



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Investigation into possible human rights abuses of dancers at Mavericks
Gentleman's Club

Referral by Desai ADJP in *Mavericks Revue CC and Others v Director General
of the Department of Home Affairs and Another* (WCHA Case No
22369/20122)

File Ref No: WP/1213/0041

REPORT

1. Introduction

1.1 The South African Human Rights Commission (hereinafter referred to as "the Commission") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa 1996 (hereinafter referred to as "the Constitution").

1.2 In terms of Chapter 2 Section 184 (1) of the Constitution,

The South African Human Rights Commission must-

- (a) promote respect for human rights and a culture of human rights;*
- (b) promote the protection, development and attainment of human rights; and*
- (c) monitor and assess the observance of human rights in the Republic.*

Further, in terms of Section 184 (2):

The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power-

- (a) to investigate and to report on the observance of human rights;*
- (b) to take steps to secure appropriate redress where human rights have been violated;...*

- 1.3 The Human Rights Commission Act, 54 of 1994 (as promulgated in terms of Section 184(4) of the Constitution) further supplements the powers of the Commission.
- 1.4 Section 9(6) of the Human Rights Commission Act and Complaints Handling Procedures promulgated in terms of this Act determine the procedure to be followed in conducting an investigation regarding the alleged violation of/ or threat to a fundamental right.
- 1.5 It is within the framework of this constitutional mandate that the Commission undertakes this investigation.

2. The Parties

- 2.1 Mavericks Revue CC ("Mavericks") duly incorporated in terms of the laws of the Republic, with its principal place of business at 68 Barrack Street, Cape Town, Western Cape Province. The business operations of Mavericks is described by the sole member of the corporation as a "gentlemen's revue bar", which engages the services of a large number of foreign "exotic dancers".¹

¹ Para 2 of the judgment: *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another* (22369/11) [2012] ZAWCHC 5 (3 February 2012)

2.2 Department of Home Affairs (DOHA), a national government department within the Republic and whose mandate is:

"Firstly, the DHA is custodian, protector and verifier of the identity and status of citizens and other persons resident in South Africa. This makes it possible for people to realize their rights and access benefits and opportunities in both the public and private domains. By expanding these services to marginalized communities, the department plays a key enabler in deepening democracy and social justice.

Secondly, the DHA controls, regulates and facilitates immigration and the movement of persons through ports of entry. It also provides civics and immigration services at foreign missions; and determines the status of asylum seekers and refugees in accordance with international obligations. The department thus makes a significant contribution to ensuring national security, enabling economic development and promoting good international relations".²

3. The Complaint

3.1 **Background into the Investigation into *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another*.³**

3.1.1 Withdrawal of Corporate Permits by Department of Home Affairs (DOHA)

3.1.1.1. Mavericks was, until 7 October 2011, the holder of two corporate permits issued in terms of section 21 of the Immigration Act 13 of 2002 (the first issued on 20 July 2005 and the second issued on 29 November 2009), which entitled them to employ up to 200 foreign nationals as 'exotic dancers'.⁴ The corporation has been in operation since 1 November 2001.

² <http://www.dha.gov.za/index.php/about-us> - Downloaded on 16 August 2013

³ *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another* (22369/11) [2012] ZAWCHC 5

⁴ *Ibid* at paragraph 4.

3.1.1.2. On 7 October 2011 the Director-General of the DOHA took a decision that the two corporate work permits issued to Mavericks, as well as all outstanding corporate worker certificates,⁵ were to be returned to the DOHA by Friday 4 November 2011. He also directed that all foreign nationals employed in terms of the permits and certificates should have left the country by that date.⁶ The decision was communicated to Mavericks by a letter dated 21 October 2011.

3.1.1.3. After the permits were withdrawn, charges were laid by the DOHA against twelve foreign dancers in terms of section 49(6) of the Immigration Act 13 of 2002 for continuing to work without the required permits. Following representations made to the Western Cape Directorate of Public Prosecutions by their legal representative, charges were withdrawn against eleven of the twelve foreign dancers on 23 March 2012. Charges against the twelfth dancer were withdrawn on 14 September 2012.

3.1.2 Application for Interim Relief

3.1.2.1 In November 2011 Mavericks launched an application for interim relief suspending the Director-General's decision regarding the permits as well as the directive that the foreign nationals depart, pending an application for the judicial review of the decision.

3.1.2.2. Judgment was handed down by Judge Desai ADJP on 3 February 2012 in which the application was dismissed with costs.

3.1.2.3. In terms of the judgement of the court requested the Commission to *"investigate whether the human rights of the dancers are being infringed and, if so, what steps can be taken to alleviate their plight."*⁷

3.1.3 Review Application

⁵ These are the certificates in terms of which individual foreigners are employed by the holder of the corporate permit, and issued temporary residence (corporate worker permits) by DOHA. See paragraph 7.5 below on immigration law framework.

⁶ Page 8 of the Record : *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another*

⁷ *Ibid* at paragraph 46.

3.1.3.1. Although Mavericks initially sought leave to appeal the judgment dismissing the application for interim relief, the appeal was not proceeded with. The review application was launched on 3 February 2012 under case number 1927/2012. The Rule 53 Record was filed on 24 April 2012 and the Respondents filed opposing affidavits on 21 January 2013.

3.1.3.2. In the review application, the court was asked to:

- (a) review and set aside the decision of the Director-General to withdraw the corporate permits in terms of section 21(3) of the Immigration Act;
- (b) declare Regulations 18(3)(c) and 18(4) to the Immigration Act inconsistent with the Constitution;
- (c) review and set aside Immigration Directive 27 of 2011 of 5 December 2011 (in terms of which directive DOHA officials were advised not to issue authorisation to work in terms of section 11(2) of the Immigration Act, to exotic dancers amongst other categories of foreigners).

3.1.3.3. While the application for the review was instituted it has however not been prosecuted.

3.2 Referral of complaint to SAHRC by Cape High Court, Judge Desai

3.2.1. On the 15 February 2012 the Commission received correspondence dated 7 February 2012 from the Director-General of the DOHA as per instruction of the Court requesting the Commission to conduct an investigation into *“whether human rights of dancers are being infringed and, if so, what steps can be taken to alleviate their plight.”*⁸

⁸ Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another (22369/11) [2012] ZAWCHC 5 (3 February 2012) at paragraph 46

3.2.2. The concerns regarding the rights of the foreign dancers are set in the Court's judgment. The concerns relate to the vulnerable position of the dancers; the possible contravention of Article 3(a) of the Protocol to Prevent Suppress and Punish Trafficking in Persons; the nature of the contracts entered into between the dancers and Mavericks; and the conditions under which the foreign dancers are procured, housed and work makes them vulnerable to exploitation.

3.2.3. The Court noted the following:

"The so-called exotic dancers come to this country having concluded a flimsy one-sided contract. They are guaranteed nothing. They have to share a room for which they pay rent on a weekly basis. They are not paid at all and given no benefits whatsoever. More alarmingly they have to pay Mavericks R2000 per week. The contracts do not specify who pays for their plane ticket to South Africa and, if it is paid by Mavericks, when and how it is to be repaid. The contract does not specify what happens if they are unable to generate sufficient cash to pay the weekly R2000 and, if at all, they are entitled to keep certain basic sums - as a first payment - for food, shelter and clothing. Save to state vaguely that they are expected to model and dance on tables there is no job description. What do they model? Are they fully informed as to the exact nature of the work they are expected to do so that they can exercise some choice in the matter? Can they speak English? If not, are there people around with whom they can communicate?"

Though there have been several cases involving Mavericks and I assume that others have had sight of the contracts into which the dancers are obliged to enter, it appears that it has been blandly accepted that these are exotic dancers whatever that may mean. The conditions under which the foreign dancers are procured, housed and expected to work makes them susceptible to exploitation. They are in a vulnerable situation and the fact that the person in control of them demands or, at least, expects large sums of money on a weekly basis

*places him in possible contravention of Article 3 para (a) of the
PROTOCOL TO PREVENT SUPPRESS AND PUNISH
TRAFFICKING IN PERSONS.⁹*

4. Human rights under investigation

Human rights issues raised in course of the investigation include:¹⁰

4.1. *Equality*

"9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law."

4.2. *Human dignity*

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

4.3. *Freedom and security of the person*

12 (2) Everyone has the right to bodily and psychological integrity...

4.4. *Slavery, servitude and forced labour*

13. No one may be subjected to slavery, servitude or forced labour.

4.5. *Privacy*

14. Everyone has the right to privacy...

4.6. *Freedom of movement and residence*

21 (1) Everyone has the right to freedom of movement.

4.7. *Labour relations*

23. (1) Everyone has the right to fair labour practices.

⁹ Para 43-44 of the Judgement

¹⁰ Chapter 2 of the Constitution of South Africa

5. SCOPE AND PARAMETERS OF THE INVESTIGATION

- 5.2** The scope and parameters of the investigation and this report were informed by both the Court's request and the mandate of the Commission however limitations and challenges in respect of the investigation are documented below.
- 5.3** The components of the investigation were identified from a reading of the extensive court record, which set out the concerns raised by the court in its judgment regarding the conditions under which foreign dancers are procured, and the contracts entered into between the dancers and Mavericks. These issues include trafficking; fair labour practices; human dignity; equality; privacy and freedom of movement.
- 5.4** Given that the dancers involved in the litigation that gave rise to the request for this investigation were foreigners, the Report also deals briefly with immigration policy.¹¹ Apart from the issues relating to permits to enter and work in South Africa, all the issues identified apply to both foreign and South African dancers at Mavericks.

6. CHALLENGES FACED DURING THE INVESTIGATION PROCESS:

6.1 Complexity of Issue under Investigation

6.1.1 Intersection of a range of legal questions.

The existence of overlapping issues in the investigation must be acknowledged as these have a bearing on the determination of findings and recommendations contained in the report. For instance, the absence or limitation of certain rights may

¹¹ It should be noted that shortly after the judgment was handed down and once charges against them had been withdrawn by the DPP, many [most] of the dancers working at Mavericks at the time the application was launched left South Africa. The Commission has therefore not restricted its investigation to the dancers specifically referred to by the court in its judgment, but has included all dancers, foreigners and South Africans, who work at Mavericks and whose human rights may have been infringed, or who may be vulnerable to exploitation.

be a potential indicator of the existence of trafficking; abuse of immigration laws may enable trafficking but may not necessarily meet the standard of evidence of trafficking;¹² and the issue of maintenance of labour standards would also be a component of immigration law and discussions therein.

6.1.2 Definitional and evidentiary challenges.

The issues are complex, and are embedded in a context of diffuse and developing international and domestic legal frameworks, which in turn give rise to definitional and evidentiary challenges. The legislative challenges exist partly because of the complexity of both the ethical and policy underpinnings.

6.1.3 The contested nature of the issues

These intertwined issues and the shifting legislative frameworks in which they occur are not only complex, they are contested. The contested nature of the issues (the debate around the respective power relations of employees or independent contractors; what constitutes an exploitative contract; immigration policy and its implementation; or whether the legalization of sex work will result in the increase or decrease of trafficking)¹³ invariably influences the wider debate, and has an impact on proposed interventions and future policy direction. For instance, it was evident in the various interviews undertaken during the investigation that the position taken by the individual or organisation on one or more of these issues are informed by their view as to whether or not the human rights of the dancers at Mavericks are being infringed. This also shaped their critique of the Draft Report, including what facts and factors the Commission should consider relevant in coming to its conclusions and the recommendations it should make.¹⁴

The moral and political views underpinning the debate around prostitution/sex work have permeated some of the inputs and perspectives of individuals and

¹² But may be evidence of people smuggling

¹³ For instance, the Counter-Trafficking Coalition in Cape Town – a coalition of NGOs (and the IOM) which aims to co-operate on issues involving trafficking, be it advocacy, prevention and education campaigns or assistance to trafficking victims – apparently no longer operates effectively or even meets due to the different positions held on the legalization of sex work.

¹⁴ There are those who hold the view that stripping or performing lap dances in small booths in which the sex-act is simulated is in and of itself a violation of the dignity of the dancer. This is based on the position that women cannot consent to exploitation or commodification their bodies and by extension the violation of their human right to dignity.

organisations. If, as has been alleged, sexual intercourse for reward takes place at Mavericks, this would be a crime under the Sexual Offences Act 23 of 1957 as amended.¹⁵ Whether or not this would constitute a human rights abuse would depend on the facts of each case; the context (including the elements within the definition of trafficking, such as coercion and deception); as well as the theoretical and political positions taken on choice and agency in the sex-work debate.

Other contributors went further to argue that touching, simulation of sex acts and friction dancing should be included in the definition of sexual act (currently widened in the definition of sexual act and sexual violation in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. By implication, they argue that the sale of these 'services' should be considered as a form of prostitution and therefore a criminal offence.

Similarly, if, as has been suggested, the only conclusion to be drawn from the "booking out" fee or the fines imposed on dancers wishing to leave before the Maverick's closes, is that this amounts to "pimping" the dancers.¹⁶

In this investigation context has therefore been key to understanding the issues and identifying patterns that aid in formulating questions in the investigation. The context and the results of the investigation have ultimately informed the recommendations.

6.2 Constraints of the Investigation

6.2.1 The Commission does not have the mandate, capacity or resources to conduct criminal investigations. Where the Commission finds *prima facie* evidence of a crime, it is required to refer such matters to the appropriate law enforcement agencies for further investigation.

