

The effect of section 43 of the BCEA on employment contracts and legislative protection of minors

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OPSOMMING

Die uitwerking van artikel 43 van die Wet of Basiese Diensvoorwaardes op dienskontrakte en die statutêre beskerming van minderjariges

Artikel 43 van die Wet op Basiese Diensvoorwaardes belet die indiensneming van kinders jonger as 15 jaar. Dit is 'n strafregtelike oortreding om te vereis of om toe te laat dat 'n kind werk verrig wat onvanpas is vir 'n persoon van sy of haar ouderdom, of wat die kind se welsyn bedreig. Artikel 43 swyg oor die geldigheid al dan nie van 'n werkskontrak wat met 'n minderjarige van jonger as 15 aangegaan is. Dit is van belang om te bepaal indien artikel 43 die gemeenregtelike posisie verander deur dit 'n kriminele oortreding te maak om die minderjarige in diens te neem. Die skrywer ontleed die teks van artikel 43 deur 'n 'purposive approach' tot wetsuitleg te volg en kom tot die slotsom dat artikel 43 nie die gemeenregtelike posisie verander nie, op voorwaarde dat die kontrak aan die vereistes van artikel 43(2) van die Wet voldoen.

1 Introduction

In South African law, a minor is any person below the age of eighteen years.¹ However, as far as the capacity to perform a juristic act is concerned, minority is divided into two groups, namely minors aged between zero and seven years (*infans*), and minors aged between seven and eighteen years (usually referred to as *pupilis*).² This paper focuses on minors aged between seven and eighteen years to the exclusion of the group aged between zero and seven years. Therefore, any reference to minors in this paper refers to minors aged between seven and eighteen years.

Child labour is a dynamic concept in that children are found in a variety of labour sectors, ranging from the worst forms of labour to soft employment. In South Africa in particular, children are mostly employed on farms while others do vacation work and there are those who do worst forms of labour, which rip them off their education and childhood, and endanger their lives. Additionally, diseases and illnesses such as HIV/AIDS have left many families as child-headed households with the result

1 S 7 of the Children's Act 38 of 2005.

2 Christie *The Law of Contract in South Africa* (2006) 232.

that children seek employment in order to pursue a living. Equally, in families where at least one parent is still alive, levels of poverty cause children to seek employment in an attempt to support the family. The survey conducted by the South African Department of Human Settlement for the province of KwaZulu-Natal indicated that 2 808 children, between the ages of ten and fourteen years, live in child-headed households.³ Countrywide statistics reveal that 44 000 children, below the age of eleven years, live in child-headed households⁴ and that there are an estimated 800 000 child labourers in South Africa.⁵ This number is a cause for concern. Of course, it must be noted that social grants are available for these children and that if successful, each child is given R350 per month (approximately US \$25).⁶ However, given the high cost of living, the falling Rand against the American Dollar and increasing food prices, this amount needs to be supplemented. Consequently, the status of the employment contracts that children, below the age of eleven years, are concluding need to be assessed.

Against the above background, this contribution seeks to determine whether section 43 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA), which makes it a criminal offence to employ minors aged below fifteen years, results in a contract of employment concluded between a child below the age of fifteen years illegal and, therefore, void. In essence, this question will address further practical questions on the minor's right of recourse to labour institutions and remedies in the following instances: (a) where a child is not paid wages and wants to enforce his/her rights in terms of the BCEA; (b) where a child is unfairly dismissed on grounds of incapacity or misconduct; (c) where a child is injured in the workplace and eligibility for compensation under the South African Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the COIDA) is questioned. The scenarios mentioned above are embedded in the constitutional right to fair labour practice espoused in section 23 of the South African Constitution of 1996 (the Constitution) and more so in the Labour Relations Act (LRA),⁷ which seeks to give effect to section 23 of the Constitution.⁸ In all the above-mentioned situations, can it be argued that the employment contract was illegal and children are therefore not eligible for remedies under common law, the BCEA and/or any relevant labour statute? In answering these questions, the author will begin the analysis by discussing the status of employment

3 KwaZulu-Natal Department of Human Settlement 'Research on Child Headed Households' (June 2010) p 7 available from <http://www.kzndhs.gov.za/Portals/0/docs/Research%20and%20Report/Research%20Report.CHH2010.pdf> (accessed 2015-02-17).

4 *Idem* 8.

5 'Child labour in SA still too high' 2013-08-01 available from <http://www.fin24.com/Economy/Child-labour-in-SA-still-too-high-20130801> (accessed 2015-02-18).

6 Parliament Budget Speech 6 presented to Parliament on 2015-02-24 p 22 available from <http://www.parliament.gov.za/content/speech~11.pdf> (accessed 2016-07-11).

7 Labour Relation Act 66 of 1995 (the LRA).

8 S 3 of the LRA; *Chirwa v Transnet* 2008 4 SA 367 (CC) par 110.

contracts concluded by minors. The discussion will then focus on the wording of section 43 of the BCEA with a view to determine if it makes the contract concluded by a minor, aged below 15 years, void and what the consequences thereof are (remedies).

