

**CAN LABOUR LAW SUCCEED IN RECONCILING THE RIGHTS AND  
INTERESTS OF LABOUR BROKER EMPLOYEES AND EMPLOYERS IN  
SOUTH AFRICA AND NAMIBIA?**

By

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## DECLARATION

I declare that *can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia* - is my own work, that it has not been submitted before for any degree or assessment in any other university, and that all sources I have used or quoted have been indicated and acknowledged by means of complete references.

Full Name.....

Date.....

Signed.....



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Lastly, to the youth of Namibia let us forever unite in hardwork, solidarity and justice to drive Namibia to the top of economic development in Africa.

## **ABSTRACT**

The ever increasing regional and global trade competition has manifested itself in a growing number of non-standard forms of employment including the increasing use of "temporary employment services" (or "labour brokers" as commonly referred to). Labour brokers enter into employment relationships as third parties with client companies to supply employees through a commercial contract. These labour services usually fall outside the regular two-party contract of employment defined under existing labour laws and thus the employees are not covered by that law. Labour brokers have been labelled as "the re-emergence of new apartheid strategy" and "modern slavery" by some quarters in labour sectors of Namibia and South Africa. Trade unions, particularly, have led the most vocal resistance against labour brokers in both countries. They argue that, like previous apartheid contract labour systems, labour brokers today erode standards for decent working conditions and weaken union representations in the workplace. Thus unions have repeatedly sent strong calls to lawmakers to amend existing labour laws and 'forever put labour broking in its grave where it belong'<sup>1</sup>. On the other hand, employers have argued that recent forces of globalisation demand flexible employment strategies and banning labour brokers will make it more difficult for local businesses compete profitably globally via flexible short term employments and can lead to losses of many job opportunities.<sup>2</sup>

It is against this background that I will argue that current labour laws should be amended to define and regulate labour brokers more closely and compel them to recognise workers rights and conditions as equal as those of standard employees. But first, I will highlight some socio-economic indicators influencing the labour markets in South Africa and Namibia, including the history of worker's rights under the contract labour systems in both countries. Second, I will look at some of the expressed exploitive conditions resulting from the use of labour brokers and also look at some reasons why businesses engage labour brokers. Thereafter I will point out some of the reasons why trade unions have called for a total ban on labour brokers. I will then discuss the difficulty of banning labour brokers, including the constitutional challenge in the landmark case of *African Personnel Services v Government of the Republic of Namibia*<sup>3</sup>. Lastly i will expand on the ruling by the Namibian Supreme Court of Appeal (NSA) recommending a regulatory approach in line with the International Labour Organisation's (ILO) conventions on third-party employments.

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<sup>1</sup> Evilastus Kaaronda, Secretary General-National Union for Namibian Workers (NUNW) in *The Namibian* 5 May 2010 available at <http://www.namibian.com.na> (accessed on 18 April 2011)

<sup>2</sup> '...Present proposals [amendments to ban labour brokers] are more negative than positive on job creation and could jeopardise the jobs of an estimated 850 000 employees who work in this system. It is essential that a healthy balance is found between the protection of workers and job security.' Johan Kruger, Head - Solidarity Research Institute ,19 January 2011 available at <http://www.sabinet.co.za> (accessed on 15 July 2011)

<sup>3</sup> *African Personnel Services v Government of the Republic of Namibia* [2009] NSA 17

## **KEYWORDS**

- ❖ Globalisation
- ❖ Flexibility
- ❖ Non-standard employment
- ❖ Exploitive labour
- ❖ Trade unions
- ❖ Workers' rights
- ❖ Employers' interests
- ❖ Regulation
- ❖ Labour law
- ❖ Labour brokers



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# CHAPTER 1

## INTRODUCTION

### 1.1 Problem Statement

Ever since labour brokers emerged in South Africa and Namibia, many concerns of workers' rights violations have been raised. Those who argue against labour brokers allege that brokers are involved in a direct modern day form of slavery.<sup>1</sup> It is argued that like slavery, brokers hire out employees to third parties and thereafter collect a price/fee from the client for the labour provided by the workers. The broker then deducts a large percentage fee and pays the workers a basic salary often without providing other employment benefits. These workers are regularly excluded from pension benefits, medical coverage and workmen's compensation for injuries on duty or terminations.<sup>2</sup> It is with this in mind that over the past few years' lawmakers in South Africa and Namibia, under severe pressure from trade union movements, have contemplated amending existing labour laws to ban the practice of labour brokers in the labour market. However, article 21 (j) of the Namibian Constitution and section 22 of the South African Constitution respectively, gives both natural and juristic persons including labour brokers the 'right to choose trade, occupation and profession freely'<sup>3</sup>. Thus it has become virtually impossible to outlaw labour broking as a form of business trade as it infringes the right of labour company as was ruled in the Namibian Supreme Court of Appeal (SCA) case between *African Personnel Services v Government of the Republic of Namibia*.<sup>4</sup> However, section 22 of the constitution in South Africa adds that 'laws can be passed to regulate how people practice their trade, occupation or professions'. Thus strong regulation has emerged as the best form of legislative direction that best reconciles the interest of employers for flexible employment options with the rights of workers for better protection in labour broking jobs.

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<sup>1</sup> Judge **Parker C** of the High Court of Namibia concluded that labour hire 'smacks of the hiring of a slave by his slave-master to another person by reducing human beings as "private property" ', in *African Personnel Services & others v Government of the Republic of Namibia* [2007] NAHC.

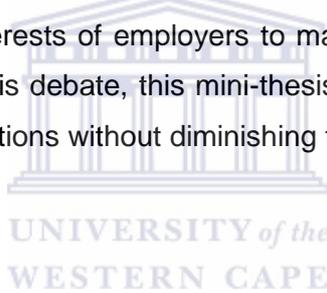
<sup>2</sup> A report by Labour Resource and Research Institute (LaRRI) in Namibia, highlighted that 'although the provisions of Namibian labour law apply to labour broking companies as well, the practice of employment at will is applied by labour brokers; labour broking is hardly a springboard for permanent jobs; and the most significant problems experienced by labour broking workers are the lack of benefits and job security and low wages.' The debate was preceded by LaRRI available at [www.larri.com.na](http://www.larri.com.na) (accessed on 16 April 2011).

<sup>3</sup> Article 21(j) of the Namibian Constitution, No. 02 of 1996 and Section 22 of the South African Constitution.

<sup>4</sup> *African Personnel Services v Government of the Republic of Namibia* [2009] NSA 17.

## 1.2 Research Question

Law is a field of study that is dynamic and continuously evolves to regulate and address the developments in society. In Namibia and South African, the legislative assemblies in both countries have constantly reviewed laws and policies, since the dawn of democracy, to safeguard the rights of citizens better and also create economic environments that promote business growth and competitiveness. This mini-thesis, specifically, investigates the research question on how labour laws can succeed in reconciling the rights and interests of labour broker employees and employers in South African and Namibia. Unions and labour broking employees have expressed that many of their rights are not recognised by activities of labour brokers under existing labour laws thus labour brokers should not be allowed to exist as employers, while on the other hand businesses have complained that existing labour laws are too rigid and must show more flexibility to allow employers to work with modern forms of flexible employment strategies such as labour broking to stay competitive in a globalised modern business world. Thus instead of the law completely getting rid of labour brokers and taking away the interests of employers to maintain competitiveness as sought by the various stakeholders in this debate, this mini-thesis investigates how labour law can succeed to reconcile the two positions without diminishing the others rights or interests.



## 1.3 Aim/s of the Research

This mini-thesis aims to guide the ongoing national labour debates in South Africa and Namibia, that existing labour laws should be amended to outlaw labour brokers for creating exploitive conditions of employment. Trade unions in both South Africa and Namibia have advocated for a total ban on labour broking operations, while businesses have argued against such drastic action. The employers have expressed the view that banning labour broking will lead to many job losses and increase unemployment figures as the sector creates more employment opportunities in the labour markets.<sup>5</sup>

The mini-thesis thus aims to provide concrete recommendations to lawmakers that rather than unconstitutionally banning labour broking, lawmakers should try to amend existing labour laws to regulate labour brokers in a framework that compels them to adhere to basic employment conditions. A strong regulation will ensure full protection of worker rights for

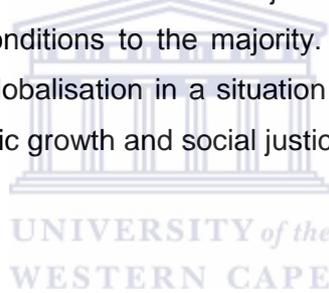
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<sup>5</sup> '...Present proposals [amendments to ban labour brokers] are more negative than positive on job creation and could jeopardise the jobs of an estimated 850 000 employees who work in this system. It is essential that a healthy balance is found between the protection of workers and job security.' Johan Kruger, Head - Solidarity Research Institute, 19 January 2011 available at <http://www.sabinet.co.za> (accessed on 15 July 2011).

decent work without diminishing the business sector's need for flexible employment strategies such as short-term employment contracts.

## 1.4 Rationale of the Study

It is not a secret that the 20<sup>th</sup> century context of globalisation, such as flexible employment structures, has presented the world of work with both promises and problems. In developing economies such as South Africa and Namibia, globalisation has made the pursuit of the development agenda while maintaining internal and external stability a difficult and delicate task. On the one hand, 'globalisation holds out to participants the promise of growth in trade and international investment, on the other hand it heightens the risks of instability and marginalisation'<sup>6</sup>, especially the protection of worker's rights employed under the recent flexible non-standard forms of employment, such as labour broking. Thus, the mini-thesis aims to highlight lessons that both South Africa and Namibia can share on the measures undertaken to regulate or outlaw labour brokers to date. Both countries have fairly new labour laws that were adopted to foster better social justice for all after years of oppressed worker's rights and exploitive conditions to the majority. In recent times these laws have come up against the forces of globalisation in a situation that has threatened to hold back both the level of national economic growth and social justice achievements.



## 1.5 Research Hypothesis

Although trade unions in South Africa and Namibia have made persistent and militant calls for the respective government to amend existing labour laws and 'forever put labour broking to its grave where it belong'<sup>7</sup>, in contrast to the opposing view expressed by employers for 'more flexibility in the legislation of the labour market'<sup>8</sup>, this mini-thesis will argue that a regulatory approach can succeed in finding a balance between the interests of employers for greater flexibility and the workers' rights to achieve better protection in their employment conditions.

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<sup>6</sup> According to Barker (2003) in *A new agenda for being human ... again ... in the world of work* available at <http://www.mywage.com/main/> (accessed on 5 April 2011).

<sup>7</sup> Evilastus Kaaronda, Secretary General-National Union for Namibian Workers (NUNW), in *The Namibian* 5 May 2010 available at <http://www.namibian.com.na> (accessed on 18 April 2011).

<sup>8</sup> 'Total prohibition of labour brokers did not address the situation in a satisfactory way. The question needs to be asked why labour brokers became part of certain labour market dispensations. The main reasons are the over-regulation and inflexibility of the labour market, obliging employers to make use of alternative methods of staffing their businesses in order to remain competitive..' said Tim Parkhouse, Secretary General- Namibia Employers Federation (NEF), in *The Namibian*, 6 July 2007 available at <http://www.namibian.com.na> (accessed on 21 April 2011).

## 1.6 Scope/Limitation of the Research

The mini-thesis will be restricted to the development of labour brokers in South Africa and Namibia as new democracies that emerged from the same exploitive apartheid systems in respect of seeking decent employment conditions and rights for all citizens irrespective of their social class. It will particularly focus on the scope of those labour laws that came into existence after the independence of both countries in the early 1990s. These labour laws were greatly expected to provide better social justice in labour conditions to both unskilled and semi-skilled workers. However many shortcomings have been exposed in those recent labour laws of both countries by the pressures of globalisation such as the usage of non-standard forms of employment. One of the forms of employment that has proved to be a challenge to existing labour laws is labour broking. Thus this mini-thesis will also discuss some lessons that both South Africa and Namibia can share and learn from each other on the challenges and measures undertaken to control labour broking employment, such as those highlighted in the labour broking case of *African Personnel Services v GRN*.<sup>9</sup> In addition special recognition will be given to the 'decent work'<sup>10</sup> definition of the body that oversees world labour standards, the International Labour Organisation (ILO), to which both South Africa<sup>11</sup> and Namibia<sup>12</sup> are affiliated.

## 1.7 Significance of the Research

Although labour laws differ from country to country, a comparative analysis on the impact of labour brokers on the rights of workers in the two countries being discussed is significant because being young democracies, South Africa and Namibia emerged at the height of world globalisation with relatively new labour laws. Initially these statutes primarily sought to ensure fair workers rights and conditions that were often denied to the majority of the citizens in the pre-democracy labour markets. However, the effects of globalisation have put heavy strains on the original scope of those labour statutes especially around the initial

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<sup>9</sup> *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17.

<sup>10</sup> The four pillars of decent work, according to the ILO, are employment opportunities, workers' rights, social protection and representation.

<sup>11</sup> South Africa is a member of the International Labour Organisation (ILO) and the Constitution of the Republic of South Africa directs that international law "must", and foreign law "may" be considered when the Bill of Rights is interpreted. Section 39 of the Constitution of South Africa.

<sup>12</sup> Namibia is also member of the ILO and under the heading "*Principles of State Policy*", the Namibian Constitution provides that the state must adopt policies aimed at "adherence to and action in accordance with the international Conventions and Recommendations of the ILO". Although it is a member, Namibia is not a signatory to the ILO's *Private Employment Agencies Convention*, which seeks to provide guidelines in respect of labour broking.

definition of the parties to a contract of employment. That definition only recognised employment that exists between two parties, an employer and an employee, leaving out the new globalisation phenomenon of third parties such as labour brokers uncontrolled. The situation created a vacuum for extreme exploitation of workers basic conditions of employment and benefits by certain businesses, on the notion of fostering competitiveness.<sup>13</sup> Thus the mini-thesis is of great significance to outline that amendments are needed in the current labour laws to ensure sound regulatory approaches that guarantee every worker in South Africa and Namibia with full employment rights. Under a regulatory approach, employers have room to keep up with global competitive flexible employment strategies while ensuring decent work for workers. In the on-going debate whether to ban labour brokers or not, this mini-thesis aims to educate workers and unions in South Africa and Namibia that in the current context of high unemployment and a very high unskilled labour force, sound regulations of labour broking enterprises in labour law can actually help protect their rights and basic conditions of employment in this industry rather than completely diminishing these chances of employment.

## 1.8 Research Methodology

This research is conducted by reviewing the literature published in secondary sources that include articles in journals, academic books, newspapers, and web publications as well as those from primary sources, such as, policies, laws, international conventions and original narratives by independent researchers, academic scholars, labour think tanks, unions and employer federations on the effects of labour brokers on workers' rights and employers need for flexible labour. The mini-thesis will attempt to paint a picture on the development of labour broking in South Africa and Namibia, after it has constructed a narrative review on the history of labour rights in both counties, and then it will end by developing arguments based on an analysis of existing labour laws versus the operations of labour brokers. In addition it will highlight recent court judgments on controlling labour brokers, as well as analyse the relevant international conventions on non-standards forms of employment.

## 1.9 Chapter Outline

Chapter *ONE* gives the background to the research of the thesis. It outlines the aim and rationale of the research. The chapter clarifies why the research question was set topic. This chapter also provides a problem statement and a hypothesis for the research topic. Lastly,

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<sup>13</sup> "...regulation of Labour in South Africa presents a tool for ensuring competitiveness between firms by setting the terms on which they compete with each other thereby avoid a 'race to the bottom'. It prevents employers using certain practices that amount to destructive competition-i.e. low wages or lack of safety as a basis for competing with other employers. It therefore forces employers who wish to remain competitive to direct their efforts to effective utilisation of human resources, innovation and the search for new markets." Sengenberger, 1994, in Benjamin P. *Labour Market Regulation: International and South African Perspectives* (2005) 6.

the chapter addresses the area to which the topic will be limited and the methodologies used to source information about the topic.

Chapter *TWO* briefly describes the economies in the Republic of South Africa and the Republic of Namibia, including, national income levels and annual GDP as well as prevailing socio-demographics, such as, population sizes, literacy levels, and life expectancy and unemployment levels to highlight the various factors that drive and encourage people to seek employment under less favourable conditions provided by unregulated labour brokers. Thereafter this chapter gives an overview of the history of workers' rights and the development of current labour laws in the two countries as they set out to protect workers from post-democracy exploitative and unfavourable working conditions subjected to the majority of the populations.

Chapter *THREE* discusses the development of labour brokers in South Africa and Namibia. The chapter will also look at the definitions of an employee and the status of labour brokers in the current legislations of South African and Namibia. It then looks at the position and conventions of the International Labour Organisation (ILO) on third party employments such a labour brokers. Thereafter it will discuss the difference between labour brokers, independent contractors and placement agencies. Lastly this chapter it will highlight some reasons why modern companies engage the services of labour brokering services.

Chapter *FOUR* will highlight some of the expressed exploitive conditions resulting from the employment under labour brokers that are protected in standard employment relationships. More specifically the chapter looks at the level of job security and tenure of employment of workers employed by labour brokers. In addition, in this chapter, the extent to which the retrenchment and contract termination practices of labour broking companies adhere to existing South African and Namibian labour Acts, will be discussed.

Chapter *FIVE* discusses the position of trade unions on labour brokers, specifically their difficulty to organise and categorise the employees under such enterprises. The chapter will also highlights the current levels of union representation for labour broker employees and the ongoing debate whether or not to organise them.

Chapter *SIX* looks at the previous steps to totally outlaw activities of labour brokers. The chapter will especially discuss the position of the courts in the *African Personnel Services v GRN*<sup>14</sup> case in Namibia. This chapter outlines the proposed amendments to existing labour laws to effectively regulate the operation of labour brokers.

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<sup>14</sup> *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17.

Chapter *SEVEN* draws conclusions from all the content covered by the thesis and makes recommendations to develop labour laws that protect workers' rights without diminishing the labour broker clients' need for flexibility.

## CHAPTER 2

### LABOUR MARKETS IN SOUTH AFRICA AND NAMIBIA

#### 2.1 Introduction

This chapter traces the socio-development factors and the history of workers' rights in the labour markets of South Africa and Namibia. This is done primarily in order to give a background on how current labour laws have fallen short in recent times in providing strong protection levels to all employees, as was envisaged in moving away from the apartheid labour era. The initial laws founded under the beacon of democratisation were set out to successfully transform the old exploitive labour markets and ensure economic improvement of all citizens. However they have seen little progress to ensure decent employment conditions and living standards due to amongst others the ever increasing unemployment rates far outweighing the new jobs created annually in the labour markets of both countries as result of slow economic growths. Because of the high levels of unemployment prevailing throughout South Africa and Namibia, the practices of non-standard employment such as labour broking have fed of those figures of desperation. As the populations grow rapidly, and more and more poorly literate and less skilled citizens will become desperate for employment opportunities under any form.<sup>15</sup> Thus it might be crucial that sound regulations in both countries are passed and implemented to ensure that the activities of labour brokers are effectively registered and regulated so that people do not sink further into poverty as a result of exploitation. Despite being blessed with an abundance of natural resources and minerals, it seems the economies of both South Africa and Namibia have failed to grow since democratisation at a GDP rate that has created new meaningful and decent jobs under the new globalisation market forces. Thus innovative approaches in regulation might have to be developed and adopted if labour markets are too keep the limited non-standard jobs being created by labour brokers especially in countries where there are minimal employment opportunities for those who are less educated and unskilled citizens.

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<sup>15</sup> Jauch H *Trade Unions in Namibia* (2004) 7 concludes that 'features of those colonial legacies are still visible today as Namibia is characterised by huge socio-economic inequalities that are largely a reflection of its colonial apartheid history, but also of the class stratification that has taken place since independence'.

## 2.2 South Africa

### 2.2.1 Population

Since South Africa's first democratic election in 1994, there have been three official censuses. The first was in 1996, the second followed in 2001, while the third took place in October 2011. Initially the population stood at 40.6-million in 1996 and increased to 44.8-million in 2001. But from 2001 to 2011, the population grew by an additional 15.5 per cent according to the national census 2011 results released by Statistics South Africa<sup>16</sup> in October 2012.<sup>17</sup> Thus, according to the official results from the last national census the country's population stood at around 51.7 million in October 2011. This rapid population growth of around 11million people from the first national census in 1996 to the last one in 2011 has far out grown the job creation rate in the South African labour market. As a result more and more people are constantly hunting for an opportunity to be employed out of desperation even under conditions that are less favourable such as labour brokers.