¹⁵ Section 2 and 3 which deal with brothels; and Section 19 *Enticing to commission of immoral acts*

¹⁶ See Section 3 and in particular 3 (b), (c), (d), (e) of Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

- 6.2.1.1. The Commission does not have the expertise and resources required to conduct investigations into organised crime. Its mandate is to investigate human rights abuses, which may overlap with criminal activity. Where there is evidence of human rights abuses the Commission must investigate and where appropriate depending on the nature of the violation seek to remedy the matter either through conciliation or mediation process or to refer the matter to the Equality Court.
- 6.2.1.2. The Commission is required to cooperate with other statutory bodies. These procedures are provided for in Section 7(1)(b) of the Human Rights Commission Act, 1994 (Act No. 54 of 1994) which provides that the Commission shall co-operate with institutions, bodies or authorities similar to the Commission to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction. This is spelt out clearly in terms of its Complaints Handling Procedures, issued in terms of Section 9(6) of the Human Rights Commission Act 54 of 1994 (Gazette, 27 January 2012, No 34963), the Commission may refer a matter to an appropriate institution, body or authority having overlapping jurisdiction and who could more effectively or expeditiously deal with the matter.¹⁷ In instances where labour issues are involved, for example, the Commission may refer to the appropriate body such as the Commission for Conciliation Mediation or Arbitration (CCMA) or Labour Court, whichever is appropriate.
- 6.2.1.3. The Commission does not have the resources to conduct forensic investigations. "Follow the money" is always good advice for an investigator and evidence supporting trafficking may be unearthed, such as control of the dancers' money, or payments to agents for airline tickets.
- 6.2.1.4. The Commission is not equipped nor does it have access or powers to conduct organised crime investigations. The investigation of trafficking

¹⁷ The basis for the referral is Chapter 4 Sections 12(7) and 12(8) (a) respectively, of the Commission's Complaints Handling Procedures.

across borders is time and resource-intensive and requires a collaborative effort between other countries and international law enforcement agencies, to which the Commission is not privy. It was also not possible for the investigators to investigate the personal circumstances of the dancers – to establish, for instance, whether or not they came from poor backgrounds – or to investigate allegations against recruitment agencies in other countries.

6.2.2 Interviews with law enforcement officers and prosecutors confirmed the difficulties involved in investigating and prosecuting trafficking and trafficking-related offences. While it may be relatively easy to arrest a woman who is working without a permit or on a fraudulent permit, it would be more difficult to obtain information on the persons or organisations that brought a woman to South Africa and/or who were exploiting her. The nature of trafficking, it has been acknowledged, requires international networks and is organised in nature; occurring across borders and on a vast scale; is well resourced financially with complex networks including corrupt government officials; and by nature, violent or embedded with the threat of violence and intimidation.

6.2.3 It is also worth noting that the dancers for Mavericks represent what might be termed the “high end” of the trade. Some identified themselves as professional dancers who invest in their skills, spending long hours at the gym and in beauty parlours. This is the visible face of the industry, but many scholars/commentators have noted that the worst abuses occur at the lower end of this market, in poorer parts of the City, out of sight and hidden.

Concern was expressed by a range of stakeholders, during the interview process, that the Commission, by limiting the focus of its investigation into Mavericks was problematic and even counter-productive, given instances of human trafficking and exploitation which occurring in more serious cases and at the lower/bottom end of the market and involving children.

6.3 Hostility of dancers

6.3.1 The investigation was hampered by the initial hostility which the dancers displayed towards Commission staff. In addition to the reluctance of the dancers to be open, communication was hampered by the fact that most of the foreign dancers interviewed were not fluent in English.

6.3.2 The dancers exhibited high levels of suspicion.

The dancers were initially not willing to participate in interviews with the Commission staff following their alleged abusive treatment by the DOHA and the SAPS during a 'raid' when they were kept at the Barrack Street offices for a number of hours before being taken to the police station where they allege they were subjected to further abuse and held in police cells before being processed.

6.3.3 The women were not willing to comply with request to be interviewed due to the late nights that they work.

To circumvent this problem the Commission attempted to engage women both during its site visit and during formal interviews at the Commission's offices. Women were encouraged to approach the Commission on their own accord and in their own time after initial meetings with them at the Commission's offices.

6.4. Delays in Receiving Information from Relevant Parties

6.4.1. Prior to the investigation, the Commission had requested information from the DOHA, but this had not been forthcoming.

6.4.2. The Commission experienced further delays in obtaining information that was subsequently requested from the DOHA as well as information requested from the attorneys acting on behalf of Mavericks.

6.4.3. The Commission had been advised that the owner of Mavericks and his attorney had at the time, been out of South Africa, hence the delay.

6.4.4. The inaccessibility of officials from the government departments for purposes of consultation further frustrated the investigation.

6.4.5. The Commission remains concerned that the right to fair labour practices of dancers working at Mavericks (and many other clubs where dancers sign contracts as independent contractors, but are nevertheless subjected to significant management control) may be infringed.¹⁸ The Commission is not precluded from referring this aspect of the complaint to the CCMA and the Department of Labour for further investigation.

7. Investigation by the Commission

7.1. Site inspection and interviews

7.1.1 Following the referral of the matter to the Commission by the Court the Western Cape Provincial Office of the Commission conducted a site inspection visit on 9 July 2012. The inspection was unannounced, however, Mavericks attorneys had been given notice of the Commission's intention to visit the club in pursuant of its investigation and the power of the Commission in this respect. The Commission was met by the "Manager" who was interviewed, and a site inspection was undertaken of the club and living areas. The Commission also attempted to interview five women in their quarters -- these unscheduled interviews were conducted between Commission staff and dancers without the "Manager". The dancers proved hostile and reluctant to communicate these initial interviews rendered little information.

7.1.2 Given the unannounced nature of the site inspection and the fact that many of the dancers were not at the club at the time (not all dancers reside at the club and some were on errands) the Commission scheduled further interviews at its offices in July 2012.

¹⁸ The recommendation that the Department of Labour investigate the contractual relationship as well as the working conditions of both foreign and local dancers may result in increased regulation of the industry to the benefit of the dancers.

7.1.3 The Commission obtained a register from management of the women who were working at Mavericks at the time of the investigation. Out of the 32 women working at Mavericks, four were on vacation and hence unavailable for interview. Out of the 28 available women, the Commission interviewed 19. Ten of the women interviewed were non-nationals and nine were South African women. Maverick's management was interviewed independently of the women and did not sit in on the focus groups.

On the 11 July 2012 a legal officer from the Commission met with all the dancers at Mavericks to introduce the Commission and to explain the process. Mavericks' management was also asked to submit a register of all the women employed to the Commission.

The Commission conducted further interviews with Maverick dancers between 17 July and 23 July in which 19 women were interviewed through focus group discussions and one on one interviews, a further interview was conducted with the Manager.¹⁹

Due to the unavailability of the women and their hostility during the one-on-one interviews conducted previously, it was decided that the Commission would host a combination of focus group discussion and one-on-one interviews to improve rapport and generate a level of trust with Commission staff. The dancers were also encouraged after this introductory process to approach the Commission at any time subsequently to discuss any concerns.

A total of three focus group sessions and five one-on-one interviews were held with dancers during this period.

No women from Mavericks approached the Commission after the interviews for assistance.

7.1.4 Interview Method

¹⁹ (17 July 2012 – 5 women (1 focus group with 4 women, 1 individual interview), 18 July 2012 - 4 women), 19 July - 8 women – focus group) and 23 July 2012 (3 women in one on one interviews).

7.1.4.1. The interviews were conducted in focus group discussions with four to eight women at a time. General discussions were undertaken with all the women in the focus groups, allowing for each woman to give their view and perspective. Certain women were more forthcoming than others. However, the focus groups were facilitated in such a manner as to allow maximum participation.

7.1.4.2. The one-on-one interviews were conducted according to a structured interview instrument, which had been prepared before the actual interviews. In some instances, interviewees asked additional questions.

7.1.4.3. It is important to note that due to the secrecy and shame often associated with 'stripping', women do not often share the nature of their work with their families. Even though Mavericks is considered to employ a large number of foreign women, at the time of this investigation there were more South African women employed than foreign women. Hence the experiences, reasons for engaging in this nature of work, and other factors may vary in some instances between foreign and South African women.

7.2 Submission of draft report to Desai ADJP

On 21 September 2012 a draft report was handed to Desai ADJP. Draft reports were also submitted to the parties to the litigation on 26 September 2012. The parties were afforded an opportunity to make inputs/provide comments on the Draft Report. The Commission has taken these comments and criticisms into account in the final report. Subsequent to this process the Commission also broadened its scope of engagement with other individuals and organisations into the broader context in which such violations might take place.

7.3 Unannounced site inspection during operating hours

7.3.1 The Commission conducted an unannounced visit to the club on the evening of 10 October 2012. Two male members of the Commission's staff visited the Club as

paying guest to observe and gather further information in support of the investigation.

7.3.2 The objective of the visit was to:

- 7.3.2.1. assess and observe the operation of the club generally;
- 7.3.2.2. *modus operandi* of the club including allegations of “forced alcohol” consumption by the dancers;
- 7.3.2.3. clarify the “services” being offered and/or rendered; and
- 7.3.2.4. identify any other matters arising from such observations which may corroborate, enhance or highlight any further concerns raised by the court and in the draft report of the Commission on matters identified to date in the investigation.

7.3.3 The feedback and observations of the investigators were as follows:

- 7.3.3.1. The entrance fee included supper (a choice between three meals). Within a few minutes of having been seated the investigators were approached by an Asian woman dressed in traditional black attire and who enquired whether they wanted a shoulder or neck massage, which was priced at approximately R120.
- 7.3.3.2. There was a mix of patrons, both foreign (mainly Chinese, Indian, Pakistani, European) and South African.
- 7.3.3.3. Patrons were approached by the dancers, who tried to entice patrons into having a table or lap dance. If no interest was shown, they moved on to other patrons.

7.3.3.4. Dancers took turns dancing around the central pole dance area. Some of the dancers stripped by just removing their tops while other dancers stripped down completely as part of their routine.

7.3.3.5. A lap dance was priced at R200 per person for a period of six minutes only. Dancers adhered to the allocated dance time. The Commission's investigators were taken to a small room with a leather couch where the dancer went through her routine.

7.3.3.6. The investigators did not observe any illicit drug activity in the club. The bouncers were not around in the main area and nobody seemed to have been monitoring the dancers closely. There were no obvious signs of restrictions on movement of dancers.

7.3.3.7. The dancers were drinking; however, it was within the patrons' discretion whether they bought a drink(s) for any of the dancers.

7.3.3.8. The investigators were offered the option of a dance at a cost of R1000, which lasts for 15 minutes and in terms of which touching was permitted.

7.3.3.9. In the course of the evening a parade took place. All the girls in the club were introduced one by one (each had to parade to the central dancing pole while being introduced, then proceeded downstairs and formed a line). Once all the dancers had been introduced they then paraded through the central seating area around the patrons. At that point the investigators observed 37 dancers were counted, all of whom were topless.

7.3.3.10. There was a VIP area where dancers performed a private dance for a patron. The curtains which were thick were drawn in the booth at that stage. The booth itself was small - just large enough for two patrons to be seated plus the dancer who would perform the dance.

7.3.3.11. Another area within the club was noted, though not visited by the investigators, called the "The Library". This area the investigators were

informed was more exclusive than the VIP area. The fee for a dance in "The Library" commenced at a cost of R1750 and could last up to 30 minutes.

7.3.3.12. From the investigators observations none of the dancers, at any point appeared to be under any kind of duress.

7.4 Informal interviews conducted with patrons and dancers.

One patron interviewed informally declined to go on record indicated that he had witnessed sex between dancers and patrons in the library and that this was common knowledge as to "what went on there".

Interviews conducted with a former dancer who previously performed at Mavericks confirmed that sex took place within the booths. She further indicated that patrons were allowed to touch dancers. However, she, for fear of her life and previous threats against her family from other establishments in which she alleges she was trafficked and held against her will, declined to go on record.

7.5 Interviews with management of Mavericks

Management of Mavericks were interviewed and responded to requests for information.

7.6 Court appearance on 18 December 2012

The Commission was summoned to Court on 18 December 2012 by Desai ADJP. During court proceedings Desai ADJP stated that the Commission had not sufficiently applied its mind to the Palermo Protocol and accordingly requested the Commission to relook at this aspect of its Report. The Commission was requested to file its report on the 15 February 2013. (The Commission subsequently made representations to the Judge regarding an extension of time required to complete the investigation and procedures in respect of investigation and finalisation of its

Report as determined by the Human Rights Commission Act and Procedures of the Commission. All parties were duly notified thereof).

7.7 Appointment of Counsel

Following the court appearance the Commission briefed counsel to assist it with the finalisation of the report and to provide specialist input migration policy, immigration law, labour law and criminal law in order to boost the Commission's capacity to address the gaps in the report in relation to the concerns raised by Desai ADJP and others.

7.8 Further engagement with government departments and interest groups.

In the course of its investigation the Commission conducted interviews with a number of government departments and interest groups in order to gain a wider understanding of the context of within which clubs such as Mavericks operate as well as understanding the legal and policy challenges associated with these clubs.

Government departments interviewed:

- (1) DOHA;
- (2) National Prosecuting Authority;
- (3) The Hawks;
- (4) South African Police Services;
- (5) Metro Police.

Chapter 9 Bodies

- (1) Commission for Gender Equality;

Interest groups-

- (1) SWEAT;
- (2) Annex;
- (3) Embrace Dignity;
- (4) Rape Crisis;
- (5) Stop Trafficking;

- (6) Concerned civil society group/individuals who requested anonymity;
- (7) Women who worked within the industry.

The DOHA and the South African Police Services provided an extensive and detailed background of the intergovernmental structures established in order to counteract trafficking and trafficking-related offences, as well as details of current and past investigations in Cape Town, and the challenges involved in obtaining successful prosecutions. This input provided significant background understanding of the methods used by traffickers, profiles of traffickers, the various agents or middle-men (and women), as well as the victims.