2 Status of Minor's Contract at Common Law

2 1 Capacity

Given their inability to appreciate the consequences of their actions, minors do not have full capacity to perform juristic acts – that is, any action that the law attaches consequences to. This means that minors need assistance from guardians to perform juristic acts.⁹ Consequently, any juristic act performed by a minor who is unassisted, is voidable at the instance of the guardian or at the instance of the minor when the minor reaches upon majority.¹⁰ Whereas voidability relates to juristic acts concluded by the minor between the ages of seven and eighteen years, different statutes in South Africa regulate a minor's actions differently – leading to inconsistencies in the legal system. Thus, whereas the law generally does not give minors full capacity to give consent, the Children's Act accords minors, above twelve years, full capacity to give consent to medical treatment or operations performed on him/her and also on his/her child as provided for by section 129 of the Children's Act. Nevertheless, for contracts in general, minors aged between seven and eighteen years require assistance from guardians, otherwise the contract is voidable. While there are different contracts that a minor can conclude, this paper focuses on employment contracts.

As correctly indicated by Grogan, the capacity to enter into an employment contract is governed by general principles of the law of contract.¹¹ This means that an employment contract concluded by a minor between the ages of seven and eighteen years is voidable at the instance of the guardian or at the instance of the minor when the minor reaches majority.¹² If the guardian chooses to exercise his authority over such contract and withholds his consent, the contract becomes void *ab initio*. No rights and obligations arise from a void contract but a claim of unjustified enrichment can be made.¹³ However, if the guardian decides to ratify the contract, it becomes enforceable against both parties (the minor and the other contracting party) and normal rights and obligations

9 The assistance can come in many forms, which include, *inter alia*, that a guardian can give his or her consent; a guardian can assist the minor in concluding the contract; a guardian can conclude the contract on behalf of the minor; or a guardian can ratify the contract *ex post facto*; see Christie *supra* n 2 at 233.

10 Christie *supra* n 2 at 233.

11 Grogan *Workplace Law* (2014) 38.

12 *Ibid.*

13 Christie & Bradfield *Christie's: The law of contract in South Africa* (2011) 244-245.

arising from the contract will be exercised by both parties. For employment contracts where the guardian withholds his consent, the minor will not be able to exercise certain rights accruing from an employment contract as will be discussed below.

2 2 Legality

As indicated above, section 43 of the BCEA not only deals with voidability of a minor's contract, but it also centres on the legality of the minor's employment – given that section 43 makes it a criminal offence to employ a minor who is aged below fifteen years. Therefore, it becomes important to discuss legality and the implications thereof.

One of the essential elements for concluding an employment contract is that the contract must be legal otherwise it becomes unenforceable.¹⁴ Specifically, it must not be against public policy and it must not be prohibited by statute. Agreements that are against public policy or prohibited by statute are usually void and unenforceable while others may be valid but unenforceable.¹⁵ It is crucial to note that for an agreement which is prohibited by the statute to be void, the statutory provision must specifically state that the prohibited agreement is void or invalid – otherwise, the agreement remains only illegal but not void.¹⁶ If the statute merely prohibits the formation of a particular agreement without stating that the agreement is void, then the intention of the legislature to also void such agreement must be determined.¹⁷ The criteria for determining the intention of the legislature is to consider the language, scope and object of the provision and the consequences in relation to justice and convenience of adopting one view rather than another.¹⁸

The legislature would generally be regarded as having intended to render the agreement void if upholding it would give rise to the mischief that the legislature intended to prevent.¹⁹ It will be determined below whether the legislature intended to make the employment relationship that involves a minor, aged below fifteen years, illegal and void.

The usual consequences of an illegal contract would be an invocation of the *ex turpi causa non oritur* action rule, thereby declaring the contract unenforceable. Other than the *ex turpi causa* action rule, the *in pari delicto potior est condition defendetis* rule is also invoked. The effect of the latter rule is to weigh the guilt to determine who, between the plaintiff and the defendant, has participated more than the other in an illegal contract. However, given that employment rights are derived from the

14 *Idem* 406.

15 *Ibid.*

16 *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC) 635; Sharrock *Business Transactions Law* (2007) 96.

17 *Ibid.*

18 *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) 188.

19 Sharrock *supra* n 16 at 96.

Constitution, these rules find limited application in an employment relationship as will be discussed below (see par 3 4).

3 Effect of Section 43 of the BCEA as Amended on a Minor's Employment Contract

3 1 General Approach to Statutory Interpretation

Although there are many canons of statutory interpretation in the common law system, the practice of South African courts has been to give effect to the literal meaning of words and seek the intention of the legislature (literalist-cum-intentionalist approach).²⁰ This approach has been endorsed by the Constitutional Court.²¹ Accordingly, the wording of section 43 will be determined using the literalist-cum-intentionalist approach to determine if it can be given an interpretation that is tantamount to invalidating an employment contract concluded by a minor. Section 43 of the BCEA provides as follows:

- (1) No person may employ a child –
 - (a) who is under 15 years of age; or
 - (b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.
- (2) No person may employ a child in employment
 - (a) that is inappropriate for a person of that age;
 - (b) that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.
- (3) A person who employs a child in contravention of subsection (1) or (2) commits an offence.

