaintiff developed a rash on her skin and was coughing which caused a pain on her chest.
10. The First and Second Plaintiffs were released from custody on 25 October 2013 at 09h00 without an explanation.
11. The First and Second Plaintiffs were detained in conditions not consistent with human dignity.

#### The Plaintiffs' Rights and the Constitution

12. In terms of Section 7 (2),and Section 205 (3) read with Sections 1(c) (2), 2, 8 (1) and 41 (1) (c) and having regard to Sections 38, 39 (1), 39 (2) and 173 of the Constitution, the South African Police Service (herein referred to as SAPS) members were obliged to:



- 12.1 Protect the Plaintiffs' dignity (S 10);
- 12.2 Not to treat or punish the Plaintiffs' in a cruel, inhumane or degrading way (S 12 (1) (e));
- 12.3 Protect the right their bodily and psychological integrity (S 12 (2));
- 12.4 Secure their well-being (S 41 (1) (b));
- 12.5 Inform the Plaintiffs' at their detention, of the right to choose and consult with a legal practitioner and to be informed of this right promptly (S 35 (2) (b));
- 12.6 To ensure that the condition of retention are consistent with human dignity and of adequate accommodation (S 35 (2) (e));
- 12.7 To be pro-active, effective, coherent, responsive and accountable in the above regard (S 1 (d) and S 41 (1) (c)).

#### Defendant's Breach

13. In breach of the abovementioned and further wrongfully and negligently, the SAPS members, whose identify are unknown to the Plaintiffs':
  - 13.1 Acted with indifference to the health of the First Plaintiff;
  - 13.2 Failed to afford the Plaintiffs' a telephone call after their arrest, alternative the said members of SAPS failed to call the family members the Plaintiffs and inform them of the arrest and detention;
  - 13.3 Failed to fulfil the Plaintiffs' constitutional rights and acted in breach thereof;
  - 13.4 Failed to protect the Plaintiffs' dignity (Section 10);
  - 13.5 Failed to secure their well-being (Section 41 (1) (b));
  - 13.6 Failed to ensure conditions of detention that are consistent with human dignity and adequate accommodation (S 35 (2) (e)).

Damages

14. As a result of the foregoing, the First and Second Plaintiffs have suffered damages made up as follows:

14.1 General damages for unlawful arrest and unlawful detention, including discomfort, inconvenience and contumelia:

- (i) The First Plaintiff RXX;
- (ii) The Second Plaintiff RXX.

Conclusion

15. **WHEREFORE** the Plaintiffs pray for Judgment against the Defendant:

- (a) Payment of the sum of R XX as damages.
- (b) Payment of interest on the aforesaid amount or any other amount which may be awarded by this Honourable Court calculated at the rate of 15,5% per annum from date of judgment to date of payment.
- (c) Costs of suit.
- (d) Further and/or alternative relief.

**DATED** at **CAPE TOWN** on this the **DAY** of.....**XX**.

Per: \_\_\_\_\_

[name of attorney]

Plaintiffs' Attorneys

Address

Tel:

Fax:

(Ref:)

**TO: THE REGISTRAR**

High Court

**CAPE TOWN**

**AND TO: THE STATE ATTORNEY**

First and Second

Defendants' Attorneys

4<sup>th</sup> Floor, 22 Long Street

**CAPE TOWN**

## PLEADINGS

After the summons is issued, the State Attorney will have to send a Notice of Intention to Defend. After this is done, pleadings go back and forth. These documents will list the story of what happened, and the State will respond to explain why they think it did not happen in the way the sex worker has described it.

When pleadings are sent, this is an opportunity for the sex worker's attorney to ask the State to submit a *discovery* affidavit – in this the State has to go through the Occurrence Book and Custody Register to check if the sex worker was in fact detained. As her attorney, you can ask the State to produce copies of the relevant pages.

## CLOSE OF PLEADINGS

After the pleadings have been finalised, the case will be put on the court roll and you will prepare for trial. Once it goes to court, the normal procedures of giving evidence, cross-examination and re-examination will follow.

*See the examples of these pleadings below:*

- Defendant's Notice of Intention to Defend (Figure 10): page 282.
- Defendant's Plea (Figure 11): page 283.
- Plaintiff's Notice of Bar (if the State does not submit their Plea in time) (Figure 12): page 288.
- Plaintiff's Plea in Replication (Figure 13): page 290.
- Plaintiff's Discovery Notice (Figure 14): page 292.
- Plaintiff's Notice to Compel Discovery (if the State does not comply in time) (Figure 15): page 294.
- Founding Affidavit supporting Notice to Compel Discovery (Figure 16): page 296.

Figure 10: Example: Notice of Intention to Defend

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION)**

**CASE NO:**

In the matter between:

**[INSERT NAME]**

**First Plaintiff**

**[INSERT NAME]**

**Second Plaintiff**

and

**MINISTER OF SAFETY AND SECURITY**

**Defendant**

---

**NOTICE OF INTENTION TO DEFEND**

---

**BE PLEASED TO TAKE NOTICE** that Defendants intend to defend this action and have appointed the address of State Attorney, 4<sup>th</sup> Floor, Liberty Centre, 22 Long Street, Cape Town, as the address for the service upon them of all notices and documents in the action.

**DATED AT \_\_\_\_\_ ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ [YEAR]**

Figure 11: Defendant's Plea

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF BELLVILLE  
HELD AT BELLVILLE

Case Number:

In the matter between:

**ABC**

Plaintiff

and

**THE MINISTER OF SAFETY AND SECURITY**

Defendant

---

**DEFENDANT'S PLEA**

---

Defendant pleads to the Plaintiff's Particulars of Claim as follows:

1. **AD PARAGRAPH 1 THEREOF:**

Save to state that the Plaintiff's names are **ABC**

Defendant has no knowledge of the remainder of the allegations contained in this paragraph and therefore cannot admit same and puts the Plaintiff to the proof thereof.

2. AD PARAGRAPHS 2 THEREOF:

Save for denying that the defendant is the Minister of Safety and Security, but the Minister of Police, the Defendant admits each allegation in this paragraph.

3. AD PARAGRAPHS 3 TO 5 THEREOF:

Defendant admits the allegations contained in these paragraphs.

4. AD PARAGRAPH 6 THEREOF:

5. AD PARAGRAPHS 6 AND 7 THEREOF:

5.1 It is admitted that the Plaintiff was lawfully arrested on 17 November 2013 by members of the South African Police Services at approximately 00h15 and detained at XYZ Police Station until he was released on the same day at 9h10.

5.2 In amplification of the aforesaid admission, Defendant avers that the plaintiff was lawfully arrested in terms of Section 40(1) (a) of the Criminal Procedure Act 51 of 1977(herein after referred to as the CPA). Defendant avers further that the Plaintiff was arrested for contravening section 2(3)(b) of the City of Cape Town Street By—law 2007.

5.3 The aforesaid detention was lawful in terms of section 50 of the Criminal Procedure Act 51 of 1977.

5.4 The remainder of the allegations contained in this paragraph are denied as if specifically set forth and traversed and Plaintiff is put to the proof thereof with Defendant reserving its right to lead evidence in rebuttal of any of the said allegations

6. **AD PARAGRAPHS 8 AND 9 THEREOF:**

The allegations contained in these paragraphs are denied as if specifically set forth and traversed and Plaintiff is put to the proof thereof with Defendant reserving its right to lead evidence in rebuttal of any of the said allegations

7. **AD PARAGRAPH 10 THEREOF:**

Defendant admits that the Plaintiff was released at approximately 9h10 on the 17<sup>th</sup> of November 2013.

8. **AD PARAGRAPH 11 THEREOF:**

Defendant denies each and every allegation contained in these paragraphs as if specifically set forth and traversed and puts the Plaintiff to the proof thereof.



9. **AD PARAGRAPHS 12 TO 19 THEREOF:**

9.1 Defendant admits the allegations contained in these paragraphs insofar as they are consistent with sections of the Constitution referred to therein.

9.2 The remainder of the allegations contained herein are denied and the Plaintiff is put to the proof thereof.

10. **AD PARAGRAPHS 20 TO 26 THEREOF:**

Defendant denies that he and/or his members were in breached of any duty referred to in these paragraphs and puts the Plaintiff to the proof thereof.

11. **AD PARAGRAPH 27 THEREOF:**

Defendant denies each and every allegation contained in this paragraph as if specifically set forth and traversed and puts the Plaintiff to the proof thereof.

12. **AD PARAGRAPH 28 THEREOF:**

Defendant admits its refusal to pay to the Plaintiff the sum claimed but denies it is liable to the Plaintiff in the amount claimed or at all.

**WHEREFORE** the Defendant prays that the Plaintiff's claim be dismissed with costs and that judgment be entered in its favour with costs.

DATED AT CAPE TOWN ON THIS 5<sup>th</sup> DAY OF SEPTEMBER 2014

**STATE ATTORNEY**

Per: \_\_\_\_\_

(NAME)

Defendant's Attorney

4<sup>TH</sup> Floor

22 Long Street

**CAPE TOWN**

8001

(Ref: 1277/14/P17)

TO: **THE CLERK OF THE CIVIL COURT**  
Magistrate's Court  
BELLVILLE

AND TO: **WOMENS LEGAL CENTRE.**  
Plaintiff's Attorneys  
2th Floor  
Constitution House  
124 Adderley Street  
CAPE TOWN  
(Ref SLM/al/P6/L/0010)

Figure 12: Example: Notice of Bar

**IN THE HIGH COURT OF SOUTH AFRICA**

**WESTERN CAPE DIVISION, CAPE TOWN**

**CASE NO:**

In the matter between:

|            |                         |
|------------|-------------------------|
| <b>ABC</b> | <b>First Plaintiff</b>  |
| <b>DEF</b> | <b>Second Plaintiff</b> |
| <b>GHI</b> | <b>Third Plaintiff</b>  |
| <b>JKL</b> | <b>Fourth Plaintiff</b> |
| <b>MNO</b> | <b>Fifth Plaintiff</b>  |
| <b>PQR</b> | <b>Sixth Plaintiff</b>  |

and

|  |                  |
|--|------------------|
| <b>MINISTER OF SAFETY AND SECURITY</b> | <b>Defendant</b> |
|--|------------------|

---

**NOTICE OF BAR**

---

**TAKE NOTICE THAT** the Plaintiffs call upon the Defendant to deliver their amended plea within five (5) days of receipt of this notice.

**TAKE NOTICE FURTHER,** that should the defendant fail to do so, the defendants shall be in default with such plea and *ipso facto* barred.

**DATED AT CAPE TOWN THIS DAY OF MAY 2014.**

---

**WOMEN'S LEGAL CENTRE**

Plaintiff's Attorneys

7<sup>th</sup> Floor Constitution House

124 Adderley Street

CAPE TOWN

8001

Tel: (021) 4245660

Fax: (021) 4245206

**Ref: SLM/al/P6/L/0034**

**TO: THE REGISTRAR**

HIGH COURT

CAPE TOWN

**AND TO: THE STATE ATTORNEYS**

Defendant's Attorneys

4<sup>th</sup> Floor

22 Long Street

CAPE TOWN

Ref: (name) (2505/12/P12)

Figure 13: Example: Plea in Replication

**IN THE MAGISTRATE’S COURT FOR THE DISTRICT OF BELLVILLE HELD  
AT BELLVILLE**

Case No:

In the matter between:

|            |                  |
|------------|------------------|
| <b>ABC</b> | First Plaintiff  |
| <b>DEF</b> | Second Plaintiff |

and

|  |           |
|--|-----------|
| <b>MINISTER OF SAFETY AND SECURITY</b> | Defendant |
|--|-----------|

---

**PLAINTIFF’S REPLICATION**

---

**TAKE NOTICE** that the First and Second Plaintiff (“the plaintiffs”) replicate to the Defendant’s Special Plea as follows:

**1. AD PARA 1**

- 1.1. The plaintiffs deny that there has been non-compliance with Section 3(2) (a) of the Institution of Legal Proceeding Act (“the Act”).
- 1.2. The first plaintiff was unlawfully arrested on 19 October 2010.
- 1.3. On 17 November 2010 the first plaintiff sent a letter giving notice of her intention to institute proceedings against the Minister of Safety and Security. This letter was sent well within the 6 month period prescribed by the Act and is attached hereto as Annexure “**SHN1**”.
- 1.4. On 10 January 2011 the first plaintiff forwarded a second letter giving notice of her intention to institute proceedings against the Minister of Police. This letter was sent well within the 6 month period as prescribed by the Act and is attached hereto as Annexure “**SHN2**”
- 1.5. Although the letter is dated 10 January 2010, it was posted on 10 January 2011, as evidenced by the Post Office Slip attached hereto as

Annexure “**SHN3**”.

1.6. The second plaintiff was arrested on the 19 October 2011.

1.7. On 17 November 2010 the second plaintiff sent a letter giving notice of her intention to institute proceedings against the Minister of Safety and Security. This letter was sent well within the 6 month period prescribed by the Act and is attached hereto as Annexure “**WL1**”.

1.8. On 10 January 2011 the plaintiff forwarded a second letter giving notice of her intention to institute proceedings against the Minister of Safety and Security. This letter was sent well within the 6 month period as prescribed by the Act and is attached hereto as Annexure “**WL2**”

1.8.1. Although the letter is dated 10 January 2010, it was posted on 10 January 2011, as evidenced by the Post Office Slip attached hereto as Annexure “**WL3**”.

**WHEREFORE** the plaintiffs prays that the defendant’s special plea be dismissed with costs.

**DATED** at **CAPE TOWN** on this **DAY** of **AUGUST 2011**.

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Plaintiff’s Attorneys

To: **THE CLERK OF THE COURT**  
Magistrate’s Court  
**BELLVILLE**

And to: **STATE ATTORNEY**  
Defendant’s Attorney  
4<sup>th</sup> Floor  
22 Long Street  
**CAPE TOWN**

Figure 14: Example: Discovery Notice

|   |                  |
|---|------------------|
| <b>IN THE HIGH COURT OF SOUTH AFRICA</b>  |                  |
| <b>(WESTERN CAPE DIVISION, CAPE TOWN)</b> |                  |
|   | <b>CASE NO:</b>  |
| In the matter between:                    |                  |
| <b>ABC</b>                                | First Plaintiff  |
| <b>DEF</b>                                | Second Plaintiff |
| <b>GHI</b>                                | Third Plaintiff  |
| <b>JKL</b>                                | Fourth Plaintiff |
| and                                       |                  |
| <b>MINISTER OF SAFETY AND SECURITY</b>    | Defendant        |

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**DISCOVERY NOTICE IN TERMS OF RULE 35**

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**TAKE NOTICE** in terms of Rule of Court 35(1) that the Plaintiffs hereby require that the Defendant make discovery on oath within twenty (20) days of receipt hereof of all documents and tape recordings relating to any matter in question in this action (whether such matter is one arising between Plaintiffs and Defendant or not) which are or have at any time been in possession or control of the Defendant.

**TAKE NOTICE FURTHER** in terms of Rule of Court 35 (8) that the Defendants are hereby required to specify in writing particulars of dates and parties of or to any document or tape recording intended to be used at the trial of this action on behalf of the Defendant.

**TAKE NOTICE FURTHER** in terms of Rule 35 (6) that the Plaintiffs requires that the Defendant shall make available for inspection within five (5) days after delivery of their Discovery Affidavits aforesaid all documents or tape recordings which are referred to therein and which are not privileged.

**TAKE NOTICE FURTHER** in terms of Rule 35 (10) that that Plaintiffs requires the Defendant to produce at the hearing of this matter the originals of all

documents or tape recordings discovered by him as aforesaid, not being privileged documents.

**DATED AT CAPE TOWN THIS DAY OF JULY 2014.**

---

Plaintiffs' Attorneys

**TO: THE REGISTRAR OF THE HIGH COURT**  
Western Cape Division  
CAPE TOWN

**AND TO: THE STATE ATTORNEY**  
Defendants' Attorneys  
4<sup>th</sup> Floor  
22 Long Street  
CAPE TOWN



Figure 15: Notice to Compel Discovery

**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF THE  
WESTERN CAPE**

**HELD AT BELLVILLE**

Case No: RCC BELL:

In the matter between:

**ABC**

Applicant

and

**MINISTER OF SAFETY AND SECURITY**

Respondent

---

**NOTICE OF MOTION**

---

**BE PLEASED TO TAKE NOTICE** that the application will be made on behalf of the above-mentioned Applicant on the \_\_\_\_\_ day of July 2014 at 08:30 am or so soon thereafter as Applicant's attorney may be heard for an order in the following terms:

1. Compelling the Respondent to comply with the Applicant's Rule 23 Notice and make discovery on oath within 10 days of service of the court order, of all documents and tape recordings relating to any matter in question in this action which are or have been in the Respondents possession or control; namely:
  - 1.1 In respect of Claim A (27 March 2010), copies of the SAP 13, SAP 328, Occurrence book number 1676, and a copy of the arresting officer's pocket book;
  - 1.2 In respect of Claim B (19 May 2010), Applicant was detained at XYZ Police Station. A copy of the fine, notice of rights, SAP 10, SAP 14, SAP 328, a copy of the arresting officer's pocket book;
  - 1.3 That the Respondent pays the costs of this application;
  - 1.4 Granting the applicant further and/or alternative relief.

**TAKE NOTICE FURTHER** that the affidavit of (name of the attorney) which is annexed hereto will be used in support of this application hereto.

**TAKE NOTICE FURTHER** that if you intend opposing this application you are required:

- (a) To notify the Applicant's attorney in writing of your intention to do so on or before the \_\_\_\_\_ 2014;
- (b) And within 10 days after you have given so notice of your intention to oppose the application, to file your answering affidavits, if any, and further that you are required to appoint in such notice an address referred to in rule 55(1) (g) at which you will accept notice and service of all documents in these proceedings.

If there is no such notice of intention to oppose, the application will be made on the \_\_\_\_\_ 2014.

**DATED AT CAPE TOWN ON THIS \_\_\_\_\_ day of July 2014.**

\_\_\_\_\_  
Attorney on behalf of the Plaintiff

**TO: THE CLERK OF THE COURT**  
Regional Court  
Bellville

**AND TO: THE STATE ATTORNEY**  
Attorney on behalf of the Defendant  
4<sup>th</sup> Floor  
22 Long Street  
Cape Town

Figure 16: Founding Affidavit supporting Notice to Compel Discovery

**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF THE  
WESTERN CAPE**

**HELD AT BELLVILLE**

Case No:

In the matter between:

**ABC**

Applicant

and

**MINISTER OF SAFETY AND SECURITY**

Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

(Name of the attorney)

Do hereby make oath and say:

1. I am an adult female attorney, practising as such under the name and style of Women's Legal Centre, with the offices situated at 124 Adderley Street, 7<sup>th</sup> Floor Constitution House, and Cape Town. I am the attorney on record for the Plaintiff in the main action and the Applicant herein.
2. The facts deposed hereto are within my personal knowledge and belief true and correct unless the otherwise is indicated. Where they are not to my personal knowledge, I verily believe them to be true and correct.
3. This is an application to compel discovery by the Respondent in accordance with the Applicant's notice in terms of Rule 23 dated 5 May 2014.