In the interviews conducted with the IOM and NGOs who deal with trafficking and sex work; more generally, the Commission sought information on the work of the organisation as well as their interaction with other NGOs; policy makers and law enforcement agencies; and victims of trafficking and related human rights abuses.

The investigation also dealt with the specific situation at Mavericks. All the organisations and individuals were asked to provide details as to their involvement with Mavericks; for instance, whether a dancer had approached that organisation for assistance or used a hot line. Law enforcement agencies were asked about investigations specifically pertaining to Mavericks or their dancers.

7.9 Desktop research

Desktop research included a literature review; examination of international and domestic legal frameworks (including case law); the court record; and online sources.

8. Legal Framework

8.1 International Legal Framework

8.1.1 Convention on the Elimination of all Forms of Discrimination against Women (1979) [CEDAW]²⁰

South Africa signed the CEDAW Convention on 29 January 1993 and ratified it on 15 December 1995. The Convention prohibits all discrimination that has "*the effect or purpose of impairing women's enjoyment or exercise of their fundamental rights and freedoms.*"²¹ Article 6 provides that States Parties must take all appropriate measures, including legislating, to suppress "*all forms of traffic in women and exploitation of prostitution of women*". CEDAW further recommends that all States Parties take specific punitive and preventative measures to overcome trafficking and sexual exploitation.

8.1.2 Convention on the Rights of the Child (1989) [CRC]²²

South Africa ratified the Convention on the Rights of the Child on 16 June 1995. A number of provisions in this Convention are relevant to child trafficking.

8.1.3 Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) [OPSC]²³

The Optional Protocol is a supplement to the Convention on the Rights of the Child, requiring that States Parties prohibit child pornography, child prostitution and the sale of children. South Africa ratified this protocol on 1 July 2003. While trafficking is not specifically mentioned, there is a definition of the "*sale of children*": "*any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.*"

²⁰ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p.13, available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html> [accessed 28 August 2012]

²¹ Id., Article 1

²² UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae5b38f0.html> [accessed 28 August 2012]

²³ UN General Assembly, Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, United Nations, vol. 2171, p. 227, available at <http://www2.ohchr.org/english/law/crc-sale.htm> [accessed 28 August 2012]

8.1.4 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000) [Palermo Protocol]²⁴

South Africa signed the Palermo Protocol on 14 December 2000 and ratified it on 20 February 2004.

The Palermo Protocol provides a definition of human trafficking in Article 3 as follows:

- (a) *'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;*
- (b) *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) are used;*
- (c) *The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;*
- (d) *"Child" shall mean any person less than eighteen years of age.*

²⁴ UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at: <http://www.unhcr.org/refworld/docid/4720706c0.html> [accessed 28 August 2012]

As a result of the ratification of these international legal instruments, South Africa is bound to these provisions and required to ensure that the rights of women and children are adequately protected.

8.2 Regional Human Rights Instruments

8.2.1 African Charter on Human and Peoples' Rights (1981)²⁵

South Africa acceded to this Charter on 9 July 1996. The African Charter on Human and Peoples' Rights (also known as the "Banjul Charter") is the foundational document in the African human rights system. A number of rights set out in the Charter are important in the context of human trafficking. Article 4 provides that all persons are entitled to respect for their life and the integrity of their person. Article 5 states that every person has the right to human dignity and prohibits all forms of exploitation and degradation of persons; particularly slavery, slave trading, torture, cruel, inhuman or degrading punishment and treatment.

8.2.2 African Charter on the Rights and Welfare of the Child (1990)²⁶

South Africa ratified the Charter on 7 January 2000. In terms of Article 29 on Sale, Trafficking and Abduction, "*States Parties to the present Charter shall take appropriate measures to prevent: (a) the abduction, the sale of, or trafficking of children for any purpose or in any form, by any person including parents or legal guardians of the child; (b) the use of children in all forms of begging.*"

8.2.3 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003)²⁷

²⁵ Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.unhcr.org/refworld/docid/3ae6b3630.html> [accessed 28 August 2012]

²⁶ Organization of African Unity, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.unhcr.org/refworld/docid/3ae6b38c18.html> [accessed August 28 2012]

²⁷ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, available at: <http://www.unhcr.org/refworld/docid/3f4b139d4.html> [accessed 28 August 2012]

The Protocol to the Africa Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the African Women's Protocol") was adopted in 2003 to expand on the rights set out in the Charter, with particular reference to Article 18(3). The Protocol specifically deals with human trafficking under Article 4, which guarantees the right to life and the integrity and security of the person. Certain other provisions, such as Article 3, setting out the right to dignity, are also relevant to this investigation. South Africa ratified this Protocol on 7 December 2004.

South Africa must adhere to all African regional legal instruments to which it is bound. It is clear that South Africa has a legal imperative to protect the rights of women and children and to ensure that appropriate legislation and policies are drafted and implemented.

8.3 South African Legislative Context

8.3.1 Constitution of the Republic of South Africa, 1996²⁸

The following provisions of the Constitution are relevant to the rights of women and specifically the rights of women working at Mavericks as dancers.²⁹ It is against the backdrop of the Constitution that this investigation has taken place:

Equality

"9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law."

Human dignity

"10. Everyone has inherent dignity and the right to have their dignity respected and protected. "

Freedom and security of the person

²⁸ Constitution of the Republic of South Africa, 1996, available at: <http://www.info.gov.za/documents/constitution/1996/index.htm> [accessed 28 August 2012]

²⁹ No dancers working at Mavericks were below the age of 18.

"12. (2) Everyone has the right to bodily and psychological integrity..."

Slavery, servitude and forced labour

"13. No one may be subjected to slavery, servitude or forced labour."

Privacy

"14. Everyone has the right to privacy..."

Freedom of movement and residence

"21.(1) Everyone has the right to freedom of movement. "

Labour relations

"23.(1) Everyone has the right to fair labour practices."

8.3.2 Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000

[PEPUDA]³⁰

Prohibition of unfair discrimination on ground of gender

Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including – gender-based violence; female genital mutilation; the system of preventing women from inheriting family property; any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child; any policy or conduct that unfairly limits access of women to land rights, finance, and other resources; discrimination on the grounds of pregnancy; limiting women's access to social services or benefits, such as health, education and social security; the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably

³⁰ Promotion of Equality and Prevention of Unfair Discrimination Act, Act No.4 of 2000, available at: http://www.acts.co.za/prom_of_equality/whnjs.htm [accessed 28 August 2012]

accommodate the needs of such persons; systemic inequality of access to opportunities by women as a result of the sexual division of labour.

South Africa has comprehensive constitutional rights protection as is evidenced from the provisions above and the PEPUDA legislation. The sections outlined above apply to both South African and non-South African citizens.³¹

8.3.3 Prevention and Combating of Trafficking in Persons Act, 2013 (Trafficking Act)³²

The Bill was passed by the National Assembly on 29 January 2010 and formally signed into law by the President on 29 July 2013.

The purpose of the Trafficking Act is:

To give effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to provide for measures to protect and assist victims of trafficking in persons; to provide for the coordinated implementation, application and administration of the Act; to prevent and combat the trafficking in persons within or across the borders of the Republic; and to provide for matters connected therewith."

Under the Trafficking Act, '**trafficking in persons**' includes:

"4.(1) Any person who delivers, recruits, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of—

(a) a threat of harm;

(b) the threat or use of force, intimidation or other forms of coercion;

(c) the abuse of vulnerability;

(d) fraud;

³¹ *Boloro v Bophutatswana*

³² Prevention and Combating of Trafficking in Persons Bill, available at: <http://www.info.gov.za/view/DownloadFileAction?id=118892> [accessed 28 August 2012]

- (e) *deception;*
- (f) *abduction;*
- (g) *kidnapping;*
- (h) *the abuse of power;*
- (i) *the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or*
- (j) *the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.*

(2) *Any person who—*

- (a) *adopts a child, facilitated or secured through legal or illegal means; or*
- (b) *concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or matter, is guilty of an offence.”*

Regulations which will operationalise this Act have, at the time of drafting of this report, not been released for public comment.

8.3.4 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Trafficking in persons for sexual purposes is also prohibited under sections 70 and 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and Chapter 18 of the Children’s Act 38 of 2005 deals fairly comprehensively with the trafficking of children.³³

Chapter 7 of the Criminal Law Amendment Act 32 of 2007 sets out transitional provisions relating to trafficking in persons for sexual purposes in partial compliance with South African’s international obligations.

³³ Sections 281-291

8.3.5 Offences under the Common Law

Depending on the circumstances of a particular case, there are a number of offences in terms of which a person or persons suspected of being involved in the trafficking of persons for the purposes may be charged.

Under the common law, these options include, but are not limited to: *abduction* (the unlawful and intentional removal of an unmarried minor from the control of her/his parents or guardian with the intention of having sexual intercourse with the minor); *kidnapping* (the unlawful and intentional deprivation of a person of her/his freedom of movement); *rape* (unlawful and intentional sexual intercourse with a woman without her consent); *indecent assault* (unlawful and intentional assault with the object of committing an indecency); *assault* (either common or with the intent to inflict grievous bodily harm – unlawful and intentional application of force to the person of another); and extortion.

8.3.6 The Sexual Offences Act 23 of 1957 as amended³⁴

The Sexual Offences Act 23 of 1957 as amended has a number of provisions that may be relevant when prosecuting a trafficking or trafficking-related case. These include Section 2 which makes it illegal to keep a brothel; Section 10 makes it unlawful to procure an adult female for unlawful carnal intercourse with another person; whilst Section 12 criminalises the detaining of a female against her will, either with the intention that she would have sexual intercourse with a male or with the intention that she be detained in a brothel; Section 12A makes it a crime to assist a person to communicate with another person for sex for reward; while Section 20 prohibits living off the earnings of prostitution or assisting in the commission of indecent acts.

³⁴ Sexual Offences Act 23 of 1957, available at: <http://www.justice.gov.za/legislation/acts/1957-023.pdf> [accessed 28 August 2012]

8.3.7 The Prevention of Organised Crime Act, 121 of 1998³⁵, the Basic Conditions of Employment Act, 1997; the Film and Publication Act 1996, the Domestic Violence Act and the Intimidation Act 1982

All these Acts contain offences which relate to aspects of trafficking. Nevertheless, comprehensive legislation which deals with all aspects of trafficking, not just sexual purposes or trafficking of children, but forced labour or similar slave-like situation, forced marriages or adoption, was required in order for South Africa to fully meet the obligations flowing from our ratification of the Palermo Protocol hence the passing of the Prevention and Combating of Trafficking in Persons Act discussed above.

8.3.8 Immigration Act 13 of 2002 (as amended by Act 19 of 2004)

The Immigration Act makes it clear that any foreigner who is in South Africa in contravention of that Act is an illegal foreigner and that illegal foreigners must depart or are liable to deportation.³⁶ Although section 31(2)(b) has been used to allow victims of trafficking who would otherwise be required to leave to remain in South Africa in order to give evidence against their traffickers, law enforcement officials complain that too frequently victims or possible victims are merely deported.³⁷ In such cases the victims may be denied needed human rights protection, and the investigation into the perpetrators of such abuses is hindered. The passing into law of the Trafficking Act will have the potential to enhance the protection of human rights on both a national and international level and assist in combating organised criminal networks.

Apart from trafficking-related offences under the Immigration Act and the Basic Conditions of Employment Act, 1997³⁸ South Africa's immigration and labour laws seek to protect the human rights of both foreigners and South African citizens. The next two sections of this report deal with these two areas of our law with regard to

³⁵ Prevention of Organised Crime Act, No.121 of 1998, available at: <https://www.fic.gov.za/DownloadContent/LEGISLATION/ACTS/02.POCA.pdf> [accessed 28 August 2012]

³⁶ Sections 1 and 32

³⁷ See US State Department Report on Trafficking for 2011 on South Africa in <http://www.state.gov/documents/organization/164457.pdf>

³⁸ Which prohibits forced labour and slavery, Sections 42 and 28

their relevance to this investigation. Immigration Act places a number of duties and obligations on foreigners, their employers, state departments, learning and other institutions and persons in charge of "lodging or sleeping accommodation ...for payment or reward" – and failure to meet these obligations may constitute an offence under the Act. Section 42(1) provides that (save for necessary humanitarian assistance) no person may aid and abet illegal foreigners³⁹ or "a foreigner in respect of any matter, conduct or transaction which violates such foreigners status, when applicable." The examples of prohibited conduct in this regard set out under subsection 42(1)(b) are wide in scope and cover situations under which those involved in the trafficking process may conceivably be prosecuted.⁴⁰

Section 35 deals specifically with duties imposed on conveyances and the Director-General may impose a fine of up to R 10 000 on the owner or person in charge of a conveyance conveys a foreigner to a port of entry and that foreigner is not in possession of a passport and visa (if required).⁴¹ The person in charge of the conveyance is also responsible for the costs of detention and removal of a person refused admission to South Africa at a port of entry.⁴² The Trafficking Act also provides for specific offences and penalties on those who move people illegally – whether they are smuggled or trafficked.⁴³

The policy objectives underpinning the Immigration Act are found in the Preamble.

The stated aims of the legislation include:

"(d) Economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or foreign people is enabled, skilled human resources are increased...and tourism is promoted."⁴⁴

³⁹ An illegal foreigner is an foreigner who is in the Republic in contravention of the Immigration Act

⁴⁰ Such aid includes the issuing of a licence or authorization to conduct a business or occupation, entering into an agreement with an illegal foreigner in order to conduct business or occupation or otherwise enabling him or her to do so, providing accommodation, or letting or selling property to an illegal foreigner. The purpose of spreading obligations widely is to make it harder for illegal foreigners to operate below the radar.