In 2013, this section was amended as follows:

- (1) Subject to section 50(2)(b), a person [may employ] must not require or permit a child to work, if the child –
 - (a) [who] is under 15 years of age; or
 - (b) [who] is under the minimum school-leaving age in terms of any law, [if this is 15 or older].
- (2) [No] A person [may employ] must not require or permit a child [in employment] to perform any work or provide any services –
 - (a) that [is] are inappropriate for a person of that age;
 - (b) that [places] place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

20 Du Plessis *Re-interpretation of Statutes* (2004) 118.

21 *African Christian Democratic Party v Electoral Commission and Others* 2006 3 SA 305 (CC) parrr 21, 25, 28 & 31; *Daniels v Campbell* 2004 5 SA 331 (CC) parrr 22-23.

- (3) A person who [employs] requires or permits a child to work in contravention of subsection (1) or (2) commits an offence.

In their ordinary meaning, the words in section 43(1) do not allow employment of children aged below fifteen years or a child who is below the minimum school-leaving age in terms of any law. To this effect, the South African Schools Act²² is the relevant law in point since it prescribes the minimum school-leaving age. That being said, section 43(2) creates flexibility to the general prohibition created in section 43(1). Thus, it allows employment of children aged below fifteen years provided that the work or service to be performed by the child does not place the child's well-being, education, physical or mental health, or spiritual, moral or social development at risk. This means that a child can be employed, in accordance with the ordinary requirements of the law of contract, provided that the work or service complies with section 43(2). Further, section 43 does not say anything about the validity of the employment contract concluded by a minor aged below fifteen years other than making it an offence for parents and employers to allow such children to work or provide services. Consequently, one needs to determine the intention of the legislature in this regard.

It is notable that the original section 43 uses a permissive word 'may' while the amendment uses the stronger word 'must'. It may therefore be argued that although section 43 is silent on the status of employment contracts concluded by a minor or with a minor, such contracts are illegal and void because section 43 uses the stronger word 'must'. This, coupled with the fact that it makes it an offence to employ a child aged below fifteen years, may be an indication of the legislature's intention to void or invalidate such contracts. To this end, a distinction is made between peremptory or directory provisions; if the use of the word 'must' is given a peremptory usage, then failure to comply with section 43 makes the contract of employment void but if it is merely directory, then such a contract will be voidable or valid where the guardian has given consent in accordance with the general principles of the law of contract – despite that it is concluded in contravention of section 43.²³ The test laid down in *Sutter v Scheepers*, a decision widely followed by South African courts,²⁴ to determine whether words should be given peremptory or directory effect is as follows:

Generally the words "shall" or "must" are understood as being peremptory unless there are other circumstances that negate this construction:

- (a) if a provision is couched in the negative, it is regarded as peremptory instead of being merely directory ...

22 South African Schools Act 84 of 1996 (the SASA).

23 *Sutter v Scheepers* 1932 AD 165 par 173.

24 See *The Minister of Environmental Affairs & Tourism v Pepper Bay Fishing* 2003 6 SA 407 (SCA); *Kylie v CCMA* 2010 31 ILJ 1600 (LAC); and *Standard Bank of South Africa v Abduraouf Darwood* 2012 6 SA 151 (WCC).

- (b) if a provision is couched in the positive and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory ...
- (c) if we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead injustice or even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of provision being directory.
- (d) The history of the legislation will also afford a clue in some cases.²⁵

Applying this test, one would like to construe section 43 as peremptory, thereby nullifying or voiding the contract of employment concluded by the minor aged below fifteen years, however, other circumstances (section 43(2)) may negate such a construction. As indicated above, section 43(2) permits employing children aged below fifteen years provided that the work is appropriate to a person of that age and provided that the work does not place in danger the child's wellbeing, education, physical or mental health, or spiritual, moral or social development. Given section 43(2) therefore, section 43 cannot be regarded as being peremptory despite that it is couched in the negative.

Assuming that section 43 were to be regarded as peremptory, thereby nullifying or voiding any contract of employment concluded by the minor, the effect of such construction on minors will lead to injustice or unfair labour practice as will be discussed below. Thus, one would recall that ordinarily the contract concluded by the minor is voidable but can be ratified by the guardian or the minor upon such minor attaining majority (eighteen years). That being said, if the guardian decides not to ratify the contract, it becomes void *ab initio* and unenforceable. For employment contracts, it follows that if ratified by the guardian; the minor can enforce the contract of employment against the employer and be entitled to remedies such as reinstatement or compensation in cases where the minor is unfairly dismissed. Further, the employer can be held vicariously liable for actions of the minor committed during the scope of the minor's employment and the employer can claim against the minor for losses incurred. In addition, a minor would be eligible to claim under COIDA if injured at the workplace or at least under common law for breach of employer's duty to provide safe working conditions.²⁶ However, if the employment contract is void, a minor injured at work cannot claim under COIDA as a claim from COIDA is embedded in a valid employment contract since the injury ought to have occurred during the scope of one's work. The same is true for the common law duty to provide safe working conditions – it presupposes a valid employment contract. Further, if void, it follows that the minor who is unfairly dismissed cannot be reinstated since one can only be reinstated if there existed a valid employment contract. Equally, such a minor cannot be awarded compensation for having performed under an illegal contract.