### 2.2.2 Education Levels

Education in a country goes in correlation with employability of the population as it determines the quality and type of human resources the country has in terms of skills and knowledge. It refers particularly to the skills and knowledge acquired through an established schooling system that improves the chances of employability of the population. The biggest challenge facing the post-apartheid South Africa is the upliftment and improvement of its skills base through education and training to meet the demand in the ever dynamic labour market. This is particularly challenging following years of discriminatory and unequal parallel education systems that prevailed in the country for many years before 1994. A study conducted by Market Research Africa and the SABC in 1994 showed that while 88 per cent of white learners had access to dictionaries, 65 per cent to encyclopaedias, 90 per cent to their own room, 71 per cent to their own desk, 68 per cent to their own reading light, 33 per cent to a personal computer, and 93 per cent to television, comparative figures for black learners were that 43 per cent had access to dictionaries, and 2 per cent to encyclopaedias, 15 per cent had their own rooms, 3 per cent their own desk, and 5 per cent their own reading light, 0 per cent a personal computer and about 69 per cent access to a television. The gaps

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<sup>16</sup> The national body that gathers statistics on all matters related to the country under the Statistics Act of 1999.

<sup>17</sup> According to South Africa info available at <http://www.southafrica.info/about/people/census-301012a.htm> (accessed on 20 April 2013)

between these figures have slightly reduced over the past 18 years of democracy; however, there still exists a huge population group with very little or no education in South Africa thus making them difficult to employ and vulnerable for labour exploitation. These groups form the majority of the employees usually employed under the recent phenomenon of labour brokers as they are often very desperate and willing to accept any kinds of conditions put for employment. With their low levels of education and limited understanding of labour law provisions, not only are they extremely vulnerable in the employment power equilibrium but many labour brokers go as far as exploiting their labour rights continuously.

### 2.2.3 Unemployment Rate

One of the main factors that have continued to drive labour brokers and their operations to grow is that South Africa has a large population of unemployed desperate job seekers. These are mainly people from the previously disadvantaged population groups who as highlighted above have had very little education to date. Because of their perceived level of unemployability, they often find it extremely difficult to secure job opportunities in the labour markets. That is when some labour brokers would come along with promises of job opportunities that often are below the International Labour Organisation (ILO) standards of decent work.

According to figures from the last quarter reports of 2012 produced by Statistics South Africa, unemployment figures in the country stood at 25 percent.<sup>18</sup> South Africa unemployment rate statistics are defined in terms of what is referred to by Stats- SA as the *strict definition*. This 'strict' definition of unemployment excludes from the ranks of the unemployed those individuals (15-65 years old) who are without jobs and available for work, but who are not actively seeking work. However, Barker expresses concern about this definition. He points out that the shortcoming of this definition is that the criterion only considers those who 'have taken active steps to look for work and excludes those that have lost hope to look for work even though they might desperately need a job'.<sup>19</sup>

The ILO has provided for this problem by indicating that the standard definition of unemployment can be applied by relaxing the criterion of seeking work. It states that 'unemployed workers are those who are currently not working but are willing and able to work for pay, currently available to work, and have actively searched for work'. However, the ILO mentions that other appropriate tests to suit national circumstances can be developed.<sup>20</sup>

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<sup>18</sup> Statistics available at <http://www.statssa.gov.za/default.asp> (accessed on 20 April 2013).

<sup>19</sup> Barker F *The South African Labour Market: Theory and Practise* 5 ed (2007) 208

<sup>20</sup> International Labour Organisation (ILO) amended draft resolution concerning statistics of the economically active population, employment, unemployment and underemployment (1982). See also <http://www.ilo.org/public/english/bureau/stat/res/index.htm> (accessed on 21 November 2011).

#### 2.2.4 Economic Index

Some of the highlighted reasons that drive scores of people to seek employment below decent work levels with labour brokers have been the dissatisfactory economic growth levels and new employment creation rates in the job markets. The recent economic performance in South Africa has been below the projected rate that will enable the markets to create a number of new job opportunities to maintain a correlation with the rapid population growth numbers.

Although South Africa has the largest economy in Africa, accounts for 24 per cent of the continent's Gross Domestic Product (GDP), and is ranked as an upper-middle income economy by the World Bank the majority of the population finds it tough to find a decent job.<sup>21</sup> For many years, mining has been the main driving force behind the development of Africa's most advanced and richest economy. Although diamond and gold production may now be well down from their peaks in recent years, South Africa still remains the world's second largest producer of gold. In addition, it is the world's largest producer of chrome, manganese, platinum, vanadium and vermiculite, the second largest producer of ilmenite, palladium, rutile and zirconium, while it is also the world's third largest coal exporter.<sup>22</sup>

However the country is ranked in the top 10 countries in the world for income inequality.<sup>23</sup> The demise of apartheid in 1994 left a skewed racial economic hierarchy that placed whites firmly at the top, followed by Indians, coloureds, and then blacks.<sup>24</sup> Thus all these natural resources have failed to reach the majority of the population as many are still living in abject poverty due to lack of employment or if they do find employment than they poor working conditions and are lowly paid. Barker adds that 'had the country's economic growth been higher than the annual average of 2.7 per cent experienced since the transition to full democracy, the country would probably have been able to create more jobs' .<sup>25</sup>

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<sup>21</sup> The World Bank *Working for a world free of poverty* available on [http://data.worldbank.org/country/south-africa#cp\\_wdi](http://data.worldbank.org/country/south-africa#cp_wdi) (accessed 20 April 2013).

<sup>22</sup> According to *Economy of South Africa* available at [http://en.wikipedia.org/wiki/Economy\\_of\\_South\\_Africa](http://en.wikipedia.org/wiki/Economy_of_South_Africa) (accessed on 23 November 2011)

<sup>23</sup> 'South Africa has highest gap between rich and poor', *The Business Report*, 28 September 2009, available on [Busrep.co.za](http://busrep.co.za). (accessed on 23 November 2011).

<sup>24</sup> According to *The Marxism South African 2011 local government elections: what is in it for the working class* available on <http://www.marxist.com/south-african-2011-local-government-elections.htm> (accessed on 20 April 2013)

<sup>25</sup> Barker F *The South African Labour Market: Theory and Practise* 5 ed (2007) 47.

## 2.2.5 History and Development of the South African Labour Laws

The history of labour in South Africa can be as far traced back as 1652 when the first settlers arrived at the Cape. According to Finnemore, even at that early stage 'the need for labour was already a pressing issue'. He writes that

*'not only was the indigenous population subordinated directly in the [global] slave-trade. But by the end of the eighteenth century slavery had become an integral part of the Cape Colony of South Africa. The nomadic Boer farmers carried these ideas in to the interior, where blacks were expected to do manual labour. They rendered their services to the farmers in return for squatting rights.'*<sup>26</sup>

At this time, the employment relationship was regarded as being one of master and servant. The relationship between employers and their domestic or farm a worker was governed by various Acts, including the master and servants Act 15 of 1856.

However, the most dramatic impact on South African labour history occurred around 1897 with the discovery of diamonds and gold. During this time, mining entrepreneurs looking to fully tap into the new found riches of the country were limited by the lack of a ready source of skilled and unskilled labour to draw on. Thus they turned to European and even Australian labour markets to attract employees. Subsequently many skilled white workers began careers in elite positions and the first trade union founded in 1881, known as the Carpenters and Joiners Union was primarily formed to protect this status of the white "elite" in major mine jobs.

But while skilled labour for mines could be provided by overseas recruitment, there was no pool of unskilled labour available to draw on. At the time, the majority of the black citizens were still successfully subsisting off the land and not many were willing to go to the mines.<sup>27</sup> However, Finnemore writes that after white settlers started to forcefully deprive the indigenous populations of their land they were forced to look for work on the mines to earn money.

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<sup>26</sup> Finnemore M *Introduction to Labour Relations in South Africa 5ed* (1997) 21.

<sup>27</sup> Finnemore M (1997) 22.

The mining industry would continue to grow with an increase in the shortage of cheap labour; however, many black workers showed a disinterest in taking up further mine jobs due to the poor work conditions. Bhoola adds that 'the difference in political power between whites and blacks became entrenched as trade unions, catering largely for white workers, were bargaining increasingly on the basis of race'<sup>28</sup> at the time. In 1911, the Native Labour Regulation Act was passed making it a crime for blacks to leave their jobs, and strikes were prohibited. In 1913 the Land Act was passed to finally force black peasants off their land.<sup>29</sup> Eventually these two laws would compel blacks to concentrate on looking for jobs as cheap labour in specific districts through what was known as the migratory labour system. In terms of this system, black workers were forced to take any job offered as the pass law only permitted them a few days in which to find work in the allocated area.

The control of the black labour force was ultimately secured by the discriminatory legislation and radical government support for white mine owners. Blacks had no political voice in all spheres of the booming South Africa mining industry, or in upper class society. This lack of political rights led to the formation of the South African Native National Congress (the forerunner of the present day African National Congress) in 1912. The organisation protested against the new Constitution which failed to extend voting rights to the black population. It also rejected the provisions of the Mines and Works Act which provided a colour bar for jobs on the mines.

According to Finnemore, at that time black workers still did not organise trade unions on the mines. He points out, first, that they were isolated from one another by the compound system, secondly, that they received no support from white workers who could have shared their union expertise with them and lastly, that tribal allegiances were still strong amongst the indigenous groups.<sup>30</sup>

However, the interest of black workers in unions outside the mines was indicated by the development in 1919 of the Industrial and Commercial Workers Union (ICU). The union had broad issues of concern to the black population, ranging from land evictions to low wages and raids on beer brewing establishments operated largely by black women who had moved to urban areas with their husbands. The ICU took up many issues in the courts and was generally seen as a vociferous fighter for black workers' rights and the dignity of black persons. But due to internal differences, divisions in leadership, lack of democratic structures and other external pressures, the union collapsed by the early 1930s.

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<sup>28</sup> Bhoola U *Labour Law in South Africa* (2010) available at <http://www.jobs-south-africa.com/labour-law.html> (accessed on 09 January 2012).

<sup>29</sup> In terms of the Act only about ten per cent of the South African land would be reserved for black ownership. Black farmers were also prohibited from renting any land from white farmers. Thus shortages of land and overcrowding forced many of these black farmers to look for work in urban areas and the migratory labour system was consequently established.

<sup>30</sup> Finnemore M *Introduction to Labour Relations in South Africa 5ed* (1997) 26.

Nevertheless the greatest attention to labour relation concerns of the black workers was manifested after the 1922 Rand Rebellion. Following this general strike, which Bhoola referred to as 'one of the watershed moments in South African labour history', the government at the time passed the Industrial Conciliation Act in 1924.<sup>31</sup> This Act was the direct forefather of the Industrial Conciliation Act of 1956, which was later, renamed the Labour Relations Act of 1956. In terms of this Act of 1956, trade unions representing white workers were accorded recognition; while a separate system for Black workers was created.

In 1948 the National Party came into power, which saw the birth of Afrikaner nationalism. In 1950 the Suppression of Communism Act was passed, which led to the large-scale repression of union activists. The 1950s was a turbulent time in the political history of South Africa. This turbulence led to the amendment of the 1956 Industrial Conciliation Act in order to ensure tougher controls over black workers.

In 1979 a Commission of Inquiry, the Wiehahn Commission was set up to investigate the labour situation in South Africa. In its subsequent Report the Wiehahn Commission made recommendations that were to forever change the face of labour law in South Africa. Amongst the most significant recommendations that were made was to extend freedom of association to all persons, irrespective of race or sex. The result was that trade unions representing black workers were now able to make use of the machinery of the Labour Relations Act of 1956.

During the early 1980s the power struggle in South Africa reached new heights. The government became further entrapped in attempting to defend its interests and policies against what it termed the 'total onslaught', led by the African National Congress (ANC) and the South African Communist Party (SACP). In 1985, the Congress of South African Trade Unions (COSATU) was formed from a large number of independent unions and various former union bodies that disbanded due to both lack of the will for political involvement and growing pressures on their membership, and it became the biggest union umbrella body.<sup>32</sup> From the outset, COSATU identified itself with the political problems which affected its member's daily lives and thus developed a strong relationship with the underground ANC leadership, which was still banned at the time.

Despite the high political turmoil of the 1980s, at most times the statutory systems and regulations frameworks were used to express grievances. Amongst the significant

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<sup>31</sup> The machinery for state control over industrial relations was further extended with the enactment of the Wage Act in 1925. The Act provided for the unilateral determination of wages and working conditions by the State where there was no agreement under the Industrial Conciliation Act. The Wage Act applied to black workers and a few black trade unions were able to gain some benefits for members by using the Wage Act to their advantage.

<sup>32</sup> At its inception COSATU had a total membership of 450 000.

developments of this period was the transformation of the Industrial Court into an important labour instrument providing useful guidelines on the regulation of 'grey areas', such as, in respect of dismissals and retrenchments.

The period between 1990 to 1994 saw the birth of the new democratic South Africa. Given the active role played by workers and their trade unions in the struggle to end apartheid, it was hardly surprising that a lot of attention was given to labour rights in the new South Africa. Thus in 1994, the interim Constitution, Act 200 of 1993, came into effect. It made provision for the right to fair labour practices, the right to bargain collectively and the right to strike as some of the basic fundamental rights under Chapter 2, the Bill of Rights. These rights would remain entrenched in the final Constitution that was later adopted by the first democratic legislative assembly in 1996.<sup>33</sup>

Also in 1994, the new Department of Labour appointed a Ministerial Legal Task Team, the Cheadle Task Team<sup>34</sup>, to draft new labour legislation. As a result of the draft submissions of the Cheadle Task Team, and then some intensive debate by the National Economic Development and Labour Council (NEDLAC)<sup>35</sup>, the Labour Relations Act 66 of 1995 (LRA) was born and came into effect on 11 November 1996. The LRA was followed by the Basic Conditions of Employment Act in 1997 (BCEA), and the Employment Equity Act (EEA) and the Skills Development Act (SDA) in 1998.

The LRA remains the principal labour statute. It regulates collective rights<sup>36</sup> and provides protection to individual employees against unfair dismissal and unfair labour practices. The LRA also regulates trade unions, employer organisations, the establishment of workplace structures and dispute resolution agencies, such as, the Commission of Conciliation, Mediation and Arbitration (CCMA) and Labour Courts. The BCEA, on the other hand, establishes basic conditions of employment with respect to a standard contract of employment between only two parties and provides for enforcement on rights as well as duties. The EEA prohibits all sorts of unfair discrimination in employment, defined to include a wide range of policies and procedures, including those that regulate access to employment. Lastly, the SDA requires employers to contribute a percentage of their payrolls towards funding the infrastructure established by the SDA. All these Acts heralded a new era in South African labour law.

The LRA was amended in 1998, and again in 2002. The amendments effected in 2002 were far more significant, and introduced revised procedures for larger-scale retrenchments and a

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<sup>33</sup> Section 23 of the Constitution deals specifically with labour relations.

<sup>34</sup> Named after its chairman, Professor Halton Cheadle, who led that team in drafting the new labour laws.

<sup>35</sup> A tripartite body founded in 1995 that consists of representatives of government, organised labour and employers.

<sup>36</sup> Such as, the right to organise, the right to strike and collective bargaining in section 11-22 of the Labour Relations Act of 1995.

right to strike when the substantive fairness of retrenchments is disputed. Van Niekerk expressed the view that the labour market is dynamic, and for that reason, labour legislation is never immune from critical reflection and, when necessary, revision.<sup>37</sup>

In 2005, Professor Halton Cheadle in an article entitled '*Regulation Flexibility: Revisiting the LRA and the BCEA*'<sup>38</sup> argued in favour of a series of reforms based on a consideration of whether the conceptual structure underpinning the current labour laws remained valid. His observations are particularly true if one looks at the recent influences of globalisation on the labour market with increases in non-standard forms of employment. Indications given during the recent presidential 'State of the Nation' addresses by President Jacob Zuma is that that amendments to labour laws are in the pipeline, particularly concerning the ongoing debates about labour broking.

## 2.3 Namibia

### 2.3.1 Population

Just like South Africa, Namibia has conducted two successive censuses since independence in 1990. But Namibia has a far smaller population than its southern historical neighbour. At the first national census in 1991 the population stood at 1.4 million inhabitants. In 2001 it increased to a total of 1.9 million people, and according to census report released by the National Planning Commission in April 2012, the population of Namibia increase to around 2.1 million after the 2011 National Housing and Population Census.<sup>39</sup>

The report notes that more than 1, 2 million or 58 per cent of the population in Namibia live in rural areas while 885 500 which is 42 per cent live in urban areas. There is, however, a clear indication that urbanisation in Namibia is on the increase when comparing it to the 2001 results when 67 per cent were living in rural areas and 33 per cent in urban areas. According to the report, the calculated population of 2,1 million is actually 4 per cent lower than was initially expected. The Director-General of the National Planning Commission, Tom Alweendo, is quoted in the media as says that:

'The population has increased from the 1,8 million in 2001 by 15 per cent. This indicates an average growth of about 1,5 per cent per year 'which is manageable relating to the economic growth of about 4,7% of the country'.

'We do not want our population to grow faster than our economy,' he stressed.

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<sup>37</sup> Van Niekerk A (ed), Christianson MA & McGregor M et al *Law at Work* (2008) 15.

<sup>38</sup> Cheadle H *Regulated Flexibility: Revisiting the LRA and the BCEA* (2006) 27 ILJ 663

<sup>39</sup> According to The Namibian Sun available at <http://sun.com.na/content/national-news/census-results-put-population-21-million> ( accessed on 21 April 2013).

The Population and Housing Census is 'extremely important in the development agenda of the country as it has immediate policy implications for education, health, social amenities and shelter', Alweendo said.<sup>40</sup>

Overall results from the 2011 Population and Housing Census show that urban figures have been changing rapidly due to the high urban migration rates that have taken place since independence in 1990 as more and more people have been moving to cities and towns across Namibia in search of any fixed jobs and wage incomes.

### 2.3.2 Education Levels

In Namibia, the position with regard to skilled and unskilled workers is very similar to that of South Africa and many other developing countries: there is an oversupply of unskilled workers (unemployment), and a shortage of skilled workers.

According to the Namibian Labour Force Survey 2008, about 13.6 per cent of the population in Namibia had no formal education at all while 45.3 per cent attained or completed some level of primary education. Only about 1.2 per cent of the population obtained any tertiary education, and around 0.7 per cent post-graduate education. Unemployment is related to the levels of education as the bulk of the unemployed 59.9 per cent had only primary or junior secondary education. In contrast, less than 1 per cent of the unemployed had a post-secondary education.<sup>41</sup> Thus just like in South Africa, the perceived unemployability of large sections of the population groups has created a large pool of desperate citizens. Labour brokers have exploited the unskilled population groups need for jobs.

### 2.3.3 Unemployment Rate

The Namibian government's definition of unemployment is based on three criteria, namely:

- being without work,
- being available for work, and
- seeking work.

As in the case South Africa, this 'strict' definition of unemployment excludes from the ranks of the unemployed those individuals (15-65 years old) who are without jobs and available for work, but who are not actively seeking work. Jauch expresses concern that using the 'strict'

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<sup>40</sup> See The Namibian Sun available at <http://sun.com.na/content/national-news/census-results-put-population-21-million> (accessed on 21 April 2013)

<sup>41</sup> The Namibian Labour Force Survey 2008: Final Report Windhoek: Ministry of Labour and National Planning Commission available at [http://www.ilo.org/survey\\_libraries](http://www.ilo.org/survey_libraries) (accessed on 29 September 2011) (hereafter The Namibian Labour Force Survey (2008)).

definition of unemployment in the context of the Namibian labour market is problematic.<sup>42</sup> He argues that to use the criterion 'actively seeking for work' to classify the unemployed may not be accurate as many unemployed people may have stopped looking for work-not because they do not want to work, but simply because they may be demoralised and have given up all hope of finding a job. Others may not bother to seek work as they witness the fruitless efforts of their friends and relatives. Thus he points out that the criterion of 'not seeking work' tells us very little and may not be a relevant criterion in labour markets that are characterised by mass unemployment.

The "broad definition" of unemployment, on the other hand, regards every person between 15-65 years and without work but available for work as being unemployed-whether he/she is looking for work or not. According to a Labour Force Survey conducted in 2008, unemployment in Namibia in terms of the broad definition stands at around 51.2 per cent, whilst this figure is reduced to 29.4 per cent when the strict definition is applied.<sup>43</sup>

Barker argues that 'high unemployment ... can be related to a high population growth rate, a low economic growth rate and declining labour intensity in the economy'<sup>44</sup>. He states that far fewer job opportunities than in the past are now being created for every percentage point of economic growth. Thus despite the relatively modest looking 600 000 population growth from the first national census in 1991 to the last one in 2011, the new jobs created in the country are much fewer than the rate of the population growth thus creating an opportunity for exploitative working conditions such as that of some labour brokers.

#### 2.3.4 Economic Index

Namibia is one of the richest countries in Africa with minerals, such as, diamonds, gold, copper, zinc and the world's second largest deposits of uranium. The country's GNP per capita was calculated at \$2334 USD in December 2005, compared with an African average of \$681 USD for the same period. However, these averages do not reveal the huge income inequalities amongst the population. The richest 5 per cent of the population controls 71 percent of the GDP, with an average income of \$14 000 USD per year. The poorest 55 per cent account only for 3 per cent of the GDP, with a per capita income of less than \$100 USD per year.

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<sup>42</sup>Jauch H *Trade Unions in Namibia* (2008) 13.

<sup>43</sup>The Namibian Labour Force Survey (2008) 7.