⁴¹ See section 50(3) and section 35(7)

⁴² Section 35(8)

⁴³ Chapter 13 of the Trafficking Act

⁴⁴ Paragraph (d) of the Preamble to the Immigration Act.

“(h) The South African economy may have access at all times to the full measure of needed contributions by foreigners.”⁴⁵

“(i) The contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers.”⁴⁶

The Immigration Act makes it clear that the state is to retain control over the immigration of foreigners.⁴⁷ The Director-General is empowered to issue immigration permits and to withdraw them, subject to administrative justice safeguards. The right to enter South Africa is limited to citizens, but both citizens and foreigners have the right to leave.

The Immigration Act broadened the scope of temporary permits for foreigners working in South Africa. The drafters of this legislation aimed to provide more flexibility in responding to the need to attract investment and skills, while at the same time protecting South African workers.

A number of temporary residence permits entitle the holder thereof to work. These include the holders of visitor's permits under subsection 11(1) (b) (ii) (issued to self-supporting voluntary or charity workers); visitor's permits under subsection 11(2) (short-term work authorization) and subsection 11(6) (spousal visas). Holders of study permits under subsection 13(3) may do limited work and retired persons may receive authorisation to work under section 20(2). Other work-related permits include: treaty permits under section 14; business permits under section 15; work permits, which include quota work permits (where certain scarce skills have been identified by government), intra-company transfer work permits (for employees of multi-national companies), exceptional skills work permits and general work permits

⁴⁵ *Ibid* para (h)

⁴⁶ *Ibid* para (j)

⁴⁷ *Ibid* para (b). This is seen as essential to the sovereignty of the state, which was affirmed by the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* (the *Certification* judgement) in quoting the following passage from Tribe's *American Constitutional Law*: "it is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." 1996(4) SA 744(CC) at para 21

under section 19; corporate permits under section 21 and exchange permits under section 22.⁴⁸

Section 19 of the Immigration Act provides for a number of different types of work permit, with specific requirements for each type. The requirements, which are set out in the Immigration Act and the Regulations, are designed to respond to the needs of the employer as well as the impact on existing labour standards and the rights and expectations of South African workers.

The requirements for the general work permit reflect the emphasis on a need being established by a prospective employer for foreign workers. For instance, a prospective employer must provide proof of a diligent search for a South African or permanent resident with similar skills and qualifications to the foreigner it wishes to employ. An advertisement must be placed in a national newspaper in order to facilitate this search, which would also meet the policy requirement of the expectations of South African workers to be afforded job opportunities. Labour standards are protected (both South African and foreigners) by requiring benchmarking certificates and employment contract. Proof of qualifications and experience is also required.

The corporate permit is the only permit issued to an employer. All other permits referred to in the chapter of the Immigration Act dealing with temporary residence permits are issued to individual foreigners. The predecessor to corporate permits under the Aliens Control Act 96 of 1991 largely served the needs of mines and agribusiness for foreign labour. Under the Immigration Act, corporate permits have been expanded to include employers of skilled labour who can show the need to employ foreigners (such as call centres).⁴⁹

The corporate permit is issued to a corporate applicant based on the corporate applicant satisfying the Director-General (who consults with the Department of

⁴⁸ The holders of asylum seeker and refugee permits issued under the Refugees Act, 130 of 1998 may also work. The DOHA and SAPS officials interviewed noted that a number of women employed in various dance clubs and brothels in and around Cape Town have been found to be in possession of these permits, which are also used by labour traffickers.

⁴⁹ There are three categories of corporate permit holders: farmers; mines and "other".

Trade and Industry before issuing the permit) of its need to employ foreigners.⁵⁰ The corporate applicant may then employ foreigners without having to meet all the requirements required for a general work permit, such as advertising the position in a national newspaper or obtaining a salary benchmarking certificate. The expectations of South Africa workers are met by the corporate applicant satisfying the Director-General of the need for foreign workers.⁵¹ Labour standards are ensured by the requirement of the employment contract.

The Director-General issues both a corporate permit and corporate worker certificates to the corporate applicant. The foreigners recruited by the corporate employer then submit an application for a temporary residence permit, together with the corporate worker certificate and the employment contract to an office of the Department of Home Affairs in South Africa or an embassy abroad.⁵² Once the work permit has been issued to the foreign employee the corporate worker certificate is returned to the employer who must keep it on record.⁵³ The holder of the corporate permit is obliged under both the Immigration Act and the Regulations to report to the DOHA when the corporate worker leaves its employment. The Director-General withdrew the corporate permits on the basis that Mavericks had not met the conditions of these permits. This decision and the basis therefore, is the subject of the review application.

Up until the withdrawal of the corporate permits issued to Mavericks, most of the foreign dancers working at Mavericks were residing and working in South Africa on permits issued under the corporate permit.⁵⁴ However, as was evident from the pleadings one was on a volunteer permit authorizing her to do voluntary work with a

⁵⁰ The corporate employer must also provide financial guarantees to defray deportation costs should the corporate permit be withdrawn or the individual foreigners employed on such permit fail to leave when they are no longer subject to the permit.

⁵¹ Section 21(2)(c)

⁵² Other, more general temporary residence permit requirements must also be met, such as a medical and radiological report, and a police clearance certificate.

⁵³ Subsection 21(2) (a) provides that the corporate applicant must provide an undertaking that it will (i) take prescribed measures to ensure that any foreigner employed in terms of the corporate permit will at all times comply with the provisions of this Act and the corporate permit; and (ii) immediately notify the Director-General if it has reason to believe that such foreigner is no longer in compliance with subparagraph (i). Subregulation 18(4) states that "in order to comply with subregulation (3) (c), a corporate applicant shall return the certificate contemplated in subregulation (2) (b) to the Director-General on completion of the corporate worker's tour of duty." This purpose of this subregulation is to ensure compliance with the terms of the corporate permit. For instance, the Department must be able to monitor how many foreigners are employed by the corporate applicant.

⁵⁴ The Act does not give a name for the permit issued to an individual in respect of whom a corporate worker certificate has been issued under the corporate permit, but in recent years the words "corporate worker" usually appear on the temporary residence permit issued in terms of section 10.

church, and others were applying for the renewal or extension of spousal permits under sections 11(1) (ii) and sections 11(6) respectively.⁵⁵

According to the Maverick's website, dancers who wish to work at Mavericks are advised to apply for authorisation to work while holding a visitor's permit in terms of section 11(2).⁵⁶ A visitor's permit is initially issued for a maximum period of three months and may only be extended for a further three months.⁵⁷ However, according to Immigration Directive 27 of 2011 issued by the Director-General on 5 December 2011, work authorisation in terms of section 11(2) is no longer issued to exotic dancers. This directive is the subject of the application for review under case number 1927/12 referred to above.

8.3.9 Labour Legislation

While the lack of consent is the primary indicator of trafficking, the exploitative or servile conditions of work are both an indicator of a lack of real consent, and a separate indicator of trafficking.⁵⁸ In the case which gave rise to this investigation the court, in commenting on the nature of the contract, the conditions under which dancers were expected to work, and the fact that they were neither paid at all nor given benefits, expressed the opinion that these factors made them susceptible to exploitation. The question for this investigation is whether or not the dancers are in fact exploited and their human rights infringed. In order to make such a finding (even if such finding is *prima facie*) the nature and content of the contractual relationship between the dancers and Mavericks must be interrogated.

As mentioned above, the very nature of what constitutes an exploitative contract is contested as it is predicated on an assessment of the respective bargaining power of the parties, as well as the allocation of risk. For instance, it could be argued that as a revue club needs dancers to attract patrons and make money, and the dancer

⁵⁵ Replying papers *Mavericks*

⁵⁶ Mavericks website <http://www.mavericks.co.za/become-a-dancer/visa-work-permit> [accessed on 30 September 2013]

⁵⁷ Section 11(1)(i)

⁵⁸ UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1997/44. Addendum: Report on the mission to Haiti, 27 January 2000, E/CN.4/2000/58/Add.3.* available at: <http://www.refworld.org/docid/3b00f42e.html> [accessed 4 October 2013]

needs a venue in which to dance and earn an income, the bargaining position is equal. However, this does not take into account the fact that foreign dancers may in many instances be vulnerable due to their isolation, language difficulties and dependence on the venue where they earn their income.

The question of unequal bargaining relationships is particularly relevant in the context of employment, or employment-like relationships.

The right to fair labour practices enshrined in the Constitution finds its expression in, amongst other legislation, the Basic Conditions of Employment Act No. 75 of 1997 and the Labour Relations Act 66 of 1995 ("LRA"). The question is who is entitled to the protection afforded by this legislation?

The definition of "employee" in section 213 of the LRA reads as follows:

"Employee" means –

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have corresponding meanings to that of 'employee'".

The distinction between employees and independent contractors has received much attention over the years from our courts.⁵⁹ Two recent cases provide guidance as to the applicable legal test.

In *State Information Technology Agency v CCMA*⁶⁰, the Labour Appeal Court approved the "substance over form" approach posited by it in *Denel (Pty) Ltd v Gerber*.⁶¹ The existence of an employment relationship is judged on the basis of the substance of the arrangements between the parties as opposed to the legal form

⁵⁹ See for example *Smit v Workman's Compensation Commissioner* 1979 (1) SA 51 (A) 61A-H; *SABC v McKenzie* [1999] 1 BLLR 1 (LAC) 6A-I; *Niselov v Liberty Life Association of Africa Ltd* 1998 (4) SA 163 (SCA).

⁶⁰ (2008) 29 ILJ 2234 (LAC)

⁶¹ (2005) 26 ILJ 1256 (LAC)

adopted.⁶² In other words, the terms of any written contract are but one factor to be considered, but are certainly not determinative of the relationship.⁶³ When determining the question of an employment relationship, the court must consider the following primary criteria:

- (1) an employer's right to supervision and control;
- (2) whether the employee forms an integral part of the organization with the employer; and,
- (3) the extent to which the employee was economically dependent upon the employer.

The Court held that when determining whether or not an employee is economically dependent on an employer, the question to be asked is whether the person retains the capacity to contract with others. The fact that a person is required by contract to only provide services to one "client" is a very strong indication of economic dependence.⁶⁴

In *Pam Golding Properties (Pty) Ltd v Erasmus*⁶⁵ the Labour Court pointed out that the Labour Appeal Court approach was closely aligned with, though not identical, to the "dominant impression" test.⁶⁶ The Court also cited with approval Paul Benjamin's proposition that the presence of any one of the factors highlighted by the Labour Appeal Court would be sufficient to indicate the existence of an employment relationship.⁶⁷

The Court also considered it appropriate for CCMA commissioners to have regard to the factors set out in section 200A of the LRA as guidelines (where the prescribed income threshold was exceeded).⁶⁸

⁶² 2238B

⁶³ See also *Denel (supra)* paragraph 19; *SABC (supra)* 7A-C.

⁶⁴ Citing P Benjamin "An accident of history: Who is (and who should be) an employee under South African labour law" (2004) 25 ILJ 1094 at 803.

⁶⁵ (2010) 31 ILJ 1460 (LC).

⁶⁶ 1468B.

⁶⁷ 1468I.

⁶⁸ 1467F. In the case of dancers working at Mavericks, their income exceeds the prescribed threshold.

The stated purpose of these guidelines⁶⁹ is, *inter alia*, to –

“...

2 (d) *ensure that employees – who are in an unequal bargaining position in relation to their employer – are protected through labour law and are not deprived of these protections by contracting arrangements;*

(e) *to assist persons applying and interpreting labour law to understand and interpret the variety of employment relationships present in the labour market including disguised employment, ambiguous employment relationships, atypical (or non-standard) employment and triangular employment relationships*

...”

8.3.10 South African Law Commission Reports

The South African Law Commission has noted that the conventional understanding of prostitution usually encompasses *the exchange of sexual acts for money or goods*.⁷⁰ The commercial sex industry extends beyond what is typically referred to as prostitution to also include, for example, the pornography industry and sex-based entertainment such as live sex shows. It is therefore necessary “*to bear in mind that current legal definitions of prostitution may be at variance with more culture-specific understandings of this notion in the African context.*”⁷¹

The South African Law Reform Commission was established by the South African Law Reform Commission Act of 1973.⁷² Since the 1980’s, there has been a ‘new wave’ of feminist-backed campaigns against trafficking in women, child prostitution and sex tourism. A fundamental division between these groups depends on whether a person can voluntarily choose ‘prostitution’ as a form of work, or whether there “*is always an element of coercion even where the prostitute appears to choose this*

⁶⁹ Published in the *Gazette*: 29445 of 1 December 2006 under General Notice 1774. This document forms part of the court record at page 100, as an annexure to Maverick’s founding affidavit.

⁷⁰ South African Law Commission, Project 107, Issue Paper 19, Sexual Offences: Adult Prostitution, pg 53

⁷¹ South African Law Commission, Project 107, Issue Paper 19, Sexual Offences: Adult Prostitution, pg 54

⁷² South African Law Reform Commission Discussion Paper 0001/2009, Project 107, Sexual Offences, Adult Prostitution

option.”⁷³ Although prostitution is formally criminalised, the current system in practice is a mixture of criminalisation and legalisation. There are certain instances where criminal prohibitions are not enforced by police or the prosecuting authorities. In addition, indoor prostitution occurs within brothels, escort agencies, massage parlours, private homes, clubs, hotels, bars and brothels. The range of indoor prostitution enterprises thus covers commercial, residential and industrial zones, as well as known night life areas.⁷⁴ Due to the fact that prostitution is illegal, protective measures contained in labour legislation do not apply to prostitutes. Therefore, even where prostitutes/sex workers are forced to work in agencies under circumstances verging on slavery, they would not have recourse to the remedies available to other workers.⁷⁵

8.5 Literature Review

8.5.1 Defining Trafficking

In addition to a review of the legislative framework, the Commission assessed the relevant literature on trafficking, as well as literature on the linkages between trafficking and migration. This background enabled the Commission to contextualise the reasons associated with women moving and migrating to other countries and hence being caught up in trafficking generally.