²⁵ *Sutter v Scheepers supra* n 23 at par 173.

²⁶ *Media 24 Ltd v Grobler* 2005 7 BLLR 649 (SCA).

Additionally, predatory employers may use minors and dismiss them when 'pay-day' approaches without any remedies available to such minors except holding the employer in question criminally liable. On the basis of the aforementioned, the injustices that are likely to occur if section 43 were to be declared peremptory are so grave that the provision should be regarded as directory. The issue of sanction alone does not always mean the provision is peremptory because, at times, the legislature simply uses sanction as a deterrent rather than as an indication to void an agreement.²⁷

One should realise that the amendment replaces any reference to 'employment' with 'require or permit a child to work' which could be an indication that the legislature does not even regard rendering of services by a minor for reward as employment. However, it is not the form that courts are concerned with but the substance of the relationship.²⁸ Thus, it does not matter that the working relationship between a minor and an employer is given a different label – so long as the substance of the relationship is that of employment – the contract will be looked at as such.

As indicated above, section 43 makes reference to any law that prescribes the school-leaving age, and the provisions of SASA will be looked into as well to determine if they can be interpreted to invalidate the contract of employment concluded by the minor – specifically section 3 of SASA which deals with compulsory schooling. Section 3 of SASA compels parents to ensure that every learner under his or her responsibility attends school from the age of seven years until the attainment of either fifteen years or the ninth grade. Since admission to schools is not dependent on the parents, SASA also places an obligation on the Executive Council to ensure that there are enough opportunities for every child in the province to attend school.²⁹ Although the obligation to ensure that children below the age of fifteen years is placed on parents, anyone who employs a child below the age of fifteen years contravenes section 3 of SASA by analogy. The same question raised above is applicable here – is the employment contract concluded by the minor who is below the age of fifteen years void because the minor is supposed to be at school? The wording of section 3 does not indicate that every child below the age of fifteen years must be at school because resources (places at school) are put in place progressively as per section 3(4) of SASA. Also, concluding the employment contract does not mean that the minor has to leave school. Thus, a minor below the age of fifteen years can conclude an employment contract under which he works only on weekends for half a day and this, surely, does not infringe section 3 of SASA. Therefore, it is inconceivable that an employment contract

27 De Ville *Constitutional and Statutory Interpretation* (2000) 261; *Pottie v Kotze* 1954 3 SA 719 (A).

28 *State Information Technology Agency (Pty) Limited v CCMA* 2008 29 ILJ 2234 (LAC) par 10.

29 Ss 3(3) & (4) of the SASA.

concluded by the minor below the age of fifteen years can be rendered void on the grounds that it contravenes section 3 of SASA especially if such contract complies with section 43(2) of the BCEA.

Further, the difficulty posed by section 43(2) is that it is silent on who should determine the appropriateness or suitability of work to be done by a specific minor. It is therefore unclear whether it is the courts or the employer or the authorities in the Department of Labour who are tasked with such a determination.³⁰ Therefore, because of its vagueness, it cannot be interpreted to mean that it voids all employment contracts concluded by a minor especially because statute law must be interpreted in line with the common law unless it categorically changes the common law position. This golden principle of interpretation of statutes was echoed in *Johannesburg Municipality v Cohen's Trustees*³¹ where the Court held that '[i]t is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law'.³² Consequently, since a long standing common law position on the status of minors' employment contracts is that such a contract is voidable at the instance of the minor upon attaining majority or at the instance of the guardian, a permissive provision such as section 43 cannot be found to be voiding employment contracts concluded by the minor aged below fifteen years.

As indicated earlier, section 43 makes it a criminal offence to employ a minor without stating whether the contract, concluded in contravention of section 43, is legal or not. To this end, South African courts have had an opportunity to deal with a provision similar to section 43 of the BCEA, with the purpose of the inquiry being to determine if the intention of the legislature was to render employment contracts, concluded by illegal immigrants, void.³³ It is important to look at this provision, which has been subject to courts' interpretation given its resemblance to section 43 of the BCEA, because both provisions criminalise the employment of illegal foreigners and minors respectively but are silent on the validity of the contracts concluded with illegal immigrants or children. The provision at issue is section 38, read with section 49, of the Immigration Act 13 of 2002. Section 38 provides as follows:

- (1) No person shall employ –
 - (a) an illegal foreigner;
 - (b) a foreigner whose status does not authorise him or her to be employed by such person; or

30 Comparison can be drawn between section 43(2) and section 7(2) of Employment Equity Act 55 of 1998 which prohibits HIV testing of employees by an employer unless a court finds it justifiable. Meaning, the employer must apply to court to get permission to test employees for HIV.

31 1909 TS 811.

32 *Idem* par 823.

33 See *Discovery Health Limited v CCMA supra* n 16 at 635.

- (c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.