4. The Applicants/ Notice in terms of Rule 23 was served on the Respondent's attorneys on the 5<sup>th</sup> May 2014. A copy of the Notice, showing service to the Respondents is annexed hereto marked "**NJM 1**".
5. On the 11<sup>th</sup> June 2013, I sent a letter to the Respondent's attorneys, requesting discovery of documents in relation to Claims A, B and C of the action in addition to the Notice sent to the Respondent on the 12<sup>th</sup> April 2013. A copy of the aforesaid letter is annexed hereto marked "**NJM 2**".
6. On the 18<sup>th</sup> October 2013 I sent an email to the Respondent's email address, which further requested discovery of items in respect of all claims as mentioned above, and that failure to do so would result in an application to compel discovery. A copy of the letter is annexed hereto marked "**NJM 3**".
7. On the 07<sup>th</sup> November 2013, I received an email from the Respondent's attorney stating that a staff member from the Women's Legal Centre may uplift the necessary documents. A copy of the email is annexed hereto and marked "**NJM4**".
8. On the 18<sup>th</sup> November 2013 the Respondent's attorneys served a copy of the following documents:
  - 8.1 Copy of Charge Sheet with CASE NO.....
  - 8.2 A notice of rights in terms of the constitution with serial number Q 4819011, dated 23 June 2010;
  - 8.3 A notice of rights in terms of the constitution with serial number Q4819011 dated 23 June 2013 ;
  - 8.4 Statement by (name of police officer), date stamped 23 June 2010;
  - 8.5 Written notice to appear in court (C0650083);
  - 8.6 Charge Sheet J15 (81/801118) dated 21 July 2010;
  - 8.7 A Notice of rights in terms of constitution, Q4817720 dated 27 March 2010;
  - 8.8 Statement by (name of police officer ), dated 27 March 2010;

- 8.9 Occurrence book Wednesday, dated 23 June 2010;
- 8.10 A copy of the SAP 10, Saturday, dated 27 June 2010;
- 8.11 A copy of the Cell Register for June 2010; and
- 8.12 A copy of page 3 of Respondent's Discovery Affidavit.
9. On the 03<sup>rd</sup> December 2013, my colleague (name of attorney) sent a letter to the Respondent's attorneys, informing them that the documents served were incorrect and a request was made to furnish us with the correct documents. A copy of the letter is annexed hereto marked "**NJM 5**".
12. To date the Respondent has failed to respond to all requests made to them and furthermore has not made discovery as they have been requested to do so by the Plaintiff in terms of Plaintiff's Rule 23 Notice and the Respondent's discovery has been outstanding since 12<sup>th</sup> April 2013.
13. Accordingly, I pray for an order as set out in the Notice of Motion to which this affidavit is attached to.

I hereby certify that the Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at CAPE TOWN on this \_\_\_\_\_ day of JULY 2014, the regulations contained in Government Notice 1648 of 19 August 1977, as amended, having been complied with.

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COMMISSIONER OF OATHS

Full names:

Occupation:

Address:

# 10

## Labour law

We cover key laws in South Africa which directly affect the working conditions of employees, and disputes in the workplace and ways of resolving these.

For example, sex workers who work in a brothel have the same rights as any other employee to decent working conditions and fair treatment. Similarly, even though sex work is currently criminalised, brothel owners have to follow labour laws.

This chapter is drawn from WLC's Paralegal Manual, 2013.

*Key laws on terms and conditions of employment:*

- Basic Conditions of Employment Act 75 of 1997 (BCEA).
- Occupational Health and Safety Act 85 of 1993.

*Key laws on disputes and ways of settling disputes:*

- Labour Relations Act 66 of 1995 (LRA).
- Employment Equity Act 55 of 1998.

If a client comes to you with a labour-related issue, please fill in our WLC Questionnaire: Human Rights Violations Questionnaire: Labour Matters.

For this questionnaire, see page 78.

## 10.1 The contract of employment

If you agree to work for someone, and that person agrees to pay you for this work, then you and the employer have a *contract of employment*. You are called the *employee*.

### Express and implied terms of a contract

The type of work that you must do, hours of work, wages and a place to live can all be part of your agreement with your employer. These are called *conditions of employment*. They are *express* terms of the contract.

Sometimes you and the employer may not talk about some conditions of employment, for example: taking annual leave. If it is the custom for all employees to take annual leave, then you can also take annual leave. This is part of your contract, even if you did not talk about it. These are *implied* terms of the contract.

### Verbal and written contracts

The law says that a contract does not have to be in writing. If two people speak and they agree about the contract, then this contract is called a *verbal* contract. A verbal contract is also legal and enforceable.

A *written* contract is better. If all the conditions of the contract are written on a piece of paper, and the employer signs the paper, then you have proof of what was agreed.

**Section 29 of the BCEA** says that, except for employees working less than 24 hours per month and employers who employ less than 5 people, the employer must give employees certain particulars of the job *in writing*.

*These details include:*

- A description of the job.
- The hours that the employee will be expected to work.
- Ordinary and overtime rates of payment, including payment in kind (for example, accommodation) and its value.
- Any deductions to be made.
- How much leave the employee will get.

- The notice period.
- The name and address of the employer.
- The date of payment.

If an employee can't read, the particulars must be explained in a language the employee understands.

If you have a contract, but you do not do the thing that was agreed, then you are in breach of the contract. The law says that if one person breaks a contract, then the other person can use the law to force that person to do what was agreed. Breaking a contract is also called a *breach of contract*.

### **Contracts in line with accepted standards**

*A contract of employment must be in line with terms and conditions of employment in:*

- The BCEA or
- Collective agreement or
- Sectoral determination (depending on what the employee is covered by),  
AND
- Any other laws which protect employees such as the Labour Relations Act (LRA) and the Occupational Health and Safety Act.

If a contract breaks any of these protective laws, it is not enforceable unless the conditions are more favourable to the employee.

If an employee is covered by the BCEA, terms and conditions of employment in the BCEA override those in any contract of employment which are less favourable to the employee than those in the BCEA. In other words, the contract cannot be less favourable to the employee than the conditions laid down in the law.

#### **10.1.1 How to use a contract of employment**

If the employer breaks a contract of employment, then an employee can sue the employer in a civil court case for breach of contract:



- It is easier to prove that an employer broke a contract of employment if the contract is in writing.
- If the contract is verbal, it is better to have witnesses. If you don't have witnesses, then it is the employee's word against the employer's word.

The employee always has a right to at least the terms and conditions in the BCEA. If the breach of contract goes against a term or condition in the BCEA, then an employee can go to the Department of Labour and lay a complaint. The Department will issue a Compliance Order which tells the employer to comply with the BCEA. This is a much easier and cheaper way to deal with problems that fall under the BCEA.

### 10.1.2 Changing the contract

An employer can change the contract even if the employee does not agree to the changes. But a change in a contract is like a new contract. To change the contract, the employer must give notice of the change to the employee and must negotiate the new terms and conditions with the employee.

If the employer and employee/s cannot agree about the changes in the contract, then the employer may go ahead and introduce the changes. If the employee then just accepts the new conditions and goes on working, then the new conditions become part of the contract.

*If the employee does not agree to the changes, then he/she can:*

- Refer a dispute to the CCMA or Bargaining Council under Section 64(4) of the LRA. The employee can ask the CCMA to issue a notice to instruct the employer to restore the terms and conditions which were there before the change took place. The employer must obey this notice within 48 hours of receiving it.
- Refuse to accept the changes. If the employer then dismisses the employee, it is an *automatically unfair dismissal*.
- Choose to stop working for the employer. If the employee was forced to resign rather than be forced to accept the changes, it may be an automatically unfair dismissal.

## 10.2 Laws on terms and conditions of employment

*Terms and conditions of employment may be covered by:*

- The BCEA.
- Centralised collective agreements, like Bargaining Council Agreements, under the LRA.
- Sectoral determinations under the BCEA, or Wage Determinations under the Wage Act.
- Special exceptions to centralised collective agreements, sectoral determinations, or the BCEA, made by the Minister of Labour (called *deregulation*).
- Workplace-based collective agreements under the BCEA.
- An individual agreement between a worker and employer (the contract of employment).

The Merchant Shipping Act covers conditions of employment for employees who are at sea within South Africa's territorial waters, while members of the South African National Defence Force, the National Intelligence Agency, and the South African Secret Service are covered by different laws. The Occupational Health and Safety Act gives employees rights to health and safety at work.

## 10.3 Wage regulating measures

Collective agreements, Bargaining Council Agreements (BCAs), Wage Determinations and sectoral determinations (S/WDs), which regulate terms and conditions of employment, are commonly called *wage regulating measures*.

They include different conditions of employment for different employees in different sectors. For example, all these agreements and determinations talk about a period of notice, but in one wage determination the notice period may be one week, while in another it may be 2 weeks.

*Here is a list of the more common aspects relating to conditions of employment which appear in all wage regulating measures:*

- *Area and scope:* defines the geographical area the BCA or S/WD covers, and

describes the type of work included in the BCA or S/WD.

- *Definitions*: defines the different categories of employees, including casual employees.
- *Remuneration*: describes minimum wages for different categories of employees and includes monies received by the employee excluding things like bonuses to assist employees.
- *Payment of remuneration*: how employees should be paid their wages.
- *Deductions*: from an employee's wage.
- *Hours of work and pay*: this includes public holidays and Sunday.
- *Annual leave and sick leave*.
- *Piece work and commission work*: *Piece-work* means that an employee is paid for the number of items produced and not for the hours worked.
- *Termination of contract of employment*: how much notice an employer must give.
- *Prohibition of employment*: for example: pregnant women and children may not be allowed to do certain work.
- *Dispute resolution*: the LRA allows employees and employers to collectively agree to dispute resolution procedures that differ from those in the Act.

If there are any particular terms or conditions of employment that are not specified by a Bargaining Council Agreement or a sectoral determination, then those terms or conditions of employment in the Basic Conditions of Employment Act will apply to employees.

## **10.4 How do you know which law applies to a worker?**

All employees will fall under one of the above laws about conditions of employment. Many employees fall under more than one of these laws.

The laws work in order of priority. For example, if a Bargaining Council Agreement (or other centralised collective agreement) covers the work done by an employee, then that Agreement applies to that employee.

If there is no Bargaining Council Agreement, then you must see whether a sectorial determination or wage determination applies. If no Bargaining Council Agreement or S/WD applies, then the BCEA will apply, unless they are specifically excluded by the BCEA.

An individual contract of employment may override the BCEA provided it is definitely more advantageous for the employee and provided it does not affect certain 'core' rights which are identified in the BCEA.

## **10.5 Basic Conditions of Employment Act**

*All employees are covered by the BCEA (Act 75 of 1997), except:*

- Members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service.
- Unpaid voluntary employees who do work for a charitable organisation.
- Employees who work for an employer for less than 24 hours a month.
- Employees on vessels at sea where the Merchant Shipping Act of 1951 is the law.
- Special provisions for companies employing fewer than 10 employees.

### **10.5.1 Prohibited employment**

#### **CHILD LABOUR**

- Children below 15 may not be required or permitted to work.
- Children between 15 and 18 may not perform work that places their well-being, education, or physical and mental health at risk.

The Department of Labour and state prosecutor will be primarily responsible for enforcing the rules about child labour. To employ children is a criminal offence.

#### **FORCED LABOUR**

No-one may force employees to work (for example, an employee was unfairly dismissed and was also not paid leave pay). This is a criminal offence.

## 10.5.2 Enforcement of the BCEA

The Department of Labour is responsible for enforcing the BCEA. The Department appoints inspectors who have wide powers to make sure employers obey the Act.

*An employee whose employer is not obeying the BCEA can complain to the Department of Labour (not the CCMA):*

- A labour inspector will investigate. If the inspector decides the employer is breaking the law, they will try to get a written promise from the employer to obey the BCEA.
- The inspector may issue a 'Compliance Order' to employers who do not obey the BCEA.
- If the employer ignores the compliance order, the Department of Labour must refer the case to the Labour Court to force the employer to obey. Employers can also appeal against compliance orders to the Director General of Labour or the Labour Court.

If an employee and employer are in a dispute about a matter covered by the Labour Relations Act and they are busy trying to resolve the dispute at the CCMA, then the CCMA can also order the employer to pay money that is owed to the employee as part of the employee's BCEA rights.

For example, if a dismissal is being contested at the CCMA, the CCMA will be able to order an employer to pay outstanding money owed to the employee. The law is made like this just to simplify procedures and to avoid the matter having to go to both the Department of Labour and the CCMA, or the courts.

The Department of Labour will only make a criminal case against an employer for employment of child labour.

Employees can also make their own civil case in the Magistrate's Court and the Small Claims Court to get money that is owing to them.

## 10.5.3 Summary: BCEA

### WORKING TIMES AND PAY

- The maximum working hours are 45 hours a week for ordinary pay.
- The maximum length of a working day is 9 hours if the worker works a 5-day

week, but 8 hours a day if the worker works a 6-day week.

- Where the working week is squashed into fewer days, then shifts of longer hours may be introduced with the employee's consent. For example, an employee can agree to work shifts of 12 hours over 4 working days.
- Overtime is voluntary. No worker may work more than 10 hours of overtime a week.
- Overtime must be paid for each hour of overtime worked, at a rate of one and a half times the worker's ordinary hourly wage.
- No employee may work more than 12 hours in any day (including overtime on that day).

Even though overtime is voluntary, if the employee agreed in the original contract to work overtime when necessary, then this overtime must be worked. If the employee refuses to work overtime then she/he is in breach of the contract and the employer can take disciplinary action against the employee.

An employer, who is employing less than 10 employees, only needs to pay overtime at 'time and a third' of the normal wage. The employer can also agree with the employee to work up to 15 hours overtime during a week instead of the normal 10 hours.

- Payment for Sunday work must be the greater of:
  - ~ Double the normal hourly rate for the amount of Sunday hours worked
  - ~ One full-day's pay.

If it is normally part of a worker's job to work on a Sunday, then s/he must be paid at a rate of time and a half his/her normal hourly rate.

- Employees should be paid for public holidays which fall on a day that they normally would have worked, even though they will be off and not working on the public holiday. A worker can agree to work on a public holiday, but this is voluntary.
- If a worker does agree to work on a public holiday, they must get a normal working day off in exchange or they must be paid double the normal hourly rate for the amount of hours worked on the public holiday. Where a public holiday falls on a Sunday, the following Monday is regarded as a public holiday.

## DEDUCTIONS

Deductions from wages (except those required by law) are not permitted without the written consent of the worker.

*The deductions required by law which an employer makes from the wages of a worker are:*

- Unemployment Insurance Fund (UIF).
- SITE (tax).
- Any deduction ordered by a court.

*The lawful deductions an employer can make from the wages of a worker, if the worker instructs the employer in writing to make the deduction are:*

- Trade union subscriptions.
- Medical aid contributions.
- Pension or provident fund.
- Money to pay back a housing loan or other loan from the employer.
- Money for food and accommodation.
- For loss or damages at work, as long as the employee has been given a hearing to explain the facts.

The amount that can be deducted can be equal to (but not more than) 25% of the normal wage to offset losses.

*Often employers also make unlawful deductions from workers' wages, for example:*

- The employer says there were shortages in a till and the worker has to pay back the shortages.
- The worker breaks something at work.
- The worker owes the employer money, but did not agree that the amount owing should be deducted.
- The worker is off sick and the employer deducts money for the days not worked.

- The worker is absent from work without leave (permission to take annual, family responsibility or maternity leave, or being sick).

*If an employer wants to deduct a fine from a worker's wage, to compensate the employer for loss or damage, the employer can only deduct the fine if:*

- The loss/damage happened during the 'course and scope of employment.'
- The worker was at fault.
- A fair hearing was held to give the worker a chance to state her/his case.
- The employer does not deduct more than the actual value of the loss or damage.
- The total amount deducted is no more than 25% of the employee's wages.
- The employer gives consent in writing.

## **DAILY AND WEEKLY REST PERIODS**

- No employee's hours of work may be spread over more than 12 hours a day. ('Spread over' means from the start of work to the end of work, including any breaks for meals or rest and any overtime.)
- A rest period of one hour is required after every 5 hours worked. This can be reduced to 30 minutes, if the employee and employer agree in writing.
- Every employee has a right to a daily rest period of 12 hours from the end of work on one day to the start of work on the following day. This rest period can be reduced to 10 hours if an employee lives on the premises and gets a meal break of at least 3 hours (this may be relevant to domestic workers, caretakers and farmworkers).
- Every employee has a right to a weekly rest period of 36 continuous hours. For many employees, this is over the weekend.
- An agreement in writing between the employer and employee may reduce the meal interval to not less than 30 minutes or do away with a meal interval if the employee works less than 6 hours on a day.
- The agreement can also provide for a rest period of at least 60 consecutive hours (hours in a row) every 2 weeks.



## LEAVE

Leave can be annual (yearly) leave, sick leave, maternity leave, family responsibility leave or unpaid leave.

### Annual leave

- Every employee has a right to 21 consecutive days paid leave a year. This is the equivalent of three week's time off.
- The employee has a right to take 21 days all in one go, but can choose to use the annual leave to take occasional days off work. The employer then deducts these days of occasional leave that an employee took during the year from the annual leave.
- Annual leave must be taken within 6 months of the end of an annual leave cycle (a year's work).
- If the employee is off work on any other kind of leave, these days do not count as part of annual leave. Another way of saying this is that annual leave cannot be taken at the same time as sick leave, family responsibility leave or maternity leave.
- If the leave period covers a public holiday, then the public holiday does not count as part of the employee's leave. Paid public holidays are: 1 January New Year's Day, 21 March Human Rights Day, Good Friday, Family Day, 27 April Freedom Day, 1 May Employees' Day, 16 June Youth Day, 9 August National Women's Day, 24 September Heritage Day, 16 December Day of Reconciliation, 25 December Christmas Day, 26 December Day of Goodwill.
- Annual leave cannot be taken at the same time as the notice period.
- Leave pay is not a bonus on top of normal pay. It simply means that an employee gets a holiday every year, and gets normal pay for those days. If an employee doesn't take leave, or all the leave, the employer will not pay out leave pay instead of leave.
- If an employee leaves a job without having taken all the leave that is due to them, the employee must be paid for the days of leave that they have not taken. This is called *pro rata* leave pay.