The core of any definition of trafficking is that it is never consensual. Article 3(b) of the Palermo Convention specifically negates consent where such consent is obtained by *“threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”*

In addition to the lack of consent, common elements of trafficking patterns include the brokering and transport of human beings, and exploitative or servile conditions of work or relationships. Trafficking is undertaken for prostitution or other sex

⁷³ South African Law Commission, Project 107, Issue Paper 19, Sexual Offences: Adult Prostitution, pg 72

⁷⁴ South African Law Commission, Project 107, Issue Paper 19, Sexual Offences: Adult Prostitution, pg 76

⁷⁵ South African Law Commission, Project 107, Issue Paper 19, Sexual Offences: Adult Prostitution, pg 82

work,⁷⁶ labour in homes, farms and factories, and for the purposes of marriage or adoption. The non-consensual nature of trafficking distinguishes it from other forms of migration.

The point of departure for many recent studies on trafficking is the 2000 Report of the UN Special Rapporteur on Violence Against Women – a comprehensive analysis of the global status of trafficking, particularly of women and children. The Report identifies four types of situations in which women may be considered as having been trafficked.

- (1) The first group of women are those who are completely deceived or coerced. They have no idea where they are going, or the nature of the work they will be doing.
- (2) The second group have been told half-truths about their employment by their recruiters, and may be forced to do work they had not previously agreed to do. They have little choice, and their power to change the situation is restricted by debt bondage and/or the confiscation of their passports.
- (3) Women who are informed about the kind of work they will be doing and do not want to do it, but have no viable economic alternative. They relinquish control to their trafficker who exploits their economic and legal vulnerability for financial gain.
- (4) The fourth group comprises women who are fully informed about the work they are to perform, have no objection to performing it, are in control of their finances, and have relatively unrestricted movement.

Only women in the last group can be said not to have been trafficked.⁷⁷ There is nevertheless on-going debate about whether women who claim to 'choose' this kind of work as free agents are in fact driven by pressure of circumstance in a world in which women's bodies remain highly commodified.

⁷⁶ The South African Law Reform Commission: Position Paper 19 2002 on Adult Prostitution at para 1.36 refers to commercial sex work as including pornography and sex entertainment.

⁷⁷ E/CN.4/2000.68 29 February 2000 at paragraphs 35 and 36

8.5.2 Polarized debate on trafficking

The debate on trafficking is polarized, and the positions taken on the legalisation of prostitution are mirrored in the debate on trafficking. Neo-abolitionists, such as Professor MacKinnon, hold the position that any migration for the purposes of prostitution is trafficking. This, however, is not reflected in the Protocol, which precludes only forced prostitution.

Professor MacKinnon reflects the parallel debates in the following way:

“No one defends trafficking. There is no pro-sex-trafficking position any more than there is a public pro-slavery position for labor these days. The only issue is defining these terms so nothing anyone wants to defend is covered. It is hard to find overt defenders of inequality either, even as its legal definition is also largely shaped by existing practices the powerful want to keep.

Prostitution is not like this. Some people are for it; they affirmatively support it. Many more regard it as politically correct to tolerate and oppose doing anything effective about it. Most assume that, if not exactly desirable, prostitution is necessary or inevitable and harmless. These views of prostitution lie beneath and surround any debate on sex trafficking, whether prostitution is distinguished from trafficking or seen as indistinguishable from it...[T]he fundamental positions in this debate – to polarize somewhat, but this debate is remarkably polarized – are the sex work model and the sexual exploitation approach.”⁷⁸

Professor MacKinnon cites SWEAT as a proponent of the first approach, and Embrace Dignity as a proponent of the second.⁷⁹ Both NGOs were interviewed in the preparation of this report.

8.5.3 South Africa Law Commission Report

⁷⁸ C. MacKinnon “Trafficking, Prostitution and Equality” in *Harvard Civil Rights – Civil Liberties* Volume 46 2011 271 pages 271 – 272

⁷⁹ *Id* page 272

The Position Paper 111 of the South African Law Reform Commission (SALRC) Project 13, 2006 on Trafficking in Persons provides a comprehensive analysis of the history, background, legislative framework, legislative and operational gap identified by such literature.⁸⁰ Chapter 9 of Position Paper 19 of the South African Law Reform Commission (Project 107), 2002 on Adult Prostitution is limited to a discussion on trafficking and sex work, although other chapters are useful for any discussion on broader debates around sex-work and human rights.

8.5.4 Absence of reliable data

While studies, such as the SALRC reports referred to above, are valuable, the lack of credible and representative data both internationally and locally makes it difficult to obtain an accurate and comprehensive picture of trafficking in South Africa.⁸¹ C Gould states the problem this way:

‘Much of the literature laments the absence of data about the prevalence of trafficking and yet, reaches the conclusion that it is a ‘growing’ problem. The reason given for the inability of researchers to quantify the problem is that the industry is hidden and inaccessible. In the same breath researchers quote one another, claiming that perpetrators are making huge profits from the trafficking industry.’⁸²

Critics of a number of studies suggest that overestimations of the number of potentially trafficked persons (such as the figure of 30 000 quoted ahead of the recent FIFA World Cup tournaments in Germany and South Africa) occur when researchers quote organisations which benefit from funding for trafficking-related work, be it advocacy or victim assistance.⁸³ The danger is that generalised claims inform popular (and often xenophobic) perceptions, which in turn find their way back into studies.

⁸⁰ Although now somewhat dated, the Position Paper includes an extensive bibliography

⁸¹ For example, R Pharoah is critical of the methods used and small samples in the two 2000 Molo Songolo studies on trafficking of women and children, as well as the IOM study by J Martens, M Pieczkowski & B van Vuuren-Smyth *Seduction, Sale & Slavery: Trafficking in Women & Children in Southern Africa* Pretoria IOM Regional Office for Southern Africa (2003). R Pharoah *Getting to Grips with Trafficking* Institute for Security Studies Pretoria (2006)

⁸² C Gould ‘Cheap Lives: Countering human trafficking. considerations and constraints SA *Crime Quarterly* Vol 16 June 2006 19- 25 at 22

⁸³ <http://www.irinnews.org/report/93104/south-africa-still-waiting-for-an-anti-human-trafficking-law>

8.5.5 Research undertaken by Human Science Research Council

Research undertaken by the Human Sciences Research Council (HSRC) for the Sexual Offences and Community Affairs (SOCA) Unit of the National Prosecuting Authority found that:⁸⁴

8.5.5.1 South Africa has become known as a destination for illegally trafficked women as it is seen as a financially stable economy;

8.5.5.2 Women are trafficked within South African borders as well as across them;

8.5.5.3 Russian and Eastern European traffickers, working on behalf of Russian and Bulgarian crime syndicates with bases in South Africa, recruit women by offering jobs such as waitresses, strippers and hostesses;

8.5.5.4 Few women are actually aware that they will be employed as sex workers in brothels and up-market clubs in Johannesburg and Cape Town. Once they are in South Africa, these women are forced to pay off their debts incurred in bringing them into the country in this way. Any resistance is met with threats of violence to the women and their families. South Africa is a destination country for people trafficked from Thailand, Philippines, India, China, Bulgaria, Romania, Russia and the Ukraine;

8.5.5.5 Research indicates the predominant victims of this intercontinental trafficking are women between the ages of 19 and 50.

8.5.5.6 Although the primary form of exploitation is sex work, these criminal syndicates are generally involved in many areas of illegal activities, such as smuggling and the trafficking of weapons and narcotics.

⁸⁴ "Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa", p.119, available at <http://www.hsrc.ac.za/Document-3562.phtml> [accessed on 6 September 2012]

This study too has been criticised as giving *“very little information about methods used, no clear presentation of data and no indication is given as to whether information has been verified for accuracy.....difficult to know what one can trust and what is mere scaremongering”*⁸⁵

The HSRC report cited cases where immigration officials from the DOHA had dealt human with trafficking, including a matter in Welkom involving a prostitution ring, which used Thai women. The report stated that the members of the DOHA inspectorate only realized at a later stage, once they had been trained to identify trafficking cases that the case should have been dealt with differently.⁸⁶ In another matter cited in this report, 26 Thai women, mostly in their twenties, had been brought to South Africa on 30-day holiday permits. Five of the women claimed that they were trafficked and currently three of the accused are facing charges of racketeering, sexual offences, money laundering and living off the proceeds of prostitution.⁸⁷

8.5.6 The HSRC cites the following problems identified by the DOHA in preventing, detecting and investigating trafficking:

8.5.6.1 Capacity problems: Port of Entry officials deal with thousands of people leaving and entering the country every day and do not have the ability to scrutinize each document in detail. The DOHA have not established standard operating procedures for officials faced with human trafficking;⁸⁸

8.5.6.2 Lack of timely response by Social Development workers.⁸⁹ The failure of Social Development to regularly attend meetings of the Inter-Agency Trafficking Forum, or to ensure that their officials are present during anti-trafficking operations undermines both the operation (the chances of obtaining evidence which may convict a trafficker) and the human rights of trafficking victims. This aspect of the HSRC was confirmed by an

⁸⁵ C Gould, M Richter & I Palmery “Of Nigerians, albinos, satanists and anecdotes. A critical review of the HSRC report on human trafficking” *SA Crime Quarterly* Vol 32 June 2010 37- at 44

⁸⁶ *HSRC report*. p.132

⁸⁷ *Id.*, p.132

⁸⁸ *Id.*, p.133

⁸⁹ *Id.* p. 133

International Organisation for Migration official and a member of SAPS interviewed by the Commission;

8.5.6.3 Lack of cooperation between SAPS and the DOHA in regards to human trafficking. Dockets often go missing and magistrates dismiss cases. Furthermore, DOHA officials believe that courts misunderstand their work to such an extent that cases dealing with human trafficking may be compromised;⁹⁰

8.5.6.4 Language barriers: The HSCR report cited DOHA's need to have interpreters in order to communicate with potential victims and establish whether they are victims of trafficking.⁹¹

8.5.7 Case Law

To date there have been no reported judgments dealing with specifically with trafficking.⁹² However, the facts in *Malachi v Cape Dance Academy International (Pty) Ltd and Others*⁹³ are indicative of a context where trafficking may well have taken place. In this case the Constitutional Court confirmed the constitutional invalidity of certain sections of the Magistrate's Court Act 32 of 1955, which provided for the arrest and detention *tanquam suspectus de fuga* of someone suspected of leaving the country to avoid debt.

The applicant in this matter had been recruited from Moldova by Cape Dance Academy International to work as an exotic dancer at the House of Rasputin (the employers). Upon her arrival she had to hand her passport to a representative of her employers. When she asked for it back she was told that she first had to repay money owed to her employers in respect of the airfare, the work permit costs, and accommodation. After a few months she apparently owed her employers

⁹⁰ *Id* p.133. However, SAPS and prosecutors interviewed by the Commission placed the blame on the DOHA for not always understanding the nature and complexity involved in trafficking matters, and for failing to obtain assistance from other agencies or departments. For instance, the fact that DOHA brought the 12 Mavericks dancers to court without requesting assistance from SAPS or other departments involved in the Inter-Agency Human Trafficking Forum referred to in the introduction were brought to court was cited as a possible reason for the failure of the prosecution.

⁹¹ *Id*, p.133

⁹² Footnote on *Phillips v NDPP – AFU matter*

⁹³ 2010 (6) SA 1 (CC)

approximately R 100 000. She eventually obtained assistance from the Russian Consulate in securing an air ticket home and was due to leave on 9 July 2009. Her employers came to know of her plans and obtained an order for her arrest and detention in the Magistrates' Court on the basis that she intended to flee South Africa without paying her debt to them. She was detained at Pollsmoor Correctional Centre from 9 to 24 July 2009. She successfully challenged her detention and the constitutional validity of the provisions under which she had been incarcerated in the Western Cape High Court.⁹⁴

The few paragraphs in the judgment dealing with the facts indicate that Ms Maiachi had at the very least been subject to debt bondage (having become indebted for significant sum in a matter of months) and that her freedom of movement was limited by virtue of her employers being in possession of her passport.

8.5.8 Trafficking and Migration

Studies have highlighted the overlaps between migration and trafficking, and note that trafficking occurs in less developed countries where women lack access to resources and face gender discrimination. Feminization of poverty has led to the feminization of migration, as women leave their homes in search of viable economic options.⁹⁵

There are important linkages between trafficking and migration, and an analysis of migration patterns is an important tool in combating trafficking. There are three ways in which trafficked people may enter the country of destination: legally, illegally with forged or fraudulently obtained documents or in secret. Research has found that when a migrant is able to enter the country legally, the traffickers will generally take away travel documents and passports resulting in the migrant being unable to prove they have a right to be in the country. Being undocumented places the foreigner in a particularly vulnerable position as he or she risks arrest and deportation.⁹⁶

⁹⁴ *Id* paras 5 - 10

⁹⁵ http://www.unodc.org/unodc/en/human-trafficking/faq_s.htm#Which_countries_are_affected_by_human_trafficking

⁹⁶ *Id* p.119

In certain circumstances the trafficked person may enter legally, for instance on a visitor's permit, and then become an 'illegal foreigner' by overstaying. Such 'foreigner' would also be vulnerable. The DOHA have provided the Commission with a number of examples where exotic dancers, assisted by immigration practitioners or agents, have obtained or attempted to obtain permits by misleading DOHA officials in South Africa or at South African embassies. These examples included exotic dancers who had been recruited to work at Mavericks. However, no evidence was provided to the Commission to show that the individual dancer was being deceived that she was indeed going to study, not dance. In the absence of the lack of consent, the fact that a dancer obtains assistance in entering South Africa without complying with the provisions of the Immigration Act would be evidence of people smuggling rather than human trafficking. In such an instance both the foreign dancer and the immigration practitioner could be prosecuted for offences under the Immigration Act.