Section 49(3) of that Act states that anyone 'who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year'.

Section 38(1) of the Immigration Act is the reason behind the dismissal of a foreign national, Lanzetta, who was employed by Discovery Health.³⁴ In this case, Discovery Health had employed a foreigner who had claimed to be in possession of a work permit. Upon realising that the employee did not have a work permit, Discovery Health terminated the contract of employment. The employee took Discovery Health to the Commission for Conciliation, Mediation and Arbitration (CCMA). The first issue to be determined was whether the Commission had jurisdiction because, as Discovery Health contended, the applicant was not an employee since the employment contract was unlawful.³⁵ The Commission ruled that the applicant was an employee and further that the CCMA did have jurisdiction.³⁶ On appeal, the Labour Court had to decide whether the employment contract between Discovery Health and Lanzetta was valid and, if not, whether the invalidity meant that there was no employer-employee relationship between the parties. On the question of the validity of the contract, the Court held that the Immigration Act does not directly declare that a contract of employment concluded without the necessary permit is void but found, rather, that it merely prohibits an act of employing foreigners in violation of the Immigration Act and imposes penalties.³⁷ In the absence of direct pronouncement from the BCEA regarding the validity of a contract of employment concluded in contravention of Immigration Act, the Court sought to determine whether the legislature intended to rely on the deterrent effect of the sanction imposed on employers who breach the Immigration Act or whether the legislature intended to render the contract of employment void.³⁸ The Court found that there is no indication from section 38(1) that the legislature intended to limit the right to fair labour practice – except to penalise persons who employ others in contravention of section 38(1). The Court specifically ruled that:

by criminalising only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the Legislature did not intend to render invalid the underlying contract.³⁹

Given the similarities between section 38, read with section 49, of the Immigration Act and section 43 of the BCEA, the legal principles or

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Idem* par 640.

38 *Ibid.*

39 *Idem* par 642.

findings in *Discovery Health* are highly persuasive in deciding the effect of section 43 of the BCEA on a contract of employment concluded by a minor. To this effect, the author submits that since section 43 of the BCEA only criminalises employing minors aged below fifteen years and does not explicitly invalidate the contract of employment concluded by the minor who is below the age of fifteen years, any contract of employment concluded in contravention of section 43 of the BCEA remains only voidable, in accordance with the general principles of the law of contract, or valid if the guardian gives his/her consent and the contract complies with section 43(2).

3 2 Constitutional Approach

The advent of the new constitutional order in South Africa has had a great impact on the interpretation of statutes. Thus, while the general approach to interpretation as discussed above is still maintained, a purposive approach has also been applied extensively. The starting point is still the literal-cum-intentionalist approach, and if the words are still not clear, then the purposive approach is resorted to.⁴⁰ Of course, there is a thin line between the intention of the legislature and purpose of the legislation in question.⁴¹ But, the purposive approach, as construed by the Constitutional Court, goes beyond the purpose of the act and requires that the act be interpreted in a manner that promotes the Bill of Rights.⁴² Thus, in *Bertie Van Zyl (Pty) Ltd and Montina Boerdery (Pty) Ltd v Minister of Safety and Security*,⁴³ Mokgoro J stated that the Constitution requires a purposive approach to statutory interpretation,⁴⁴ which was also alluded to in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*⁴⁵ by Ngcobo J as:

The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights.⁴⁶

On the basis of the above, section 43 must be interpreted in line with the Bill of Rights. Accordingly, section 28 of the Constitution deals with the rights of children and protects children from exploitative labour. Specifically, section 28(1)(e) and (f) which provides as follows:

- (1) Every child has a right –
- (e) to be protected from exploitative labour

40 Du Plessis *supra* n 20 at 118.

41 *Ibid.*

42 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) par 91.

43 2009 10 BCLR 978 (CC).

44 *Idem* par 21.

45 2004 4 SA 490 (CC).

46 *Idem* par 91.

- (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

To this effect, the above sections have been interpreted to mean that while paragraph (e) places a positive duty on the state to protect children from exploitative labour, paragraph (f) places negative obligations on employers and parents to refrain from engaging children in exploitative labour.⁴⁷ Overall, both paragraphs (e) and (f) recognise that children are engaged in gainful work and they both, therefore, do not ban child labour completely but rather ban exploitative labour.⁴⁸ Exploitative labour is one which is not appropriate for a person of that child's age and one which places the child's wellbeing, education, physical or mental health or social development at risk. Accordingly, section 43 of the BCEA has to be interpreted in line with section 28(1)(e) and (f) of the Constitution. As such, while section 43(1) prohibits child labour, section 43(2) recognises that children, aged below fifteen years, can be employed provided that the work or service does not place the child's wellbeing, education, physical or mental health or social development at risk. This conclusion reinforces the interpretation of section 43 adopted using the general approach to the interpretation of statutes above. Thus, section 43 does not completely prohibit employment of children aged below fifteen years; it allows employment to the extent that the work or services to be offered by the minor comply with the requirements of section 43(2). Nowhere in the section 43 does the legislature make a contract of employment concluded by the minor aged below fifteen years void.