## **Sick leave**

- A permanent employee has a right to paid sick leave of 30 days over any three-year cycle (36 days if the employee works a 6-day week).
- During the first six months that an employee works for an employer, she/ he gets one day paid sick leave for every 26 days worked.
- Once all these paid sick leave days are used up, the employer does not have to pay the employee when he/she is off sick.
- An employee who works more than 24 hours during any month earns one day's leave for every 26 days worked.
- Seasonal or temporary employees have a right to one day's sick leave for every 26 days worked over the first 6-month cycle.
- Employees who are sick for more than 2 days may be required to produce a doctor's certificate. If an employee lives on the premises and it is difficult for them to get to a doctor (for example, in rural areas), the employee does not have to produce a certificate unless the employer gives the employee reasonable assistance to get the certificate.
- Sick leave pay is not a bonus on top of normal pay. It simply means that if an employee is genuinely sick and has to take time off work, the employer must pay the employee up to a certain number of days. For example, if a waitress in a restaurant only took 3 days sick leave this year, the employer does not owe her the money for the remaining sick leave days at the end of the year.

## **Family responsibility leave**

Every employee with more than 4 months' service with an employer, and who works on more than 4 days a week, has a right to 3 days paid family responsibility leave a year. This can be taken if a direct family member dies, or when a child is born or is ill. A total of 3 days is allocated for this kind of leave and not 3 days for each event.

## **Maternity leave**

Women employees have a right to 4 months unpaid maternity leave. During this time, the employee may draw maternity benefits from the Unemployment Insurance Fund.

## **UNPAID LEAVE**

An employer may agree to let an employee take extra days of annual leave, or the employee may be sick for longer than the paid sick leave. Then the employer does not have to pay the employee for these days.

## **ABSENT WITHOUT LEAVE**

If an employee takes leave without getting permission from the employer and is not sick, the employer does not have to pay the employee for the time taken off.

If the employee takes off many days in a row without permission (normally more than four consecutive days), or often takes time off without permission, the employer may presume that the employee has deserted (left without giving notice) his/her employment.

The employer may employ someone else to do the job. In this case the employer does not give the employee notice. But if the worker returns, fair dismissal rules must be followed.

## **NOTICE**

- During the first 6 months of employment, employees have a right to at least one weeks' notice of the termination of their services.
- After the first 6 months, but during the first year of employment, employees have a right to 2 weeks' notice.
- If they have worked for more than one year, employees have a right to 4 weeks' notice.
- If an employment contract has a longer period of notice than the BCEA, the longer notice must be given.
- Notice works both ways: if an employee resigns without giving the employer the correct amount of notice, for example one week, the employer can claim one week's pay from the employee.
- Notice must be in writing.
- Neither the employer nor the employee can give notice while the employee is on annual leave.

## 10.6 Employment Equity Act

The Employment Equity Act 55 of 1998 (EEA) aims to create an environment of equality and non-discrimination in the workplace.

*The EEA sets out grounds for non-discrimination in the workplace including:*

- Race.
- Gender.
- Sex.
- Pregnancy.
- Marital status.
- Ethnic origin.
- Social origin.
- Colour.
- Sexual orientation.
- Age.
- Disability.
- Religion.
- Conscience.
- Belief.
- Culture.
- Language.
- Birth.
- Family responsibility.
- HIV status.
- Political opinion.



## Disputes of interest

You can have a *dispute about making new rights*: for example, employees wanting to get paid higher wages, or the employer brings in a new pension fund scheme that employees must belong to. These disputes are also called *disputes of interest*.

Disputes of interest are often handled by a union and are the subject of negotiation and possible industrial action (strike action) where agreement cannot be reached. The LRA describes structures and processes which can be used to resolve disputes of interest. The Act also governs the procedures for taking industrial action.

## Disputes of right

There are also *disputes over rights which already exist* in a contract, a law, an agreement or in custom and practice. These kinds of disputes are called *disputes of right*.

Disputes of right usually involve an unfair dismissal (for example retrenching employees without consulting with the employees) or unfair discrimination or an unfair labour practice (such as 'removal of benefits'). The LRA sets out how disputes over rights in the workplace must be handled and the Employment Equity Act sets out how discrimination will be dealt with in the workplace.

A dispute of right can also happen when an employer or employee doesn't obey a term or condition of a wage regulating measure, for example: the BCEA, a Bargaining Council Agreement (or other collective agreement), Wage Determination, sectoral determination, or a Ministerial exemption.

An example of a dispute of right is where an employer doesn't pay an employee the correct leave pay. Enforcement and disputes about terms and conditions of employment that fall under these laws should be dealt with by the relevant Bargaining Council or the Department of Labour.

### 10.7.1 Remedies for disputes of interest

The LRA sets out structures and processes which can be used to resolve disputes of interest. The outcome of disputes of interest will depend on the relative strength of employees and employers. Each party may use different strategies to win what they want.

Employees can take *industrial action over disputes of interest*, like strikes, work stoppages and go-slows once they have followed prescribed dispute procedures.

Employees cannot strike over disputes of rights under the LRA (for example: unfair labour practices and unfair dismissals).

The LRA governs the procedures that must be followed before industrial action can be taken by employees or by the employer.

### **10.7.2 Remedies for disputes of right**

#### WHERE THERE IS NO BARGAINING COUNCIL

If it is a dispute about enforcing a right under the BCEA, collective agreement under the BCEA, a sectoral determination or a Wage Determination or the Occupational Health and Safety Act, then a complaint can be sent to the Department of Labour. The complaint can include a request for a 'Compliance Order' which is issued by an inspector of the Department.

If it is a matter of *enforcing* a right or a *dispute of rights* under the LRA (for example, an alleged unfair dismissal) where no bargaining council exists in that sector, then the case should be referred to the CCMA for conciliation.

If conciliation fails, then refer the dispute to arbitration within 30 days of receiving the certificate of failed conciliation from the CCMA. The CCMA will hear disputes over a BCEA issue if it is related to a case which is being arbitrated by the CCMA, for example: a claim of unfair dismissal is before the CCMA together with a claim for unpaid leave pay.

#### WHERE THERE IS A BARGAINING COUNCIL

If it is a dispute of rights under a Bargaining Council Agreement, then the problem should be referred to the Bargaining Council for enforcement or conciliation. If conciliation fails, then refer the dispute to arbitration within 30 days of receiving the certificate of failed conciliation from the Bargaining Council.

## **10.8 The Labour Relations Act**

The LRA (Act 66 of 1995) governs how employers and employees should deal with each other. It is not about terms and conditions of employment.

It deals with rights of individuals around fairness, bargaining and dispute resolution, and rights and obligations of trade unions.

### 10.8.1 What does the LRA cover?

Except for members of the SANDF, the National Intelligence Agency and Secret Service, all employees are covered by the LRA, including farmworkers, domestic workers and public sector employees, such as teachers, nurses and police.

An independent contractor is not defined as an 'employee' and is therefore excluded from the LRA and BCEA provisions.

*The LRA covers issues like:*

- Rights of employees to form and join a union.
- Rights of employers to form and join an employers' organisation.
- The rights of trade unions in the workplace.
- Collective bargaining.
- Bargaining Councils and Statutory Councils.
- The establishment of workplace forums, which allow employees to participate in management decisions at work.
- What are fair and unfair labour practices?
- Procedures that must be followed for dismissals to be fair.
- Dispute resolution structures and procedures, including the CCMA.
- Industrial action.

### 10.8.2 Unfair labour practices

WHAT IS AN UNFAIR LABOUR PRACTICE?

The LRA prohibits unfair labour practices.

An *unfair labour practice* is any unfair act or omission at the workplace, involving for example:

- Unfair conduct of an employer relating to the promotion or demotion or probation of an employee.



- Unfair conduct relating to the provision of training of an employee.
- Unfair conduct relating to the provision of benefits for (example, pension, medical aid) to an employee.
- Unfair disciplinary action against an employee short of a dismissal, for example: a final written warning or unfair suspension.
- The refusal to reinstate or re-employ a former employee, for example: a retrenchment.

References to unfair discrimination against an employee in the LRA have been transferred to the Employment Equity Act 55 of 1998 (EEA) so 'unfair discrimination' is no longer defined as an unfair labour practice in the LRA. The EEA lists the grounds for non-discrimination in the workplace and describes the steps that a person can take if they believe they have been unfairly discriminated against on any of the listed grounds.

## REMEDIES AGAINST UNFAIR LABOUR PRACTICES

Disputes over alleged unfair labour practices must be referred within 90 days of the alleged unfair labour practice being committed (or of the employee becoming aware of the unfair labour practice) to the CCMA or Bargaining Council.

## 10.9 Dismissals

### 10.9.1 What is a dismissal?

***A dismissal means that an employer terminates a contract of employment with or without notice.***

#### DISMISSAL WITH NOTICE

*With notice* means the employer tells the employee to leave work after working for the required term of notice as set out in the contract of employment. The employee gets paid for the time he/she worked, plus any leave pay (if this is owing).

Where notice is to be paid, the notice pay must be what is set out as notice in the contract of employment, for example: one week's pay instead of one week's notice. The payment must include the value of payment in kind if this applies to a particular sector. Employees must therefore get wages for the hours worked, plus

any leave pay, plus payment in lieu of notice.

## DISMISSAL WITHOUT NOTICE

*Without notice* means the employee leaves immediately and is paid out instead of getting notice (called *payment in lieu of notice*). Dismissal without notice is called *summary dismissal*. While summary dismissal might take place where an employee is guilty of a very serious act (for example, theft), it will still be unfair procedurally if a fair hearing has not been held before the dismissal.

If the employee has been summarily dismissed (with fair reasons and following a fair hearing), the employee has to leave immediately. The employer does not have to make any payment in lieu of notice.

### EXAMPLES

- A contract employee whose fixed-term contract is suddenly ended or renewed on less favourable terms, where the employee expected the contract to be renewed because it has often been renewed before or because an expectation exists that the employment will be ongoing.
- A woman who is not taken back into her job after her maternity leave.
- An employer dismisses a number of employees for some reason (for example, for being on strike) and offers to re-employ some, but not all.
- An employee who was forced to walk out or resign because the employer made the working environment impossible to tolerate.
- The employee leaves his/her work (with notice or without notice) because a new employer has taken over the business and is not paying the employee the same wages and conditions of work which he/she enjoyed before.
- Employees have been retrenched. The employer must pay the employee severance pay of at least one week's remuneration for every full year that the employee worked for the employer. The payment must include the value of payment in kind. The employee must get wages for the hours worked, plus any leave pay, plus notice or payment in lieu of notice, plus severance pay.

Employees in the circumstances above have a right to fair dismissal reasons and fair dismissal procedures under the LRA. An employee could claim unfair dismissal through the CCMA or relevant Bargaining Council.

### **10.9.2 Automatically unfair dismissals**

*The dismissal is automatically unfair if the worker is dismissed for:*

- Exercising any of the rights given by the LRA or participating in proceedings under the Act.
- Taking part in lawful union activities.
- Taking part in a legal strike or other industrial action or protest action.
- Refusing to do the work of someone who was on strike.
- Being pregnant or any reason related to pregnancy.
- Refusing to accept a change in working conditions.
- Reasons that are due to arbitrary (unfair) discrimination.
- A reason related to a transfer following a merger of the company with another organisation.
- Where the employee is dismissed following a disclosure made by her/him under the Disclosure of Information Act.

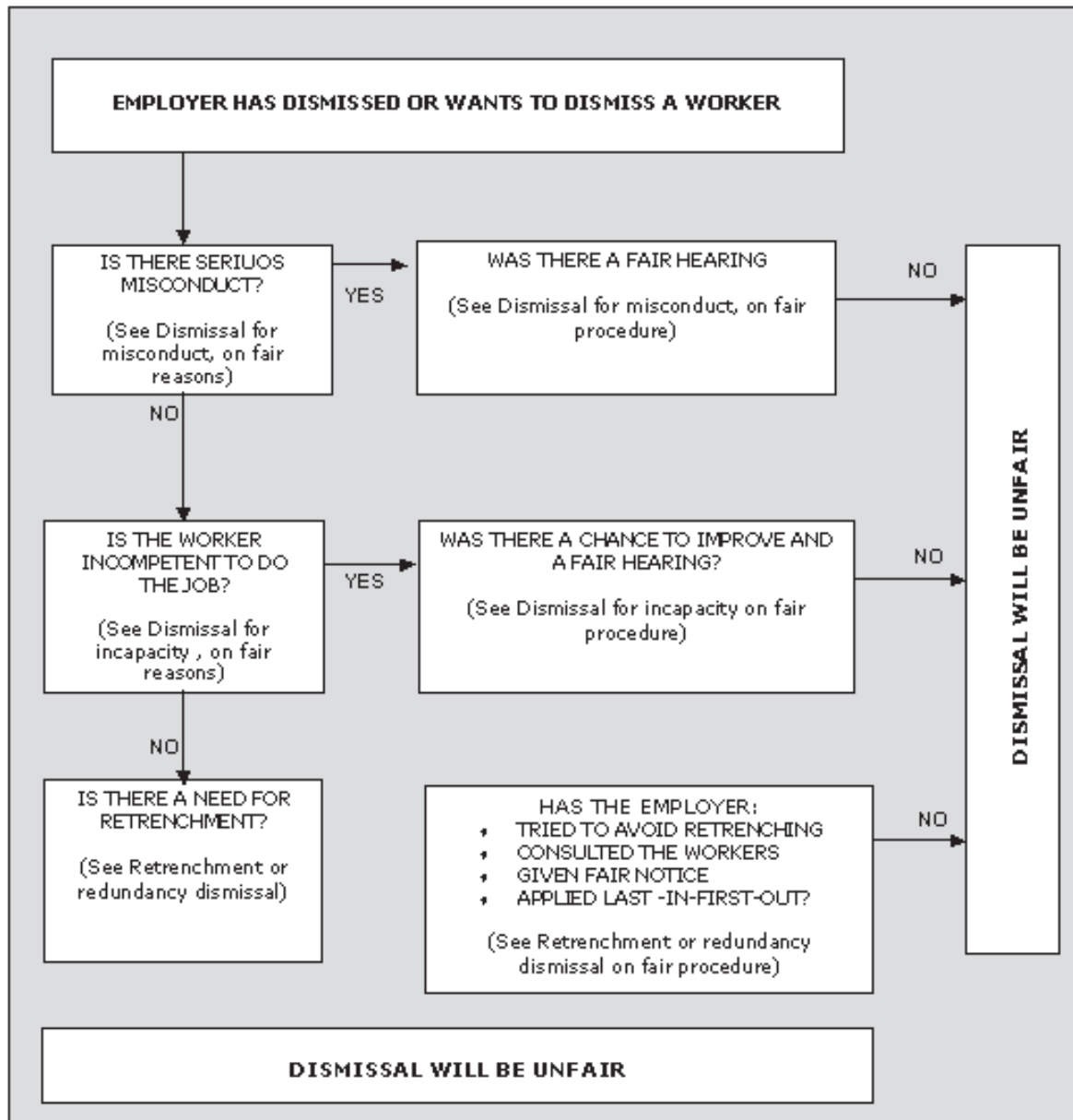
### **10.9.3 When is a dismissal fair or unfair?**

The LRA has a Code of Good Practice for Dismissals that employers must follow.

*The 'fairness' of dismissal is decided in 2 ways:*

- Substantive fairness (good reason for dismissal?).
- Procedural fairness (correct procedure followed?).

Figure 17: Unfair dismissal



### 10.9.4 Dismissal for misconduct

#### FAIR REASONS

Employers should introduce clear rules of conduct that are known to all workers. Some rules may be so well established or obvious that everyone can be expected to know them, for example: that violence at work is not acceptable.

*Dismissals for misconduct will only be fair if:*

- The employee broke a rule of conduct in the workplace.
- The rule was reasonable and necessary.

- The employee knew of the rule or should have known of the rule.
- The employer applied the rule consistently (there are no other employees who have been allowed to get away with this misconduct).
- It is appropriate to dismiss the employee for this reason, rather than taking disciplinary action or imposing a lesser penalty, such as a final warning.

For minor mistakes the employer must use informal advice. Corrective or progressive discipline must be used for misconduct. The aim of corrective discipline is to correct the employee and help him/ her overcome the problem. Progressive discipline can get stronger every time the employee repeats the misconduct.

*Employees should not be dismissed for a first offence, unless it is very serious, such as:*

- Gross insubordination or dishonesty.
- Intentional damage to the employer's property.
- Putting others' safety at risk.
- Physical assault of a co-employee.

Employees can be dismissed for misconduct if they go on strike without following the procedures. The employer must contact a trade union official and tell the official of the planned dismissals, and try to give employees an ultimatum (final warning) with enough time to consider the ultimatum.

*Before deciding to dismiss the employee for misconduct, the employer must consider:*

- The employee's circumstances (for example: length of service, previous disciplinary record, personal circumstances).
- The nature of the job.
- The circumstances in which the misconduct took place.

## FAIR PROCEDURE

Employers must keep records for each employee, which say what offences an employee committed, what disciplinary action was taken and why the action was taken.

If there is repeated misconduct, the employer must give the employee warnings. A final warning for repeated misconduct or serious misconduct must be given in writing.

*There must be a fair hearing:*

- If the employee is a shop steward, the employer must first inform or consult the union.
- The employee must know in advance what the charges are.
- The employee must be given enough time to prepare for a hearing.
- The employee must be present at the hearing and be allowed to state his/her case.
- The employee must be allowed to be represented at the hearing by a shop steward or co-employee.
- The employee must be allowed to see documents and cross-examine evidence used against him/ her.
- The employer should bring all witnesses against the worker to the hearing. The worker should have a chance to cross-examine witnesses called against him/her.
- The employee should be allowed to call witnesses.
- The employee must be given reasons for any decisions taken.

Sometimes, if the employer has only a very small business she/he will not be expected to meet all these requirements.

### **10.9.5 Dismissal for incapacity**

FAIR REASONS

*A dismissal for incapacity can be for:*

- Poor work performance.
- Physical disability or ill health.

- Incompatibility (with job or other workers).

*When deciding whether a dismissal for incapacity was fair or not, these questions must be considered:*

- Did the employee fail to work to a required standard?
- Was the employee aware of the standard?
- Was the employee given a fair chance to meet the standard?
- Was dismissal the appropriate outcome for failing to meet the standard?
- Is the incapacity serious and is an improvement likely?
- Could the employee be accommodated in an alternative position if one is available?

#### FAIR PROCEDURE

*Dismissals for poor performance will only be fair if the employer:*

- Has given the employee proper training, instructions, evaluation, guidance and advice.
- Assessed the employee's performance over a reasonable period of time.
- Investigated the reasons for continued poor performance.
- Investigated ways of solving the problem without resorting to dismissal.
- Gave the employee a chance to be heard before deciding to dismiss.
- Considered employing the employee in an alternate and appropriate position if one was available.