<sup>44</sup>Barker (1999) 7.

In a recent survey on labour it was found that almost half of all Namibian households (41.8 per cent) relied solely on 'wages and salaries' as their main source of income.<sup>45</sup> In his discussion on labour in Namibia, Jauch adds that in urban areas, like Windhoek, Walvis Bay and Swakopmund, this figure was as high as 76 per cent.<sup>46</sup> Thus an analysis of these figures gives a clear indication of the major importance of wages and salaries to the survival of many Namibian households and the potential detrimental effects of unemployment living those that cant find decent jobs and are less skilled to seek employment less favourable conditions offered by some labour brokers.

### 2.3.5 History and Development of the Namibian Labour Laws

For close to 116 years of German and South African colonial rule, South West Africa<sup>47</sup> had never had any comprehensive labour legislation that identified and reflected the local working population. Especially in the era of South African rule , 'Namibia' was treated as a fifth province of South Africa and this meant that almost all South African labour laws applied in Namibia.<sup>48</sup>

Similar to experiences in early South Africa, up until the discovery of diamonds and gold, the early documented Namibian economy was largely agrarian, with the main economic activity being agriculture governed by a Master and Servant Act that regulated the relationship between German traders and indigenous people working on the farms.

However, after the defeat of the German forces in World War I by Britain and its allies, that included the white South African government, the South West African territory was temporarily placed under the trusteeship of South Africa. This mandate was given by the League of Nations<sup>49</sup> that was formed after the defeat of the Germans in the First World War. The trusteeship was only supposed to last until the indigenous population were educated and could take over to govern them.

In 1948, the National Party came into power in South Africa. One of its first steps was to appoint the Botha Commission to revise all existing labour legislation including the status of black workers in the territory. The Commission recommended the establishment of a separate 'co-ordinating body' with the aim of streamlining wages and other conditions of

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<sup>45</sup> The Namibian Labour Force Survey (2008) 1.

<sup>46</sup> Jauch H *Trade Unions in Namibia* (2004) 12.

<sup>47</sup> "South West Africa" was the given name of Namibia during the occupation years under German (1884-1914) and South Africa (1915-1989) until it gained independence in 1990. Although the main liberation movement SWAPO was using the name Namibia in exile and UN petitions decades before official independence.

<sup>48</sup> Wiehahn N E *Report of the Commission of Inquiry into Labour Matters in Namibia* (1989) Windhoek 2. (hereafter Wiehahn Report on Namibia).

<sup>49</sup> Later renamed the United Nations (UN) with various development agencies including the International Labour Organization (ILO).

employment on the basis of skills levels rather than racial levels. However, the government ignored these recommendations and focused more on advancing Afrikaner nationalism policies<sup>50</sup> and promoting repressive labour laws against black workers and their union activists. During that time the National Party government passed a number of discriminatory Acts not only enforceable in South Africa but equally over the territory of South West Africa.

Amongst these discriminatory laws which were forcefully carried over into the Namibian territory was the Wage and Industrial Conciliation Ordinance of 1952, which excluded black workers from the definition of employees and prevented black Namibian workers from legally forming or joining trade unions.<sup>51</sup>

In the 1970s black workers in Namibia, allied with the exiled members of the main liberation movement, the South West African People's Organisation (SWAPO), organised themselves to form underground unions with affiliation to National Union of Namibia Workers (NUNW). They particularly intended to fight the exploitative apartheid contract labour system, the South West African Native Labour Administration (SWANLA)<sup>52</sup>. According to Hishongwa in her book *The Contract Labour System and its Effects on Family and Social Life in Namibia*, for many decades SWANLA was used as a tool to break the social development of the black man and his family, by allowing the separation of thousands of fathers, brothers and sons as cheap labour at far away mines and farms, and many mothers as sleep-in domestic workers under exploitive conditions.<sup>53</sup>

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At the peak of the resistance against SWANLA, the unions and their members carried out a number of large industrial strikes country wide between 1986 and 1988. One such strike included about 4,000 mineworkers at the then Tsumeb Cooperation Limited (TCL) copper mine at Tsumeb. That was followed by one of about 3,000 workers of the then Consolidated Diamond Mines (CDM) at Oranjemund and another one of about 50,000 workers at the economic capital, Walvis Bay. At one point, in protest against CDM's celebration of its 50<sup>th</sup> anniversary in 1986, workers stated:

*'We, the toiling, sweating and oppressed Namibian workers, have nothing to celebrate, for we feel strongly that we have been discriminated against ... To us 50 years of celebration are a reminder of 50 years of exploitation, over mining and oppression.'*<sup>54</sup>

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<sup>50</sup> The Native Law Amendment Act 54 of 1952.

<sup>51</sup> Jauch H *Trade Unions in Namibia* (2004) 26.

<sup>52</sup> Through the SWANLA system of labour, white industry owners could hire citizens, mostly blacks, from the State at minimal costs and benefits.

<sup>53</sup> Hishongwa N *The Contract Labour System and its Effects on Family and Social Life in Namibia* (1992) 56.

<sup>54</sup> Hishongwa N (1992) 82.

Following all these popular unrests and mounting international pressures, Namibia gained her national independence on 21 March 1990. Two years after independence, the new SWAPO government, which had led the liberation struggle for those exploited and marginalised under apartheid, introduced a new Labour Act in 1992 with the aim of consolidating labour related legislation into a single Act. The Act covered all workers within the boundaries of the Republic of Namibia regardless of colour, race, culture, religion or sex and provides for basic workers' rights and conditions for all. It further provided for the establishment of independent bodies to oversee the enforcement of its provisions, such as, the labour courts, a tripartite Labour Advisory Council, and of wage commissions to determine minimum wages in particular industries.

Compared with the apartheid government's labour legislation, the Labour Act of 1992 constituted a significant improvement for the workers and their unions. A large majority of the previously marginalised black workforce could now enjoy all the basic labour and trade union rights and could collectively bargain for improved conditions of employment. This Act would continue for years as the benchmark for standard employment relations between employers and employees in the Republic of Namibia.

In 2004, at the turn of new millennium, a tripartite task force team was set up to assess the effectiveness of the Labour Act of 1992 after several protected strikes in the country had taken place. This team recommended the amendment of the 1992 Act to, amongst others replace the district labour courts with a speedier and more economical system of alternate dispute resolution through arbitration and conciliation. More significantly it recommended certain regulation changes to accommodate the rapid increasing phenomenon of third-party employments in the country. This led to the eventual enactment of the Labour Act, 2004, which provided not only for a new system of dispute prevention and resolution, but also for several improvements in the minimum conditions of employment, and for extensive measures addressing the practice of labour brokers.

However, the 2004 Act could not be put into effect in it is entirely because of several technical flaws that prevented its implementation, especially the provisions dealing with vacation and maternity benefits. The Namibian Employer's Federation also took issue with each improvement of minimum conditions of employment and debated the merits of these benefits with government.

During 2005, the Namibian Ministry of Labour and Social Welfare instituted a complete technical review of the entire 2004 Act, a process that would result in scores of technical

revisions in order to streamline the Act and to 'close inadvertently-caused loopholes' such as banning labour brokers. These subsequently resulted in a new Labour Bill of 2006, which Parliament eventually adopted as the current existing Labour Act, 2007<sup>55</sup>.

However the new Labour Act of 2007, especially section 128 that sought to prohibit labour brokers, was challenged in the courts of Namibia for the constitutionality of it. African Personnel Services (APS) at the time one of the biggest labour broking companies sought a court interdict to stop the implementation of section 128 shortly after the coming into operation of the new Labour Act, 2007. After the High Court of Namibia initially ruled that the ban under the new Act was legal as labour broking carried traces of the SWANLA contract labour system from the apartheid era, APS took its case to the Supreme Court of Namibia. In December 2009, the Supreme court found that the outright outlawing of labour hire was an unreasonable infringement of article 21 (1) (j) of the Constitution's protection of the right to practise any profession, or carry on any occupation, trade or business. The court rather ruled that government should look into a regulatory framework.<sup>56</sup>

From the above discussions, it is clear that the rights of workers in Namibia has a long and very sensitive history that has played a major role in how existing labour laws were enacted and thus the strong calls to ban the recent phenomenon of labour broking for breaking down everything achieved. However the courts have noted that despite the deep history of workers' rights in the country and the need to safe guard these rights, is not legally viable to ban labour brokers in country were the constitution that strongly supports free choice of enterprise and trade thus they have in essence noted that there is a need for an regulatory approach that reconciles the protection of workers' rights and the interests of the business sector.

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<sup>55</sup> In full, this Act is commonly referred to as Labour Act, No 11 of 2007.

<sup>56</sup> Menges W 'Labour hire is legal' *The Namibian* 15 December 2009 4.

## CHAPTER 3

### LABOUR BROKING AND THE NEW WORLD OF WORK

#### 3.1 Introduction

The new context of globalisation has presented the world of work with both promises and problems. For developing nations, such as South Africa and Namibia, 'globalisation has made the pursuit of development and maintenance of internal and external stability difficult and delicate tasks. On the one hand, globalisation holds out to participants the promise of growth in trade and international investments; on the other hand it heightens the risks of instability and marginalisation'<sup>57</sup>. As young democracies, both South Africa and Namibia first had to face challenges in ensuring that previous practices of exploitation and marginalisation against the majority population groups were corrected with legislation providing for fairness, and at the same time this legislation had to drive the new economies towards competitiveness on the global stage. One of the key developments in the labour market resulting from this phenomenon of globalisation is that more and more companies prefer to keep workers around for the minimum possible time in order to cut costs during hardship times, such as, strikes, labour unrest and untimely leaves. Sweet and Meiksins highlighted that 'in the "new economy", the drive to create more efficient and profitable enterprises had influenced the distribution of work, which as a result some jobs that used to be plentiful had virtually disappeared, and the skills needed to obtain such jobs are changing as well.'<sup>58</sup> This indicated a broad shift from the traditional standard form of employment to a flexible approach driven by the constant pursuit of maximum profits in the ever dynamic competitive world of business. The globalisation phenomenon gave rise to many forms of non-standard employment, of which that of labour brokers is the one that has drawn the most attention both in South Africa and Namibia.<sup>59</sup>

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<sup>57</sup> Barker 2003: 181 in *A new agenda for being human ... again ... in the world of work (2007)* available at <http://www.mywage.com/main/> (accessed on 5 April 2011).

<sup>58</sup> Sweet S and Meiksins P *Changing Contours of Work: Job and Opportunities in the New Economy* (2008)14.

<sup>59</sup> One of the most comprehensive studies on labour brokers was carried out in Namibia by the Labour Resource and Research Institute (LaRRI) in 2006. The study found that labour brokers as a particular form of outsourcing had emerged in Namibia in the late 1990s. This labour-only form of outsourcing forms part of a global trend towards more "flexible" forms of employment, which are implemented by employers in the pursuit of higher profits. Labour Resource and Research Institute (LaRRI) *Labour hire in Namibia: Current practices and Effects* (2006).

### 3.2 What are Labour Brokers?

Labour brokers are businesses established in recent times to provide “flexible” labour services, usually unskilled and semi-skilled for short and medium-term periods to various client companies. The brokers would conclude commercial agreements with the client companies in terms of which a labour broker is paid for labour services being rendered by a certain number of workers requested by the ‘client’. The brokers would then remunerate the workers with a wage percentage from the payment they invoice to the clients. Most labour brokers retain a substantial part of a worker’s hourly wage rates, anything between 15 and 55 per cent, as their fee.<sup>60</sup> Currently the courts cannot protect these workers against massive deductions, since the existing law is very limited in controlling labour brokers. However, sound regulations can help determine the maximum percentage deductible for specified labour broking categories and industries.

Currently, in the absence of clear policies on labour brokers no registration data is available to provide clear figures on the number of employees and types of groups employed by brokers. Study counts have been limited to a few commissioned studies by the state labour departments and a few papers prepared by private individuals. However, it is agreed is that South Africa has a far more vibrant labour broking industry than Namibia. Its industry comprises of hundreds of businesses that have emerged, mostly in the post-apartheid era of the “new South Africa”, to supply labour operations to various clients in manufacturing, farming, retail, mining and other large scale economic contributors. In Namibia, as Jauch points out, that ‘the labour broking industry is dominated by one large company, which originated from South Africa and now operates across Namibia’.<sup>61</sup> In addition, he mentions that there are several other smaller labour brokers most of whom are limited to serving a few clients, mostly in one particular town. Jauch highlights that they all mostly supply workers to client companies in various industries, including, mining, fishing, and retail. Their clients include both private companies and state owned enterprises (SOEs).

Since the period of democratisation and passing of new labour laws, more and more companies in South Africa and Namibia, like everywhere else around the world, are now adopting the new flexible labour ‘temporary employment services’<sup>62</sup> to cope with the competitive edge of the new global market. In the absence of statutory regulation or

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<sup>60</sup> Jauch H *Namibia’s Labour Hire Debate in Perspective* (2010) 2.

<sup>61</sup> Jauch H (2010) 2.

<sup>62</sup> As referred to in s198(1) of the *Labour Relations Act* 66 of 1995 of South Africa. In Namibia the expression “labour hire” is used. The International Labour Organisation’s (ILO) *Private Employment Agencies Convention* 181 of 1997 refers to it as “private employment agencies. However, this thesis shall adopt the term “Labour brokers”, as commonly popularised by academics.

prohibition, the current triangular employments are not illegal.<sup>63</sup> However, only South Africa has set any form of guidelines on how to deal with the emergence of this form of employment. Section 198 (1) of the LRA initially defined a temporary employment service as: 'any person who, for reward, procures for or provides to a client other persons-

- (a) who render services to, or perform work for the client; and
- (b) who are remunerated by the temporary employment service'.

Alarming however, Van der Burg, Lindoor & Messina et al point out that 'these businesses enjoy the benefit of the labour without adherence to the legal framework of labour legislation as the labour broker "takes care" of the legal implications'.<sup>64</sup> This is a relationship where the remuneration of the workers comes from a different third party (as expressed in (b) above) rather than directly from the entity where their labour service is rendered and currently falls outside the legal definitions of an employee under existing labour laws. Thus, technically no recognised contract of employment exists between the client and the worker. The current situation has led to 'an unregulated environment for labour brokers operations, which if not regulated will continue to leave workers at greater risk of exploitation and with very little legal grounds to challenge unfair dismissal and bargain poor working conditions'<sup>65</sup>.

### 3.3 The "Elusive" Employee

Although more and more companies have opted for the new practice of replacing the traditional full-time, permanent, employer-employee relationship with a triangular commercial engagement, the reality is that the current operations of labour brokers show features of the existence of an employment relationship and should theoretically comply to labour laws. The existing definitions of an employee in both the South African LRA<sup>66</sup> and BCEA<sup>67</sup> were initially drafted on the basis of the traditional contract of employment as per the common law *locatio conductio operarum* developed from Roman times<sup>64</sup> and thus seem a bit left behind by the evolution of globalisation. Currently the LRA defines an employee as: 'any person, excluding an independent contractor,

- a) who works for another person or for the State, and who receives or is entitled to receive, any remuneration;
- b) and any other person who, in any manner, assists in carrying on or conducting the business of an employer'<sup>68</sup>.

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<sup>63</sup> Benjamin P *Decent Work and Non-standard employees: Option for legislative reform in South Africa* (2010) 31 ILJ 849.

<sup>64</sup> van der Burg A, Lindoor E & Messina S et al *Going for Broke: A Case Study of Labour brokerage on Fruit Farms in Grabouw* (2009) 4.

<sup>65</sup> van der Burg A, Lindoor E & Messina S et al (2009) 4.

<sup>66</sup> No 66 of 1995.

<sup>67</sup> No75 of 1997.

<sup>68</sup> Section 200A of them LRA.

Similarly the Namibian Labour Act (NLA)<sup>69</sup> defines an employee to mean ‘any individual, other than an independent contractor who;

- a) works for another person and who receives, or is entitled to receive, remuneration for that work; or
- b) in any manner assists in carrying on or conducting the business of an employer’.

Under recent employment forms of labour broking, the above definitions of an employee in the Labour Acts of both countries clearly leave a big gap for labour brokers to exploit without any legal obligation. Both Acts read that an employee ‘receives or is entitled to receive remuneration for assisting to conduct the business of that employer’. However, in labour broking operations where the workers assist to conduct activities of a certain client company but then are remunerated by the broker, such workers fall clearly outside the scope of the defined employee in these Acts. Technically, the workers do not work or assist with conducting the business of the labour broker but rather that of the client company were their are based for the majority of their time. However since they are directly recruited by the brokers and receive their remuneration from the brokers the client company has no legal obligation to these employees. Thus it means only the labour broker is liable for any unfair dismissals and unlawful labour practices, whether committed by the broker or the client company.

However, the courts have identified some features that resemble a employee-employer relationship between client and hired workers. In South Africa, years before the existence of the current labour laws, South African court in *Smit v Workmen’s Compensation Commissioner*<sup>70</sup> summarised a list of factors that, at common law, it considered were indicative of an employment relationship between an employee and a client. These factors were then translated into the LRA<sup>71</sup> and the BCEA<sup>72</sup> through amendments made in 2002 to define the existence of any employment relationship. The Amendment Acts would consider a direct relationship of employment to exist if any one or more of the following factors were present:

- a) ‘The manner in which the person works is subject to the control or direction of another person;
- b) The person’s hours of work are subject to the control or direction of another person;

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<sup>69</sup> NLA, No 11 of 2007.

<sup>70</sup> *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A).

<sup>71</sup> Section 200A of the Labour Relations Act Amendment of 2002.

<sup>72</sup> Section 83 A of the BCEA Amendment Act of 2002.

- c) In the case of a person who works for an organisation, the person is a part of that organisation;
- d) The person has worked for that other person for an average of at least forty hours per month over the last three months;
- e) The person is economically dependent on the other person for whom that person works or renders services;
- f) The person is provided with tools of trade or work equipment by the other person;
- or
- g) The person only works for or renders services to one person'.<sup>73</sup>

Looking at the above listed employment factors as summarised, we can determine whether there exist some grounds for the client company to carry some legal liability for the workers placed by a labour broker. First, it is known that the workers in labour broking operations are usually under the supervision and control of the client business, rather than the broker. Secondly, a substantial fraction of the prescribed maximum forty-five hours of work per week, in terms of the Labour Acts, are spent on the premises of the client business, rather than at the premises of the broker. Thirdly, it is the client company that usually supplies all the work equipment, provides training, sets targets, and guides the day-to-day duties of the workers. All these factors point to some form of employment relationship in existence between the client and those workers that are placed by the labour brokers. Therefore, amendments to labour laws, especially in Namibia, should extend more legal liability to the client, based on the factors mentioned in *Workmen's Compensation Commissioner* as South Africa did in the amendments of LRA 200A and BCEA 83A. This will allow employees to seek damages against both the broker and the client in case of unfair labour practices.

However, despite the factors listed in the *Smit* case as well as now LRA section 200A and BCEA section 83A, pointing to the existence of an employment relationship between client-employee, the current definition of an employee is enforced by post-democracy Roman legislation where a contract of employment is only known to exist between two parties, the employee and the labour broker. Thus the courts will not recognise that a labour broking employee is in a contract of employment with a client to entitle him/her to seek for damages for unfair labour practices in the CCMA or the LC. So the current LRA and NLA definitions of who is an employee have become more and more left behind by non-standard labour broking employment that emerged out of the global need for companies to be more human resource effective and financially competitive, thus leading them to hire labour services through third-parties without any accountability to the labourer and thus a legal 'vacuum' has developed in existing labour laws. Thus reconstructions are needed to the scope and definition

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<sup>73</sup> Section 83 A of the BCEA and section 200A of the Labour Relations Act.

of the employee in existing labour law to succeed in the protection of these workers rights. Now whenever a labour broker is involved in the recruitment of a worker, it is no longer considered to be an employment relationship by law, but rather a form of independent commercial contracting, limited with regard to the protection guidelines subscribed to by current labour laws.

### 3.4 The Current Legislation on Labour Brokers in Namibia and South Africa

In Namibia, apart from recent drastic demands for a ban, the legislation is completely silent in protecting the rights workers employed by labour brokers. For many years workers in this sector have been working in a 'vacuum' unprotected by legislation, allowing labour brokers and their clients to hire and fire these employees at will without giving the prescribed termination notices, severance pay, and such.

As mentioned earlier, South Africa has taken a slightly different approach to that of Namibia in dealing with the existence of labour brokers. Section 198 of the LRA provisions were inserted to govern labour brokers or Temporary Employment Services (TES) as they are referred to in the Act. The Act refers to TES, as '*any person who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client*'<sup>74</sup>. In this South African Act the worker's rights are partially protected specifically through s198 (4) of the Act which makes it clear that 'the client is jointly and severally liable with the labour broker if there is a contravention of:

- 1) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
- 2) a binding arbitration award that regulates terms and conditions of employment;
- 3) the BCEA; or
- 4) a sectoral determination'.<sup>75</sup>

However, according to Benjamin 's198 of the LRA recognises TES without regulating them'.<sup>76</sup> He states that this has allowed a situation to occur in which 'TES has been used to establish relationships that deprive employees of fundamental legislative protections'. Subsequently, the courts have ruled that under s198, a client company incurs no obligation in connection with unfair dismissals and unlawful labour practices suffered by employees of labour brokers, even if the violations were committed by that client. It was confirmed in *April*

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<sup>74</sup> Section 198 (1) of the LRA.