3 3 The Effect of the International Labour Organisation on Statutory Interpretation

International law plays a major role in South Africa to the extent that it does not conflict with the Constitution. To this effect, South Africa is a party to many international labour organisation treaties and sections 39(1) and 233 of the Constitution require courts to take into account international law in interpreting statutes. At this point it is important to consider the International Labour Organisation (ILO) conventions on child labour with a view to determining whether section 43 of the BCEA invalidates employment contracts concluded by minors aged below fifteen years.

The ILO's Convention on Minimum Age (Minimum Age Convention), which South Africa is a party to, sets employment age as eighteen years

47 Robinson 'Children's Rights in the South African Constitution' 2003 *Potchefstroom Electronic Law Journal* 48.

48 *Ibid.*

and above.⁴⁹ That being said, it nonetheless allows children aged at least twelve years to do work provided that the tasks do not threaten their health and safety, or hinder their education or vocational orientation and training.⁵⁰ While it is acknowledged that the ILO aims to abolish child labour, this provision takes cognizance of the fact that children are engaged in gainful employment. However, it seeks to protect children involved in gainful employment from exploitation by requiring that the tasks should not threaten their health and safety or hinder their education or vocational orientation and training. Similar to section 43 of the BCEA and the Constitution, this provision does not seek to invalidate employment contracts concluded by minors aged below fifteen years provided that the tasks comply with Article 7.1 of the Minimum Age Convention. Additionally, the minimum standards provided for in the Minimum Age Convention apply to:

mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.⁵¹

This means that the ILO's minimum age for other forms of employment can be even lower. Therefore, given section 43(2) of the BCEA, the Constitution and the ILO's Minimum Age Convention, it becomes difficult to conclude that all contracts concluded by a minor aged below fifteen years are void. Of course, South Africa is free to raise the bar higher than the minimum protections afforded by international treaties but there is no pronouncement from section 43 as it currently stands that the legislature intended to raise the bar.

3 4 Remedies

Having concluded that section 43 of the BCEA does not render an employment contract concluded by a minor, aged below fifteen years, illegal and void, it becomes vital to look at the remedies available to the minor who gets unfairly dismissed or gets injured at the workplace. Can such a minor get the remedies under the LRA because his contract is valid although it contravenes the BCEA? Although not dealing with minors, courts have drawn a distinction between contracts that are illegal, because the subject matter of the contract is illegal, and contracts that are otherwise legal but contravene a statute when awarding remedies and these are contentious issues in South Africa following the decisions in *Discovery Health* and *Kylie v CCMA and Michelle van Zyl t/a Brigitte's*.⁵²

49 International Labour Organisation Convention 138 on the Minimum Age (1973-06-26) 1015 UNTS 297 at art 3(1).

50 *Idem* art 7(1).

51 *Idem* art 5(2).

52 *Kylie and Van Zyl t/a Brigittes* (2007) 28 ILJ 470 (CCMA) which, on appeal, became *Kylie v CCMA and Michelle van Zyl t/a Brigitte's* 2010 31 ILJ 1600 (LAC).

With regard to contracts that are illegal because the subject matter of the contract is illegal, reference is made to the *Kylie* case. This case started at the CCMA as an application against unfair dismissal. The applicant was a sex worker, employed at a massage parlour to perform various sexual services. Without a hearing, the applicant was informed that her services had been terminated. The dispute was heard at the CCMA where the respondent objected to the CCMA's jurisdiction given that the applicant was employed to perform unlawful acts. The question was whether the applicant was an employee in accordance with section 213 of the LRA in the light of the fact that the Sexual Offences Act⁵³ criminalises sex work. The CCMA considered that the Sexual Offences Act prohibits prostitution both in the sense that it makes it a criminal offence to keep a brothel as well as to engage in carnal intercourse or perform indecent acts for reward.⁵⁴ The CCMA ruled that the nature of the work that the respondent employed the applicant to perform was illegal in terms of South African law – that is, the Sexual Offences Act.⁵⁵ It therefore follows that the purpose for which the employment contract between the applicant and respondent was concluded was illegal, and this resulted in the applicant not falling into section 213 of LRA – thereby excluding the jurisdiction of the CCMA. The matter was appealed to the Labour Court where it was held that the definition of an employee in section 213 is wide enough to embrace a person whose contract was otherwise unenforceable at common law. However, the Labour Court held that a sex worker would not be entitled to protection against unfair dismissal in accordance with section 185(a) of the LRA as that would be contrary to the common law principle – entrenched in the South African Constitution – which prevents courts from sanctioning or encouraging illegal activity. Further, relying on section 193(2) of LRA, which prescribes the remedies in cases of unfair dismissal, the Court concluded that:

Nothing illustrates the conflict of the objective of the right to a fair dismissal and the objecting of the Sexual Offences Act more than an issue of reinstatement. An order of reinstatement is the primary remedy for an unfair dismissal. Reinstating a person in illegal employment would not only sanction illegal activity but may constitute an order on the employer to commit a crime.⁵⁶

This ruling was appealed to the Labour Appeal Court which relied on section 23 of the Constitution and found that it is broad enough to encompass even employees such as the applicant who are performing illegal work. Unlike the Labour Court, which looked at the LRA (the statute which creates labour courts) to determine whether the applicant was an employee, the Labour Appeal Court relied on section 23 of the

53 Sexual Offences Act 23 of 1957.

54 *Kylie and Van Zyl t/a Brigittes* supra n 52 at 477.