*Dismissals for (temporary/permanent) ill health or disability will only be fair if the employer:*

- Investigated the degree and duration of the injury or incapacity.
- Considered ways of avoiding dismissal, for example: getting a temporary

employee until the ill employee is better.

- Tried to find alternative work for the employee to do.
- Tried to adapt the work so that the employee could still do it.
- Gave the employee a chance to be heard before deciding to dismiss.

*Key factors in deciding whether the dismissal is fair or not:*

- How badly ill or disabled is the employee (degree of incapacity)?
- For how long is he/she likely to remain ill or disabled (duration of incapacity)?
- What is the reason for the incapacity (for example: did the employee become injured or ill because of their work)?

### **10.9.6 Remedies against unfair dismissal**

If an employee thinks that the dismissal was unfair, in other words that the employer didn't follow fair procedures or there is not a 'good reason' for the dismissal, then the employee can try to challenge the dismissal. If a dismissal is found to be unfair, the employee will be able to get reinstated or re-employed, or get compensation money.

*Reinstatement* means the employee gets the job back as if she/he was never dismissed.

*Re-employment* means the employee gets the job back, but starts like a new employee.

*The employee is likely to get compensation if:*

- The employee does not want the job back.
- The circumstances surrounding the dismissal would make the relationship between employee and employer intolerable.
- It is not reasonably practical for the employer to take the employee back.
- The dismissal is unfair merely because the employer failed to follow a fair procedure, but there was a good reason for dismissal.

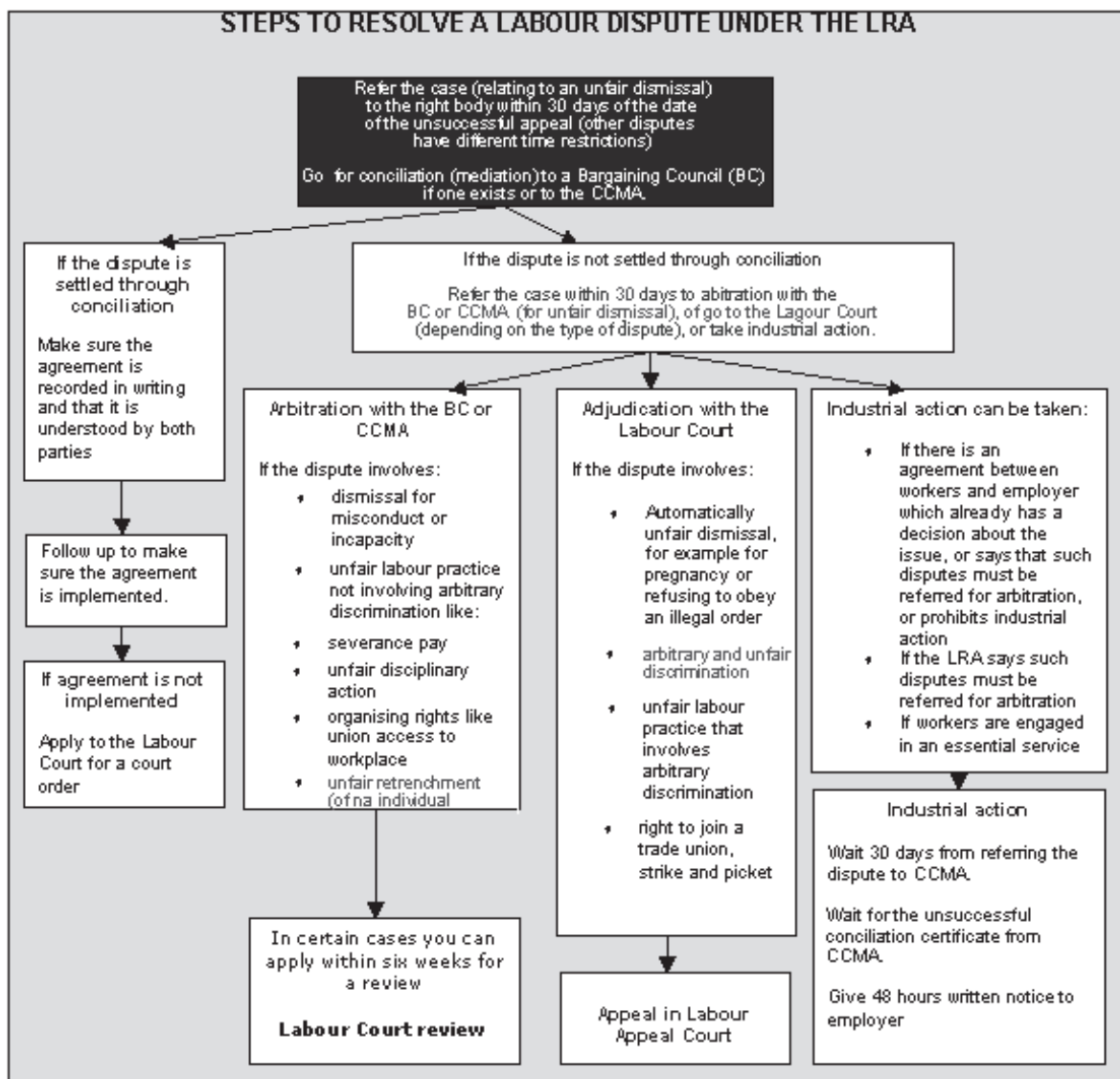


The employee can get up to 12 months' wages as compensation for an unfair dismissal. If it was an automatically unfair dismissal, the employee could get up to 24 months' wages as compensation.

### 10.9.7 Disputes under the LRA

The Labour Relations Act sets out the procedures to be followed to resolve disputes over unfair labour practices and unfair dismissals.

Figure 18: LRA steps to resolve disputes



## 10.10 Conciliation by the CCMA or Bargaining Council

### WHAT IS CONCILIATION?

Conciliation is a process to bring the two sides in a dispute together after they have reached a deadlock. 'Deadlock' means that after trying to negotiate, they still can't solve the problem. In conciliation, an independent and neutral third party is used to mediate between the 2 sides. Under the Labour Relations Act, the mediator is a commissioner from the CCMA or Bargaining Council.

### HOW TO REFER THE DISPUTE TO THE RIGHT BODY

Find out whether there is a Bargaining Council covering the sector that the employee works in. If there is a Bargaining Council, phone that Council and find out the steps you should take to refer the case for conciliation.

*If there is no Bargaining Council, the dispute must be referred to the Commission for CCMA for conciliation:*

- Fill in form LRA 7.11.
- Send a copy of the form to the employer, by fax, registered mail or personal delivery.
- Send a copy to the CCMA, by fax, registered mail or personal delivery. Attach proof that you have sent a copy to the employer, for example: a fax transmission slip, registered mail slip or affidavit confirming personal delivery.

If the employee does not want conciliation and arbitration to take place on the same day with the same commissioner, he/she must note this in the appropriate space on the dispute form.

The LRA form 7.11 follows on the next page.

Figure 19: CCMA conciliation form

|   |  |  |  |   |  |   |  |   |  |  |   |   |
|---|--|--|--|---|--|---|--|---|--|--|---|---|
| <p>LRA Form 7.11<br/>Labour Relations Act 1995<br/>Section 133 and<br/>Section 191(1)</p>   | <p align="center"><b>PART A</b><br/><b>REFERRING A DISPUTE TO</b><br/><b>THE CCMA FOR CONCILIATION</b><br/><b>(INCLUDING CON-ARB)</b></p>  |  |   |   |  |   |  |   |  |  |   |   |
| <p><b>READ THIS FIRST</b></p>  <p><b>WHAT IS THE PURPOSE OF THIS FORM?</b></p> <p>This form enables a person or organisation to refer a dispute to the CCMA for conciliation and con-arb.</p> <p><b>WHO FILLS IN THIS FORM?</b></p> <p>Employer, employee, union or employers' organisation.</p> <p><b>WHERE DOES THIS FORM GO?</b></p> <p>The Registrar, Provincial Office of the CCMA in the province where the dispute arose. See details on this page.</p> <p><b>WHAT WILL HAPPEN WHEN THIS FORM IS SUBMITTED?</b></p> <p>When you refer the dispute to the CCMA, it will appoint a commissioner who must attempt to resolve the dispute within 30 days.</p> <p><b>OTHER INSTITUTIONS</b></p> <p>Please note that if you are covered by a bargaining council, a statutory council or an accredited agency you may have to take the dispute to that council or agency.</p> <p>You may also need to deal with the dispute in terms of a private procedure if one applies.</p> <p>If in doubt contact the CCMA for assistance.</p> <p><b>FURTHER INSTRUCTIONS</b></p> <p>A copy of this form must be served on the other party.</p> <p>Proof that a copy of this form has been served on the other party must be supplied by attaching:</p> <ul style="list-style-type: none"> <li>▪ A copy of a registered slip from the Post Office;</li> <li>▪ A copy of a signed receipt if hand delivered;</li> <li>▪ A signed statement confirming service by the person delivering the form;</li> <li>▪ A copy of a fax confirmation slip; or</li> <li>▪ Any other satisfactory proof of service.</li> </ul> | <p align="center"><b>PROVINCIAL OFFICES OF THE CCMA</b></p> <table border="0"> <tr> <td data-bbox="564 526 847 712"> <p><b>CCMA EASTERN CAPE</b><br/>107 Govan Mbeki Street<br/><b>PORT ELIZABETH</b><br/>Private Bag X22500, PORT ELIZABETH<br/>6000<br/>Tel: (041) 505 4300<br/>Fax: (041) 596-4586<br/>Email: <a href="mailto:PE@ccma.org.za">PE@ccma.org.za</a></p> </td> <td data-bbox="906 548 1193 712"> <p><b>CCMA NORTH WEST PROVINCE</b><br/>CCMA House 47 Siddle Street,<br/><b>KLERKSDORP</b><br/>Private Bag X5004, KLERKSDORP, 2571<br/>Tel: (018) 454-0700<br/>Fax: (018) 452-4126<br/>Email: <a href="mailto:KDR@ccma.org.za">KDR@ccma.org.za</a></p> </td> </tr> <tr> <td data-bbox="564 734 847 943"> <p><b>CCMA FREE STATE</b><br/>NBS Building,<br/>Cnr Elizabeth &amp; Westburger Street<br/><b>BLOEMFONTEIN</b><br/>Private Bag X20705, BLOEMFONTEIN,<br/>9300<br/>Tel: (051) 505-4400<br/>Fax: (051) 448-4468/9<br/>Email: <a href="mailto:BLM@ccma.org.za">BLM@ccma.org.za</a></p> </td> <td data-bbox="906 757 1193 920"> <p><b>CCMA NORTHERN CAPE</b><br/>CCMA House, 1A Bean Street<br/><b>KIMBERLEY</b><br/>Private Bag X6100, KIMBERLEY, 8300<br/>Tel: (053) 831-6780<br/>Fax: (053) 831-5947/8<br/>Email: <a href="mailto:KMB@ccma.org.za">KMB@ccma.org.za</a></p> </td> </tr> <tr> <td data-bbox="564 965 847 1128"> <p><b>CCMA GAUTENG</b><br/>CCMA House, 20 Anderson Street,<br/><b>JOHANNESBURG</b><br/>Private Bag X94, MARSHALLTOWN, 2107<br/>Tel: (011) 377-6600<br/>Fax: (011) 377-6678/58/80<br/>Email: <a href="mailto:GAUTENG@ccma.org.za">GAUTENG@ccma.org.za</a></p> </td> <td data-bbox="906 965 1193 1128"> <p><b>CCMA LIMPOPO</b><br/>104 Hans van Rensburg Street,<br/><b>POLOKWANE, 0699</b><br/>Private Bag X9512, POLOKWANE 0700<br/>Tel: (015) 297-5010<br/>Fax: (015) 297-1649<br/>Email: <a href="mailto:FTB@ccma.org.za">FTB@ccma.org.za</a></p> </td> </tr> <tr> <td data-bbox="564 1182 847 1346"> <p><b>CCMA KWAZULU NATAL</b><br/>Garlicks Chambers, 61 Field Street,<br/><b>DURBAN</b><br/>Private Bag X54363, Durban 4000<br/>Tel: (031) 362 - 2300<br/>Fax: (031) 306-5402<br/>Email: <a href="mailto:KZN@ccma.org.za">KZN@ccma.org.za</a></p> </td> <td data-bbox="906 1182 1193 1346"> <p><b>CCMA WESTERN CAPE</b><br/>CCMA House, 78 Darling Street,<br/><b>CAPE TOWN</b><br/>Private Bag X9167, Cape Town, 8000<br/>Tel: (021) 469-0111<br/>Fax: (021) 465-7197 or 465-7193<br/>Email: <a href="mailto:CTN@ccma.org.za">CTN@ccma.org.za</a></p> </td> </tr> <tr> <td data-bbox="564 1391 847 1554"> <p><b>CCMA MPUMALANGA</b><br/>CCMA House, Eadie Street<br/><b>WITBANK</b><br/>Private Bag X7290, WITBANK 1035<br/>Tel: (013) 656-2800<br/>Fax: (013) 656-2885/6<br/>Email: <a href="mailto:WTB@ccma.org.za">WTB@ccma.org.za</a></p> </td> <td data-bbox="906 1435 1193 1532"> <p align="center"><i>Visit the CCMA website at:</i></p> <p align="center"><a href="http://www.ccma.org.za">http://www.ccma.org.za</a></p> </td> </tr> </table> |  | <p><b>CCMA EASTERN CAPE</b><br/>107 Govan Mbeki Street<br/><b>PORT ELIZABETH</b><br/>Private Bag X22500, PORT ELIZABETH<br/>6000<br/>Tel: (041) 505 4300<br/>Fax: (041) 596-4586<br/>Email: <a href="mailto:PE@ccma.org.za">PE@ccma.org.za</a></p> | <p><b>CCMA NORTH WEST PROVINCE</b><br/>CCMA House 47 Siddle Street,<br/><b>KLERKSDORP</b><br/>Private Bag X5004, KLERKSDORP, 2571<br/>Tel: (018) 454-0700<br/>Fax: (018) 452-4126<br/>Email: <a href="mailto:KDR@ccma.org.za">KDR@ccma.org.za</a></p> | <p><b>CCMA FREE STATE</b><br/>NBS Building,<br/>Cnr Elizabeth &amp; Westburger Street<br/><b>BLOEMFONTEIN</b><br/>Private Bag X20705, BLOEMFONTEIN,<br/>9300<br/>Tel: (051) 505-4400<br/>Fax: (051) 448-4468/9<br/>Email: <a href="mailto:BLM@ccma.org.za">BLM@ccma.org.za</a></p> | <p><b>CCMA NORTHERN CAPE</b><br/>CCMA House, 1A Bean Street<br/><b>KIMBERLEY</b><br/>Private Bag X6100, KIMBERLEY, 8300<br/>Tel: (053) 831-6780<br/>Fax: (053) 831-5947/8<br/>Email: <a href="mailto:KMB@ccma.org.za">KMB@ccma.org.za</a></p> | <p><b>CCMA GAUTENG</b><br/>CCMA House, 20 Anderson Street,<br/><b>JOHANNESBURG</b><br/>Private Bag X94, MARSHALLTOWN, 2107<br/>Tel: (011) 377-6600<br/>Fax: (011) 377-6678/58/80<br/>Email: <a href="mailto:GAUTENG@ccma.org.za">GAUTENG@ccma.org.za</a></p> | <p><b>CCMA LIMPOPO</b><br/>104 Hans van Rensburg Street,<br/><b>POLOKWANE, 0699</b><br/>Private Bag X9512, POLOKWANE 0700<br/>Tel: (015) 297-5010<br/>Fax: (015) 297-1649<br/>Email: <a href="mailto:FTB@ccma.org.za">FTB@ccma.org.za</a></p> | <p><b>CCMA KWAZULU NATAL</b><br/>Garlicks Chambers, 61 Field Street,<br/><b>DURBAN</b><br/>Private Bag X54363, Durban 4000<br/>Tel: (031) 362 - 2300<br/>Fax: (031) 306-5402<br/>Email: <a href="mailto:KZN@ccma.org.za">KZN@ccma.org.za</a></p> | <p><b>CCMA WESTERN CAPE</b><br/>CCMA House, 78 Darling Street,<br/><b>CAPE TOWN</b><br/>Private Bag X9167, Cape Town, 8000<br/>Tel: (021) 469-0111<br/>Fax: (021) 465-7197 or 465-7193<br/>Email: <a href="mailto:CTN@ccma.org.za">CTN@ccma.org.za</a></p> | <p><b>CCMA MPUMALANGA</b><br/>CCMA House, Eadie Street<br/><b>WITBANK</b><br/>Private Bag X7290, WITBANK 1035<br/>Tel: (013) 656-2800<br/>Fax: (013) 656-2885/6<br/>Email: <a href="mailto:WTB@ccma.org.za">WTB@ccma.org.za</a></p> | <p align="center"><i>Visit the CCMA website at:</i></p> <p align="center"><a href="http://www.ccma.org.za">http://www.ccma.org.za</a></p> |
| <p><b>CCMA EASTERN CAPE</b><br/>107 Govan Mbeki Street<br/><b>PORT ELIZABETH</b><br/>Private Bag X22500, PORT ELIZABETH<br/>6000<br/>Tel: (041) 505 4300<br/>Fax: (041) 596-4586<br/>Email: <a href="mailto:PE@ccma.org.za">PE@ccma.org.za</a></p>  | <p><b>CCMA NORTH WEST PROVINCE</b><br/>CCMA House 47 Siddle Street,<br/><b>KLERKSDORP</b><br/>Private Bag X5004, KLERKSDORP, 2571<br/>Tel: (018) 454-0700<br/>Fax: (018) 452-4126<br/>Email: <a href="mailto:KDR@ccma.org.za">KDR@ccma.org.za</a></p>  |  |  |   |  |   |  |   |  |  |   |   |
| <p><b>CCMA FREE STATE</b><br/>NBS Building,<br/>Cnr Elizabeth &amp; Westburger Street<br/><b>BLOEMFONTEIN</b><br/>Private Bag X20705, BLOEMFONTEIN,<br/>9300<br/>Tel: (051) 505-4400<br/>Fax: (051) 448-4468/9<br/>Email: <a href="mailto:BLM@ccma.org.za">BLM@ccma.org.za</a></p>  | <p><b>CCMA NORTHERN CAPE</b><br/>CCMA House, 1A Bean Street<br/><b>KIMBERLEY</b><br/>Private Bag X6100, KIMBERLEY, 8300<br/>Tel: (053) 831-6780<br/>Fax: (053) 831-5947/8<br/>Email: <a href="mailto:KMB@ccma.org.za">KMB@ccma.org.za</a></p>  |  |  |   |  |   |  |   |  |  |   |   |
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|  |   |
|--|---|
| <p>Tick the correct box <input checked="" type="checkbox"/></p> <p>The name of the employee or an employer that is referring the dispute must be filled in (a).<br/>If there is more than one employee to the dispute and the referring party is not a trade union, then each employee must supply their personal details and signature on a separate page, which must be attached to this form.</p> <p>These alternate contact details should be of a union official or representative, a relative or a friend.</p> <p>The name of the trade union or employers organisation that is referring the dispute or assisting a member to refer a dispute must be filled in (b).</p> <p style="text-align: center;"><b>OTHER PARTIES</b></p> <p>If more than one party is referring the dispute or if the dispute is referred against more than one party, write down the additional names and particulars on a separate page and attach to this form.</p> <div style="text-align: center; margin-top: 20px;"> </div> | <p><b>1. DETAILS OF PARTY REFERRING THE DISPUTE</b></p> <p>As the referring party, are you:</p> <p> <input type="checkbox"/> An employee                      <input type="checkbox"/> A trade union<br/> <input type="checkbox"/> An employer                        <input type="checkbox"/> An employer's organization         </p> <p><b>(a) Name of the party if the referring party is an <u>employee</u> or <u>employer</u></b></p> <p>Name:.....<br/>         ID Number:.....<br/>         Postal Address:..... Postal Code:.....<br/>         Tel:..... Cell:.....<br/>         Fax:..... Email:.....</p> <p><b>Alternate contact details of employee:</b></p> <p>Name:.....<br/>         Postal Address:..... Postal Code:.....<br/>         Tel:..... Cell:.....<br/>         Fax:..... Email:.....</p> <p><b>(b) Name of the referring party if the referring party is an employer's organisation or trade union, or if the employer's organisation is assisting a member to the dispute</b></p> <p>Name:.....<br/>         Postal Address:..... Postal Code:.....<br/>         Tel:..... Cell:.....<br/>         Fax:..... Email:.....</p> <p><b>2. DETAILS OF THE OTHER PARTY (PARTY WITH WHOM YOU ARE IN DISPUTE)</b></p> <p>The other party is:</p> <p> <input type="checkbox"/> An employee                      <input type="checkbox"/> A trade union<br/> <input type="checkbox"/> An employer                        <input type="checkbox"/> An employer's organisation         </p> <p>Name:.....<br/>         Postal Address:..... Postal Code:.....<br/>         Tel:..... Cell:.....<br/>         Fax:..... Email:.....</p> <p style="text-align: right;">Please turn over </p> |
|--|---|



Tick the correct box

If the dispute concerns dismissals, also complete Part B (See Page 5)

This section must be completed!