<sup>75</sup> Section 198 (4) of the LRA.

<sup>76</sup> Benjamin P 'Decent work and non-standard employees: options for legislative reform in South Africa' (2010) 853.

*v Workforce Group Holdings (Pty) Ltd*<sup>77</sup>, that the client company cannot be held responsible for any unfair conduct by the labour broker since Mr April (the worker) was not an employee of the client. Thus, every time a client hires workers from a labour broker, the client company is legally not prosecutable for any violations in working conditions experienced by the workers, such as, unfair dismissals with no severance pay or notification.<sup>78</sup> According to Gericke this is in direct contrast with the all inclusive purpose and objects of Employment Equity Act<sup>79</sup> which aim to avoid all forms of unfair discrimination in the workplace.<sup>80</sup> Thus, clearly the labour laws of both countries are still falling short for reaching the levels of protection accorded to the rights and conditions of employees in traditional forms of employment.

### 3.5 The Position of the International Labour Organisation (ILO)

Debates over the operation of triangular employment in labour markets have a long history since the 18 century trade in slaves. It was the early campaigns to end slavery that eventually gave birth to the ILO through the adoption of the Treaty of Versailles in 1919, which entrenched various core principles relating to the rights of workers at the end of World War I.<sup>81</sup>

Shortly after the ILO was founded, it called for the abolition of all forms of master and servant type slavery relationships. This was given effect by ILO Convention No. 34 (1935), proposing the abolition of profit-making employment agencies in favour of a state monopoly. In the case of South Africa and Namibia, the favouring of a state labour monopoly led to the introduction of a web of apartheid regulations promoting the exploitation of the black population through discriminatory labour systems in the 1900s. Notwithstanding that the apartheid government subsequently faced heavy international sanctions and isolation for years, this system would remain in place until the new political dispensation of the early 1990s.

In 1949, an international 'demand for contingent labour created a demand for service providers, a demand not efficiently met by state actors and to which private entrepreneurs

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<sup>77</sup> *April v Workforce Group Holdings (Pty) Ltd* [2005] 26 ILJ 2224 (CCMA). This was similarly confirmed in *NUMSA & Others v SA Five Engineering (Pty) Ltd & Others* [2007] 28 ILJ 1290 (LC).

<sup>78</sup> Section 198 (2). This section gives was further emphasized in the ruling of *Pienaar v Tony Cooper & Associates* [1995] 16 ILJ 192 (IC). See also *Qwabe & others and Robertsons Foods & Another* (2007) 28 ILJ 1356 (CCMA).

<sup>79</sup> Employment Equity Act, No 55 of 1998

<sup>80</sup> Section 1(a)-(d) of the LRA as referenced by Gericke E *Temporary Employment Services: Closing a Loophole in Section 198 of the Labour Relations Act 66 of 1995* (2010) 94.

<sup>81</sup> The clause concerning the rights of workers included freedom of association, the eight-hour day, weekly rest, the abolition of child labour, equal remuneration for work of equal value, and the general principle that labour was not a commodity. See also Vosko L 'Legitimizing the triangular employment relationship: Emerging international labour standards from a comparative perspective' (1997) *Comparative Labour Law and Policy Journal*, Vol 19(1) 1: 48-49.

responded, despite legal restrictions or prohibitions<sup>82</sup>. Nghishililwa states that over the next following years the demand for change could no longer be ignored and this gave birth to the development of labour brokers internationally.<sup>83</sup> At the same time ILO, Convention No.96 on Fee-charging Employment Agencies, which formed the legal basis of an ILO tenet that labour is not a commodity, was revised. Adopted in 1949, ILO Convention 96 only regulated work recruitment and placement; basically, it authorised limited exceptions to the rule laid down in ILO Convention 34 of 1935.<sup>84</sup>

In recent years, the ILO has been focused on workers who find themselves outside the protection of labour legislations. Among them are workers employed in a triangular employment relationship, such as that of labour broking, namely, when they are ‘... employees of an enterprise (the provider) to perform work for a third party (the user enterprise) to whom their employer provides labour or services’<sup>85</sup>. Thus in recent years, the ILO’s adoption of Convention 181 of 1997 on Private Employment Agencies served as a response to the serious tension within the prevailing regulatory regimes associated with the standard employment relationship. Raday, pointed out that this tension centres on the perceived necessity to transform the normative model of employment, while simultaneously preserving security for workers engaged in employment relationships where responsibility could not be placed squarely on one entity in full.<sup>86</sup>

Furthermore, Nghishililwa discusses that ILO Convention 181 on Private Employment Agencies not only recognises private employment agencies as employers, but also establishes a minimum level of protection for their employees, who are made available to a user enterprise to perform contract labour.<sup>87</sup> He states that by adopting Convention 181, the ILO had to reverse its historic stance against labour market intermediaries and revise its sceptical view of non-standard forms of employment. According to him, in a way ILO, Convention 181 also legitimises a triangular employment relationship, shifting from the standard employment relationship towards a new model which embraces more flexible forms of employment.

More significantly, in the 1997 Convention on Private Employment Agencies, the ILO went as far as giving standard definitions for the operation of a private employment agency. The definition concerning the current operations of labour brokers is in Article 1 (b) of Convention 181 which defines the term *private employment agency* as:

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<sup>82</sup> Nghishililwa F ‘*The banning of Labour Hire in Namibia: How realistic is it?*’ (2009) 1 NLJ 2.

<sup>83</sup> Nghishililwa F (2009) 1 NLJ 3.

<sup>84</sup> Finkin M & Sanford J ‘*An introduction to the regulation of leasing and employment agencies*’ (2001) 23 CLLPJ 1.

<sup>85</sup> Theron J ‘*The shift to services and triangular employment: Implications for labour market reform*’ (2008) 9 ILJ p 16–17.

<sup>86</sup> Raday F ‘*The insider–outsider politics of labour-only contracting*’ (1999) 20 CLLPJ 2.

<sup>87</sup> Nghishililwa F ‘*The banning of Labour Hire in Namibia: How realistic is it?*’ (2009) 1 NLJ 212.

-any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: 'Services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person which assigns their tasks and supervises the execution of these tasks'.<sup>88</sup>

All in all, it is clear that since the adoption of the last Conventions on Fee-charging Employment Agencies shortly after the end of World War I to give better rights and decent work standards to slave workers, the laws have encountered many challenges in keeping up with the nature of work in the new global economy. As time went by there had been an increase in labour conflicts between the rights and interests of all parties in an employment relationship. The ILO recognised that the workers, on the one hand, were looking for greater security for their rights and for decent work standards. On the other hand, the ILO also was faced with employers arguing for more flexibility in the laws. Thus, with time there was a need for an updated regulatory framework, such as the ILO's Convention 34 of 1935 concerning Private Employment Agencies, to incorporate the competitive forces of globalisation without diminishing worker's rights.<sup>89</sup> Even so, the ILO still places responsibility on individual member states to determine the decent work conditions governing the operations of private employment agencies. The ILO agency recommends the introduction of a system of licensing or certification of private employment agencies except where they are otherwise regulated or determined by appropriate national laws.<sup>90</sup> Thompson, in his publication *The changing nature of employment* of 2003, stressed the importance of "nationalisation" of labour legislation quoting the remarks made by the Director-General of the ILO when he reported in 1999 on the quest for decent work –

*'The goal is not just the creation of jobs, but the creation of jobs of acceptable quality. The quantity of employment cannot be divorced from its quality. All societies have a notion of decent work, but the quality of employment can mean many things. It could relate to different forms of work, and also to different conditions of work, as well as feelings of value and satisfaction. The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market.'*  
*'The future cannot be a forecast - it must be a goal. The question is the future that we want, and how we can make it happen. The future is not yet written. .The answer is*

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<sup>88</sup> Article 1, ILO Convention 181 Concerning Private Employment Agencies, 1997.

<sup>89</sup> Article 2.

<sup>90</sup> Article 3.

*to give the global economy the widespread social legitimacy it lacks today by making markets work for everybody.*<sup>91</sup>

Today, apart from the respective Labour Acts, the Constitutions of South African and Namibia guarantee a number of fundamental rights and the promotion fair labour practices and employment equality standards to all workers, including employees in the labour broking sector as recommended by the ILO conventions. According to the ILO, decent work is captured in four strategic objectives: fundamental principles, rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism.<sup>92</sup>

While ILO Convention 181 of 1997 on Private Employment Agencies also provides that workers recruited by private employment agencies should not be denied the right to freedom of association and the right to bargain collectively, a right which is currently not exercised by most labour broking workers.<sup>93</sup> In addition, under Convention 181, private agencies are prohibited to charge directly or indirectly, in whole or in part, any fees or costs to workers they place with third-parties.<sup>94</sup> Thus member states are obliged to ensure that the necessary measures are taken to provide adequate protection for workers employed by private employment agencies with regard to their working conditions.<sup>95</sup>

Recently the ILO's Employment Relationship Recommendation of 2006 further proposed that countries should adopt policies to ensure that employment protection is available to all forms of employment relationships, including those involving multiple parties.<sup>96</sup> Benjamin stressed that labour laws should seek to ensure 'that employees in triangular relationship enjoy the same level of protection traditionally provided by the law for employers that have bilateral employment relationships, without impeding legitimate private and public business initiatives'<sup>97</sup>. This will require adopting laws that are regulatory in nature, rather than try to unconstitutionally ban this form of employment completely.

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<sup>91</sup> Thompson P 'The changing nature of employment' (2003) 24 ILJ 1793 at 1794 and 1815.

<sup>92</sup> This concept was first initiated by ILO Director-General Juan Somavia at the International Labour Conference in June 1999. See also Ghai D (ed) *International Labour Organisation (ILO) Decent work: Objectives and Strategies* (2006) 27.

<sup>93</sup> Article 4. See also Article 21(e) Namibian Constitution and section 18 of the South African Constitution.

<sup>94</sup> Article 7.

<sup>95</sup> This protection is referred to in Article 11. In relation to freedom of association, collective bargaining, minimum wage, working time and working conditions; statutory social security benefits, access to training, occupational health and safety, compensation in case of occupational accidents or disease; compensation in case of insolvency and protection of workers' claims, maternity protection and benefits, and parental protection and benefits.

<sup>96</sup> Benjamin P 'Decent Work and Non-standard employees: Option for legislative reform in South Africa' (2010) 31 ILJ 855.

<sup>97</sup> Benjamin P (2010) 855.

### 3.6 Other Non-Standard Employments: Differences and Similarities

In his publication on labour brokers titled *Namibia's Labour Hire Debate in Perspective*, Jauch highlights that one of the challenges to overcome in addressing workers rights as against labour brokers, is that this form of non-standard employment constitutes only one form of outsourcing that co-exists with other forms, such as, cleaning and security sub-contractors.<sup>98</sup> He points out that 'outlawing labour brokers while allowing other forms of outsourcing to continue could result in labour brokers re-constituting themselves as service providers' with little change in the rights of their employees. Jauch argues that the NLA tried to define labour brokers broadly without drawing a clear line between that and other forms of outsourcing. The aim was to compel employers to rather employ their staff directly and to shoulder some social responsibility for their workers' rights. Employers were, however, still able to employ staff on a temporary basis (if they could not be employed permanently) as the NLA contained no restrictions in this regard.<sup>99</sup>

#### 3.6.1 Labour Brokers versus Independent Contractors

Independent contracting has recently become one of the main forms of employment that some labour brokers use in their attempts to disguise their exploitive operations and the unfair working conditions of their workers from legal liability. According to a LaRRI study report titled *Labour hire in Namibia: current practices and effects*, some contracts issued by labour brokers treat workers as "independent contractors" and state that "the contractor will only be remunerated for the actual hours worked", which implies that no payment is due during leave, including sick leave or maternity leave.<sup>100</sup> Furthermore, the contract states that 'the contractor will avail him or herself to perform duties on Sunday or Public holidays if so required'<sup>101</sup>. In other words, the labour broking workers have to issue a "blank cheque" regarding their availability for work on those days.

Under both the LRA and NLA an independent contractor is excluded from the legal definition of an employee and therefore not subject to the Labour Act provisions guiding the employment relationship between employers and their employees, such as, severance pay, strike rules, and retrenchment procedures, amongst others.<sup>102</sup> The Acts define an employee

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<sup>98</sup> Jauch H *Namibia's Labour Hire Debate in Perspective* (2010) 6.

<sup>99</sup> Jauch H (2010) 6.

<sup>100</sup> Labour Resource and Research Institute (LaRRI) Report *Labour hire in Namibia: current practices and effects* (2006) 23.

<sup>101</sup> LaRRI (2006) 23.

<sup>102</sup> Section 198(3) of the LRA.

as ‘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’<sup>103</sup>.

According to van Niekerk, the origins of independent contracting ‘can be traced to the Roman law origins that dealt with the determination of who is an employee and who is an independent contractor’<sup>104</sup>. In *Colonial Mutual Life Assurance Society v MacDonald*<sup>105</sup>, the court noted that under Roman law an employment contract ‘is one of letting and hiring of services’ under a contract of employment (*locatio conductio operarum*).<sup>106</sup> It held that under Roman law an independent contractor agreement ‘is the letting and hiring of some defined piece of work’ (*locatio conductio operis*).<sup>107</sup> The current structure and operations of labour brokers have strong features of a contract of employment rather than independent contracting. Labour broking businesses are involved in the hiring and letting of labour services on an ongoing basis, rather than of some defined piece of work.

On the other hand, cleaning and security services are provided by independent contractors but are often mistakenly categorised as falling in the same category as labour broking since most cleaning and security workers are often also unskilled or semi-skilled and provided with very low wages. Furthermore, like labour broking employees, cleaning and security workers perform their activities at the premises of the client company rather than the hiring company that pays their salary and they can similarly be easily rotated among different clients. However, the most significant difference between these two forms of employment lies therein that one involves a labour-only contracting (labour brokers) and the other a specific-job contracting. To use the indicators mentioned in *Colonial Mutual Life Assurance Society v MacDonald*, labour brokers would mostly involve “the hiring and letting of a (labour) service”, while cleaning and security services would involve “the letting and hiring of some defined piece of work” such a guarding or cleaning under the fulltime control and supervision of the original hiring party and not the client.<sup>108</sup>

Renowned Labour law writer, John Grogan in one of his publications titled *Employment Rights*, adds that over recent years the South African courts have further developed tests to identify the existence of a contract of employment or independent contracting through the application of the dominant impression test between different forms of non-standard employment.<sup>109</sup> The test establishes that the central characteristic of all contracts of

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<sup>103</sup> In the both section 200A of Labour Relation Amendment Act of 2002 and section 1 of the Namibian Labour Act of 2007.

<sup>104</sup> van Niekerk A (ed), Christianson MA & McGregor M et al *Law at Work* (2008) 62.

<sup>105</sup> *Colonial Mutual Life Assurance Society v MacDonald* [1931] AD 412.

<sup>106</sup> See section 1 of the Labour Relations Amendment Act 1991.

<sup>107</sup> Section 198(2) of the LRA.

<sup>108</sup> Similarly under the definition of the ILO, companies that provide clients with specific services such cleaning and security, fall into the category of what the ILO called “job contracting”.

<sup>109</sup> Grogan J *Employment Rights* (2010) 16.

employment is the employer's ability to 'control and supervise the manner in which employee perform their work by following instructions and obeying commands'<sup>110</sup> of the company. In the agreement between the client company and the labour broker, it is more often the client company rather than the labour broker that passes everyday work instructions, and provides training and equipment for the workers hired. A true independent contractor does not receive that from the client; even security and cleaning companies provide their own instructions, training and equipment to their workers.

Other decisive indicators that a court would look at under the dominant impression test to determine the key differences between the work of labour brokers and independent contractors are that normally someone who is a labour broker worker is assigned specific 'office' hours and is not allowed to work for anyone else during those hours, while an independent contractor could freely work on more than one project at any given time. A case study report on *Labour Brokerage on Fruit Farms in Grabouw* established that:

'A true independent contractor will be a registered provisional taxpayer who runs his/her own business and therefore works his/her own hours. The person will invoice the employer each month for his/her services rendered and be paid adequately but not be subject to usual 'employment' matters such as the deduction of PAYE or UIF from his/her invoice, will not receive a car allowance, annual leave, sick leave, 13th cheque and so on.'<sup>111</sup>

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This differentiation between independent contractors and standard contracts of employment is very important in adjudicating labour cases in the new global economy. Many labour brokers would often unfairly dismiss their employees and classify them as independent contractors. This unlawful disguise was demonstrated in the landmark South African case of *LAD Brokers (Pty) Ltd v Mandla*<sup>112</sup>. In this case, LAD Brokers concluded an "independent contractor" agreement with Mandla, which entailed that the services of Mandla be 'let' from the "books" of LAD Brokers by a client company. When the client company gave notice to cancel its contract with LAD Brokers, LAD Brokers also terminated the contract between itself and Mandla. In its evidence to the court, LAD Brokers conceded that it was indeed a party to a triangular arrangement, but contended that Mandla was an independent contractor under it and thus by virtue of s198 (3)<sup>113</sup> of the LRA of both LAD Brokers and the client company were not liable as regards the unfair dismissal provisions under s198 (4).

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<sup>110</sup> Grogan J (2010) 16.

<sup>111</sup> Women on Farms Project (WFP) Report *Going for Broke: A Case Study of Labour brokerage on Fruit Farms in Grabouw* (2009) 17.

<sup>112</sup> *LAD Brokers (Pty) Ltd v Mandla* [2001] 22 ILJ 1813 (LAC).

<sup>113</sup> Section 198 (3) reads that "a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person".

The court was faced with the following question in the *LAD Brokers* case: which relationship is relevant in order to establish whether Mandla was in fact an independent contractor or labour broker employee? The court held that the relationship to be considered was the one between Mandla and the client, and not LAD Broker's relationship with the client. Based on the common law tests, such as, the supervision and control test and the dominant impression test, the Labour Appeal Court held:

*'The nature of the relationship between the parties [is] to be determined primarily from the contract between them. The contract between the appellant (LAD Brokers) and the respondent (Mandla) expressly provided that the respondent was an independent contractor. However, the label chosen by the parties was not definitive. The contract also provided ... that the appellant had the right to terminate the agreement if the respondent's conduct adversely affected its reputation, and that the respondent would observe standards set by the appellant and promote its interests ... the further question was whether, if the respondent rendered service to the client company as an employee, Mandla also had the same relationship with the appellant by virtue of the Act ... the clear intention of the Act is too ensure that persons such as labour brokers who pay employees remuneration be held liable as employers ... in terms of the Act the respondent was deemed an employee of the appellant ... [and the] termination of his services ... subsequently amounted to a dismissal'.<sup>114</sup>*

Thus, the court found that the broker was the employer and that the employee was not an independent contractor.



### 3.6.2 Labour Brokers versus Recruitment Agencies

In the middle of the ongoing concerns about the practice of labour brokers, one other employment confusion on the part of critics of labour broking is the inability to distinguish between the activities of labour brokers and those of recruitment agencies. As discussed earlier under section 3.2, labour brokers are businesses that supply labour services to assist in conducting the activities of client companies through a commercial agreement. This agreement is usually for a specified period of time as requested by the client (needs) for which the broker will invoice the client according to the scale of labour requested. The broker will administer the payroll function for those workers and continue to pay a certain percentage wage to the worker until the contract lapses or until the time agreed in the commercial contract lapses.

Recruitment agencies, on the other hand, are approached by a client company to assist in filling certain vacant positions with candidates having certain qualities at a once-off flat rate

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<sup>114</sup> *LAD Brokers (Pty) Ltd v Mandla* [2001] 22 ILJ 1813 (LAC).

fee paid by the client. The agent will then take charge of the basic human resources activities on behalf of the client, such as, job advertisement, screening of applications, psychometrical tests and reference checks, as part of the recruitment and selection process. Once the agent has assessed the candidates, they will then submit a report to the client company about the abilities of all candidates assessed and recommend which candidate is the most employable. However, the onus is still on the company to make the final decision, or whether to disregard that recommendation and appoint alternatives. But what is important is that once the recruitment agency has submitted the report, the involvement of the agency ends. The candidate that is recommended becomes the direct responsibility of the client business: on its payroll, and in terms of the regular standard two-party contract of employment. On the other hand, in the case of labour brokers, once they are approached to do a certain job project, they themselves would screen and make the final decision regarding the suitable workers, and will continue to administer the remunerations and benefits for those workers until the client terminates the commercial contract with the broker.