55 *Idem* 479.

56 *Kylie v CCMA and Michelle van Zyl t/a Brigitte's* supra n 52 at par 11.

Constitution which attracted heavy criticism with which the present author agrees with.⁵⁷ Nevertheless, having found that the applicant was an employee and that she was unfairly dismissed, the Court then considered appropriate remedies and held that section 193 of LRA provides for considerable flexibility in awarding remedies such that although the primary remedy is reinstatement, the applicant or the court can refuse reinstatement where it is not reasonably practicable for the employer to reinstate or re-employ the employee, and held that it is manifestly not practicable to reinstate the applicant as that would be against public policy.⁵⁸ Similarly, the Court could not award compensation since compensation, awarded for substantive unfairness, is regarded as monetary equivalent for loss of employment and it would be inappropriate where the nature of services rendered are illegal.⁵⁹ However, the Court ruled that monetary compensation for procedural unfairness could be awarded as that is *solatium* for the loss by an employee of her right to fair procedure.⁶⁰

For contracts where the subject matter is legal but the performance contravenes the statute, reference is made to *Discovery Health*, the facts which have been discussed above. Relying on the Constitutional Court decision in *South African National Defence Force Union v Minister of Defence*,⁶¹ the Court in *Discovery Health* ruled that the protection against unfair labour practices enshrined in section 23 of the Constitution is not limited or dependent on the existence of an employment contract,⁶² and held further that the definition of employee in the LRA is not confined to the existence of an employment contract.⁶³ Consequently, 'the fact that Lanzetta's contract was contractually invalid only because Discovery Health had employed him in breach of s 38(1) of the Immigration Act did not automatically disqualify him from that status'.⁶⁴ The Court concluded that the contract of employment between Lanzetta and Discovery Health was not invalid despite the fact that Lanzetta did not have a valid work permit to work for Discovery.⁶⁵ The case was then reverted to the CCMA to award appropriate remedies for unfair dismissal.

From *Kylie* and *Discovery Health*, it is important to discuss the remedies available to a minor if the contract were to be regarded as voidable or void. Starting with the issue of jurisdiction (access to courts), it can easily be concluded from the discussion above that irrespective of whether the contract is valid (where a guardian has given consent),

57 Selala 'The Enforceability of Illegal Employment Contracts according to the Labour Appeal Court Comments on *Kylie v CCMA* 2011 4 SA 383 (LAC)' 2011 *Potchefstroom Electronic Law Journal* 2.

58 *Kylie v CCMA and Michelle van Zyl t/a Brigitte's supra* n 52 at par 52.

59 *Idem* par 53.

60 *Ibid.*

61 1999 4 SA 469 (CC).

62 *Discovery Health Limited v CCMA supra* n 16 at par 40

63 *Idem* par 48.

64 *Idem* par 49.

65 *Idem* par 54.

voidable or void, a minor will have access to courts since the statutory (LRA) definition of an employee encompasses even contracts whose performance is illegal because they are performed by the minor contrary to section 43 of the BCEA. In addition, as courts have ruled, the right to fair labour practice enshrined in section 23 of the Constitution extends to everyone, including those who would otherwise not be regarded as employees by virtue of them being prohibited from working.

The most crucial aspect when discussing remedies relates to the kind of relief available to a minor who gets unfairly dismissed or who seeks to claim compensation under COIDA for injuries sustained at the workplace. From *Kylie*, if one were to adopt an interpretation that voids a contract of employment concluded by a minor in contravention of section 43 of the BCEA, reinstatement or compensation would not be available remedies as it would be contrary to public policy to reinstate an employee that was party to a void contract or to compensate one for performing under a void contract. Additionally, if the employer followed due process in dismissing the minor, the minor would not be eligible for any kind of compensation because *solatium* is only available for procedurally unfair dismissal. Consequently, the effect of declaring such contract void would be worse than the harm that the legislature seeks to prevent as the Court warned in *Sutter v Scheepers* and *Discovery Health*⁶⁶ because the consequences of declaring such a contract void would be unfair labour practice against the minor. Alternatively, were the contract to be declared voidable or valid where a guardian gave consent, perhaps reinstatement could be a viable remedy if the employer complied with section 43(2) – that is, provided the work is appropriate to the person of that age and provided the work does not endanger the child’s wellbeing, education, physical or mental health, or spiritual, moral or social development. Assuming the work does not comply with section 43(2), courts can refuse reinstatement and award compensation as an alternative remedy because the underlying work done would not have been illegal – unlike with sex work. Similarly, if the minor were to be injured at the workplace under a voidable or valid contract of employment, the minor would be entitled to compensation under COIDA. It is important to note that, although very old data, the survey compiled by the Department of Labour in 2003 indicated that 61 percent of children who are engaged in economic activities have claimed to have been exposed to hazardous environments while four percent indicated that they have been injured at work.⁶⁷ Therefore, the issue of injuries sustained at the workplace is real and eligibility to claim compensation under COIDA becomes important. Going back to section 43 of the BCEA, if it were to be interpreted as voiding the contract of employment involving the minor, the minor would not be eligible to claim compensation under COIDA given the definition of ‘employee’ in COIDA. Whereas the definition of employee under the LRA is wide enough to include the minor whose contract contravenes the statute (the BCEA), the