If necessary write the details on a separate page and attach to this form

#### UNFAIR LABOUR PRACTICE

If the dispute(s) concerns an unfair labour practice the dispute must be referred (ie. received by the CCMA) within 90 days of the act or omission which gave rise to the unfair labour practice. If more than 90 days has elapsed you are required to apply for condonation.

### 3. NATURE OF THE DISPUTE

What is the dispute about (tick only one box)?

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> Unfair dismissal  | <input type="checkbox"/> Unfair Labour Practice (Give details) | <input type="checkbox"/> Refusal to Bargain  |
| <input type="checkbox"/> Organisational Rights                                   | <input type="checkbox"/> Mutual Interest                       | <input type="checkbox"/> S80 BCEA  |
| <input type="checkbox"/> Unilateral change to terms and conditions of employment | <input type="checkbox"/> Severance pay S41 BCEA                | <input type="checkbox"/> Unfair Discrimination S10 of the Employment Equity Act (Give details) |
| <input type="checkbox"/> Interpretation/ Application of Collective Agreement     | <input type="checkbox"/> Disclosure of Information             | <input type="checkbox"/> S19 Skills Development Act  |
| <input type="checkbox"/> Freedom of Association                                  | <input type="checkbox"/> Unfair Labour Practice (probation)    |  |
| <input type="checkbox"/> Other (please describe) .....                           |  |  |

Summarise the facts of the dispute you are referring: .....

.....  
.....  
.....

### 4. DATE DISPUTE AROSE

The dispute arose on: .....  
(give the date, day, month and year)

The dispute arose where: .....  
(give the city/town in which the dispute)

If the dispute concerns a dismissal the date inserted here must be the same as that set out in Item 2 of Part B.


### 5. DETAILS OF DISPUTE PROCEDURES FOLLOWED

Have you followed all internal grievance / disciplinary procedures before coming to the CCMA?  YES  NO

Describe the procedures followed: .....

### 6. RESULT OF CONCILIATION

What outcome do you require? .....

Please turn over 





Part B of the CCMA conciliation form (at the bottom of the form) requires us to provide the procedural and substantive reasons as to why the dismissal is unfair on a separate page. We do this as an Annexure attached to the CCMA form, as in the example below.

**EXAMPLE: EXPLANATORY ANNEXURE TO CCMA FORM**

1. I have been employed at Fancy Delights as a sex worker for a period of 3 to 4 months. I started working in February 2014. On or about 5 May 2014 I worked night shift. I did 3 one-hour bookings. It was a credit card booking and in terms of my agreement with the employer, payment for a credit card booking would only be received, or becomes due to me as the employee 7 days after the booking is done, and the services are provided.
2. The money in respect of services provided on 5 May were due on 12 May 2014. Employer failed to make the payment.
3. On 10 May 2014 I worked night shift and did an 8-hour booking. 6 hours were immediate cash bookings and 2 hours were credit card bookings. Cash bookings were due on the day and credit card booking due on 17 May. Employer failed to make both payments.
4. On 11 May 2014 I worked day time shift and did 6 hours credit card booking and also received a tip from the client in the amount of R1,000. Monies were due on 18 May but employer failed to make payment.
5. Due to all the above, I was not able to buy food nor pay for necessities, as the employer refused to make payments.
6. The total amount of monies owed by employer is R6,200.00 in respect of all bookings.
7. Payment due per hour is R400.00.
8. Tip received: R1,000.00.
9. Employer only paid me an amount of R100.00 on 14 May 2014. I had to leave my employment because of bad working conditions.
10. I made several requests to employer asking for the monies owed through SMS messages and WhatsApp (social media). All requests made were ignored by employer.
11. Employer is also keeping my personal belongings in his possession and refuses to give them back to me.



### 10.10.1 Applying for condonation

If more than 30 days have passed since the dismissal (or 90 days if it is an unfair labour practice) took place, you will have to apply for *condonation*, which is like an extension of the deadline.

If a Bargaining Council will deal with the case, ask the Council how to apply for condonation.

If the CCMA will deal with the case, you can apply for condonation on form LRA 7.11, or the CCMA will ask you to fill in condonation forms if you didn't do it on form LRA 7.11.

Condonation may be granted if you are able to give good reasons for being late with the application. *When you apply for condonation you should focus on:*

- The 'degree of lateness' of your application (how many days/weeks/months late is it).
- The prejudice to the parties.
- The likelihood of success of your case.
- The amount of 'public interest' there is in your case going forward.
- Application for condonation must be in the form of an affidavit.

### 10.10.2 The conciliation meeting

The commissioner will arrange a venue and time for the conciliation, and will inform both parties. At the conciliation meeting, the commissioner meets with both sides to the dispute to find ways to settle the dispute to everyone's satisfaction.

The meeting is conducted in an informal way and the commissioner can meet the parties together or separately, as often as needed. The commissioner has the power to subpoena any person to attend the meeting.

The commissioner must try to resolve the dispute within 30 days of it being referred to the CCMA or Bargaining Council. The employee/s and employer are free to agree to any solution to settle the dispute at a conciliation meeting.

A certificate will be issued by the commissioner at the end of the meeting to say whether the dispute has been settled or not.

### 10.10.3 Who can represent employees and employers in a conciliation meeting?

Employees can be represented by a co-employee, a trade union office bearer or official, or a lawyer.

**Note:**

Paralegals may not represent employees in conciliation proceedings. The paralegal can ask to be present and can advise the employee during the meeting. If the employer objects to the paralegal being there, the employee can ask for a break to consult with the paralegal before making any final decisions.

The employer can be represented by an employee of the business (like the Human Resources Manager) or by a representative of an employers' organisation, but not an attorney if the case concerns misconduct or incapacity dismissal.

### 10.10.4 Successful conciliation

If the conciliation is successful, an agreement is reached which both parties must follow. If they do, the case is resolved and ends here.

#### **What happens if the conciliation agreement is not respected?**

If either party breaks the agreement, the other party may apply to the Labour Court to have the agreement made into a court order.

*These are the steps to follow:*

- Get the application forms from the Registrar of the Court and fill them in.
- Attach a copy of the agreement and an affidavit to the application. The affidavit must state:
  - ~ When the dispute was referred for conciliation.
  - ~ When the conciliation meeting was held.
  - ~ When the agreement was made.
  - ~ What happened after the agreement was made.
  - ~ Whether demands have been made.

- Whether the worker has kept his/her part of the agreement.
- Serve the application on the employer.
- File the application and proof that you have served notice on the employer, with the Registrar of the Court.

### 10.10.5 Unsuccessful conciliation

If the 2 sides cannot reach an agreement, or the employer refuses to attend the conciliation meeting, the commissioner will issue a certificate stating that the case has not been resolved. The certificate will be sent to both parties by the commissioner's office.

Either party can then refer the case for arbitration at the CCMA or adjudication at the Labour Court, depending on the nature of the dispute.

*Disputes over these issues are referred to the CCMA or Bargaining Council for arbitration:*

- Unfair labour practices that do not involve discrimination.
- Dismissals for acts of misconduct (the employer says the employee did something wrong).
- Dismissals for incapacity (the employer says the employee can't do the work properly).
- Severance pay.
- Disputes concerning organisational rights for a trade union.
- Alleged unfair retrenchment where the retrenchment involved an individual employee.
- Breach of a collective agreement.
- Disputes over these matters are referred to the *Labour Court for adjudication:*
- Disputes that involve unfair discrimination.
- Retrenchments.
- Automatically unfair dismissals.

- If the parties believe that it is going to be too expensive to take the matter to the Labour Court, they can agree to have the case arbitrated by the CCMA or Bargaining Council, even if the case falls within the jurisdiction of the Labour Court.

## **10.11 Arbitration by the CCMA or Bargaining Council**

### **10.11.1 What is arbitration?**

Arbitration means the 2 parties to the dispute agree to use a third party to settle a dispute. A third party is someone who is not from the union or employer's side. The arbitrator acts as judge to decide the dispute. Arbitration is usually used to settle *disputes of right* (in other words, disputes about rights that already exist).

Under the LRA, the arbitrator is a commissioner from the CCMA or Bargaining Council. After hearing what both sides have to say, the commissioner can make a ruling that is legally binding and must be accepted by both parties.

### **10.11.2 How to refer a case for arbitration**

If there is a Bargaining Council which regulates the sector that the parties work in, the case must be resolved according to the rules of that Council. Contact the relevant Council to find out what to do if the worker wants to refer the cases to arbitration. In some cases, even though there is a Bargaining Council, the arbitration may be done by the CCMA.

*To refer the matter to the CCMA for arbitration:*

- Fill in form LRA 7.143.
- Send a copy of the form to the employer, by fax, registered mail or personal delivery.
- Send a copy to the CCMA, by fax, registered mail or personal delivery. Attach proof that you have sent a copy to the employer, for example: a fax transmission slip, registered mail slip, or affidavit confirming personal delivery.

### 10.11.3 The arbitration hearing

The CCMA or Bargaining Council will appoint a commissioner to arbitrate, will set the time and venue, and inform both parties. The arbitration hearing is relatively informal and the commissioner will encourage the parties to focus on the real merits of their cases, and to avoid legal technicalities.

After hearing evidence from both sides under oath, the commissioner can make a ruling that is legally binding and must be accepted by both parties. If the commissioner decides that the employer was wrong, the commissioner can order the employer to take certain steps or to pay compensation.

### 10.11.4 Who can represent employees and employers in arbitration?

Employees can only be represented by another employee, a lawyer where the case does not involve misconduct or incapacity dismissal, a union official or a union office bearer.

Employers can only be represented by a lawyer where the dispute is not a misconduct or incapacity dismissal, an employee of the business, or a representative from an employers' organisation.

In cases involving dismissal for misconduct or incapacity, lawyers are not allowed unless the commissioner specifically allows this.

### 10.11.5 Arbitration appeals

There is no appeal against an arbitration award. *But either side may request the Labour Court to review the arbitrator's decision, if they think:*

- The arbitrator went beyond her/his powers.
- There was something legally wrong in the proceedings.
- The arbitrator did not consider relevant issues in accordance with the law.
- They must ask for a review within 6 weeks of receiving the arbitration decision.

## **10.12 Adjudication by the Labour Court**

### **10.12.1 What is adjudication?**

Adjudication is a formal court judgement that is legally binding on all parties. The Labour Courts are set up under the LRA and are based at the High Court in each province. High Court judges and lawyers with labour law experience staff the Labour Court. The Labour Court has the same status as the High Court.

### **10.12.2 How to refer a case for adjudication**

If a case goes to the Labour Court for a court judgement (adjudication), phone the Registrar of the nearest Labour Court to get the necessary referral forms. The judge will hear evidence from both sides and make a judgement.

### **10.12.3 Who can represent employees and employers in a Labour Court case?**

Employees and employers can be represented by a lawyer in Labour Court cases. Legal Aid may be granted to pay for the employee's lawyer.

### **10.12.4 Adjudication appeals**

A Labour Appeal Court can hear appeals, and has the same status as the Supreme Court of Appeal. If either side does not agree with the decisions of the Labour Court, they can appeal to the Labour Appeal Court.

## 10.13 Labour law in action: Kylie's case

### CASE STUDY:

#### SEX WORKER DEMANDS LABOUR RIGHTS

##### Who is Kylie?

“Kylie” is a sex worker who was fired from her employment at a brothel in Cape Town. She took her case to the Commission for Conciliation, Mediation and Arbitration (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 – is currently illegal in South Africa. Kylie then went to the Labour Court. The Labour Court ruled that, as a sex worker, Kylie does not have a right to protection against unfair dismissal. Her lawyers appealed against this judgement to the Labour Appeal Court.

##### Why is her case important?

Kylie's case is important because the application is about ensuring that the law protects everyone, especially the most vulnerable workers in our society. Sex workers are particularly vulnerable to exploitation in the employment relationship, both because sex work is outlawed and because of the nature of their work.

The Labour Court and the CCMA's interpretation of the employment relationship in the LRA, if taken to its logical conclusion, would have drastic implications in excluding all employees who are in an employment relationship but whose contracts of employment are unenforceable for one reason or another.

This would result in these kinds of employees being deprived of a wide range of protections under the LRA, BCEA, the Occupational Health and Safety Act and the Employment Equity Act, meaning that these workers would be effectively deprived altogether of their right to fair labour practices under Section 23 of the Constitution.

The WLC's interpretation is in line with previous judgements of the Labour Court where the Court has decided that an employment relationship has existed between parties in spite of the fact that they have never entered into an employment contract at all.

The WLC is of the opinion granting sex workers their labour rights does not amount to legalising sex work and thus does not conflict with the Sexual Offences Act which criminalises sex work. Even if it was found that the 2 acts contradict each other, the LRA states expressly that where the LRA conflicts with the provisions of any other law except the Constitution, then the LRA should prevail. In other words, committing a victimless crime should not deprive you of the other constitutional rights to which you have a right.

### **The background**

“Kylie” is a sex worker. She was employed at the massage parlour called Brigitte’s in Cape Town. She was a full-time employee. She provided personal services to clients for reward. Her services included “massage, intercourse, pelvic massage, foot fetishes, and dominance.” She worked for 14 hours a day from 08h00 to 22h00. Only later was she allowed to take Sundays off. She was subject to a system of rules and fines.

Employees who missed work without permission were fined R100. A R50 fine was imposed if an employee went to the shop for more than 15 minutes. If the bath wasn’t cleaned a R30 fine was imposed. Employees arguing in front of clients or sleeping while on duty were fined R50. She lived and worked on the parlour premises.

In doing this work, Kylie contravened Section 3(a) of the Sexual Offences Act which states that, “any person who resides in a brothel” is deemed to keep a brothel. Keeping a brothel is an offence under Section 2 of the SOA. She also contravened Section 20(1)(aA) of the SOA because she had “unlawful carnal intercourse” and because she committed “acts of indecency” with other people for reward.

In 2006, after working there for 13 years (from 1993 to 2006) Kylie was summarily dismissed from her employment for not obeying the rules of the brothel. The reasons alleged for dismissing her were:

- A failure to do sufficient bookings.
- Exercising discretion or choice in terms of clients and conduct.
- Spending an hour in her room with her boyfriend who didn’t pay.
- Hardly ever working on weekends.
- Failure to adhere to time, leading to discontent of other employees.



- Employer informed Kylie that she is still using drugs and made mention of the fact that she refuses to do oral sex.

In May 2006, Kylie took the dispute to the CCMA for conciliation, alleging that she had been unfairly dismissed. Conciliation proceedings took place in June 2006, but the parties were unable to come to an agreement.

The dispute was referred to arbitration but before that could take place, the Commissioner said another question had to be settled first – did the CCMA in fact have jurisdiction in the matter, since sex work is unlawful in South Africa? She invited Kylie to file an application for a ruling on that issue.

In December 2006, the Commissioner ruled that the CCMA did not have jurisdiction in the matter because:

- The work that Kylie had been employed to do was illegal.
- It rendered her contract of employment invalid.

The CCMA did not have jurisdiction because “the basis of the CCMA’s jurisdiction is that there must be a legally enforceable contract”.

In January 2007, Kylie launched an application in the Labour Court for the Commissioner’s jurisdiction ruling to be reviewed and set aside under Section 145(2)(a) of the LRA.

In Kylie’s submission to the Labour Court, she and her lawyers argued that:

- Some of the work that she was employed to do was illegal under the SOA of 1957. But, it is work which is widely tolerated in our society and is no longer condemned as other crimes usually are.
- The criminalisation of sex work makes sex workers particularly vulnerable to exploitation by their employers. Therefore, they are all the more in need of protection.
- The provisions in the LRA are designed to ensure the constitutional right to fair labour practices is enjoyed by everyone.
- In considering the proper interpretation of the LRA’s definition of an “employee,” it is clear that the LRA protects everyone who is as a matter of fact in an employment relationship, whether or not it is also underpinned by an enforceable contract.

- The court should not deny sex workers the protection of the LRC because even though sex work is unlawful, protection of sex workers is in line with public policy and does not offend it.
- The Labour Court handed down judgement on 31 July 2008. The Court decided that the definition of an “employee” in Section 213 of the LRA is probably wide enough to include someone whose contract of employment is unenforceable at common law.

However, the Labour Court also decided that a sex worker does not have a right to protection against unfair dismissal under the LRA because it would be contrary to a common law principle which has been entrenched as a founding value of the Constitution: that the courts “ought not to sanction or encourage illegal activity.”