### **3.7 Reasons why Modern Businesses Engage Labour Brokers**

Businesses everywhere in the new world engage brokers to maintain a competitive edge in terms of ensuring a continuous maximum workforce performance and to pursue better profit by outperform their rivals. According to Hall, costs and flexibility are the two major motivations for employers' use of labour brokers. He further states that 'flexibility is probably the most well-known reason for labour market transformation in the industrialised world and its impact on workers can be minimised by thorough regulation of flexible labour and through the protection of acceptable employment conditions'<sup>115</sup>. Some research studies conducted by the Labour Resource and Research Institute (LaRRI)<sup>116</sup> in Namibia, as well as one by Jan Theron<sup>117</sup> and information gathered by the Department of Labour (DoL) Survey of 2004 in South Africa pointed to some of the reasons why companies use labour brokers. The LaRRI and DoL studies entailed wide-ranging interviews with companies who hire employees through labour brokers. Companies provided the following reasons for employing labour broker workers instead of employing all their staff directly:

#### **a) Flexibility and cost cutting**

The reduction of labour costs and the enhancement of flexibility linked to uncertainty and competition in the business environment add to the advantages of entering into an agreement with a labour broker.<sup>118</sup> The labour brokers can provide workers on demand for

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<sup>115</sup> Hall, 2002 in LaRRI *Labour hire in Namibia: current practices and effects* (2006) 14.

<sup>116</sup> LaRRI *Labour hire in Namibia: current practices and effects* (2006) 19.

<sup>117</sup> Theron 2005 26 ILJ 625.

<sup>118</sup> Hutchinson and Le Roux 'Temporary Employment Services and the LRA: Labour Brokers, their Clients and the Dismissal of Employees' 2000 9 CLL 51

specific hours, days or weeks. They thus allow companies to order workers when they are needed and to send them home when there is no work. Labour brokers also allow businesses to replace staff quickly for short periods, e.g. during holidays and peak seasons, in case of sickness and even during strikes. Client companies only pay for the hours actually worked, as they do not pay for workers who do not come to work. In such cases the labour broker will provide a replacement. One executive of a manufacturing company explained that:

*'It is cheaper for us to employ workers through a labour broker as we don't have to pay the benefits such as housing medical aid etc. We also don't have to pay if a worker does not come to work'.<sup>119</sup>*

Another manager added:

*'When permanent workers go on leave you can't replace them. If you do, it costs the company money. I will feel it when my permanent worker goes on leave but I don't feel it if a labour broking worker goes on leave'.<sup>120</sup>*

## **b) Concentrating on “core business”**

Linked to the above argument is the practice of outsourcing labour relations to a labour broker so that the clients can concentrate on other aspects of their business: *'The broker will take over the management of the staff so that we can concentrate on our core business'<sup>121</sup>*, said a manager of a retail store that makes use of labour brokers.

The managing director of a prominent fish processing company added:

*'If the owner had to employ many people such as HR managers, assistants to the manager etc. it would be too costly and the business would shut down. If the owner still had to deal with HR issues he would have no time to concentrate on running the company. This is why we use labour brokers to deal with labour issues'<sup>122</sup>.*

Another manager of a manufacturing company pointed out that:

*'[The] Labour broker is not the only company servicing us. There are a host of contractors to carry out specific tasks such as window cleaning, pest control, gardening, electrical services engineering etc. This is part of the company's strategy to concentrate on its core business while subcontracting all other work to specialists in their specific fields'<sup>123</sup>.*

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<sup>119</sup> LaRRI (2006) 20.

<sup>120</sup> LaRRI (2006) 20.

<sup>121</sup> LaRRI (2006) 21.

<sup>122</sup> LaRRI (2006) 21.

<sup>123</sup> LaRRI (2006) 21.

### c) Access to skilled and qualified workers

One company pointed out that their labour brokers supplied them with highly skilled workers at short notice when the need arose. This saved them the costs associated with employing skilled workers on a permanent basis.<sup>124</sup> In addition, wage levels for lesser-skilled workers can easily be reduced as there is usually no requirement to ensure that workers placed by a labour broker receive the same level of remuneration as permanent workers of the client for similar work.<sup>125</sup>

However, that company acknowledged that the disadvantage was that the company had 'to use different people all the time and risk injury on the job and lack of skills or expertise'<sup>126</sup>.

### d) Replacing "unproductive" workers

A manager of a manufacturing company outlined this argument:

*'If a labour broking worker does not perform well, we can inform the broker company not to send that worker back again and instead provide us with a hard working worker. This allows for high productivity for the company, as only hard working workers will be deployed at our company. Thus you get more out of a labour broking worker than your own permanent worker.'*<sup>127</sup>

Some other client companies also indicated that they experienced labour broking workers as more productive, possibly because they wanted to be appointed as permanent workers in future.

However, not all companies shared this view as shown in the following statement:

*'The disadvantage of using labour broking workers is that we don't have an influence over the choice of workers. We have to take whomever the broker sends us...Also I have the impression that labour broking employees don't take their work that seriously. They regard themselves as temporary employees and don't see much of a future with us...there is a kind of a "could not care less" attitude, which is a pity. Also we lose trained people overnight due to the high levels of staff turnover at labour brokers.'*<sup>128</sup>

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<sup>124</sup> Hutchinson and Le Roux 2000 9 CLL 52

<sup>125</sup> Theron 2005 26 ILJ 626 629

<sup>126</sup> LaRRI (2006) 22.

<sup>127</sup> LaRRI (2006) 22.

<sup>128</sup> LaRRI (2006) 22.

### e) Avoiding disciplinary cases

Another widespread reason for the use of workers from labour brokers is to avoid the procedures for disciplinary action set out in the Labour laws. A director at a big company in the Namibian economy pointed out that:

*'If we have trouble with a labour broking worker, we simply phone the broker and they take care of it. Disciplinary cases are quite a burden in the case of permanent staff while it is easy for us in the case of labour broking workers. We lodge a complaint with the broker who reacts promptly. If no solution can be found, the worker will be replaced. This saves us the trouble of dealing with workers who sometimes come to work drunk or are simply absent without a valid reason. This is an advantage for us although it is not positive from a worker's perspective.'*<sup>129</sup>

Confirming this view, a consultant of a retail store explained:

*'Initially the company employed workers directly but disciplinary matters took a lot of time and were expensive. Labour laws are tough and every small thing usually ends up in court. Now the labour broker deals with the labour issues.'*<sup>130</sup>

### f) Avoiding trade unions

Workers hired from a labour broker are seldom represented by a union, which leaves them in vulnerable position as individuals in respect of negotiations as they are hardly in a position to negotiate for better working conditions or more favourable terms in their contract of employment with a broker.<sup>131</sup>The owner of a construction company stated that:

*'I started using labour brokers because of the unreasonable requests and foolishness of the trade unions. You have to deal with unreasonable requests for very high salary increases. The problem with unions is that they don't request, they demand for these increases and they always want to have meetings... As a one-man business I did not have the time, otherwise this would affect my business in a negative way. I realised that either I had to sit in meetings with the unions all the time or I had to use experts to deal with them because they know how to deal with them...since they have been big shots in the trade unions.'*<sup>132</sup>

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<sup>129</sup> LaRRI (2006) 21.

<sup>130</sup> LaRRI (2006) 21.

<sup>131</sup> In the *Mandla* case *supra* 965 the worker was interviewed and accepted by the client before he was employed by the labour broker who then had to facilitate the contract of employment, and the remuneration of the worker for a fee. The worker was only expected to sign the contract with the broker and told that he would be working as an independent contractor, which means exclusion from the protection under the definition of employee in terms of the LRA (s 213).

<sup>132</sup> LaRRI (2006) 22.

With regards to complying with any relevant collective agreement mentioned in “a discreet section of the LRA”, Theron remarks that ‘a strong system of centralised bargaining failed to materialise’<sup>133</sup>. So in these circumstances the other provisions regarding labour-brokering...became an open invitation to employers to escape [their] own prescriptions’ with regard to the collective agreements to which they would have been bound.<sup>134</sup>

#### **g) Reducing the impact of strikes**

Several companies indicated that they started using labour broking workers following a strike by permanent workers. A retail manager pointed out that:

*‘After an illegal strike, we decided to bring in the labour broking services so that it spreads the risks if ever there would be another strike. If the permanent staff went on strike, we could still continue with the labour broking staff.’<sup>135</sup>*

From the above discussed reasons, one cannot overlook the fact that some of the expressed views and comments are against the spirit of sound labour relations promoted in the labour acts. For example, some companies stated that when hiring labour brokers they cut costs by not providing benefits and not paying the employees when they are on leave. More worrying is the fact that some executives confirmed the alarming dismissal rates in respect of labour broking employees by stating that the labour broking option allowed them to send back non-performing workers and demand hardworking replacements. To make matters worse, those executives appreciate the fact that usually no disciplinary hearing is instituted for workers dismissed in the labour broking contract. However, the view causing the most concern which is derived from LaRRI and DoL studies on why companies engaged labour brokers, centres around that they hope to avoid trade unions.<sup>136</sup> The executives pointed out that with labour broking they can engage employees in vulnerable positions when negotiating conditions of employment. These practices are against the spirit of collective bargaining and the employees’ constitutional freedom of association.<sup>137</sup>

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<sup>133</sup> Theron 2005 26 *ILJ* 625. See also section 198(4) of the LRA

<sup>134</sup> Theron 2005 26 *ILJ* 625.

<sup>135</sup> LaRRI (2006) 21.

<sup>136</sup> LaRRI *Labour hire in Namibia: current practices and effects* (2006) 19-22. See also Theron 2005 26 *ILJ* 625.

<sup>137</sup> Article 21(e) Namibian Constitution and section 18 of the South African Constitution in addition to s23.

## CHAPTER 4

### EXPLOITIVE WORKING CONDITIONS

#### 4.1 Introduction

With the emergence of labour brokers, some quarters of society led by trade unions have argued that not since the era of apartheid have exploitive conditions of this kind been observed in the South African and Namibian labour markets. Trade unions argue that labour broking practices have reversed all labour relations and working condition successes achieved through the liberation struggles. The comparison is that, just like the previous exploitive labour systems under apartheid, today labour brokers erode opportunities for social justice and fair treatment. Thus, unions have called for stricter labour policies to ensure the full protection of these workers. Some of the concerns raised by the union movements for policy revision to re-examine the legality of labour brokers for following exploitive employment conditions, relate to the denial of collective bargaining and the dismissal rates. They point out that labour broking employment contracts are often terminated as soon as the commercial contract between the labour broker and its client ends. “On the spot” retrenchments are a regular occurrence. In addition, unions state that these workers often face long periods of uncertainty in employment as they are constantly vulnerable to both substantively and procedurally unfair terminations. Plus they argue that apart from the employees having no job security, most are employed on the basis of “no work – no pay”.

Other expressed concerns regarding the exploitative nature of labour brokers include a lack of training on health and safety procedures and poor wages far below that of permanent workers performing the same duties. Labour broking employees are usually only provided with basic benefits required by law, such as, workmen’s compensation and social security, while other general social benefits, such as, pension fund contributions or medical aid cover are totally denied.

## 4.2 Ongoing Concerns

The LaRRI study of 2006 confirmed that the biggest problems experienced by labour broking employees were the lack of benefits, low wages and job insecurity. Because of the exclusion of triangular relationships in the initial definition of an employee, existing Labour Acts in both South Africa and Namibia have impacted very little on the working conditions of labour broker workers and have failed to grant these workers protection against abuses. The study further points out that the majority of labour brokers are usually aware of the basic conditions of employment set out in the labour legislation of the country and will claim to adhere to them by, for example, registering employees for social security and workmen's compensation benefits.<sup>138</sup> However, the widespread practice is that most labour brokers will often engage labour consultants to advise them on the minimum requirements and try to ensure that those are met cost-effectively. Generally, employment conditions for labour broker employees at most times are of an exploitive nature as 'many do not receive any paid leaves or severance payouts in case of retrenchment'<sup>139</sup>. All this exploitive conditions can only be really addressed with a sound regulatory law framework, clearly detailing the basic conditions of employment in the industry.

But the most alarming and regulatory challenging observation in the operation of labour brokers over recent years has been a drastic strategy by some companies to convert more and more solid jobs to those of contracts under labour brokers.

According to the LaRRI report 'the use of labour brokers ... is not limited to peak periods and specific tasks only. Over the past few years, labour broking has become an established practice and in some instances permanent workers were retrenched [to avoid legislative requirements] and replaced by those of labour broking companies'<sup>140</sup>.

## 4.3 Inadequate Responsibility

Being some of the most unskilled and semi-skilled groups in the labour market, many labour broking workers in the *Grabouw* case study expressed an interest in further training.<sup>141</sup> They saw training as an opportunity to acquire further competency in the jobs and to reduce termination by reason of incapacity or workplace injuries. However, many labour brokers and client companies fail to facilitate any sort of training for their employees, and when workers fail to achieve targets or suffer injuries on duty; they are instantly dismissed and replaced.

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<sup>138</sup> LaRRI (2006) 23.

<sup>139</sup> Jauch *H Namibia's Labour Hire Debate in Perspective* (2010) 4.

<sup>140</sup> LaRRI (2006) 6.

<sup>141</sup> As interviewed in the *Case Study of Labour brokerage on Fruit Farms in Grabouw Women on Farms Project* (2009) 43.

This lack of training of labour broking employees is often complicated by the continued existence of confusion amongst the workers on whose shoulders this responsibility should fall. Because some of the workers perceive themselves as employees of the client companies whilst they are actually employed by the labour broking business.<sup>142</sup> This is mainly because the relationship between workers and a client company is not always clear. To illustrate the confusion around who should be responsible for training the employees in a labour broking system, a Grabouw case study is examined. Some workers were interviewed and most of them were almost unanimous in acknowledging the labour broker as their employer, but the majority believed that it was the responsibility of the client company to provide training to workers. The main reason cited for the client company bearing the responsibility for training was the perception that the workers' employers (brokers) would not be able to afford to pay them salaries and to provide training; the workers argued that '*...farm owners have enough money to provide training*'<sup>143</sup>. However since the current Labour laws only recognise the broker as the employer, the responsibility for training should rest with the labour broking entity.

In response to the same question, most labour brokers in the case study saw the training of workers as their responsibility and not that of the client companies.<sup>144</sup> However, many stated that the seasons they are hired for were usually very busy and there was therefore no time available to train workers. A small group of labour brokers believed that there was no responsibility for anyone to provide training to "temporary workers". This finding again confirms the confusion regarding roles and responsibilities between labour brokers and client companies in relation to workers. This in turn has weakened the workers' ability to claim their rights.

When asked about their knowledge of labour rights, all the workers who were interviewed in the *Grabouw* case study indicated that they did not know their labour rights and had never received any form of training about their labour rights: '*We don't know our rights, but we really want to know our rights, so that we can also talk about our problems.*'<sup>145</sup> At the same time they expressed scepticism about whether this would make an objective difference to their circumstances given their weak bargaining position as contract workers. In the words of one worker respondent: '*It [knowledge of our labour rights] will not help us because we will be too scared to use the knowledge. We just go if they chase us away.*'<sup>146</sup> But if labour broking is to continue to operate in South Africa and Namibia, the regulatory frameworks on

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<sup>142</sup> Anderson A 'Minister wants finality on labour bills' *Business Day*, 19 October 2011.

<sup>143</sup> Labour brokerage on Fruit Farms in Grabouw Case study (2009) 43.

<sup>144</sup> Labour brokerage on Fruit Farms in Grabouw Case study (2009) 44.

<sup>145</sup> Labour brokerage on Fruit Farms in Grabouw Case Study(2009) 44.

<sup>146</sup> Labour brokerage on Fruit Farms in Grabouw Case Study(2009) 44.

the industry should compel both brokers and clients to provide adequate training to the employees both in terms of the scope of work and access to union representation.

#### 4.4 High Job Insecurity

According to s185 of the LRA 'every employee has the right not to be unfairly dismissed'. The LRA in ss186-194 lays down guidelines to be followed when any terminations are initiated between an employer and employee, in ss186-194, while ss29-37 of the NLA give the same protection in respect of Namibian labour operations. However, Jauch in his labour broking publication titled *Namibia's Labour Hire Debate in Perspective* states that, although in theory the existing labour provisions on employment termination apply to labour broking companies as well, the usual practice is to hire and dismiss workers at will without following any legislation provided procedure.<sup>147</sup> He points out that client companies can request the removal of any of the labour broker's workers at any time without giving the employee the prescribed period of notice required on termination of all employment relationships. The labour company will then have to send a replacement. Benjamin adds that the client's decision to request an agency to withdraw an employee is conveyed from client to agency in terms of their commercial arrangement and therefore falls beyond the reach of labour law.<sup>148</sup> Thus, new labour law reforms relating to labour brokers could succeed in regulating how these employers deal with those employees that are unwanted by clients-possibly along the lines of the current procedures on retrenchments.

According to van Niekerk & Linstrom, whatever security of employment exists between the labour broker and its employees is largely dependent on the terms of the contract between them.<sup>149</sup> They further add that agreements of this nature typically provide that the labour broker offers work only for the duration of a particular assignment. However, even when this condition is expressed, the work period of the employee is not guaranteed as was the case in *Dick v Cozens Recruitment Services*<sup>150</sup>. The client can request the removal at any time. In this case the CCMA Commissioner held that were there was no intention by the broker to supply the employee with actual employment other than through the assignment taking place with the client. The period of fictional employment with the client could only be intended to coincide with the period of the commercial agreement with the client. Thus the labour broker is not obliged to place the employee in alternative employment when a client terminates an assignment.

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<sup>147</sup> Jauch H *Namibia's Labour Hire Debate in Perspective* (2010) 4.

<sup>148</sup> Benjamin P *Decent work and non-standard employees: options for legislative reform in South Africa* (2010) 851.

<sup>149</sup> Van Niekerk A & Linstrom K *Unfair Dismissal* 3 ed (2006) 12.

<sup>150</sup> *Dick v Cozens Recruitment Services* [2001] 22 IJL 276 (CCMA).

Companies who engage labour brokers often argue that labour broking is the “flexible” option to “substitute” employees who are judged to be underperforming for reasons, such as, incapacity, misconduct, absenteeism and wild strike actions. However the nature of labour broking terminations has contributed to the “commodification” of labour as an easily exchangeable and replaceable commodity.<sup>151</sup> However, recently arbitrators have initiated steps to stop these conspicuous dismissals in labour broking employment matters. In *Molusi and Ngisiza Bonke Manpower Services CC*<sup>152</sup>, a South African case, a broker and client refused to allow an employee to resume work after maternity leave which amounted to clear unfair dismissal.<sup>153</sup> Shortly after the appellant, Ms Molusi, was placed with a client company as a data capturer, she took maternity leave. Upon her return to resume duty, the labour broker gave her a month’s notice because, so it said, the client company had done some restructuring and no longer required her services. As with many other cases, the labour broker, Ngisiza Bonke Manpower, claimed that Ms Molusi’s dismissal was perfectly fair because she was aware all along that her employment was linked to the client’s needs. The CCMA Commissioner disagreed. He ruled that if this were so, both the client and the labour broker could simply disregard the provisions of the BCEA and the employee’s constitutional right to ‘fair labour practices’<sup>154</sup>. The Commissioner ruled that the labour broker, Ngisiza Bonke Manpower, had simply chosen to “wash its hands of the employee”. However, under the normal circumstances of a standard employment relationship, [to let go of the employee] the client employer would have been required to follow retrenchment procedures, and the broker as the employer should have taken over this duty. Thus Ms Molusi was awarded compensation.

However, without a clear labour broking regulatory framework, one South African case still proves the inconsistency and the difficulty arbitrators have in dealing with terminations of unprotected employees. In *NUMSA obo Fortuin & Others and Laborie Arbeidsburo*<sup>155</sup>, the labour broker undertook to terminate the employment of 14 employees with bad absenteeism records at the insistence of a client. The client had given the broker the ultimatum to dismiss the employees or risk losing the assignment. Here the arbitrator wrote:

‘There are certainly elements of both misconduct and operational requirements when considering the reason for the dismissal of these 14 employees. They were told that the labour broker had to dismiss them, or lose the whole contract. The situation is complicated by the fact that the client company was obviously concerned with the employees’ conduct however, the labour broker was more concerned about ensuring

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<sup>151</sup> Jauch H *Namibia’s Labour Hire Debate in Perspective* (2010) 4.

<sup>152</sup> *Molusi and Ngisiza Bonke Manpower Services CC* [2009] 30 ILJ 1657 (CCMA).

<sup>153</sup> Section 25 of the BCEA.

<sup>154</sup> Section 23 of the Constitution of the Republic of South Africa.