66 *Sutter v Scheepers* *supra* n 23 at par 175; *Discovery Health Limited v CCMA* *supra* n 16 at par 642.

definition of employee under COIDA is restrictive and only limited to the existence of an employment contract. Thus, section 1(xix) of COIDA defines an employee as:

A person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind.

The words 'entered into or work under a contract of service' presuppose legality or validity of such a contract. Consequently, any person who has entered into an invalid contract of service cannot be regarded as an employee for the purposes of COIDA and, therefore, is not eligible to claim compensation under COIDA. Equally, a minor employee would not be eligible to lodge a claim of injuries under the common law duty of an employer to provide safe working conditions because for this action to arise, there has to be a valid common law employment contract. Therefore, if section 43 of the BCEA were to be interpreted as voiding a minor's employment contract, the minor would not be eligible to claim under COIDA or under common law.

Based on the above considerations regarding remedies and the finding in *Discovery Health* that the contract of employment between Lanzetta and Discovery Health was valid despite that it contravened the Immigration Act, it is concluded that the contract of employment concluded by a minor can only be voidable or valid where a guardian gives his/her consent in accordance with the ordinary principles of the law of contract.

4 Conclusion

From the discussion above, it is concluded that although section 43 of the BCEA criminalises the employment of children below the age of fifteen years, the underlying employment contract concluded by the minor cannot be rendered void but, rather, voidable in accordance with the general principles of the law of contract. This is because section 43 of the BCEA does not explicitly state that such a contract is void as required by the law stated in *Sutter v Scheepers*, *Johannesburg Municipality*, and *Discovery Health*. In addition, both the general and purposive approach to statutory interpretation do not support any view that section 43 seeks

67 Department of Labour 'Child Labour Action Programme for South Africa' (2003) 15 available from <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCUQFjAB&url=http%3A%2F%2Fwww.labour.gov.za%2FDOL%2Fdownloads%2Fdocuments%2Fuseful-documents%2Fbasic-conditions-of-employment%2FResearch%2520report%2520National%2520Child%2520Labour%2520Action%2520Programme%2520for%2520South%2520Africa.doc&ei=yDguVZSMFeLd7QbmIIHIAw&usq=AFQjCNFVtSEjY3ES8lvnDk0AEPY0btiXvg&bvm=bv.90790515,d.ZGU> (accessed 2015-07-11).

to render employment contracts concluded by minors, aged below fifteen years, void.

The decisions in *Discovery Health* and *Kylie* shed light on the nature or status of employment contracts concluded in contravention of section 43 of the BCEA by clarifying that where the purpose of the contract is legal, the underlying contract cannot be rendered void despite the fact that it contravenes certain legislation. Consequently, the author comes to the conclusion that an employment contract concluded for a legal purpose by a minor cannot be rendered void despite that it may contravene section 43 of the BCEA.

It is important to mention that despite arriving at the conclusion that employment contracts concluded by minors in contravention of section 43 of the BCEA are voidable, the author does not lose sight of efforts of the international community, such as the ILO, to abolish child labour. To this end, South Africa is also party to the ILO Conventions and as such, the country has bound itself to abolish child labour. Additionally, given the large number of child-headed households, especially in the developing countries, states find it difficult to completely abolish child labour, at least at the present moment. As a result, the ILO sets minimum ages and conditions upon which children may be employed. For light work, developing countries are given twelve years as the minimum age for employment. Therefore, while the author takes cognizance of the efforts to progressively abolish child labour internationally and nationally, section 43 of the BCEA cannot presently be interpreted as rendering the contract of employment concluded by a minor void. Furthermore, the consequences of rendering an employment contract, concluded by a minor, void are greater than rendering it voidable because once such a contract is declared void, minors are taken out of the sphere of legal protection. This is so because while they are given access to courts, courts do not give effective labour remedies (reinstatement or compensation) to illegal contracts as it would be contrary to public policy. Consequently, it is a mockery for the law and for the courts to say that people who are engaged in illegal contracts, such as in *Kylie*, have a right to fair labour practice espoused in the Constitution and the LRA yet there are no remedies available to them. As Pistorius puts it, jurisdiction does not only refer to access to courts – the power courts have over a defendant – but also the court's ability to give effective remedy.⁶⁸ Consequently, it is as good as holding that courts do not have jurisdiction, as was done by the CCMA in *Kylie*, given that labour remedies (reinstatement and compensation) are not available to parties in illegal contracts.

68 Pistorius *Pollack on Jurisdiction* (1993) 4.