In August 2008, Kylie’s attorneys filed a notice of intention to apply for leave to appeal to the Labour Appeal Court (LAC) against the whole judgement and orders made by Acting Justice Cheadle of the Labour Court.

On 11 March 2010, the case was heard by 3 judges in the LAC. Kylie’s counsel argued that she has a right to protection against unfair dismissal under Section 185(a) of the LRA because:

- Even if the Court accepts that Kylie’s work was illegal under the Sexual Offences Act and that it rendered her contract of employment unenforceable at common law, she nevertheless has the right to fair labour practices under Section 23(1) of the Constitution, which states: “Everyone has the right to fair labour practices.”
- Kylie qualifies for protection against unfair dismissal under Section 185(a) of the LRA because she was an “employee” as defined in Section 213 of the LRA. That was so because she was in an employment relationship. It does not matter that her contract of employment was unenforceable or indeed whether she had any contract of employment at all.
- There is a common law principle that the courts do not enforce contracts which are contrary to public policy. But this is no more than a principle of common law. It is also more limited in its scope than the Labour Court suggested. It is not a founding value of the Constitution. It is subject to the Constitution and any legislation enacted under it. It is accordingly trumped by Kylie’s rights under Section 23(1) of the Constitution and Section

185(a) of the LRA.

On 28 May 2010, the LAC handed down a favourable judgment. The Labour Appeal Court accepted that when faced with a situation like Kylie's, the starting point should be the Constitution, and that the illegal activity of a sex worker does not prevent her from enjoying a range of Constitutional rights. The Labour Appeal Court held that the right to fair labour practices does vest in 'everyone' in an employment relationship.

The LAC endorsed the Constitutional Court's comments in another case that sex workers should not be stripped of their right to be treated with dignity by clients, and concluded that this should apply to employers as well. Thus, the right to fair labour practices applies to sex workers in an employment relationship.

In relation to the LAC's finding that giving sex workers a remedy would encourage and sanction illegal activity, the LAC said that the common law principle was not absolute or inflexible and that a Court has discretion in relation to its application.

The LAC noted that "many sex workers are particularly vulnerable and are exposed to exploitation and vicious abuse" and as part of a class of vulnerable employees, sex workers should have the protection of the LRA.

As a result of the LAC's judgement, sex workers can now approach the relevant CCMA, Bargaining Council or the Labour Court. The arbitrator or judge would then have to consider if the sex worker has been treated unfairly and what an appropriate remedy would be. It may not mean re-instatement, but there are other available remedies, such as compensation. The LAC decided that the CCMA does have jurisdiction to decide the case.

The WLC referred the case to the CCMA for arbitration. After the case was referred back to the CCMA and before the set down date for arbitration, the parties entered into a settlement agreement, the exact terms of which are confidential.

The WLC encourages sex workers to come forward and make use of the CCMA, as this is now a forum that can offer a remedy to them in the case of unfair dismissals and exploitative working conditions. The *Kylie* case paved the way for this.

# Addressing the health rights of sex workers

## 11.1 The need to address health care rights of sex workers

Widespread stigma and discrimination against sex workers at clinics significantly inhibits health-seeking behaviour, and their access to available prevention and treatment services.

Sex workers have limited access to health and welfare services because they are afraid that, if they seek these services and disclose their occupation, they will be arrested or unfairly discriminated against.

*This forces the industry underground making it very difficult for health service providers to properly serve sex workers:*

- Sex workers have reported situations where health care officials refuse to provide treatment or provide inadequate treatment. Health carers often make very abusive remarks when discovering or even suspecting the person is a sex worker. Decriminalising sex work would greatly assist sex workers in accessing health services without being afraid to disclose their occupation.
- Sex workers do not have proper working conditions and therefore many are vulnerable to HIV. Most sex workers work in unhealthy and unregulated conditions, where there is little or no promotion of safer sex, where the manager encourages a high turnover of clients and provides little or no control over clients' behaviour.<sup>176</sup>

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<sup>176</sup> UNAIDS Guidance Note: HIV and Sex Work 2007, 2.

- Sex workers living with HIV complain that they are treated badly at hospitals and clinics. Sometimes medical staff refuses to treat people living with HIV. People also complain that information about their illness is not kept confidential. UNAIDS suggest that decriminalisation is a necessary step to addressing HIV vulnerability amongst sex workers.<sup>177</sup>

Our work in WLC and SWEAT confirms that many sex workers have poor access to adequate health services and HIV prevention measures, post-exposure prophylaxis after rape, emergency contraception, management of sexually transmitted infections and drug treatment. Sex workers face barriers in accessing their health needs such as unfair discrimination and constant harassment from law enforcement officials.

If a client reports violations of health and medical rights, please fill in the WLC *Human Rights Violations Questionnaire: Health*.

For this questionnaire, see page ....

### 11.1.1 Why are sex workers more vulnerable to HIV? <sup>178</sup>

There is little research about HIV prevalence among sex workers in South Africa. The studies that do exist show that HIV rates among sex workers are between 44% and 69%.<sup>179</sup> These rates are significantly higher than the general population. Other African countries, such as Kenya, have shown that sex workers can account for approximately 14% of all new HIV infections.<sup>180</sup>

People engaged in sex work appear to be at increased risk for acquiring HIV through exposure to more sexual partners, higher threat of violence in sexual encounters, riskier sex, the use of substances during sexual encounters, and because of limited access to health care services.<sup>181</sup>

While sex workers are committed to using condoms with clients, their adherence is reliant on cooperation by clients, which is not always easy to achieve. Sometimes

177 UNAIDS Global Reference Group on HIV/AIDS and Human Rights, 2003.

178 Brown B, Duby Z, Bekker LG, *Sex Workers: An introductory manual for health care workers in South Africa*, Desmond Tutu HIV Foundation, 2012, 9.

179 Fick N, *Coping with Stigma, Discrimination and Violence – Sex Workers talk about their experiences* SWEAT. Cape Town, 2005.

180 Desmond Tutu HIV Foundation, Joint UN Team on HIV and AIDS, *Key Populations, Key Responses: A gap analysis and recommendations for key populations in South Africa, and recommendations for the National Strategic Plan for HIV/AIDS, STIs and TB (2012–2016)*, South Africa. October 2011; Brown B, Duby Z, Bekker LG, *Sex Workers: An introductory manual for health care workers in South Africa*, Desmond Tutu HIV Foundation, 2012, 9

181 Ibid.

clients offer more money for sex without a condom, or threaten to go to other sex workers who will agree to sex without a condom.<sup>182</sup>

Clients also might pay more for riskier sexual practices, such as anal sex, without a condom. This means that more immediate survival needs take precedent over safer sex practices. For many sex workers, ensuring that they are able to provide for themselves at the end of the night can be more important than their long-term health.

An additional risk for sex workers is in their relationships with boyfriends and husbands, in which they might not use condoms. Sex workers are also vulnerable to violence from clients and partners, and have little access to recourse if they do experience violence, since they are considered criminals in the eyes of the police.

### 11.1.2 What human rights abuses do sex workers experience?<sup>183</sup>

Every South African is granted certain rights by the Constitution. Some of these include the right to dignity, to freedom from violence, to bodily integrity, and to choose their profession.

Unfortunately, for many sex workers, these rights are violated daily. Reports from many cities throughout South Africa show that sex workers experience significant harassment from the police.<sup>184</sup> This harassment has been well-documented and includes arrest without just cause, rape, verbal abuse and physical abuse.<sup>185</sup> When sex workers attempt to pursue their right to justice to address these infringements on their rights, many are simply laughed at in police stations and refused any help.<sup>186</sup>

Sex workers experience a very similar situation in health care facilities where they are commonly refused services and where their confidentiality is broken, thereby exposing their HIV status and/or their status as a sex worker. This may contribute to further stigma.<sup>187</sup>

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182 Ibid.

183 Scorgie F, Nakato D, Akoth DO, Netshivhambe M, Chakuvinga P, Nkomo P et al, *'I expect to be abused and I have fear': Sex workers' experiences of human rights violations and barriers to accessing healthcare in four African countries*, Final Report. Johannesburg: African Sex Workers Alliance. 2011; Brown B, Duby Z, Bekker LG, *Sex Workers: An introductory manual for health care workers in South Africa*, Desmond Tutu HIV Foundation, 2012, 9

184 Suresh W, Furr LA, Srikrishnan AK, *An Assessment of the Mental health of Street-Based Sex Workers in Chennai, India* Journal of Contemporary Criminal Justice, Vol 25 (2), 2009:186-201.

185 Ibid note 180.

186 Ibid.

187 Ibid.

Discrimination and stigma from health care workers come in many forms, and range from being very overt and blatant to unintentional and subconscious. Many health care workers are not even aware of how their own behaviours and attitudes may be stigmatising.

However, despite an individual's personal beliefs, it is the duty of health care workers to provide good health care to all, and to optimise their practices and settings in order to achieve this.

### **11.1.3 How can health workers improve conditions for sex workers?<sup>188</sup>**

There are many myths and misconceptions about sex workers. These myths and misconceptions drive stereotypes and create stigma. Stigma can prevent sex workers from receiving quality health care and may also result in further discrimination. So, in order for conditions to improve for sex workers, these myths, misconceptions and biases must change.

Addressing myths that health care workers have about sex workers will change misconceptions and stereotypes, and in turn lead to a reduction in health worker stigma toward sex workers.

In order for sex workers to begin to access effective health care, health care providers must be willing to see sex workers as human beings.

*The South African National AIDS Council (SANAC) aims to improve conditions for sex workers and has developed formal recommendations, including:<sup>189</sup>*

1. The development of sex worker-sensitised services within health care clinics and mobile sites that are staffed by sex worker peer educators.
2. The training of health care workers to reduce stigma and discrimination in health care settings.
3. The provision of male and female condoms, and water-based lubricants.
4. The development of inclusive HIV prevention messages that involve sex workers.
5. The strong inclusion of sex workers in drug and alcohol rehabilitation programmes.

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188 Brown B, DUBY Z, Bekker LG, *Sex Workers: An introductory manual for health care workers in South Africa*, Desmond Tutu HIV Foundation, 2012, 9.

189 Romans S et al, *The mental and physical health of female sex workers: A comparative study*. Australian and New Zealand Journal of Psychiatry, Vol. 35(1), 2001:75-80.



6. The inclusion of sex workers in the development of research about sex work.

## 11.2 Addressing stigma by health care officials<sup>190</sup>

### 11.2.1 What are stigma and discrimination?

*Stigma* refers to the strong negative feelings or significant disapproval connected to a person, group or characteristic. For example, at the beginning of the HIV epidemic, a significant stigma developed toward people who were living with HIV.

#### CASE STUDY

Nozuko, a 23-year-old university student, recently found out she is HIV positive. When Nozuko discloses her status to her friends, they begin to act differently around her and no longer spend time with her after lectures. When she confronts her friends about their behaviour, they tell Nozuko that they do not want to be seen or spend time with someone who is HIV positive. In this scenario, Nozuko is being stigmatised because of the negative feelings her friends have toward her because she is living with HIV.

Often, when people have feelings like Nozuko's friends toward others, it may cause them to act differently toward those they are stigmatising. For example, Nozuko's friends may no longer want to share drinking glasses with her or live in the same flat. This change in behaviour can often lead to discrimination, which is most often the unfair treatment of an individual or group because of a certain characteristic.

If Nozuko's friends forced her to move out of their flat because she is living with HIV, she would be experiencing unfair discrimination.

*There are 2 types of stigma that can lead to unfair discrimination:*

- *External* stigma is stigma that is experienced outwardly because of the way in which a person is being treated by others.
- *Internal* stigma is when a person who is experiencing stigma begins to believe and accept the stigma he or she has experienced. After being treated so negatively by her friends, Nozuko may, over time, begin to think that she is in fact dirty or unclean, and may begin to hate herself for being HIV positive.

<sup>190</sup> The material on addressing stigma by health care officials has been taken from: Brown B, Duby Z, Bekker LG, *Sex Workers: An introductory manual for health care workers in South Africa*, Desmond Tutu HIV Foundation, 2012, 21-32.



## 11.2.2 How is stigma developed?

Stigma is often influenced by the values and beliefs of an individual or group. A person can become stigmatised when they are considered to be different from other people and when that difference is considered to be negative or undesirable. Often, a person's or community's values and beliefs determine what they believe is negative or undesirable.

Thus, stigma can be developed from values and beliefs, as well as religious and cultural practices. The first step to understanding and identifying stigma is to better identify your own values, beliefs and practices.

## 11.2.3 What are the signs of stigma?

In certain situations, stigma may be very clear, but in other circumstances it may be more difficult to identify. In some cases, individuals may even be unaware that they are stigmatising someone or that they are being stigmatised by others.

Therefore, it is important to understand the signs of both external and internal stigma so that proper actions can be taken to address it.

*Signs of external stigma may include:*

**Avoidance:** when individuals spend less time with or do not want to be around stigmatised people, for example: a person who begins to avoid a close friend because he or she is stigmatised.

**Rejection:** when individuals are no longer willing to associate or welcome stigmatised people in their lives, for example: a family member rejecting a stigmatised relative and no longer allowing that person to live with them.

**Moral judgement:** when individuals begin to see a stigmatised person as immoral or when they use their values to justify stigmatising someone, for example: when an individual becomes stigmatised because she does something that conflicts with the religious beliefs of others.

**Stigma by association:** when those who associate with a stigmatised person are also stigmatised themselves, for example: someone who remains a close friend with a stigmatised person.

**Gossip:** when individuals begin to speak negatively about other people who are stigmatised, for example: within a social circle when one of the members becomes stigmatised.

**Unwillingness to employ:** when you are unwilling to hire an individual who would otherwise be qualified for the job, only because of certain characteristics that may be stigmatised.

**Abuse:** when a person physical, emotionally or verbally abuses someone, they may be doing this because of stigma they may have toward that person.

**Victimisation:** when someone is blamed for problems that are unrelated to them and singled out for cruel or unjust treatment. People who are stigmatised may often be victimised.

Unlike external stigma, the signs of internal stigma may be much harder to identify because many of them occur within the individual and are focused on the way they feel about themselves.

*Some signs of internal stigma include:*

**Self-exclusion from services (including health services) or opportunities:** when a stigmatised individual avoids opportunities due to fear of being further stigmatised, or the individual feels unworthy of those opportunities.

**Perceptions of self:** when you have low self-esteem, sense of self-worth or other self-confidence issues, including low self-efficacy or a low perception of your ability to conduct a specific task, like accessing health care.

**Social withdrawal:** when you disengage from your social networks.

**Overcompensation:** when you feel the need to overly contribute to a situation to make up for their perceived stigmatisation, for example: you are overly grateful when someone is kind to you.

**Mental health issues:** you become depressed or develop mental health issues, for example: you may develop generalised anxiety disorder because of continual stress and anxiety from your perceived stigma.

**Substance abuse:** you may turn to drugs or alcohol to cope with your stigma.

**Suicide or attempted suicide:** you may not be able to cope with your internal stigma and turn to suicide in order to escape the pain of their stigma.

## 11.2.4 Why are sex workers stigmatised?

In most cases, sex workers experience stigma due to a variety of reasons.

### **Sexual frequency and sexual taboos**

Sex workers engage in frequent sexual activity. Many societies have conservative views or taboos about sexual behaviour. This means that they have very restrictive beliefs about how sex should and should not occur. Therefore, sex workers may be considered immoral because they engage in sex outside of marriage or because they are promoting behaviours that the community considers taboo.

### **The associations to HIV and fear of transmission**

Sex has become linked with HIV since it is the most common way that HIV is spread. Since sex workers engage in frequent sex, they are seen as spreading HIV, even when they are HIV negative. In some cases, health care workers may especially stigmatise sex workers after assuming that they are HIV positive, and the health care worker may go to extra lengths to protect against HIV. This can often result in offensive behaviour, such as an unwillingness to touch the patient.

### **Stigma as women**

Most sex workers are women, and women often experience unique stigma and unfair discrimination in many places around the world. Women are often not seen as being equal to men and are expected to willingly consent to the directions of a man. Some cultures perceive sex workers to be 'cheap' women that do not deserve dignity or who have given their right to dignity away when they became sex workers. When this stigma is applied to sex workers, it can often mean that they are exposed to physical violence or rape.

### **Migration and xenophobia**

Some sex workers are migrants from other communities in South Africa or immigrants from other countries. In these situations, they may experience stigma because they are seen as foreigners who do not belong in the community. They may be excluded because of their foreign status and may be unable to find other forms of employment.

### **The illegality of sex work**

Most importantly, sex workers are affected by stigma because in many countries, including South Africa, sex work is illegal. Therefore, sex workers are perceived as

individuals who are breaking the law. Some sex workers are also living with HIV, and experience stigma and unfair discrimination because of their HIV status.

### **Homophobia and male/transgender sex workers**

Many communities unfairly discriminate against same-sex sexual behaviour, and many individuals may have a strong aversion to homosexuals, known as *homophobia*. Male and transgender sex workers may engage in sex with male clients, and may therefore experience homophobia and stigma because of this behaviour.

Transgender sex workers are also discriminated on the basis of gender identity, referred to as *transphobia*. This means that they may display – through their clothing, make-up, hairstyle, and behaviour – a gender identity that is in contrast to the gender role that is expected of them according to their biological sex.

### **Double or overlapping stigma**

Sex workers regularly experience double or overlapping stigma. *Double stigma* occurs when a person experiences stigma because of multiple characteristics. For example, a sex worker experiences double stigma for being both an immigrant and living with HIV.

## **11.2.5 What affect does stigma have on sex workers?**

Stigma can often lead to a person being excluded from society, feeling devalued and shamed. Both internal and external stigma can gravely affect the health and well-being of sex workers. Sex workers may experience abuse by their clients or pimps, but because of internal stigma they may also not feel worthy enough to seek health care.

When sex workers do seek health care, external stigma can often make their experiences less than ideal. For example, nurses within community clinics who stigmatise sex workers may use insulting language toward them or blame them for whatever current medical condition they may have.

Many reports have also indicated that many health care providers break the confidentiality of sex workers by exposing them as sex workers or even disclosing their HIV status to others within the clinic.

## EXAMPLE

“I stopped going to the clinic. They [the nurses] looked down on me for what I do. The last time, the sister started shouting at me in front of others. She said: ‘Why do you open your legs for so many? Because you are a prostitute? This is your fault, this is why you are sick now.’” (Lulu, a sex worker, Cape Town)

Many sex workers may also not feel comfortable disclosing to health care workers that they engage in sex work because they are afraid of the negative stigma they may experience. Here health care workers are not provided full details of the patient’s risk or behaviour, and are therefore unable to provide effective health care or treatment.

Sex workers also experience stigma and discrimination when they attempt to report abuse or crime committed against them to police. For example, if a sex worker is raped by a client or otherwise physically assaulted, she may have difficulty in reporting this to the police.