<sup>155</sup> *NUMSA obo Fortuin & Others and Laborie Arbeidsburo* [2003] 24 ILJ 1438 (BCA).

the continuity of the contract. Thus the broker chose to tell them that the reason why they were being dismissed was because they had poor absenteeism records.<sup>156</sup>

In *Laborie Arbeidsburo*, the arbitrator's solution was to prescribe both the procedures for misconduct and for operational requirements. In the circumstances, he said, the labour broker should first have investigated whether the client's complaint was valid, and if so, dismissed the employees for misconduct. If the client's complaint had proved incorrect, the labour broker could have commenced consultations for retrenchments. As it happened the broker did neither; it simply accepted the client's word and dismissed the employees without informing them of the reason. To make matters worse, because the labour broker failed to find alternative positions for the employees, the circumstances of this case founded claims for constructive dismissals.<sup>157</sup>

Van Eck stresses that 'so long as the person placed is not deemed to be a worker of the client but rather of the labour broker, the CCMA and the Labour Court do not have jurisdiction to consider disputes in respect of unfair dismissal and unfair labour practice disputes between the client and the worker'<sup>158</sup>. In addition, he mentions that the contract between the labour broker and the worker is often made subject to the continuation of the commercial contract between the labour broker and the client. In instances where this has been explicitly agreed upon, the courts have confirmed that the termination of the contract of employment on grounds that the client has terminated the commercial contract with the labour broker does not constitute dismissal at all.<sup>159</sup> According to Van Eck, the effect of this is that if the termination does not constitute dismissal, a dispute about an unfair dismissal cannot be referred to the CCMA, and the employee is left without remedy even though the circumstances may be grossly unfair.<sup>160</sup>

#### **4.5 The Employment on 'Fixed Contract' Concept**

Usually fixed-term contracts are appropriately used for work on projects of limited duration such as construction projects. However Benjamin in his publication entitled *Decent Work and Non-standard employees: Option for legislative reform in South Africa*, points out that the absence of any requirement that fixed-term contracts must be for an appropriate purpose has allowed widespread use to be made of fixed-term contracts in many sectors for what is

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<sup>156</sup> [2003] 24 ILJ 1438 (BCA) at 1444 C-E.

<sup>157</sup> *Fourie and JD Bester Labour Brokers CC* [2003] ILJ 1625 (BCA).

<sup>158</sup> Van Eck BPS *Temporary employment in South Africa and Namibia* (2010) 5. See also *Mandla v LAD Brokers (Pty) Ltd* [2000] BLLR 1047 (LC); *Vilane v SITA (Pty) Ltd* [2008] BALR 486 (CCMA).

<sup>159</sup> In *Sindane v Prestige Cleaning Services* [2009] BLLR 1249 (LC), the Labour Court confirmed that the termination of a commercial agreement between a labour broker and a client that resulted in the coming to an end of a worker's contract did not constitute dismissal. See also the discussion of *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* 2005 ILJ 2224 (CCMA) by Bosch 2008 ILJ 831.

<sup>160</sup> Van Eck BPS *Temporary employment in South Africa and Namibia* (2010) 5.

in effect indefinite employment.<sup>161</sup> In the current legal vacuum, although the word “temporary” is used to refer to the operations of labour brokers, ‘there is no clear statutory restriction on the duration of labour brokerage arrangements’<sup>162</sup>. The durations of these employment relationships are simply dependent on the length of the commercial contract between the broker and the client, which could be the arrival of an agreed date or purpose. After this said date or purpose the employee no longer has a contract and will not be required for the activities of the business. Thus, the contact between the employee and labour broker will also terminate automatically. In one of the contracts that the LaRRI Study came across, it was stated that:

*‘In the event of the client terminating their contract with the company [labour broker] or our company terminating their contract with the client, or the client wishing to discontinue your services, for whatever reason, your services with regard to this contract will be terminated.’<sup>163</sup> Furthermore ‘it is specifically recorded that upon termination of this [employment] agreement, that said termination, for whatever reason, cannot be construed as being a retrenchment and/or dismissal’<sup>164</sup>.*

Thus, contract terminations are usually not consensual, and more worrying, very few retrenchments provisions are followed as per Labour law procedures on how to end the contract. The provision of full labour protection for labour broker employees under the existing laws, will allow labour broking employees to seek compensation from the courts and tribunals for the many unfair contract terminations. However, under the current position of labour laws in South Africa and Namibia, the majority of such cases go unprosecuted and leave many citizens without any severance pay, impoverished, and on the streets.

However, in certain cases even if the commercial contract between the broker and one client comes to an end or the client has asked for the employee to be replaced, the worker’s employment contract with the labour company can still continue elsewhere with a different client. This re-assigning of the employee to a different client does not qualify as a contract termination. Grogan, in his book *Dismissal*, emphasised that in the absence of a contractual provision to that effect, the mere fact that a broker’s client insists that a particular employee be removed from the project for which he is engaged does not automatically terminate the contract.<sup>165</sup> He points out that the broker should completely dismiss the employee from duty before they can claim for unfair contract termination.<sup>166</sup> This position was supported by the Labour Court in *Colven Associates Border CC v Metal & Engineering Industries Bargaining*

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<sup>161</sup> Benjamin (2010) 864.

<sup>162</sup> Van der Wielt H *Labour brokers- The Future?* Presentation at SASLAW Meeting, 23 March 2010

<sup>163</sup> LaRRI Labour hire in Namibia: Current practices and effects (2006) 25.

<sup>164</sup> LaRRI (2006) 25.

<sup>165</sup> Grogan J *Dismissal* (2010) 41

<sup>166</sup> Grogan J (2010) 41.

*Council & Others.*<sup>167</sup> In this case, a client of the labour broker, Colven Associates Border CC, insisted that a respondent employee be removed from its premises after he was involved in a fight. The broker's commercial contract with the client obliged it to do so. The broker duly informed the employee that he was not to report to the client company's premises, but notified him that he was not dismissed. The employee disappeared, and later claimed to have been unfairly dismissed by the labour broker. He succeeded in the CCMA and was re-instated. However, the Labour Court found that the Commissioner had misdirected his inquiry as regards to the circumstances that gave rise to the employee's removal from the client's premises. The employee was employed by the broker; therefore the proper inquiry was whether the labour broker had dismissed him. The court found that the Commissioner had overlooked this fact, and should have found that the labour broker had informed the employee that his removal from the client company's premises did not mean that he was dismissed. Thus the earlier award by the Commissioner was set aside.

In the LaRRI Report on labour brokers published in Namibia, several of the labour broking employment contracts that were collected during that study on the Namibian situation in 2006 contain some dubious clauses that openly violate the provisions of the Labour Act. For example, one contract states that once the worker's contract with the labour broking company is terminated "for whatever reason", he or she may not accept employment at any of the labour broker's client companies for a period of six months. The contract further states that, *'should the employee break this condition, the employee accepts all costs that would have been charged to the client, i.e. a placement fee at 15% of the employees annual salary, as well as all legal costs incurred to enforce this condition'*<sup>168</sup>. This clause certainly aims to prevent those labour broking employees that are dismissed, whether fairly or unfairly, from obtaining permanent employment at a client company under different circumstances.<sup>169</sup>

Furthermore, in the same contracts, LaRRI found a clause that requires employees to agree 'to undergo a polygraph test, whenever there is an allegation of theft and/or fraud'<sup>170</sup>, which is not a legal measure relating to fair trial and procedure. The contracts also stipulate that 'the employee indemnifies any of the employer's clients against any claims which may be made against it under the Compensation of Occupational Injuries and Diseases Act'. In some cases labour companies issue their staff with contracts that state that those workers receive 'three consecutive paid off days after every completed month including work on holidays'<sup>171</sup>. In other words, workers work every single day for a full month and then receive three days off. This is a blatant violation of the labour law but constitutes standard practice as confirmed by one labour broker, its clients and the workers. Some contracts further state

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<sup>167</sup> *Colven Associates Border CC v Metal & Engineering Industries Bargaining Council & Others* [2009] 30 ILJ 2406 (LC).

<sup>168</sup> LaRRI *Labour hire in Namibia: current practices and effects* (2006) 23.

<sup>169</sup> LaRRI *Labour hire in Namibia: current practices and effects* (2006) 23.

<sup>170</sup> LaRRI *Labour hire in Namibia: current practices and effects* (2006) 23.

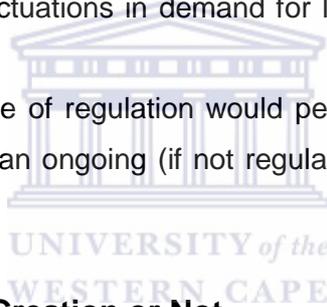
<sup>171</sup> LaRRI (2006) 23.

that the industry requires a seven day week and that the employee shall therefore work seven days a week, unless otherwise directed. While 'overtime payments are included in the basic salary'<sup>172</sup>, the common practice is that workers have to work for 9 – 12 hours every day at a fixed remuneration per day, no matter how much overtime the labour broking workers have done its never paid which is illegal and unlawful.

Benjamin stresses that 'effective regulation is a feasible approach to preventing abusive practices and exploitation associated with labour broking by limiting the sectors and types of work for which employees can be contracted'<sup>173</sup>. He stresses that were this approach to be adopted, labour brokers could be permitted to place workers in categories of work that are by their nature 'temporary' or of limited duration. According to him, these include workers engaged –

- (a) on short-term contracts of a specified duration;
- (b) as substitutes for employees when workers are absent due to illness, vacation, training or leave;
- (c) for short periods to meet fluctuations in demand for labour or to cope with emergency provisions.<sup>174</sup>

Benjamin concludes that this type of regulation would permit those employees who desire this sort of flexibility, to work on an ongoing (if not regular) basis by performing a series of short-term placements.<sup>175</sup>



#### 4.6 Necessary Employment Creation or Not

According to Hutchinson and Le Roux, although workers face the possibility of being exploited either by the labour broker or the client of the labour broker, it is still a better option from an unemployed person's perspective to be part of a tripartite employment relationship than to face a day without the possibility of earning an income.<sup>176</sup> They point out that every person needs an opportunity to earn a living and add dignity to his or her life. The development of a person's skills and abilities contributes to the physical and mental wellbeing of that person and his or her dependants. Social recognition and human dignity are values closely linked to a person's perception of worth and self-worth.<sup>177</sup> Gericke adds that every society needs a system that is responsible for the creation of jobs and has the

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<sup>172</sup> LaRRI (2006) 23.

<sup>173</sup> Benjamin P 'Decent Work and Non-standard employees: Option for legislative reform in South Africa' (2010) 31 ILJ 856.

<sup>174</sup> Benjamin P (2010) 855.

<sup>175</sup> Benjamin (2010) 855.

<sup>176</sup> Hutchinson and Le Roux 'Temporary Employment Services and the LRA: Labour Brokers, their Clients and the Dismissal of Employees' (2000) 9 CLL 51 and 53.

<sup>177</sup> In *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) par 27 the SCA accepted "[t]he freedom to engage in productive work ... is indeed an important component of human dignity ... Self-esteem and the sense of self-worth – the fulfilment of what is to be human – is most often bound up with being accepted as socially useful". In *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3 (CC) par 59 the Constitutional Court noted that "one's work is part of one's identity and is constitutive of one's dignity" and that "there is a relationship between work and the human personality as a whole".

development of skills as its highest priority. It is in this regard that the role played by a labour broker has become extremely valuable. He says that in this regard labour brokers fulfil a major role of ensuring bread on the table for millions.<sup>178</sup>

In the groundbreaking 2006 LaRRI study it was found that the vast majority of the work created by the operations of labour brokers is usually that of manual labourers, shelf packers, cashiers, merchandisers, machine operators, bakers, drivers, etc which are usually temporary.<sup>179</sup> More significantly, the study found that 'increasingly this includes mostly desperate young people who completed school but were unable to find permanent jobs elsewhere'<sup>180</sup>. The only real meaningful employment creation effect of labour brokers is very limited as almost all jobs are created by the client companies. Normally only a limited number of administrative and supervisory staffs are employed on a permanent basis with full benefits by labour broking companies. However, on the other hand, some client companies indicated that they would probably have employed fewer workers if the labour broking option were not open to them.<sup>181</sup>

Most recent labour brokers describe themselves as black economic empowerment business that aim to empower previously disadvantaged groups to derive greater benefit from national economies and to correct previous wealth inequalities. However, according to the study by the LaRRI most labour broking businesses contribute little to socio-economic development, equality and social justice. They merely create business opportunities and profits for a small group of owners and managers, leaving the majority of the workforce in further poverty as result of lower wages and poor working conditions. Thus the price for labour broking practices is paid by the workers directly affected.

As further observed by the 2006 LARRI study, labour broking employment is hardly a springboard to permanent jobs. Indications were that very few labour broking workers were eventually taken over by client companies as permanent staff.<sup>182</sup> One labour broker in Namibia explicitly prevents its workers from taking up employment at any client company even well after the brokerage contract has lapsed.

In fact, according to the Report published by the LaRRI in 2006, 'over the past few years, labour broking has become an established practice and in some instances permanent workers were retrenched and referred for recruitment under a labour broker often doing the

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<sup>178</sup> Gericke *Temporary Employment Services: Closing a Loophole in Section 198 of the Labour Relations Act 66 of 1995* (2010) 97.

<sup>179</sup> LaRRI *Labour hire in Namibia: Current practices and Effects* (2006) 20.

<sup>180</sup> LaRRI (2006) 20.

<sup>181</sup> LaRRI (2006) 20.

<sup>182</sup> LaRRI *Labour hire in Namibia: Current practices and Effects* (2006) 6.

same work but at lower wages and benefits. The argument is thus that labour brokers pose a serious threat to permanent jobs, especially in the lower skills categories.

Interestingly, some labour broking businesses have claimed that any abolition of labour broking would lead to thousands of job losses.<sup>183</sup> However Jauch points out that ‘this argument is based on the assumption that client companies will reduce their operations and pursuit of profits if they cannot use labour brokers any longer’<sup>184</sup>. According to Jauch, this is debatable. He points out that what seems certain is that labour brokers themselves are not job creators and therefore make a very limited contribution to Namibia’s development and the creation of decent work.



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<sup>183</sup> According to Richard Pike, CEO of Adcorp Holdings – one of the largest labour companies in South Africa: “The amount of job losses would be so high that it will make the number of the economic recession retrenchments ‘insignificant’ as employment services industry contributes billions of rand to the domestic economy, outperforming the agricultural sector”. Mr Pike claims that “the industry abides by labour laws from the International Labour Organisation and the guidelines of its mother body, the Confederation of Associations in the Private Sector”. According to him, Namibia banned labour brokers which resulted in 30 per cent of all contractors losing their jobs: report from the *Sowetan* 21 May 2009 as stated in Legal Brief Today.

<sup>184</sup> Jauch H *Namibia’s Labour Hire Debate in Perspective* (2010) 6.

## CHAPTER 5

### UNIONISATION IN LABOUR BROKING

#### 5.1 Introduction

The emergence of non-standard employment in the new global economy is attributed to the shift of the balance of power from employees back to the employers' advantage in employment relationships.<sup>185</sup> But even before the rise of the old economy in pre-democracy Namibia and South Africa, employment relationships centred on the forced labour of the vast majority of the population. Workers' rights suffered severely at the hands of apartheid policies and discriminatory regulations which gave all the power to minority group employers. Eventually it triggered dramatic increases in trade union movements and their membership. Most trade unions at the time served as solidarity, struggle organizations for aggrieved workers, especially those from the black population, that were deliberately discriminated against in order to create a cheap labour class.

However, according to Sweet & Meiksins unions in the new economy of globalisation are finding it more and more difficult to attract new members.<sup>186</sup> Analysts have suggested that the decline in union membership indicates that the new economy has resulted in a changed relationship between employers and employees for the better, as a result of which management philosophies and new forms of work organizations ostensibly promote collaboration and harmony between employers and their workers. In this culture of co-operation, traditional unions are not attractive to workers, who often see them as threatening the company's interests and their jobs.<sup>187</sup> For developing countries, such as, South Africa and Namibia, the decline in unionisation has occurred simultaneously with the declining wage and job security levels. Unions find it particularly very difficult to gain membership in the flexible non-standard employment practices of the new global economy. For example, in respect of labour broking workers, this is difficult because those workers are less likely to devote their entire careers to a single job. Labour broking employees are not only vulnerable to abrupt employment terminations, but often find themselves in different industries in a short space of time. This chapter discusses more in detail the difficulties that trade unions encounter in the trying to organise labour broking workers in the changing working patterns presented by the new economy and new organisational practices.

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<sup>185</sup> Sweet S & Meiksins P *Changing Contours of Work- Jobs and Opportunities in the New Economy* (2008) 32.

<sup>186</sup> Sweet S & Meiksins (2008) 33.

<sup>187</sup> Sweet S & Meiskins P (2008) 34

## 5.2 The Current Position of Trade Unions

The major trade unions in Namibia and South Africa are radically opposed to labour brokers. They consider their operations as an attack on labour relation successes achieved since the days of the struggle against the apartheid contract – labour systems, like the South West Africa Native Labour Association (SWANLA) and other exploitive policies. Unions are particularly concerned that the option of labour brokers has allowed companies to drop the basic standards of employment conditions to poverty levels by retrenching permanent workers and re-hiring them through the operations of labour brokers at half salaries and reduced benefits.

In his unpublished paper, entitled *Temporary Employment Services in South Africa and Namibia*, Van Eck discusses that the leading trade union federations, namely the Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions (NACTU), have confirmed that they are in favour of a legislative ban on labour broking.<sup>188</sup> In Namibia, since the practice of labour broking emerged in the late 1990s, the biggest union umbrella body, the National Union of Namibian Workers (NUNW), has organised a number of country wide demonstrations against labour broker. They are also particularly against the alarming rate at which permanent workers were being retrenched just to be re-employed as a labour broker's workers under more reduced and extreme conditions. The then NUNW Secretary-General, Ranga Haikali, stated in year 2000 during one such demonstration that:

*'Labour Broking Companies remind us of the contract labour system under which Namibian workers suffered before independence. Our memories are still fresh about the role SWANLA played in upholding an unjust and exploitative system and we seem to allow a revival in the form of Labour Brokers. We need to take stock of the goals we set ourselves during the liberation struggle and of the rights and freedoms brought about by our independence. Are these goals and achievements cherished or are we beginning to undermine and destroy them? Are we moving forward as a free people in a free country or are we moving backwards. We need to realise our historical responsibility for the destiny of our country, the destiny of our people and the destiny of future generations.'*<sup>189</sup>

The union movements in both countries have thus continuously demanded that government and national lawmakers initiate steps abolish labour brokers. They have suggested that the national departments of labour should rather provide public employment services to companies looking for temporary and flexible workers, to stop exploitation by greedy individuals.

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<sup>188</sup> Van Eck BPS *Temporary employment in South Africa and Namibia* (2010) 2.

<sup>189</sup> LaRRI *Labour hire in Namibia: Current practices and Effects* (2006) 66.

### 5.3 To Organise or Not to Organise

Since their emergence, union movements in both South Africa and Namibia have found it extremely challenging to represent the rights of labour broking employees. This sector is often characterised by poor levels of union representation and collective bargaining campaigns. The low levels of representation can be attributed to the fact that unions find it difficult to organise labour broking workers for a number of reasons. According to Hall, labour broking workers often have relatively inconsistent work histories and non-standard work patterns.<sup>190</sup> This makes it difficult for unions to be able to identify and approach potential members and to detect likely breaches of labour conditions. He points out that this has also played a significant role in discouraging unions from organising labour broking workers. The unions argue that these workers are not in permanent continuous employment and thus would not be able to pay their membership fees on a continuous basis like permanent workers.<sup>191</sup> Some unions have even refused to recognise labour broking workers as they perceive them as a threat to their existing members' jobs.

According to the 2006 LaRRI Study, due to the lack of protection and the precarious nature of labour broking work, workers are often afraid to inform unions about the labour company's or the client company's rights violations.<sup>192</sup> The Report states that the workers are usually afraid of losing their jobs and of not being assigned new jobs. The Report also points out that another common reason for low levels of representation among labour broking workers is that they have no time to visit union offices due to long working hours. The only time available is in the evenings, and in most cases union offices only operate during office hours. The workers get paid only for the actual hours worked and taking time off during the day to go to the union offices results in a loss of income; thus it makes going there practically impossible.<sup>193</sup>

Anderson et al argued that of all workers in non-standard forms of employment, labour broking workers are worse off than even casual workers as they have a very minimal chance to establish a relationship within the workplace setting.<sup>194</sup> Anderson et al point out that labour broker employees are continuously moved between different work stations for short periods. They are often perceived by permanent workers as a threat and labelled as "low status workers", carrying out low-skill casual work and being used as "scab labour" during strikes.

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<sup>190</sup> Hall R (2002) in LaRRI *Labour hire in Namibia: Current practices and effects* (2006) 12

<sup>191</sup> Hall R (2002) in LaRRI (2006) 12.

<sup>192</sup> LaRRI (2006) 12.

<sup>193</sup> LaRRI (2006) 12.

<sup>194</sup> LaRRI (2006) 12.

Thus, permanent workers do not identify with labour broking employees, which makes the formation of relationships and the creation of solidarity almost impossible.<sup>195</sup>

#### 5.4 Difficulty in Categorisation

The process to organise labour broker employees for collective bargaining purposes has proved to be difficult in circumstances where a worker's job performed at a client and the industry sector for labour brokers each are associated with a different union. Benjamin, in his publication *Decent work and non-standard employees*, states that in theory these employees should affiliate and bargain for their rights through the union guarding the industry where the broker, who is deemed to be their employer, carries out business but in practice this has prove to be difficult as the employees usually have very little contact with the broker.