Foreigners wishing to remain in South Africa, and who do not qualify for other temporary residence permits enter into marriages in order to obtain a spousal visa in terms of section 11(6). In cases where these marriages are so-called marriages of convenience, the foreigner may be indebted to the agent who arranges the marriage. Where the marriage itself is legitimate, but where it later breaks down, the foreigner likewise becomes vulnerable.

The linkages between trafficking and migration highlight the role of the DOHA in countering human trafficking in South Africa.

8.5.8 Gender Dimensions Related to Trafficking

An analysis of gender reports with respect to human trafficking indicate that while both men and women are trafficked, it is women and children who are affected most due to the feminisation of poverty and economic and social pressures they face. For women living in poverty who have families to support, prostitution or the sale of sex in whichever form may be the only avenue to earn a living. Many are tempted to enter into this form of work as a short-term goal with the view to earn greater incomes. It is common to find that commercial providers of sex services are

primarily women. It is a sector, which is easy to enter if you are attractive and willing to perform the duties required. Studies describe how *“the desire for adventure, the urge to see new places, to be free from control, the aspiration for better living standards, material gratification or competitive lifestyles create pressures to move or to enter this particular industry.”*⁹⁷

A study by the UN takes the example of the former Soviet states, where political changes have *“contributed to great stress, caused by high unemployment, unequal access to the formal labour market, extremely low wages, lack of child care, sexual harassment in the workplace, and gender violence. The number of female-headed households has grown considerably, and this has placed additional burdens upon women: trying to feed their families. [...] The high level of trafficking from the former Soviet countries suggests that many factors are at work; key among them are high rates of feminised poverty, rigid gender relations and subordination of women.”*⁹⁸

These factors are not only confined to Soviet women but are often the root causes of many women either being trafficked or entering work which sells sex as an occupation. The factors related to the social burden of caring for families and siblings are relevant to South African women who enter this particular industry as dancers.

In conclusion, it is important to note that women often resort to this type of work as a result of having to provide for their families. The gender analysis is congruent with the findings of the investigation below, which demonstrate clearly that due to the role that women play in their families, they feel obliged to find suitable employment, which will allow them to provide financially for their families.

9. Results of Investigation

As indicated above, the Commission visited Mavericks and interviewed both staff members and dancers who were working at Mavericks at the time. Interviews were

⁹⁷ Trafficking in Persons: a Gender and Rights Perspective, p.15, available at: <http://www.un.org/womenwatch/daw/eqm/trafficking2002/reports/EP-DCunha.PDF> [accessed on 6 September 2012]

⁹⁸ Trafficking in Women, Girls and Boys. Key Issues for Population and Development Programmes, p.43, available at: <http://www.unfpa.org/webdav/site/global/shared/documents/publications/2003/Trafficking.pdf> [accessed 6 September 2012]

conducted with a number of non-governmental organisations that provide services to trafficking victims and to sex workers, and with the International Organisation for Migration. Each organisation's representative was specifically asked whether they had ever provided services to a dancer who was working, or had previously worked at Mavericks. Likewise, in interviews conducted with prosecutors, law enforcement, immigration and intelligence officers, interviewees were questioned about their agencies' dealings with victims of trafficking who were working, or who had worked at Mavericks. Informal conversations were held with some of Maverick's patrons.

This section of the report is based on the Commission staff's own observations and on information obtained from interviews and site inspections.

9.1 Overview of the establishment

Although open to all, most of Mavericks' clientele are men. The entrance charge for men is R100.00 and R50 for women. The club is open six days a week, from Monday to Saturday. It is marketed as 'a gentleman's club in Cape Town and [is] South Africa's most distinguished strip club'⁹⁹ where women dance and strip. Patrons can order food and drinks. Mavericks has both a general and so-called exclusive clientele. The "exclusive clientele" pay membership fees to the club.

The dancers perform various shows on three stages, which involve dancing and stripping. Dancers perform table dances, which are erotic dances at individual tables in the main areas of the club. Lighting is dim. Security cameras are evident throughout the areas of the club that the Commission inspected. The Commission was informed that there are 203 cameras in and around the club.

Private booths are set aside for lap dances. A lap dance is an erotic dance performed either in immediate contact with a seated patron or within a very short distance of a seated patron. The dancer may be naked or wearing a g-string. The club management stated that patrons may not touch the dancers and that full-contact dancing (in which the dancer engages in non-penetrative sexual contact

⁹⁹ www.mavericks.co.za

with the patron, such as “grinding” her body against the patron) is not permitted. However, this is contrary to information obtained by investigators that ‘touching’ was allowed for a fee. The Commission noted the small size of dancing booths in which the dancers are required to conduct lap dances. On one floor, the dancing booths are rooms with sliding doors that are opened by the dancers with discs. Each booth contains an emergency button that may be broken at any time to open the booth. On two other floors, dancing booths are merely seated areas enclosed by curtains. One floor contains a swing in the centre.

The Commission did not visit an area of the club known as “The Library”, due to the fact that it is furnished in the style of a library in a gentleman’s club. The Commission was advised that this area is for club members only and is a very private area, usually occupied by “rich and influential” patrons. According to the menu,¹⁰⁰ only eight men may be in The Library at one time. There is a separate smoking section. A stage occupies one floor and the Commission was advised that the stage is for special dances. During the inspection, one woman was receiving choreography classes in preparation for one such special dance.

Mavericks occupy four floors in the building, two of which are for the actual activities of the club. The other two floors provide accommodation for women who work at Mavericks.

At the time of the first visit, approximately thirty-two dancers were working at Mavericks, the majority being South African. Previously, there were more foreign dancers than South African.

The observations gained during the visits to Mavericks was that this club represents the “high end”, that is, the most expensive sector, of what may be termed the adult entertainment market. The décor of the club and the costumes of the dancers were of a very high standard. Notwithstanding the professionalism of many of the dancers, and Maverick’s objection to being categorized with the approximately fifteen other strip clubs in Cape Town, the dancers strip and perform exotic dances,

¹⁰⁰ This is a card that looks like a restaurant menu and gives prices for various dances. The dances, if not the dancers themselves, are commodities.

including lap dances, which simulate sex. There is no umbrella body regulating the live adult entertainment industry.

9.2 Dancers' working conditions

9.2.1 Working Hours

The women work from 7pm to 4am every day. Women have stage names and their real identity is not revealed to clients. Women receive Sundays and one other day a week off. Some of the women are students and most work on weekends.¹⁰¹ Some women request specific periods and get assigned according to a roster for three months.

9.2.2 Accommodation

Women have the option of staying in accommodation provided by Mavericks. The Commission visited the accommodation, which is situated in the same building as the club. The bathrooms are shared spaces with open showers, no curtains and no privacy. As with the working areas, security cameras are evident other than in the bedrooms and bathrooms.

Most of the women interviewed do not occupy the Mavericks accommodation, although a few had occupied the accommodation for several months upon arrival. Currently, mainly non-national women reside there. Upon inspection, the accommodation appeared clean and spacious with some women sharing rooms. The women did not report any problems associated with living in the accommodation.

When probed about whether or not they felt their privacy was invaded in any way whilst occupying the accommodation, they all responded that there were no security cameras in their rooms and hence they did not feel their privacy to be infringed.

¹⁰¹ Only foreign dancers who have study permits to enable them to study at institutes of higher learning may work on a part-time basis in terms of section 13(3)(a) of the Immigration Act. Regulation 10(4) limits the hours to 20 per week.

When asked about the rule that no visitors are allowed in the accommodation, they all felt that this was a reasonable rule for security purposes.

9.2.3 Leave entitlement

The Commission was advised that after working for a period of six months, the women are generally entitled to two weeks' leave. Some of the foreign dancers work during the summer season, then travel to similar "revue" clubs in America, Europe or the Far East and return the following season.

9.2.4 Sick Leave

The women are required to report any illness suffered to management. If it persists for more than two days, a medical certificate is required as verification. Mavericks has its own doctor who attends to the women, but the women indicated that they are permitted to visit any doctor of their choice if they wish. According to the rules imposed by Mavericks, even if a dancer has a letter from her doctor, she must report to the nurse employed by the club.

9.2.5 Fees and levies paid by dancers

The women pay fees or levies in amount of R2 000 per week. Of the R2 000 levy, R650 is paid by Mavericks to the agency which recruited the dancer. Women who live in accommodation in the club building pay an additional R850 per week.

9.2.6 Perks and Benefits

The women may eat in the club between 7.30 and 9pm in the evening, for which they are not charged. Other than food, the women do not receive any benefits. All necessary expenses, such as cell phones, waxes, costumes, hair styling or anything similar, are for their own account. The in-house choreographer teaches women who require extra dance classes, but if any other women wish to take extra classes they must pay for themselves.

The women perform dances on stage, at tables and in the booths. They are paid directly by the clients. When asked about lap dances and table dances, the women responded that for a 15-minute dance, they receive R1 000 and pay R200 to Mavericks for the use of the dancing booth. Each woman receives her money in cash and must pay Mavericks the amount of R200 per dance before the end of each week when paying their levy.

As indicated above, the dancers are required to strip down completely during their dances with clients. This means that women are required to remove all their clothing, including g-strings. The women indicated that they had to dance when menstruating and were not allowed to stay away from work during this time. The management of Mavericks denies this. During the interviews, the women concurred that they appreciated the high income they make. However, when asked what they disliked about Mavericks, they indicated that they did not like being told where to sit and what to do.

The women interviewed stated that they make "good money" and appreciate the fact that they earn well. It was not possible for the Commission to establish exactly how much money the women earn, but it is considerably more than a dancer would earn. It was reported that during the tourist season a dancer might earn over R 50 000 per month. Due to the fact that Mavericks considers the dancers to be "independent contractors", tax is not deducted from their earnings. The women are required to register as provisional taxpayers. It is unlikely that they in fact do so – whether they are foreign or local.



Picture of a swing in one of the curtained booths at Mavericks

9.2.10 Commission on sale of champagne and consumption of alcohol

The women earn commission of 20% on each bottle of French champagne bought by a client they are with. A number of women also said that they felt slightly pressured to drink alcohol. Some of the women felt that the alcohol assisted them in performing well in their jobs, but others did not generally like consuming large amounts of alcohol and felt obliged to do so in order to carry out their work duties. Some of the women reported that they were required to encourage clients to purchase more expensive bottles of champagne and wine at the bar, as this benefitted Mavericks.

Mavericks denied that the women were encouraged to drink too much and argued that this would be counterproductive. Management pointed out that the women were skilled in “pretending” to drink with the patrons while not consuming much. However, the Commission staff who visited the club unannounced one evening described more than one woman as being very tipsy.

9.3 The dancers

9.3.1 Recruitment of dancers

According to the management of Mavericks, women are recruited as “professional dancers” and there are several marketing methods as such. These include:

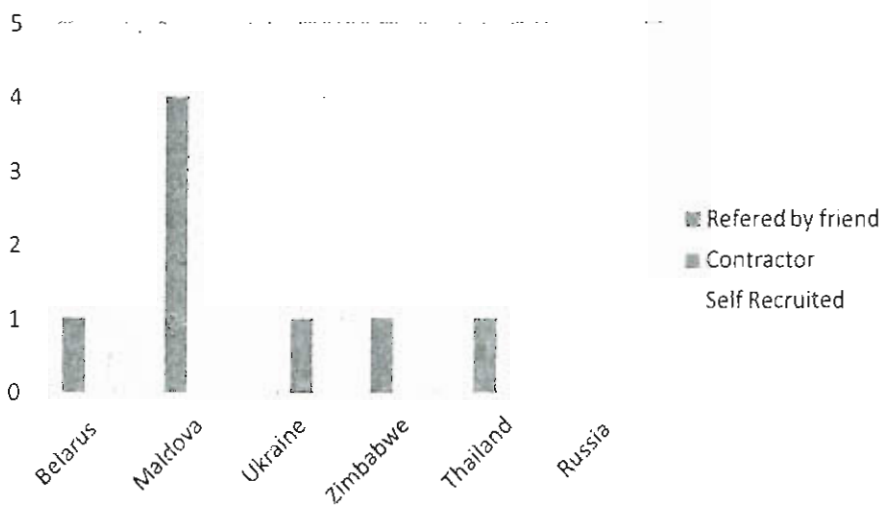
- (1) Strippermagazine.com
- (2) Facebook advertising
- (3) International recruitment agencies which work in the industry (one based in Canada and others in the UK and Romania)
- (4) An application via Mavericks’ website

Prospective dancers are required to send a headshot, body shot and evidence of previous dance experience. According to Mavericks, if their application is successful, Mavericks requests a copy of their bio page in their passport and the application for the necessary temporary residence permit is made by the dancer in her home country at her own costs. Mavericks provides assistance with necessary documentation.

Financial assistance is provided to some women based in South America (such as Brazil). In these circumstances, Mavericks appoints its own travel agent who does travel bookings. When a foreign dancer arrives in South Africa, she has to sign a promissory note and pay back costs within six to eight weeks.