Sex workers have detailed the lack of support they receive from police, often stating that upon reporting a rape, they are simply laughed at and told that “that was what you were looking for”.

### 11.2.6 How can we address stigma towards sex workers?

Many health care workers may have stigma toward sex workers. There are many ways this can be addressed both individually and within the health care setting.

## EXAMPLE

Health care workers should take care to avoid using language that is stigmatising toward sex workers

It is common for sex workers to be described as ‘whores’ or ‘sluts’. This type of language is offensive and should not be used in a health care setting because it discourages sex workers from accessing care.

You may find that this language is used by staff within the health care facility or from community members or other patients. Whoever uses this language should be discouraged in order to emphasise that the health care facility is a non-discriminatory environment.

## 11.3 Health care workers and the law

### 11.3.1 Is providing health care to sex workers illegal? <sup>191</sup>

Even though sex work is illegal in South Africa, it is not illegal to provide health care services to sex worker patients.

A sex worker's right to health care is protected by our Constitution. Section 27 clearly states that everyone has the right to access health care services, and that no one may be refused emergency medical treatment.

Also, other parts of the Constitution more broadly address a sex worker's right to access care. For example, Section 10 states that everyone has "inherent dignity and the right to have their dignity respected and protected".

Sex workers and their right to access care are further protected by other South African laws. The Sexual Offences Act enforces the right of everyone to access post-exposure prophylaxis (PEP). The National Health Act of 2003 further promotes the right of everyone to access medical treatment.

### 11.3.2 Must health care workers provide medical care to sex workers? <sup>192</sup>

All South Africans are equal before the law and our Constitution binds all branches of government, including public health care settings, to "respect, protect, promote, and fulfill" the obligations set out in the Bill of Rights.

This means that it is every health care worker's duty to provide to sex workers the same care and treatment provided to other patients. Health care workers may have personal beliefs that make providing care to sex workers is challenging for them. Yet, health care workers have a duty to see all sex workers as human beings who deserve fair treatment.

Unfortunately, this is not always the case, and many situations arise in which sex workers are unable to access or are denied care.

*Sex workers have reported situations where health care workers:*

- Refuse treatment.

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<sup>191</sup> Brown et al, *ibid*, 34.

<sup>192</sup> *Ibid*.

- Provide inadequate treatment.
- Make very abusive remarks when discovering or even suspecting the person is a sex worker.
- Withhold critical prevention and treatment tools, including PEP, emergency contraception, treatment for sexually transmitted infections (STIs), drug treatment, and condoms and lubricants.

Without these critical services sex workers may experience unwanted pregnancies, are at increased risk for getting infected with HIV, battle with untreated STIs, or engage in unsafe sexual practices without condoms or lubrication.

### **11.3.3 Must health care workers report a patient to the police if he or she is a sex worker?**<sup>193</sup>

Sex work may be illegal in South Africa, but South African law does not require that a health care worker report a patient to the police who has admitted to practising sex work.

Section 54 of the Sexual Offences Act addresses the requirements for reporting sexual offences. It only requires reporting of sexual offences involving minors and people with disabilities. Therefore, health care workers are free to provide services to adult sex workers without being required to report them to the police.

## **11.4 How does the illegality of sex work affect the health of sex workers?**<sup>194</sup>

The fact that sex work is illegal in South Africa can create a variety of situations that negatively affect sex workers more than the general population.

*Health care workers should be aware of these factors when working with a sex worker patient:*

### **11.4.1 Lack of disclosure**

Many sex workers are afraid that if they disclose their occupation as a health care worker, they will be arrested. If a patient does not disclose to a health care provider that they are engaging in sex work, then the health care worker will not be able to provide the most effective care.

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<sup>193</sup> Ibid, 35.

<sup>194</sup> Ibid, 35-36.

## **EXAMPLE**

If a male sex worker is raped by a client, he may need to access PEP. If the sex worker is unwilling to disclose his occupation, he may be unwilling to share this experience with a health care worker.

As a result, the health care worker would be unaware of the sex worker's potential need for PEP. In this circumstance, because the sex worker was unable to disclose his occupation, the patient was unable to access an important HIV prevention tool.

### **11.4.2 Self-esteem and seeking health care**

Some sex workers may experience low self-esteem or see themselves as less worthy of care, as their form of employment is illegal. This can result in sex workers not seeking care for a condition until it is significantly advanced.

#### **Unsafe and unhealthy working conditions**

Since sex work is illegal, sex workers are unable to report unsafe or unhealthy working conditions that could negatively impact on their health. This is because, if they were to report the unsafe conditions, they would also have to disclose their status as a sex worker and could potentially be arrested. As a result, sex workers could face continual threats to their health because of their working conditions.

This is an important factor for health care workers to keep in mind, as it could affect the treatment they need to provide. For example, sex workers have reported that police will confiscate their condoms, or use these as evidence that they are practising sex work. This can force sex workers into not carrying or using condoms in order to continue to work even though the risk to their health increases.

#### **Violence and rape**

Sex workers are at high risk for rape and other forms of violence, but have fewer options than the general population to seek help or support. Because sex work is illegal, a sex worker is unable to report to the police that she was raped or assaulted without risking being arrested. This means that both police and clients can assault sex workers with little worry of any repercussions.

Sex workers frequently report being assaulted, raped and pepper-sprayed by police during their arrests, even though they do not resist arrest. They report being detained by police in conditions which deprive them of medical treatment and are unhygienic.



The illegality of sex work in South Africa also affects a sex worker's health by increasing their vulnerability to violence in a number of ways. Sex workers around the world continue to be murdered at rates higher than the general population. In fact, in some places standardised mortality rates for sex workers are 6 times those seen in the general population.<sup>195</sup>

The incidence of physical violence, including rape, is higher among sex workers than among the general population. Violence links with social stigma and discrimination in producing disempowerment, and in some situations learned helplessness, giving the sex workers the message that their life does not matter.

Sex workers can bring criminal charges and civil claims if their health and medical rights have been violated. Therefore, these rights will be explained below.

## 11.5 Confidentiality

*Confidentiality* means that doctors, nurses, psychologists, dentists and other health care workers have a moral and legal duty to keep all information about patients confidential.

*Any information about the patient's illness or treatment cannot be given to another person unless:*

- The patient consents to this.
- The information is about the illness or treatment of a child – then health workers can tell others but only with the permission of the child's parent or guardian.
- The patient is dead – then the doctor must get permission from the *next-of-kin* (the person's closest family).

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<sup>195</sup> SWEAT, *Reducing Vulnerabilities, Accessing Health and Rights: Sex Work in the National Strategic Plan for HIV and AIDS, STIs and TB*, Submission to Draft Zero of the National Strategic Plan, 2012–1016; Brown B, Duby Z, Bekker LG, *Sex Workers: An introductory manual for health care workers in South Africa*, Desmond Tutu HIV Foundation, 2012, 36.

## **CASE STUDY: CONFIDENTIALITY**

In the *McGeary* case, the Supreme Court of Appeal said that a doctor cannot tell other doctors about the HIV status of a patient without the patient's consent.<sup>198</sup>

McGeary applied for a life assurance policy. The insurance company told him to have an HIV test before they could approve his application. The doctor got the results of the HIV test and told McGeary that he was HIV positive.

The next day the doctor played golf with another doctor and a dentist. During the game they discussed AIDS and McGeary's doctor told the other two that McGeary was HIV positive.

The news of McGeary's condition spread around the small community. McGeary began a civil claim to get compensation from his doctor for breaking his rights to confidentiality. The Court said the doctor had to pay McGeary compensation for not respecting his right to confidentiality.

### **11.5.1 Some rules about confidentiality**

#### **Telling other health care workers**

A health care worker must get a patient's permission before giving any of the patient's medical information to another health care worker or to another health care centre.

#### **Telling a patient's sexual partner**

A health care worker may not tell the patient's sexual partner that the patient has HIV, unless the partner appears to be at risk because the patient refuses to practise safer sex.

The health care worker must counsel the patient on the need to tell their sexual partner and to practise safer sex. The health care worker must then warn the patient that if he/she does not tell their sexual partner or practise safer sex, then the health care worker will have to tell the partner about the person's HIV status.

#### **Telling a court**

A court can order a health care worker to give them confidential information.

<sup>198</sup> McGeary case: *Jansen van Vuuren and Another NNO v Kruger*, 1993 (4) SA 842 (A); Also available at: <http://www.paralegaladvice.org.za/docs/chap09/03.html>.

## 11.5.2 Confidentiality and openness

HIV and AIDS are not openly discussed mainly because many people living with HIV fear stigma and unfair discrimination if they tell others. Communities need to be educated about HIV and the supportive role they can play in the lives of people living with HIV.

In this way, people may be encouraged to be more open about their HIV status and to get the health support they need. Some people choose to be open about their HIV status to some people, such as family and close friends. This does not mean they lose their right to confidentiality with a doctor, nurse, health care worker or employer. A person's right to privacy and confidentiality must always be respected.

## 11.5.3 Remedies if a health care worker abuses your right to confidentiality

You can complain to the Health Professions Council of South Africa (HPCSA) or the SANC. You can also make a civil claim for damages against the health care worker, hospital or clinic, or any member of the public who has abused your rights.

### CASE STUDY

Brenda, a sex worker, goes to the clinic for HIV testing. The nurse, who tells her she is HIV positive, tells other friends of her family that Brenda is living with HIV. What rights and remedies does Brenda have? She can make a complaint to the South African Nursing Council (SANC) and also bring a civil claim against the nurse and the clinic.

## 11.6 HIV testing and informed consent

Everyone has the right to make their own decisions about their body, so no patient can be given medical treatment without their consent.

*Consenting to medical treatment has 2 parts to it:*

- Having the information you need to agree to have an HIV test or get medical treatment (understanding), AND
- Giving permission for the HIV test or medical treatment (agreeing).

With an HIV test, you must know what the test is, why it is being done and what the result will mean for you before you agree to the blood sample being taken. This is called *pre-test counselling*.

After the HIV test results have been received, you must be counselled again to help you understand and accept the effect that an HIV negative or HIV positive result will have on your life. This is called *post-test counselling*.

### **11.6.1 General rules about HIV testing and consent**

*Remember:*

- You can give verbal or written consent to have an HIV test.
- If you go to hospital, you cannot be tested for HIV without your consent.

### **11.6.2 Exceptions to the rule of informed consent**

*These are the exceptions to the rule that a person must give their consent to treatment or an operation:*

- If a patient needs emergency treatment.
- HIV and other testing done on blood donations.
- Mentally ill patients: the mental hospital must get permission from one of these people: the patient's spouse, parent, child (if the child is 21 or older), brother or sister.
- HIV tests are routinely done on the blood of all pregnant women for health research, but the name of the woman is not attached to the blood sample, so no one knows whose blood it is.

### **11.6.3 Who can give consent?**

Adults who are of sound and sober mind can give consent to medical treatment. Children of 14 or older can also give their own consent to medical treatment.

#### 11.6.4 What can you do if an HIV test was done without your consent?

If an HIV test was done without consent, your rights have been abused. You can complain to the Health Professions Council of South Africa (HPCSA) or the South African National Nursing Council (SANC).

You can also bring a civil claim for invasion of privacy, and a criminal charge of assault against the health care worker or the person they were acting on behalf of (for example: the clinic, an employer).

#### 11.6.5 Examples: International case law

##### THE MACEDONIA CASE

A civil court in Macedonia found in favour of sex workers who had been unfairly detained and forced to undergo infectious disease testing.

On 28 November 2008, 13 women were detained by police, without any justified suspicion or evidence of criminal behaviour. The overnight detention was justified on the grounds of suspicion of “involvement of prostitution”. The Minister of the Interior went on to say the police action was “part of the fight against a socio-pathological phenomenon in society to eliminate street prostitution”.<sup>197</sup>

The women were held in unfit conditions, denied access to medical attention and were unjustly exposed to the media without being charged with a crime.

A lawsuit was filed on behalf of the women with the support of the Open Society Foundation and the Healthy Options Project Skopje (HOPS). They attested that the women’s rights under the articles of the European Convention on Human Rights had been violated by the police, the administrative court (who ordered the medical testing), and the clinic that completed the testing.<sup>198</sup>

In addition, the women were denied access to a lawyer and were forced to undress in front of male officers. Some of the women had health complications and were denied medical care. When being transported to the clinic to undergo forced testing, they were not given information about where they were going.<sup>199</sup> At the

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197 Canadian HIV/AIDS Legal Network, Human Rights Watch et al, *Open Letter to the Government of Macedonia Regarding the Detention, Compulsory Media Testing and Criminal Prosecution of Alleged Sex Workers* in November 2008, 17.12.08: <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=908>.

198 Scamell D, *A Legal Victory for Sex Workers in Macedonia*, 29.2.12: <http://rabble.ca/babble/sex-worker-rights/legal-victory-sex-workers-macedonia>.

199 Ibid.

clinic, they were forced to undergo Hepatitis C testing, in order to determine if they would be charged with “transmitting an infectious disease”. Seven of the women tested positive for Hepatitis C.

Thereafter, The Ministry of the Interior published photos of the women on its website and alerted the media. According to an open letter to the Government of Macedonia, by December 2008 police and prosecutors had still not disclosed evidence required by Macedonian law to prosecute the women on the charges of spreading an infectious disease.<sup>200</sup>

In this case numerous NGOs have expressed that the actions against the women violated their rights to security of the person under the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Furthermore, the method of testing was flawed, as UN health agencies maintain that HIV testing should be completed only with informed, voluntary consent, pre/post counselling, and strict confidentiality.<sup>201</sup>

The Court found that:

“The Ministry of Interior and the Skopje Court had violated the right to privacy, liberty, security of persons, freedom from torture or inhuman and degrading treatment or punishment, and ordered that both defendants pay damages.”<sup>202</sup>

This was an important case for sex worker rights in underlining that sex workers, like all humans, deserve privacy, dignity, and the protection of the State.

## **MANDATORY HIV TESTING IN MALAWI**

In Malawi, a group of 11 women filed an application in the Blantyre High Court stating that the government violated their constitutional rights in subjecting them to compulsory HIV tests and revealing the results in open court. This initial application was filed in March 2011 and the court was to hear submissions in February 2014. The Centre for the Development of People (CEDEP) and the

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200 Canadian HIV/AIDS Legal Network, Human Rights Watch et al, *Open Letter to the Government of Macedonia Regarding the Detention, Compulsory Media Testing and Criminal Prosecution of Alleged Sex Workers* in November 2008, 17.12.08: <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=908>.

201 Ibid.

202 Scamell D, *A Legal Victory for Sex Workers in Macedonia*, 29.2.12: <http://rabble.ca/babble/sex-worker-rights/legal-victory-sex-workers-macedonia>.

Southern Africa Litigation Centre are assisting with the case.<sup>203</sup>

The women were part of a larger group of sex workers who were arbitrarily arrested in Mwanza in 2009 and charged with “an act of negligence (contrary to Section 192 of the penal code) for unlawfully and knowingly committing an act likely to spread infection of the disease HIV and AIDS by practising prostitution”.<sup>204</sup>

After the arrest, the managing police officer and a district health officer sent the women to be tested at the Mwanza District Hospital.<sup>205</sup> Once at the hospital, they were asked to give medical officers their hands in order for blood to be taken, but they were not informed why a blood sample was necessary.<sup>206</sup>

In court, the women were unrepresented and plead guilty because of ongoing police intimidation. Their HIV test results were read aloud in open court. This was the first time some of the women had learned of their HIV positive status.<sup>207</sup>

Human rights lawyer, Chrispine Sibanda has taken up this case with another NGO on the basis of a constitutional challenge. As she explains:

“In the judicial review, we are asking the court to condemn the action of the police, the District Hospital and the Magistrate, and say it was unlawful, arbitrary and unreasonable.”<sup>208</sup>

Their argument asserts that the women’s constitutional rights were violated in the mandatory testing and public disclosure of the test results. The Malawian Constitution provides:

- The right to privacy and liberty of a person (Section 21).
- The right to non-discrimination (Section 20).
- The right to freedom from cruel, inhuman and degrading treatment (Section 19(3)).
- The right to dignity of the person (Section 19(1)).

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203 Case Summary: Mandatory HIV Testing in Malawi: *S v Mwanza Police, Mwanza District Hospital, Ministries of Justice, Internal Affairs, Health, Attorney-General and Ex parte: HB, JM (o.b.o 9 others)*: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/02/Mwanza-fact-sheet-1.pdf>.

204 Sibande C, *Criminalize Hate Not HIV*, International Planned Parenthood Federations (IPPF): <http://www.hivandthelaw.com/perspectives/real-stories/malawi>.

205 CDC National Prevention Information Network, *Malawi Sex Workers Sue Government After Forced HIV Test*, 14.11.11: <http://www.thebody.com/content/64730/malawi-sex-workers-sue-government-after-forced-hiv.html>.

206 Sibande C, *Criminalize Hate Not HIV*, International Planned Parenthood Federations (IPPF): <http://www.hivandthelaw.com/perspectives/real-stories/malawi>.

207 Ibid.

208 Ibid.



In addition, in challenging the admission of the illegally-obtained HIV test results in each applicant's criminal case, the applicants argue that this violated their constitutional right to a fair trial.<sup>209</sup>

This case will be critical in setting precedent in Malawi on mandatory HIV testing and the treatment of sex workers.

## **FORCED HIV AND STI TESTING OF SEX WORKERS IN KYRGYZSTAN**

In Kyrgyzstan, a new police unit known as the Department for Combating Human Trafficking and Crimes against Public Morality has been unjustly detaining and forcibly testing sex workers.

Human rights activists have expressed their concern surrounding these new police practices which violate sex worker's human rights. Sex work is decriminalised in Kyrgyzstan, but activities surrounding sex work, such as managing a brothel, are illegal. In addition, "only knowingly inflecting someone with the HIV virus is an offence."<sup>210</sup>

In a most recent event, 70 sex workers were detained, 61 of which were forced to complete HIV and STI testing. This large detention was part of a two-day police operation, which targeted hotels in the capital city of Bishkek on 26-27 December 2013.

Mandatory testing of sex workers came to an end in the country in 2003. However, the practice resurfaced when the head of the Department for Combating Human Trafficking and Crimes Against Public Morality expressed to the media that over 120 sex workers were being tested for STIs as part of prosecuting 9 brothel owners.

In Kyrgyzstan, sex workers often face extortion and harassment by the police. Additionally, the media is often invited to join the police on their raids, violating the sex workers' rights to privacy. During the December 2013 raid, police held on to sex workers' passports and only returned them after the compulsory STI testing had been completed.

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209 Case Summary: Mandatory HIV Testing in Malawi: *S v Mwanza Police, Mwanza District Hospital, Ministries of Justice, Internal Affairs, Health, Attorney-General and Ex parte: HB, JM (o.b.o 9 others)*: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/02/Mwanza-fact-sheet-1.pdf>.