The other significant difficulty in organise labour broking employees under trade unions is that the operations of a labour broker are not restricted to one industry thus it can be found that a broker will provide for example a certain driver this month to a client in the mining industry and the next month this driver is placed with a client in the food and retail industry. From month to month, the difficulty will exist for this driver whether to affiliate to the union guarding the mining industry were he is for one month or join the union guarding the food and retail industry knowing that next month he could be in another industry. This type's difficulty leaves most workers under labour brokers to remain without union representation. But since employees are legally only in an employment relationship with the broker and not with the client company where they perform their services, industry categorisation at most times is unclear. The difficulty arises particularly around the question: whether to affiliate the labour workers to the union in the sector of the client employer where they actually do the work or to affiliate to specific labour broking service unions.<sup>196</sup>

This difficulty was raised in *Workforce Group Holdings (Pty) Ltd and National Bargaining Council for the Road Freight Industry*<sup>197</sup>, where the applicant (labour broker) supplied employees to clients in various industries, including some drivers to two clients involved in transporting goods. Although the provision of drivers to these clients only made up about 8 per cent of its total operations, the labour broker registered with the respondent council. The labour broker then sought deregistration on the basis that it was involved in the services sector and that it was associated with its employees, not for purposes of road transportation, but to provide various services to clients. In his judgement, the CCMA Commissioner

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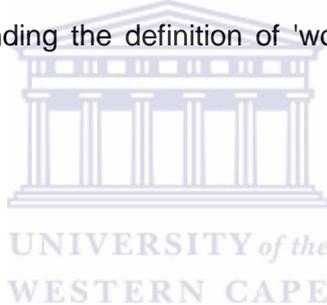
<sup>195</sup> Anderson J, Archer T, & Smiljanic V (2003) in LaRRI (2006) 13.

<sup>196</sup> Grogan J *Collective Labour Law* (2010) 93.

<sup>197</sup> *Workforce Group Holdings (Pty) Ltd and National Bargaining Council for the Road Freight Industry* [2006] 27 ILJ 2743 (CCMA).

rejected the labour broker's argument. He found that employees did not perform work for the broker but for the clients. There was accordingly no 'joint association' with a common purpose; each employee rather forms a separate association depending on the assignment to perform particular duties a client. The Workforce Group accordingly remained registered with the road freight industry council.

However, if workers are affiliate to the work and operation of the client company, as the Commissioner indicated in *Workforce Group Holdings*, what happens to their union membership when they are moved to a new client in a different industry? Thus, as result of demarcation difficulties, a large number of labour broking employees are usually not able to exercise any bargaining power and are not organised, and as a results are exposed to increased vulnerability, including arbitrary dismissals. They are also unable to participate in workplace negotiations over, such as, of salary increments, better working conditions and benefits.<sup>198</sup> Benjamin stresses that with effective regulation employees placed by labour brokers should be able to exercise their rights to acquire organisational rights and engage in collective bargaining with either the labour broker or the client for whom they work. Such a result can be achieved by amending the definition of 'workplace' to take into account the nature of labour broking.<sup>199</sup>



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<sup>198</sup> LaRRI (2006) 12.

<sup>199</sup> Benjamin P 'Decent work and non-standard employees: options for legislative reform in South Africa' (2010) *ILJ* 868.

## CHAPTER 6

### TOTAL BAN OR FLEXIBLE REGULATION

#### 6.1 Introduction

Prior to the political developments of 1990 and 1994, international standards played a very small role in influencing labour law policies in Namibia and South Africa. This is largely due to the heavy international sanctions that were placed on the apartheid government for its discriminatory and unfair practices that were widely criticised by the global community. However, under the new political dispensation, the isolation of local labour markets is no longer the case. Labour law policies in both countries can no longer be developed without recognition of global labour standards, such as those advocated by the International Labour Organisation (ILO) under section 3.5 of this paper, primarily because, like other developing countries, both South Africa and Namibia have a keen interest in world trade. In addition both countries have made room to recognise international laws and agreements under section 29 and section 233 of the South African Constitution and article 144 of the Namibia Constitution.

Thus, as members of the ILO, all the labour laws since the rise of democracy in South Africa and Namibia have strongly integrated the conventions and decent standards of the ILO as an important source of customary international law.<sup>200</sup> The importance of this international impact was highlighted in the ongoing Namibian debate on whether to totally ban labour brokers or rather put in place meaningful regulations, specifically in the *African Personnel Services v Government of the Republic of Namibia*<sup>201</sup> case.

This chapter will examine the recent attempts to ban brokers that were initiated in Namibia leading to the two landmark rulings of the High Court and the Supreme Court of Appeal. Lastly, some possible measures will be suggested that labour law in South Africa and Namibia can follow to put in place sound regulations that both protect worker's rights and provide business enterprises with room to undertake flexible employment options to keep with global competitive demands.

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<sup>200</sup> South Africa rejoined the ILO on 26 May 1994 and since then has ratified all of the ILO's core conventions.

<sup>201</sup> *Africa Personnel Services (Pty) Ltd & Others v Government of the Republic of Namibia* [2009] NSA 17

## 6.2 The 2007 Ban in Namibia

Namibian parliamentarians in 2007 initiated steps to completely ban the operations of labour brokers. This was largely because of growing pressures from union movements as a result of the ruling party SWAPO's alliance with the NUNW from days of the struggle against apartheid. They agreed that similarities existed between the working conditions of labour brokers and those which existed under the apartheid contract labour systems, specifically concerning the low protection level of workers' rights and the no-compliance with the ILO's decent work standards. Subsequently, the Namibian Labour Act 11 of 2007 was passed in this regard. Section 128 (1) prohibited labour brokers in the following terms: '*No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party*'. According to Nghishilwa, rather than on legal grounds, parliament sought to justify the prohibition of labour brokers on the ground that the practice was against public policy (*contra bonis mores*) because "it offended decency and morality" of employment conditions. He argued that the law does not recognize and define notions of decency and morality even though no one would wish to support a system that is oppressive and exploitive.

However, even if there is a rational connection between the prohibition of labour brokers and the permissible objectives of morality and decency as reasonable reasons for the restriction of freedoms and rights, the courts had to be satisfied that such restrictions were legal. In other words, the restrictions had to be limited to what was constitutionally necessary to achieve the objective.<sup>202</sup>

Subsequently, the banning of labour brokers by the new Labour Act of 2007 led to a confrontation in the Namibian courts between two schools of thought: one that validated the ban for reasons of "offending decency and morality", and the other contesting going for the actual legality of the ban in terms of the constitutional "right to engage in business, trade or profession of choice".

### 6.2. 1 High Court Judgement

The first significant development shortly after the coming into operation of the new Labour Act in 2007, was an interdict filed in the High Court by one of the biggest labour companies in the country, African Personnel Services (APS)<sup>203</sup>. APS was arguing that s128, which prohibits labour hire, undermined its constitutional right to do business.

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<sup>202</sup> Nghishilwa F '*The banning of Labour Hire in Namibia: How realistic is it?*' (2009) 1 NLJ 2 at 318.

<sup>203</sup> APS employs approximately 6 085 employees.

The *Africa Personnel Services (Pty) Ltd and others v Government of the Republic of Namibia*<sup>204</sup> case was heard 24 and 25 November 2008, and pitted APS and the Namibia Employers Federation (NEF) against the government and trade unions. The first applicant, APS, a specialist labour company providing employees for various clients and businesses, challenged the constitutionality of s128 of the new Labour Act, and specifically on the basis of the Namibian Constitution which provides that all persons have the right to 'practise any profession, or carry on any occupation, trade or businesses'<sup>205</sup>. A similar provision is contained in 22 of the South African Constitution.<sup>206</sup>

Three judges delivered a unanimous verdict on 1 December 2008. They found that 'labour brokers are not lawful in Namibia because it has no legal basis in Namibian law'<sup>207</sup>. The judges justified this view on the basis that contracts of employment are based on Roman law when they involve 'the letting or hiring of personal services in return for monetary return' between two parties only. The judges further argued that Roman law only recognised slavery of persons who are not Roman citizens and therefore such persons (slaves) could be hired or rented to another person for whom the slaves performed a personal service. However, they stressed that Namibia follows the Roman law traditions through its historical connections to South Africa and its Roman-Dutch law definition of a standard contract of employment. Thus, they emphasised that the hiring or renting out of employees to another person for reward falls outside the law of contract of employment in Namibia and smacks of the hiring of a slave by his slave-master to another person.

The court thus found that there was no law in Namibia under which labour brokers could enter into a contract of employment with persons and then hire them for reward to third parties. The judges concluded that labour broking 'has no legal basis at all in Namibian law, and, therefore, is not lawful'<sup>208</sup>. Furthermore, the court found that labour broking violates a fundamental principle on which the ILO is based, namely, that 'labour is not a commodity'<sup>209</sup>. Thus, the three judges of the High Court found that labour brokers are not lawful in Namibia and that s128 of the new Labour Act should be enforced by the respondent, the Namibian government.

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<sup>204</sup> *Africa Personnel Services (Pty) Ltd & Others v Government of the Republic of Namibia* (2009) NSA 17.

<sup>205</sup> Article 21 (1) (j)

<sup>206</sup> Section 22 of the South African *Constitution* provides that 'every citizen has the right to choose their trade, occupation or profession freely. Laws can be passed to regulate how people practice their trade, occupation or professions'.

<sup>207</sup> *Africa Personnel Services (Pty) Ltd & Others v Government of the Republic of Namibia* (2009) NSA 17.

<sup>208</sup> *Africa Personnel Services (Pty) Ltd & Others v Government of the Republic of Namibia* (2009) NSA 17.

<sup>209</sup> Jauch H *Namibia's Labour Hire Debate in Perspective* (2010) 6.

## 6.2.2 Supreme Court of Appeal (SCA) Judgement

APS launched an appeal in the Supreme Court of Appeal of Namibia shortly after the ruling of the High Court.<sup>174</sup> The case was heard on 3 March 2009. APS argued that s128 of the Labour Act which 'prohibits third-party employment' was unconstitutional as it encroached on its right to 'practise any profession, or carry on any occupation, trade or business' as set out in Article 21 (1) (j) of the Constitution of the Republic of Namibia.

On 14 December 2009, a full bench<sup>210</sup> of the SCA delivered a judgement in favour of the applicant APS. The first question the court had to answer was: Whether the right envisaged in Art 21(1) (j) of the Namibian Constitution applied to juristic persons.<sup>211</sup> The court relied on a broad interpretation of this Article and, more specifically, on Chapter 3 of the Constitution, which grants subjects the full measure of the rights set out therein, and this found no reason to limit the words "All persons" in Art 21 (1) (j) to *natural persons*. The appellant APS, as an aggrieved person, had *locus standi*, the court found.

The court also found that a mere statutory prohibition of an economic activity could not place the prohibition beyond the ambit of constitutional review. Thus, the court was obliged to ask a second question: Was the statutory limitation of a freedom permissible in terms of Art 21(2)<sup>212</sup> of the Constitution? In this case, the question that needed to be answered was whether or not the limitation of the appellant's right "to practise any profession, or carry on any occupation, trade or business", as stated in Article 21(1)(j), by the prohibition of labour brokers in s128 of the Labour Act could be justified in terms of Art 21(2). Indeed, whether, if s128 of the Labour Act were found to be constitutional, it would be impossible for APS to proceed with its business.<sup>213</sup>

In their arguments, both parties accepted that labour broking or agency work was open to abuse by selfish individuals. However, while the applicant APS suggested that the abuses could be controlled by regulation, the respondent government and trade unions insisted that 128 of the Labour Act was a legitimate means to deal with past and possible future abuse.

In giving judgement, the court pondered at length on the differences between the colonial migrant worker systems and labour broking operations that exist today.<sup>214</sup> He states that the

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<sup>210</sup> Shivute, CJ; Maritz, JA; Strydom, AJA; Chomba, AJA; and Mtambanengwe, AJA.

<sup>211</sup> Nghishililwa F 'The banning of Labour Hire in Namibia: How realistic is it?' (2009) 1 NLJ 2 at 318.

<sup>212</sup> 'The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.'

<sup>213</sup> Nghishililwa F 'The banning of Labour Hire in Namibia: How realistic is it?' (2009) 1 NLJ 2 at 318.

<sup>214</sup> Jauch H *Namibia's Labour Hire Debate in Perspective* (2010) 7.

court found that placement agencies (and not labour broking companies) were similar to the services provided by SWANLA as they matched “offers of and applications for employment” without becoming ‘a party to the employment relationship that may arise there from’<sup>215</sup>. The judges thus argued that unlike the colonial migrant labour agency SWANLA, which acted as a link between the contract labourers and their apartheid bosses, labour brokers ‘employed their workers directly and assumed responsibility for their contractual and statutory obligations’<sup>216</sup>. The judges further found that the contract labour system and labour brokers (referred to as “agency work”) ‘have very little in common under our current constitutional dispensation’<sup>217</sup>. While not outrightly denying the abuses suffered by labour broking workers in Namibia, the judges agreed with the High Court’s observations that labour broking ‘evokes powerful and painful memories of the abusive contract labour system [SWANLA], which was deeply resented by the majority of Namibians’. However, the judges argued that the employment relationship had changed drastically from classical to modern times and thus that the situation found in Roman times was no longer applicable today. They also argued that workers today entered freely into contracts with labour companies and that freedom of contract was not only a matter of public policy but also ‘a fundamental principle of our law’.<sup>218</sup> Thus, the judges believed that these gaps could be addressed through regulations and did not require an outright ban of labour brokers.

The judges further cited the recent ILO Convention 181 of 1997 on Private Employment Agencies<sup>219</sup> which recognises the operations of private employment agencies with the need for the protection of their workers. The court therefore made the following closing comment:

*‘Given the scope of regulation contemplated in the 1997-Convention [sic] to facilitate agency work and to prevent potential abuses[,] the wide-ranging regulative measures introduced in other democratic societies to demarcate the areas of economic activity and the categories of employees in relation to which agency work may properly be engaged in and the potential to effectively regulate agency work in Namibia without compromising the objects of the Act or the legitimate objectives of “decency and morality” in Article 21(2) of the Constitution, the blanket prohibition of agency work by*

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<sup>215</sup> para 78.

<sup>216</sup> para 79.

<sup>217</sup> para 80.

<sup>218</sup> Para 27.

<sup>219</sup> It defines the term *private employment agency* in Article 1 as: “For the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

- a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise there from;
- b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a “user enterprise”) which assigns their tasks and supervises the execution of these tasks;
- c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.”

s. 128 of the Act substantially overshoots permissible restrictions which, in terms of that Sub-Article, may be placed on the exercise of the freedom to carry on any trade or business protected under Article 21(1)(j) of the Constitution. The prohibition is tailored much wider than that which reasonable restrictions would require for the achievement of the same objectives and is disproportionately severe compared to what is necessary in a democratic society for those purposes. Even if a generous margin of appreciation would be allowed in favour of Parliament, as the respondents urge us to do, the unreasonable extent of the prohibition's sweep would still fall well outside it.<sup>220</sup>

They ruled that “the ILO Convention urged the regulation of agency work not the prohibition thereof”.<sup>221</sup> Thus the objectives of the new Labour Act could be achieved without a total prohibition.

For now, s128 of the Namibian Labour Act of 2007 has been set aside. More significantly this case has proved to be a great marker in the ongoing debate whether to outlaw or regulate labour brokers, not only in Namibia but also in South Africa. Any efforts by the South African government to reform existing labour laws and totally ban labour brokers, as advocated by COSATU, are widely expected to face a similar Constitutional Court challenge as that of the *African Personnel Services* case of Namibia. Thus, South Africa should similarly look at a regulatory framework to deal with the operations of labour brokers.<sup>222</sup>

### 6.3 Feasibility of Regulation

A few years before the Labour Act of 2007 was passed to outlaw brokers, the Namibian government circulated its ‘*Guidelines for the Regulation of Labour Hire in Namibia*’ for discussion among unions and employers. The Guidelines were initiated in an attempt to regulate the labour broking industry under a proposed Labour Act Amendment Bill of 2004. However, after some extensive debates between trade unions, employers and the government within the framework of the Labour Advisory Council, a final amended set of ‘*Proposed Guidelines for Labour Hire and Employment Agencies*’ was presented by the Ministry of Labour in August 2000. These Guidelines set out a duty for employment agencies to register with the Labour Commissioner and to adhere to the Namibian Constitution, the Labour Act, the Company Act and any other Namibian law. Employment agencies are required to declare if they render their services free of charge or if they levy a fee on the user-enterprise or their workers.

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<sup>220</sup> *Africa Personnel Services (Pty) Ltd & Others v Government of the Republic of Namibia* [2009] NSA 17.

<sup>221</sup> Para 102; See also Nghishililwa F ‘*The banning of Labour Hire in Namibia: How realistic is it?*’ (2009) 1 NLJ 2 at 320.

<sup>222</sup> Benjamin P ‘*Decent work and non-standard employees: options for legislative reform in South Africa*’ (2010) ILJ 845.

In, addition it was proposed that the Labour Commissioner may cancel the registration of any employment agency if it contravenes any law or the Guidelines. However, the Minister of Labour may grant exemption from the Guidelines as long as the laws are adhered to. More significantly, these Guidelines set out minimum hourly wages for labourers, semi-skilled workers and skilled workers.<sup>223</sup> Also, the proposed regulation required employment agencies to register their workers with the Social Security Commission. However, the employment agencies were not compelled to provide any additional benefits, as the Guidelines merely appealed to such agencies to register their workers with a recognised pension fund 'where possible'.

Furthermore, the Guidelines required employment agencies to design a training programme to 'uplift industry training skills'. All workers employed on a 'regular basis' by an employment agency had to be included in the training plan. However, the Guidelines did not spell out what constitutes a 'regular basis'. Unless this is clearly defined, employment agencies will have the prerogative to decide who will be trained, for what period and in which field. The proposed regulations held employment agencies responsible to provide training for their workers when they are required to carry out any work 'which could threaten their health, safety or welfare'. Furthermore, employment agencies will have to keep records of their workers, develop fair and just grievance and disciplinary procedures in line with the Labour Act, and promote good labour relations. Employment agencies would also not be allowed to participate in any scheme aimed at retrenching workers at client companies and replacing them with workers from employment agencies.<sup>224</sup>

However, as yet the proposed Guidelines have not been implemented, primarily because the trade unions continue to argue that the proposed Guidelines were raising more questions than answers. According to Jauch, amongst the concerns expressed by the labour movements about the proposed labour broking regulations was the question of minimum conditions of employment, which were left vague.<sup>225</sup> In addition, he mentions that the unions were concerned that the proposed regulations were silent on the question of permissible fees that labour companies could charge. They further stressed that the Guidelines also contained no limitations on the period for which an employee could be treated as a casual worker, and thus be subjected to abuse. The union pressure and concerns led the government of the Republic of Namibia to believe that the regulation of labour brokers presents more challenges than solutions. The government then followed through and initiated the infamous ban under s128 of the Labour Act of 2007, subsequently bringing the

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<sup>223</sup> LaRRI *Labour hire in Namibia: current practices and effects* (2006) 69.

<sup>224</sup> LaRRI *Labour hire in Namibia: Current practices and effects* (2006) 69.

<sup>225</sup> Jauch H *Namibia's Labour Hire Debate in Perspective* (2010) 6.

SCA to rule that part of the Act 'unconstitutional' in the landmark judgement in *African Personnel Services (Pty) Ltd and otter v Government of the Republic of Namibia*.

In South Africa, equal efforts to introduce regulations were initiated in the 1983 amendment to the LRA<sup>226</sup>. However, just as in Namibia, the proposed regulation guidelines requiring labour brokers to register were never enforced and were dropped altogether from the post-democratic new LRA of 1995 that is in operation today. Later, the Skills Development Act of 1998 again made a further attempt to enforce the registration of labour brokers by requiring that an "employment service for gain" be registered. The term was not defined and seemed to be wide enough to encompass Temporary Employment Services (TES), which had decided that the provision did not apply to them.

Many scholars stress that any attempts by the South African government to existing labour legislation and ban labour brokers will face a constitutional challenge similar to that of Namibia. The South African government has seriously taken note of those constitutional developments in Namibia. In July 2007, the Minister of Labour, Mildred Oliphant, released draft proposed regulations with regard to employment services.<sup>227</sup> Inter alia, the Labour Relations Amendment Bill states that 'an employee must be employed permanently unless the employer can establish justification for employment on fixed term'. This will limit temporary work. The new Bill also abolishes s198 of the LRA, which currently regulates labour brokers.<sup>228</sup>

In addition, as part of the regulation measures, the Basic Conditions of Employment Bill makes it a criminal offence for labour broking employers not to pay wages and overtime. Similarly, the Employment Equity Amendment Bill will require that labour broking and permanent employees receive equal pay be for equal value, with transgressors being subjected to penalties based on turnover profits.

In addition, a new law is proposed to further deal with labour broking. The Employment Services Bill is meant to register, and regulate the actions of, private employment services agencies, personnel agencies, temporary employment services, labour brokers and labour recruitment agencies, including their compliance with labour legislation. More significantly, however, is that this new Bill provides for the establishment of a Public Employment Agency, which 'provides recruitment and placement services free of charge<sup>229</sup>. Many believe these

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<sup>226</sup> No 28 of 1956.