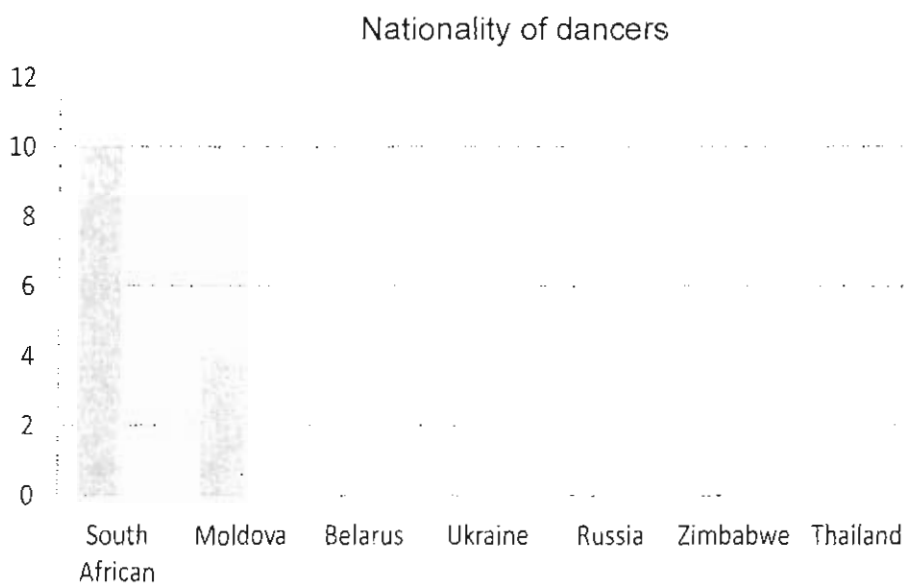
Of the twenty women interviewed, eleven said that a friend had told them about Mavericks. Seven out of these eleven women were non-nationals. Out of the remaining three non-national women, two discovered Mavericks through the Internet and one indicated that she had obtained the information via a recruitment agent located in South Africa.

The table below reflects the nationalities of the foreign dancers interviewed and the means by which they were recruited.



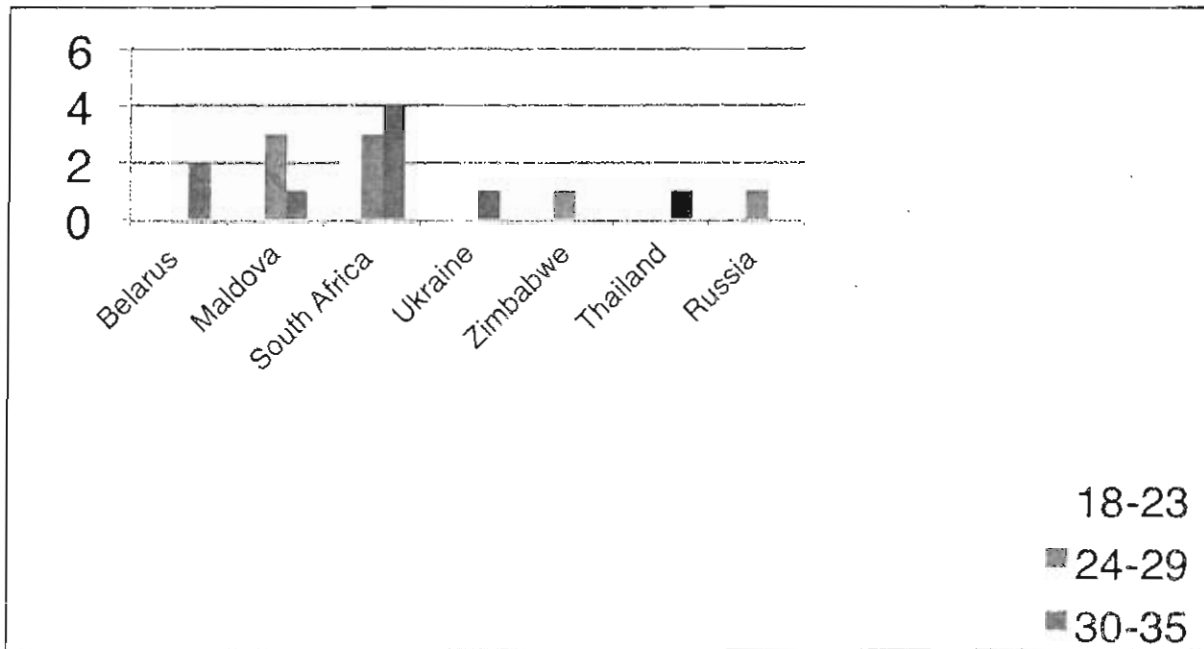
Out of the 20 dancers interviewed, ten were native to South Africa and ten were from overseas. Of the 10 foreign women, four were from Moldova, two were from Belarus, one was from Ukraine, one was from Russia, one was from Zimbabwe, and one was from Thailand.

The following table reflects the demographic profile of the dancers who 'work' at Mavericks



The following table reflects the age and nationality of the dancers

Age and nationality



Age: The age of dancers working at Mavericks ranges from 19 to 35 with a median age of 28.

The tables above show that most of the women working as dancers at Mavericks are from South Africa. The non-national women are mainly recruited from Moldova. Moldova, according to the International Organization for Migration, has a GDP per capita of US\$3 110 (currently R26 152) and is the poorest country in Europe.¹⁰² It is interesting that the South African women are older, whilst the non-national women are in the younger age category.

A number of Mavericks dancers are parents, although these were mostly the South African women. Most of the non-national women support their families – both parents and siblings – in their countries of origin.

9.3.2 Reasons given by foreign dancers for working in South Africa

¹⁰² Huffington Post, "Moldova, A Hot Bed for Human Trafficking" http://www.huffingtonpost.com/niki-i-junker/moldova-a-hot-bed-for-human-trafficking_b_608576.html [accessed on 19 July 2012]

The main reason advanced by non-nationals for working in South Africa is to “earn good money quickly”. Most of the non-national women interviewed are supporting their families in their countries of origin. At least two non-national women interviewed have relationships with South African men and two are studying in South Africa. Most of the women indicated that they really enjoy dancing. It is important to note that very few non-national women remain in the employ of Mavericks since the litigation.

9.3.3 Reasons given by South African dancers for working at Mavericks

The reasons the South African women gave for working in this industry are mainly to earn “good money quickly”, either to support their families or to pursue business opportunities in the future. Interestingly, two South African women stated that they enjoy dancing, dressing up and being told they are beautiful every day; it was clear that the employment serves to reinforce their sense of self worth. However, all the women, when asked individually whether or not their families knew what type of work they do, responded in the negative, saying that they would be judged.

The attraction of earning a high income quickly was evident from the responses of the South African women who reported that they are often drawn back into the industry due to the difficulty of earning a similar income in other work environments.

9.3.4 Length of service

One woman interviewed has danced at Mavericks since 2002. The others started working at different times and for varied periods. Subsequent to the withdrawal of the corporate permits and the criminal charges under the Immigration Act against twelve of the dancers, many of the foreign women have returned to their countries of origin and there are currently more South African women than foreign women employed at Mavericks. South African women generally seem to be employed for longer periods – up to 10 years in one case.

9.3.5 Immigration status

All the non-national women who were interviewed claimed that their temporary or permanent residence paperwork was in order and they were living and working in South Africa legally. A number of women who were arrested were not entitled to work, according to information obtained after the interviews from DOHA, and the court file. In some of these instances, they had applied for an extension of a permit, but the receipt for the application specifically stated that an application was not in itself a status and that the holder of the receipt was not entitled to work.

Fourteen women were in possession of these "change of status" forms. Charges were apparently withdrawn, as there was no evidence in the docket that the women were in fact working. As stated above, the Commission does not conduct criminal investigations.

Even though all the non-national women indicated that they attended to their visa requirements independently of Mavericks, it is unlikely that they would have been in a position to fulfill all of these requirements without assistance from within South Africa or without the assistance of an immigration practitioner or agent. Many of the foreign dancers spoke little English. DOHA officials indicated that immigration practitioners in fact submit most of the applications for permits for dancers submitted to them. Mavericks indicated that they assist the dancers by providing them with the necessary documentation, such as the contract and a letter.

Non-national women who were interviewed and asked about the payment of their visas fees and air tickets all responded that they paid them independently and that there was no third party who had made payment on their behalf.

As indicated above, most of the women who were subject to the application that gave rise to this investigation have left South Africa. In view of the protracted investigation, in May 2013 the Commission requested Mavericks to provide it with copies of the permits of all foreign women dancing at the club at the time. Of the nineteen permits received, seven were permits issued to a spouse of a South African citizen or permanent resident in terms of section 11(6) of the Immigration

Act.¹⁰³ Immigration and law enforcement officers indicated that many foreigners (including dancers) enter into marriages of convenience, but that the DOHA does not have sufficient resources to investigate. The Commission was informed that administrative procedures for the issue of spousal permits, including interviews, have been tightened up in recent months. The Commission did not investigate any of these seven permits.

Of the remaining twelve women, nine had study permits. Two were for study at the Cape Town School of English; one at the SA School of English, two at the International Academy of Health & Skin Care, three at Crossroads Empowerment Centre and one at the Hospitality and Commercial College. Only students registered at institutions of higher learning may work for up to 20 hours a week. An English language course, or a coaching course does not constitute "higher education".

The three women whose study permits reflect that they may study at Crossroads Empowerment Centre are all from Romania. Their applications were all made at the Bellville offices of DOHA.

One woman had a work permit that entitled her to work at Mavericks, and two others had work permits allowing them to work for High Performance Recruitment.

Ten of the twelve women had applied for their permits in South Africa, not in their country of origin. It is therefore assumed that they entered South Africa on a visitor's visa and applied for the change of their status in South Africa.

Although the Commission is dealing with a small sample, it is reasonable to conclude that the information given to the Commission in 2012 by the women who were interviewed and management was not entirely correct. DOHA officials interviewed informed the Commission that a small number of recruitment agents and immigration agents act for most of the women who work at Mavericks and other strip clubs in Cape Town.

¹⁰³ Although recent amendments to the Immigration Act, when implemented, require a holder of a permit to be married, at present the holder must merely show that he or she is in a "good faith spousal relationship" which is permanent and to the exclusion of others.

The fact that an amount of R650 per week is deducted from the R2 000 for recruitment agents supports the contention that most of the dancers are placed through agencies. Given that most of the foreign women are not fluent in English, but nevertheless applied for their permits in South Africa,¹⁰⁴ it is reasonable to assume that immigration agents assisted them. The fact that three women from one country applied at the same office, were given study permits for the same “centre”, and all work at Mavericks is unlikely to be coincidental.

However, the fact that many of these women (1) are more than likely working at Mavericks in contravention of the Immigration Act; (2) were more than likely assisted by an immigration agent, who with or without the assistance of a corrupt DOHA official, obtained a study permit without all the required documents, and (3) were placed at Mavericks by a recruitment agency is not proof that they are victims of trafficking. Nevertheless, as indicated above, foreign women who work illegally, do not speak English and who do not have friends or family in South Africa, may be vulnerable to exploitation, or become vulnerable.

9.3.6 Employment Status -- Independent Contracts

The women who work at Mavericks as independent contractors are required to pay a weekly levy of R2 000 for the use of Maverick’s facilities.

They are required to report for duty at 7pm and must remain at the club until 4am. The dancers reported that they are not permitted to leave any earlier, even if they wish to leave after having made their desired amount of money. They expressed difficulties with this approach, given that they are nominally independent contractors and therefore should be allowed to determine their own working hours. Maverick’s rejected this complaint and pointed out that the club needs dancers in order to attract patrons. It also needs to be able to plan the shows for each evening. The women are subject to strict rules and are under the control of the management during working hours.

¹⁰⁴ Reference here is to the 19 foreign women who were working at Mavericks in May 2013, not those interviewed in 2012.

As indicated above, an independent contractor will: be a registered provisional taxpayer; work her own hours; run her own business; be free to carry out work for more than one employer at the same time; invoice for her services and be paid accordingly; will not be subject to usual "employment" matters such as the deduction of PAYE or UIF from her invoice and will not receive a car allowance, annual leave, sick leave, 13th cheque and so on.¹⁰⁵

9.3.7 Evidence of control/coercion

Anex, which has taken over responsibility for the trafficking hotline, reported that during 2011 a South African dancer at Mavericks had telephoned anonymously to report that she felt threatened by the control over her by Mavericks employees. In particular, she complained about a Russian man who collected her and dropped her at home. She telephoned later to say that she did not want the matter to be followed up. This was the only instance where an organisation interviewed by the Commission reported dealings with a dancer or former dancer who had worked at Mavericks.

IOM have had no requests for assistance from dancers at Mavericks – for instance for assistance in returning to their country of origin or because they are trafficking victims.

The NPA have not prosecuted a trafficking case from Mavericks.

A SAPS officer interviewed referred to a raid on Mavericks undertaken some time before the corporate permits were withdrawn in 2011, and recalled that all the foreign dancers were found to be in possession of permits issued under section 20 of the Immigration Act, except for two Chinese women who were working without a permit. There was no evidence that the two women had been trafficked – merely that they were not in possession of permits.

The Commission did not find evidence of debt bondage. The levy paid to Mavericks is high, as are the fines. However, the women pay the money each week, and are

¹⁰⁵ The South African Labour Guide, <http://www.labourguide.co.za/general/employee-status-64> [accessed 20 July 2012]

therefore not in debt to Mavericks for more than a week. Women are not precluded from leaving because they owe money. However, if they leave before the end of a contract, they have to pay a penalty in order to enter into a new contract. There was absolutely no evidence that women were forced to live in housing provided by Mavericks, and those women who lived on the premises were free to come and go as they wished.