210 NSWP Global Network of Sex Work Projects, *Forced HIV and STI Testing of Sex Workers in Kyrgyzstan: A Violation of the Human Rights of Sex Workers*, 18.2.14: <http://www.nswp.org/news-story/forced-hiv-and-sti-testing-sex-workers-kyrgyzstan-volation-the-human-rights-sex-workers>.



Human rights groups and several NGOs are outraged with this new violation of sex workers' health rights. One NGO leader from the Tais Plus organisation, warned that forced testing drives the sex trade underground and instead education programs should be implemented to promote disease prevention. There is also concern that forced testing will deter sex workers from visiting local NGOs which provide anonymous HIV/STI testing and counselling.

A round table was held on 24 January 2014 with officials from the new police department, rights activists and representatives from international organisations to discuss the issue of forced medical testing. Those in opposition to forced testing expressed that they are not against the new police department, but its work should rather focus on combating sex trafficking.<sup>211</sup>

#### **CASE: WORKPLACE HIV TESTING WITHOUT CONSENT**

In the case of *A v South African Airways (SAA)*, in the Johannesburg Labour Court, A had applied for a job with SAA as a cabin attendant. He was asked to sign a consent form for an HIV test, but the test was not explained to him.

'A' was therefore tested without informed consent and without any pre- or post-test counseling.

SAA admitted that they had not followed the rules on HIV testing and informed consent. The court ordered them to pay compensation to A.<sup>212</sup>

## **11.7 The right to health care and medical treatment**

Everyone has the right of access to health care services and medical treatment, including access to affordable medicines and proper medical care. The right to access health care services includes the right to proper care from a health care worker.

*Thus it is against the law for a health care worker to:*

- Refuse to treat a person who is living with HIV.
- Treat people with HIV differently than other patients.

211 Ibid.

212 <http://www.paralegaladvice.org.za/docs/chap09/03.html>.

The right to health care includes providing medical treatment to people in need. The government has committed itself to making antiretroviral (ARV) treatment available to all people who need ARVs and the roll-out of treatment should be available in all provinces.

A sex worker or any person who wants to receive ARVs must be medically certified by a State doctor at a public clinic or by your own private doctor.

### **Remedies if your right to health care and medical treatment has been refused**

If a hospital or clinic refuses to treat someone living with HIV, they can be reported to the Department of Health, the Public Protector or the South African Human Rights Commission.

The case can also be taken to the High Court, which can review and cancel the hospital's decision to refuse to provide treatment.

You can also sue the clinic or hospital for damages sustained as a result of their refusal to provide the necessary treatment.



# Human trafficking

This chapter is drawn from the WLC's Paralegal Manual (2013).

If a sex worker identifies a survivor of human trafficking or presents this issue to you, please complete our *WLC Human Right Violations Questionnaire: Human Trafficking*.

For this questionnaire, see page 81.

Lawyers who work with sex workers need to be able to distinguish between consensual sex work *and* sexual exploitation. In the majority of the cases, the sex workers you will deal with have entered sex work voluntarily.

However, in some occasions you might come across sex workers, mainly women and minors, who do sex work because they are being forced to by someone else. In these situations, it is common that the sex worker is also a survivor of *human trafficking*.

Lawyers should therefore be able to identify survivors of human trafficking and provide the right support and advice to them. This chapter will help you to better understand what human trafficking is and the current legal framework to deal with this serious human rights issue that requires national, regional and global collaboration and action.<sup>213</sup>

## 12.1 What is human trafficking?

*Human trafficking* includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale disposal or receiving of a person, within

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<sup>213</sup> We acknowledge contributions to the contents of this Chapter from Anex: Activists Networking against the Exploitation of Children.

or across the borders of South Africa, *by means of one or more of:*

- A threat of harm.
- The threat or use of force, intimidation or other forms of coercion.
- Abduction.
- Fraud.
- Deception or false pretences.
- The abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his/her unwillingness or resistance to being trafficked, or unwillingness to participate in trafficking.
- The giving or receiving of payments, compensation, rewards, benefits or any other advantage.

The purpose of this human trafficking is often sexually exploiting, grooming or abusing a person. This includes the commission of any sexual offence or any offence of a sexual nature in any other law against the person or performing any sexual act with the person, whether committed in or outside the borders of South Africa.

## 12.2 How does human trafficking work?

*Human trafficking is a process with 3 stages:*

1. Recruitment of a person → Country, province, town of origin.
2. Transportation of a person → Country, province, town of transit.
3. Exploitation of person → Country, province, town of transit.

### 12.2.1 Recruitment

#### **Partially deceptive recruitment**

Victims may be aware that they are to be employed in a given activity but do not know under what conditions, for example: sex workers.

### **Fully deceptive recruitment**

Victims are lured by promises of employment, educational opportunities or financial gain, and are fully deceived by the true intentions of the traffickers.

### **Forcible recruitment**

- Victims are forcibly taken (abduction).
- People in a vulnerable situation are abused, for example: children and refugees.
- Refugees are both victims and perpetrators of trafficking.
- Ethnically-based refugee syndicates assist the trafficker to lure refugees and exploit them sexually.
- Payments are sometimes given to a person in control of another person, for example: children are sold off by a relative.

## **12.2.2 Transportation**

Trafficking routes always reflect one consistent factor – victims are routed to where the demand exists for their services and where the potential profit for their exploitation is the highest.

South Africa has become both an origin and a transit destination for trafficking to take place.

## **12.2.3 Exploitation**

### **Types of exploitation**

- Sexual exploitation (for example: in streets, bars, brothels, massage parlours, saunas, call-girl, escort agencies).
- Forced labour (for example, in agriculture, fishery, construction, mines, sweatshops, catering).
- Domestic servitude.
- Street begging or peddling.

- Forced military service.
- Organ removal.
- Removal of body parts.
- Children trafficked for adoption.
- Orphans of refugees being exploited.

### 12.3 Others facilitating trafficking in people

- Transport providers (for example: taxi drivers, long distance truck drivers, bus drivers, sailors).
- Professionals (for example: individuals involved in adoption of babies, lawyers, health professionals).
- Government officials (for example: immigration, border police and other law enforcement agencies).

### 12.4 How does human trafficking differ from smuggling?

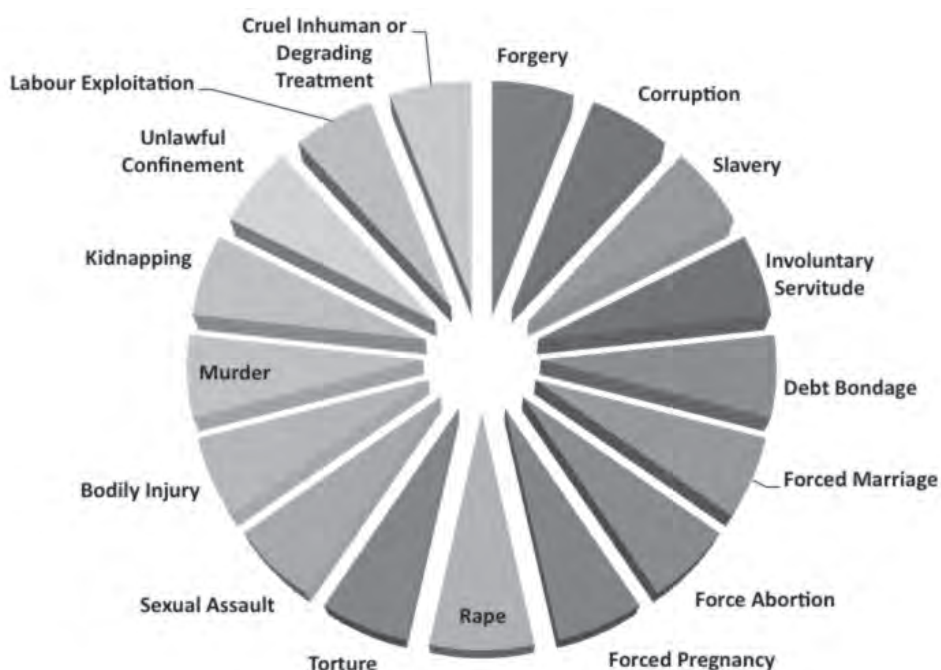


Figure 20: Trafficking crimes

With smuggling, the smuggler requests fees and there may be no deception involved in the illegal agreement.

On arrival at their destination, the smuggled person is usually free.

With trafficking, the victim is enslaved, or the terms of their debt bondage are fraudulent or highly exploitative.

The trafficker takes away the basic human rights of the person being trafficked and abused.

### 12.4.1 The elements of smuggling

- Activity**            Transportation and transfer of persons.
  
- Means**             No element of distortion of the free will of the person, either by force, deception or abuse of power. In most smuggling cases, the migrants seek to realise their objective of crossing the border into a third country illegally.
  
- Purpose**             Financial profit from illegal border crossing.



Figure 21: Trafficking and smuggling



## 12.4.2 Difference between trafficking and smuggling

| Trafficking   | Smuggling   |
|---|---|
| Legal, Illegal, no border crossing  | Illegal border crossing   |
| Legal or illegal documents  | Illegal (false or stolen documents)                                   |
| Documents taken   | Voluntary   |
| Coercion or repeated exploitation   | Person a commodity  |
| Restricted movement, control  | Movement  |
| Crime against an individual   | Crime against the State   |
| Deception   | Willingness   |
| Intimidation  | Immigration law   |
| Coercion  | Secrecy   |
| Exploitation  | Entry illegal   |
| <i>Relationship between trafficker and victim continuous and exploitative</i> | <i>With the smuggler the relationship ends at the border crossing</i> |

*Under the International Labour Organisation Convention 182:*

“Labour exploitation of children includes: -

- a) All forms of slavery or practices similar to slavery, debt bondage and serfdom and forced and compulsory labour, including forced and compulsory recruitment of children for use in armed conflict.
- b) The use or procurement or offering of a child for prostitution, for the production of pornography.
- c) The use, procuring or offering of a child for illicit trafficking of drugs as defined in the relevant law.
- d) Work which by its nature or the circumstances in which it is carried out is likely to harm the health, safety or morals of children.
- e) Work done by children below the minimum age for admission to employment.”

## 12.5 The impact of trafficking

### Psychological impact

Trauma( longer lasting trauma), learning difficulties, attention disorders, chronic stress, depression, sexual behaviour, low self-esteem, poor social skills, obsessive compulsive disorder, multiple personality disorder.

### Health

Stunted growth, physical injuries affecting development, HIV, sexually transmitted infections (STIs), tropical diseases, malaria, dengue fever, typhoid, brain damage, psychosomatic ailments, eye problems, chronic migraines, stomach aches.

## 12.6 International law on human trafficking

- The United Nations Convention against Transnational Organised Crime of 2000.
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, of 2003.
- The Convention on the Rights of the Child of 1989.
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000 (obliges the State to extend legislative and other measures to act effectively against these practices and to assist victims).
- The Convention on the Elimination of all Forms of Discrimination against Women of 1979 (obliges the State to ensure that women are not treated like objects that can be bought or sold and that women should not be exploited).
- The Rome Statute of the International Criminal Court 29 of 1930.
- The Convention Concerning the Prohibition and Immediate Action on Human and Peoples Rights of 1981.
- The African Charter on the Rights and Welfare of the Child of 1990 and Protocol to the African Charter on the Rights of Women in Africa (commits State parties to take appropriate measures to prevent the sale of or traffic in children for any purpose or in any form by any person, including parents or legal guardians of the child).

## **12.7 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children**

This Protocol of 2003 is the most significant international protocol which directs South Africa to adopt legislative and other measures as may be necessary to establish trafficking as a criminal offence.

### **Article 5 of Protocol**

State parties must adopt legislative and other measures to establish trafficking as a criminal offence.

### **Article 6 of Protocol**

State parties must assist and protect victims of trafficking, and ensure that their domestic, legal or administrative system have measures to provide victims of trafficking with information.

## **12.8 South African Constitution and laws**

- Section 231 of our Constitution addresses International Agreements, and says that an international treaty binds South Africa at an international level after it has been approved by resolution in both the National Assembly and the National Council of Provinces.
- Section 231(4) of the Constitution states that an international agreement only becomes law in South Africa when it is enacted into law by national legislation.
- South African Constitution: Bill of Rights: Sections 9, 10, 12, 21 and 28.
- Child Care Amendment Act of 1996.
- Sexual Offences Act of 1957.
- Children's Act of 2005.
- Prevention of Family Violence Act of 1993.
- Basic Conditions of Employment Act 1997.

- Prevention of Organised Crime Act 121 of 1998.
- Immigration Act 13 of 2002.

## **12.9 Prevention and Combating of Trafficking in Persons Act**

The Prevention and Combating of Trafficking in Persons Act 7 of 2013 was signed into law on 28 July 2013. For the first time, South Africa has one law to address all the offences relating to the trafficking of people.

Besides creating the main offence of trafficking in persons, this new Act also creates offences such as debt bondage; the possession, destruction and tampering with travel documents; and using the services of victims of trafficking.

### **SUMMARY OF THE ACT**

#### **Preamble**

- Recognise that poverty, unemployment and search for improved socio-economic opportunities are contributing factors making persons vulnerable to become victims of trafficking.
- Concerned by the increase of trafficking in persons, especially women and children, and the increasing role played by organised criminal networks in the trafficking of persons globally.
- Must be in line with human rights.
- Must be in line with the Protocol (see 12.7 on page 376).

#### **Chapter 2: Offences, penalties and extra-territorial jurisdiction**

- Trafficking is an offence and if a person is found guilty, he/she will be liable on conviction to a fine or imprisonment, including a fine up to R100 million or life imprisonment.
- *Debt bondage* is an offence:

“Any person who intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence.”

- It is also an offence to intentionally destroy, confiscate, tamper or conceal an identity document, passport or other travel document of a victim of trafficking.
- It is an offence to use the services of or to enable someone to use the services of a person who was trafficked.
- Anyone who incites, conspires, instigates, commands, directs, aids, advises, encourages or procures any other person to commit the offence of trafficking, can get a fine or imprisonment, including life imprisonment.
- A perpetrator cannot use a defence stating that the victim consented to the intended exploitation or that the exploitation did not occur.
- If someone commits an offence of trafficking, the employer or principal may be liable too, if the person acts within the scope of his/her employment, apparent authority, or with the implied consent of the director, employer or principal.
- Conduct facilitating trafficking in persons: if someone who leases a room or house, building or establishment, advertises, publishes, prints, facilitate or promote, including the use of the internet, is guilty of an offence, they can get a fine or imprisonment for a period up to 10 years.
- Internet Service Providers: must take all reasonable steps to prevent the use of their service for purposes of trafficking – they can be guilty of an offence and liable to a fine or imprisonment of up to 5 years.
- Liability of carriers: any one who brings a victim or removes a victim from South Africa and the victim does not have travel documents, can be liable to a fine up to R1 million or imprisonment up to 5 years.
- *Extra-territorial jurisdiction*: a court has jurisdiction for an act committed outside South Africa which would have been an offence under this Act.
- Under Section 14, when a person is convicted of any offence in Chapter 1, the court may impose a sentence, and will consider these *aggravating factors*:
  - ~ The significance of the role of the convicted person in the trafficking process.
  - ~ Previous convictions relating to the offence of trafficking in persons.
  - ~ Whether the convicted person caused the victim to become addicted to

the use of a dependence- producing substance.

- ~ The conditions in which the victim was kept.
- ~ Whether the victim was held captive for any period.
- ~ Whether the victim suffered abuse and the extent of this abuse.
- ~ The physical and psychological effects the abuse had on the victim.
- ~ Whether the offence formed part of organised crime.
- ~ Whether the victim was a child.
- ~ The nature of the relationship between the victim and the convicted person.
- ~ The state of the victim's mental health.
- ~ Whether the victim had any physical disability.

### **Chapter 3: Status of foreign victims of trafficking**

- There are protective steps for a victim to remain in South Africa during the investigation and prosecution of a perpetrator for trafficking.
- If the National Commissioner of the SAPS has in writing confirmed that the victim will be able to assist the police investigation, the victim can be issued a visitor's visa under Section 11 of the Immigration Act for up to 3 months.
- Once the person agrees to assist, they must be assessed by an accredited organisation.
- If after the 90 days, the person does not co-operate, then Social Development must decide whether it is safe for the person to return home, or Home Affairs will decide whether to repatriate (return to the country of origin) the foreigner – BUT these steps must be taken after carefully assessing the safety of the person in returning to their country of origin *and* after checking if there are institutions there to assist victims of trafficking.
- Permanent residence: application under Section 27(h) for permanent residence after being in South Africa for 5 years.

## **Chapter 4: Identification and protection of victims of trafficking**

- Immigration official, labour inspector, social worker, social service professional, medical practitioner, nurse, teacher, traditional healer who suspects that a person is a victim of trafficking, must within 24 hours report it to a police official.
- The police official must within 24 hours refer the child victim to a child protection organisation or the provincial Department of Social Development, pending a police investigation.
- With adult victims, the persons mentioned in point 1 must get written consent from the victim, unless the adult victim is mentally disabled, or in an altered state of consciousness through drugs or other causes. And then the police official must refer the adult victim to an accredited organisation.
- The accredited organisation must within 24 hours make an assessment and the victim must be informed of the right to apply for a recovery and reflection period.
- Child victims must be placed in temporary safe care and a foreign child can apply for refugee asylum.
- Foreigners must be given access to health care services.
- There should be no prosecution for being an illegal immigrant, for false documents and for being involved in an illegal activity.

## **Chapter 5: Services to adult victims of trafficking**

- Accredited organisations: must get a certificate from the Minister of Social Development.
- These organisations deal with the safety and health care of victims.
- Programmes should be focused on accommodation, counselling, rehabilitation and reintegration.
- The organisation must provide statistics on the number of victims, purposes for trafficking, and methods used to recruit.

## Chapter 6: Compensation

- *To victims of trafficking*: the court can order that the offender pay for the damage to or the loss or destruction of property, including money, physical, psychological and other injuries, being infected with a life-threatening disease, or loss of income and support.
- *Compensation to the State*: the court may make an order for payment for expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim.

## Chapter 8: General provisions

- If a child was trafficked by a parent, guardian or a person who has parental rights and responsibilities to the child, the court may suspend the person's parental rights and responsibilities, and place the child in a temporary place of safety.
- The Director-General of Home Affairs can be requested by another country that is a party to the UN Protocol to check on the legality of identity documents that may have been used to traffic a person.

### ⋮ **Note:**

⋮ A copy of this Act is available by following this link:

⋮ <http://www.gov.za/documents/index>.

⋮ <http://www.gov.za/documents/index.php?term=trafficking&dfrom=&dto=&tps%5B%5D=1 &subjs%5B%5D=0>.



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