<sup>227</sup> Draft Amendment Bills on Employment Services of 2010 available on [http:// www.labour.gov.za/](http://www.labour.gov.za/) (accessed on 5 December 2011)

<sup>228</sup> "The Minister expects that the entire process of consultation on the new bills to be finished by May 2012 and be signed in law" said Department of Labour spokesman Musa Zondi in Business Day Online available <http://www.businesday.co.za/articles/> (accessed on 5 December 2011).

<sup>229</sup> Business Live 'SA businesses wait for clarity on labour bills' available on <http://www.businesslive.co.za/southafrica/>

measures are being introduced to make it difficult for labour brokers to continue to operate, and to eventually see the services of private brokers becoming redundant by getting direct competition from the state.

While back in Namibia, the Minister of Labour, Immanuel Ngatjizeko, whose earlier attempts to outlaw the operations of labour broking in the country were blocked by the SCA judgement in the *African Personnel Services* case, tabled an amendment Bill in parliament that is widely expected to bring regulation along the lines of those proposed his South African counterpart, Ms Oliphant. Speaking to Namibian Broadcasting Corporation(NBC) shortly after the 3<sup>rd</sup> November 2011 tabling of the Bill, Ngatjizeko explained that, amongst others, the new Labour Act Amendment Bill of 2011 will make client employers jointly liable for conditions of employment of workers placed by labour brokers, including for cases of unfair dismissals.

#### **6.4 The New Labour Amendment Laws in Namibian**

Some two years following the landmark 2009 SCA judgement in the APS case challenge, two pieces of labour laws regulating the operations of labour brokers in Namibia came into operation in 2012.<sup>230</sup> The Labour amendment Act No 2 of 2012 and Part 4 of the Employment Services Act No. 8 of 2011 came into effect on 1 August 2012 and 1 September 2012, respectively. These two pieces of legislation, replaces in full, the original s128 of the Labour Ac No. 11 of 2007. The original provision made the practice of labour hire a crime.

##### **6.4.1 Namibian Labour Amendment Act of 2012**

According to a public notice issued by the Ministry of Labour in the New Era Newspaper,<sup>231</sup> under the new s128:

- Every enterprise (“user enterprise”) that utilises the labour of employees placed by a private employment agency, including a labour broker agency, assumes all obligations of an employer in terms of the law with respect to the employees;
- Every employee placed by a private employment agency with a user enterprise has the same rights and duties in relation to the user enterprise as any other employee in

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(accessed on 5 December 2011).

<sup>230</sup> According to a press statement by the Ministry of Labour and Social Welfare ‘the law will also strengthen protections to marginalized employees that are in ambiguous or disguised employment relationships. These laws are based upon international labour standards introduced by the ILO’s Private Employment Agencies Convention 181 of 1997 and Recommendation 198 of 2006 on the Employment Relationship.’ See Public Notice ‘Coming into operation of laws regulating private employment agencies and the employment relationship’ *NEW ERA* 27 July 2012 p12.

<sup>231</sup> ‘Coming into operation of laws regulating private employment agencies and the employment relationship’ *NEW ERA* 27 July 2012 p12.

relation to his or her employer, including the guarantee of basic conditions of employment, of safety and health at the workplace and protection against unfair dismissal;

- Employees placed with a user enterprise shall have the right to join trade unions and to bargain collectively with the user enterprise;
- Employees placed by a private employment agency with a user enterprise shall enjoy terms and conditions of employment that are not less favorable than those enjoyed by current employees of the user enterprise who perform the same or similar work or work of equal value;
- A user enterprise may not differentiate in employment policies or practices between current employees and placed employees;
- A user enterprise may not hire persons through a private employment agency during or in contemplation of a strike or lockout or within six months after a retrenchment to perform the same or similar work or work of equal value of current or retrenched employees;
- To compel both labour brokers and their clients to adhere to the amendments, the new act recommends criminal penalties of a maximum fine of \$ 80,000 or a maximum imprisonment of two years or both have been introduced for violations relating to differentiations in wages and employment policies and hiring of such employees during or in contemplation of a strike or lockout or within six months after a retrenchment;
- However employers may apply to the Minister for exemption from part of Section 128.

#### 6.4.2 Namibian Employment Services Act of 2011

In addition, part 4 of the Employment Services Act No. 8 of 2011 and several related sections of the Act, came into effect on 1 September 2012. This provision requires that all private employment agencies, including labour broking agencies and those that match jobseekers and employment vacancies, must obtain a license from the Employment Services Bureau of the Ministry of Labour and Social Welfare in order to operate. Private employment agencies must file applications for such licenses no later than 28 February 2013. Additional key features of the new law are:

- A private employment agency may not charge fees to employees who it places, nor may a user enterprise deduct money from the remuneration of placed employees to cover placement fees that it has paid;
- Several obligations are imposed upon private employment agencies in referring employees, including:
  - a) Duty not to discriminate in advertising of positions for employment placement and in recruitment and referral;
  - b) Prohibition against referring employees to user enterprises that has not complied with a compliance order issued by labour inspector in terms of the Labour Act, 2007 or is not in good standing with respect to Social Security contributions or is a designated employer, but is not in possession of a certificate of compliance issued by the Social Security Commission;
  - c) Obligation not to place individuals with a user enterprise unless the user enterprise promises to ensure that placed employees shall have terms and conditions of employment that are not less favourable than those applicable to the user's incumbent employees performing the same or similar work of equal value.
  - d) Prohibition against placing employees with a user company during or in contemplation of a strike or lockout or within 6 months after retrenchment of employees.
  - e) Similar to the Labour Amendment Act, criminal penalties to a maximum fine \$20,000 or two years imprisonment or both will be imposed for violations of above requirements.

#### 6.4.3 Another Court Challenge in Namibia (2012)

Following the implementation of the new Labour Amendment Act and part 4 of the Employment Services Act on 1 August 2012 and 1 September 2012 respectively, to replace the previous unconstitutional s128 of Labour Act 2007, African Personnel Services (APS) initiated another court case to challenge the legality of the two new laws.

APS insists that the new s128 of the law effectively bans labour brokers. The Minister of Labour Immanuel Ngatjizeko argues that the amendment to the Labour Act is merely regulating labour brokers, and is aimed at the relationship between companies making use of employees from labour-broking companies and the people made available to the user companies. According to APS, the change in the law has already had a major damaging effect on its operations, with a several client companies having cancelled their agreements with APS and its work force having shrunk from more than 1600 people before the amendment come into force about 319 people at this stage.

Judges Liebenberg and Geier heard arguments from senior counsel Frank, who was representing Africa Labour Services, and senior counsel MChaskalson, representing Government and the Minister of Labour and Social Welfare, in the High Court in Windhoek on 27 September 2012. In his argument before court, Frank stated that 'it appears that it is only Ngatjizeko, who is disputing that s128 would in effect get rid of labour-brokers altogether'<sup>232</sup>. Frank argued on that score, the trade unions, the Namibian Employers Federation and the Labour Commissioner are in agreement that the amendment of the Act will put the labour hire companies in Namibia out of the business, he argued. APS conceding that government may regulate business. However, section 128 goes much further than merely regulating labour hire, would have the same result as the outright ban which the supreme court found unconstitutional, he argued.

'They want to ban labour broking in effect,' Frank said. The change in the Labour Act would represent the material barrier to APS doing its business, he added, if the court agree with that view, it would have to find that s128 is unconstitutional, he concluded.

Chaskalson on the other hand, argued that APS has not shown that its fundamental rights were being limited by the new section of the Labour Act. If the court were to find that the company's right were limited, though, that is a justifiable limitation he argued. Chaskalson argued that 's128 does not infringe on APS's constitutional right to carry on its a chosen trade or business'<sup>233</sup>. What that part of the law does, he argued, is to close a loophole with APS used to exploit for its own commercial benefit. He said s128 does not ban or even aim to regulate labour brokers. What it does;

'is to regulate the relationship between labour broker company employees and the company that using their labour. At worst for a labour broking company s128 could have the effect of persuading companies which have been using the service of labour brokers, to no longer use of their services, because that would no longer help them to circumvent the Labour Act.'<sup>234</sup> he concluded.

The case was expected to continue in 2013, but for now both amendment Acts to s128 are currently in operation as of the stipulated dates of effect until the court rules otherwise when the second challenge case is concluded in the High Court and maybe even the Supreme Court of Appeal. For now, all employees' operating under the three party employment relationship are enjoying the same and more improved conditions of employment and labour law protection.

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<sup>232</sup> Menges W 'Labour-hire judgement reserved' *The Namibian*, 28 September 2012 3.

<sup>233</sup> Menges W 'Labour-hire judgement reserved' *The Namibian*, 28 September 2012 3.

<sup>234</sup> Menges W *The Namibian*, 28 September 2012 3.

## CHAPTER 7

### CONCLUSIONS AND RECOMMENDATIONS

#### 7.1 Introduction

This chapter make useful recommendations for lawmakers and the governments of South Africa and Namibia to consider in their ongoing efforts to introduce amendments to their existing labour laws. It highlights some of the key points to note, that are discussed in the thesis that can greatly influence how we look at labour broking services and the expected future development of this industry under labour law reforms. If both South Africa and Namibia can have a clear understanding of the recommendations and conclusions discussed in this chapter, both countries will successfully be able to fully establish frameworks to protect the rights of workers under labour broking. The same frameworks could also help serve the employers' interests to engage flexible employment strategies that enable them to compete globally, and to ensure continuous economic growths and job opportunities for the highly unemployed populations of both countries.

#### 7.2 Conclusions

Labour brokers are businesses setup to supply “flexible” labour services, mostly of unskilled and semi-skilled employees, to client companies. The labour brokers enter into employment relationships as third parties with client companies to supply employees through a commercial contract. These labour services are usually outside the regular two-party contract of employment defined under existing labour laws, and thus many of these employees are not covered by labour laws. The labour brokers normally advertise their operations as a service that allows client companies to concentrate on their “core business”. The growth of such arrangements between labour brokers and their clients confirmed the increasing trend to outsource labour services for “flexibility”. However, what has been alarming is that this industry has increasingly been by-passing labour laws and all the standards of work stipulated by the ILO. Thus, amendments to current labour laws in South Africa and Namibia is urgently needed to bring the individuals rendering labour services in triangular relationships within the definition of an employee. These will extent the protection provided by labour laws to labour broking employees without limiting the capacity of local business to compete globally.

Since the emergence of post-apartheid South Africa and Namibia under new democratic laws and legislations, labour broking operations have spread extensively in the labour markets and penetrated most industrial sectors to employ large numbers of the most illiterate and unskilled class groups, as globalisation continues to be a major driving force in modern business practice. However, what has been more alarming is that the emergence of labour brokers has, worryingly, converted permanent jobs into insecure jobs with lower wages and fewer benefits, because some “selfish” businesses look to take the easy way out of their social responsibilities. The majority of companies in Namibia and South Africa who engage labour brokers often point to the ever decreasing margins of profitability in the new global economy of “borderless” trade where even a company on another continent is a potential competitor for local market domination. Most companies highlight reasons such as cutting of costs, while others aim to achieve greater flexibility or to avoid trade unions, labour strikes and, more worryingly, the provisions of the Labour Acts.

Clients of labour brokers would normally request a certain number of workers for a certain period from the labour company and pay an agreed hourly fee to the labour brokers for the activities performed by those workers. Then the employee’s original labour remuneration, the broker then deducts a percentage as commission, as they see fit. As a result, on most occasions labour broker employees do not receive the same pay and benefits as those received by permanent workers in the same job. They are left to survive on poverty wages which does not help to improve the huge inequality that exists between the social classes. Thus, a regulatory framework could help in setting a maximum deductible commission by a labour broker and leave the employees in a much better position to improve their standard of living. In addition, a regulation measure should be placed in the Employment Equity Acts, and make it clear that that same-value of work should be compensated by the same pay, regardless on the duration of the employment relationship.

Furthermore, research findings have also highlighted that labour broking employment contracts usually only subsist for as long as the period of the labour commercial contract between the brokers and their client companies. Although they could be deployed on a full-time basis and may work for the same client company for years, labour broking workers are denied job security, as those deemed unsuitable are instantly and easily replaced. Some employees are replaced for taking maternity leave or the prescribed annual leave days. These terminations at most times are unlawful in substance and procedure, but the clients who often call for such replacements are not legally liable as the definition of ‘employee’ does not recognise them as employers; only the brokers. That is why, more often than not, the employees are dismissed unfairly without any procedures of retrenchment, and without severance payouts, and are just kept at home without any paid leave. The CCMA case of

*Molusi and Ngisiza Bonke Manpower Services CC* highlighted that similar liability between employers and labour brokers remains elusive and that judgements concerning unfair dismissals are dependent upon the facts of each case. In this case the appellant, who had taken maternity leave shortly after she was placed with a client company, was replaced (dismissed) as per request of the client. However, this 'replacement' clearly warranted an unfair dismissal case as the Labour Acts make provision for female employees to be given maternity leave. Thus, given these unlawful conditions of labour broking and the negative impacts on workers rights, it is understandable that many trade unions make strong calls for a ban on labour brokers. However, a reading of both international and national labour trends would suggest a more measured response. If the current definitions of an 'employee' are amended to include triangular employment relationships, the workers recruited through labour brokers will be better able to seek the prosecution of, and damages from, both the labour brokers and the clients for committed unfair dismissals, such as, those related to maternity leave, severance pay or terminations without appropriate notice periods.

There are clearly gaps in the definitions and responsibilities of clients and individuals rendering labour services in the labour broking sectors, but given the new and changing nature of employment in the new global economy, current labour laws must fully extend to those workers in these relationships. Thus, as initiated in both countries with the proposed regulation draft Bills; current employment developments necessitate a review of key labour relations legislation to ensure clarity in respect of the definition of an 'employee'. The decisions in court cases have led the way in providing clarity on the level of involvement of a client in the employment relationship.

In view of the current absence of clear definitions or regulations, all experience shows that labour brokers are effectively able to ignore existing labour legislation provisions. Thus, the proposed laws should provide for a specific framework within which a labour broker can be registered. This would compel those that seek to be licensed to pass labour law training requirements to ensure that their conduct adheres to current labour standards. The continued operation of labour brokers without any proper definition, registration or licensing process, makes the control of their activities difficult, and allows them to act outside the current labour frameworks. This situation also makes monitoring and enforcement difficult for state labour agencies and inspectorates.

The biggest resistance around the current operations of labour brokers in South Africa and Namibia has come from union movements. Trade unions in both countries have argued that labour brokers do nothing but erode employment conditions by making use of old apartheid type contract labour recruitment. They have sent repeated calls to national lawmakers to

amend existing labour legislation and totally ban all forms of labour brokers. Research has found that some unions refuse to provide membership to employees of labour brokers as they believe that in doing so they will be approving this new form of “modern slavery”. Others have found it rather difficult to categorise and organise labour broking workers because the “flexible” nature of workers’ jobs means that they are often moved between a number of client companies in different industries, or run out of all contracts and face long spells at home. In addition, they are limited in their demands for decent working conditions because most labour broking employees are excluded from most collective bargaining agreements and trade union representation as the temporary nature of their employment is perceived as making it difficult to organise them.

Politically it would seem like a very popular decision to ban labour brokers altogether in an effort to promote “morality and decency” in conditions of employment, as was initiated under section 128 of the Namibian Labour Act of 2007. However, there are legal obstacles and several arguments against banning labour brokering. The Supreme Court of Appeal in Namibia during 2007 ruled that a total ban will not necessarily solve the exploitation and concerns of workers. It pointed out that there are many forms of non-standard employment in the new global economy and most labour brokers will merely find other ways to operate illegally within the country, as independent contractors or as specialised outsourcing services similar to cleaning and security services. This will continue the same insecure and exploitive conditions for those workers since most labour brokers are aware that independent contractors are not covered under the Labour Acts.

Outlawing labour brokers would also have to address several constitutional challenges that were expressed by the SCA in Namibia in the *African Personnel Services* case. This court held that banning labour brokers limited the applicant’s fundamental ‘freedom to carry on a trade or a business of choice’ under Art 21 (1) (j) in the Namibian Constitution. The court held that the prohibition imposes restrictions on commercial activities protected by the Constitution which are grossly unreasonable. The court further held that, if agency work is properly regulated within the ambit of the Constitution and as prescribed by ILO Convention 181 of 1997, it would pose no threat to standard employment relationships or unionisation and contribute to flexibility in the economy. The court then concluded that the prohibition of economic activity is so overbroad that it is not reasonable and should be struck down as unconstitutional.

Subsequently, some three years after the landmark SCA ruling, at the time of writing this thesis, the Namibian government reversed the earlier attempt to ban labour brokers under s128. The government on 03 November 2011 introduced draft proposals to regulate the

operations of labour brokers in Namibia, a response to the SCA judgement in the *African Personnel Services* case which ruled that it was unconstitutional to prohibit labour broking companies on their right to engage in any business, trade or profession of choice. When the Minister of Labour and Social Services, Hon. Immanuel Ngatjizeko, tabled the Labour Act Amendment Bill of 2011, he highlighted that the new law will, amongst others, make client companies equally liable for employment conditions and unlawful practices.

South Africa has paid close attention to developments in neighbouring Namibia, as leading labour law academics believe that any attempts by the amendment laws proposed by the South African Department of Labour in 2010 to ban labour brokers will face a constitutional challenge similar to that in Namibia.

But as one academic pointed out, there is no doubt that labour broking is not the only exploitative practice and that it is difficult to secure decent working conditions in free market economy underpinned by structural mass unemployment. However he said that, leaving workers to the mercy of 'market forces' and arguing that regulations to protect them will lead to further unemployment does not only ignore the plight of vulnerable workers but also locks them into a poverty trap without a chance of working their way out of poverty. He adds that, workers' rights have to be defended as universal human rights and thus, exploitative practices have to be fought wherever they occur. What is required now are a host of developmental interventions to create decent work which will allow workers to meet their basic needs and in the process, create local demand for basic consumer goods. Eventually, improved employment conditions will not only improve workers' lives but also create a better economic base for local production. Thus, the government of the South Africa, as was done in 2012 by Namibia, is trying to pass labour amendment laws in favour of regulatory frameworks that will better protect workers without limiting the employers' need for flexibility in a new global market context.

### **7.3 Recommendations**

Regardless of the regulation measures that can be proposed to have in operation in the next few years, the rights of labour broking workers in South Africa and Namibia will only be fully protected and guaranteed if the Department of Labour and Ministry of Labour, respectively, play a hands-on role in regulating and monitoring the activities of labour brokers and their relationships with workers.

As a start, the South African and Namibian governments should ensure sufficient allocation of funding and personnel to conduct regular on-site inspections of labour brokers and their clients. Otherwise, if there are not enough inspectors to go around, the regulatory framework

for labour brokers will still be weakened and severely undermined. The inspectors should often speak directly to workers to get a perspective as to whether both labour brokers and clients are complying with regulatory provisions, and those falling short should be penalised or have their licences withdrawn. Both governments should also ensure that other law enforcement bodies, such as, public prosecutor, ombudsman, legal courts, and even the police; have the capacity to deal with transgressors of, and non-compliance with, the regulatory framework. The existing offices of the Ombudsman and the Public Protector in Namibia and South Africa, respectively, should also be strengthened to ensure an accountability auditing process on deliberate gaps and oversight by the labour agencies and inspectors.

In addition, from the discussions in the thesis, it is clear that labour broking employees experience greater violations of their rights as a result of a lack of representation and protection under collective agreements. For this reason, trade unions in South Africa and Namibia should become more pro-active and develop strategies to organise labour broking workers more effectively. A bargaining council for temporary workers needs to be explored once labour brokers are legally registered. In addition, the unions should also regularly facilitate training and education programmes for these workers to inform them about their labour rights, socio-economic rights, and the standards of decent work promoted by ILO conventions. More significantly, the unions should always try to involve the labour broking businesses in their training programmes as these stakeholders will only be able to get the best out of their workers if they are able to fully understand their needs and concerns, which can bring about a better product for the client companies with which they are contracted.

The regulation framework should include a provision that addresses equality and parity among different categories of workers to prevent any exploitable differentials in pay and conditions between standard employees and labour broking workers doing the same work for the same company.

Going forward, it is clear that due to the high levels of unemployment throughout South Africa and Namibia, the practices of non-standard employment, such as, labour broking are not going to disappear as the population grows rapidly, and more and more become desperate for employment. Thus, it is crucial that the proposed draft regulation alws in both countries are passed and implemented to ensure that the activities of labour brokers are effectively registered and regulated, and that their employees are paid the minimum wage, registered for social security, and workmen's compensation, and receive other basic employment benefits. These proposed labour laws and labour systems in South Africa and Namibia should thus take full account of the three-tiered employment relationship by putting

the necessary legislative mechanisms in place which will ensure and enforce responsibility for compliance by both brokers and clients jointly. Similarly, trade unions should take leaps and bounds in terms of ensuring the mobilisation and unionisation of labour broking workers.



## 8. REFERENCES

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