10. Broader Concerns

10.1 The need for broader examination of industry

The Commission shares the concern that the limited focus on Mavericks in examining the conditions of “exotic dancers” in its establishment ignores the human rights abuses, violations and incidents of trafficking taking place in the rest of the adult entertainment industry.

Furthermore the narrow focus on the adult entertainment and sex work industry in relation to trafficking could divert attention away from other aspects including child and labour trafficking.

With the promulgation of the Trafficking Act there is greater scope for the prosecution of trafficking-related offences. DOHA, SAPS and the Department of Labour should be mindful of the fact that trafficking is a process rather than a single offence. Vigilance in the implementation of the respective mandates of these state agencies will reduce the risk of trafficking. The role of labour brokers, recruitment and employment agents must be monitored.

10.2 Lack of credible data

The lack of credible data on trafficking and trafficking victims, as well as the difficulties in investigating trafficking referred to in this report, must be taken into account when drafting the National Policy Framework referred to in

Section 40 of the Trafficking Act. Costing the Trafficking Act will be difficult without a realistic assessment of the scope of trafficking.

10.3 Specialised skills required during investigation of trafficking

The Commission was acutely aware of the need for skilled and sensitive interpreters when investigating trafficking of non-nationals. The provision of interpreters must be a priority in the costing of the Act and the drafting of the National Policy Framework.

The Commission is concerned that the role of the intelligence agencies, including the External Branch of the Department of State Security is highlighted in the National Policy Framework. Intelligence gathering, and more importantly, skilled analysis of intelligence, is necessary in order to prevent and combat organised crime of this nature. The roles of officers of the External Branch of the Department of State Security, DOHA and consular officers the Department of International Relations who are posted at South African missions and embassies in “sending countries” must be revisited in light of the provisions of the Trafficking Act.

The training of officials abroad as well as the ongoing training of local law enforcement, immigration and social development personnel is vital if the aims of the National Policy Framework of coordinated and rights-respecting service delivery are to be achieved. The Commission was concerned at reports from stakeholders that officers were not adhering to guidelines that formed part of their training when undertaking operations and arrests. The Commission was also concerned at reports from various members of the intergovernmental task team dealing with trafficking in the Western Cape regarding the lack of cooperation between different departments in certain instances, and the failure of designated personnel to attend meetings.

10.4 Public Education

With regard to public awareness programmes, the Commission has noted the tendency of governments and other stakeholders to allocate large budgets for glossy posters at airports and television commercials, particularly around international sporting events. The Commission suggests that the drafters of the National Policy Framework provide for an assessment of the likely impact of public awareness campaigns to be undertaken in relation to their cost.

10.5 Support for victims

The Commission also notes with concern that issues raised by stakeholders in the sector that the lack of protections and services available for women and threat of post trial extradition in current legislation will not facilitate greater cooperation or protections of women trafficked.

11. Findings of the Commission

11.1 Fair labour practices

The conditions and terms under which the women work at Mavericks are inconsistent with their purported status as 'independent contractors' and render them vulnerable to exploitation and constitute a prima facie violation of the right to fair labour practices.

Examples of inconsistencies include:

- 11.1.1 The lack of flexible work arrangements (currently failure to comply results in fines being levied). Women are not able to negotiate their own work days and hours. Furthermore, the application of levies and fines are unclear. The basis on which the levy is calculated is also unclear, given that the women also pay "rent" for the use of the booths for lap dances.

11.1.2 It may be inferred, that in terms of the structure of the current working relationship between Mavericks and its “employees”, the fines amount to an exercise of control over the women. Such level of control would imply that the contract is indeed one of employment. However due to the fact that the women are labeled as ‘independent contractors’, they are not able to access the rights of an employee under labour laws. For instance, the hours they are required to work are in excess of those set out in the Basic Conditions of Employment Act; they may be fined, or their contracts terminated without due process, as set out in the Labour Relations Act.

11.1.3 The dancers do not receive a salary from Mavericks, but are paid by the patrons for individual dances (or receive commission on French champagne). In some instances Mavericks has paid for the flights of dancers who then signed a promissory note in order to pay back the ‘advance’.

11.1.4 Some of the dancers indicated that their services had been secured through recruitment agencies. The agencies in question were paid a fee by Mavericks, which was obtained from the dancer for as long as she works at the club.

11.1.5 The Commission staff deduced from discussions that the women saw themselves as employees rather than independent agents.

11.2 Privacy

Use of Security Cameras

When asked how they feel about the number of security cameras in the venue (203 accordingly to Management), the women indicated these were for security purposes. However, there were no security cameras in the dancing booths which are behind the locked doors.

When probed on this issue the women indicated that they felt very safe, they knew that if there were any incidents with clients trying to make unwanted advances, security would be alerted immediately and, in any case, they could hit the green security button in cases of emergency. Only two women indicated that they had ever experienced problems with clients. They stated that they had dealt with the problematic client themselves without the assistance of Mavericks' security.

There were no cameras visible in the rooms used as accommodation or toilet areas.

Whilst the presence of so many security cameras may be indicative of an invasion of privacy, and a tool to control and monitor the dancers and other employees the Commission could not make a finding of violation of the right to privacy.

11.3 Human Dignity and Bodily Integrity

11.3.1 Dancing requirements

The right to human dignity was one of the major concerns of this investigation.

While the women interviewed stated that they enjoyed their work, many indicated that they did not disclose their 'profession' to their families as they feared that they would be 'judged' for having chosen this work.

Women are required to remove all their clothing during table dances (including all underwear), which occur in the full view and proximity of all patrons within the vicinity of the table, rather than an individual client as during a lap dance.

It was not possible to determine whether or not the women were acting of their own free will or under duress without knowing their circumstances or history. The element of 'choice'/ consent remains ambiguous as certain pull factors may be

indicative as highlighted in research i.e. poverty or extortion, threats of violence which would render woman particularly vulnerable to exploitation.

The women interviewed complained that they were made to work when menstruating, as the dancers are required to strip down completely when performing, they must wear tampons. It is specified that they must wear tampons and have to remove all clothing, including underwear, in all circumstances.

It may be uncomfortable and humiliating for a woman who is menstruating to have to strip and endure this attention. Maverick's management deny that women are required to work when menstruating. It may well be that the women feel that they do not have a real choice as they did not get an income if they do not work. They are required to function and perform their duties irrespective of their potential discomfort, health, general well-being or possible humiliation and embarrassment.

The above constitute a prima facie violation of the right to human dignity and bodily integrity

11.3.2 Sexual Contact

The Commission received information from one patron and former dancer that sexual favours were exchanged at Mavericks, this was supported by one interview with a law enforcement officer. The parties declined to go on record or provide further information. All the women interviewed insisted that they only danced at Mavericks and vehemently denied selling sex.

Immigration and law enforcement officials argue that in requiring a 'booking out fee' or 'fine' if a dancer leaves early (usually with a patron) Mavericks is acting as a 'pimp' as the 'fine' or 'booking fee' levied against the dancer (which is paid by the patron) amounts to payment of sexual services which accrues to Mavericks.

Mavericks denied that sex was sold or permitted in its premises

The Commission could establish that 'touching' and other forms of contact were permitted as part of the dance routines however was unable to establish whether women performed sexual favours under duress and/or for reward.

11.3.2 Drug Testing

The women stated they did not object to taking drug tests and did not feel this was an invasion of their bodily integrity. Some indicated that they had never been tested, but at least two admitted that they had a problem with drugs. They were aware that if found to be taking drugs their contract with Mavericks would be terminated. Management responded that they refer the women to rehabilitation centres if this occurs. The women stated that large penalties are imposed if they wish to return.

The drug tests seem to be conducted selectively on women whom Mavericks suspects of using them.

The women also reported that general medical examinations are conducted upon their arrival and prior to employment at Mavericks.

The Commission was concerned that random drug tests and medical examinations are being conducted without express permission being obtained from the women. It is clear that the women feel compelled to take the drug/medical tests in order to retain their "employment" at Mavericks, resulting in the absence of voluntary consent being given by them.

The requirements of drug and medical testing appear to be a requirement of the job (to what end this is unclear given the nature of work which Mavericks allege is undertaken), the women therefore have no choice to refuse mandatory testing or examination if required by management. **This constitutes a prima facie violation of the right to bodily integrity and security in and control over their own bodies.**

11.3.3 Treatment by DOHA and Law Enforcement Officials

Operation conducted by the Home Affairs in November 2011

- 11.3.3.1 The few women interviewed in 2012 who still remained at Mavericks after the operation and who were arrested and appeared in court, complained about abuse by police and DOHA officials. They allege they were taken from the DOHA offices in Barrack Street to the police station in Buitenkant Street where they were processed. They were held in a cell, but according to the women were not told the reasons for their arrest nor how long they were going to be held in the police cells. The experience seems to have caused much trauma. It was reported that one woman suffered a panic attack and paramedics were called to assist. One woman reported being called a “*whore*” by an official.
- 11.3.3.2 Both the IOM and representatives of a number of organisations working with trafficking victims expressed the opinion that SAPS and DOHA officials did not always respect the dignity of people working in establishments when undertaking operations, in spite of training and guidelines. The attitudes of these staff, it was noted, were counterproductive as it discouraged victims from cooperating with law enforcement officials. NGO representatives gave examples of situations where, during a raid on a brothel, the “*madam*” and the women who worked for her as prostitutes were arrested and held in a cell together, in contravention of guidelines set out in training. When these allegations were put to SAPS and DOHA officials, they were denied. However, SAPS did mention that Social Development staff were not always available to assist with services to possible trafficking victims during an operation. It was also evident that SAPS preferred working with certain NGOs.

Based on the testimony of women who were interviewed the **offensive nature of comments made by officials would constitute a prima violation of the right to human dignity.**

11.4 Freedom of Movement /Trafficking

On the basis of the limits of the investigation the Commission was not in a position to make a finding that the women's right of freedom of movement was infringed. The limited mandate of the Commission and absence of resources could not sufficiently investigate the circumstances of each dancer and establish whether there was duress or coercion. All of the 'non-national' women reported that they came to South Africa by choice and had prior knowledge of the type of work they would be doing. Mavericks further argued the nature of 'work' required from the dancer was fully disclosed prior to their arriving at Mavericks. Both Mavericks' website, as well as another website claiming to be that of Mavericks, makes it clear that the dancers are required to strip and perform lap dances. The issue of prostitution requires further investigation by the relevant legal authority.

Women also indicated that their movement to and from the club was not restricted however; the payment of booking out fees or levies for leaving early suggests the contrary. Furthermore, the use of certain drivers/ taxis and role of bouncers in securing transport was indicative of some form of control over the dancer's movements. This requires further investigation by the relevant legal authority.

The women claimed that they were not held against their will however, some did report that their passports and money was held by Mavericks management for 'safekeeping'.

The evidence provided to the Commission raises serious concerns relating to the freedom of movement of the dancers noting the levels of control exercised over them – this warrants further investigation by the relevant legal authority.

13. Recommendations

It is recommended that:

- 13.1 That **Mavericks** review its current policies to ensure compliance with the relevant labour legislation and constitutional provisions as identified above. More particularly,

the contractual relationship between Mavericks and the women who 'dance' and 'strip' at the club must be clarified. That the Department of Labour monitor compliance with labour laws in respect thereof.

13.2 That the **Commission for Conciliation Mediation and Arbitration (CCMA)** assist with an inquiry in terms of Section 200A (3) inquiry, in terms of the Labour Relations Act in order to establish whether or not the dancers are employees of Mavericks and make recommendations to the **Department of Labour** regarding redress of this situation.

13.3 That **Mavericks** take the necessary steps to ensure compliance with laws in relation to immigration and that all non-national women who work at the club are in possession of valid temporary or permanent residence permits. Further that the Department of Home Affairs monitor compliance with the laws.

13.4 That the **Department of Labour** investigate the working conditions of non national and South African dancers at Mavericks and other strip clubs in order to ascertain whether these clubs are contravening provisions of the Basic Conditions of Employment Act. Furthermore that the appropriate regulatory framework be put in place to ensure compliance with Legislation.

13.5 That the **Department of Home Affairs** ensure effective monitoring capacity of the Inspectorate to perform its functions.

13.6 That the **Department of Justice and Constitutional Development** expedite the drafting of Regulations and urgently ensure implementation of the Prevention and Combating of Trafficking in Persons Act.

13.7 That the **Department of Justice and Constitutional Development** ensure that adequate support systems are put in place and that capacity exists to effectively support victims of trafficking.

13.8 That the **responsible Departments/Agencies** of existing and new law enforcement (SAPS, Metro police included) and immigration officers receive human rights

training and training on Prevention and Combating of Trafficking in Persons Act, and that monitoring systems are put in place to ensure compliance with the provisions of this Act.

13.9 That the **responsible Departments/Agencies** of law enforcement and immigration officers comply with legal requirements when undertaking raids or operations and further that that protocols and standing orders integrate a human rights paradigm into operations of these agencies.

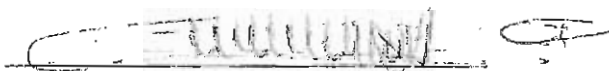
13.10 That the **South African Police Services** initiate an investigation into issues highlighted in this report which require further criminal and forensic investigation.

14. APPEAL

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

**The Chairperson, Adv M.L. Mushwana
South African Human Rights Commission
Private Bag X2700
Houghton
2041**

SIGNED ON THIS THE 6th DAY OF June 2014.



**Adv M.L. Mushwana
The Chairperson
South African Human Rights Commission**